Supreme Court of California
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No. 20-16796

IN THE

United States Court of Appeals for the Ninth Circuit

MICHAEL R. RATTAGAN,
Plaintiff-Appellant,

v.

UBER TECHNOLOGIES, INC.
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 3:19-CV-01988 (Chen, J.)

APPELLEE'S SUPPLEMENTAL EXCERPTS OF RECORD INDEX VOLUME

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MICHAEL R. RATTAGAN,

Plaintiff,

v.

UBER TECHNOLOGIES, INC.,

Defendant

Civil Case No.: 3:19-cv-01988-EMC

NOTICE OF UNOPPOSED MOTION AND UNOPPOSED MOTION TO WITHDRAW AS COUNSEL

Judge: Hon. Edward M. Chen

NOTICE OF UNOPPOSED MOTION

PLEASE TAKE NOTICE that on Thursday, January 16, 2020, at 1:30 p.m., or as soon thereafter as the matter may be heard, before the Honorable Edward M. Chen in Courtroom 5 of the United States District Court, Northern District of California, San Francisco Division, 450 Golden Gate Avenue, San Francisco, California, Stephen J. Rosenfeld and Christopher G. Dean of McDonald Hopkins LLC and Frank A. Cialone of Shartsis Friese LLP (collectively "Current Counsel") will, and hereby does, move to withdraw as counsel for Plaintiff. The Motion is based on this Notice of Unopposed Motion and Unopposed Motion, and such further evidence and argument as the Court may request.

UNOPPOSED MOTION

In accordance with Local Rule 11-5, Stephen J. Rosenfeld and Christopher G. Dean of McDonald Hopkins LLC and Frank A. Cialone of Shartsis Friese LLP (collectively "Current Counsel") move this court for an order allowing their withdrawal as counsel for the Plaintiff in this case. In support thereof, Current Counsel state as follows:

1. Current Counsel seek to withdraw for professional reasons.
2. Due notice has been given to Plaintiff in writing and verbally of Current Counsel's intent to withdraw, as required by Local Rule 11-5(a), allowing Plaintiff an opportunity to retain replacement counsel.
3. Plaintiff consents to this withdrawal and is in the process of securing replacement counsel.
4. To permit Plaintiff time to secure replacement counsel and for such counsel to have appropriate opportunity to transition, the parties have agreed to a sixty-day extension of time, which stipulation will be filed later today.
5. This motion is not brought for purposes of unduly delaying the proceedings or to prejudice Defendant. Defendant does not oppose this motion.

WHEREFORE, McDonald Hopkins LLC, Shartsis Friese LLP, Stephen J. Rosenfeld, Christopher G. Dean, and Frank A. Cialone respectfully request that this Court allow their withdrawal in this matter.

DATED: December 18, 2019

Respectfully submitted,
MCDONALD HOPKINS LLC

By: */s/ Stephen J. Rosenfeld*
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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MICHAEL R. RATTAGAN,

Plaintiff,

v.

UBER TECHNOLOGIES, INC.

Defendant.

Civil Case No.: 3:19-CV-01988-EMC

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS

Date: August 8, 2019
Time: 1:30 PM
Location: Courtroom 5 - 17th Floor
Judge: Hon. Edward M. Chen

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INTRODUCTION

To state Rattagan's case is to refute it. Rattagan asserts that Uber Technologies, Inc. is liable in tort to him—a service provider to two foreign Uber subsidiaries—due to the allegedly negative reactions of Argentinian governmental authorities, labor unions, and journalists to Uber's completely lawful operations in Argentina.[1] This theory is untenable as a matter of law. In particular, Rattagan's case must be dismissed based on his failure to dispute two critical points.

First, Rattagan does not oppose Uber Technologies' Request for Judicial Notice of legal rulings holding that Uber's Argentina operations were lawful, and he does not dispute Uber Technologies' interpretation of those rulings. The legality of Uber's operations is therefore definitively established. That is fatal to Rattagan's case, because he identifies no authority suggesting that Uber Technologies can be held liable for the actions of a foreign sovereign in response to lawful business activity.

Second, Rattagan does not plausibly allege that Uber Technologies, the California parent company that is the only named defendant, owed any duty to Rattagan, who was hired by two Dutch entities, Uber International BV and Uber International Holding BV (the "Uber International Entities"). Because Uber Technologies did not owe Rattagan any duties, it cannot have committed any breach. By dismissing as defendants the Uber International Entities, Rattagan forum-shopped his way into federal court, but in the process invalidated his substantive claims as a matter of law.

Rattagan's Amended Complaint fails to state a claim, and he does not identify any further amendments that could remedy its deficiencies. Accordingly, for the reasons stated below and in the Motion to Dismiss, the Court should dismiss the Amended Complaint in its entirety and with prejudice.

ARGUMENT

I. Rattagan's Claims For Intentional Infliction Of Emotional Distress And Negligence Are Time-Barred [Counts 4 and 5].

Rattagan asserts that fact disputes preclude application at this stage of the statute of limitations to his intentional infliction of emotional distress and negligence claims. Dkt. 28 ("Opp.") at 2. To the

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[1] As in the Motion, Uber Technologies, Inc. is referred to as "Uber Technologies," and the group of subsidiaries and affiliates that conducts Uber's global operations is referred to collectively as "Uber."

contrary, it is evident from the face of the Amended Complaint that Rattagan's claims for intentional infliction of emotional distress and negligence are time-barred. Rattagan alleges that Uber's purported misconduct first caused him injury on April 15, 2016, the day that Argentine authorities allegedly raided his offices and local news media televised that raid, purportedly causing him emotional distress and reputational harm. *See* Dkt. 15 ("Am. Compl.") ¶¶ 37-38; Dkt. 23 ("Mot.") at 7. Rattagan waited three years to file this lawsuit in April 2019—a full year after the two-year limitations period for these claims expired. One of Rattagan's own cases affirms the well-established propriety of dismissal under these circumstances. Opp. at 2 (citing *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682-83 (9th Cir. 1980) (affirming district court's order of dismissal on statute of limitations grounds)). Rattagan's other case is inapposite; *Belete v. Oaks Corner* declined only to rule on a "fact-intensive" equitable tolling claim at the motion-to-dismiss stage. 2016 WL 6393510, at *4 (N.D. Cal. Oct. 28, 2016). But Rattagan does not allege equitable tolling.

Nor does Rattagan's "continuous accrual" theory, Opp. at 2-5, save his claims, for the straightforward reason that no violation of a "continuing or recurring obligation" is alleged. *Aryeh v. Canon Bus. Sols., Inc.*, 55 Cal. 4th 1185, 1199 (2013). Rattagan's specific allegations in the Amended Complaint are inconsistent with his conclusory references to "ongoing and recurring invasions of Mr. Rattagan's rights" and "continuing wrongful acts." Opp. at 4; *In re Syntex Corp. Sec. Litig.*, 95 F.3d 922, 926 (9th Cir. 1996) ("conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim"). The Amended Complaint alleges that Uber's purportedly wrongful conduct—not replacing Rattagan as legal representative after launching operations in Argentina—ceased in June 2016, when Rattagan was no longer the legal representative. *See* Am. Compl. ¶¶ 30, 49. In his Opposition, Rattagan points to allegations that make this timeline clear: (1) sometime in *May 2016*, Uber delivered a letter to a city official in Buenos Aires mentioning Rattagan; (2) Rattagan reached out to Uber Technologies' Chief Legal Officer on *May 26, 2016*, to request assistance terminating his engagement, and she "responded that day" to assist Rattagan; (3) Rattagan was replaced as legal representative for the Uber International Entities "approximately two months" after the launch, or sometime in *June 2016*; and (4) Uber's operations continued during the two months between the launch and Rattagan's replacement as legal representative in *June 2016*. *See* Am. Compl.

¶¶ 45-49; Opp. at 5. None of these allegations gets close to alleging tortious conduct after the *April 2017* limitations cutoff.

The "continuous accrual" cases cited by Rattagan, Opp. at 2-4, are wildly inapposite. In *Dryden v. Board of Pension Commissioners*, a widow who belatedly sued for a pension after the initial six-month limitations period had expired was not precluded from seeking "*present* and *future*" pension payments because her "right to pension payments *is a continuing right*." 6 Cal. 2d 575, 580-81 (1936) (emphases in original). In *Howard Jarvis Taxpayers Ass'n v. City of La Habra*, plaintiffs who belatedly challenged the validity of a municipal tax were not precluded from bringing claims based on the government's continuing monthly collection of the tax. 25 Cal. 4th 809, 818-22 (2001).[2] Both cases involved continued instances of the allegedly wrongful acts—the failure to pay pension checks and improper collection of taxes—that occurred within the limitations period.

The same holds true for the "continuing violation" employment discrimination cases cited by Rattagan, Opp. at 2-4, where the plaintiff's claim depends on a course of conduct that includes acts of discrimination occurring within the limitations period. *See O'Loghlin v. Cty. of Orange*, 229 F.3d 871, 875 (9th Cir. 2000) ("if a discriminatory act takes place within the limitations period and that act is 'related and similar to' acts that took place outside the limitations period, all the related acts—including the earlier acts—are actionable as part of a continuing violation."); *DeGrassi v. City of Glendora*, 207 F.3d 636, 645 (9th Cir. 2000) (same); *Richards v. CH2M Hill, Inc.*, 26 Cal. 4th 798, 812-23 (2001) (same); *see also Komarova v. Nat'l Credit Acceptance, Inc.*, 175 Cal. App. 4th 324, 345 (2009) (harassing debt collection phone calls continuing into limitations period may form basis for wrongful debt collection practices claim under continuing violation theory).

In contrast to all of those cases, the only allegedly "continuing" events in the Amended Complaint are not continued wrongful *conduct*, but rather Rattagan's purportedly continuing *injuries*. *See* Opp. at 5 (referencing later "tax evasion charge" brought by prosecutors based on Rattagan's April

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[2] Rattagan also cites *Jones v. Tracy School District*, 27 Cal. 3d 99 (1980), as support for "the application of the continuous accrual doctrine." Opp. at 4. *Jones* does not discuss that doctrine at all. Rather, the court determined the limitations period based on its interpretation of the California Labor Code. 27 Cal. 3d at 105. *Jones* also discussed the equitable tolling doctrine, *id.* at 107-09, which is not alleged here.

2016 to June 2016 service as legal representative for the Uber International Entities). The Amended Complaint does not allege any improper *conduct* by Uber Technologies after June 2016, the date Mr. Rattagan ceased to be the Uber International Entities' legal representative. Mere continuing *injury* from an act within the limitations period does not serve to extend that period. *Vaca v. Wachovia Mortg. Corp.*, 198 Cal. App. 4th 737, 745 (2011) ("[I]f continuing injury from a completed act generally extended the limitations period, those periods would lack meaning. Parties could file suit at any time, as long as their injuries persisted. This is not the law."); Mot. at 7-8.

The continuous accrual and continuing violation doctrines are "a response to the inequities that would arise if the expiration of the limitations period following a first breach of duty or instance of misconduct were treated as sufficient to bar suit for any subsequent breach or misconduct; parties engaged in long-standing misfeasance would thereby obtain immunity in perpetuity from suit even for recent and ongoing misfeasance." *Aryeh*, 55 Cal. 4th at 1198. That concern does not apply here, where any tortious conduct indisputably ceased in June 2016. There is no inequity in requiring Rattagan—a lawyer—to have asserted his claims within the two-year limitation period.

II. Rattagan's Claims For Breach Of Fiduciary Duty, Deceit, And Fraud Fail As A Matter Of Law Because Uber Technologies Did Not Owe Any Legal Duty To Rattagan [Counts 1-3].

A. Rattagan Fails To Allege A Plausible Fiduciary Duty [Count 1].

Rattagan's Opposition is premised on his assertion that "Uber" appointed Mr. Rattagan "to the position of legal representative of the shareholders of Uber's Argentine operation." Opp. at 6. Rattagan's vague reference to "Uber" is an effort to paper over his admission that he served as legal representative for the Uber International Entities—*i.e.*, the "shareholders" of Uber Argentina SRL—*not* the sole defendant, Uber Technologies. Am. Compl. ¶¶ 13-17. Any duty to Rattagan would be owed by corporations that are not parties to this case. *See* Mot. at 9.

Rattagan's authorities do not help his assertion that Uber Technologies owed him a fiduciary duty. Opp. at 6-8. In both *Richelle L. v. Roman Catholic Archbishop* and *Shum v. Intel Corp.*, his only cases applying California law, the courts found that no fiduciary duty existed. *See Richelle L.*, 106 Cal. App. 4th 257, 282 (2003) (affirming demurrer as to breach of fiduciary duty claim); *Shum*, 2008 WL 4414722, at *9 (N.D. Cal. Sept. 26, 2008) (finding "that on the circumstances in this case [the defendant] does not owe any fiduciary duty to [the plaintiff]"). Indeed, *Shum* confirms the high bar for a finding of fiduciary duty:

> *Before a person can be found to owe a fiduciary duty to another, the factual circumstances attendant to their relationship must show that he knowingly undertook to act on behalf and for the benefit of the other person*, or that the relationship itself is one which imposes that undertaking as a matter of law, such as guardian and ward, trustee and beneficiary, principal and agent, or attorney and client.

Shum, 2008 WL 4414722, at *4 (emphasis added); Mot. at 9-10. Nowhere in the Amended Complaint does Rattagan allege that, as the result of Rattagan's agreement to act as the legal representative of the Uber International Entities, Uber Technologies somehow "undertook to act on behalf and for the benefit of" Rattagan. To the contrary, the Amended Complaint alleges only duties that *Rattagan* assumed as legal representative for the Uber International Entities. *See* Am. Compl. ¶ 15; Mot. at 9-10.

Rattagan claims that *Shen v. Leo A. Daly Co.*, 222 F.3d 472 (8th Cir. 2000), is "on all fours with this case." Opp. at 7. *Shen* is wholly distinguishable. First, it applies Nebraska law to a "responsible person" designation in Taiwan, not California law to a "legal representative" relationship in Argentina. Second, *Shen* did not involve a breach of fiduciary duty claim at all. Instead, the Eighth Circuit affirmed "a violation of the implied covenant of good faith and fair dealing"—that is, a standard contract claim. *Shen*, 222 F.3d at 476-77 ("The district court held that [Defendant] breached the implied covenant of good faith and fair dealing based on the agency relationship between [Defendant] and [Plaintiff]. We agree."). Rattagan does not allege a claim for breach of contract or breach of the implied covenant of good faith and fair dealing, and so *Shen* is inapposite. Third, *Shen* dealt with a defendant corporation that designated its *employee*—undoubtedly a person to whom the defendant employer owed duties—as a "responsible person" in Taiwan. *Id.* That is different from the situation here, where Rattagan, an experienced lawyer, voluntarily agreed after arm's-length negotiations to serve as an Argentine "legal representative"—not a Taiwanese "responsible person"—for the Uber International Entities.

The inapposite reliance on *Shen* underscores the conceptual defect in Rattagan's fiduciary duty claims. Fiduciary obligations depend on what the cases sometimes call "vulnerability," which might exist in a guardian-ward or trustee-beneficiary relationship, but is absent here. Opp. at 6; *see Richelle L.*, 106 Cal. App. 4th at 273 ("The vulnerability that is the necessary predicate of a confidential relation, and which the law treats as 'absolutely essential,' usually arises from advanced age, youth, lack of education, weakness of mind, grief, sickness, or some other incapacity.”). Rattagan does not identify any authority holding that “vulnerability” sufficient to confer a fiduciary duty may arise from an experienced, able professional’s knowing and voluntary agreement to act as a local service provider for a foreign company. That is an ordinary contractual relationship. *See Oakland Raiders v. Nat’l Football League*, 131 Cal. App. 4th 621, 633-34 (2005). If anything, the fiduciary relationship should run the *other* direction, since it was Rattagan who was supplying specialized knowledge as a legal representative, much like it is the attorney, not the client, who owes fiduciary obligations in an attorney-client relationship. *See Knight v. Aqui*, 966 F. Supp. 2d 989, 996 (N.D. Cal. 2013); Mot. at 12.

Finally, Rattagan’s argument regarding the scope of any fiduciary duty confirms that his claim must be dismissed. Rattagan alleges that Uber Technologies owed a fiduciary duty to either (1) comply with Argentine law; *or* (2) remove Rattagan as the legal representative. Opp. at 7-8. Even if Uber were deemed to be a fiduciary, it is plain from the Amended Complaint and the uncontested Request for Judicial Notice that *Uber did both of these things*. With respect to (1), Rattagan does not dispute that Argentina courts have confirmed Uber’s operations in Buenos Aires are entirely lawful. *See* Mot. at 5-6; Request for Judicial Notice Exs. A-D (Dkt. 24). With respect to (2), Uber replaced Rattagan as legal representative within two months of the launch, in approximately June 2016. Am. Compl. ¶¶ 30, 34, 49. Rattagan’s own allegations defeat his claim.

B. Rattagan Fails To Allege That Uber Technologies Had A Special Duty To Disclose Information To Rattagan [Counts 2-3].

Rattagan does not allege that Uber Technologies made any affirmative misrepresentations, and he acknowledges that the alleged *omissions* are actionable only under four circumstances where a defendant has an affirmative duty to speak: “(1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts.” *LiMandri v. Judkins*, 52 Cal. App. 4th 326, 336 (1997) (citation omitted); Opp. at 8. As discussed above, Rattagan has not adequately alleged a fiduciary relationship. As to the other three circumstances, Rattagan does not dispute that the existence of some transaction between the parties is a prerequisite to any duty. *See*

Deteresa v. Am. Broad. Cos., 121 F.3d 460, 467 (9th Cir. 1997); *LiMandri*, 52 Cal. App. 4th at 337; Opp. at 8. His only response is to point to his status as the legal representative for the Uber International Entities; he says nothing about Uber Technologies. Opp. at 8. Because there was no transaction at all between Uber Technologies and Rattagan, there could not have been any duty to disclose. *See Deteresa*, 121 F.3d at 467; *LiMandri*, 52 Cal. App. 4th at 337.

Rattagan next argues there was a duty to disclose based on a supposed "ostensible agency" relationship between him and Uber Technologies. Opp. at 9. Ostensible agency is "when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." Cal. Civ. Code § 2300. This theory fails on multiple grounds. First, Rattagan did not plead an ostensible agency relationship or facts to support it in the Amended Complaint. *See Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) ("In determining the propriety of a Rule 12(b)(6) dismissal, a court *may not* look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss.").

Second, ostensible agency can only be created by the acts of the principal, and Rattagan has not alleged any action by Uber Technologies that could form the basis for such agency. *See Lee v. Helmco, Inc.*, 199 Cal. App. 2d 820, 834 (1962). Indeed, he misleadingly paraphrases the Amended Complaint as alleging that "Uber publicly appointed Mr. Rattagan as its legal representative in Argentina." Opp. at 9. What the Amended Complaint actually alleges, and what Rattagan acknowledges on the prior page of the Opposition, is that Rattagan served as legal representative for the Uber International Entities, not Uber Technologies. *See* Am. Compl. ¶ 15 ("Mr. Rattagan would act as the *Shareholders'* legal representative in Argentina") (emphasis added); Opp. at 8 ("Mr. Rattagan was appointed the legal representative for the *shareholders*") (emphasis added).

Third, even if Rattagan had adequately pled an ostensible agency relationship, his invocation of the doctrine to argue that Uber Technologies owed him duties is a drastic departure from the purpose of the doctrine. Ostensible agency exists to protect *third parties* who justifiably, but wrongly, believe that an ostensible agent is an actual agent. *See* William Lindsley & Kimberly C. Simmons, 2B Cal. Jur. 3d Agency § 76 (the doctrine "stands as a shield against the working of an unjust injury to innocent third persons. . . . Ostensible authority may be taken advantage of or not at the election of the person relying on the principal's conduct."). Only the deceived third party can benefit from ostensible agency; none of the cases Rattagan cites remotely supports the proposition that a third party's mistaken belief about agency status creates new duties running from the principal to a supposed ostensible agent such as Rattagan.

Finally, the cases establish that there is no generalized duty of a party to disclose that it is going to commit a tort or wrongful act, under penalty of fraud liability. *See LiMandri*, 52 Cal. App. 4th at 338 ("LiMandri's nondisclosure causes of action *are further problematic* in that they essentially seek to hold Judkins liable for failing to disclose his intention to wrongfully assert the superiority of Security's lien rights.") (emphasis added); *Deteresa*, 121 F.3d at 467 ("Deteresa further contends that Radziwill had a duty to disclose that he was taping her because federal and state law prohibits unauthorized taping of confidential communications. California courts, however, have rejected this basis for fraud."). Rattagan argues these cases are distinguishable because they do not involve a preexisting relationship between the plaintiff and the defendant. Opp. at 10. But this distinction has no legal relevance to the principle that, regardless of the relationship between the parties, there is no duty to disclose an intent to commit a wrongful act. While the wrongful act itself may give rise to tort liability, the law does not permit a plaintiff like Rattagan to superimpose fraud liability for a failure to disclose an intent to commit the same wrongful act.

III. Rattagan Fails To Plausibly Allege That Uber Technologies Caused His Purported Damages [Counts 1-5].

Rattagan acknowledges that to prevail on any claim, he must plausibly allege proximate causation. And he likewise acknowledges that unforeseeable conduct by independent, intervening actors—here, a sovereign foreign government's response to lawful business activity—breaks the proximate causal chain. *See* Mot. at 13-14; Opp. at 10-11. Rattagan asserts, however, that foreseeability is "inherently a question of fact" and is immune from scrutiny at the motion-to-dismiss stage. Opp. at 10. But as Rattagan's own cases make clear, "where the facts are such that the only reasonable conclusion is an absence of causation, the question is one of law, not of fact." *Steinle v. City & Cty. of S.F.*, 230 F. Supp. 3d 994, 1034 (N.D. Cal. 2017) (citation omitted). Courts regularly dismiss claims at the pleadings stage when proximate causation is not plausibly alleged. For example, *Lopez v. Nissan*

North America Inc., which Rattagan does not address, held as a matter of law that a third party's actions constituted "an intervening and superseding cause" of the plaintiff's alleged injuries, resulting in a "causal link . . . too attenuated for [the defendant's] conduct to be considered a proximate cause of" the plaintiff's harm. 2017 WL 10338593, at *5 (N.D. Cal. Nov. 6, 2017) (dismissing claim against doctor who prescribed medical marijuana to driver who injured pedestrian because driver's decision to operate vehicle while intoxicated was superseding cause). Here as in *Nissan*, the Amended Complaint depends on an attenuated causal link interrupted by the intervening acts of third parties. Indeed, it is hard to imagine a clearer example of an intervening act than the alleged choice of a sovereign government to improperly charge the legal representative of the Uber International Entities with violations of law based on Uber's undisputedly lawful operations in Argentina.[3]

Rattagan argues that "Uber's prior experiences launching in locations around the world made the fallout in Argentina not only foreseeable but also inevitable." Opp. at 10. The Amended Complaint does not allege any "prior experiences" in which persons affiliated with Uber's operations were personally charged with violations of law when the operations were held to be entirely lawful by the courts. Rattagan does claim that, after initial "negative press" and "protests" in other countries, in Colombia in particular, those launches "evolved into peaceful and legally compliant operations." Am. Compl. ¶ 31. It is difficult to see how any experience with "peaceful and legally compliant" operations in Colombia and elsewhere would render foreseeable what purportedly transpired in Argentina. Moreover, Rattagan fails entirely to explain why Uber's experience in Colombia, a separate country with a separate legal regime, could foreseeably predict its experience in Argentina. Were Rattagan's argument credited, Uber could not launch legally compliant operations in any jurisdiction, given the theoretical risk that some news media or taxi drivers or local authorities in that jurisdiction might react poorly.

Finally, even if the Argentine authorities' alleged reactions were legally foreseeable and could

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[3] *Vasquez v. Residential Investments, Inc.*, Rattagan's authority, is not to the contrary. 118 Cal. App. 4th 269 (2004); *see* Opp. at 11. *Vasquez* determined that criminal intrusion into a property is a foreseeable result of an owner's failure to maintain the security of the property, not a superseding cause. *Id.* at 290. Here, the Argentine government's prosecution of Rattagan based on its unsupported claim that Uber's operations were unlawful could not have been a foreseeable result of Uber's *lawful* business operations.

somehow be held to be Uber's responsibility, Rattagan does not allege what *Uber Technologies* did to cause those actions and Rattagan's resulting alleged injuries. The only tie between Uber and Rattagan's alleged harm is his service as legal representative to the Uber International Entities—a relationship he did not have with Uber Technologies, the only defendant in this lawsuit.

IV. Rattagan's Claims For Deceit And Fraud Fail Because They Do Not Satisfy The Heightened Pleading Requirements Of Rule 9(b) [Counts 2-3].

Rattagan's response to Uber Technologies' three 9(b) arguments is inadequate. First, the Motion argued that the Amended Complaint does not specify what information Uber Technologies supposedly should have disclosed with respect to hiring counsel for Uber's launch in Argentina. Mot. at 14-15; Opp. at 11-12. Rattagan admits in the Amended Complaint that he knew Uber had other advisors in the region, and his response was not to withdraw as legal advisor, but rather to pitch for more work. *See* Am. Compl. ¶ 24. His Opposition does not point to any other supposed omissions.

Second, Uber Technologies argued that Rattagan failed to adequately plead that it had advance knowledge of the Argentine authorities' future reaction to its launch. *See* Mot. at 15. In response, Rattagan points only to his allegation that "Uber experienced the same reaction in Colombia prior to its launch in Argentina." Opp. at 12. Even if the events in Colombia somehow foreordained what would happen in Argentina, a position that seems to have no logic other than geographic stereotyping, the response in Colombia was *not* the same. According to the Amended Complaint, in Colombia there were protests, fines, and a warning from the president. *See* Am. Compl. ¶ 31. Nowhere does Rattagan allege that any other launches, including in Colombia, led to arrests and criminal charges against attorneys or statutory representatives based on activity that was entirely lawful.

Third, in response to Uber Technologies' argument that failure to disclose a known fact—such as Uber's intention to continue operations in Argentina—is not actionable, Rattagan denies that he is making any such claim. Opp. at 12 n.1; Mot. at 15. Yet the very paragraph he cites in the Amended Complaint alleges that Uber suppressed that it "would [not] cease operations." Am. Compl. ¶ 78. Rattagan re-interprets his claim to allege only that Uber failed to disclose that it would not "change its practices to comply with" unspecified "directives of Argentine authorities before replacing him as legal representative." *Id.* But this reframed "failure to comply" allegation fails for all of the same reasons.

The Amended Complaint makes no suggestion that Uber Technologies knew in advance that (1) Argentine authorities would incorrectly allege Uber's operations were illegal; (2) that Argentine authorities would issue directives based on this incorrect belief; and (3) that Uber planned in advance to disobey any future directives.

Rattagan also identifies nine allegations he says show the specificity required by 9(b). *See* Opp. at 12. Only two of the nine allegations have anything to do with the alleged omissions: "Uber failed to inform Mr. Rattagan it was preparing to launch" and "Uber failed to inform Mr. Rattagan that it would be operating in a manner that authorities would foreseeably consider to be in violation of applicable laws and regulations." *See id.* The first alleged omission is contradicted by the Amended Complaint's clear allegation that Rattagan learned of the launch preparations a month in advance. Am Compl. ¶¶ 23-24; *see Med Vets Inc. v. VIP Petcare Holdings, Inc.*, 2019 WL 1767335, at *5 (N.D. Cal. Apr. 22, 2019) (dismissing with prejudice claims based on "inconsistent" allegations). The second alleged omission fails to specify how Uber Technologies knew in advance how the Argentine authorities would react to the launch.

V. Rattagan's Claim For Intentional Infliction Of Emotional Distress Fails Because Rattagan Does Not Allege Outrageous Conduct Or Severe Emotional Distress [Count 4].

Intentional infliction of emotional distress claims are not common in commercial disputes, and for good reason. A party is permitted to "pursue[] its own economic interests," even in a rough and tumble manner, without being subject to a claim for intentional infliction of emotional distress. *See Trerice v. Blue Cross of Cal.*, 209 Cal. App. 3d 878, 885 (1989); *see Moncada v. W. Coast Quartz Corp.*, 221 Cal. App. 4th 768, 780-81 (2013) (allegations demonstrating "a callous disregard for plaintiffs' professional and personal well-being" do not support a claim for intentional infliction of emotional distress). Thus, commercial conduct "is only outrageous if it goes beyond all reasonable bounds of decency." *Ross v. Creel Printing & Publ'g Co.*, 100 Cal. App. 4th 736, 745 (2002) (citation omitted). Uber Technologies' alleged conduct—launching lawful operations without first seeking the guidance of the legal representative of certain of its subsidiaries—is a far cry from the cases where courts find outrageous conduct. For example, Rattagan cites *Fletcher* as an example of outrageous conduct based on "an insurer's attempt to deprive its insured of benefits." Opp. at 14. Yet as this Court has recognized, *see Averbach v. Vnescheconombank*, 280 F Supp. 2d 945, 959-60 (N.D. Cal. 2003) (Chen, J.), the conduct alleged in *Fletcher* was entirely different in kind. The *Fletcher* defendant "engaged in an active and malicious campaign of false and threatening letters that exploited the plaintiff's disabled . . . position" and "led to plaintiff's family going without proper food and clothing, delinquent house payments, the loss of real property, the termination of electricity, and forcing [plaintiff's] daughter to miss school on the days his wife worked." *Id.*[4]

Rattagan next argues that Uber Technologies cannot avail itself of the defense of a good faith belief in the legality of Uber's Argentine operations because the Amended Complaint does not allege such a good faith belief. Opp. at 14. This ignores Uber Technologies' unopposed Request for Judicial Notice showing that Uber's operations were, in fact, legal. *See* Dkt. 24. Uber's good faith belief in the legality of its operations is definitively established by the undisputed, judicially noticeable evidence that it successfully litigated and won the issue in Argentina's courts. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (stating that a court need not "accept as true allegations that contradict matters properly subject to judicial notice").

Rattagan also wrongly contends that he adequately alleged the severity of his supposed emotional distress. To overcome a motion to dismiss, the "plaintiff must allege facts that indicate the 'nature or extent of any mental distress suffered as a result of the alleged outrageous conduct.'" *Landucci v. State Farm Ins. Co.*, 65 F. Supp. 3d 694, 711 (N.D. Cal. 2014) (citation omitted). Where, as here, the plaintiff does not allege the manifestations, extent, or severity of the distress, intentional infliction of emotional distress claims fail. *Landucci*, for example, found the plaintiff's allegations of mental anguish, anxiety, and feeling "extremely emotionally distressed and pained, fearing for her job and livelihood" were not sufficient to allege severe emotional distress. *Id.* at 712; *see also Nelson v. Cty. of Sacramento*, 926 F. Supp. 2d 1159, 1172 (E.D. Cal. 2013) (allegations of "pain, grief, shame, humiliation, embarrassment, anger, disappointment, depression, sleeplessness, anxiety, disappointment,

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[4] Rattagan also cites *Cervantez v. J.C. Penney Co.*, 24 Cal. 3d 579, 593-94 (1979), in which a security guard knowingly arrested an innocent person, and *Alcorn v. Anbro Engineering, Inc.*, 2 Cal. 3d 493, 496-97 (1970), in which the defendant employer yelled racial obscenities at an employee. Those allegations are qualitatively different from launching an app-based ride-sharing service.

damage to reputation, and worry" failed to plead emotional distress because they lacked "specific facts to show their nature and extent").

In *Dougherty v. Bank of America*, 2018 WL 1518574, at *9 (E.D. Cal. 2018), allegations of "emotional distress resulting in doctor's visits, psychological testing, and medication" were insufficient. In *Creger v. Hudson 141 Homeowners Association*, 2015 WL 501965, at *18 (Cal. Ct. App. Feb. 5, 2015), strained marital relations and feelings of devastation and "living in a nightmare" were found not to be severe. Rattagan's boilerplate allegations of "public humiliation," "reputational harm," "fear," and "severe emotional distress," Am. Compl. ¶¶ 93-96, are not distinguishable from *Landucci*, *Nelson*, *Dougherty*, *Creger*, *Wong*, or *Hughes*. Rattagan's intentional infliction of emotional distress claim fails and should be dismissed.[5]

VI. The Claims For Fraud, Deceit, And Negligence Are Barred By The Economic Loss Rule [Counts 2-3, 5].

Rattagan briefly contends that the economic loss rule does not bar his claims because, he says, he "is not seeking recovery based on contractual damages." *See* Opp. at 16. That is precisely the point: the economic loss rule bars a plaintiff from recovering tort damages, as Rattagan tries to do here, when a contract governs the relationship. *See Robinson Helicopter Co. v. Dana Corp.*, 34 Cal. 4th 979, 988 (2004); *JMP Sec. LLP v. Altair Nanotechs. Inc.*, 880 F. Supp. 2d 1029, 1042 (N.D. Cal. 2012).

Rattagan then argues that the economic loss rule does not bar his claims because they are based on duties "entirely unrelated" to his alleged contract with Uber Technologies: a supposed fiduciary duty and obligation to disclose information. Opp. at 17. But the entire basis for Uber Technologies owing those supposed duties is the alleged contractual relationship with Rattagan. *See* Am. Compl. ¶ 80 ("Uber was obligated to disclose the concealed facts due to its . . . contractual relationship with Mr. Rattagan"), ¶ 87 (same); *see also id.* ¶ 100 ("Uber owed a duty of care to Mr. Rattagan based on . . .

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[5] Rattagan also argues that he need not allege physical injury to recover for intentional infliction of emotional distress. Opp. at 15. Uber Technologies does not dispute this point, but Rattagan cannot recover for emotional distress absent physical injury on his *negligence* claim. *See* Mot. at 19 n.5; *Averbach*, 280 F Supp. 2d at 960 (Chen, J.) ("any claim for [negligent infliction of] emotional distress is further barred because such claims are generally not available where the alleged wrongdoing results only in economic injury to the plaintiff").

their . . . contractual relationship"). If Rattagan's conclusory allegations of a contract with Uber Technologies are credited, then the economic loss rule bars recovery for fraud, deceit, and negligence. A party cannot circumvent the application of the economic loss rule by omitting contract allegations and seeking to proceed in tort.

VII. Rattagan Cannot Recover Punitive Damages For Any Of His Claims.

Rattagan concedes that, to state a punitive damages claim against a corporate defendant, he must plead "willful and malicious" conduct on the part of an officer, director, or managing agent of that corporation. *Taiwan Semiconductor Mfg. Co. v. Tela Innovations, Inc.*, 2014 WL 3705350, at *6 (N.D. Cal. July 24, 2014); *see* Mot. at 19-20. Rattagan identifies three employees whose alleged conduct is relevant to his claims. Only one of those employees is an "officer" of Uber Technologies, and none of their conduct can plausibly be considered "malicious."

As detailed in the Motion, the only "officer" mentioned in the Amended Complaint is Salle Yoo, Uber Technologies' "Chief Legal Officer, General Counsel, and Corporate Secretary." Mot. at 20. Rattagan alleges that he asked Ms. Yoo to "promptly designate someone" to talk to him about transitioning out of the legal representative role, and that Ms. Yoo responded to his request the same day, expressed concern, and assigned an Uber employee to address Rattagan's requests. Am. Compl. ¶¶ 46-47. Rattagan does not allege malice in Ms. Yoo's actions. And though Rattagan identifies Todd Hamblet as the employee to whom Ms. Yoo assigned responsibility for addressing Rattagan's requests, Rattagan does not allege any conduct directed toward him by Hamblet at all, let alone any malicious conduct.

Finally, Rattagan asserts that he "contacted Uber's Latin America Legal Director to express his concerns prior to launch." Opp. at 18 (citing Am. Compl. ¶ 24). That is demonstrably incorrect. What the Amended Complaint actually alleges is that Rattagan emailed Enrique Gonzalez, Uber's Latin America Legal Director, to offer Rattagan's law firm's "expertise to help Uber navigate the issues surrounding the launch," Am. Compl. ¶ 24; that, "[o]n information and belief," Gonzalez "engaged another attorney in Buenos Aires to assist in Uber's preparations," *id.* ¶ 27; and that Gonzalez did not immediately arrange a meeting at Rattagan's request following the launch, *id.* ¶ 33. Gonzalez's alleged decision to retain other advisors to prepare for Uber's Argentina launch, and to not give more business to Rattagan, cannot plausibly constitute "malicious" conduct.

All of the remaining allegations in the Amended Complaint refer to conduct by "Uber," not individual employees, and so are irrelevant to the punitive damages claim. Rattagan nevertheless urges the Court to disregard California pleading requirements because other courts purportedly "do not require specificity in pleading actions by corporate officers." Opp. at 17. That is not true: the cases he cites require allegations plausibly establishing that the employee conduct at issue was ratified or authorized by an officer, director, or managing agent of the corporation—allegations that are absent from the Amended Complaint. *See Shaterian v. Wells Fargo Bank, N.A.*, 829 F. Supp. 2d 873, 889 (N.D. Cal. 2011) (plaintiff alleged "certain facts suggesting that [the defendant] authorized or ratified" the fraudulent loans); *Rees v. PNC Bank, N.A.*, 308 F.R.D. 266, 275 (N.D. Cal. 2015) (identifying specific allegations that "plausibly suggest . . . knowledge, authorization, or ratification by an officer, director, or managing agent of the Defendant corporations"); *Ortega v. Univ. of Pac.*, 2013 WL 6054447, at *4 (E.D. Cal. Nov. 15, 2013) (finding authorization or ratification plausibly alleged by specific factual allegations); *Nouri v. Ryobi Am. Corp.*, 2014 WL 5106903, at *1 (C.D. Cal. Oct. 9, 2014) (plaintiff alleged that challenged conduct was "authorized"). The dicta Rattagan cites in *Robinson v. Managed Accounts Receivable Corp.* should be disregarded; in that case, the defendant did not move to dismiss the punitive damages claim on the ground that malicious actions by corporate officers or directors were not alleged. 654 F. Supp. 2d 1051, 1066 n.13 (C.D. Cal. 2009).

VIII. The Amended Complaint Should Be Dismissed With Prejudice.

Rattagan has already had two opportunities to state a claim, and he should not be given a third. Rattagan's inability to identify any amendments he could make to the already amended Complaint that would cure the deficiencies identified in the Motion confirm the futility of his request for leave to amend. Nor does Rattagan dispute that many of the allegations in the Amended Complaint, though taken as true for purposes of this Motion, are in fact false, as detailed in Uber's Rule 11 Motion. *See* Dkt. 27. Rattagan should not be permitted an opportunity to prolong this baseless lawsuit.

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Respectfully submitted,

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MICHAEL R. RATTAGAN, Plaintiff, v. UBER TECHNOLOGIES, INC.; Defendant.	Case No. 3:19-CV-01988-EMC JUDGE EDWARD M. CHEN **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

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INTRODUCTION

The Amended Complaint ("Complaint") exposes Uber's recklessly orchestrated entry into the Argentine ride-sharing market and the unimaginable harm it inflicted on Mr. Rattagan as a result. Having previously experienced violent protests and legal repercussions time and again as it launched across the globe, Uber was well aware of the disastrous fallout that would result from its ill-prepared launch in Buenos Aires. Undeterred, Uber made Mr. Rattagan the face of the company's operations in Argentina, then secretly moved to launch without his knowledge or counsel and with complete disregard for the inevitable consequences that would befall him.

In an attempt to escape liability for its wrongful acts, Uber misinterprets the origins of the duties it owed to Mr. Rattagan, ignores and misrepresents significant portions of the meticulously detailed allegations in the Complaint, and conspicuously neglects to acknowledge ample legal authority that supports Mr. Rattagan's claims. Specifically, Uber's motion fails for the following reasons:

- neither Mr. Rattagan's claim for intentional infliction of emotion distress nor his claim for negligence is time-barred based on the application of continuing-wrong accrual principles;
- Mr. Rattagan clearly alleges the existence of both a fiduciary duty on the part of Uber as well as the duty to disclose information to Mr. Rattagan based on the factual circumstances of their relationship;
- Uber's claim of lack of proximate cause fails not only because it is inappropriate to determine proximate cause at this stage but also because the actions of Argentine law enforcement were reasonably foreseeable based on – among other things – Mr. Rattagan's allegation of Uber's prior launch experiences in South America;
- Uber's Fed. R. Civ. P. 9(b) arguments fail because Mr. Rattagan's detailed complaint clearly alleges the appropriate specificity;
- Mr. Rattagan appropriately alleged in his claim for intentional infliction of emotional distress that Uber's conduct was extreme and that Mr. Rattagan suffered severe emotional distress;

- the economic loss doctrine does not bar Mr. Rattagan's claims because he is not seeking recovery based on contractual damages; and
- Mr. Rattagan's claim for punitive damages is appropriate because he sufficiently pled both fraud and malice.

For these reasons, and those set forth more fully below, the Court should deny Uber's Motion to Dismiss and allow this case to proceed to discovery.

ARGUMENT

I. MR. RATTAGAN'S CLAIMS FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AND NEGLIGENCE ARE NOT TIME-BARRED BASED ON CONTINUING-WRONG ACCRUAL PRINCIPLES.

Uber's continuing invasions of Mr. Rattagan's rights prevent application of the statute of limitations here. When a motion to dismiss is based on the running of the statute of limitations, "it can be granted only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980). In contrast, "where the statute of limitations question turns on factual issues that may be disputed," it "is more appropriately addressed at a later stage of the proceeding." *Belete v. Oaks Corner*, No. 16-CV-04850-JCS, 2016 WL 6393510, at *4 (N.D. Cal. Oct. 28, 2016).

The statute of limitations for intentional infliction of emotional distress and negligence claims is two years. Cal. Code Civ. P. § 335.1. Uber argues that Mr. Rattagan's claims accrued on April 15, 2016, the date City inspectors and police officers raided his office and the homes of his colleagues, and therefore became time-barred as of April 15, 2018. (MTD at 7.) Uber is wrong.

Mr. Rattagan's intentional infliction of emotional distress and negligence claims are timely filed due to continuing-wrong accrual principles. There are two main branches of continuing-wrong accrual principles: the continuing violation doctrine and the theory of continuous accrual. *See, e.g., Richards v. CH2M Hill, Inc.*, 26 Cal.4th 798, 811–818 (2001) (continuing violation doctrine); *Howard Jarvis Taxpayers Assn. v. City of La Habra*, 25 Cal.4th 809, 818–822 (2001) (theory of continuous accrual). The California Supreme Court has defined the two continuing accrual principles as follows:

> The continuing violation doctrine aggregates a series of wrongs or injuries for purposes of the statute of limitations, treating the limitations period as accruing for all of them upon commission or sufferance of the last of them. Finally, under the theory of continuous accrual, a series of wrongs or injuries may be viewed as each triggering its own limitations period, such that a suit for relief may be partially time-barred as to older events but timely as to those within the applicable limitations period.

Aryeh v. Canon Bus. Sols., Inc., 55 Cal. 4th 1185, 1192 (2013) (internal citations omitted.)

The continuing violations doctrine is an equitable doctrine designed "to prevent a defendant from using its earlier illegal conduct to avoid liability for later illegal conduct of the same sort." *O'Loghlin v. County of Orange*, 229 F.3d 871, 875 (9th Cir. 2000). To establish a continuing violation, a plaintiff must show "that the alleged ... acts are related closely enough to constitute a continuing violation." *DeGrassi v. City of Glendora*, 207 F.3d 636, 645 (9th Cir.2000) (quoting *Green v. Los Angeles County Superintendent of Schools*, 883 F.2d 1472, 1480 (9th Cir.1989)). Where the alleged conduct constitutes a continuing pattern and course of conduct, the continuing violation doctrine permits recovery "for actions that take place outside the limitations period if these actions are sufficiently linked to unlawful conduct within the limitations period [.]" *Richards*, 26 Cal.4th at 812. As detailed below, Mr. Rattagan's allegation that Uber continued operations in a manner that Argentine authorities had deemed illegal demonstrated a pattern of conduct and course of conduct that invokes the continuing violation doctrine and tolls the statute of limitations for his claims. Under the continuous accrual theory, "separate, recurring invasions of the same right can each trigger their own statute of limitations." *Aryeh*, 55 Cal. 4th at 1198. Continuous accrual applies "whenever there is a continuing or recurring obligation: 'When an obligation or liability arises on a recurring basis, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period.'" *Id*. at 1199 (quoting *Hogar Dulce Hogar v. Cmty. Dev. Comm'n*, 110 Cal.App.4th 1288, 1295 (2003). California courts have recognized the application of the continuous accrual doctrine in a variety of circumstances, including: where sex discrimination continued for six years despite a two-year statute of limitations, *Jones v. Tracy School Dist.*, 27 Cal.3d 99 (1980); a widow sued for a pension six months after the period for filing a claim had expired because "[t]he right to pension payments is a continuing right," *Dryden v. Bd. of Pension Commrs.*, 6 Cal.2d 575, 580 (1936); and where the limitations period had run to challenge the validity of a municipal tax ordinance, reasoning that the continuing monthly collection on the tax that was alleged was an ongoing breach of state law, *Howard Jarvis Taxpayers Assn.*, 25 Cal.4th at 818–822.

Here, each of Uber's ongoing and recurring invasions of Mr. Rattagan's rights have tolled the existing statute of limitations and triggered a new statute of limitations for his intentional infliction of emotional distress and negligence claims. *Komarova v. Nat'l Credit Acceptance, Inc.*, 175 Cal. App. 4th 324, 345, (2009); *Aryeh*, 55 Cal.4th at 1202. These claims therefore are not time-barred. *Id.*

Uber's arguments against the application of continuing-wrong accrual principles fail. First, Uber asserts that ongoing harm from previous tortious conduct does not extend the applicable statute of limitations. (MTD at 8.) But Mr. Rattagan does not claim that the ongoing ill effects of Uber's actions justify a tolling; he claims that Uber's continuing wrongful acts do so.

Second, in anticipation of Mr. Rattagan's invocation of continuing-wrong accrual principles, Uber argues that the Complaint merely "refers vaguely and in passing to Uber's 'continuing conduct.'" (MTD at 8.) This, too, is wrong. The Complaint contains numerous specific allegations of Uber's closely related, continuous wrongful actions. Among other things, it alleges that:

- Mr. Rattagan remained the name and face of Uber in Argentina for more than two months after the launch despite requesting immediate replacement. (Am. Compl. (Dkt. 15) ¶ 30.) During that time, Uber continued to operate in the same manner that caused Argentine authorities to seek to impose criminal liability on anyone involved with Uber's launch, including Mr. Rattagan. (*Id.*)

- Despite Mr. Rattagan's request for removal and lack of involvement, Uber subsequently delivered a letter to City officials concerning the launch that showed Mr. Rattagan's law firm office address and name, falsely implying his ongoing association with Uber. (*Id.* ¶ 45.)

- After Mr. Rattagan elevated his concerns to Uber's Chief Legal Officer, General Counsel, and Corporate Secretary months after launch, Uber nevertheless continued to operate in a manner that it knew was placing Mr. Rattagan in severe danger of additional criminal liability. (*Id.* ¶ 48.)

- The tax evasion charge that was brought against Mr. Rattagan was deemed aggravated due specifically to the volume of Uber's sales in the year *after* the launch. (Id. ¶ 56.) Had Uber replaced Mr. Rattagan, or stopped operating in the same manner while the Prosecutor was claiming that Uber was acting illegally, the charge against Mr. Rattagan would not have been "aggravated" and may not have been filed at all. (*Id.*)

Thus, the Complaint alleges that Uber's continuing and recurring closely related wrongful actions after the April 15, 2016 initial accrual have caused harm to Mr. Rattagan, tolled the existing statutes of limitation under the continuing violations doctrine, and created a new statute of limitations under the continuous accrual theory for each wrongful act. Accordingly, continuing-wrong accrual principles apply, and Mr. Rattagan's claims of intentional infliction of emotional distress and negligence are timely filed.

II. MR. RATTAGAN ADEQUATELY ALLEGES THAT UBER OWED HIM LEGAL DUTIES.

Uber erroneously contends that Mr. Rattagan failed to allege the plausible existence of any legal duties owed to Rattagan. Uber argues that it either had no relationship with Mr. Rattagan, or, in the alternative, that the relationship created only duties flowing from Mr. Rattagan to Uber. Uber's argument is without merit. Mr. Rattagan adequately alleges the existence of a fiduciary duty on the part of Uber, as well as the duty to disclose information to Mr. Rattagan based on the factual circumstances of their relationship.

A. Mr. Rattagan Adequately Alleges A Fiduciary Duty

Mr. Rattagan sufficiently alleges a confidential relationship generating a fiduciary duty. Fiduciary duties can arise as a matter of law or as a matter of fact. In the latter situation, the existence of the duty depends on the factual circumstances attendant to the relationship. *Richelle L. v. Roman Catholic Archbishop*, 106 Cal.App.4th 257, 271 (2003). Indeed, the list of relationships that impose a fiduciary duty "is not graven in stone." Chodos, *The Law of Fiduciary Duties* (2000), p. 1. The existence of a confidential relationship generating a fiduciary duty is a question of fact, the essential elements of which are "1) The vulnerability of one party to the other which 2) results in the empowerment of the stronger party by the weaker which 3) empowerment has been solicited or accepted by the stronger party and 4) prevents the weaker party from effectively protecting itself." *Shum v. Intel Corp.*, No. C-02-03262-DLJ, 2008 WL 4414722, at *7 (N.D. Cal. Sept. 26, 2008) (citation omitted).

Uber appointed Mr. Rattagan to the position of legal representative of the shareholders of Uber's Argentine operation. (Am. Compl. ¶¶ 13-15.) As the name and face of Uber's operations in Argentina, Mr. Rattagan was placed in an extraordinarily vulnerable and powerless position whereby he would be held criminally liable in the event Uber actually or perceivably violated local laws or regulations. Uber solicited that empowerment in appointing Mr. Rattagan as the legal representative, and Mr. Rattagan was prevented from effectively protecting himself once in that position. (*Id.* ¶¶ 13-15.) Instead, Mr. Rattagan became entirely dependent on Uber to act in his best interests with respect to the legality of its operations in Argentina. As thoroughly alleged, the resulting fallout that Mr. Rattagan experienced fully demonstrates both his vulnerability and Uber's empowerment. (Id. ¶¶ 31-32, 36-39, 54-58, 61, 63.)

The Eighth Circuit Court of Appeals found that a principal owed its agent a fiduciary duty in a nearly identical situation. *Shen v. Leo A. Daly Co.*, 222 F.3d 472 (8th Cir. 2000). In *Shen*, a corporation designated its employee (Shen) as its "person responsible" or legal representative in Taiwan. *Id.* at 475. The employee was later terminated, but the corporation failed to designate a new legal representative. *Id.* When the corporation thereafter failed to pay certain taxes to the Taiwanese government, the former employee was restricted from leaving the country. *Id.* at 476. The *Shen* court held that given the nature of the relationship, the corporation owed a fiduciary duty to its former employee and breached that duty by failing to pay the tax and find a replacement for Shen as its legal representative. *Id.* at 477-78.

Shen is on all fours with this case. Just like in *Shen*, and as further detailed in Section II(B) below, Uber appointed Mr. Rattagan as its legal representative in Argentina. The nature of that relationship imposed fiduciary obligations on Uber to conduct itself in a manner that would avoid exposing Mr. Rattagan to potential criminal and civil liability due to its actions. Uber breached that duty by operating in a manner that predictably put Mr. Rattagan within the crosshairs of Argentine legal authorities, and by failing to replace him as its legal representative.

Uber argues that the scope of the fiduciary duty asserted by Mr. Rattagan is implausible because it would require Uber to cease operations. (MTD at 10.) This is hyperbole. Uber had two acceptable options at its disposal prior to launch: (1) commit to compliance with local law enforcement and courts, or (2) remove Mr. Rattagan as its legal representative and ignore local law enforcement and court decisions at its own peril. Instead, Uber chose to ignore local authorities and leave Mr. Rattagan in a position to bear the brunt of the consequences.

B. Mr. Rattagan Adequately Alleges That Uber Had A Duty To Disclose Certain Facts To Him

The failure to disclose certain facts constitutes fraud or deceit: "(1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts." *LiMandri v. Judkins*, 52 Cal.App.4th 326, 336 (1997) (internal quotation marks and citation omitted). The first situation requires a fiduciary relationship; the other three "presupposes the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise." *Id.* at 336-37.

In all four situations, a duty to disclose exists. Here, all four situations apply:

- As set forth in Section II(A) above, Uber and Mr. Rattagan were in a fiduciary relationship, thus satisfying the first circumstance.
- Uber had exclusive knowledge that it had hired different legal counsel in the country, that it was secretively preparing to launch in a manner that authorities would foreseeably consider to be in violation of applicable laws and regulations, and that it would neither cease operations nor change its practices to comply with directives of Argentine authorities. (Am. Comp. ¶¶ 23-29, 31, 47, 56, 78, 85.)
- Uber actively concealed all of those material facts from Mr. Rattagan.
- While Uber made partial representations to Mr. Rattagan insofar as it advised him of future plans to launch operations in Argentina, it then suppressed the additional and pivotal material facts set forth above.

Uber argues that the three remaining circumstances do not apply because it had no relationship with Mr. Rattagan. Given that Mr. Rattagan was appointed the legal representative for the shareholders of Uber's Argentine operations, Uber's assertion is specious. *Id.* ¶¶ 13-15.

Even if not for that, Uber had a duty to disclose because of its implied agency relationship with Mr. Rattagan. "Agency may be implied from the circumstances and conduct of the parties." *Michelson v. Hamada*, 29 Cal.App.4th 1566, 1579 (1994), internal citations omitted. "An ostensible agency exists when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." *Lee v. Helmco, Inc.*, 199 Cal.App.2d 820, 834 (1962); *See also Marcelos v. Dominguez*, No. C 08-00056 WHA, 2008 WL 2788173, at *8 (N.D. Cal. July 18, 2008).

Uber publicly appointed Mr. Rattagan as its legal representative in Argentina. (Am. Compl. ¶¶ 13-15.) This action caused third parties to believe that Mr. Rattagan was Uber's agent, as evidenced by local authorities placing criminal liability for Uber's actions upon him.

According to the Restatement (Third) Of Agency § 8.15 (2006), "[a] principal has a duty to deal with the agent fairly and in good faith, including a duty to provide the agent with information about risks of physical harm or pecuniary loss that the principal knows, has reason to know, or should know are present in the agent's work but unknown to the agent." The comments to the Restatement clarify that these duties "are distinct from duties created by contract . . . and from a principal's duty to indemnify an agent. . ." *Id.* at comment a. The comments further explain that this "general duty obliges the principal to refrain from engaging in conduct that will foreseeably result in loss for the agent . . . [and that] the principal furnish information to the agent, in particular, information about circumstances of which the agent is unaware that might subject the agent to physical or pecuniary loss in acting on the principal's behalf, [especially . . .] information material to the agent's professional reputation or risk of pecuniary loss to third parties with whom the agent deals on the principal's behalf. *Id.* at comments b and c. Uber breached these fundamental duties in its dealings with Mr. Rattagan.

Therefore, whether as a result of the attorney-client relationship, the contractual relationship, Uber's appointment of Mr. Rattagan as legal representative, or ostensible agency, the Complaint adequately alleges numerous relationships that give rise to Uber's duty to disclose the concealed facts described in Mr. Rattagan's claims for fraud and deceit.

The cases that Uber cites for the proposition that there is no duty to disclose one's intention to commit a tort are readily distinguished. *See Deteresa v. Am. Broad. Cos.*, 121 F.3d 460, 467 (9th Cir. 1997); *Limandri v. Judkins*, 60 Cal. App. 4th 326 (1997). In those cases, there was no relationship between the plaintiff and defendant, and therefore no duty to disclose existed. In contrast, here a relationship plainly existed between Uber and Mr. Rattagan, and it was adequately pled in the Complaint.

III. MR. RATTAGAN ADEQUATELY ALLEGES PROXIMATE CAUSE

Uber ignores the clear allegations concerning the foreseeability of the reaction of Argentine law enforcement when it falsely claims that Mr. Rattagan failed to sufficiently allege that it was the proximate cause of Mr. Rattagan's damages. (MTD at 13.) Moreover, because foreseeability is inherently a question of fact, it is inappropriate to determine sufficiency of proximate cause at this stage. *See, e.g.*, *Steinle v. City & Cty. of San Francisco*, 230 F. Supp. 3d 994, 1034 (N.D. Cal. 2017) (internal quotations omitted) (finding resolution of causation at pleading stage "premature"); *Lopez v. McDonald's Corp.*, 193 Cal.App.3d 495, 507 n. 6 (1987) ("[F]oreseeability is a question of fact . . . in any case about which reasonable minds can differ within the more focused, fact-specific settings of breach of duty and causation.").

Even if proximate causation were appropriate to decide at this stage, Mr. Rattagan adequately pled its existence. Indeed, the Complaint contains express allegations that Uber's prior experiences launching in locations around the world made the fallout in Argentina not only foreseeable but also inevitable. (Am. Compl. ¶ 31.) Specifically, Mr. Rattagan alleges Uber experienced a similar legal firestorm in Colombia over the same issues that would arise in Argentina just before its launch in Argentina. (*Id.*) Moreover, Mr. Rattagan alleged that Uber faced negative press and violent labor demonstrations and protests following its launches in London, Mexico City, Barcelona, and Sao Paulo. (Am. Compl. ¶ 31.) Uber could have reasonably foreseen that the fallout that just occurred in Colombia would repeat itself when Uber acted in the same manner in Argentina.

Uber has also failed to establish that the acts of the Argentine authorities break the chain of causation. To demonstrate that a third-party's act is a superseding cause, the defendant "must establish as a matter of law that the intervening act was so highly unusual or extraordinary that the occurrence was not likely to happen and therefore was not foreseeable." *Vasquez v. Residential Inv., Inc.*, 118 Cal.App.4th 269, 288–89 (2004). Here, in light of Mr. Rattagan's allegations about Uber's prior experiences with similarly tumultuous launches around the world, the Argentine authorities' response was not "so highly unusual or extraordinary" so as to be unlikely or unforeseeable; on the contrary, the response was eminently predictable and foreseeable, and thus is not a superseding cause as a matter of law. Mr. Rattagan therefore sufficiently pled proximate cause.

IV. MR. RATTAGAN'S CLAIMS FOR DECEIT AND FRAUD SATISFY THE HEIGHTENED PLEADING REQUIREMENTS OF RULE 9(b)

Uber erroneously contends that Mr. Rattagan's deceit and fraud claims do not meet the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). Uber claims Mr. Rattagan did not specify "what" facts Uber should have disclosed, as well as "how," "where," and "when" Uber should have done so. (MTD at 14.) The express allegations in the Complaint contradict Uber's baseless contention.

Rule 9(b) provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake," although "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). "Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (citation omitted). Where, as here, the fraud is by omission, a plaintiff cannot plead a specific time or place of a failure to act and may accordingly plead fraud in alternative ways. *Washington v. Baenziger*, 673 F. Supp. 1478, 1482 (N.D. Cal. 1987).

The Complaint satisfies the Rule 9(b) heightened pleading requirement. Among other things, it alleges that: (1) Mr. Rattagan was appointed the legal representative of Uber of Argentina prior to launch (Am. Compl. ¶¶ 15); (2) Uber was aware of Mr. Rattagan's role prior to launch (*Id.*); (3) Uber hired another attorney who it did not request be placed on public documents as it had with Mr. Rattagan (*Id.* ¶¶ 27-29); (4) Mr. Rattagan reminded Uber of his role prior to the launch (*Id.* ¶¶ 23-24); (5) Uber failed to inform Mr. Rattagan it was preparing to launch (*Id.* ¶¶ 25-26); (6) Uber failed to inform Mr. Rattagan that it would be operating in a manner that authorities would foreseeably consider to be in violation of applicable laws and regulations (*Id.* ¶ 26); (7) Uber continued using the name and address of Mr. Rattagan's law firm in communications with the City after the launch and subsequent to Mr. Rattagan's request that he be removed as legal representative (*Id.* ¶ 45); and (8) Uber took months to rectify the situation and remove Mr. Rattagan as formal legal representative, further supporting the malicious intent of their prior actions (*Id.* ¶¶ 30, 49). Furthermore, Mr. Rattagan alleges that Uber was fully aware that law enforcement would deem its activities illegal as Uber experienced the same reaction in Colombia prior to its launch in Argentina. (*Id.* ¶ 31.)[1]

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[1] Uber tries to spin Mr. Rattagan's claims as if he were simply complaining about Uber's failure to tell him the generally known fact that it intended to do business in Argentina. (MTD at 15.) However, Mr. Rattagan does not allege that Uber failed to disclose "the open and obvious fact that Uber would continue its operations," but instead that Uber failed to disclose that it would refuse to comply with the directives of Argentine authorities. (Compl. ¶ 78.)

These allegations state with particularity "what" facts Uber had a duty to disclose, as well as the "how", "when," and "where" based on the duty to disclose those facts to Mr. Rattagan prior to launch by advising him of its intentions and providing him an opportunity to be removed as legal representative. Mr. Rattagan did not provide vague conclusions of fraud and deceit, but rather set forth in great detail the specific acts that gave rise to Uber's duty to disclose facts to Mr. Rattagan, as well as exactly what facts were required to be disclosed but were instead concealed. Accordingly, Mr. Rattagan has met the heightened pleading standards of Rule 9(b).

V. MR. RATTAGAN ADEQUATELY ALLEGES INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Mr. Rattagan sufficiently alleged outrageous conduct and severe emotional distress in his claim for intentional infliction of emotional distress. To state a claim for intentional infliction of emotion distress, a plaintiff must allege "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." *Cervantez v. J.C. Penney Co.*, 24 Cal.3d 579, 593 (1979); *see* Rest.2d Torts, § 46(1). Uber argues that Mr. Rattagan failed to allege: (A) that its conduct was extreme and outrageous; and (B) that he suffered severe emotional distress. (MTD at 15-18.) Uber is wrong.

A. Mr. Rattagan Plausibly Alleged Extreme and Outrageous Conduct.

Uber incorrectly contends that Mr. Rattagan did not adequately allege that Uber's conduct was extreme and outrageous because its operations were lawful. (MTD at 16.) Although "an assertion of legal rights in pursuit of one's own economic interests" is not outrageous as a matter of law, *see Yu v. Signet Bank/Va.*, 69 Cal.App.4th 1377, 1398 (1999), the means by which one conducts an otherwise lawful business can be deemed outrageous, *Johannson v. Wachovia Mortg. FSB*, No. C 11-02822 WHA, 2011 WL 3443952, at *4 (N.D. Cal. Aug. 5, 2011). In

Johannson, for example, this Court found that a foreclosure action alone could not support the "outrageous conduct" prong of an intentional infliction of emotion distress claim, but the allegation that the defendant misled the plaintiff into believing she could keep her home while the defendant sold it out from under her was sufficient to overcome a motion to dismiss. *Id.*

Here, even if Uber complied with Argentine law, its conduct in secretly planning and launching in such a way as to expose Mr. Rattagan to foreseeable public and legal scrutiny while shielding its new counsel from the same consequences would, "when recited to an average member of the community, arouse his or her resentment . . . and lead him or her to exclaim, 'outrageous!'" *Id.* (quoting *McMahon v. Craig*, 176 Cal. App. 4th 1502, 1515-16 (2009)).

Moreover, California courts recognize liability for the intentional infliction of emotional distress in situations based on conduct far less egregious than that at issue here. For instance, liability existed for a security guard's false arrest of a store customer on shoplifting charges, *Cervantez*, 24 Cal.3d 579, for racial epithets directed against an employee by his coworkers and supervisors, *Alcorn v. Anbro Eng'g, Inc.*, 2 Cal.3d 493 (1970), and for an insurer's attempt to deprive its insured of benefits due under a disability policy. *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, (1970).

Perhaps realizing the futility of its position, Uber attempts to re-write the Complaint to reflect its purported defense that, even if it were wrong about the legality of its operations, a good faith belief that its actions were legal could not constitute outrageous conduct as a matter of law. (MTD at 16.) Nothing in the pleadings supports Uber's assertion that Uber believed its actions were legal, much less that its actions were made in good faith. On the contrary, the Complaint clearly and repeatedly alleges that Uber knew how its conduct would be received by Argentine authorities, but proceeded anyway. Mr. Rattagan adequately pled outrageous conduct.

B. Mr. Rattagan Plausibly Alleged That His Emotional Distress Was Severe

Mr. Rattagan also sufficiently alleged severe emotional distress. The old requirement that a plaintiff suffer physical injuries from the defendant's conduct no longer exists "in cases involving extreme and outrageous intentional invasions of one's *mental and emotional tranquility.*" *Alcorn,* 2 Cal.3d at 498 (emphasis added).. "The jury is ordinarily in a better position . . . to determine whether outrageous conduct results in mental distress than whether that distress in turn results in physical injury." *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal.2d 330, 338 (1952). As set forth above, Uber's conduct was extreme and outrageous, and therefore Mr. Rattagan need not allege that his mental distress resulted in physical injury. *See*, *supra*, Section V(A).

Uber's argument relies on two cases whereby courts found that severe emotional distress was not adequately pled. (MTD at 17.) Those cases are readily distinguishable from the facts alleged here. In *Wong v. Jing*, the plaintiff alleged only that conduct "was very emotionally upsetting" and caused her to "lose sleep, have stomach upset and generalized anxiety." 189 Cal. App. 4th 1354, 1376 (2010). Similarly, In *Hughes v. Pair*, the plaintiff alleged merely "discomfort, worry, anxiety, upset stomach, concern, and agitation." 46 Cal.4th 1035, 1051 (2009). Mr. Rattagan has alleged more extreme emotional distress than in *Wong* and *Hughes*.

Lest there be any doubt about the severity of the distress that Mr. Rattagan suffered at Uber's hands, he alleges that the sterling reputation he spent a lifetime developing was destroyed when his name has become synonymous with tax evasion, illegal commercial operations by a foreign business, and felonious conduct. (Am Compl. ¶ 61.) Moreover, Mr. Rattagan was forced to suffer through the most humiliating experience of his life, being fingerprinted thirteen times, having his mugshot taken, and being interrogated by local authorities. (*Id.* ¶ 57.) He also has been forced to live under constant threat and fear of further humiliation and the physically exhausting emotions that come with facing charges that further jeopardize his reputation, peace of mind, livelihood, and very freedom. (*Id.* ¶ 63.) Perhaps worst of all, Mr. Rattagan has been forced to live with the constant fear that his family will be subjected to the same horror that befell his colleagues as local authorities may raid his home at any time. (*Id.* ¶ 39.)

Mr. Rattagan's allegations are similar and no less extreme than those in *Grenier v. Taylor,* 234 Cal. App. 4th 471 (2015). In *Grenier*, the court found that allegations that plaintiffs' "reputations are ruined, they do not want to leave their residence, they have considered moving away to establish a life of anonymity, and they fear for their physical safety" were sufficient to establish a prima facie showing of extreme emotional distress. *Id.* at 486-87. Just as in *Grenier*, Mr. Rattagan has plausibly alleged that his emotional distress was severe. *See supra*. His intentional infliction of emotional distress claim was therefore appropriately pled.

VI. THE ECONOMIC LOSS RULE DOES NOT BAR MR. RATTAGAN'S CLAIMS

Uber misconstrues Mr. Rattagan's deceit, fraud, and negligence claims in contending that the economic loss doctrine bars the claims. (MTD at 18.) The economic loss doctrine does not apply because Mr. Rattagan is not seeking recovery based on contractual damages.

The economic loss rule requires a party "to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise." *Robinson Helicopter Co. v. Dana Corp.*, 34 Cal.4th 979, 988 (2004). The rule "prevent[s] the law of contract and the law of tort from dissolving one into the other." *Id.* (internal quotations omitted). However, "the same wrongful act may constitute both a breach of contract and an invasion of an interest protected by the law of torts." *N. Am. Chem. Co. v.*

Superior Court, 59 Cal. App. 4th 764, 774 (1997).[2]

In *Robinson Helicopter*, the Supreme Court of California held that the economic loss rule did not bar a plaintiff's fraud and intentional misrepresentation claims because they arose from duties independent of the breach of contract. 34 Cal. 4th at 991. There, the court permitted tort damages because the fraud exposed the plaintiff to liability for personal damages independent of its economic loss. *Id*. at 993. The same is true here. Mr. Rattagan's claims are based on duties and damages entirely unrelated to and independent of the promises and expectations involved in his contract with Uber. As set forth in Sections II(A) and (B) above, Uber owed Mr. Rattagan a fiduciary duty and duty to disclose information based on the relationship between the parties. Furthermore, Mr. Rattagan seeks only to recover damages based on personal liability, whereas a recovery based on contract would seek the economic loss, or benefits he expected to receive. *Id*. Consequently, the economic loss rule does not apply and is not a bar to any of his claims.

VII. MR. RATTAGAN'S CLAIMS PERMIT THE AWARD OF PUNITIVE DAMAGES

Finally, Mr. Rattagan appropriately seeks punitive damages. Under California law, punitive damages are available where "the defendant has been guilty of oppression, fraud, or malice." Cal. Civ. Code § 3294(a). Uber argues that Mr. Rattagan cannot recover punitive damages because he has not alleged that Uber's corporate officers, directors, or managing agents acted willfully and maliciously. (MTD at 19.) Uber is wrong.

California's federal courts do not require specificity in pleading actions by corporate officers. In fact, even where willful and malicious conduct of officers has not been alleged, courts have assumed authorization, *see, e.g., Robinson v. Managed Accounts Receivables Corp.*,

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[2] California courts have allowed tort damages in numerous contract cases, including for: breach of the covenant of good faith and fair dealing, *Crisci v. Sec. Ins. Co.*, 66 Cal.2d 425, 433-34 (1967); wrongful discharge, *Tameny v. Atl. Richfield Co.*, 27 Cal.3d 167, 175-76 (1980); and fraudulently inducement, *Las Palmas Assoc. v. Las Palmas Ctr. Assoc.*, 235 Cal. App. 3d 1220, 1238-1239 (1991).

654 F. Supp. 2d 1051, 1066 n.13 (C.D. Cal. 2009) (assuming on motion to strike that employee's conduct was authorized by his superiors), or inferred authorization or ratification based on factual allegations in the complaint, *see*, *e.g.*, *Shaterian v. Wells Fargo Bank, N.A.*, 829 F. Supp. 2d 873, 888–89 (N.D. Cal. 2011) (denying motion to strike even in absence of express allegations authorization or ratification based on argument that fraudulent loan would not have been made if it was not authorized or ratified by corporate employer). In *Rees v. PNC Bank, N.A.*, for example, this Court found that the allegations plausibly suggested a calculated plan to injure the plaintiffs that "could not have occurred absent advance knowledge, authorization, or ratification by an officer, director, or managing agent" of the defendant, and therefore did not require the plaintiffs to specifically make those allegations in order to plead for punitive damages. 308 F.R.D. 266, 273 (N.D. Cal. 2015) (citing *Ortega v. Univ. of Pac.*, Case No. 13–1426, 2013 WL 6054447, at *4 (E.D. Cal. Nov. 15, 2013) (inferring authorization or ratification from superior's refusal to investigate complaints of wrongful acts)); *Nouri v. Ryobi Am. Corp.*, Case No. 14–6283, 2014 WL 5106903, at *1 (C.D. Cal. Oct. 9, 2014) (denying motion to strike, finding plaintiff had adequately pleaded a claim for punitive damages under section 3294 based on bare allegation that conduct "was authorized"); *see also Shaterian*, 829 F. Supp. 2d at 888–89.

In this case, Mr. Rattagan has adequately alleged fraud and malice. Specifically, he alleges that: (1) Uber retained other counsel without advising him or causing the new counsel to replace him as the name and face of Uber in Argentina (Am. Compl. ¶¶ 24, 27-28); (2) he contacted Uber's Latin American Legal Director to express his concerns prior to launch (*Id.* ¶ 24); (3) Uber failed to remove and replace him as Uber's legal representative in Argentina for more than two months after his request (*Id.* ¶¶ 30, 49); (4) his request for an urgent meeting with Uber's new counsel following the launch were ignored (*Id.* ¶ 33); (5) Uber continued to send correspondence showing the name and address of Mr. Rattagan's law firm, giving the false impression of his continued involvement (*Id.* ¶45); (6) Uber "allowed its new attorney to remain concealed . . . callously exposing Mr. Rattagan . . . to the hellish consequences of Uber's controversial launch strategy" (*Id.* ¶ 29); (7) Uber was "content to let Mr. Rattagan, his colleagues, and his law firm bear the brunt of the negative public reaction and potential consequences" (*Id.* ¶ 33, 65); and (8) Mr. Rattagan contacted Salle Yoo, Uber's Chief Legal Officer, General Counsel, and Corporate Secretary, to explain the devastating impact of Uber's operations, who then assigned the matter to Todd Hamblet, Uber's Managing Counsel, Corporate, and yet Uber continued its operations without change despite the harm that it was aware was being inflicted on Mr. Rattagan as a result of local law enforcement's assertions that Uber was not complying with applicable laws and regulations. (*Id.* ¶¶ 46-48, 64.)

Mr. Rattagan has not only alleged fraud and malice that could be readily assumed and inferred in satisfaction of the requirement to plead for punitive damages, he has also specifically pled that Uber executives and legal counsel participated in a calculated plan to allow him to bear the consequences of Uber's launch while its new counsel remained unscathed and able to continue operating with impunity. Accordingly, Mr. Rattagan's allegations are sufficient to permit the recovery of punitive damages.

CONCLUSION

For the reasons set forth herein, Mr. Rattagan respectfully requests this Court enter an Order denying Uber's Motion to Dismiss in its entirety.

Mr. Rattagan is confident that the Complaint adequately alleges sufficient facts to support each claim, as set forth above. However, in the event the Court finds merit to any of Uber's assertions, Mr. Rattagan respectfully requests that he be granted leave to amend the Complaint as the Court deems necessary. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend "shall be freely given when justice so requires," bearing in mind "the underlying purpose of Rule 15 to facilitate decisions on the merits, rather than on the pleadings or technicalities." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (alterations and internal quotation marks omitted). Leave to amend generally shall be denied only if allowing amendment would unduly prejudice the opposing party, cause undue delay, or be futile, or if the moving party has acted in bad faith. *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532 (9th Cir. 2008); *see also Cardenas v. Caliber Home Loans, Inc.*, 281 F. Supp. 3d 862, 867–68 (N.D. Cal. 2017). No such prejudice would exist here.

Dated: July 8, 2019 Respectfully submitted,

By: /s/ Stephen J. Rosenfeld
Stephen J. Rosenfeld (pro hac vice)
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Chicago, IL 60654
Phone: (312) 642-6103
E-mail: srosenfeld@mcdonaldhopkins.com

Attorney for Defendant
Michael R. Rattagan

CERTIFICATE OF SERVICE

This is to certify that on July 8, 2019, Stephen J. Rosenfeld, an attorney, caused to be served a true and correct copy of the foregoing document via electronic mail on all counsel of record who have consented to electronic service.

/s/ *Stephen J. Rosenfeld*

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Counsel for Defendant
Uber Technologies, Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MICHAEL R. RATTAGAN,

Plaintiff,

v.

UBER TECHNOLOGIES, INC.

Defendant.

Civil Case No. 3:19-CV-01988-EMC

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF UBER TECHNOLOGIES, INC.'S MOTION TO DISMISS

Date:	August 8, 2019
Time:	1:30 P.M.
Location:	Courtroom 5 - 17th Floor
Judge:	Hon. Edward M. Chen

Defendant Uber Technologies, Inc. requests that the Court, pursuant to Federal Rule of Evidence 201, take judicial notice of the following four decisions of Argentine courts, attached as exhibits to the Declaration of Miguel López Forastier:

- Exhibit A: *"Uber" and Others About 83 - Improper Use of Public Space*, Court of Appeals for Criminal Misdemeanors and Minor Violations, May 7, 2019.
- Exhibit B: *Corrales, Jonathan Facundo About 6.1.4. Driver's License Category*, Court of First Instance for Criminal Misdemeanors and Minor Violations, November 27, 2018.
- Exhibit C: *Bellini Marco, Alfredo About 6.1.49 BIS - Provision of a Public Taxi Service Without a Permit*, Court of First Instance for Criminal Misdemeanors and Minor Violations, November 28, 2018.
- Exhibit D: *Gimeno, Jacinto Anibal About 6.1.53 - Metered Parking*, Court of First Instance for Criminal Misdemeanors and Minor Violations, November 28, 2018.

Each Argentine court decision is accompanied by a certified translation.

A court may take judicial notice of facts that are "not subject to reasonable dispute" when they "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Judicial notice may be taken at any stage of a proceeding. Fed. R. Evid. 201(d).

Exhibits A-D are subject to judicial notice because they are decisions of Argentine courts and, as such, are matters of public record not subject to reasonable dispute. *See, e.g.*, *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) ("[W]e 'may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.'" (citations omitted)); *Tahaya Misr Inv., Inc. v. Helwan Cement S.A.E.*, No. 2:16-cv-01001-CAS(AFMx), 2016 WL 4072332, at *1 n.3 (C.D. Cal. July 27, 2016) (collecting cases taking judicial notice of foreign court documents). Moreover, because these decisions hold that Uber's operations in Argentina were and are lawful, they are directly relevant to Plaintiff Michael Rattagan's allegations in the Amended Complaint that he purportedly was harmed by third parties who incorrectly claimed Uber's operations were unlawful. *See Robinson Rancheria Citizens Council*, 971 F.2d at 248; *see, e.g.*, Am. Compl. ¶¶ 30, 36-37, 50-58, 61-63.

For the foregoing reasons, Uber Technologies respectfully requests that the Court consider and take judicial notice of the above-specified documents.

Dated: June 24, 2019

COVINGTON & BURLING LLP

/s/ Clara J. Shin
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Uber Technologies, Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MICHAEL R. RATTAGAN, Plaintiff, v. UBER TECHNOLOGIES, INC. Defendant.	Civil Case No. 3:19-CV-01988-EMC **DECLARATION OF MIGUEL LÓPEZ FORASTIER IN SUPPORT OF UBER TECHNOLOGIES' REQUEST FOR JUDICIAL NOTICE**

I, Miguel López Forastier, hereby declare as follows:

1. I am a partner at Covington & Burling LLP, counsel for Defendant Uber Technologies, Inc. I am licensed to practice law in Argentina, New York, and the District of Columbia. I am fluent in Spanish.

2. The Spanish language version of Exhibit A, *"Uber" y Otros Sobre 83 – Usar Indebidamente el Espacio Público*, Cámara de Apelaciones en lo Penal Contravencional de Faltas, May 7, 2019, is a true and correct copy of the original opinion issued by the Court of Appeals for Criminal Misdemeanors and Minor Violations. It is accompanied by a certified English translation.

3. The Spanish language version of Exhibit B, *Corrales, Jonathan Facundo Sobre 6.1.4 - Categoría de Licencia Para Conducir*, Juzgado de 1ra Instancia en lo Penal Contravencional de Faltas,

November 27, 2018, is a true and correct copy of the original opinion issued by the Court of First Instance for Criminal Misdemeanors and Minor Violations. It is accompanied by a certified English translation.

4. The Spanish language version of Exhibit C, *Bellini Marco, Alfredo Sobre 6.1.49 BIS - Prestación de Servicio Público de Taxis Sin Habilitación*, Juzgado de 1ra Instancia en lo Penal Contravencional de Faltas, November 28, 2018, is a true and correct copy of the original opinion issued by the Court of First Instance for Criminal Misdemeanors and Minor Violations. It is accompanied by a certified English translation.

5. The Spanish language version of Exhibit D, *Gimeno, Jacinto Aníbal Sobre 6.1.53 - Estacionamiento Medido*, Juzgado de 1ra Instancia en lo Penal Contravencional de Faltas, November 28, 2018, is a true and correct copy of the original opinion issued by the Court of First Instance for Criminal Misdemeanors and Minor Violations. It is accompanied by a certified English translation.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on the 24th day of June, 2019.

DATED: June 24, 2019

Respectfully submitted,

By: ______________________________
Miguel López Forastier
Covington & Burling LLP

EXHIBIT A

PCYF

SALA 3 PCYF
SECRETARÍA UNICA
ZONA: 36

PODER JUDICIAL
de la CIUDAD AUTÓNOMA DE BUENOS AIRES
FUERO PENAL, CONTRAVENCIONAL Y DE FALTAS
LIBERTAD 1042 - CABA

C

CÉDULA DE NOTIFICACIÓN
NÚMERO: 51257 / 2019
CUIJ: C-01-00175003-4

Cámara Penal Contravencional y de Faltas
Sala III

Destinatario: **DR. RAMIREZ, NICOLAS DANIEL** –UBER ARG SRL

Calle: **LAVALLE 1447 Localidad: CABA**

Piso: 3RO	**Depto: 7**
Torre/Esc/Cuerpo/Otro: OFICINA: 7	
Tipo domicilio: **CONSTITUIDO**	**Carácter:** **NORMAL**
Fuero: PCYF	**Expediente: DEB 4790/2016-864 (BGF)** CUIJ: DEB J-01-00037097-1/2016-864

Adjuntos: SI	Notif. Pers.: NO	Aviso Ley: NO	Bajo Resp. de la Parte: NO	Con habilitación, día y hora: NO

Observaciones:

SALA 3 PCYF | ZONA: 36

13bs
180

Hágase saber a Ud. que en los autos caratulados **"UBER" Y OTROS SOBRE 83 - USAR INDEBIDAMENTE EL ESPACIO PUBLICO C/FINES LUCRATIVOS (NO AUTORIZADAS) (Art. 86 según TC Ley 5666 y modif.) Expte. N° DEB 4790/2016-864** que tramitan ante este Tribunal se ha dictado la siguiente resolución: "Ciudad de Buenos Aires, 7 de mayo de 2019. ... En virtud de lo expuesto el Tribunal, por mayoría, RESUELVE: **I. REVOCAR** el punto dispositivo I de la sentencia dictada en autos (fs. 185/186) y ABSOLVER a Mariano Xavier Otero y a Uber Argentina SRL de la contravención prevista en el art. 86 CC, por la que fueron condenados. **II. DECLARAR** la prescripción de la acción de la conducta que fue calificada como constitutiva de la contravención prevista en el art. 74 CC respecto de Uber Argentina SRL y Mariano Xavier Otero y CONFIRMAR el punto dispositivo II en cuanto ABSUELVE a Mariano Xavier Otero y a Uber Argentina SRL en relación con esta conducta. **III. DECLARAR** la prescripción de la acción respecto de Fernando Horacio Cao y Diego Mariano Oliveira, en relación a la conducta prevista en el art. 74 CC y CONFIRMAR el punto dispositivo III en cuanto ABSUELVE a Fernando Horacio Cao y Diego Mariano Oliveira de las contravenciones previstas en los arts. 74 y 86 CC. Regístrese, notifíquese a las partes y oportunamente, remítase al juzgado de origen." Fdo. **JORGE ATILIO FRANZA; SERGIO DELGADO; JOSE SAEZ CAPEL- JUECES DE CAMARA.** Ante mi: **MARIA TERESA DOCE- SECRETARIA**

Queda Ud. notificado

Ciudad Autónoma de Buenos Aires 09 de mayo de 2019

Benjamín M. Garzón Funes
Prosecretario Letrado de Cámara

III

Juzgado Nº 25

Registro Nº 520 | 2019

... de fojas 21 (veintiuno)

DIEGO URRERE PON
Secretario
Secretaría General
Cámara de Apelaciones Penal,
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Poder Judicial de la Ciudad de Buenos Aires
Fuero Penal Contravencional y de Faltas

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CÁMARA DE APELACIONES EN LO PCYF - SALA III

"UBER" Y OTROS SOBRE 83 - USAR INDEBIDAMENTE EL ESPACIO PUBLICO C/FINES LUCRATIVOS (NO AUTORIZADAS) (Art. 86 según TC Ley 5666 y modif.)

Número: DEB 4790/2016-864

CUIJ: DEB J-01-00037097-1/2016-864

Actuación Nro: 13047859/2019

Sala III

Ciudad de Buenos Aires, 7 de mayo de 2019.

Sergio Delgado dijo:

VISTOS:

Se elevó el caso a estudio de este Tribunal en virtud de los recursos de apelación que lucen a fs. 199/210vta., fs. 211/226 y fs. 227/242, interpuestos por el Ministerio Público Fiscal, el Dr. Ramírez a cargo de la defensa de UBER Argentina SRL, los Dres. Gil Lavedra y Ramírez a cargo de la defensa de Otero, contra la sentencia dictada el 21 de septiembre de 2018, cuyos fundamentos lucen a fs. 187/198, mediante la cual el juez de primera instancia -en lo pertinente- resolvió: "I.- CONDENAR A UBER ARGENTINA S.R.L. Y A MARIANO XAVIER OTERO, de las demás condiciones obrantes en autos, A LA PENA DE 60.000.- (SESENTA MIL) PESOS DE MULTA DE CUMPLIMIENTO EFECTIVO A CADA UNO DE ELLOS, CON MÁS LA ACCESORIA DE INHABILITACIÓN POR EL TÉRMINO DE 2 AÑOS para que ejerzan cualquier actividad vinculada a la prestación de servicio de transporte de pasajeros, tanto de la índole de la brindada por UBER, como de cualquier otra modalidad, de modo directo o indirecto, como también por sí o por intermedio de terceros, CON COSTAS, en orden a la contravención de organizar actividades lucrativas no autorizadas en el espacio público (arts. 22, 23, 25, 26, 29, 34 y 86, 2° apartado del Código Contravencional y 48 del Código de Procedimiento Contravencional). II.- ABSOLVER A UBER ARGENTINA S.R.L. Y A MARIANO XAVIER OTERO en orden a la contravención de violación de clausura (arts. 74 del Código Contravencional y 48 del Código de Procedimiento Contravencional). III.- ABSOLVER A FERNANDO

HORACIO CAO Y A DIEGO MARIANO OLIVEIRA en orden a las contravenciones de organizar actividades lucrativas no autorizadas en el espacio público y de violación de clausura (arts. 74 y 86 del Código Contravencional y 48 del Código de Procedimiento Contravencional)…". (fs. 185/186).

Arribadas las actuaciones a esta Alzada, se corrió vista a las partes en los términos del art. 53 de la Ley 12, ocasión en que el Dr. Martín Lapadú, Fiscal de Cámara, mantuvo el recurso interpuesto por su colega de primera instancia, y postuló el rechazo de los recursos interpuestos por las defensas técnicas de UBER Argentina SRL y Mariano Otero (fs. 247/258). Por su parte, el Dr. Ramírez, ejerciendo la defensa de UBER Argentina SRL, Mariano Otero, Fernando Horacio Cao y Diego Mariano Oliveira, mantuvo el recurso oportunamente interpuesto, y solicitó el rechazo del remedio fiscal (fs. 265/271).

Cumplidos los actos y plazos procesales, el caso pasó a estudio (fs. 272).

Y CONSIDERANDO:

Primera cuestión: Admisibilidad:

No comparto el trámite dado a esta causa. No es posible resolver una apelación contra una condena contravencional sin celebrar la audiencia que ordena el art. 41 del Código Penal, supletoriamente aplicable al no estar excluida su aplicación por el Código Contravencional, conforme lo previsto por su art. 20.

Así lo impone la inviolabilidad de la defensa en juicio garantizada por el art. 18 de la Constitución nacional y el principio de inmediatez garantizado por el art. 13 inc. 3 de la Constitución de la Ciudad. También lo impone el deber de respetar la dignidad de todo ser humano a quien no es posible juzgar sin haberlo visto y oído en audiencia personal ante el tribunal que va a decidir si revoca o confirma su condena.

La decisión que aquí estamos tomando, por ello, omite una intervención del tribunal y del imputado legalmente prevista y está prohibida conforme lo previsto por el art. 72 inc. 3 del CPP en función de lo previsto en el art. 20 del CC y del art. 41 del Código Penal antes citado.

CÁMARA DE APELACIONES EN LO PCYF - SALA III

"UBER" Y OTROS SOBRE 83 - USAR INDEBIDAMENTE EL ESPACIO PUBLICO C/FINES LUCRATIVOS (NO AUTORIZADAS) (Art. 86 según TC Ley 5666 y modif.)

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Mi opinión sobre un tema análogo en un asunto penal la he expresado anteriormente en la causa nº 53311-01-00/2011 "Incidente de apelación en autos Saavedra Vega, Elmer y otros s/inf. arts. 150 y 184 CP" (resuelta 29/12/11), criterio que en un asunto contravencional también sostuve en la causa nº 27329-00-00/10 "Méndez, Raúl Carmelo. s/infr. art. 81, oferta y demanda de sexo en espacio públicos-CC", el 27/12/11, ambas del registro de la Sala I de esta Cámara de apelaciones.

En dichos antecedentes sostuve que el principio de inmediatez asegura que el juez que debe resolver respecto de la libertad de las personas debe darles oportunidad de alegar personalmente en audiencia ante el tribunal. El derecho de alegar personalmente ante el juez que debe resolver sobre estos temas se ha asumido como un compromiso internacional por el Estado argentino y ha sido especialmente asegurado por la Constitución de esta ciudad (art. 13 inc. 3 de la Constitución local).

La garantía constitucional a la inviolabilidad de la defensa en juicio (art. 18 C.N.) rige y debe ser interpretada de buena fe en nuestro ámbito. El art. 14.1 y 3 inc. D) del Pacto Internacional de Derechos Civiles y Políticos (1966) de la O.N.U. y el art. 8.1 del Pacto de San José de Costa Rica aseguran, además, el derecho a ser oído por el juez o el tribunal Nuestro ordenamiento local también garantiza expresamente la inmediatez (conforme el inciso 3 del art. 13 de su constitución), esto es, el derecho a que el juez tome contacto directo con el imputado, escuchando personalmente sus alegaciones, tanto en primera como en segunda instancia. Derecho que la legislación ritual asegura adoptando el procedimiento oral en todas las instancias. Y que la norma citada del Código Penal asegura en todo el país, independientemente del procedimiento aplicable, al menos con el limitado alcance de la audiencia de visu que regula.

El debido proceso legal, que comprende el derecho a ser oído por el tribunal en la sustanciación de la acusación, rige en todas las instancias del proceso. Así lo ha entendido la Corte Interamericana de Derechos Humanos que, en el caso Radilla Pacheco vs. México, Sentencia del 23 de noviembre de 2009, ha sostenido que el concepto de juez natural y el principio de debido proceso legal rigen y se proyectan sobre las diversas instancias procesales (párrafo 280). De nada sirve, en mi opinión, garantizar al acusado el derecho a ser oído en primera instancia si quien en definitiva confirma su condena o la agrava, o revoca su absolución – el tribunal de segunda instancia –, ni lo oye, ni lo conoce. Esto ocurre en estos autos, en los que se nos llama a resolver sobre la posible revocación de una absolución dictada respecto de una persona a la que no hemos visto nunca.

La Corte Suprema de Justicia de la Nación hizo aplicación de esta garantía en una causa penal al dejar sin efecto la pena de prisión perpetua impuesta por la Sala I de la Cámara Nacional de Casación Penal en la causa resuelta en "M.D.E. y otro s/robo agravado por el uso de armas en concurso real con homicidio calificado" –causa nº 1174-(Fallos 328:4343). En dicha oportunidad, el voto conformado por la mayoría de nuestro máximo tribunal recordó –entre otras cuestiones– la letra del artículo 41 del Código Penal al establecer la obligación de que el juez tome conocimiento directo de visu del sujeto sometido a proceso (consid. 18 del fallo citado), agregando que medidas de extrema relevancia para el acusado no deben ser llevadas a cabo "… sin un mínimo de inmediación…", para luego, de forma determinante, sostener que: "… una pena dictada sin escuchar lo que tiene que decir al respecto el condenado no puede considerarse bien determinada." (consid. 19. Aspecto también oportunamente admitido por los votos concurrentes, como el caso del Dr. Fayt, consid. 6).

Respecto de este principio, también se ha dicho que: "Su incumplimiento apareja la nulidad de la sentencia. La práctica que limita su aplicación a los tribunales de primera instancia contraría el texto y los fundamentos del precepto, que reclama su aplicación cualquiera que sea la instancia ordinaria de que se trate." (D. Baigún-E. Zaffaroni -direc.-, Código Penal y normas complementarias. Análisis doctrinal y jurisprudencial; t. 2ª, pp. 94/95; ed. Hamurabi; 2º ed., 2007).

No siendo compartida mi opinión relativa a la necesidad de que oigamos y conozcamos personalmente a los condenados que aquí recurren, en cuanto a la admisibilidad de los recursos interpuestos, todos ellos cumplen con las exigencias del art. 52 de la Ley de Procedimiento Contravencional, pues fueron presentados contra la sentencia definitiva del caso, por escrito, ante el mismo juez que la dictó y dentro del plazo legal.

Segunda cuestión: Agravios.

En el transcurso de la audiencia de debate, el juez de grado rechazó la recusación planteada por la defensa, en el entendimiento de que si bien coincidía con el planteo efectuado por la parte, lo cierto es que la cuestión ya había sido zanjada por la Sala II de esta Alzada el 4 de octubre de 2017, en el marco de la causa N° 4790-40-16, autos "Legajo de juicio de Fernando Martín Ocampo s/ inf. Art. 74 y 83 del CC". Por tal motivo, no se encontraba habilitado para apartarse del caso.

Por su parte, en la sentencia recurrida, consideró acreditado con los medios de prueba producidos en la audiencia de debate la acusación seguida contra Mariano Xavier Otero y UBER Argentina SRL en los términos del art. 86 2° párr. del CC.

Distinta fue la suerte de Cao y Oliveira. En este caso, el juez consideró que "no se ha podido establecer a lo largo del juicio oral, ni pudo visualizarse del alegato fiscal comportamiento alguno que pueda sindicarlos en forma contundente como organizadores, con el alcance que la ley contravencional requiere, de la actividad lucrativa imputada", absolviéndolos de este modo de la conducta atribuida en los términos del art. 86 del CC.

Por último, respecto a la violación de clausura reprochada a los cuatro imputados en los términos del art. 74 CC, el a quo consideró que "De la mera lectura de ambas normas, cuando se menciona 'lugar', 'ámbito', 'trabajos necesarios para la reparación', 'establecimiento', 'local', surge con toda claridad que se habla de un ámbito físico y no de una actividad y extender el término clausura al bloqueo de un sitio de Internet es extender el significado de dichas palabras, aplicar analogía y por sobre todo hacer dicha interpretación en perjuicio de los imputados. En consecuencia, sin hesitación alguna, puede afirmarse que la conducta imputada resulta a todas luces atípica." (fs. 196 y vta.) cuestionando, de este modo, la medida impuesta por la Sra. Juez a cargo del Juzgado Penal, Contravencional y de Faltas Nro. 16, y absolviéndolos de la imputación formulada en aquellos términos.

El Sr. Fiscal en el escrito de fs. 199/210vta., se alzó en contra de la decisión absolutoria del juez de primera instancia. En concreto, criticó los fundamentos del fallo detallando los elementos producidos en la audiencia de debate sobre los que considera que logró demostrar la hipótesis acusatoria respecto a la responsabilidad contravencional de Cao y Oliveira en torno a la conducta prevista en el art. 86 2° párr. del CC.

A su vez, cuestionó el tratamiento que el a quo dio a la violación de la clausura enrostrada a los imputados, y por último, se agravió de la pena impuesta, en cuanto no se impuso la clausura como sanción.

Adelanto que, en mi opinión, no corresponde hacer lugar al recurso del fiscal, por los fundamentos que a continuación expondré.

En primer lugar, se debe recordar que ha resuelto ya con anterioridad esta Sala (in re 469-00/CC/2006, "Alcaraz Héctor Juan ó Ríos, Ramón Alberto s/inf. art. 189 bis C.P. – APELACION", entre otras) que este tribunal de alzada se encuentra facultado para llevar a cabo una revisión amplia de los hechos y las pruebas, como único modo de efectivizar la garantía del doble conforme. En este sentido, la doctrina emanada del fallo "Casal" de la Corte Suprema de Justicia de la Nación, sienta las bases para garantizar la doble instancia dentro de los lineamientos instituidos por la Corte Interamericana de Derechos Humanos.

Nuestro ordenamiento jurídico local impone en la valoración probatoria el sistema de sana crítica racional (art. 248 inc. 3 CPPCABA aplicable al caso en virtud del art. 6 de la Ley 12), sistema que no prevé pautas generales para acreditar los hechos, ni determina abstractamente un valor de las pruebas específico en los mismos términos que el sistema de prueba tasada. Por el contrario, relega en el juez dicha tarea, otorgándole la libertad de asignarles el valor que resulte de su producción y admitiendo todas aquellas que considere útiles para el esclarecimiento de la verdad.

Ahora bien, la omisión de reglas preestablecidas no lo exime del deber de fundar las decisiones, es decir, de brindar los motivos por los que se inclina por una u otra postura. Exige también que la valoración crítica de los elementos de prueba se realice de conformidad con las reglas de la lógica, de la experiencia y de los conocimientos científicos.

Dicho ello, corresponde ahora traer a colación los hechos atribuidos a Uber Argentina SRL, a Mariano Xavier Otero, a Fernando Horacio Cao y a Diego Mariano Oliveira.

Al momento de efectuar la acusación en el alegato de inicio, el Sr. Fiscal imputó a los nombrados haber organizado en distintos tiempos entre el 12 de abril de 2016 y hasta el 28 de agosto de 2018, actividades lucrativas no autorizadas en el espacio público, más precisamente, haber efectuado el ofrecimiento al público en general para la prestación del servicio de transporte de pasajeros en automóviles, sin contar con la debida autorización, a través de la aplicación móvil suministrada por la empresa "UBER", "UBER TECHONOLOGIES INC.", y/o "UBER ARGENTINA SRL", "HINTER ARGENTINA SRL" que permite conectar al pasajero con la empresa, como así también, brindando la posibilidad de suscribirse mediante la página www.uber.com para realizar la actividad como conductor de automóviles de ese servicio.

Asimismo, se les atribuyó violar la clausura judicial impuesta por la Sra. Juez a cargo del Juzgado Penal, Contravencional y de Faltas N° 16, el día 23 de abril de 2016, en la que ordenó la clausura/bloqueo preventivo de la página web de UBER, de las plataformas digitales, aplicaciones y todo otro recurso tecnológico que permita contratar y/o hacer uso de los servicios de transporte de pasajeros que ofrece la empresa, al encontrarse disponible la página web de UBER, las plataformas digitales, aplicaciones para hacer uso de los servicios de transporte de pasajeros que ofrece la empresa.

Ahora bien, ya me expedí en incidentes anteriores de este caso respecto a la atipicidad de la actividad lucrativa que ejerce UBER en el ámbito de nuestra ciudad en los términos del art. 86 CC.

La ley 4121 reguló el funcionamiento de las actividades feriales en la ciudad. Previó el emplazamiento de las ferias artesanales y comerciales que se autorizan, prohibió ejercer el comercio en la vía pública sin permiso (art. 12) y la instalación, ampliación extensión de nuevas ferias en el espacio público de las Áreas de Protección Histórica de la ciudad (art. 13) y modificó el texto del Artículo 83 del Código Contravencional (la Ley 1.472 y modificatorias) que quedó redactado de la siguiente manera:

"Usar indebidamente el espacio público. Quien realiza actividades lucrativas no autorizadas en el espacio público es sancionado… con multa de quinientos… a mil… pesos…". El último párrafo de este artículo aclara que "no constituye contravención la venta ambulatoria en la vía pública o en transportes públicos de baratijas o artículos similares, artesanías y, en general, la venta que no implique una competencia desleal efectiva para con el comercio establecido, ni la actividad de los artistas callejeros en la medida que no exijan contraprestación pecuniaria".

Por el art. 16 de la misma ley se dispuso que esta nueva contravención entraría en vigencia ciento veinte días después de promulgada la presente ley y una vez concretada la efectiva puesta en funcionamiento del registro de "manualistas".

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Esta norma se incorporó al Código Contravencional con la clara finalidad de proteger el espacio público de la proliferación de ferias clandestinas o de puestos no autorizados de venta callejera y proteger al comercio regularmente establecido de la competencia desleal que implican los puestos clandestinos de venta que aprovechan el espacio público. No tiene por objeto la regulación del tránsito, ni el transporte de personas.

No usa indebidamente el espacio público, en mi opinión, realizando una actividad lucrativa no autorizada, quien circula conduciendo un vehículo por las calles y avenidas libradas al tránsito automotor, con o sin acompañantes, sean estos conocidos del conductor o pasajeros que con él contrataron un transporte.

La circulación automotor, en tales casos, que es la actividad desarrollada por el conductor del vehículo, sí está autorizada en tanto tránsito automotor, es decir, en tanto uso admitido del espacio público. Está permitido que cualquier conductor transite con su vehículo particular o el que le ha sido encomendado por las calles y avenidas libradas al uso automotor con o sin pasajeros. Si algunos conductores lo hacen prestando el servicio público de taxi o de remises, deberán hacerlo con la habilitación y licencias respectivas. Pero de no hacerlo, no estarán usando ilegalmente el espacio público sino infringiendo las normas que impiden tales actividades sin licencia o habilitación. Esto vale para quien circule con su automóvil pintado como un taxi sin licencia y también para los choferes de la firma UBER SRL en formación.

La circunstancia de que no haya sido habilitada la actividad lucrativa de transporte automotor de pasajeros que implica la actividad de UBER no justifica que se efectúe una analogía entre esta actividad no autorizada y la de un feriante clandestino que instala su puesto de venta en un lugar no autorizado.

Las normas penales y contravencionales no pueden ser aplicadas a casos análogos a los que comprenden en su interpretación razonable. Y no pueden ser aplicadas de modo analógico en perjuicio del imputado (art. 5 del CC y 19 segunda parte de la CN).

Dichas consideraciones se aplican a esta causa, en la que se ha condenado a Uber Argentina SRL y a Otero por organizar dicha actividad lucrativa, en realidad atípica de la reprimida por el art. 86 del CC.

Por las mismas consideraciones no resulta necesario analizar el recurso fiscal contra la absolución de Cao y Oliveira, en tanto la conducta que aquí se les ha reprochado es atípica.

Respecto de la imputación de haber violado una clausura coincido con el voto del Dr. Sáez Capel. Se operó la prescripción de la acción contravencional, razón por la cual corresponde confirmar la absolución recurrida.

Por estas razones corresponde resolver conforme lo propone en su voto el Dr. Sáez Capel, al que adhiero en lo sustancial.

El Dr. Jorge Atilio Franza dijo:

VISTOS

Se elevó el caso a estudio de este Tribunal en virtud de los recursos de apelación que lucen a fs. 199/210vta., fs. 211/226 y fs. 227/242, interpuestos por el Ministerio Público Fiscal, el Dr. Ramírez a cargo de la defensa de UBER Argentina SRL, los Dres. Gil Lavedra y Ramírez a cargo de la defensa de Otero, contra la sentencia dictada el 21 de septiembre de 2018, cuyos fundamentos lucen a fs. 187/198, mediante la cual el juez de primera instancia -en lo pertinente- resolvió: *"I.- CONDENAR A UBER ARGENTINA S.R.L. Y A MARIANO XAVIER OTERO, de las demás condiciones obrantes en autos, A LA PENA DE 60.000.- (SESENTA MIL) PESOS DE MULTA DE CUMPLIMIENTO EFECTIVO A CADA UNO DE ELLOS,*

CON MÁS LA ACCESORIA DE INHABILITACIÓN POR EL TÉRMINO DE 2 AÑOS para que ejerzan cualquier actividad vinculada a la prestación de servicio de transporte de pasajeros, tanto de la índole de la brindada por UBER, como de cualquier otra modalidad, de modo directo o indirecto, como también por sí o por intermedio de terceros, CON COSTAS, en orden a la contravención de organizar actividades lucrativas no autorizadas en el espacio público (arts. 22, 23, 25, 26, 29, 34 y 86, 2° apartado del Código Contravencional y 48 del Código de Procedimiento Contravencional). II.- ABSOLVER A UBER ARGENTINA S.R.L. Y A MARIANO XAVIER OTERO en orden a la contravención de violación de clausura (arts. 74 del Código Contravencional y 48 del Código de Procedimiento Contravencional). III.- ABSOLVER A FERNANDO HORACIO CAO Y A DIEGO MARIANO OLIVEIRA en orden a las contravenciones de organizar actividades lucrativas no autorizadas en el espacio público y de violación de clausura (arts. 74 y 86 del Código Contravencional y 48 del Código de Procedimiento Contravencional)...". (fs. 185/186).

Arribadas las actuaciones a esta Alzada, se corrió vista a las partes en los términos del art. 53 de la Ley 12, ocasión en que el Dr. Martín Lapadú, Fiscal de Cámara, mantuvo el recurso interpuesto por su colega de primera instancia, y postuló el rechazo de los recursos interpuestos por las defensas técnicas de UBER Argentina SRL y Mariano Otero (fs. 247/258). Por su parte, el Dr. Ramírez, ejerciendo la defensa de UBER Argentina SRL, Mariano Otero, Fernando Horacio Cao y Diego Mariano Oliveira, mantuvo el recurso oportunamente interpuesto, y solicitó el rechazo del remedio fiscal (fs. 265/271).

Cumplidos los actos y plazos procesales, el caso pasó a estudio (fs. 272).

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Y CONSIDERANDO

Primera cuestión: Admisibilidad

En cuanto a la admisibilidad de los recursos en estudio, todos ellos cumplen con las exigencias del art. 52 de la Ley de Procedimiento Contravencional, pues fueron presentados contra la sentencia definitiva del caso, por escrito, ante el mismo juez que la dictó y dentro del plazo legal.

Segunda cuestión: Agravios

En el transcurso de la audiencia de debate, el juez de grado rechazó la recusación planteada por la defensa, en el entendimiento de que si bien coincidía con el planteo efectuado por la parte, lo cierto es que la cuestión ya había sido zanjada por la Sala II de esta Alzada el 4 de octubre de 2017, en el marco de la causa N° 4790-40-16, autos "Legajo de juicio de Fernando Martín Ocampo s/ inf. Art. 74 y 83 del CC". Por tal motivo, no se encontraba habilitado para apartarse del caso.

Por su parte, en la sentencia recurrida, consideró acreditado con los medios de prueba producidos en la audiencia de debate la acusación seguida contra Mariano Xavier Otero y UBER Argentina SRL en los términos del art. 86 2° párr. del CC.

Distinta fue la suerte de Cao y Oliveira. En este caso, el juez consideró que "*no se ha podido establecer a lo largo del juicio oral, ni pudo visualizarse del alegato fiscal comportamiento alguno que pueda sindicarlos en forma contundente como organizadores, con el alcance que la ley contravencional requiere, de la actividad lucrativa imputada*", absolviéndolos de este modo de la conducta atribuida en los términos del art. 86 párr. 2° del CC.

Por último, respecto a la violación de clausura reprochada a los cuatro imputados en los términos del art. 74 CC, el *a quo* consideró que "*De la mera lectura de ambas normas, cuando se menciona 'lugar', 'ámbito', 'trabajos necesarios para la reparación', 'establecimiento', 'local', surge con toda claridad que se habla de un ámbito físico y no de una actividad y extender el término clausura al bloqueo de un sitio de Internet es extender el significado de dichas palabras, aplicar analogía y por sobre todo hacer dicha interpretación en perjuicio de los imputados. En consecuencia,* *sin hesitación alguna, puede afirmarse que la conducta imputada resulta a todas luces atípica.*" (fs. 196 y vta.) cuestionando, de este modo, la medida impuesta por la Sra. Juez a cargo del Juzgado Penal, Contravencional y de Faltas Nro. 16, y absolviéndolos de la imputación formulada en aquellos términos.

a) Del recurso del Ministerio Público Fiscal

El Sr. Fiscal en el libelo que luce a fs. 199/210vta., se alzó en contra de la decisión absolutoria del juez de primera instancia. En concreto, criticó los fundamentos del fallo detallando los elementos producidos en la audiencia de debate sobre los que considera que logró demostrar la hipótesis acusatoria respecto a la responsabilidad contravencional de Cao y Oliveira en torno a la conducta prevista en el art. 86 2° párr. del CC.

A su vez, cuestionó el tratamiento que el *a quo* dio a la violación de la clausura enrostrada a los imputados, y por último, se agravió de la pena impuesta, en cuanto no se impuso la clausura como sanción.

Puesto a analizar el fondo de la cuestión planteada por el acusador público, adelanto que haré lugar al recurso en todos sus términos, por los fundamentos que a continuación expondré.

En primer lugar, es dable recordar que ha resuelto ya con anterioridad esta Sala (*in re 469-00/CC/2006, "Alcaraz Héctor Juan ó Ríos, Ramón Alberto s/inf. art. 189 bis C.P. – APELACION", entre otras)* que este tribunal de alzada se encuentra facultado para llevar a cabo una revisión amplia de los hechos y las pruebas, como único modo de efectivizar la garantía del doble conforme. En este sentido, la doctrina emanada del fallo

"*Casal*" de la Corte Suprema de Justicia de la Nación, sienta las bases para garantizar la doble instancia dentro de los lineamientos instituidos por la Corte Interamericana de Derechos Humanos.

Nuestro ordenamiento jurídico local impone en la valoración probatoria el sistema de sana crítica racional (art. 248 inc. 3 CPPCABA aplicable al caso en virtud del art. 6 de la Ley 12), sistema que no prevé pautas generales para acreditar los hechos, ni determina abstractamente un valor de las pruebas específico en los mismos términos que el sistema de prueba tasada. Por el contrario, relega en el juez dicha tarea, otorgandole la libertad de asignarles el valor que resulte de su producción y admitiendo todas aquellas que considere útiles para el esclarecimiento de la verdad.

Ahora bien, la omisión de reglas preestablecidas no lo exime del deber de fundar las decisiones, es decir, de brindar los motivos por los que se inclina por una u otra postura. Exige también que la valoración crítica de los elementos de prueba se realice de conformidad con las reglas de la lógica, de la experiencia y de los conocimientos científicos.

Dicho ello, corresponde ahora traer a colación los hechos atribuidos a Fernando Horacio Cao y Diego Mariano Oliveira.

Al momento de efectuar la acusación en el alegato de inicio, el Sr. Fiscal imputó a los nombrados haber organizado desde el 23 de junio de 2016 hasta el 28 de agosto de 2018, actividades lucrativas no autorizadas en el espacio público, más precisamente, haber efectuado el ofrecimiento al público en general para la prestación del servicio de transporte de pasajeros en automóviles, sin contar con la debida autorización, a través de la aplicación móvil suministrada por la empresa "UBER", "UBER TECHONOLOGIES INC.", y/o "UBER ARGENTINA SRL", "HINTER ARGENTINA SRL" que permite conectar al pasajero con la empresa, como así también, brindando la posibilidad de suscribirse mediante la página www.uber.com para realizar la actividad como conductor de automóviles de ese servicio.

Asimismo, se les atribuyó que en calidad de gerente titular y suplente respectivamente, de "UBER Argentina SRL", en el mismo período de tiempo, violaron la clausura judicial impuesta por la Sra. Juez a cargo del Juzgado Penal, Contravencional y de Faltas N° 16, el día 23 de abril de 2016, en la que ordenó la clausura/bloqueo preventivo de la página web de UBER, de las plataformas digitales, aplicaciones y todo otro recurso tecnológico que permita contratar y//o hacer uso de los servicios de transporte de pasajeros que ofrece la empresa, al encontrarse disponible la página web de UBER, las plataformas digitales, aplicaciones para hacer uso de los servicios de transporte de pasajeros que ofrece la empresa.

Ahora bien, ya me expedí en incidentes anteriores de este caso[1] respecto a la ilegalidad de la actividad lucrativa que ejerce UBER en el ámbito de nuestra ciudad en los términos del art. 86 CC, por lo que ahora me referiré puntualmente al agravante atribuido a los aquí imputados. En aquellas oportunidades, sostuve que más allá de la moderna forma que pretende implementar la firma UBER de acceder al servicio a través de una aplicación mediante internet –que no es más que la manera en que se ponen en contacto los consumidores con los conductores-, lo cierto es que se trata de una actividad económica de transporte legalmente regulada y por lo tanto, no puede funcionar hasta tanto no sea autorizada por la ciudad.

La figura contravencional que prevé el art. 86 párr. 2° del CC sanciona a "*Quien organiza actividades lucrativas no autorizadas en el espacio público, en volúmenes y modalidades similares a las del comercio establecido, es sancionado/a con multa de diez mil a sesenta mil pesos*".

Al respecto, cabe destacar que "organiza" quien establece o reforma algo para lograr un fin, coordinando a personas y los medios adecuados. Para que pueda ser

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[1] 4790-655/2016 "NN s/ 83 CC" rta. 27-12-2018, 4790-227/2016 "Waksmann, Naum Adrian s/ 74 y 83 CC" rta. 10-07-2018, 4790-40/2016 "Ocampo, Fernando Lucas Martín s/ 74 y 83 CC" rta. 17-04-2018, 4790-13/2016 "Sajoux, Nicolás s/ 83 CC" rta. 27-03-2018.

subsumida dentro del concepto de organizador, la conducta desarrollada por el sujeto activo requerirá no sólo haber participado en la decisión delictiva, sino también haber organizado al grupo de personas que ejercerán la conducta típica, determinando el lugar de su desarrollo y la actividad concreta a realizar[2].

Delimitados los antecedentes del caso y el marco legal sobre el que habré de resolver, corresponde ahora adentrarme en el análisis de las constancias que lucen en el legajo y los fundamentos que el *a quo* brindó para sostener su decisión.

En el juicio oral se demostró que Mariano Otero, Fernando Horacio Cao, Diego Mariano Oliveira y "UBER Argentina SRL", actuando en el marco de la organización empresarial de nivel internacional conocida mundialmente como UBER y sus empresas afines creadas a su servicio en el territorio de nuestro país, llevaron adelante las acciones necesarias para implementar en la Ciudad Autónoma de Buenos Aires el servicio de transporte de pasajeros propio de la firma mencionada.

A tal fin, se inició el trámite de inscripción de "UBER Argentina SRL", proceso que no pudo ser cabalmente completado por irregularidades detectadas por la Inspección General de Justicia, toda vez que simultáneamente al intento de inscripción de la sociedad mencionada, se creó otra empresa, "Hinter Argentina SRL", con identidad de socios y objeto societario, lo que impidió la suscripción de ambas sociedades.

No obstante, el 23 de junio de 2016 fueron nombrados Fernando Cao como socio gerente titular y Diego Mariano Oliveira como socio gerente suplente y representante legal en Argentina de las sociedades extranjeras "Uber International BV" y "Uber Internacional Holding BV". Desde ese rol, modificaron la sede social de "Uber Argentina SRL", "Hinter Argentina SRL", y las sociedades extranjeras *supra* mencionadas al inmueble sito en Maipú 521, piso 1°, oficina "A" de esta ciudad.

Ello se ve corroborado por los documentos secuestrados en el allanaminto practicado en el inmueble en cuestión, por el informe confeccionado por la AFIP que luce a fs 186/204 del incidente que corre por cuerda, y por la declaración testimonial

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[2] Morosi, Guillermo E. H. y Rua, Gonzalo S., *Código Contravencional de la Ciudad Autónoma de Buenos Aires comentado y anotado*, Buenos Aires, Abeledo Perrot, 2010, p. 379

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prestada por Berguesio en la audiencia de debate. Al respecto, el testigo refirió ser el responsable de la finca donde existe un *call center* de cobranzas denominado "B y R Solution SA" y expresó que Oliveira –de quien es amigo y mantiene una relación comercial- le solicitó usar ese domicilio como sede social de "Uber Argentina SRL".

Ahora bien, Cao y Oliveira no solo ocuparon roles de gerenciales en las sociedades *supra* mencionadas, sino que su principal aporte al funcionamiento de la filial argentina y a la actividad ilícita se realizó desde otra persona jurídica que constituyeron, "Techonology Support Service Argentina SA". Esta sociedad sirvió como plataforma desde la que se efectuaron numerosos pagos vinculados con la publicidad y el marketing de la marca, y se alquilaron locales para su funcionamiento.

Al respecto, declararon en el juicio oral Diego Devesa, Marcelo Cora y Julián Di Guilmi -responsables de los *coworkings* "6 grados", "Urban Station" y "Join coworking" respectivamente- quienes manifestaron que emitieron facturas a nombre de "Techonology Services Support Argentina SA" por el alquiler en los espacios de trabajo que dirigen para tareas administrativas, y que las personas que se apersonaban a dichas oficinas (socios-conductores) lo hacían citados por Uber. A su vez, manifestaron haber recibido mails firmados por Uber con los datos para que le sean emitidas las facturas a nombre de la sociedad anónima mencionada.

Pero no solo hicieron uso de recursos locales como la contratación de espacios de trabajo para reunirse con socios-conductores, sino que desde aquella sociedad se concretó una plataforma publicitaria orientada a maximizar la captación de usuarios que hizo posible la implementación del servicio en todo el territorio de nuestro país.

De esta forma, si bien la filial argentina de la firma UBER nunca se constituyó cabalmente, se logró instalar el producto en territorio nacional y se cubrieron las necesidades logísticas, económicas y publicitarias mediante un entramado de sociedades que actuaron en su servicio y que hicieron posible su desarrollo, donde Cao y Oliveira tuvieron un rol fundamental.

Lo hasta aquí analizado entiendo logró demostrar que para instalar el producto elaborado en el extranjero consistente en el servicio de transporte de pasajeros mediante la modalidad propia de UBER, el rol que ocuparon los imputados fue esencial, pues no solo ocuparon lugares gerenciales en las sociedades que conformaron el UBER Group, sino que constituyeron una nueva persona jurídica desde la que llevaron adelante la publicidad del servicio, facilitaron el contacto con los conductores a través de los locales que alquilaron a tal fin, y canalizaron pagos, todo lo cual aseguró el efectivo desempeño del servicio. Ello, en conjunto con la estructura de pagos que fue expuesta en el debate -que excede el objeto de estudio en este caso-, con la actuación de Mariano Xavier Otero y la utilización de determinadas herramientas tecnológicas, hicieron posible la ejecución de la actividad de transporte de pasajeros en este territorio.

Por otro lado, en la audiencia declaró Javier Armando Lorente, testimonio que el Juez consideró fundamental para descartar la hipótesis acusatoria. En este punto, si bien el testigo fue esclarecedor en su relato respecto de conceptos de la Ley N° 19.550, lo cierto es que las actividades que se le endilgan a los imputados exceden los puntos sobre los que declaró el Dr. Lorente. En efecto, se especificaron las actividades puntuales que los acusados llevaron adelante, que no se limitaron únicamente a su rol administrativo en las sociedades UBER y Hinter, sino que tuvieron especial relevancia en el marco de "Techonology Support Service SA".

Expuesto cuanto antecede, considero que la afirmación efectuada por el *a quo* respecto a que no se pudo establecer en el juicio oral comportamiento alguno para sindicar a Cao y Oliveira de forma contundente como organizadores no se condice con lo ocurrido en el debate, pues el plexo probatorio reunido en la investigación y producido en el marco del juicio oral resulta por demás suficiente para tener por acreditados los hechos imputados y la responsabilidad de los nombrados en ellos. De tal modo, se logró demostrar cómo sin los aportes de Cao y Oliveira a través de la comunidad societaria expuesta, no hubiera sido posible la implementación del servicio de transporte propio de la firma Uber en el territorio de nuestra ciudad, como así tampoco su ofrecimiento al público, a través de la aplicación móvil y el sitio web de la empresa.

En efecto, tal como enseña el destacado Profesor Dr. Enrique Bacigalupo, "*La materia de estudio de la teoría del autor y de los partícipes está constituida por las condiciones bajo las cuales puede afirmarse que alguien es autor de una acción típica y aquellas otras condiciones que establecen la posibilidad de extender la punibilidad a otros comportamientos que no han consistido en la ejecución del hecho punible, pero que de alguna manera han cooperado a su realización. Esta teoría tiene que proporcionar los criterios que permitan saber quién ha tenido un papel principal en la ejecución del delito y quién un papel secundario. El papel principal lo desempeñan los autores y el secundario, los partícipes*" (Enrique Bacigalupo, *Lineamientos de la teoría del delito*, Hammurabi, 4° edición, Buenos Aires, 2014, página 135).

Así las cosas, es indispensable tener en cuenta que en el presente proceso se ha investigado una hipótesis acusatoria consistente en la imputación de la organización de una actividad lucrativa de enorme envergadura en la Ciudad Autónoma de Buenos Aires.

En ese orden de ideas, resulta prácticamente irrisorio imaginar que el cúmulo de diligencias que implica el montaje de semejante estructura de negocios recaiga en una única persona, es decir, que un individuo en soledad pueda montar la organización entera de una empresa como Uber en Argentina, y que, consecuentemente, de esa persona pueda decirse que organizó la actividad en sentido *fuerte*, es decir, realizando todos y cada uno de los actos necesarios.

Por el contrario, la situación imputada se condice más con la organización de una actividad que, con la fuerza de lo evidente, requiere de la intervención de varios sujetos.

De esta forma, no parece posible que la imputación devenga en el señalamiento hacia cada uno de los individuos de la organización en un todo, sino que razonablemente, tal como se ha elaborado por parte del Ministerio Público Fiscal, la imputación está dirigida a la porción del hecho en la que cada uno de los imputados tuvo parte, configurando cada una de las porciones un aporte esencial para esa organización como respuesta a una evidente repartija de funciones. Dicho ello, queda claro que se trata de coautores de tipo funcional.

En lo que aquí interesa, el dominio funcional, el Profesor Dr. Claus Roxin se ha pronunciado en la forma en que se transcribe, a saber: "*El interviniente no puede realizar nada solo; la intimidación de los empleados del banco o el sujetar a la víctima no realizan el resultado: únicamente si el compinche coopera 'funciona' el plan. Pero también el otro se ve igualmente 'desamparado'; de no quedar inmovilizados los empleados del banco, sería detenido, y de no sujetar nadie a la víctima, ésta se defendería o huiría. Así pues, para ambos la situación es la misma: sólo pueden realizar su plan actuando conjuntamente; pero cada uno por separado puede anular el plan conjunto retirando su aportación. En esta medida, cada uno tiene el hecho en sus manos*". (Roxin, Claus, *Autoría y Dominio del Hecho en Derecho Penal,* Marcial Pons, Madrid, séptima edición, página 309).

Por su parte, resulta llamativo y de interés para quien suscribe conocer los motivos que han llevado al colega de grado a pasar por alto las numerosas intervenciones de los imputados que han quedado probadas en aras a implementar el negocio en el país, o bien, los extremos dogmáticos acerca de la coautoría que hacen, a mi criterio, a su responsabilidad contravencional. Lamentablemente, no es posible arribar a tal conocimiento a partir de la lectura de sus escasos fundamentos sobre el punto.

Tal como luce en mi plexo argumental, considero que de los hechos probados en el marco de la audiencia de debate se vislumbran aportes de tipo esencial por parte de los Sres. Cao y Oliveira con respecto a la puesta en marcha del servicio de transporte Uber en el marco de esta jurisdicción.

Por ello, considero que corresponde revocar el punto III de la sentencia impugnada, y condenar a Cao y Oliveira en orden a la contravención prevista y reprimida por el art. 86 párr. 2° del CC.

Puesto a analizar ahora la imputación efectuada en los términos del art. 74 CC, resulta necesario precisar algunas cuestiones en derredor de la figura en estudio.

En primer lugar, la conducta típica consiste en violar una clausura, acción que implica "infringir o quebrantar", es decir, **ignorar o desatender** la orden de clausura que haya sido efectivamente notificada. Debe existir una orden expresa de clausura judicial o administrativa de determinado espacio, conocida por los agentes, e incumplida.

El término "clausura" importa el cierre provisorio de un establecimiento o local, pero también abarca una actividad que no ha sido autorizada por la autoridad de control. Por violar se entiende principalmente continuar con una actividad que se encuentra en contradicción con la normativa aplicable al caso, desoyendo la voluntad de la autoridad de aplicación de dicha medida, es decir, el desvalor del acto consiste acá en una conducta de desobediencia[3].

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[3] Aboso, Gustavo Eduardo, *Código contravencional y procedimiento – Ley 12 C.A.B.A.*, Buenos Aires, Euros Editores, 2016, p. 279

Por su parte, cualquiera puede ser autor del tipo en estudio, incluso quien no haya sido objeto específico de la orden, que en la generalidad de los casos, es indeterminado. Ello, en virtud de que por la naturaleza de la medida, el efecto que tiene es *erga omnes*, pues impone una prohibición de manera general de hacer uso de determinado ámbito para alguna actividad, o cualquier tipo de uso.

En la faz subjetiva del tipo, se exige dolo en la comisión, se requiere el conocimiento efectivo del agente y la voluntad de actuar en contra de la orden.

Aplicando lo expuesto al *sub examine,* la clausura impuesta por la titular del Juzgado Penal, Contravencional y de Faltas N° 16, el 23 de abril de 2016, se encontraba firme al momento del debate, al haber sido confirmada por la Sala II de esta Cámara y no recurrida ante el Tribunal Superior de Justicia local. En dicha ocasión, los jueces que integraron el tribunal ordenaron la "*...clausura/bloqueo preventivo en los términos del art. 29 de la LPC, de la página web https://www.uber.com/argentina y las plataformas digitales, aplicaciones y todo otro recurso tecnológico que permita contratar y/o hacer uso de los servicios de transporte de pasajeros que ofrece la empresa UBER TECHONOLOGIES INC, UBER ARGENTINA SRL o UBER B.V., limitándola al estricto ámbito de la ciudad de Buenos Aires, hasta tanto la empresa se adecue a la normativa de la ciudad*"[4].

Por tal motivo, no correspondía en esta instancia del proceso volver sobre la medida cautelar impuesta a tenor del art. 30 LPC (según Ley N° 6017) por otro magistrado y firme, sino que analizar exclusivamente si en este caso concreto se había desobedecido dicha orden, en los términos del art. 74 del CC. En efecto, habiendo la defensa ejercido su derecho de recurrir la orden de clausura, y habiendo sido confirmada aquella decisión por esta Alzada, nada resta debatir en el marco de estas actuaciones al respecto.

Pero aun cuando posteriormente se considerase inválida la clausura impuesta (extremo que, insisto, no ocurrió en este caso) en el momento mismo en que el autor dolosamente la viola estando aquella vigente se configura el tipo en estudio, pues lo que la norma castiga es la violación de una clausura ordenada y conocida. Tiene la

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[4] Expte. 4790-02-CC/2016 caratulado "incidente de apelación de clausura preventiva art. 29 LPC en autos UBER SRL s/ infr. 83 CC", rta. El 5-05-2016.

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naturaleza de una desobediencia, circunscripta exclusivamente a las medidas de clausura dispuestas por la autoridad administrativa o judicial.

Dicho esto, es de destacar que la orden no pudo materializarse en virtud de la dificultad técnica de circunscribirla al exclusivo ámbito de la Ciudad Autónoma de Buenos Aires, lo que, sumado al reiterado incumplimiento, dio lugar a una nueva resolución que buscó extender el alcance de dicha medida a todo el ámbito de la República Argentina.

No obstante ello, la clausura primigenia nunca perdió vigencia, y con ello el deber de suspender el ofrecimiento del servicio de UBER en el ámbito de la ciudad nunca dejó de ser exigible a todo aquel que tuviera la capacidad de cumplirla, hasta tanto la firma se adecue a la normativa local.

Yerra el *a quo* al considerar que solamente la materialización de la orden mediante la imposibilidad fáctica de utilizar el servicio en el ámbito de esta ciudad permitiría imputar la conducta del art. 74 CC, pues previo a ello, la medida emanó del órgano competente, adquirió firmeza y se dirigió a evitar que la actividad investigada continuara disponible al público, por entender que ponía en riesgo la seguridad pública en los términos del art. 30 LPC. Por ello, como bien refirió el Fiscal, se ha confundido la decisión de clausura con la faja que la publicita. Al respecto, se ha dicho que "…la constatación de dicha violación puede estar dada por la rotura de las fajas que se colocan generalmente en las puertas de acceso al local interdicto, o tan sólo con el desarrollo de la actividad, más allá de las fajas mencionadas"[5].

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[5] Muñoz, Damián y Nogueira, Gonzalo "Las contravenciones contra la Administración Púbica a la luz de la garantía de lesividad", *Revista de derecho penal: Delitos, contravenciones y faltas de la Ciudad Autónoma de Buenos Aires*, N° 1, Rubinzal Culzoni, 2004 , p.32

Ahora bien, pese a la interdicción impuesta, el servicio mediante las plataformas informáticas de UBER continuó siendo ofrecido del mismo modo en que lo hacía antes de la medida en cuestión, tanto mediante la página web como a través de la aplicación. Ello se deduce no sólo de la circunstancia de que la vigencia del servicio es de público y notorio conocimiento, sino también del hecho de que luego del juicio tengo por probado que Cao, Oliveira, Otero y la propia firma Uber Argentina SRL continuaron con la organización de la actividad comercial no autorizada hasta el 28 de agosto de 2018, habiéndose emitido numerosas facturas a nombre de la empresa por servicios prestados, y habiéndose registrado nuevos usuarios luego de la orden de bloqueo, todo lo cual indica que lo hicieron a pesar de tener efectivo conocimiento de la medida que pesaba sobre aquel. Es que no admite discusión que si se continuó con la organización de la actividad ilícita hasta la fecha mencionada, indefectiblemente se hizo en detrimento de la resolución judicial de clausura.

Es decir, en lugar de realizar los trámites necesarios para cumplir con la normativa local exigible para el tipo de servicio que UBER ofrece, y una vez finiquitado, solicitar el levantamiento de la clausura/bloqueo impuesto, sus autoridades decidieron desoír la orden dictada por la juez competente y seguir adelante con la actividad ilícita, explotándola pese a la prohibición declarada en ese sentido, configurando de este modo la conducta reprimida por el art. 74 CC.

A su vez, entiendo que la medida era plenamente exigible a los imputados desde que las pruebas reunidas y producidas en el debate permiten aseverar que independientemente de los obstáculos que encontró la Enacom para implementar la medida, la firma contaba con la tecnología suficiente para inhibir el ofrecimiento de su servicio en el ámbito delimitado. Adquiere relevancia en este punto la declaración de Mariano Damián Manfredi, funcionario judicial del Centro de Investigaciones Judiciales, quien expresó que si bien era sumamente difícil que desde el Estado se pudiera bloquear una página web o una aplicación en los términos ordenados por la Dra. Alvaro, el administrador del sitio podía hacerlo sin mayores complejidades.

Ahora bien, en cuanto a la delimitación temporal de la conducta reprochada, encuentro acertada la imputación formulada por el Sr. Fiscal. Ello, en virtud de que tanto Otero como "UBER Argentina SRL" se encontraban dentro de la estructura de la firma previo a la orden de clausura, y Oliveira y Cao desde el 23 de junio del mismo año, día en que fueron designados socios gerentes de las sociedades extranjeras y de la filial argentina.

Por lo expuesto, considero probada la violación de la clausura y bloqueo ordenados por la Juez a cargo del Juzgado PCyF N°16 el 23 de abril de 2018, por lo que corresponde revocar los putos II y III de la pieza de fs. 185/186, en los términos aquí señalados.

Dicho esto, resulta oportuno analizar en este momento la prescripción de la acción contravencional alegada por la defensa.

En este punto, si bien el magistrado no se expidió al respecto en la sentencia por considerar atípica la conducta, expresó que coincidía en un todo con los argumentos vertidos por la defensa, por lo que corresponde me expida al respecto.

La figura que prevé el art. 74 CC es una contravención permanente, en virtud de lo cual el cómputo del plazo previsto en el art. 42 CC debe comenzar ante el cese de la conducta[6]. Por tal motivo, y considerando que la orden de clausura sigue vigente y que se ha demostrado en la audiencia de debate que la firma Uber aún no cuenta con la autorización del Gobierno de la CABA para operar el servicio de transporte de pasajeros no obstante continuar con su actividad, entiendo la conducta no ha cesado, por lo que no ha comenzado el cómputo del plazo en cuestión.

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[6] Ob. Cit. MOROSI-RUA p. 378. En igual sentido Vázquez, Marcelo Pablo y Aboso, Gustavo Eduardo, *Código contravencional de la Ciudad Autónoma de Buenos Aires comentado, concordado, anotado con jurisprudencia y legislación complementaria*, Buenos Aires, Euros Editores, 1999, p. 201.

Pero aun considerando la delimitación temporal efectuada por el Ministerio Público Fiscal, que se extendería hasta el 28 de agosto de 2018 (audiencia de debate), también se evidencia, a todas luces, que no ha transcurrido el plazo del art. 42 CC.

b) De los recursos de las defensas técnicas de "UBER Argentina SRL" y Mariano Xavier Otero, Dres. Nicolás Daniel Ramírez y Ricardo Gil Lavedra

En el remedio interpuesto a fs. 211/226, el Dr. Ramírez se alzó en contra de la sentencia dictada en primera instancia por cuanto se condenó a "UBER Argentina SRL"; y en el libelo que luce a fs. 227/242, el profesional mencionado junto con el Dr. Gil Lavedra cuestionaron la condena de Mariano Xavier Otero.

Ahora bien, atento a la similitud y cantidad de planteos que edifican ambos recursos de apelación, los trataré de forma conjunta.

En primer lugar, la defensa se agravia de la sentencia dictada en autos por entender afectada la garantía de imparcialidad al haber el *a quo* coincidido con los argumentos que fundaron el planteo de recusación que hizo la parte durante la audiencia de debate, pero aun así, haberlo rechazado.

En este punto, pese a las desafortunadas expresiones del *a quo*, corresponde mantener el criterio adoptado por la Sala II de esta Cámara, que en el marco del legajo 4790-40/2016 consideró que todos los hechos investigados en el caso N° 4790 "*... integran un mismo y único proceso el cual, por una cuestión de mero ordenamiento administrativo, fue desglosado en incidentes con la finalidad de una mejor organización y utilización de los recursos judiciales...*

Decidir lo contrario implicaría sostener que se trata de procesos independientes, lo cual no ocurre en el caso, y podría además generar una situación de privación de justicia en la medida que la cantidad de acusados –que de por sí es muy numerosa- fuera superior a la de Magistrados en condiciones de resolver".

No habiendo la defensa brindado ningún argumento que derribe la claridad en lo resuelto por aquel Tribunal, entiendo que en este caso no se encuentra afectada la garantía de imparcialidad.

Luego, la parte planteó la nulidad de la acusación formulada por el Sr. Fiscal en el requerimiento de elevación a juicio por entender que "*...se omitió individualizar de modo claro, preciso y circunstanciado el hecho reprochado*" (fs. 213vta.). Por tal motivo, alegó una afectación al derecho de defensa de su ahijado procesal.

Previo a expedirme, vale recordar que la nulidad –conforme reiterada jurisprudencia de este tribunal– resulta una medida extrema y excepcional, que jamás podría ser declarada en sólo beneficio de la ley, sino únicamente cuando exista un perjuicio efectivo o una lesión constitucional verificada en el caso concreto; de lo contrario, tal pronunciamiento devendría un excesivo rigorismo formal: una nulidad por la nulidad misma.

En la misma línea, se ha pronunciado la Corte Suprema de Justicia de la Nación, al sostener: *la nulidad procesal requiere un perjuicio concreto para alguna de las partes, porque cuando se adopta en el sólo interés del formal cumplimiento de la ley importa un manifiesto exceso ritual no compatible con el buen servicio de justicia* (CSJN, Fallos 295:961; 298:312; 311:237, entre otros).

Ahora bien, el artículo 46 de la ley 12 establece: "*El o la Fiscal, en el requerimiento de juicio, debe identificar al imputado o imputada, describir y tipificar el hecho, exponer la prueba en la que se funda, ofrecer prueba, solicitar la pena que considera adecuada al caso y explicar las circunstancias tenidas en cuenta para ello*". La finalidad de este artículo es que la defensa pueda conocer la acusación que deberá contradecir en la posterior etapa de debate. Por lo tanto, si la exposición del encargado de realizar la acusación resulta insuficiente o contradictoria, la contraparte no podrá, por desconocimiento, contradecir la acusación y, por tanto, se vería privada de desarrollar en toda su extensión sus potestades defensivas.

Dicho esto, la cuestión planteada gira en torno a presuntas deficiencias que presentaría la descripción de los hechos efectuada en el requerimiento de elevación a juicio formulado por el acusador.

Así pues, de la lectura de la imputación formalizada se vislumbra que ha logrado expresar con claridad la conducta objeto de la investigación, lo que permitió el pleno ejercicio del derecho de defensa de los acusados. En concreto, a lo largo de la pieza tachada de nula se expusieron los mecanismos que utilizaron los imputados para organizar la actividad ilícita de servicio de transporte mediante la modalidad Uber y la responsabilidad que le cabía a cada uno.

Pero, además, la Sala II de esta Cámara ya ha tenido oportunidad de resolver el planteo introducido por la parte con anterioridad en éste caso, expidiéndose en términos de la validez de las imputaciones efectuadas[7].

Por ello, en sintonía con la naturaleza restrictiva en materia de nulidades, y apegándome al principio de trascendencia de los actos procesales, rechazaré el planteo de nulidad efectuado por la defensa.

Habiéndome expedido reiteradamente en el marco del caso N° 4790/2016 respecto de la ilicitud de la actividad lucrativa ejercida por la firma UBER en los términos del art. 86 CC[8] -conforme *supra* expuse- corresponde avocarme al análisis de los planteos de falta de participación de Mariano Xavier Otero y "Uber Argentina SRL" que hace la defensa.

Al momento de resolver, el *a quo* consideró probada la participación de Otero y "UBER Argentina SRL" en la conducta reprochada a tenor del art. 86 párr. 2° del CC.

Respecto del primero, valoró las entrevistas que le fueron realizadas en medios gráficos y radiales a Otero, donde se presentó como el CEO o gerente general de la

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[7] Expte. N° 4790-230/2016

[8] 4790-655/2016 "NN s/ 83 CC" rta. 27-12-2018, 4790-227/2016 "Waksmann, Naum Adrian s/ 74 y 83 CC" rta. 10-07-2018, 4790-40/2016 "Ocampo, Fernando Lucas Martín s/ 74 y 83 CC" rta. 17-04-2018, 4790-13/2016 "Sajoux, Nicolás s/ 83 CC" rta. 27-03-2018.

firma Uber Argentina, la entrevista realizada mediante oficio al Secretario de Transporte Juan José Méndez, la propia declaración del imputado en la audiencia de debate y la documental incorporada al juicio.

De los dichos del testigo Méndez, tomó en consideración la información por él brindada respecto de las reuniones que mantuvo con Otero –entre otros- durante los meses de diciembre de 2015 y enero de 2016, para ofrecerles alternativas legales para el servicio que ofrece la plataforma, además de asegurar que el servicio de Uber nunca fue autorizado ni se habían realizado trámites a tal fin por parte de la firma.

También se cuenta en el legajo con el contrato laboral de Otero con Capital Consulting SA (punto 111 de la audiencia de prueba cuya acta luce a fs. 35/54vta.), donde se le asignaron tareas vinculadas a las estrategias de marketing y campañas para aumentar la cantidad de usuarios, administrar la distribución y la cadena de suministro, representar a Uber en eventos locales, comunicar a la sede central las necesidades relativas al producto, asumir crecimiento de la cartera de clientes en la ciudad, entre otras.

A su vez, cobran relevancia los efectos secuestrados en los numerosos allanamientos practicados en el marco de este caso, entre ellos la nota de "Uber Techonologies INC" de fecha 9 de febrero de 2016 por medio de la cual se le informa que se le adjudicaron acciones de la empresa al incuso, que fue incautada en el inmueble sito en Marcelo T. de Alvear N° 1582 piso 1° "10" de esta ciudad (punto 142.4 del acta que luce a fs. 35/54vta.).

Por su parte, Otero relató que en febrero de 2016 lo contactaron de Capital Consulting para hacerse cargo de la promoción de Uber en Argentina, a raíz de lo cual comenzó a hablar con periodistas de manera pública y privada, y representó a Uber en eventos locales, pero, sin embargo, negó tener algún tipo de injerencia en la toma de decisiones de la firma.

No obstante, como señala el magistrado, los dichos de Otero no se condicen con la prueba contundente producida en la audiencia de debate, pues lejos de tener un rol meramente administrativo a cargo de la publicidad de Uber, se logró demostrar que el imputado ocupaba la autoridad máxima a nivel nacional dentro de la estructura investigada. En este marco, el contrato de trabajo firmado entre el acusado y Capital Consulting echa por tierra los intentos de despegarse del accionar endilgado de Otero, y expone con claridad las funciones eminentemente organizativas y de responsabilidad en la sociedad en cuestión.

Por consiguiente, considero que los argumentos que edificaron el recurso de la defensa respecto de Otero no lograron desvirtuar los fundamentos de la sentencia cuestionada, que basándose en los elementos probatorios colectados en autos, expusieron con claridad el valor que le otorgó a cada uno y lo conectó con la hipótesis acusatoria.

Ahora corresponde analizar la condena respecto a "Uber Argentina SRL". En este punto, no se encuentra cuestionado que su estado actual ante la Inscripción General de Justicia es de "sociedad en proceso de formación", pero en lo que difieren las partes es en la actividad comercial que se le atribuye pese a su inconclusa inscripción.

En este punto, el *a quo* consideró irrefutables las facturas aportadas por la AFIP (fs. 49/186 del incidente que corre por cuerda), emitidas entre el 1° de julio de 2017 y el 6 de agosto de 2018 por "Uber Argentina SRL".

Coincido nuevamente con el criterio adoptado por el magistrado, y considero que la defensa no ha introducido ningún argumento novedoso ni terminante que me convenza de casar lo resuelto.

En este punto, si bien en la consulta vinculante presentada por "Rasier Operations B.V." (fs. 3/8vta. del incidente que corre por cuerda) se informó a la AFIP que dicha firma operaba directamente en éste país la aplicación móvil de Uber, aquí se

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la achaca a la filial argentina de la firma el haber intervenido en la organización del servicio que presta. En efecto, las facturas *supra* mencionadas fueron emitidas por la imputada con su número de CUIT, en virtud de "servicios prestados" y viajes semanales a distintas personas, por distintos valores. Es decir, la circunstancia de no estar cabalmente inscripta en la IGJ no la inhibió de realizar actividad comercial utilizando el CUIT asignado por la AFIP.

En virtud de lo expuesto, considero acertado el criterio condenatorio del *a quo*, pues se ha demostrado en la audiencia de debate que tanto Mariano Xavier Otero como "Uber Argentina SRL" formaron parte de la organización de actividades lucrativas en el espacio público sin autorización, en los términos del art. 86 2° párr. CC, conforme sostuvo la acusación.

Por último, corresponde analizar el agravio vinculado al rechazo de la extinción de la acción por pago voluntario del mínimo de la multa respecto a la imputación formulada en los términos del art. 86 2° párr. CC, a tenor del art. 64 CP (de aplicación supletoria conforme el art. 20 LPC).

Previo a todo es dable destacar que las causales de extinción de la acción que dispone el art. 64 CP deben plantearse "*...en cualquier estado de la instrucción y mientras no se haya iniciado el juicio*". Existe consenso respecto de que la causal de extinción solamente funciona en el ámbito de los delitos reprimidos *únicamente* con *pena de multa*. No es factible si además es posible (en abstracto) otra pena, alternativa, conjunta, accesoria o complementaria[9].

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[9] Zaffaroni, Eugenio y Baigún, *Código penal y normas complementarias*, vol. 2B, Hammurabi, 2012, p. 280.

Por su parte, el art. 20 del Código Contravencional admite la aplicación supletoria de las disposiciones del Código Penal "*...siempre que no estén excluidas por este Código*".

Al momento de resolver, el *a quo* consideró que "*... es un sistema cerrado la redacción del Código Contravencional en cuanto al mecanismo de la pena. Entiende que se excluye y se contrapone si el legislador hubiera querido en el caso puntual claramente lo hubiera indicado. Se entiende que la naturaleza contravencional es diferente a la penal y en este caso no procede...*".

Coincido con el magistrado en su razonamiento. La ley 1472 ofrece un sistema propio de causales de extinción de la acción (art. 40) distinto al penal, y no halla entre ellas esta variante de pago.

Pero más aún considero que el planteo fue correctamente rechazado en virtud de que al momento en que fue presentado –preliminar del juicio- cabía la posibilidad de que la pena aplicable fuera la de arresto. En efecto, en el requerimiento de elevación a juicio el Ministerio Público Fiscal solicitó para Oliveira, Cao, Otero la pena principal de arresto por veinte (20) días respecto de cada uno de ellos, y como accesoria la inhabilitación por el término de dos (2) años para realizar, organizar, explotar, desarrollar y/o publicitar actividades de transporte de pasajeros de cualquier tipo y por cualquier medio.

Por tal motivo, atento a que la pena aplicable al caso no era la de multa únicamente, y considerando que en este acto me encuentro revocando la absolución dictada por el magistrado de grado y habilitando, de este modo, la aplicación de una sanción distinta a la señalada, no corresponde hacer lugar al recurso de la defensa en este punto.

Por último, corresponde precisar que no es materia de este Tribunal fijar la pena a imponer en virtud de las condenas que propongo en este acto, pues hacerlo sin haber previamente tenido contacto con los imputados en los términos del art. 41 CP podría generar futuros planteos nulificantes. En este sentido, sin perjuicio de que el Código Contravencional nada exige al respecto, considero conveniente delegar en el

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juzgador de primera instancia la determinación de la cuantía y naturaleza de la pena a imponer en el caso en estudio.

En sintonía con ello, el Dr. Maier, en el precedente "Tissot"[10] del Tribunal Superior de Justicia local, consideró "*…es cierto que el organismo que condena, la Sala II de la Cámara Contravencional, en momento alguno tuvo frente a sí a la acusada e impuso una condena, y la pena que es su consecuencia, a una persona que, al menos para esos jueces, es absolutamente desconocida (cf. punto 7.2.2 del recurso de inconstitucionalidad). A mi juicio éste es el meollo de una lesión constitucional primaria, al menos del art. 75, inc. 12, de la CN, cuando ordena establecer el juicio público en materia penal, verdadera cláusula de garantía del acusado (cf. también, CN, 24 y 118). No es que yo crea que esta garantía sea necesariamente exigible en materia contravencional sino que, en primer lugar, la propia CCBA, art. 13, inc. 3, que conoce la competencia de legislación contravencional de la Ciudad, repite esta exigencia ("inmediatez", defensa en juicio) y, además, la LPC —reglamentaria en este aspecto de la Constitución—, consecuentemente, ha ratificado estos principios al imponer la asistencia del acusado como condición de la sentencia de condena (LPC, 46). Nótese que el CP, 41, exige que los jueces que condenen conozcan personalmente al acusado*".

Por tal motivo, no daré tratamiento al agravio invocado por el Ministerio Público Fiscal en su recurso vinculado a la imposición de la pena de clausura en los términos del art. 33 CC.

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[10] Expte. nº 4382/05 "Tissot, Marta s/ inf. art. 83 CC ley nº 1472 —apelación— s/ recurso de inconstitucionalidad concedido" y su acumulado expte. nº 4411/05 "Ministerio Público —Defensoría Oficial en lo Contravencional y de Faltas nº 3— s/ queja por recurso de inconstitucionalidad denegado en 'Tissot, Marta s/ inf. art. 83 CC ley nº 1472 —apelación—'", rto. 6-06-2006.

En virtud de lo considerado, propongo al acuerdo: I. HACER LUGAR al recurso de apelación interpuesto por el Ministerio Público Fiscal a fs. 199/210 vta., y en consecuencia revocar el punto II del veredicto dictado el 21 de septiembre de 2018, que luce a fs. 185/186, CONDENANDO a UBER ARGENTINA SRL y a MARIANO OTERO en orden a la contravención de violación de clausura (art. 74 del Código Contravencional); II. HACER LUGAR al recurso de apelación interpuesto por el Ministerio Público Fiscal a fs. 199/210 vta., y en consecuencia revocar el punto III del veredicto dictado el 21 de septiembre de 2018, que luce a fs. 185/186, CONDENANDO a FERNANDO HORACIO CAO y a DIEGO MARIANO OLIVEIRA en orden a las contravenciones de organizar actividades lucrativas en el espacio público y de violación de clausura (arts. 74 y 86 párr. 2° del Código Contravencional); III. NO HACER LUGAR a los recursos de apelación interpuestos por la defensa técnica de Mariano Xavier Otero y "Uber Argentina SRL" a fs. 211/226 y fs. 227/242, y en consecuencia CONFIRMAR el punto I del veredicto dictado el 21 de septiembre de 2018, que luce a fs. 185/186, en cuanto fuera materia de agravio; IV. REMITIR el caso al juzgado Penal, Contravencional y de Faltas de origen para que su titular resuelva respecto de la pena aplicable al caso; y V. TENER PRESENTES las reservas efectuadas por la defensa.

Así voto.-

El Dr. José Sáez Capel dijo:

I. Adhiero al análisis de admisibilidad de los recursos, efectuado por mi colega preopinante en el voto que antecede.

II. Ahora bien, admitidos los recursos, corresponde analizar los agravios esgrimidos a fin de dilucidar si la resolución del Magistrado de grado resulta ajustada a derecho.

Violación de Clausura

Como primera cuestión, cabe señalar que no comparto la postura del juez en cuanto a que no es posible subsumir la conducta en el tipo contravencional de violación de clausura por el solo hecho de que lo que se clausuró o bloqueó es un sitio de internet y no un ámbito físico.

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Sala III

CÁMARA DE APELACIONES EN LO PCYF - SALA III

"UBER" Y OTROS SOBRE 83 - USAR INDEBIDAMENTE EL ESPACIO PUBLICO C/FINES LUCRATIVOS (NO AUTORIZADAS) (Art. 86 según TC Ley 5666 y modif.)

Número: DEB 4790/2016-864

CUIJ: DEB J-01-00037097-1/2016-864

Actuación Nro: 13047859/2019

Ello, puesto que en precedentes de la Sala I, que originariamente integro, se sostuvo que "*no puede soslayarse la interpretación literal del término 'lugar', utilizado por la norma para definir su alcance, en la medida que la defensa pretende restringirlo a los inmuebles. No obstante, lugar es definido como "(...) 2.m. Sitio o paraje...5.m. Pasaje, texto, autoridad o sentencia; expresión o conjunto de expresiones de un autor o de un libro escrito..." (Diccionario de la Real Academia Española. Ed. Espasa-Calpe. Madrid 1970, pág. 815), es decir que a la afirmación sostenida por la Sra. Juez de Grado, respecto a texto inserto en internet y que puede ser adjudicado a un autor determinado es susceptible de ser cerrado, cabe agregar que la misma definición en su punto 2.m. lo define como sitio; por lo que no quedan dudas que el criterio sostenido por la defensa debe ser rechazado, en el entendimiento que en dicha terminología se encuentran comprendidos los sitios de internet.*" (Causa 28185-00-CC/2006 (int. 228/08) "BWIN.COM s/ infr. art. 116, Organizar y explotar juego, CC- Apelación", 7 de abril de 2008).

En razón de lo expuesto, le asiste razón al titular de la acción en lo referido a la subsunción típica de la conducta imputada en los presentes actuados, consistente en la violación de clausura de la plataforma de Uber Argentina (art. 74 CC).

Aclarado ello, cabe adelantar que, en relación con esta conducta investigada, en el presente proceso, ha operado la prescripción de la acción, por las consideraciones que a continuación expondré.

Al respecto, tal como he afirmado en numerosos precedentes, la prescripción es un instituto de orden público, que se produce de pleno derecho por el transcurso del plazo legal sin que se verifiquen circunstancias que la suspendan o interrumpan y debe

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ser declarada por los tribunales en cualquier estado de la causa y en forma previa a toda decisión sobre el fondo del asunto (Fallos CSJN 318:2491; 225:179; 311:2205; 186:396, entre otras y Tribunal Superior de Justicia en causas "Andretta, Carlos Hugo s/art. 41 CC s/queja por denegación de recurso de inconstitucionalidad", expte. nº 811/00, rto. el 15/5/01, "Caballero, Jorge Alberto y otros s/art. 71 CC s/queja por denegación de recurso de inconstitucionalidad s/ incidente de prescripción", expte. nº 912/01, rto. el 5/12/01 y "Masliah Sasson, Claudio s/queja por recurso de inconstitucionalidad denegado", expte. nº 1514/02, rto. el 1/11/02, esta Sala Causa N° 50740-00-CC/10 "Bucci, Diego Ariel s/ infr. art. 73 CC" – Apelación, rta. el 9/8/2012; entre muchas otras).

En relación con ello, el art. 42 del Código Contravencional establece que la acción prescribe a los dieciocho meses de cometida la contravención o de la cesación de la misma si fuera permanente (siempre que no se trate de una contravención de tránsito o de las consignadas en el Título V). Por su parte, el art. 44 de dicho cuerpo legal dispone que sólo se interrumpe la prescripción de la acción por la celebración de la audiencia de juicio o la rebeldía del imputado y, de acuerdo a lo previsto en el art. 45, se suspende por la concesión de la suspensión del proceso a prueba.

Aclarado ello, en el caso, el titular de la acción le atribuyó a Uber Argentina SRL y a Mariano Xavier Otero el hecho de fecha 23 de abril de 2016, ocasión en la que habría violado la clausura judicial impuesta, sin que se verifique hasta el momento en que se dio inicio a la audiencia de juicio (22/8/2018) ninguna de las causales de interrupción o suspensión reseñadas *supra*. Por lo tanto, por los motivos que se expondrán a continuación, cabe adelantar que antes de que se diera inicio al debate oral y público, la conducta ya se encontraba prescripta.

Sobre este asunto, tal como he afirmado en numerosos precedentes de la Sala I que integro de origen, la contravención atribuida de violación de clausura (art. 74 CC, según ley 6017) resulta de comisión instantánea y de efectos permanentes, y claramente se consuma en el momento del hecho, es decir, cuando se violó la clausura impuesta. Por tanto, la fecha a tener en cuenta como punto de partida para el cómputo de la prescripción de la acción es el 23/4/2016 (Causas de Sala I, Nº 27062-00-07 (146/07)

"SANDOVAL ALARCON, Edinson Eduardo s/ infr. art. 83, Usar indebidamente el espacio público c/ fines lucrativos (no autorizados) CC -Apelación", resuelta el 30 de octubre del 2007; N° 50740-00-CC/10 "Bucci, Diego Ariel s/ infr. art. 73 CC" –Apelación, rta. el 9/8/2012; Nº 17088-00-00/14 "Sobrevilla Calle, Anthony Martín s/art. 73 CC", rta. el 16/2/2016; entre otras).

En este punto, teniendo en cuenta la contravención aquí investigada, no es posible equiparar -a fin del inicio del cómputo del plazo de la prescripción- el momento de comisión de la contravención a la continuidad de sus efectos. Así pues, el art. 42 CC, al hacer mención a la cesación de la contravención "si la misma fuese permanente" se refiere a los supuestos de contravenciones permanentes o continuadas. El primer supuesto se produce cuando el acto consumativo se prolonga en el tiempo, por ello *"La expresión verbal con la que con que la ley describe el delito, ha de permitir que la consumación sea continua e invariablemente típica, antijurídica y culpable, durante un tiempo que puede prolongarse. De suerte que en cualquier momento de ese tiempo el delito se está consumando"* (Fontán Balestra, Carlos; "Derecho Penal- Introducción y Parte general" Ed. Abeledo Perrot, Bs. As., 1998, pág. 208); por su parte, el segundo se da cuando *"una persona es responsable de varios hechos que realizan el mismo tipo de delito y cuya determinación y tratamiento procesales individualizados carecen de sentido y resultan imposibles"*(Jescheck, H.H., "Tratado de Derecho Penal", parte general, V II, Bosh, 1978, págs 1000/01). Pero en forma alguna, se dan por la subsistencia de sus efectos.

Por lo expresado, toda vez que desde la fecha del hecho, hasta la fecha en que se dio inicio al debate oral y público, el día 22/8/2018, había transcurrido en exceso el plazo previsto en el art. 42 del Código Contravencional. En consecuencia, corresponde declarar la prescripción de la acción respecto de la violación de clausura investigada en las presentes actuaciones y CONFIRMAR la ABSOLUCIÓN dispuesta por el juez de grado en relación a esta conducta respecto de los Sres. Mariano Xavier Otero, Fernando Horacio Cao y Diego Mariano Oliveira y de Uber Argentina SRL.

La solución que se propicia en este punto, me exime de analizar los restantes agravios planteados por las partes con relación a la contravención de violación de clausura.

III. Usar indebidamente el espacio público.

En segundo lugar, en relación con la imputación efectuada por el fiscal consistente en haber organizado actividades lucrativas no autorizadas en el espacio público, corresponde analizar si la conducta atribuida a los imputados encuadra en el tipo contravencional previsto por el art 86, segundo párrafo, del CC.

Ahora bien, del análisis de los presentes actuados se desprende que se atribuyó a Otero, Cao, Oliveira y Uber Argentina SRL haber organizado el ofrecimiento al público de la prestación del servicio de transporte de pasajeros, a través la aplicación móvil de Uber Argentina SRL. En dicha plataforma digital se efectuaba el contacto de la oferta con la demanda dicha actividad comercial. Es decir, se acercaba a las partes a) quienes ingresaran a ella con un usuario de pasajero de transporte privado a fin de solicitar un viaje, y b) conductores con un usuario registrado en el sitio, que llevaban a cabo la ejecución de dicho servicio.

Al respecto, cabe adelantar que la conducta endilgada no encuadra en el art. 86 CC, toda vez que existe otra norma específica que la sanciona, que es el transporte de pasajeros en el ámbito de la Ciudad de Buenos Aires, sin habilitación o permiso, lo que si bien se lleva adelante en la vía pública y con ánimo de lucro, no implica necesariamente una afectación al espacio público, bien jurídico protegido por el art. 86 CC.

Así, tal como afirmamos en la causa de Sala I, que integro de origen, en donde se imputó a un conductor de Uber el hecho consistente en transportar pasajeros sin habilitación se sostuvo que "cabe concluir que su actividad de transporte de pasajeros en

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Sala III

CÁMARA DE APELACIONES EN LO PCYF - SALA III

"UBER" Y OTROS SOBRE 83 - USAR INDEBIDAMENTE EL ESPACIO PUBLICO C/FINES LUCRATIVOS (NO AUTORIZADAS) (Art. 86 según TC Ley 5666 y modif.)

Número: DEB 4790/2016-864

CUIJ: DEB J-01-00037097-1/2016-864

Actuación Nro: 13047859/2019

vehículos solo podría llevarse a cabo de manera legalmente habilitada si esta se adecua a alguna de las habilitaciones mencionadas, existentes en la normativa local de CABA actual. De lo contrario, resulta en infracción a las leyes locales y, por ello, susceptible de ser sancionada de conformidad con lo dispuesto en el art. 6.1.49 de la Ley 451." (Causa Nº 33523/2018-0 "RIVERO, Eduardo Raúl sobre 6.1.49 – Requisitos de los vehículos de transporte de carga y de pasajeros", resuelta el 6 de marzo de 2019.)

Así, más allá de que, en cada caso en concreto, algunos de estos rodados puedan no tener la habilitación y demás permisos reglamentarios, esto debe analizarse en cada caso en particular y si la conducta resulta subsumible en las previsiones de la Sección 6, denominada "Tránsito", de la Ley 451, que resultan ser las específicas para sancionar conductas antirreglamentarias en la materia. Admitir la postura que pretende el titular de la acción, conllevaría a que un vehículo mal estacionado en la acera, que se encuentre en venta, pudiera encuadrar en la norma contravencional en cuestión y no en las regulaciones de tránsito.

Como se expresó, la falta de habilitación o permisos de cada vehículo que participa en la actividad comercial desarrollada por UBER debe evaluarse en cada caso en particular y, en ocasión de verificarse su ausencia, no es la contravención aquí imputada la que reprime la conducta a reprochar, sino la mencionada ley de faltas.

Asimismo, tal como se expuso, la ley específica siempre debe aplicarse por sobre la ley general, y este resultaría otro motivo por el cual no podría encuadrarse en la contravención aquí imputada, por lo que resulta atípica a la luz de la normativa contravencional.

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Ahora bien, por último, cabe aclarar que no es posible, en esta instancia del proceso, remitir las actuaciones a fin de que se siga un proceso de acuerdo a la normativa de faltas en virtud de la modificación jurídica antes mencionada. Esto se debe a que el régimen procesal de faltas es distinto y con otros principios y que, en base al gran avance del presente proceso contravencional, en el cual ya se ha realizado el debate oral y público; realizar un nuevo proceso en adecuación al régimen de faltas implicaría una violación a la garantía de prohibición de la persecución penal múltiple por el mismo hecho.

En relación con esto, cabe señalar que la Sala I sostuvo la posibilidad de efectuar un reencause del proceso cuando, una vez iniciado el proceso contravencional, se entendió que en realidad dicha conducta constituía una falta (Causa N° 24436-00-CC/10 "ALTAMIRANO, Jorge Leonardo s/infr. Art.(s).113 bis, Violación de Semáforo en rojo- Apelación" resuelta el 13/9/2010). Sin embargo, en el caso en estudio, la situación es diferente, toda vez que se ha dictado sentencia, por lo que iniciar un nuevo proceso en faltas implicaría la violación a la mencionada garantía constitucional.

De este modo fue entendido por la Corte Suprema de Justicia de la Nación en el caso "Polak", en el que se sostuvo "Que una interpretación amplia de la garantía contra el múltiple juzgamiento conduce no sólo a la inadmisibilidad de imponer una nueva pena por el mismo delito, sino que lleva a la prohibición de un segundo proceso por el mismo delito, sea que el acusado haya sufrido pena o no la haya sufrido, y sea que en el primer proceso haya sido absuelto o condenado. Y ello es así porque a partir del fundamento material de la citada garantía no es posible permitir que el Estado, con todos sus recursos y poder, lleve a cabo esfuerzos repetidos para condenar a un individuo por un supuesto delito, sometiéndolo así a molestias, gastos y sufrimientos, y obligándolo a vivir en un continuo estado de ansiedad e inseguridad, y a aumentar, también, la posibilidad de que, aun siendo inocente, sea hallado culpable (confr. citas en Fallos: 310:2845, disidencia de los jueces Petracchi y Bacqué)." (Polak, Federico Gabriel s/ violación de los deberes de funcionario público s/ casación -causa N° 174 - 4/95-. Resuelta el 15 de octubre de 1998).

Cámara Penal Contravencional y de Faltas Sala III

Por dichos fundamentos, cabe concluir que la errónea tipificación legal efectuada en este proceso, en donde se intentó calificar como contravención una conducta que no puede ser encuadrada como tal, debe conllevar a la absolución de los imputados y esto implica la imposibilidad de realizar un nuevo proceso por estos mismos hechos.

Por lo hasta aquí expuesto, voto por: I.- Revocar el punto dispositivo I y ABSOLVER a Mariano Xavier Otero y a Uber Argentina SRL de la contravención prevista en el art. 86 CC, por la que fueron condenados. II.- Declarar la prescripción de la acción de la conducta que fue calificada como constitutiva de la contravención prevista en el art. 74 CC respecto de Uber Argentina SRL y Mariano Xavier Otero y CONFIRMAR el punto dispositivo II en cuanto ABSUELVE a Mariano Xavier Otero y a Uber Argentina SRL en relación con esta conducta. III.- Declarar la prescripción de la acción respecto de Fernando Horacio Cao y Diego Mariano Oliveira, en relación a la conducta prevista en el art. 74 CC y CONFIRMAR el punto dispositivo III en cuanto ABSUELVE a Fernando Horacio Cao y Diego Mariano Oliveira de las contravenciones previstas en los arts. 74 y 86 CC.

En virtud de lo expuesto el Tribunal, por mayoría, **RESUELVE:**

I. REVOCAR el punto dispositivo I de la sentencia dictada en autos (fs. 185/186) y **ABSOLVER** a Mariano Xavier Otero y a Uber Argentina SRL de la contravención prevista en el art. 86 CC, por la que fueron condenados.

II. DECLARAR la prescripción de la acción de la conducta que fue calificada como constitutiva de la contravención prevista en el art. 74 CC respecto de Uber Argentina SRL y Mariano Xavier Otero y CONFIRMAR el punto

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dispositivo II en cuanto ABSUELVE a Mariano Xavier Otero y a Uber Argentina SRL en relación con esta conducta.

III. DECLARAR la prescripción de la acción respecto de **Fernando Horacio Cao y Diego Mariano Oliveira, en relación a la conducta prevista en el art. 74 CC** y **CONFIRMAR** el punto dispositivo III en cuanto ABSUELVE a Fernando Horacio Cao y Diego Mariano Oliveira de las contravenciones previstas en los arts. 74 y 86 CC.

Regístrese, notifíquese a las partes y oportunamente, remítase al juzgado de origen.

Sergio Delgado
Juez de Cámara

Dr. JORGE ATILIO FRANZA
JUEZ DE CAMARA

JOSE SAEZ CAPEL
JUEZ DE CÁMARA

Ante mi

MARIA T. DOCE
SECRETARIA DE CÁMARA

En / /2019 se remitieron las actuaciones a la Fiscalía de Cámara Oeste a los efectos de notificar la resolución dictada en autos. Conste.

PCYF

ROOM 3 PCYF
ONLY SECRETARIAT
ZONE: 36

JUDICIAL POWER
of the AUTONOMOUS CITY OF BUENOS AIRES
FELONY AND MISDEMEANOR CRIMINAL COURT
LIBERTAD 1042 - CABA

C

NOTIFICATION CERTIFICATE
NUMBER: 51257/2019
CUIJ: C-01-00175003-4

[seal:] Criminal Chamber of Felony and Misdemeanor Criminal Courtroom III

Addressee: **DR. RAMIREZ, NICOLAS DANIEL-UBER ARG SRL**

Street: **LAVALLE 1447 City: CABA**

Floor: 3RO | **Dept: 7**

Tower/ Off./ Body/ Other: OFFICE: 7

Type of address: **ESTABLISHED** | **Character:** **NORMAL**

Jurisdiction: PCYF [signature] | **File: DEB 4790/2016-864 (BGF)**
CUIJ: DEB J-01-00037097-1/2016-864

Attachments: YES | Notif. Pers.: NO | Legal Notice: NO | Under Resp. of the Party: NO | With authorization, day and time: NO

Observations:

ROOM 3 PCYF | ZONE: 36

To be known that in the case files **"UBER" AND OTHERS ABOUT 83 - USING THE PUBLIC SPACE WITH LUCRATIVE PURPOSES (UNAUTHORIZED) (Art. 86 according to TC Law 5666 and modif.) Expte. No. DEB 4790/2016-864** that are processed before this Court, the following resolution has been issued: "City of Buenos Aires, May 7, 2019. ... In virtue of the foregoing, the Court, by majority, RESOLVES: **I. TO REVOKE** the dispositive point I of the judgment issued in the case files (fs. 185/186) and ABSOLVE Mariano Xavier Otero and Uber Argentina SRL for the violation provided for in art. 86 CC, for which they were convicted. **II. TO DECLARE** the prescription of the action of the conduct that was qualified as constituting the contravention provided for in art. 74 CC regarding Uber Argentina SRL and Mariano Xavier Otero and TO CONFIRM dispositive point II as EXONERATING to Mariano Xavier Otero and Uber Argentina SRL in relation to this conduct. **III. TO DECLARE** the prescription of the action with respect to Femando Horacio Cao and Diego Mariano Oliveira, in relation to the conduct contemplated in art. 74 CC and TO CONFIRM dispositive point III as EXONERATING to Femando Horacio Cao and Diego Mariano Oliveira of the contraventions foreseen in the arts. 74 and 86 CC. Register, notify the parties and opportunely, refer to the court of origin" Signed. **JORGE ATILIO FRANZA; SERGIO DELGADO; JOSE SAEZ CAPEL- JUECES DE CAMARA.** Before me: **MARIA TERESA DOCE- SECRETARY**

[stamp:]
Benjamin M. Garzón Funes
Deputy Secretary of the Chamber
[signature]

You are notified

Autonomous City of Buenos Aires May 9, 2019

[stamp:] DIEGO URRERE PON
Secretary
General Secretariat Chamber
of Felony and Misdemeanor
Criminal Court

[illegible] [hw:] III
[illegible] [hw:] 25
Registro Nº [hw:] S20 /2019
[illegible] [hw:] 21 [illegible]

Judicial Branch of the City of Buenos Aires
Criminal Infringement and Misdemeanors Legal System

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[signature]

[seal:] Criminal Chamber of Felony and Misdemeanor Criminal Courtroom III

2019 - Year of 25th Anniversary of the recognition of the autonomy of the City of Buenos Aires

COURT OF APPEALS FOR CRIMINAL MISDEMEANORS AND MINOR VIOLATIONS- ROOM III

"UBER" AND OTHERS ABOUT 83 - IMPROPER USE OF PUBLIC SPACE FOR LUCRATIVE PURPOSES (NOT AUTHORIZED) (Art. 86 according to TC Law 5666 and modif.)

Number: DEB 4790/2016-864

CUIJ: DEB J-01-00037097-1/2016-864

Proceedings No: 13047859/2019

City of Buenos Aires, May 7, 2019.

[signature]
[stamp:] [illegible]]

Sergio Delgado said:

SEEN:

The case was brought to the attention of this Court by virtue of the appeals that appear before fs. 199/210vta., fs. 211/226 and fs. 227/242, filed by the Fiscal Public Prosecutor's Office, Dr. Ramírez, in charge of the defense of UBER Argentina SRL, Drs. Gil Lavedra and Ramírez in charge of the defense of Otero, against the sentence dictated on September 21, 2018, whose foundations are present on fs. 187/198, by means of which the judge of first instance -in the pertinent- resolved: "I.- TO CONDEMN UBER ARGENTINA SRL AND MARIANO XAVIER OTERO, of the other conditions in the case, AT THE PENALTY OF 60,000.- (SIXTY THOUSAND) PESOS OF FINE OF EFFECTIVE COMPLIANCE TO EACH OF THEM, ADDING THE ACCESSORY OF DISABLEMENT FOR THE TERM OF 2 YEARS so that they may exercise any activity related to the provision of passenger transport service, both of the nature of the one provided by UBER, or of any other modality, directly or indirectly, as well as by itself or through third parties, WITH COSTS, in order to contravene organizing non-authorized lucrative activities in the public space (articles 22, 23, 25, 26, 29, 34 and 86, 2nd section of the Infractions Code and 48th of the Code of Infractions Procedure). II.- TO ABSOLVE UBER ARGENTINA SRL AND MARIANO XAVIER OTERO for the violations of violation of the closure (articles 74 of the Infractions Code and 48 of the Code of Infractions Procedure). III.- TO ABSOLVE FERNANDO HORACIO CAO AND DIEGO MARIANO OLIVEIRA for the violations of organizing non-authorized lucrative activities in the public space and violation of closure (articles 74 and 86 of the Infractions Code and 48 of the Code of Infractions Procedure)...". (fs. 185/186).

Upon submission of the proceedings to this Court of Appeal, the parties were seen in the terms of art. 53 of Law 12, on which occasion Dr. Martín Lapadú, Chamber Prosecutor, maintained the appeal filed by his colleague of first instance, and applied for the rejection of the remedies filed by the technical defenses of UBER Argentina SRL and Mariano Otero (fs. 247/258). For his part, Dr. Ramírez, exercising the defense of UBER Argentina SRL, Mariano Otero, Femando Horacio Cao and Diego Mariano Oliveira, maintained the appeal timely filed, and requested the rejection of the tax remedy (fs. 265/271).

Once the acts and procedural deadlines were completed, the case was studied (fs. 272).

AND CONSIDERING:

First question: Admissibility:

I do not share the procedure given to this cause. It is not possible to resolve an appeal against an infractions conviction without holding the hearing ordered by art. 41 of the Penal Code, supplementary applicable, since its application by the Infractions Code is not excluded, as foreseen by its art. 20.

This is required by the inviolability of the defense in a trial guaranteed by art. 18 of the national Constitution and the principle of immediacy guaranteed by art. 13 inc. 3 of the Constitution of the City. It is also imposed by the duty to respect the dignity of every human being who cannot be judged without having seen and heard in a personal hearing before the court that will decide whether to revoke or confirm his conviction.

The decision we are taking here, therefore, omits an intervention of the court and of the defendant legally provided and is prohibited as provided by the art. 72 inc. 3 of the CPP according to the provisions of art. 20 of the CC and art. 41 of the aforementioned Penal Code.

COURT OF APPEALS FOR CRIMINAL MISDEMEANORS AND MINOR VIOLATIONS- ROOM III

"UBER" AND OTHERS ABOUT 83 - IMPROPER USE OF PUBLIC SPACE FOR LUCRATIVE PURPOSES (NOT AUTHORIZED) (Art. 86 according to TC Law 5666 and modif.)

Number: DEB 4790/2016-864

CUIJ: DEB J-01-00037097-1/2016-864

Proceedings No: 13047859/2019

My opinion on an analogous subject in a criminal case I have expressed previously in the case No. 53311-01-00/2011 “Incident of appeal in the case of Saavedra Vega, Elmer and others s/inf. arts. 150 and 184 CP” (resolved December 29, 2011), criterion that in an infractions matter I also argued in case No. 27329-00-00/10 “Méndez, Raúl Carmelo. s/inf art. 81, supply and demand of sex in public space-CC”, on December 27, 2011, both of the registry of Room I of this Chamber of Appeals.

In the foregoing, I argued that the principle of immediacy ensures that the judge who must decide regarding the liberty of the persons must give them the opportunity to personally argue in a hearing before the court. The right to personally argue before the judge that must decide on these issues has been assumed as an international commitment by the Argentine State and has been specially secured by the Constitution of this city (Article 13, paragraph 3 of the local Constitution).

The constitutional guarantee of the inviolability of the defense in court (art. 18 CN) governs and must be interpreted in good faith in our field. The art. 14.1 and 3 inc. D) of the International Covenant on Civil and Political Rights (1966) of the UN and art. 8.1 of the Pact of San José of Costa Rica ensure, in addition, the right to be heard by the judge or the court. Our local ordinance also expressly guarantees the immediacy (according to subsection 3 of article 13 of its constitution), that is, the right to the judge to make direct contact with the accused, personally hearing their allegations, both at first and second instance. Right that the ritual legislation assures adopting the oral procedure in all the instances. And that the cited norm of the Penal Code ensures throughout the country, independently of the applicable procedure, at least with the limited scope of de visu hearing it regulates.

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The due process of law, which includes the right to be heard by the court in the prosecution, governs all instances of the process. This is what the Inter-American Court of Human Rights has understood that, in the case of Radilla Pacheco v. Mexico, Judgment of November 23, 2009, has maintained that the concept of natural judge and the principle of due process of law govern and are projected on the various procedural instances (paragraph 280). It is of no use, in my opinion, to guarantee the accused the right to be heard in the first instance if the person who ultimately confirms or aggravates his conviction, or revokes his acquittal - the second instance court -, neither hears nor knows him. This happens in these processes, in which we are called to resolve on the possible revocation of an acquittal issued with respect to a person we have never seen before.

The Supreme Court of Justice of the Nation applied this guarantee in a criminal case by nullifying the penalty of life imprisonment imposed by Chamber I of the National Chamber of Criminal Cassation in the case resolved in “M.D.E. and other without aggravated robbery by the use of weapons in a real contest with qualified homicide” -cause No. 1174-(Rulings 328:4343). On that occasion, the vote conformed by the majority of our highest court recalled -among other issues- the letter of Article 41 of the Penal Code when establishing the obligation for the judge to take direct knowledge de visu of the person subject to trial (section 18 of the aforementioned ruling), adding that measures of extreme relevance for the defendant should not be carried out “... without a minimum of immediacy ...”, and then, in a decisive way, argue that: “... a sentence handed down without hearing what the convicted has to say about it cannot be considered well determined.” (consid. 19. Aspect also opportunely admitted by the concurrent votes, as the case of Dr. Fayt, consid. 6).

Regarding this principle, it has also been said that: “Failure to comply brings the nullity of the sentence. The practice that limits its application to the courts of first instance contradicts the text and the bases of the precept, which claims its application whatever the ordinary instance in question.” (D. Baigún-E. Zaffaroni -direc.-, Criminal Code and complementary regulations. Doctrinal and jurisprudential analysis ; t. 2^{a}, pp. 94/95; ed. Hamurabi; 2nd ed., 2007).

COURT OF APPEALS FOR CRIMINAL MISDEMEANORS AND MINOR VIOLATIONS- ROOM III

"UBER" AND OTHERS ABOUT 83 - IMPROPER USE OF PUBLIC SPACE FOR LUCRATIVE PURPOSES (NOT AUTHORIZED) (Art. 86 according to TC Law 5666 and modif.)

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Not being my opinion related to the need to hear and know personally the condemned here, with regard to the admissibility of appeals filed, they all meet the requirements of art. 52 of the Law of Infractions Proceedings, because they were presented against the definitive sentence of the case, in writing, before the same judge that dictated it and within the legal term.

Second question: Grievances.

During the debate hearing, the judge rejected the challenge raised by the defense, on the understanding that although it coincided with the statement made by the party, the truth is that the matter had already been settled by Room II of this Court of Appeal on October 4, 2017, within the framework of case No. 4790-40-16, processes “Judgment file of Fernando Martín Ocampo s/ inf. Art. 74 and 83 of the CC”. For this reason, he was not authorized to depart from the case.

For its part, in the judgment under appeal, it considered that the indictment against Mariano Xavier Otero and UBER Argentina SRL was proved with the evidence produced during the debate hearing in the terms of art. 86 2nd para. of the CC.

The fate of Cao and Oliveira was different. In this case, the judge considered that “it has not been possible to establish during the oral trial, nor could the tax allegation be viewed as having any behavior that could forcefully organize them as organizers, with the scope required by the infractions law, of the lucrative activity imputed”, thus absolving them from the conduct attributed in the terms of art. 86 of the CC.

Finally, regarding the breach of closure reproached to the four accused in the terms of art. 74 CC, the a quo considered that “From the mere reading of both norms, when mention is made of ‘place’, ‘field’, ‘works necessary for repair’, ‘establishment’,

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'local', it is clear that speaks of a physical environment and not an activity and extend the term closure to the blockade of an Internet site is to extend the meaning of these words, apply analogy and above all make such interpretation to the detriment of the accused. Consequently, without any hesitation, it can be affirmed that the imputed conduct is clearly atypical." (pages 196 and vta.) questioning, in this way, the measure imposed by the Judge in charge of the Felony and Misdemeanor Criminal Court. 16, and absolving them of the imputation formulated in those terms.

Prosecutor in the writing of fs. 199/210vta., rose up against the acquittal decision of the judge of first instance. In particular, criticized the grounds of the ruling detailing the elements produced in the hearing of debate on which it considers that it succeeded in demonstrating the accusatory hypothesis regarding the infractions responsibility of Cao and Oliveira regarding the conduct foreseen in art. 86 2nd para. of the CC.

In turn, he questioned the treatment that the a quo gave to the violation of the enclosure shown to the accused, and finally, it aggravated the penalty imposed, insofar as the closure was not imposed as a sanction.

I can say that, in my opinion, it does not correspond to make room for the appeal of the prosecutor, for the foundations that will be explained below.

In the first place, it must be remembered that this Chamber has already ruled in advance (in re 469-00/CC/2006, "Alcaraz Héctor Juan ó Ríos, Ramón Alberto s/ inf. Art. 189 bis C.P. - APPEAL", among others) that this court of appeals is authorized to carry out a comprehensive review of the facts and evidence, as the only way to effect the guarantee of double compliance. In this sense, the doctrine emanating from the "Casal" ruling of the Supreme Court of Justice of the Nation, establishes the bases to guarantee the double instance within the guidelines instituted by the Inter-American Court of Human Rights.

Our local legal system imposes the system of sound rational criticism (article 248 inc. 3 CPPCABA applicable to the case under art. 6 of Law 12), a system that does not provide general guidelines to accredit the facts, nor does it abstractly determine a value of the specific tests in the same terms as the appraised test system. On the contrary, it relegates the task to the judge, granting him the freedom to assign the value that results from his production and admitting all those that he considers useful for the clarification of the truth.

However, the omission of pre-established rules does not exempt him from the duty to base decisions, that is, to provide the reasons why he is inclined towards one or another position. It also requires that the critical assessment of the elements of evidence be carried out in accordance with the rules of logic, experience and scientific knowledge.

Having said that, it is now appropriate to bring up the facts attributed to Uber Argentina SRL, Mariano Xavier Otero, Femando Horacio Cao and Diego Mariano Oliveira.

At the moment of making the accusation in the opening argument, the Prosecutor imputed to the appointees to have organized at different times between April 12, 2016 and August 28, 2018, lucrative activities not authorized in the Public space, more precisely, to have made the offer to the general public for the provision of passenger transport service in cars, without having due authorization, through the mobile application provided by the company “UBER”, “UBER TECHONOLOGIES INC.”, and/or “UBER ARGENTINA SRL”, “HINTER ARGENTINA SRL” that allows connecting the passenger with the company, as well as, providing the possibility of subscribing through the page www.uber.com to carry out the activity as a car driver of that service.

They were also accused of violating the judicial closure imposed by the Judge in charge of the Felony and Misdemeanor Criminal Court No. 16, on April 23, 2016, in

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which she ordered the closure/ preventive blocking of the website of UBER, digital platforms, applications and any other technological resource that allows contracting and/ or making use of the passenger transport services offered by the company, since the UBER website is available, digital platforms, applications to use the passenger transport services offered by the company.

Now, I already issued in previous incidents of this case regarding the atypicality of the lucrative activity that UBER exercises in the area of our city in the terms of art. 86 CC.

Law 4121 regulated the operation of the fair activities in the city. He foresaw the location of the artisanal and commercial fairs that are authorized, prohibited to carry out trade on public roads without permission (Article 12) and the installation, expansion of new fairs in the public space of the Historical Protection Areas of the city (Article 13) and modified the text of Article 83 of the Infractions Code (Law 1.472 and amendments) that was drafted as follows:

"Misuse the public space. Whoever carries out unauthorized lucrative activities in the public space is sanctioned... with a fine of five hundred... to thousand... pesos...". The last paragraph of this article clarifies that "it does not constitute contravention the ambulatory sale on public roads or in public transport of trinkets or similar articles, crafts and, in general, the sale that does not imply an effective unfair competition with established commerce, nor the activity of the street artists in the measure that they do not demand pecuniary compensation".

By art. 16 of the same law provided that this new contravention would enter into force one hundred and twenty days after the enactment of this law and once the effective implementation of the registry of "craftsmen" has been specified.

This norm was incorporated into the Infractions Code with the clear purpose of protecting the public space from the proliferation of clandestine fairs or unauthorized street sales stalls and protecting the regularly established trade from the unfair competition implied by clandestine sales stalls that take advantage of public space. Its purpose is not to regulate traffic or transport people.

COURT OF APPEALS FOR CRIMINAL MISDEMEANORS AND MINOR VIOLATIONS- ROOM III

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It does not use the public space unduly, in my opinion, making an unauthorized lucrative activity, who drives a vehicle through the streets and avenues left to the automobile traffic, with or without companions, whether they are known to the driver or passengers who hired for transport.

Vehicle circulation, in such cases, which is the activity carried out by the driver of the vehicle, is authorized as a motor traffic, that is, as a permitted use of public spaces. It is permissible for any driver to travel, with their private vehicle or those entrusted to them, through streets and avenues intended for the use of vehicles, with or without passengers. If some drivers do it while providing a public taxi or remis service, they must do so with the corresponding permit and licenses. But if they do not do so, they will not be using the public space illegally, but they will violate the rules that prevent such activities without a license or authorization. This applies to those who drive with their car painted as a taxi without a license and also for the drivers of the firm UBER SRL in training.

The circumstance that the profitable activity of passenger transport involving UBER activity has not been enabled does not justify an analogy between this unauthorized activity and that of a clandestine trader who installs its sales point in an unauthorized place.

The criminal and infractions norms cannot be applied to cases analogous to those that they understand in their reasonable interpretation. And they cannot be applied analogously to the detriment of the accused (Article 5 of the CC and 19 second part of the CN).

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These considerations apply to this case, which has condemned Uber Argentina SRL and Otero for organizing this lucrative activity, in reality atypical of the one repressed by art. 86 of the CC.

For the same reasons it is not necessary to analyze the tax appeal against the acquittal of Cao and Oliveira, while the behavior that has been reproached here is atypical.

Regarding the accusation of having violated a closure coinciding with the vote of Dr. Sáez Capel. The prescription of the infractions action was operated, which is why it is necessary to confirm the appealed acquittal.

For these reasons, it corresponds to resolve as proposed in his vote Dr. Sáez Capel, to whom I adhere in substance.

Dr. Jorge Atilio Franza said:

SEEN

The case was brought to the attention of this Court in virtue of the appeals that appear before fs. 199/210vta., fs. 211/226 and fs. 227/242, filed by the Fiscal Public Prosecutor's Office, Dr. Ramírez, in charge of the defense of UBER Argentina SRL, Drs. Gil Lavedra and Ramírez in charge of the defense of Otero, against the sentence dictated on September 21, 2018, whose foundations are present on fs. 187/198, by means of which the judge of first instance -in the pertinent- resolved: *"I.- CONDEMN UBER ARGENTINA SRL AND MARIANO XAVIER OTERO, of the other conditions in the case, AT THE PENALTY OF 60,000.- (SIXTY THOUSAND) PESOS OF FINE OF EFFECTIVE COMPLIANCE TO EACH OF THEM, ADDING THE ACCESSORY OF PROHIBITION FOR THE TERM OF 2 YEARS for them to exercise any activity related to the provision of passenger transport service, both of the nature of the one provided by UBER, and of any other modality, directly or indirectly, as well as by itself or through third parties, WITH COSTS, in order to contravene organizing non-authorized lucrative activities in the public space (articles 22, 23, 25, 26, 29, 34 and 86, 2nd section of the Infractions Code and 48th of the Code of Infractions Procedure). II.- TO ABSOLVE*

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[signature]

[seal:] Criminal Chamber of Felony and Misdemeanor Criminal Courtroom III

COURT OF APPEALS FOR CRIMINAL MISDEMEANORS AND MINOR VIOLATIONS- ROOM III

"UBER" AND OTHERS ABOUT 83 - IMPROPER USE OF PUBLIC SPACE FOR LUCRATIVE PURPOSES (NOT AUTHORIZED) (Art. 86 according to TC Law 5666 and modif.)

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CUIJ: DEB J-01-00037097-1/2016-864

Proceedings No: 13047859/2019

UBER ARGENTINA SRL AND MARIANO XAVIER OTERO for the violations of violation of the closure (articles 74 of the Infractions Code and 48 of the Code of Infractions Procedure). III.- ABSOLVE FERNANDO HORACIO CAO AND DIEGO MARIANO OLIVEIRA in order to contravene organizing non-authorized lucrative activities in the public space and violation of closure (articles 74 and 86 of the Infractions Code and 48 of the Code of Contravention Procedure)...". (fs. 185/186).

Upon submission of the proceedings to this Court of Appeal, the parties were seen in the terms of art. 53 of Law 12, on which occasion Dr. Martín Lapadú, Chamber Prosecutor, maintained the appeal filed by his colleague of first instance, and applied for the rejection of the remedies filed by the technical defenses of UBER Argentina SRL and Mariano Otero (fs. 247/258). For his part, Dr. Ramírez, exercising the defense of UBER Argentina SRL, Mariano Otero, Femando Horacio Cao and Diego Mariano Oliveira, maintained the appeal timely filed, and requested the rejection of the tax remedy (fs. 265/271).

Once the acts and procedural deadlines were completed, the case was studied (fs. 272).

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AND CONSIDERING

First question: Admissibility

Regarding the admissibility of the resources under study, all of them comply with the requirements of art. 52 of the Law of Infractions Proceedings, because they were presented against the definitive sentence of the case, in writing, before the same judge that dictated it and within the legal term.

Second question: Grievances

During the debate hearing, the judge rejected the challenge raised by the defense, on the understanding that although it coincided with the statement made by the party, the truth is that the matter had already been settled by Room II of this Court of Appeal on October 4, 2017, within the framework of case No. 4790-40-16, processes “Judgment file of Fernando Martín Ocampo s/ inf. Art. 74 and 83 of the CC". For this reason, he was not authorized to depart from the case.

On the other hand, in the recount judgment, it considered credited with the means of evidence produced in the debate hearing the accusation against Mariano Xavier Otero and UBER Argentina SRL under the terms of art. 86 2nd para. of the CC.

The fate of Cao and Oliveira was different. In this case, the judge considered that “it has not been possible to establish during the oral proceedings, nor could the fiscal allegation be viewed as having any behavior that could forcefully organize them as organizers, with the scope that the infractions law requires, of the imputed lucrative activity”, absolving them in this way from the conduct attributed in the terms of art. 86 para. 2nd of the CC.

For last, with respect to the violation of the reprobate reclassification of the four accused in the terms of art. 74 CC, the a quo considered that "From the mere reading of both norms, when mentioning 'place', 'field', 'works necessary for repair', 'establishment', 'local', arises with all clarity that speaks of a physical environment and not an activity and extend the term closure to blocking a website is to extend the meaning of these words, apply analogy and above all make such interpretation to the detriment of the accused. Consequently, without any hesitation, it can be affirmed that the imputed

[seal:] Criminal Chamber of Felony and Misdemeanor Criminal Courtroom III

conduct is clearly atypical." (pages 196 and vta.) questioning, in this way, the measure imposed by the Judge in charge of the Felony and Misdemeanor Criminal Court. 16, and absolving them of the imputation formulated in those terms.

a) On the appeal of the Fiscal Public Prosecutor's Office

The Prosecutor in the libel that looks to fs. 199/210vta., rose up against the acquittal decision of the judge of first instance. Specifically, he criticized the grounds of the ruling detailing the elements produced in the debate hearing on which he considers that he was able to demonstrate the accusatory hypothesis regarding the infractions responsibility of Cao and Oliveira regarding the conduct foreseen in art. 86 2nd para. of the CC.

In turn, he questioned the treatment that the *a quo* gave to the violation of the enclosure shown to the accused, and finally, he was aggravated of the sentence imposed, as soon as the closure was not imposed as a sanction.

To analyze the merits of the matter raised by the public prosecutor, I advance that I will make the appeal in all its terms, for the foundations that will be explained below.

In the first place, it is possible to remember that this Chamber has already ruled in advance *(in re 469-00/CC/2006, "Alcaraz Héctor Juan ó Ríos, Ramón Alberto s/inf. Art. 189 bis C.P. - APPEAL", among others)* that this appeal court is empowered to carry out a comprehensive review of the facts and evidence, as the only way to effect the guarantee of double compliance. In this sense, the doctrine emanating from the ruling *"Casal"* of the Supreme Court of Justice of the Nation, establishes the bases to guarantee the double instance within the guidelines instituted by the Inter-American Court of Human Rights.

Our local legal system imposes the system of sound rational criticism (article 248 inc. 3 CPPCABA applicable to the case under art. 6 of Law 12), a system that does not provide general guidelines to accredit the facts, nor does it abstractly determine a value of the specific tests in the same terms as the appraised test system. On the contrary, it relegates the task to the judge, granting him the freedom to assign the value that results from his production and admitting all those he considers useful for the clarification of the truth.

However, the omission of pre-established rules does not exempt him from the duty to base decisions, that is, to provide the reasons why he is inclined towards one or another position. It also requires that the critical assessment of the elements of evidence be carried out in accordance with the rules of logic, experience and scientific knowledge.

Having said that, it is now appropriate to bring up the facts attributed to Fernando Horacio Cao and Diego Mariano Oliveira.

At the moment of making the accusation in the commencement brief, the Prosecutor imputed to the appointees to have organized, from June 23, 2016 to August 28, 2018, lucrative activities not authorized in the public space, more precisely, having made the offer to the general public for the provision of the passenger transport service in automobiles, without having due authorization, through the mobile application provided by the company "UBER", "UBER TECHONOLOGIES INC.", and / or "UBER ARGENTINA SRL", "HINTER ARGENTINA SRL" that allows connecting the passenger with the company, as well as, offering the possibility of subscribing through the page www.uber.com to carry out the activity as a car driver of that service.

Likewise, they were attributed as the titular and alternate manager **respectively, of "UBER Argentina SRL",** in the same period of time, they violated **the judicial closure imposed** by the Judge in charge of the Criminal, Infractions and Misdemeanor Court No. 16, on April 23, 2016, in which she ordered the closure/ preventive blocking of the UBER website, of the digital platforms, applications and any other technological resource that allows contracting and/ or making use of the passenger transport services offered by the company, since is available the UBER website, digital platforms, applications to make use of the transportation services of passengers offered by the company.

Now, I already issued in previous incidents of this case[1] regarding the illegality of the lucrative activity that UBER exercises in the area of our city in the terms of art. 86 CC, for which I will now refer to the aggravating circumstance attributed to the accused here. In those opportunities, I argued that beyond the modern form that the UBER firm intends to implement to access the service through an internet application -which is nothing more than the way consumers connect with drivers-, the truth is that it is a legally regulated transport economic activity and therefore cannot work until it is authorized by the city.

The infractions figure provided by art. 86 para. 2nd of CC sanctions "Who organizes lucrative activities not authorized in the public space, in volumes and modalities similar to those of the established trade, is sanctioned with a fine of ten thousand to sixty thousand pesos".

In this regard, it is noteworthy that "organizes" who establishes or reforms something to achieve an end, coordinating people and the appropriate means. For it to be subsumed within the concept of organizer, the behavior developed by the active subject will require not only to have participated in the criminal decision, but also to have organized the group of people who will exercise the typical behavior, determining the

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[1] 4790-655/2016 "NN s/ 83 CC" rta. December 27, 2018, 4790-227/2016 "Waksmann, Naum Adrian s/ 74 y 83 CC" rta. July 10, 2018, 4790-40/2016 "Ocampo, Femando Lucas Martín s/ 74 y 83 CC" rta. April 17, 2018, 4790-13/2016 "Sajoux, Nicolás s/ 83 CC" rta. March 27, 2018.

place of its development and the concrete activity to be carried out[2].

Delimited the background of the case and the legal framework on which I will resolve, now it is necessary to delve into the analysis of the records that appear in the file and the grounds that the *a quo* provided to sustain its decision.

In the oral trial it was demonstrated that Mariano Otero, Femando Horacio Cao, Diego Mariano Oliveira and “UBER Argentina SRL”, acting within the framework of the international business organization known worldwide as UBER and its related companies created at its service in the territory of our country, carried out the necessary actions to implement in the Autonomous City of Buenos Aires the passenger transport service of the aforementioned firm.

To this end, the registration process of “UBER Argentina SRL” was initiated, a process that could not be fully completed due to irregularities detected by the General Inspection of Justice, since at the same time as the attempt to register the aforementioned company, another company was created, “Hinter Argentina SRL”, with identity of partners and corporate purpose, which prevented the subscription of both companies.

However, on June 23, 2016, Femando Cao was appointed as managing partner and Diego Mariano Oliveira as alternate managing partner and legal representative in Argentina of the foreign companies “Uber International BV” and “Uber Internacional Holding BV”. From that role, they modified the headquarters of “Uber Argentina SRL”, “Hinter Argentina SRL”, and the foreign companies *supra* mentioned to the property located in Maipú 521, piso 1º, oficina “A” of this city.

This is corroborated by the documents sequestered in the pavilion practiced in the property in question, by the report prepared by the AFIP that looks at fs 186/204 of the incident that runs by rope, and by the testimonial statement provided by Bergucsio in the debate hearing. In this regard, the witness referred to be responsible for the farm where there is a collections *call center* called “B and R Solution SA” and said that Oliveira -of whom he is a friend and maintains a business relationship- requested him the

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[2] Morosi, Guillermo E. H. y Rua, Gonzalo S., *Infractions Code of the Autonomous City of Buenos Aires commented and annotated,* Buenos Aires, Abeledo Perrot, 2010, p. 379

use that address as the headquarters of “Uber Argentina SRL”.

That said, Cao and Oliveira not only held management roles in the societies *supra* mentioned, but their main contribution to the operation of the Argentine subsidiary and the illegal activity was carried out from another legal entity that they constituted , “Techonology Support Service Argentina SA”. This company served as a platform from which numerous payments related to advertising and brand marketing were made, and premises were rented for its operation.

In this regard, Diego Devesa, Marcelo Cora and Julián Di Guilmi -responsible for the *coworkings* “6 grados”, “Urban Station” and “Join coworking” respectively- testified in the oral proceedings- they issued invoices in the name of “Techonology Services Support Argentina SA” for the rent in the workspaces that they direct for administrative tasks, and that the people who appeared to said offices (partners-drivers) were summoned by Uber. At the same time, they stated that they had received emails signed by Uber with the data so that the invoices were issued in the name of the aforementioned corporation.

But not only did they use local resources such as contracting work spaces to meet with partner-drivers, but from that company an advertising platform was created aimed at maximizing the uptake of users that made possible the implementation of the service throughout the territory of our country.

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In this way, although the Argentine subsidiary of the UBER firm was never fully established, the product was installed in the national territory and the logistic, economic and advertising needs were met through a network of companies that acted in its service and made it possible its development, where Cao and Oliveira played a fundamental role.

What has been analyzed up to this point was able to demonstrate that, in order to install the product manufactured abroad, consisting of the passenger transport service using UBER's own modality, the role played by the accused was essential, since not only did they occupy managerial positions in the companies that made up the UBER Group, but constituted a new legal entity from which they carried out the advertising of the service, facilitated contact with the drivers through the premises they hired for that purpose, and channeled payments, all of which ensured the effective performance of the service. This, together with the payment structure that was exposed in the debate -which exceeds the object of study in this case-, with the intervention of Mariano Xavier Otero and the use of certain technological tools, made possible the execution of the activity of transportation of passengers in this territory.

On the other hand, Javier Armando Lorente testified at the hearing, testimony that the judge considered essential to rule out the accusatory hypothesis. At this point, although the witness was enlightening in his account of the concepts of Law No. 19.550, the truth is that the activities assigned to the accused exceed the points on which Dr. Lorente declared. In effect, the specific activities that the defendants carried out were specified, which were not limited solely to their administrative role in the UBER and Hinter companies, but they had special relevance in the framework of "Techonology Support Service SA".

According to the above, I consider that the statement made by *a quo* regarding that it could not establish in the oral proceedings any behavior to syndicate Cao and Oliveira forcefully as organizers is not consistent with what happened in the debate, because the plexus of evidence gathered in the investigation and produced in the framework of the oral trial is far enough to be considered as accredited the facts charged and the responsibility of those named in them. In this way, it was possible to

COURT OF APPEALS FOR CRIMINAL MISDEMEANORS AND MINOR VIOLATIONS- ROOM III

"UBER" AND OTHERS ABOUT 83 - IMPROPER USE OF PUBLIC SPACE FOR LUCRATIVE PURPOSES (NOT AUTHORIZED) (Art. 86 according to TC Law 5666 and modif.)

Number: DEB 4790/2016-864

CUIJ: DEB J-01-00037097-1/2016-864

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demonstrate how without the contributions of Cao and Oliveira through the exposed corporate community, it would not have been possible to implement Uber's own transport service in the territory of our city, as well as its offer to the public, through the mobile application and the website of the company.

In *effect*, as taught by the outstanding Professor Dr. Enrique Bacigalupo, *"The subject matter of the theory of the author and of the participants is constituted by the conditions under which it can be affirmed that someone is the author of a typical action and those other conditions that establish the possibility of extending the accountability to other behaviors that have not consisted in the execution of the punishable act, but that in some way have cooperated in its execution. This theory has to provide the criteria to know who has played a leading role* in *the execution of the crime and who played a secondary role. The main role is played by the authors and the secondary, the participants"* (Enrique Bacigalupo, *Guidelines of the theory of crime*, Hammurabi, 4th edition, Buenos Aires, 2014, page 135).

Thus, it is essential to bear in mind that, in the present process, an accusatory hypothesis has been investigated consisting of the imputation of the organization of a lucrative activity of enormous scope in the Autonomous City of Buenos Aires.

In that order of ideas, it is virtually laughable to imagine that the cluster of proceedings that implies the assembly of such a business structure rests with a single person, that is, an individual in solitude can assemble the entire organization of a company like Uber in Argentina, and that, consequently, that person can be said to have organized the activity in a strong *sense*, that is, performing each and every one of the necessary acts.

On the contrary, the imputed situation is more consistent with the organization of an activity that, with the force of the obvious, requires the intervention of several subjects.

In this way, it does not seem possible that the accusation will result in pointing to each of the individuals in the organization as a whole, but reasonably, as it has been prepared by the Fiscal Public Prosecutor's Office, the imputation is addressed to the portion of the event in which each of the accused had a part, each of the portions configuring an essential contribution for that organization in response to an evident distribution of functions. Having said that, it is clear that they are coauthors of functional type.

In what interests us here, the functional domain, Professor Dr. Claus Roxin has pronounced itself in the way it is transcribed, namely: "The intervener cannot do anything alone; the intimidation of the bank employees or the subject of the victim does not produce the result: only if the buddy cooperates the plan 'works'. But the other also looks 'helpless'; if the bank employees were not immobilized, they would be detained, and if no one was subjected to the victim, the victim would defend himself or flee. So, for both, the situation is the same: they can only carry out their plan by acting together; but each one separately can cancel the joint plan by withdrawing their contribution. In this measure, everyone has the fact in their hands". (Roxin, Claus, *Authorship and Domain of Fact in Criminal Law*, Marcial Pons, Madrid, seventh edition, page 309).

For its part, it is striking and interesting for those who subscribe to know the reasons that led the colleague to ignore the numerous interventions of the accused that have been proven in order to implement the business in the country, or well, the dogmatic extremes about the co-authorship that, in my opinion, do their infractions responsibility. Unfortunately, it is not possible to arrive at such knowledge from the reading of its few foundations on the point.

As it appears in my argument plexus, I consider that of the facts proven in the framework of the debate hearing, it is possible to see essential contributions by Mrs. Cao and Oliveira with regard to the implementation of the Uber transport service within the framework of this jurisdiction.

For this reason, I believe that it is appropriate to revoke point III of the contested judgment, and to condemn Cao and Oliveira in order of the contravention foreseen and repressed by art. 86 para. 2nd of the CC.

Now, to analyze the imputation made in the terms of art. 74 CC, it is necessary to specify some questions around the figure under study.

First, the typical behavior consists in violating a closure, an action that implies “infringing or breaking”, that is, ignoring or neglecting the closure order that has actually been notified. There must be an express order of judicial or administrative closure of a certain space, known by the agents, and unfulfilled.

The term “closure” implies the provisional closure of an establishment or premises, but also includes an activity that has not been authorized by the supervisory authority. To violate is understood primarily to continue with an activity that is in contradiction with the regulations applicable to the case, ignoring the will of the authority to apply such measure, that is, the devalue of the act here is a conduct of disobedience[3].

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[3] Aboso, Gustavo Eduardo. *Infractions code and procedure - Law 12 C.A.B.A.*, Buenos Aires, Euros Editores, 2016, p. 279

For its part, anyone can be the author of the type under study, even who has not been the specific object of the order, which in most cases, is indeterminate. This, by virtue of the fact that by the nature of the measure, the effect it has is *erga omnes,* since it imposes a general prohibition of making use of a certain scope for any activity, or any type of use.

In the subjective face of the type, fraud is required in the commission, it requires the effective knowledge of the agent and the will to act against the order.

Applying the above to the sub examine, the closure imposed by the head of the Felony and Misdemeanor Criminal Court No. 16, on April 23, 2016, was final at the time of the debate, since confirmed by Chamber II of this House and not appealed before the local Superior Court of Justice. On that occasion, the judges who formed the court ordered the *"...closure/preventive blocking in the terms of art. 29 of the LPC, of the web page https://www.uber.com/argentina and the digital platforms, applications and any other technological resource that allows to contract and/ or make use of the transport services of passengers offered by the company UBER TECHONOLOGIES INC, UBER ARGENTINA SRL or UBER B.V., limiting it to the strict scope of the city of Buenos Aires, until the company adapts to the regulations of the city"*[4].

For this reason, it did not correspond in this instance of the process to return on the precautionary measure imposed in accordance with art. 30 LPC (according to Law No. 6017) by another magistrate and sign, but analyze only if in this particular case that order had been disobeyed, in the terms of art. 74 of the CC. In effect, having the defense exercised its right to appeal the order of closure, and having been confirmed that decision by this Appeal Court, nothing remains to be discussed within the framework of these proceedings in this regard.

But even when the imposed closure was subsequently considered invalid (which, I repeat, did not happen in this case) at the very moment in which the author fraudulently violates it while the current one is in force, the type under study is configured, as norm punishable is the violation of an orderly and known closure. It has the nature of a disobedience, circumscribed exclusively to the closure measures ordered

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[4] Expte. 4790-02-CC/2016 entitled “Appeal incident of preventive closure art. 29 LPC in cars UBER SRL s/infr. 83 CC”, rta. The May 5, 2016.

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by the administrative or judicial authority.

That said, it is noteworthy that the order could not materialize by virtue of the technical difficulty of circumscribing it to the exclusive area of the Autonomous City of Buenos Aires, which, added to the repeated non-compliance, gave rise to a new resolution that sought to extend the scope of this measure to the entire scope of the Argentine Republic.

However, the original closure never lost its validity, and with it the duty to suspend the offer of the UBER service in the area of the city never ceased to be demandable to anyone who had the ability to fulfill it, until the company adapts to local regulations.

Fail on *a quo* to consider that only the materialization of the order through the factual impossibility of using the service in the area of this city would impute the conduct of art. 74 CC, because prior to this, the measure emanated from the competent body, it acquired firmness and aimed to prevent the activity being investigated from continuing to be available to the public, on the understanding that it put public safety at risk under the terms of art. 30 LPC. Therefore, as the Prosecutor referred, the decision to close with the strip that advertises it has been confused. In this regard, it has been said that "...the verification of said violation may be due to the breakage of the strips that are usually placed in the doors of access to the interdict room, or only with the development of the activity, beyond of the belts mentioned"[5].

However, despite the imposed interdiction, the service through the UBER

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[5] Muñoz, Damián y Nogueira, Gonzalo "The violations against the Public Administration in the light of the guarantee of harmfulness", *Magazine of criminal law: Offenses, violations and misdemeanors of the Autonomous City of Buenos Aires,* No. 1, Rubinzal Culzoni, 2004, p. 32

computer platforms continued to be offered in the same way as it did before the measure in question, both through the website and through the application. This can be deduced not only from the fact that the validity of the service is public and notorious knowledge, but also from the fact that after the trial I have proven that Cao, Oliveira, Otero and the firm Uber Argentina SRL continued with the organization of unauthorized commercial activity until August 28, 2018, having issued numerous invoices in the name of the company for services rendered, and having registered new users after the blocking order, all of which indicates that they did so despite having effective knowledge of the measure that weighed on that. It is that it does not admit discussion that if the organization of the illicit activity was continued until the aforementioned date, it was invariably done to the detriment of the closing judicial resolution.

That is, instead of carrying out the necessary procedures to comply with the local regulations required for the type of service that UBER offers, and once it has been finalized, request the lifting of the closure/ blockade imposed, its authorities decided to ignore the order dictated by the competent judge and continue with the illegal activity, exploiting it despite the declared prohibition in that sense, thus configuring the behavior repressed by art. 74 CC.

In turn, I understand that the measure was fully enforceable against the defendants since the evidence gathered and produced in the debate makes it possible to assert that regardless of the obstacles encountered by Enacom to implement the measure, the firm had sufficient technology to inhibit the offer of its service in the defined area. The declaration of Mariano Damián Manfredi, judicial officer of the Judicial Investigation Center, acquires relevance on this point, who stated that although it was extremely difficult for the State to block a web page or an application in the terms ordered by Dr. Alvaro, the administrator of the site could do it without major complexities.

Now, regarding the temporal delimitation of the reproached behavior, I find the imputation formulated by the Prosecutor to be correct. This, because both Otero and “UBER Argentina SRL” were within the structure of the signature prior to the closure order, and Oliveira and Cao from June 23 of the same year, day in which they were appointed managing partners of the foreign companies and the Argentine subsidiary.

Based on the foregoing, I consider proven the violation of the closure and blocking ordered by the Judge in charge of the PCyF Court No. 16 on April 23, 2018, so it is appropriate to revoke the points II and III of the piece of fs. 185/186, in the terms indicated here.

Having said that, it is opportune to analyze at this moment the prescription of the violations action alleged by the defense.

At this point, although the magistrate did not issue a ruling on the matter because it considered the conduct to be atypical, he said that it coincided in a whole with the arguments made by the defense, for which reason it should be issued to me in this regard.

The figure provided by art. 74 CC is a permanent contravention, by virtue of which the computation of the term provided in art. 42 CC must begin before the cessation of conduct[6]. For this reason, and considering that the closure order remains in force and that it has been demonstrated in the debate hearing that the Uber firm still does not have the authorization of the Government of the CABA to operate the passenger transport service, nonetheless continue with its activity, I understand the conduct has not stopped, reason why the calculation of the term in question has not begun.

But even considering the temporary delimitation made by the Fiscal Public Prosecutor's Office, which would run until August 28, 2018 (debate hearing), it is also

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[6] Ob. Cit. MORO SI-RUA p. 378 In the same sense, Vázquez, Marcelo Pablo and Aboso, Gustavo Eduardo, *Violations Code of the Autonomous City of Buenos Aires commented, agreed, annotated with jurisprudence and complementary legislation,* Buenos Aires, Euros Editores, 1999, p. 201

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evident, clearly, that it has not elapsed the term of art. 42 CC.

b) Of the resources of the technical defenses of "UBER Argentina SRL" and Mariano Xavier Otero, Drs. Nicolás Daniel Ramírez and Ricardo Gil Lavedra

In the remedy interposed to fs. 211/226, Dr. Ramírez rose up against the judgment rendered in the first instance because it was condemned to "UBER Argentina SRL"; and in the libel that looks like fs. 227/242, the professional mentioned along with Dr. Gil Lavedra questioned the conviction of Mariano Xavier Otero.

However, attentive to the similarity and number of proposals that build both appeals, I will treat them together.

In the first place, the defense is offended by the judgment handed down in the case because it affected the guarantee of impartiality, because the *a quo* coincided with the arguments that formed the objection raised by the party during the debate hearing, but, still, has been rejected.

At this point, despite the unfortunate expressions of *a quo*, it is appropriate to maintain the criterion adopted by Room II of this Chamber, which in the framework of file 4790-40/2016 considered that all facts investigated in case No. 4790 "... *make up the same and only process which, for a matter of mere administrative order, was broken down into incidents with the purpose of better organization and use of judicial remedies…*

Deciding otherwise would imply maintaining that these are independent processes, which does not occur in the case, and could also generate a situation of deprivation of justice to the extent that the number of accused - *which in itself is very large*- *was superior to that of Magistrates in a position to resolve".*

Not having the defense offered any argument that demolishes the clarity in the resolved by that Court, I understand that in this case the guarantee of impartiality is not affected.

Later, the party raised the nullity of the accusation made by the Prosecutor in the request for judicial review because it was understood that "*...it was omitted to clearly, accurately and circumstantially identify the alleged act*" (fs. 2l3vta.). For this reason, it alleged an affectation to the right of defense of his procedural godson.

Before issuing me, it is worth remembering that the nullity – consistent with reiterated jurisprudence of this court - is an extreme and exceptional measure, which could never be declared for the benefit of the law only, but only when there is an actual damage or a constitutional injury verified in the concrete case; otherwise, such a pronouncement would become an excessive formal rigorism: a nullity for nullity itself.

In the same vein, the Supreme Court of Justice of the Nation has ruled, arguing: procedural nullity requires specific harm to one of the parties, because when it is adopted in the sole interest of formal compliance of the law, a manifest ritual excess is not compatible with the good service of justice (CSJN, Judgments 295:961, 298:312, 311:237, among others).

Now, Article 46 of Law 12 states: "*The Prosecutor, in the request for judgment, must identify the accused or imputed, describe and criminalize the event, present the evidence on which it is based, offer evidence, request the penalty considered appropriate to the case and explain the circumstances in account for it*". The purpose of this article is that the defense can know the accusation that should be contradicted in the subsequent stage of debate. Therefore, if the exposition of the person in charge of making the accusation is insufficient or contradictory, the counterparty will not be able, due to ignorance, to contradict the accusation and, therefore, would be deprived of developing

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in all its extension its defensive powers.

That said, the question raised revolves around alleged deficiencies that present the description of the facts made in the request for elevation to trial made by the accuser.

Thus, from the reading of the formalized accusation, it can be seen that it has managed to clearly express the conduct that was the object of the investigation, which allowed the full exercise of the accused's right of defense. Specifically, throughout the piece marked out null the mechanisms used by the accused to organize the illicit activity of transport service through the Uber mode and the responsibility that fit each one were exposed.

But, in addition, Room II of this Chamber has already had the opportunity to resolve the proposal introduced by the party previously in this case, issuing in terms of the validity of the accusations made[7].

Therefore, in line with the restrictive nature of nullities, and adhering to the principle of transcendence of procedural acts, I will reject the nullity claim made by the defense.

Having issued me repeatedly in the context of case No. 4790/2016 regarding the illegality of the lucrative activity exercised by the UBER firm under the terms of art. 86 CC[8] -in accordance with what I exposed *supra*- corresponds to address the analysis of the lack of participation of Mariano Xavier Otero and "Uber Argentina SRL" made by the defense.

At the time of resolving, the *a quo* considered the participation of Otero and "UBER Argentina SRL" proven in the conduct complained of in accordance with art. 86 para. 2nd of the CC.

Regarding the first one, he valued the interviews that were carried out in graphic and radio media to Otero, where he presented himself as the CEO or general manager of the Uber Argentina firm, the interview conducted through an official letter to

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[7] Expte. No. 4790-230/2016

[8] 4790-655/2016 "NN s/ 83 CC" rta. December 27, 2018, 4790-227/2016 "Waksmann, Naum Adrian s/ 74 y 83 CC" rta. July 10, 2018, 4790-40/2016 "Ocampo, Femando Lucas Martín s/ 74 y 83 CC" rta. April 17, 2018, 4790-13/2016 "Sajoux, Nicolás s/ 83 CC" rta. March 27, 2018.

the Secretary of Transportation Juan José Méndez, the statement itself of the accused in the debate hearing and the documentary incorporated in the trial.

From the statements of witness Méndez, he took into consideration the information provided by him regarding the meetings he had with Otero -among others- during the months of December 2015 and January 2016, to offer them legal alternatives for the service offered by the platform, in addition to ensuring that the Uber service was never authorized nor had procedures been carried out for this purpose by the firm.

It is also counted in the file with the work contract of Otero with Capital Consulting SA (point 111 of the test audience whose minutes look at fs. 35/54vta.), where tasks related to marketing strategies and campaigns were assigned to increase the number of users, manage the distribution and the supply chain, represent Uber in local events, communicate the needs of the product to the head office, assume growth of the client portfolio in the city, among others.

In turn, the effects sequestered in the numerous searches conducted in the context of this case, including the note of “Uber Techonologies INC” dated February 9, 2016, through which it is informed that shares of the company were awarded al incuso, which was seized in the property located in Marcelo T. de Alvear No. 1582 piso 1º “10” of this city (point 142.4 of the minutes that looks at fs. 35/54vta.).

Meanwhile, Otero reported that in February 2016 he was contacted by Capital Consulting to take charge of the promotion of Uber in Argentina, as a result of which he began to speak with journalists publicly and privately, and represented Uber in local events, but, nevertheless, he denied having any kind of interference in the decision making of the firm.

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However, as the magistrate points out, Otero's statements are not consistent with the overwhelming evidence produced in the debate hearing, because far from having a merely administrative role in charge of Uber's advertising, it was demonstrated that the imputed occupied the highest authority at the national level within the structure investigated. In this context, the work contract signed between the defendant and Capital Consulting defeats the attempts to detach from Otero's foisted actions, and clearly exposes the eminently organizational and responsibility functions in the society in question.

Therefore, I consider that the arguments that edified the defense's appeal with respect to Otero failed to undermine the grounds of the contested judgment, which, based on the evidentiary elements collected in the case file, clearly stated the value it granted to each and connected with the accusatory hypothesis.

Now it is time to analyze the sentence regarding "Uber Argentina SRL". At this point, it is not questioned that its current status before the General Registration of Justice is "society in the process of formation", but in what differ the parties is in the commercial activity that is attributed to it despite its unfinished registration.

At this point, the *a quo* considered irrefutable the invoices provided by the AFIP (fs. 49/186 of the incident that runs by rope), issued between July 1, 2017 and August 6, 2018 by "Uber Argentina SRL".

I agree again with the criterion adopted by the magistrate, and I consider that the defense has not introduced any novel or final argument that convinces me to marry the resolved.

At this point, although in the binding consultation presented by "Rasier Operations B.V." (3/8vta .of the incident that runs by rope) was informed to the AFIP that this firm operated directly in this country the mobile application of Uber, here it is attributed to the Argentine subsidiary of the firm having intervened in the organization of the service it provides. In effect, the invoices *supra* mentioned were issued by the accused with their CUIT number, by virtue of "services rendered" and weekly trips to different persons, by different values. That is, the circumstance of not being fully

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registered in the IGJ did not inhibit it from carrying out commercial activity using the CUIT assigned by the AFIP.

In view of the foregoing, I consider the condemnatory criterion of *a quo* correct, since it has been demonstrated in the debate hearing that both Mariano Xavier Otero and "Uber Argentina SRL" were part of the organization of lucrative activities in the public space without authorization, in the terms of art. 86 2nd para. CC, according to the accusation.

Finally, it is necessary to analyze the tort linked to the rejection of the extinction of the action by voluntary payment of the minimum fine with respect to the imputation formulated in the terms of art. 86 2nd para. CC, according to art. 64 CP (of supplementary application according to art. 20 LPC).

Prior to all it is possible to emphasize that the grounds for termination of the action provided in art. 64 CP should consider "... in *any state of the instruction and while the trial has not begun*". There is consensus that the cause of extinction only works in the area of repressed crimes *only* with *penalty of fine.* It is not feasible if it is also possible (in the abstract) another alternative, joint, accessory or complementary penalty[9].

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[9] Zaffaroni, Eugenio and Baigún, *Criminal Code and complementary norms,* vol. 2B, Hammurabi, 2012, p. 280

For its part, art. 20 of the Violations Code admits the supplementary application of the provisions of the Criminal Code *"...provided they are not excluded by this Code".*

At the time of resolving, the a quo considered that *"... is a closed system the drafting of the Violations Code regarding the mechanism of punishment. Understand that it is excluded and opposed if the legislator had wanted in the specific case clearly indicated. It is understood that the violations nature is different from the criminal nature and in this case it does not apply...".*

I agree with the magistrate in his reasoning. Law 1472 offers its own system of grounds for termination of the action (Article 40) distinct from criminal, and does not find this variant of payment among them.

But even more, I consider that the proposal was correctly rejected because by the time it was presented - preliminary to the trial - there was the possibility that the penalty applicable was that of arrest. In effect, in the request for a trial, the Fiscal Public Prosecutor's Office requested for Oliveira, Cao, Otero the principal penalty of arrest for twenty (20) days in respect of each of them, and as an accessory the disqualification for the term of two (2) years to carry out, organize, exploit, develop and/ or publicize transport activities of passengers of any kind and by any means.

For this reason, aware that the penalty applicable to the case was not only fine, and considering that in this act I am revoking the acquittal issued by the magistrate of degree and thereby enabling the application of a different sanction to the indicated one, it does not correspond to make place to the resource of the defense in this point.

Finally, it corresponds to specify that it is not the matter of this Court to determine the penalty to be imposed by virtue of the sentences that I propose in this act, since doing so without having previously had contact with the accused in the terms of art. 41 CP could generate future nullifying claims. In this sense, without prejudice to the fact that the Violations Code requires nothing in this regard, I consider it appropriate to delegate to the first instance judge the determination of the amount and nature of the penalty to be imposed in the case under study.

In line with this, Dr. Maier, in the preceding "Tissot"[10] *of the local Superior Court of Justice, considered "... it is true that the organism that condemns, the Room II of the Violations Chamber, at any time had before itself the accused and imposed a sentence, and the penalty that is its consequence, to a person who, at least for these judges, is absolutely unknown (see point 7.2.2 of the appeal unconstitutional). In my opinion this is the core of a primary constitutional injury, at least of art. 75, inc. 12, of the CN, when it orders the establishment of a public trial in criminal matters, a true guarantee clause for the accused (see also, CN, 24 and 118). It is not that I believe that this guarantee is necessarily enforceable in contravention but that, first of all, the CCBA itself, art. 13, inc. 3, which is aware of the competence of violations legislation of the City, repeats this requirement ("immediacy", defense in trial) and, in addition, the LPC-regulation in this aspect of the Constitution-, consequently, has ratified these principles by imposing the assistance of the accused as a condition of the sentence of conviction (LPC, 46). Note that the CP, 41, requires that the judges who condemn personally know the accused."*

For this reason, I will not treat the tort invoked by the Fiscal Public Prosecutor's Office in its appeal related to the imposition of the penalty of closure in the terms of art. 33 CC.

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[10] Expte. No. 4382/05 "Tissot, Marta s/ inf. art. 83 CC Law No. 1472 - appeal - without appeal of unconstitutionality granted" and its cumulative exp. No. 4411/05 "Public Ministry - Official Ombudsman on the Felony and Misdemeanor Criminal Court No. 3- without complaint by appeal of unconstitutionality denied in 'Tissot, Marta without/ inf. art. 83 CC Law No. 1472 -appeal-'", rto. June 6, 2006.

By virtue of what is considered, I propose to the agreement: I. MAKING PLACE for the appeal filed by the Fiscal Public Prosecutor's Office to fs. 199/210 vta., and consequently revoke point II of the verdict issued on September 21, 2018, which looks to fs. 185/186, CONDEMNING UBER ARGENTINA SRL and MARIANO OTERO in order to contravene the violation of the closure (Article 74 of the Violations Code); II. MAKING PLACE for the appeal filed by the Public Prosecutor's Office to fs. 199/210 vta., and consequently revoke point III of the verdict issued on September 21, 2018, which looks like fs. 185/186, CONDEMNING FERNANDO HORACIO CAO and DIEGO MARIANO OLIVEIRA in order to contravene organizing lucrative activities in the public space and violation of closure (articles 74 and 86 para. *2nd* of the Violations Code)); III. DO NOT MAKE PLACE for appeals filed by the technical defense of Mariano Xavier Otero and "Uber Argentina SRL" at fs. 211/226 and fs. 227/242, and consequently CONFIRM point I of the verdict issued on September 21, 2018, which looks to fs. 185/186, insofar as it was a matter of grievance; IV. TO SEND the case to the Felony and Misdemeanor Criminal Court of origin so that its holder may decide on the penalty applicable to the case; and V. HAVE PRESENT the reservations made by the defense.

This is how I vote.-

Dr. José Sáez Capel said:

I. I support the analysis of the admissibility of the resources, made by my colleague in the previous vote.

II. Now, admitted the resources, it is necessary to analyze the grievances wielded in order to clarify if the resolution of the Magistrate of degree is adjusted to law.

Closing Violation

As a first question, it should be noted that I do not share the judge's position that it is not possible to subsume the conduct in the violations type of closure violation for the sole reason that what was closed or blocked is an internet site and not a physical environment.

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This, since in the precedents of Room 1, which was originally integral, it was held that "the literal interpretation of the term 'place', used by the norm to define its scope, cannot be ignored, insofar as the defense aims to restrict it to real estate. However, place is defined as "(...) 2.m. Site or place ...5.m. Passage, text, authority or sentence; expression or set of expressions of an author or of a written book..." (Dictionary of the Royal Spanish Academy. Ed. Espasa-Calpe. Madrid 1970, p. 815), is to say that the affirmation held by the Judge of Degree, with regard to the text inserted in the Internet and that can be awarded to a specific author, is likely to be closed, it should be added that the same definition in point 2.m. it defines it as a site; so there is no doubt that the criterion supported by the defense must be rejected, in the understanding that in this terminology are included the internet sites." (Cause 28185-00-CC/2006 (int. 228/08) “BWIN.COM s/infr. art. 116, Organize and exploit game, CC- Appeal”, April 7, 2008).

In view of the foregoing, the owner of the action is right in what refers to the typical subsumption of the conduct imputed in the present acts, consisting of the violation of the closure of the Uber Argentina platform (art. 74 CC).

Once this has been clarified, it is worth mentioning that, in relation to this investigated conduct, in the present process, the prescription of the action has operated, for the considerations that will be explained below.

In this regard, as I have stated on numerous precedents, the prescription is an institute of public policy, which is produced in full by the course of the legal term without circumstances that the suspension be verified or interrupt and must be declared by the courts at any stage of the case and prior to any decision on the merits (Judgments CSJN 318:2491; 225:179; 311:2205; 186:396, among others and Superior Court of Justice in cases “Andretta, Carlos Hugo s/art. 41 CC without complaint for denial of appeal of unconstitutionality”, expte. No. 811/00, rto. on May 15, 2001, “Caballero, Jorge Alberto and others s/art. 71 CC without complaint for denial of appeal of unconstitutionality without prescription incident”, expte. No. 912/01, rto. on December 5, 2001 and “Masliah Sasson, Claudio without complaint for appeal of unconstitutionality denied”, expte. No. 1514/02, rto. on November 1, 2002, this Room Cause No. 50740-00-CC/10 “Bucci, Diego Ariel s/ infr. art. 73 CC” **-** Appeal, rta. on August 9, 2012; among many others).

In relation to this, the art. 42 of the Violations Code establishes that the action prescribes eighteen months after the contravention or the cessation of the same if it was permanent (provided it is not a traffic violation or those consigned in Title V). For its part, art. 44 of said legal body provides that only the prescription of the action is interrupted by the holding of the trial hearing or the rebellion of the accused and, in accordance with the provisions of art. 45, is suspended by the concession of the suspension of the trial process.

Clarified that, in the case, the owner of the action attributed to Uber Argentina SRL and Mariano Xavier Otero the fact dated April 23, 2016, occasion in which it would have violated the judicial closure imposed, without it being verified until the moment in which the trial hearing began (August 22, 2018), none of the grounds for interruption or suspension reviewed *supra.* Therefore, for the reasons that will be explained below, it is worth mentioning that before the oral and public debate began, the behavior was already prescribed.

On this matter, as I have stated in numerous precedents of the First Chamber that I am part of, the alleged violation of the violation of the closure (art. 74 CC, according to law 6017) results from instantaneous commission and permanent effects, and clearly is consumed at the moment of the event, that is, when the imposed closure was violated. Therefore, the date to be taken into account as a starting point for the computation of the prescription of the action is April 23, 2016 (Causes of Room 1, No. 27062-00-07 (146/07) “SANDOVAL ALARCON, Edinson Eduardo s/infra. art. 83, Improper use of the public space for lucrative purposes (not authorized) CC -Appeal", resolved on October 30, 2007; No. 50740-00-CC/10 "Bucci, Diego Ariel s/infr. art. 73 CC" **-** Appeal, filed on August 9, 2012; No. 17088-00-00/14 "Sobrevilla Calle, Anthony Martín s/art. 73 CC", rta. on February 16, 2016; among others).

At this point, taking into account the contravention here investigated, it is not possible to equate the moment of commission of the contravention with the continuity of its effects, at the beginning of the computation of the limitation period. So, art. 42 CC, when mentioning the cessation of the contravention "if it were permanent" refers to the cases of permanent or continued violations. The first assumption occurs when the consummative act is prolonged in time, therefore *"The verbal expression with which the law describes the crime, must allow the consummation to be continuous and invariably typical, unlawful and guilty, during a time that can be prolonged. So that at any moment of that time the crime is being consummated"* (Fontán Balestra, Carlos, "Criminal Law - Introduction and General Part" Ed. Abeledo Perrot, Bs. As., 1998, page 208); for its part, the second occurs when *"a person is responsible for several events that perform the same type of crime and whose determination and procedural treatment individualized are meaningless and impossible*" (Jescheck, HH, "Criminal Law Treaty", general part, V II, Bosh, 1978, pp. 1000/01). But in any way, they are given for the survival of its effects.

For the *expressed*, since the date of the event, until the date on which the oral and public debate began on August 22, 2018, the deadline had passed in excess provided in art. 42 of the Violations Code. Consequently, it corresponds to declare the prescription of the action regarding the violation of the closure investigated in these proceedings and CONFIRM the ABSOLUTION provided by the judge of degree in relation to this conduct with respect to Mrs. Mariano Xavier Otero, Femando Horacio Cao and Diego

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Mariano Oliveira and of Uber Argentina SRL.

The solution that is favored in this point, exempts me from analyzing the remaining grievances raised by the parties in relation to the contravention of violation of closure.

III. Using the public space unduly.

Secondly, in relation to the imputation made by the prosecutor consisting in having organized lucrative activities not authorized in the public space, it is necessary to analyze whether the conduct attributed to the defendants falls within the violations type foreseen in article 86, second paragraph, of the CC.

Now, from the analysis of the present proceedings, it can be inferred that Otero, Cao, Oliveira and Uber Argentina SRL were responsible for having organized the offer to the public of the provision of the passenger transport service, through the mobile application Uber Argentina SRL. In this digital platform the contact of the offer with the demand was made, that commercial activity. That is, it approached the parties a) who entered it with a passenger user of private transport in order to request a trip, and b) drivers with a user registered on the site, who carried out the execution of that service.

In this regard, it should be noted that the behavior foisted does not fit in the art. 86 CC, since there is another specific rule that sanctions it, which is passenger transport in the area of the City of Buenos Aires, without authorization or permit, which is carried out on public roads and with the intention of profit does not necessarily imply an affectation to the public space, a legal right protected by art. 86 CC.

Thus, as we affirmed in the case of Chamber I, which is of origin, where a driver of Uber was charged with the fact of transporting passengers without authorization, it was held that “it can be concluded that its activity of transporting passengers in vehicles could only be carried out in a legally authorized manner if it fits into one of the aforementioned ratings, existing in the current local CABA regulations. Otherwise, it is in violation of local laws and, therefore, susceptible to be sanctioned in accordance with the provisions of art. 6.1.49 of Law 451.” (Case No. 33523 / 2018-0 "RIVERO, Eduardo Raúl on 6.1.49 - Requirements for cargo and passenger transport

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vehicles", resolved on March 6, 2019.)

Thus, beyond that, in each specific case, some of these filings may not have the authorization and other regulatory permits, this must be analyzed in each particular case and if the behavior is subsumable in the provisions of the Section 6, called “Transit”, of Law 451, which turn out to be the specific ones to sanction anti-regulatory behavior in the matter. Admitting the position intended by the owner of the action, would lead to a vehicle badly parked on the sidewalk, which is for sale, could fit in the violations rule in question and not in the traffic regulations.

As stated, the lack of authorization or permits for each vehicle participating in the commercial activity carried out by UBER must be evaluated in each particular case and, when its absence is verified, it is not the contravention here imputed that represses the conduct to reproach, but the aforementioned fault law.

Also, as stated, the specific law should always be applied by the general law, and this would be another reason why it could not be framed in the contravention here imputed, so it is atypical in the light of violations regulations.

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Now, finally, it should be clarified that it is not possible, in this instance of the process, to refer the proceedings in order to follow a process according to the rules of offenses under the aforementioned legal modification. This is due to the fact that the procedural regime of absences is different and with other principles and that, based on the great advance of the present violations process, in which the oral and public debate has already taken place; to carry out a new process in order to adapt to the regime of faults would imply a violation of the guarantee of prohibition of multiple criminal prosecution for the same act.

In relation to this, it should be noted that Room I held the possibility of redirecting the process when, once the violations proceeding was initiated, it was understood that in reality such conduct constituted a fault (Cause No. 24436-00- CC/10 “ALTAMIRANO, Jorge Leonardo s/infr. Art.(s).113 bis, Red Light Traffic Violation-Appeal” resolved on September 13, 2010. However, in the case under study, the situation is different, since a sentence has been issued, so starting a new process in absences would imply the violation of the aforementioned constitutional guarantee.

In this way it was understood by the Supreme Court of Justice of the Nation in the “Polak” case, in which it was held “That a broad interpretation of the guarantee against multiple judging leads not only to the inadmissibility of imposing a new penalty for the same crime, but it leads to the prohibition of a second trial for the same offense, whether the accused has suffered a penalty or has not suffered, and that in the first process has been acquitted or convicted. And this is so because from the material foundation of the aforementioned guarantee it is not possible to allow the State, with all its resources and power, to make repeated efforts to condemn an individual for an alleged crime, thus subjecting him to annoyance, expenses and suffering, and forcing him to live in a continuous state of anxiety and insecurity, and to increase, also, the possibility that, even though innocent, he may be found guilty (see quotes in Rulings: 310:2845, dissidence of the Petracchi and Bacqué judges).” (Polak, Federico Gabriel without violation of the duties of public official without cassation -case No. 174 - 4/95-. Resolved on October 15, 1998).

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For these reasons, it can be concluded that the erroneous legal characterization made in this process, where an attempt was made to qualify as a violation a behavior that cannot be framed as such, must lead to the acquittal of the accused and this implies the impossibility of making a new process for these same facts.

For what has been explained here, I vote for: I.- Revoke the point device I and TO ABSOLVE Mariano Xavier Otero and Uber Argentina SRL of the contravention provided for in art. 86 CC, for which they were convicted. II.- Declare the prescription of the action of the conduct that was qualified as constituting the contravention provided for in art. 74 CC regarding Uber Argentina SRL and Mariano Xavier Otero and TO CONFIRM dispositive point II as EXONERATING to Mariano Xavier Otero and Uber Argentina SRL in relation to this conduct. III.- Declare the prescription of the action with respect to Femando Horacio Cao and Diego Mariano Oliveira, in relation to the conduct contemplated in art. 74 CC and TO CONFIRM dispositive point III as EXONERATING to Femando Horacio Cao and Diego Mariano Oliveira of the contraventions foreseen in the arts. 74 and 86 CC.

In virtue of the foregoing, the Court, by majority, RESOLVES:

I. TO REVOKE the operative point I of the judgment delivered in the case files (pages 185/186) and **TO ABSOLVE** Mariano Xavier Otero and Uber Argentina SRL for the violation provided for in art. 86 CC, for which they were convicted.

II. TO DECLARE the prescription of the action of the conduct that was qualified as constituting the contravention provided for in art. 74 CC with respect to Uber Argentina SRL and Mariano Xavier Otero and TO CONFIRM the dispositive point II as ABSOLVING Mariano Xavier Otero and Uber Argentina SRL in

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relation to this conduct.

III. TO DECLARE the prescription of the action with respect to Fernando Horacio Cao and Diego Mariano Oliveira, in relation to the conduct contemplated in art. 74 CC and TO CONFIRM the dispositive point III as ABSOLVING to Fernando Horacio Cao and Diego Mariano Oliveira of the contraventions foreseen in the arts. 74 and 86 CC.

Register, notify the parties and opportunely, refer to the court of origin.

[stamp:] DR. JORGE ATILIO
FRANZA
CHAMBER JUDGE
[signature]

[stamp:] Sergio Deigado
Chamber Judge
[signature]

[stamp:] JOSE SAEZ CAPEL
CHAMBER JUDGE
[signature]

[stamp:] Before me
[signature]

[stamp:] [illegible]
[signature]

In / /2019 the proceedings were sent to the Prosecutor’s Office of the Western Chamber for the purpose of notifying the decision issued in the case file. Record.

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City of New York, State of New York, County of New York

I, Aurora Landman, hereby certify that the document, "***"Uber" and Others About 83 - Improper Use of Public Space*, Court of Appeals for Criminal Misdemeanors and Minor Violations, May 7, 2019**" is, to the best of my knowledge and belief, a true and accurate translation from Spanish into English.

Aurora Landman

Sworn to before me this
June 24, 2019

Signature, Notary Public

WENDY POON
NO. 01PO6356754
QUALIFIED IN
QUEENS COUNTY
COMM. EXP.
04-03-2021

Stamp, Notary Public

EXHIBIT B

JUZGADO DE 1RA INSTANCIA EN LO PENAL CONTRAVENCIONAL Y DE FALTAS N°14
CORRALES, JONATHAN FACUNDO SOBRE 6.1.4 - CATEGORIA DE LICENCIA PARA CONDUCIR
Número: CAU 26217/2018-0
CUIJ: CAU J-01-00050736-5/2018-0
Actuación Nro: 12405677/2018

/// la Ciudad Autónoma de Buenos Aires a los veintisiete días del mes de noviembre de dos mil dieciocho, siendo las 13:30 horas se constituyó el Dr. Javier Alejandro Bujan, en su carácter de Juez P.R.S a cargo del Juzgado de Primera Instancia en lo Penal, Contravencional y de Faltas N° 14, a fin de celebrar la audiencia oral y pública, prevista en el Título II, Capítulo VI, de la ley 1217, ordenada en la **causa N□ 1206-F/18 (expte. 26217/18)**, caratulada: **"CORRALES JONATHAN FACUNDO SOBRE 6.1.4 – CATEGORIA LICENCIA PARA CONDUCIR"** y compareció el presunto infractor, **Jonathan Facundo Corrales, titular del DNI nro. 38.031.042** junto con su abogado defensor, Dr. Nicolas Castilla Sastre Tª 78 Fª 961. Actúa como Secretario el abogado Martín Turtl.---

A continuación, el Sr. Juez advirtió a la parte que estuviera atenta a todo lo que oyera y sucediera durante el transcurso de la audiencia. Le informó de que se trataba el acto, lo apercibió y el presunto infractor luego de ser asesorado por su defensor, manifestó que si comprendía. ----------

Preguntado acerca de si tenía alguna cuestión previa para plantear, el imputado manifestó que no.---

-----**Juez:** Da inicio a la audiencia de debate oral y público y advierte al encartado que estuviera atento a lo que iba a oír, ordenando que se diera integra lectura por Secretaría a las imputaciones contenidas en las siguientes actas de comprobación, que tramitarán ante la Unidad Administrativa de Faltas nro. 61 del Gobierno de la Ciudad de Buenos Aires, a saber: Acta de Comprobación nro. **N° I-00088843**(fs. 24) según el cual el día 25 de junio de 2018 a las 10:41 horas en Av. Costanera Obligado entre Pampa y Sarmiento, se habría constatado la falta consistente en "*7550 Explotar sin autorización para prestar el servicio REmise/Escolares/taxi 6140 No portar licencia que habilita a conducir categoría vehíc.* ".

--El Juez preguntó al encartado si ha comprendido los hechos y las imputaciones contenidas en las actas y que se reflejan en la resolución condenatoria de fecha 27 de julio de 2018, así le inquirió a lo que el imputado respondió que sí. -------Posteriormente el Juez le recuerda que como principio de garantía y amparado en la Constitución Nacional, el Código Procesal Penal de la Ciudad de Buenos Aires tiene derecho a negarse a declarar sin que ello cause presunción en su contra, y que su abstención no suspenderá el presente debate oral y público, y le pregunta si comprendió lo antedicho, a lo que el imputado manifestó que sí. -Igualmente el Sr. Juez le recordó que durante el curso del debate podrá formular todas las aclaraciones que considere oportunas, siempre que se refieran a la Defensa. ---El Sr Juez hizo saber al encartado que la presente instancia en el proceso de faltas se constituye como primera instancia judicial y que lo sucedido en sede administrativa no compele ni condiciona la actuación del Tribunal, el cual solamente se encuentra limitado por la petición fiscal y que por ende la sanción impuesta puede ser absuelta y/o dispuesta en más o menos respecto de la administrativa, puesto que el principio de la *reformatio in pejus* solo funciona en materia de impedimento dentro de la propia instancia administrativa y/o en la judicial respecto de la primera y segunda instancia.--------------------------------El encartado es inquirido sobre si entiende y manifiesta que sí. -------------------

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Igualmente S.Sa. le recuerda que durante el curso del debate podrá formular todas las aclaraciones que considere oportunas, siempre que se refieran a la Defensa. ---

S.sa. hace saber al encartado que la presente instancia en el proceso de faltas se constituye como primera instancia judicial y que lo sucedido en sede administrativa no compele ni condiciona la actuación del Tribunal, el cual solamente se encuentra limitado por la petición fiscal y que por ende la sanción impuesta puede ser absuelta y/o dispuesta en más o menos respecto de la administrativa, puesto que el principio de la reformatio in pejus solo funciona en materia de impedimento dentro de la propia instancia administrativa y/o en la judicial respecto de la primera y segunda instancia.-

El encartado es inquirido sobre si entiende y manifiesta que sí. -----------------

Cuestiones preliminares.--

Defensor Particular: No tengo cuestiones preliminares, ratifico los argumentos en el descargo administrativo; como el escrito de defensa interpuesto.------------

Juez: Tiene que reproducirlo en esta audiencia.-------------------------------------

Defensor Particular: se va a reproducir tratando de ordenar como medida preliminar voy a sostener el pedido de absolución de mi cliente por cuestiones de forma y cuestiones de fondo. --

Por forma sostengo la nulidad del acta por el grave defecto formal que padece la misma y; eventualmente, independientemente de la validez o no del acta como instrumento la sanción impuesta en el acta es inexistente. Por eso se solicita la absolución por inexistencia de la infracción.-----------------------------------

Si se entiende que cumple la validez en el marco del art. 3 y 5 de la Ley 1217, igual sostengo que la infracción es inexistente.------------------------------------

Hay un nuevo sistema de multas efectuadas por teléfono, que se plasman en un acta de infracción N° I-00088843 y después tiene un formulario que difiere en su número. El acta la reconozco como la de fs.24 hay un número de acta que difiere del acta de comprobación.---

El acta obrante a fs. 24 es nula al no poseer firma, posee los datos del agente Flavia Denise Aran, es un defecto propio del sistema que no puede ser imputable a mi asistido, tampoco hay firma digital, viola el art. 3 inc. "G" de la ley 1217.---

Motivo por el cual viola el art. 5, porque deben darse los requisitos taxativos del artículo 3.---

Viola el inciso b del art. 3 de la Ley 1217, sanción genérica. Más allá que mi cliente no realiza ni remis, ni taxi ni transporte escolar, no sé la calificación de conducta reprochable. Que hizo para que tenga esa infracción, y cual es la normativa de la que me tengo que defender.--------------------------------------

La explotación sin autorización es por remis, o transportes escolar o taxis; por lo cual atacaré los tres.--

En observaciones refiere "conducto al momento de la detención noconaba con la habilitación correspondiente la pasajera Myriam disaldo dni 35426115 quien afirma haber contratado el servicio por app uber violando *art.4.1.7 ley 451 transporte ilegal de pasajeros en operativo conjunto gort supervisora valeria maiale. Contqba con categoría paravtransportar pasajeros". Refiere entonces a habilitación correspondiente. Ahora me pregunto de que? de remis, de transporte o de taxi? No lo sé, porque no lo dice, por eso se viola el art. 3 de la Ley 1217.---*

En relación al DNI 35426115 Se tendría que librar oficio, que persona tiene ese tipo de número de DNI?, dio cualquier número. Esto viola el inciso f del art 3 de la Ley 1217, cuando Flavia Aran tiene la obligación de incorporar testigos o pasajeros, debería haber cotejado si existe y ver el documento.-------- -----

Declara haber solicitado servicio por UBER violando la ley 451 art. 4.1.7, volvemos al castigo genérico, y porque quiere aplicar tratando de dar estricto cumplimiento al art. C de la ley 1217. Habla de habilitación de remis, transportes escolares y de transporte de taxi. El código de Habilitaciones también habla de remis, escolares y taxi; motivo por el cual para no ser confuso me detengo en estos argumentos en cuanto a la forma del acta.----------------

Terminando en la aclaración de las observaciones, no se encuadra ni califica la conducta, en ningún momento refiere qué habilitación se le exigió, y cual mi cliente refirió no poseer. No sabemos si fue detenido por no tener habilitación para remis, escolares o taxi; si eventualmente hubiese realizado un transporte comercial sin habilitación, le deberían haber retenido la documentación que no se la retuvieron; si el auto.---

Por eso ataco el contenido del acta de comprobación.----------------------------

Este sistema digital ya lo advirtieron en sede administrativa efectuando el archivo de otras actas por defecto formal, porque los controladores advertían que no había firma.-- La firma digital mencionada son para faltas cometidas en la vía pública, las fotomultas, infracciones. En este caso es una cuestión comercial por no poseer habilitación.---

El inciso c dice, sello, firma y cargo; en cuanto a la firma digital sólo dice el nombre; el número de acta es referencial? No. Todos los demás datos si coinciden, la pregunta es, que tengo que tomar como acta de infracción? La obrante a fs. 3 o la de fs. 24? Entiendo que corresponde que tome como acta de comprobación la de fs. 24 y solicitando la nulidad por defecto formal de la misma.---

Sr. Juez: Estoy en condiciones de resolver la primera incidencia.--------------

No comparto ninguno de los argumentos formulados por la defensa, tengo dicho en reiterados precedentes que tienen naturaleza jurídica de notitia criminis, anoticiamiento del hecho; brindada en el acta las circunstancias de hecho, modo y lugar; siendo que con eso es suficiente para el ejercicio de la defensa. No se le puede exigir que califique legalmente el acta porque no es su función, tiene que decir cuál es el hecho que se le enrostra.-----------------------------

Dado que es un anoticiamiento la interpretación de este tribunal que coincida con el tribunal es que no son requisitos ad solemnitatem sino que las mismas son ad probationem, con que se puedan identificar los elementos que no impidan el ejercicio de la defensa, el acta es válida.-- En relación a la firma digital, esto ha sido objeto de un criterio general de actuación de la Subsecretaria *de Justicia respecto de los controladores administrativos de gobierno, me sorprende que esta disposición generaba la invalidez del acta.---*

El acta puede estar acompañada, tal es el caso por ejemplo del acta circunstanciada que se acompaña al acta de comprobación; el acta de fs. 3 puede integrarse al acta de fs. 24 y no implica que sean hechos distintos por tener distinta numeración.---

Cuestionar la firma digital, seria estar en contra de las disposiciones de gobierno en relación a la firma digital. Hasta de hecho, los decretos y resoluciones del Poder Ejecutivo se firman con firma digital, sólo basta que la firma permita identificar al funcionario; sólo él tiene ese token o clave habilitada; el contexto de firma digital.--

EL acta es absolutamente válidas, se está defendiendo el ciudadano de no tener habilitación para el transporte de pasajeros, esa habilitación en los términos del art. 4.1.7 y concordantes. Más allá que no lo diga el acta de comprobación se consolida con el resto de la actividad administrativa, incluso la efectuada por el controlador.--

***RESUELVO: NO HACER LUGAR** en relación a la invalidez del acta por su contenido formal y continuaremos con la parte material.------------------------*

***S.Sa.** requiere a la **Defensa Particular** si habrá de producir prueba alguna.-----*

Defensor Particular: No produciré prueba alguna, es una cuestión de pleno derecho.---

Sr. Juez*: concede la palabra al* ***Defensor Particular*** *a efectos de alegar.--------*

Defensor Particular: Como ya dije en escritos referenciados, el no tener habilitación es una recalificación del controlador administrativo de faltas, porque el acta no debería dar lugar a interpretación. Mi cliente fue sancionada conforme acta de infracción Ley 451 art 4.1.7 de la simple lectura surge que lo que se sanciona es no poseer habilitación para remis, transportes escolares y taxis.---

Mi cliente no realiza ni el servicio de remis, ni de escolares ni taxi, este inexistente pasajero indicado refiere haber solicitado el servicio através de la aplicación UBER, y esto es correcto.--

La aplicación denominada "UBER" es un nexo por el cual un pasajero se contacta directamente con mi cliente, en este caso Jonathan Facundo CORRALES- quien también tiene la aplicación-, Myriam Disaldo no llama por teléfono a una remisería, no pide la asignación del viaje, no es la remisería quien le dice "lleva a Myriam a tal destino", contacta directamente a mi cliente; y mi cliente puede aceptar o no el viaje. Cuando acepta se establece un contrato entre partes, es un contrato privado de pasajeros, de transporte.--------

Está claramente descripto en el art. 1280 del CCyCN, en 2015 cuando se unifica código civil y comercial se incorpora una nueva figura de Transporte Privado de Transporte.---

Refiere el art. 1280 "Hay contrato de transporte cuando una parte llamada transportista o porteador se obliga a trasladar personas o cosas de un lugar a otro, y la otra, llamada pasajero o cargador, se obliga a pagar un *precio o flete", y el Artículo 1281 dispone que las normas se aplican ante la ausencia de leyes especiales, no hay Ley en CABA que regula el transporte por aplicación de teléfonos móviles.---*

Inicialmente esta aplicación, en CABA trató de tildarla de ilegal, el transporte privado de transporte es lícita en la República Argentina. Este argumento de la actividad ilícita se vio truncada cuando en Mendoza se "legalizo" UBER, que es un error fáctico y jurídico. En la Ley Nº 9048 reglamentó el contrato de transporte privado, en la provincia una actividad puede ser lícita e ilícita en el país? Mendoza tomo la iniciativa de reglamentar una actividad lícita en el ámbito de la República Argentina.---

Con esa reglamentación empezaron a existir propagandas en Canal 13, Diario la Nación, cualquier medio de comunicación. Hoy es sponsor de la AFA, están promocionando actividad lícita o están haciendo apología del delito?--------

Esta actividad lícita no está reglamentada, el Código de Habilitaciones aclara taxativamente y refiere cuáles son las obligaciones y habilitaciones para remis, taxi y transportes escolares; nada dice sobre lo que debería ser para contrato privado de transporte, en CABA no está reglamentado.------------------------

Mi cliente no está reglamentado, en algún momento lo googleo, y yo digo la no reglamentación es prohibitivo para que pueda hacer lo que dice el art. 19 de la Carta Magna, que todo lo que no está prohibido está permitido".--------------

Si lo que no está prohibido, está permitido, si en CABA no está Reglamentado, no está prohibido, por el cual ejercicio la actividad.---------------------------

Podría haber sido distinta la estrategia, no hay modo de probar que el agente haya probado que estaba con la aplicación, podría haber dicho que no había forma de acreditar que el cliente no tenía aplicación; no le puede revisar el teléfono.---

No hay nada que ocultar estabas realizando actividad lícita por arts. 1280 y 1281 del C.C.y C.N aplica ante la falta de reglamentación en CABA.-----------

Asimismo hay un precedente en el Fallo Quevedo de este mismo fuero en la causa 11465/16 resuelto por el Juzgado 31 mediante sentencia firme del 3/2/2017 que determinó que la actividad de una persona que hace UBER es distinta al remis, y que no se le puede exigir la misma.--------------------------

No se puede aplicar a mi cliente analógicamente la actividad de remis, cuando trabaja para si, es monotributista, no trabaja para una remisería, me pregunto, como podemos hacer para que en la calle no tenga problemas? Como no hay reglamentación, le dije, podes ser hipócrita mentir ir al gobierno y pedir una habilitación para remis, pero teniendo que mentir porque no es esa realmente la actividad que se realiza. Para suplir esta omisión tenés que acomodarte a la reglamentación vigente, que es más cercana que es la de remis. Que es lo que pasa, cuando llega al Gobierno le van a preguntar, o solicitar los datos y la habilitación de la remisería en la que trabaja? A lo que mi cliente respondería: no trabajo en una remisería, trabajo para mi. Y la respuesta a ese respecto es; si no trabaja en una remisería, no puede sacar la habilitación.--------------------

Aun siendo hipócrita y querer sacar habilitación que no le corresponde, le merece que tenga una sanción.--

Por lo expuesto, solicito a S.Sa, por inexistencia de la falta enrostrada, la absolución de mi cliente.

Sr. Juez: Concede la palabra al Sr. Corrales, a fin de hacer uso de entenderlo pertinente, de su derecho a la última palabra.---------------------------------------

Sr. Corrales: No haré uso de la palabra, comparto lo dicho por mi abogado.----

Sr. Juez: Me encuentro en condiciones de resolver.-----------------------------

Hay varias cuestiones, a criterio del juzgado las cuestiones extrínsecas ya se encuentran validadas, me voy a expedir sobre las cuestiones materiales, en tanto ya me he expedido en relación a la validez extrínseca del acta de comprobación.

Por lo cual, en relación al contenido material del acta de infracción, sostengo que:---

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<u>I.- APLICACIÓN PLATAFORMA INFORMÁTICA: UBER</u>.------------------------------------ Que, en primer término a fin de resolver las presentes actuaciones se torna de relevancia el análisis del tipo de actividad realizada por el Sr. Jonathan Facundo Corrales, quien refiere que se encontraba transportando a un pasajero en virtud de contrato privado con la plataforma UBER.--- UBER es una empresa que, por medio de una aplicación de teléfono celular o tableta, enlaza a particulares (previamente registrados) – que deseen utilizar su vehículo para dar transporte – con los clientes potenciales (quienes también deben registrarse y descargar la aplicación).------------- Respecto del procedimiento del mismo; el/la pasajero/a, para solicitar un viaje, debe indicar el origen y el destino y; una vez solicitado, se puede consultar la información del mismo y del conductor; así como el tiempo en que tardará en llegar el automóvil, el tipo de vehículo.----------- Para ser transportista, la empresa pide que el conductor se inscriba y acompañe licencia de conducir profesional, póliza de seguro del auto y cédula del vehículo; y mientras el mismo tenga encendida la aplicación, se identifica permanentemente su ubicación.-------------------------------- **II.- UBER: ACTIVIDAD COMERCIAL LÍCITA.**---_Ahora bien, ya se ha expedido la **Corte Suprema de Justicia de la Nación,** rechazando un recurso de queja interpuesto por el Sindicato de Peones de Taxi, **ratificándose así la legalidad de la empresa UBER**, considerada en las instancias previas **como una actividad comercial lícita** (CSJN "Recurso de hecho deducido por el Sindicato de Peones de Taxis de la Capital Federal en la causa Uber y otros s/ incidente de recurso extraordinario" de fecha 14 de agosto de 2018). --La Cámara del Crimen confirmó la decisión del Juez Zelaya y determinó que "*la prestación del servicio de transporte de pasajeros sin contar con habilitación oficial no configura una conducta tipificada por la legislación punitiva. No se advierte cuál sería el delito concreto al que se habría instigado ni los delitos indeterminados que tendría por objeto la supuesta asociación ilícita*".--En dicha causa, el fiscal "descartó la hipótesis de la instigación delictiva o de la asociación ilícita, al puntualizar que se trata del desarrollo de una actividad comercial lícita". "(...) busca desarrollar una actividad comercial lícita bajo un modo de asociación con fines legítimos".--------Se resuelve de esta forma, que la actividad descripta en las presentes actuaciones, no configuran un ilícito penal y se trata de una actividad comercial lícita.---**III.- USO LUCRATIVO DEL ESPACIO PÚBLICO SIN AUTORIZACIÓN - IMPROCEDENCIA DE LA CONTRAVENCIÓN.**---La Justicia Penal, Contravencional y de Faltas de la Ciudad Autónoma de Buenos Aires, tuvo oportunidad de pronunciarse en el Incidente 4790/2016 en los autos caratulados "Nicolás Sajoux s/ infr. al Art. 86 C.C." (anteriormente artículo 83 C.C.).---En dichas actuaciones, la Cámara de Apelaciones en lo Penal, Contravencional y de Faltas

Sala III, resolvió el planteo formulado por la defensa en relación con la imputación de la contravención dispuesta en el art. 83 del CC, relativa a la realización de actividades lucrativas en el espacio público.--Sobre el particular, la Dra. Paz afirmó que *" (...) el art. 86 no hace referencia a taxis y remises sino que, como fuera expuesto supra, reprime las actividades lucrativas en el espacio público no autorizadas por la administración". (...).*---Refiere en su voto El Dr. Delgado que *"Esta norma se incorporó al Código Contravencional con la clara finalidad de proteger el espacio público de la proliferación de ferias clandestinas o de puestos no autorizados de venta callejera (...) No tiene por objeto la regulación del tránsito, ni el transporte de personas. ".--No usa indebidamente el espacio público (...) realizando una actividad lucrativa no autorizada, quien circula conduciendo un vehículo por las calles y avenidas libradas al tránsito automotor; con o sin acompañantes, sean estos conocidos del conductor o pasajeros que con él contrataron un transporte. La circulación automotor, en tales casos, que es la actividad desarrollada por el conductor del vehículo, sí está autorizada en tanto tránsito automotor, es decir, en tanto uso admitido del espacio público. Está permitido que cualquier conductor transite con su vehículo particular o el que le ha sido encomendado por las calles y avenidas libradas al uso automotor con o sin pasajeros. **Si algunos conductores lo hacen prestando el servicio público de taxi o de remises, deberán hacerlo con la habilitación y licencias respectivas. Pero de no hacerlo, no estarán usando ilegalmente el espacio público sino infringiendo las normas que impiden tales actividades sin licencia o habilitación**.*---**IV.- SOBRE LA FALTA REPROCHADA.** ---Que se le reprocha en las presentes, la sanción prevista por el art. 6.1.49 segundo párrafo de la Ley

451, que expresa “Requisitos de los vehículos de transporte de Carga y de Pasajeros”: *El/la titular y/o responsable de un vehículo de transporte de carga y/o de pasajeros, que no posea habilitación para prestar el servicio, es sancionado/a con multa de dos mil (2.000) unidades fijas."* Citándose a su vez, en las Observaciones del Acta de Comprobación N° I00087868, la falta estipulada en el Artículo 4.1.7 Ley 451, del cual se desprende que : “*El/la titular o responsable de un servicio de taxis, de transporte de escolares, o de remises que lo explote sin la autorización para prestar el servicio establecida por la normativa vigente, es sancionado/a con multa de diez mil (10.000) unidades fijas, y la inmovilización del vehículo*”.-------------------------Corresponde analizar entonces, si la actividad esgrimida corresponde a alguno de los servicios de transporte cuya autorización establece el Gobierno de la Ciudad Autónoma, a saber:---------------1.- Servicio de Taxi:--Que, en virtud de lo expuesto de conformidad a la definición expresada en el art. 12.2.1 de la Ley 2148, el servicio de taxi es “Servicio de transporte público de personas, no colectivo, en automóviles de alquiler con taxímetro de hasta cuatro (4) pasajeros por vehículo, prestado en un vehículo y por un conductor debidamente habilitados por la Autoridad de Aplicación”.------------Atento que el servicio brindado no fue efectuado por auto con habilitación de taxi, y que el mismo no pudiera haberse confundido con dicho tipo de servicio por haberse prestado en auto sin tarifa estipulada por taxímetro-conforme los lineamientos del Gobierno de la Ciudad-, ni estar pintando por los colores amarillo y negro que pudieran generar confusión en relación a que se trataba del mismo, no se encontraba en las calles o avenidas en búsqueda de pasajeros; es que debe despejarse con claridad que el servicio brindado no era el de taxi, por lo cual habrá de descartarse el requerimiento de habilitación en dicho aspecto.---------------------------------------2.- Servicio de Remis:--Este servicio se encuentra definido en el Código de Habilitaciones, en el capítulo 8.4. en el que se prevé el Servicio de alquiler de Automóviles Particulares con conductor (remises): 8.4.1 “*Considérase agencia de remises aquella que presta el servicio de transporte de personas en automóviles de categoría particular, con conductor, detentando el pasajero el uso exclusivo del vehículo, mediante una retribución en dinero convenida entre prestador y prestatario."*, cuya actividad se encuentra regulada por Decreto N° 167/1998, Resolución S.S. Tr. N° 28/010 que creó el Registro Único del Servicio de Alquiler de Automóviles

Particulares con Conductor de Remises.--

--------El Código de Tránsito y Transporte de la Ciudad Autónoma de Buenos Aires, en el acápite de "Definiciones Generales" determina al remis como aquel *"Automóvil de alquiler no sujeto a itinerario predeterminado, con tarifa prefijada para el recorrido total, usado por ocupación total del vehículo, que no toma o deja pasajeros con boletos, billetes o pagos individuales".*------De la descripción expuesta, puede desprenderse que el servicio de remis se ofrece a persona indeterminada, cualquiera que llame o se apersone a la agencia, podrá utilizar libremente el servicio de transporte en forma individual, a cambio del precio que se determina con la empresa de remis.---

--La diferencia con el servicio de transporte por intermedio de UBER, se desprende en tanto la misma no es ya a persona indeterminada sino determinable, por cuanto sólo podrá ser parte de la operación contractual aquel/la usuario/a que haya descargado la aplicación, registrado y cargado sus datos personales en la base de la plataforma de UBER para utilizar el mismo.------------------Se destaca así que en la causa N° 11465/2016 caratulada "Quevedo, Cristian Damián s/ Infracción artículo 6.1.52 de la Ley 451", en oportunidad de alegar sobre un acta de comprobación por licencia de remis vencida, el Fiscal Villalba Diaz refirió que "*se le imputa tener una licencia de remis vencida pero que por los dichos del presunto infractor no se trató de una licencia vencida sino de un vehículo cuya tarjeta de identificación tenía destino remis, pero (...) el mismo encartado explicó y probó que estaba ejerciendo una actividad distinta, que se desarrolla por una plataforma UBER. (...) la presente imputación fue por una actividad distinta a la que estaba desarrollando y la conducta no se le podrá imputar. Que solo por eso debe ser absuelto (...)".*---La Jueza interviniente, Dra. Susana Beatriz Parada, en relación al acta de infracción relativa a la licencia de remis vencida, expresó que "*en realidad no se ha descripto la acción como* *dice el inciso b del art. 3 porque no se trataba que el Sr. Quevedo estuviera conduciendo un automotor con una licencia de remis vencida sino mediante la aplicación de otro sistema, el vehículo no funcionaba como remis (...)*--- Con los extremos expuestos, puede demostrarse así que la actividad descripta por el Sr. Corrales – actividad de transporte por intermedio de la aplicación UBER- no se encuentra entra aquellas en virtud de la cual se le requiere al servicio de remis habilitación para prestar el servicio, debiendo descartarse entonces la utilización de dicha figura.-- **V.- FALTA DE PERTINENCIA DE INTERVENCIÓN FISCAL.**---------------------------------Asimismo, no puede dejar de resaltarse que el Sr. Fiscal Coordinador, Dr. Gonzalo VIÑA, a fs. 39 de las presentes actuaciones, expresa que "(...) **tampoco se advierte que se encuentre comprometido el interés general de la sociedad o esté directamente involucrado el orden público constitucional (art. 17, incs. 1, 2 y 5 LOMP) (...) estimo que no resulta pertinente la intervención del Ministerio Público Fiscal" (sic).**--En virtud de las manifestaciones vertidas, claramente se desprende que, quien representa los intereses de la sociedad en nombre del Estado; entiende que el tema traído a estudio, no constituye temática que requiera acción directa de su parte, ya que UBER no compromete el interés general ni involucra el orden público constitucional por lo que mal podría ser tratado como un servicio público.-- Ahora bien, si el caso fuera por una infracción cometida en el marco de la Ley de Faltas -por alguna de las causales previstas en afectación a la prestación de servicio público-, la intervención del mismo devendría obligatoria; en tanto es el Fiscal en representación del poder de policía que detenta el Estado, quien debe velar por la salvaguarda y seguridad de la supuesta prestación en infracción.-- De ello se desprende que no se trata en autos, cabe resaltar, por lo manifestado por el Sr. Fiscal, de una afectación a un servicio público de pasajeros.---**VI.- DE LA NATURALEZA JURÍDICA DEL SERVICIO DE TRANSPORTE POR MEDIO DE PLATAFORMA WEB.**---Habiéndose determinado ya que la actividad comercial es lícita, que la misma no configura una contravención por

utilización de espacio público sin autorización y que la misma no puede incorporarse como actividad de taxi o remis – que ya venimos diciendo no es una falta-; debe entonces dilucidarse la naturaleza jurídica del servicio de transporte bajo análisis y si la misma requiere de algún tipo de habilitación particular.--- Se entiende al Transporte Público de pasajeros regular, como el transporte colectivo de pasajeros que la Administración organiza con el objeto de satisfacer las demandas masivas de traslado de sus usuarios/as. ---Por su parte, el Transporte Privado, es definido por el Código Civil y Comercial de la Nación, en su artículo 1280, como aquel en virtud del cual "*una parte llamada transportista o porteador se obliga a trasladar personas o cosas de un lugar a otro, y la otra, llamada pasajero o cargador, se obliga a pagar un precio o flete".*--No cabe duda alguna así que, la diferencia del transporte público, organizado o concesionado por el Estado a fin de satisfacer el servicio general de transporte en forma masiva e indeterminada; del transporte privado en virtud del cual se vincula a quien conduce un auto particular y el pasajero –determinados o determinables-, a fin de ser traslado de un lugar a otro a cambio de un precio; se configura en un contrato de transporte.--- Ni el Código Civil y Comercial de la Nación, ni la regulación específica en materia de Faltas; especifican que todo servicio de transporte deba efectuarse en el ejido de la Ciudad con habilitación previa; sino por el contrario, a ciertos tipos de transporte (taxi, remises, transporte escolar) se les requiere particularmente una habilitación previa para funcionar como tal.-----------**VII.- CONTRATO INNOMINADO. CONTRATOS CONEXOS**----------------------------------
En casos como el presente, tanto el/la transportista como el/la pasajero/a, se conectan por intermedio de una aplicación electrónica– UBER-. Esta característica no es un distingo más, no se trata en el caso de una persona indeterminada que en la acera levanta su brazo a

fin de requerir el traslado por intermedio de un taxi (diferenciado con colores particulares, taxímetro, entre otros) y/o de un servicio de remís cuya oferta es indeterminada al público en general (remisería de acceso al público en general en forma personal o telefónicamente); sino de personas particulares cuyos datos son registrados en la plataforma a fin de poder ser pasajero/a y/o transportista, respectivamente (lo que torna a los mismos determinables en forma previa a la aceptación del contrato de transporte); y cuyas características son valuadas por el/la pasajero/a y el/la transportista para consentir o no el contrato – vgr. cantidad de estrellas valuadas por otros/as usuarios/as y/o transportistas, características del vehículo en el cual será transportado, entre otros.---

------ Lo hasta aquí expuesto, me convence de entender que se trata de un servicio de transporte privado; ahora bien la utilización de una plataforma digital por intermedio de una empresa intermediaria, genera una particularidad, no prevista en el Código Civil y Comercial, lo que me hace entender a la interconexión de actos jurídicos descripta en una red contractual *sui generis*.-- El/la posible pasajero/a, al descargar la aplicación y cargar sus datos personales, y al requerir el viaje para cada caso concreto permite a UBER mediar a fin de obtener un transportista que acepte la oferta y concluya el transporte.--- El/la posible transportista por su parte, al momento de registrarse y presentar la documentación requerida tales como licencia, seguro del auto; acepta que UBER lo/a conecte con oferentes del servicio de transporte en el momento que el mismo se encuentre conectado a la aplicación; a fin de la conclusión del contrato de transporte referido entre las partes.------------------------------ Esta empresa acerca así oferta y demanda de transporte, a fin de mediar en la conclusión de un contrato de transporte privado, sin tener relación de dependencia o representación con ninguna de las partes; por cuyo servicio cobra al transportista un porcentual del 25% por viaje.------------

Puede decirse entonces que, en la práctica, el/la pasajero/a contrata con UBER, el transportista contrata con UBER, y por último -al requerirse y aceptar cada viaje- se genera un contrato de transporte entre pasajero/a y transportista.---

Se vislumbra así, conexidad entre tres contratos necesarios a fin de cumplirse el objeto común: el transporte; situación que, conforme avances del mercado y tecnología ya ha sido receptada en el nuevo Código Civil y Comercial de la Nación en el artículo 1073 y siguientes.

De la caracterización efectuada a los Contratos Conexos en dicho texto legal, se puede desprender que "*Esto significa que aun cuando se trata de negocios aparentemente autónomos, todos tienden o procuran el logro de un resultado común o negocio único, que no se podría alcanzar sin la interacción de cada uno de dichos contratos. No se exige simultaneidad temporal ni instrumentación única.*"[1]---

La Sala "M" de la Cámara Nacional de Apelaciones en lo Civil, en su pronunciamiento en los autos "Van Thienen, Guillermo Federico y otro c/M.B. Desarrollos Inmobiliarios S.A. s/daños y perjuicios", expediente n°109, del Juzgado Civil n°109, ha expresado: "*Cabe recordar que el tema de los contratos conexos -como son los de constitución del fideicomiso inmobiliario, de adhesión y de transferencia del dominio fiduciario- y que se encuentran regulados en el nuevo Código Civil y Comercial que entrará a regir en agosto de este año, no es nuevo en nuestro derecho y la cuestión quedó reflejada en el despacho de la Comisión n° 3 de las "XVII Jornadas Nacionales de Derecho Civil" realizadas en Santa Fe en 1999, en donde se dijo que "Habrá contratos conexos cuando para la realización de un negocio único se celebran, entre las mismas partes o partes diferentes, una pluralidad de contratos vinculados entre sí...", agregando que la vinculación debía medirse "...a través de una finalidad económica supracontractual, verificada jurídicamente en la causa subjetiva u objetiva, en el consentimiento, en el objeto o en las bases del negocio*"[2]---

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[1] http://www.saij.gob.ar/docs-f/codigo-comentado/CCyC_TOMO_3_FINAL_completo_digital.pdf. Código Civil y Comercial Comentado - Página 495

[2] http://www.nuevocodigocivil.com/wp-content/uploads/2015/06/Sentencia-23.pdf

La importancia de entenderla como una red negocial, radica en brindar a los/as actores de dichos actos jurídicos, la posibilidad de oponer excepciones por incumplimiento o cumplimiento defectuoso, incluso de aquellas acciones que sean de un contrato que les es ajeno, de conformidad a lo dispuesto en el art. 1075 del CCyCN; así como la extensión en el ámbito de responsabilidad´(Art. 1758 CCyCN y 40 Ley 24240) y la normativa vinculada a contratos de consumo.--

Asimismo, en esta triangulación, hay una característica muy particular: es UBER quien -conforme zona geográfica, demanda y distancia- define en cada caso el valor de viaje. Convierte esto al contrato de transporte en nulo? Pues claramente no, esto no es óbice a la existencia del contrato en sí mismo. Nada obsta a que las partes, en razón de la autonomía de la voluntad que les impera, decidan que sea un tercero quien determine el precio cierto (artículo 1006 Código Civil y Comercial de la Nación).---

En virtud de lo expresado, se entiende que el servicio de transporte por medio de la aplicación UBER, es un servicio de transporte privado; que se genera por intermedio de un contrato innominado en el que se conecta a la Empresa Uber, el/la/los/as pasajeros/as y el/la/los/as transportistas; cuya regulación – ante falta de normativa específica – será supletoriamente la relativa a Contrato de Transporte, conforme las reglas interpretativas del propio Código Civil y Comercial de la Nación en su artículo 970.---

VIII.- SOBRE LA RESPONSABILIDAD.---

Mucho se ha discutido en relación a la garantía de seguridad que debe primar y garantizarse en relación al transporte de personas.--

Sobre el particular, el propio Código Civil y Comercial, recepta mayor y extensiva responsabilidad para el caso de Contratos de Transporte; atento que dispone en su artículo 1291 que la misma se extienda no sólo al incumplimiento del contrato – situación típica de todo contrato privado-, sino también respecto de siniestros que afecten a la persona del pasajero/a y/o pérdida de sus cosas; no pudiendo limitarse esta obligación por decisión de las partes por entender los codificadores que se afectaría la seguridad de las personas, y con ello orden público.---

Por último, destaca el artículo 1758 del Código Civil y Comercial de la Nación que esta responsabilidad, es extensiva no sólo al transportista sino también, a quien obtiene provecho de ella; resultando así en concordancia con lo dispuesto en el art. 40 de la Ley 24.240 y sus modificatorias, el cual establece que "*si el daño al consumidor resulta del vicio o riesgo de la cosa o de la prestación del servicio, responderán el productor, el fabricante, el importador, el distribuidor, el proveedor, el vendedor y quien haya puesto su marca en la cosa o servicio. El transportista responderá por los daños ocasionados a la cosa con motivo o en ocasión del servicio*".--

De todo lo expuesto se desprende que, frente al consumidor – pasajero/a – responderían tanto el dueño del auto, el transportista como la empresa UBER; sin perjuicio de las acciones de repetición que pudieren efectuarse entre ellos y/o las excepciones.------------------------------

IX.- SOBRE LAS NUEVAS TECNOLOGÍAS.---

En este caso, nos encontramos ante un tipo contractual en el que converge el uso de nuevas tecnologías, ya que es a través de una aplicación que se descarga en los teléfonos celulares y/u otros dispositivos digitales que se produce el consentimiento y formación ulterior del contrato de transporte.---

Esta modalidad de contratación, se incorpora en el marco de la denominada "economía colaborativa", en virtud de que importa "*una interacción entre dos o más sujetos, a través de medios digitalizados o no, que satisface una necesidad real o potencial, a una* *o más personas. Es lo que antes se conocía como trueque y que, gracias a las plataformas digitales, se ha sofisticado establecido un marco donde los usuarios pueden interactuar entre ellos y/o con la misma plataforma (...)El movimiento del consumo colaborativo supone un cambio cultural y económico en los hábitos de consumo marcado por la migración de un escenario de consumismo individualizado hacia nuevos modelos potenciados por las redes sociales y las plataformas de tipo peer-to-peer (red-entre-pares o red-entre-iguales)"*[3]--------------------- Tal es el caso por ejemplo de "Mercadolibre", donde diversos oferentes ponen a disposición productos de variada índole (bienes muebles como ropa, zapatos, muebles), que serán adquiridos al precio allí determinado – o a convenir por las partes- por otros/as usuarios/as que se encuentran registrados/as en dicha página y por el cual la empresa cobra un porcentual en comisión, disruptiendo el viejo esquema de adquisición en locales o tiendas físicas; o el caso de Glovo, Rappi, Pedidos Ya, por los cuales el/la consumidor/a adquiere productos alimenticios, farmacéuticos, entre otros.--

La Sala I de la Cámara de Apelaciones en lo Contencioso, Administrativo y Tributario, en un fallo del 22 de junio del 2018 en relación a demanda presentada por una usuaria contra Mercado Libre, "las juezas Mariana Díaz y Fabiana H. Schafrik y el juez Carlos F. Balbín consideraron que a la plataforma le cabe la ley de defensa del consumidor. **Díaz citó jurisprudencia al decir que Mercado Libre "interviene -y por ende es responsable– desde el mismo momento en que, creando apariencia, logra atraer para sí la confianza de sus clientes", la cual "constituye la fuente primaria de sus obligaciones" y también "de sus ganancias".** "Sea cual sea el argumento que se tome, **no es discutible que Mercado Libre es un intermediario que integra una cadena comercial"**, indicó Díaz en base al fallo de la Cámara Nacional en lo Civil, Sala "K", en los autos "Claps, Enrique Martín y otro c/ Mercado Libre S.A. s/ daños y perjuicios"[4]. (el resaltado es propio)------------------------------

Todas estas aplicaciones, al igual que UBER, vinculan compradores/as con vendedores/as o usuarios/as de servicios, por medio de un sistema digital sin que se le

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3 https://www.fundacionaquae.org/wiki-aquae/innovacion/la-economia-colaborativa/

4 https://www.perfil.com/noticias/sociedad/mercado-libre-debe-cumplir-con-la-ley-de-defensa-del-consumidor-e-indemizara-a-un-usuario.phtml

haya requerido permiso ni licencia gubernamental. ---Esta nueva modalidad especial de contratación informática, ya ha sido receptada por el nuevo Código Civil y Comercial de la Nación; y se encuentra amparada por nuestra Constitución Nacional en tanto el artículo 14 garantiza el derecho a trabajar y ejercer toda industria lícita; y el artículo 19 de la Carta Magna enfatiza que *"Ningún habitante de la Nación será obligado a hacer lo que no manda la ley, ni privado de lo que ella no prohíbe"*.------------------------

Como se ha descripto previamente, la actividad ha sido considerada lícita en términos penales ya por la Corte Suprema de Justicia de la Nación, la misma encuadra en un servicio de transporte que se concreta por intermedio de una plataforma de internet y la cual cuenta con normativa de aplicación supletoria regulada por el Código Civil y Comercial de la Nación, no existiendo norma alguna que restrinja o regule esta actividad privada en miras a la seguridad o al orden público. --La inexistencia de regulación administrativa del Gobierno de la Ciudad Autónoma de Buenos Aires, o el entendimiento de que la misma no compromete el interés general de la sociedad, conforme ha expresado el Sr. Fiscal en las presentes actuaciones; no puede pasar inadvertido por este Tribunal, ni entender -por analogía con otro tipo de transporte- la falta de habilitación como prohibición o limitante para ejercer la actividad comercial lícita; derecho garantizado por la Carta Magna.---

Ahora bien, esto en nada obsta a que el Estado, entienda pertinente reglamentar su ejercicio en cierta medida en miras a preservar el orden público y la seguridad (art. 28 y 42 CN).--
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Sobre el caso particular de la utilización de la aplicación de UBER, ha elaborado recomendaciones el Relator Especial para la Libertad de Expresión, Edison Lanza, en su Informe Anual de la Comisión Interamericana de Derechos Humanos 2017 – volumen II – expresando que los Estados miembros deben: *a. Abstenerse de aplicar a Internet enfoques de reglamentación desarrollados para otros medios de comunicación —como telefonía o radio y televisión—, y diseñar un marco normativo alternativo y específico para este medio, atendiendo a sus particularidades (...) e. Garantizar que el tratamiento de los datos y el tráfico de Internet no debe ser objeto de ningún tipo de discriminación en función de factores como dispositivos, contenido, autor, origen y/o destino del material, servicio o aplicación, de conformidad con el principio de neutralidad de la red.*--

Destaca el Relator así, la importancia de incorporar y reglamentar en la normativa interna, aquellos aspectos particulares que han de tener determinados actos jurídicos ante el advenimiento de nuevas tecnologías y de la economía colaborativa.--------------------------------

Un primer paso se ha dado en materia tributaria, la Ley Nº 27.430 de Reforma Tributaria grava los servicios digitales prestados por residentes en el exterior cuando son utilizados en el país por consumidores finales y otros sujetos actualmente no alcanzados por el IVA en la importación de servicios; mecanismo incorporado a fin de evitar la evasión fiscal y la competencia desleal entre empresas.-- Ahora bien, pionera en el país en la materia de adecuación normativa en materia de transporte por plataforma digital, ha sido la Provincia de Mendoza, quien por Ley 9.086, crea la figura del "Transporte Privado a través de Plataformas Electrónicas" definido como aquel servicio que con base en el desarrollo de tecnologías de dispositivos móviles, utilizando el sistema de posicionamiento global y plataformas independientes, permite conectar a usuarios que lo demanden, punto a punto, con conductores que ofrecen dicho servicio mediante el uso de la misma aplicación, para celebrar un contrato en los términos del artículo 1280 y siguientes del Código Civil y Comercial de la Nación.---

En el uso de sus prerrogativas, conforme el principio constitucional ya referido en el cual se faculta al Estado a -en virtud de su poder de policía y como garante de la seguridad-, **reglar su ejercicio más no cercenar el derecho a ejercer la industria**; ha dispuesto dicha Provincia al respecto en el Art. 52 de la Ley referida que: "*Este transporte oneroso de pasajeros constituye <u>una actividad privada de interés público cuyo</u> cumplimiento se regirá por las disposiciones de la presente sección <u>y por la reglamentación que al efecto dicte la Autoridad de Aplicación</u>. Deberán los prestatarios cumplir con el pago de las tasas de contraprestación y las obligaciones impositivas que determine dicha normativa. En ningún caso podrá este tipo de servicio afectar la prestación de los servicios públicos de pasajeros que esta Ley determina.*".---

A su tiempo, el Decreto Reglamentario N° 1512 del 13 de septiembre del 2018, que ordena, entre otras obligaciones; a las Empresas de Redes de Transporte (ERT) inscribirse en la Dirección Provincial de Transporte, en el área de registros (art. 56); y a quienes pretendan prestar el servicio privado de transporte deberán solicitar su inscripción en las Empresas de Redes de Transporte (ERT) registradas como tal, acreditando el pago de la tasa de inscripción y fiscalización correspondiente, la documentación reglamentaria del vehículo con el que se pretenda la prestación del servicio, la documentación que acredite la identidad del conductor y la Licencia Nacional de Conducir subclase D.1., como mínimo, inscripción en la Agencia de Administración Tributaria de Mendoza (ATM), Inscripción en AFIP y contratar seguro del automotor exigido por Ley N° 9024, con el límite de cobertura máximo para transporte de pasajeros, conforme con las disposiciones de la Superintendencia de Seguros de la Nación, o la autoridad que en el futuro la reemplace (art. 57).---

<u>X.- MODIFICACIÓN AL SISTEMA DE SANCIONES PARA INFRACTORES DE TRÁNSITO DEL TRANSPORTE PÚBLICO DE PASAJEROS Y DE CARGAS. INAPLICABILIDAD AL CASO DE SERVICIO DE TRANSPORTE</u>

POR PLATAFORMA UBER.---

A principios del mes de noviembre, se ha modificado la Ley de Faltas, entre cuyas cláusulas se expresa que "Taxi, transporte de escolares, remises, vehículos de fantasía y otros sin autorización. El/la titular o responsable de un vehículo que transporte pasajeros y que lo explote sin la autorización y/o habilitación para prestar servicio establecida por la normativa vigente, es sancionado/a con multa de diez mil (10.000) unidades fijas e inhabilitación para conducir de siete (7) a treinta (30) días.---

Se entiende importante destacar que, la normativa bajo análisis, no modifica ni incorpora normativa o reglamentación de habilitaciones en la materia sino que modifica la cuantificación de la sanción.---

A todas luces puede vislumbrarse, de conformidad a las manifestaciones vertidas en el presente, que tal sería el caso de aquel que estuviere efectuando un servicio de transporte para el cual se requiera habilitación previa – remis, taxi, transporte escolar- más no podría aplicarse por analogía a quien efectúa un contrato de servicio privado por intermedio de plataforma digital; figura distinta a las referidas previamente.-------------------------------------

El Estado, es el garante constitucional de la seguridad de la ciudadanía; pero también debe garantizarse el derecho al ejercicio de una industria lícita y a la libre elección del/de la consumidor/a. Dentro de esta marco podrá disponerse normativa regulatoria que confluya al bienestar general; debiendo adaptarse a los desafíos que importan el uso de las nuevas tecnologías en la actividad comercial y de mercado.---

XI.- CONCLUSIONES.---

Que en virtud de todo lo expuesto; entiendo que el caso bajo análisis se trata de una actividad comercial lícita por la cual se brinda un servicio de transporte privado a través de plataforma electrónica, para cuyo ejercicio se requiere de, al menos, tres contratos conexos; que motivan entender al mismo con carácter *sui*

generis, convirtiéndolo así en un contrato privado innominado.--

Ahora bien, el carácter de innominado, no importa que el mismo no se encuentra autorizado o reglamentado, pues sus reglas interpretativas y normativa aplicable surgen del propio Código Civil y Comercial de la Nación, en tanto dispone en su artículo 970 que "*están regidos, en el siguiente orden, por: a) la voluntad de las partes; b) las normas generales sobre contratos y obligaciones; c) los usos y prácticas del lugar de celebración; d) las disposiciones correspondientes a los contratos nominados afines que son compatibles y se adecuan a su finalidad" (para el caso las normas generales de transporte; así como las disposiciones dispuestas en materia de tránsito).*---

Lo antedicho, en nada obsta a que en virtud de las prerrogativas otorgadas por la propia Carta Magna en su artículo 42- que impone al Estado garantizar el derecho a los/as consumidores/as y usuarios/as de bienes y servicios, en la relación de consumo, a la protección de seguridad-; cuyo imperativo se refuerza en las disposiciones de la Ley 24.240 y modificatorias- Art. 6: *Las cosas y servicios, (...), cuya utilización pueda suponer un riesgo para la salud o la integridad física de los consumidores o usuarios, deben comercializarse observando los mecanismos, instrucciones y normas establecidas o razonables para garantizar la seguridad de los mismos*- el Estado entienda pertinente reglamentar algunos aspectos particulares de este tipo de contratación, en miras a asegurar que el servicio se brinde con la protección y calidad pertinentes; como ha sido el caso ya referido de la Provincia de Mendoza.---

Como expresa Sthephen Hawking, la inteligencia es la habilidad de adaptarse a los cambios; debiendo entonces agiornarse al uso de las nuevas tecnologías; adaptando y reglamentando lo pertinente para la utilización segura de las mismas sin menoscabar el derecho a la actividad comercial de los/as ciudadanos/as; así como

de elección de los/as usuarios/as de transporte.--

Por todo ello, **RESUELVO**:---_

I.- ABSOLVER a Jonathan Facundo CORRALES DNI 38.031.042, de las demás condiciones personales obrantes en autos, en relación con la infracción prevista y reprimida en el art. 6.1.49 segundo párrafo y 4.1.7 de la Ley 451 por entender que la conducta desarrollada deviene atípica en el marco de la Ley 451, entendiendo que la misma se constituye en un contrato de transporte privado innominado con contratos conexos, de acuerdo con las consideraciones de hecho y de derecho precedentemente formuladas.-----------

II.- SIN COSTAS (art. 33 y 55 inc. H) de la ley 1217).------------------------

III.- Consentida la misma o firme que fuere, líbrese oficio al registro de antecedentes de faltas para su registro y al Controlador Administrativo de Faltas Nro. 61 para su conocimiento. **Fecho archívese.-------------------------**

No siendo para más, a las _____ hs., se da por finalizado el acto, firmando los comparecientes después de S.Sa. por ante mí, de lo que DOY FE.--------

COURT OF FIRST INSTANCE FOR CRIMINAL MISDEMEANORS AND MINOR VIOLATIONS No. 14
CORRALES, JONATHAN FACUNDO ABOUT 6.1.4 - DRIVER'S LICENSE CATEGORY
Number: CAU 26217/2018-0
CUIJ: CAU J-01-00050736-5/2018-0
Proceedings No: 12405677/2018

/// In the Autonomous City of Buenos Aires, on November 27, 2018 at 1:30 p.m., Dr. Javier Alejandro Bujan, Judge in charge of the Court of First Instance for Criminal Misdemeanors and Minor Violations No. 14, appears in person, to hold the public and oral hearing provided for in Section II, Chapter VI, of Law 1217, ordered in **case No. 1206-F/18 (File Record 26217/18), entitled**: **"CORRALES JONATHAN FACUNDO ABOUT 6.1.4 - DRIVER'S LICENSE CATEGORY"** and the alleged infringer, **Jonathan Facundo Corrales, appeared in court, holder of National Identification No. 38.031.042** along with his defense attorney, Dr. Nicolas Castilla Sastre, Tª 78 Fª 961. Attorney Martin Turtl acting in his capacity as Clerk.-------------------- --------------------------------

Hereafter, the Judge admonished the party to carefully listen to everything they heard and occurred during the course of the hearing. He informed him on what the act was about, advised him, and the alleged offender, after being advised by his attorney, stated that he understood.-------------------------

After being asked if he had any prior questions, the defendant stated that he did not.------------------------

--- Judge: The hearing of oral and public debate is initiated and the defendant is cautioned to be attentive of what he is about to hear. It is hereby ordered that the accusations contained in the following evidence documents, which shall be processed before the Criminal Administrative Unit 61 of the Government of the City of Buenos Aires, namely: Certificate of Findings **No. I-00088843**(p. 24) that, according to which, on June 25, 2018 at 10:41 a.m., at Av. Costanera Obligado between Pampa and Sarmiento, the violation consisting in *'7550 Exercise the provision of Fixed-fare taxi/School/Taxi service without authorization 6140 Not carrying a license that allows the driver to drive this category of vehicle* would have occurred."

--- The Judge asked the defendant if he has understood the facts and allegations within the minutes and portrayed in the condemnatory resolution of July 27, 2018, to what the defendant says yes. ------------- Subsequently, the Judge reminds him that as a principle of guarantee and within the National Constitution, the Criminal Procedural Code of the City of Buenos Aires has the right to refuse to testify without presumption against them, and that their abstention does not suspend the present oral and public debate, and is asked whether he understands the aforementioned, to what the defendant responds yes. -The Judge also reminds him that during the course of the debate, he may pose any questions he deems appropriate, as long as they are referring to the Defense. ---

The Judge informs the defendant that the present instance in the misdemeanor proceedings is constituted as the first judicial instance and that what occurs during the administrative headquarters does not compel or influence the Court’s action, which is only limited by the prosecutor's request and that, therefore, the sanction imposed may be acquitted and/or prepared in more or less with respect to the administrative headquarters, given that the *reformatio in pejus* principle only applies for impediment matters within the administrative and/or judicial authority itself in regards to the first and second instance.--------------------------------------- The defendant is asked whether he understands and states that he does. --------------------------- *The Judge asked the defendant if he has understood the facts and allegations contained in the minutes and reflected on the condemnatory resolution dated July 27, 2018, to what the defendant says yes.*---------

Subsequently, the Judge reminds him that according to the principle of guarantee and within the National Constitution, the Criminal Procedural Code of the City of Buenos Aires has the right to refuse to testify without presumption against them, and that their abstention does not suspend the present oral and public debate, and is asked whether he understands the aforementioned, to what the defendant responds yes.

The Judge also reminds him that during the course of the debate, he may pose any questions he deems appropriate, as long as they are referring to the Defense.

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The defendant is asked whether he understands and states that he does.

Preliminary

Issues. ---

Defense Attorney: I do not have preliminary issues, I ratify the arguments in the administrative deposition; as well as the statement of defense filed.----------------------

Judge: You must produce that in this hearing.---

Defense Attorney: This will be replicated attempting to request, as a preliminary measure, I will uphold my client's request of acquittal due to procedural and substantive issues. ---

On the procedural grounds, I maintain the lack of validity of the document because of the serious formal error it contains; eventually, regardless of the validity or lack thereof as an instrument, the sanction imposed in the document is non-existent. Therefore, the acquittal for lack of an infringement is requested.---

If it is understood that it complies with the provisions of art. 3 and 5 of Law 1217, I continue to argue that the infringement is non-existent.----------------------

There is a new penalty system carried out over the phone, that is depicted in record of infringement No. 1-00088843 and then, it has a form with a different number on it. I recognize this record as the one on p. 24 there is a number of record that differs from the record of verification.---

The record of page 24 is invalid given it does not have a signature, it contains information on agent Flavia Denise Aran, it's a defect from the system itself that cannot be attributed to my representative, neither does it have a digital signature, and violates Article 3 inc. "G" of Law 1217.--------------------------------------- ----------------------

The reason why it is a violation of art. 5, because the tax requirements from Article 3 must occur. ---

It is a violation of paragraph b of art. 3 of Law 1217, generic penalty. Furthermore, my client does not perform any service of "remis", taxi or school transportation, I do not know what reprehensible conduct. What did he do to have such infringement, and what is the regulation I need to defend myself from.---

The provision exercised without authorization is for fixed-fare taxi, school or taxi transportation services; therefore, I will tackle all three. ---

The observations state that: "the former, at the time of the detainment, did not have the relevant authorization. The passenger Myriam Disaldo, National ID No. 35426115 affirms having hired the service through the Uber App, violating Article 4.1.7 of Law 451, illegal *transport of passengers in joint operation with supervisor Valeria Maiale. The driver had the category to transport passengers." This refers to the corresponding permit. But now I ask, for what? "Remis", transport or taxi? I don't know, because it doesn't say so. That's why it is a violation of art. 3 of Law 1217.* ---

In regards to National ID No. 35426115, an official statement should be issued, what kind of person has this National ID No., they provided any random number. This violates subsection f of Article 3 of Law 1217, when Flavia Aran has the obligation to incorporate witnesses or passengers, she should have checked whether they exist and ask for their documentation. ---------

He declared to have asked for a UBER service, violating law 451 art. 4.1.7. We return to generic punishment, and because it seeks to apply strict compliance with art. C of law 1217. It refers to the permits for remis, school and taxi transportation. The Code of allotments also mentions taxi, school and fixed-fare taxi services; and in order to avoid confusion, I will elaborate on these arguments in regards to the form of the record.-----------------------------

To conclude in clarifying the observations, the conduct is not defined nor qualified, at no time does it refer to what permit was required of him, and which my client referred to not having. We do not know if he was detained for not having permission to provide taxi, school or fixed-fare taxi services; if he did in fact performed this type of commercial transport without authorization, they should have retained his documentation, which was not retained, let alone his car.--

That is why I am challenging the contents of the record of verification. ---------------------------

This digital system was already warned about at the administrative headquarters, by carrying out the file from other records by formal default, given that the controllers warned there was no signature. -- The digital signature referred to are for misdemeanors committed on public roads, traffic camera tickets, infringements. In this case, it refers to a commercial matter for not having permissions.--

Subsection c *includes stamp, signature and position; in terms of the digital signature, only the name is included; is the record number referential? No. If all the other data coincides, the question is, what do I have to consider as a record of infringement? The one from page 3 or the one on page 24? I understand that the appropriate procedure is to consider the verification of page 24 and requesting the annulment by formal defect of the same. ---*

Your Honor: I am in a position to resolve the first incidence.--

I do not share any of the arguments made by the defense, I have said in repeated precedents that the acknowledgment of the fact has a legal nature of notitia criminis; the circumstance, means and place are provided for in the record; being this sufficient for the exercise of defense. I cannot ask you to legally rate the record because this is not part of your role, you have to say what the circumstance he committed is. --

Given it is an acknowledgment that the interpretation of this Court coincides with the Court, is that these are not ad solemnitatem requirements, but the same are ad probationem, with which identify the elements that do not impede the exercise of the defense, the record is valid. -- In regards to the digital signature, this has been the subject of a general criterion of action of the Undersecretary of Justice in regards to the Government's administrative controllers, I am surprised that this provision generated the invalidity of the record.-------

COURT OF FIRST INSTANCE FOR CRIMINAL MISDEMEANORS AND MINOR VIOLATIONS No. 14
CORRALES, JONATHAN FACUNDO ABOUT 6.1.4 - DRIVER'S LICENSE CATEGORY
Number: CAU 26217/2018-0
CUIJ: CAU J-01-00050736-5/2018-0
Proceedings No: 12405677/2018

The record may be accompanied, as is the case, for example, of the circumstantial record which accompanies the record of verification.; the record of page 3 can be integrated to the record on page 24 and does not imply that they are different facts by have a different numbering. ---

To question the digital signature would be contrary to Government provisions in regards to digital signatures. Even Executive Branch decrees and resolutions are signed with a digital signature, it is sufficient that the signature identifies the official; only he has the token or key enabled; the context of digital signature. ---

The record is absolutely valid, it is defending the citizen of not having permission to transport passengers, this authorization is in terms of Art. 4.1.7 and related articles. Apart from the fact that the verification record does not say so, it is consolidated with the rest of the administrative activity, including that which is carried out by the prosecutor. ---

I HEREBY RESOLVE: TO OVERRULE *the invalidity of the record for its formal content and we shall continue with the material information.* ---

Your Honor *asks the* ***Defense Attorney*** *if there is any evidence he wishes to produce.* -----------------------------

Defense Attorney: I will not produce any evidence, it is a matter of absolute right. --

Your Honor: *The* ***Defense Attorney may take the floor in order to*** *state his case.-------------------*

Defense Attorney: As I have already mentioned in documents under reference, not having a permit is a re-qualification of the administrative supervisor of offences, because the record should not give rise to any interpretation. My client was sanctioned in accordance with the act of infringement of Law 451 Art 4.1.7, from reading the report, he is sanctioned for not having authorization to provide taxi, school, and fixed-fare taxi transportation services. ---

My client does not provide taxi, school or fixed-fare taxi services, this non-existent passenger indicated refers having requested the service through the UBER app, and this is correct. ---

The app called "UBER" is a link by which a passenger directly contacts my client, in this case Jonathan Facundo CORRALES, who also has this app, Myriam Disaldo does not call a fixed-fare taxi service by phone, does not request the trip to be assigned, and it is not a fixed-fare taxi service that says, "take Myriam to such and such location," but instead, it is Myriam who directly contacts my client, and my client accepts or does not accept the trip. When it is accepted, a contract emerges between the parties. This is a private passenger contract for transport.------------------

It is clearly described in art. 1280 of the CCyCN, in 2015, when unifying the commercial and civil code, a new classification for Private Transport on Transportation is incorporated. ------------------

In art. 1280 states that: "A transport contract occurs when one party known as carrier or operator, agrees to transfer people or things from one place to another, known as passenger or loader, agrees to pay a fee or freight," and Article 1281 provides that the rules apply in the *absence of special laws, there is no law in CABA that regulates the transport through mobile phone apps. ------------------------------*

In CABA, this application was initially attempted to be labeled as illegal; private transportation is legal in the Republic of Argentina. This argument of the illicit activity was cut short when in Mendoza, UBER as "legalized," which is a factual and legal error. Law No. 9048 regulated the contract of private transportation. Can an activity be legal in the province and illegal in the country? Mendoza took the initiative to regulate a lawful activity within the Republic of Argentina. ------------------------

As a result of this regulation, we began to see advertisements on Canal 13, Diario la Nación, and any other media outlet. Today, it is sponsor of the AFA. Are they promoting lawful activity or are they justifying the crime? ---

This lawful activity is not regulated, the Code of Allotments exhaustively clarifies and refers to what the obligations and allotments are for fixed-fare taxi, taxi and school transport; it does not refer to what should be for a private transport contract, in CABA, this is not regulated. --------------------------------

My client is not regulated. At some point I have googled it, and I say no regulation is prohibitive in order that I may do what art. 19 of the Magna Carta, that what is not prohibited, is permitted. --------

If what is not prohibited, is permitted, if this is not regulated in CABA, then it is not prohibited, whichever activity is performed. ---

The strategy could have been different, there is no way to prove that the agent proved that he was using the app, he could have said that there was no way to credit that the client did not have the app; he could not check his telephone. ---

There is nothing to hide, he was engaged in a legal activity under arts. 1280 and 1281 of the C.C. y C.N applies in the absence of CABA regulation. -------------------------------------

There is also a precedent in the Quevedo Ruling of this same jurisdiction in Case 11465/16 resolved by the 31st Court by final ruling on 2/3/2017 that determined that the activity of a person who uses UBER is different to that of a fixed-fare taxi service, and that the same cannot be required for this user. -------

You cannot analogically apply the activity of remis to my client, when he works for himself, he is an individual tax payer, he does not work for a remis provider. So I ask myself, how can we ensure that he doesn't have problems on the street? Since there is no regulation, I told him, you can be hypocritical and lie to the government to ask for a permit for a remis, but you have to lie because that is not really the activity that is being carried out. In order to compensate for this omission, you have to adapt to the current regulation, which is closer to the remis regulation. Which is the case. When you get to the Government, will they ask, or request, the data and permit of the remis provider you work for? To which my client would respond: I don't work for a remis provider, I work for myself. And the response in this regard is that if they do not work for a fixed-fare taxi service, they cannot obtain this authorization. ---------------------

Even if he were to be hypocritical and obtain authorization that does not apply to him, he deserves to have a sanction. --------------------------------------

In view of the foregoing, I request you, Your Honor, due to an absence of the infringement committed, the dismissal of my client. --

Your Honor: I shall give the floor to Mr. Corrales in order to use his right to have the final say, if considered relevant. ---------------

Mr. Corrales: I will not have the final say, I share what was said by my lawyer. --------------------------

Your Honor: I am competent to give my consent. --

There are several issues, at the discretion of the Court, the extraneous issues are already validated, I will address the material issues, as I have already addressed the extrinsic validity of the act of verification.

Therefore, in regards to the material content of the act of infringement, I assert that: ---

I.- SOFTWARE APPLICATION: UBER. ---

That, in the first term in order to resolve the present proceedings, the analysis on the type of activity conducted by Jonathan Facundo Corrales takes on relevance, who reported that he was transporting a passenger under private contract with the UBER platform.----- UBER is a company that, through a phone or tablet app, links individuals (previously registered) - who want to use their vehicle for transport - with potential customers (who must also register and download the app). --------------------

With regard to the procedure of the same; the passenger, in order to request a trip, must indicate the source and destination; and, once requested, can see this information and the driver's information; as well as the time it will take to get the car, the vehicle type. ------------

To be a carrier, the company asks the driver to register and accompany their professional license, auto insurance and identification of the vehicle; and while the same user still has the app turned on, his location is permanently identified. ---------------------------

II.- UBER: LEGAL BUSINESS ACTIVITY. --_That being said, the Nation's **Supreme Court of Justice has already been issued,** rejecting an appeal lodged by the Taxi Driver Labor Union, **ratifying the legality of the company UBER,** considered in previous instances **as a lawful commercial activity** (CSJN "Appeal on points of fact by the Taxi Driver Labor Union of the Federal Capital in the cause Uber and others on incident of extraordinary appeal" dated 14 August 2018). --The Bureau of Crime confirmed the decision of Judge Zelaya and found that "*the provision of the service of transportation of passengers without official clearance does not set a conduct characterized by punitive legislation. There is no warning of what would be the specific offense instigated or the indeterminate offenses he would have due to the alleged illicit association.'.* --- In this case, the Prosecutor "ruled out the hypothesis of instigation of criminal or unlawful association, to point out that this is the development of a lawful business activity." "(...) seeks to develop a lawful business activity as an association with legitimate purposes." ------------ In this manner, it is decided that the activity described in the present proceedings does not constitute a criminal offense and is a lawful business activity. --- **III.- LUCRATIVE USE OF PUBLIC SPACE WITHOUT AUTHORIZATION - INADMISSIBILITY OF MISDEMEANOR.** ------------------------ The Jurisdiction on Misdemeanors, Violations and Criminal Matters of the Autonomous City of Buenos Aires, had the opportunity to rule upon Incident 4790/2016 in court records entitled "Nicholas Sajoux on infringement of Art. 86 C.C." (formerly Article 83 C.C.). --------------------------------------- In those proceedings, the Court of Appeals on Misdemeanors, Violations and Criminal Matters, Court III, solved the proposal formulated by the defense in regards to the allocation of the infringement contained in Art. 83 of the C.C. regarding carrying out income-generating activities in the public space. --

On this matter, Dr. Paz stated that" *(...) art. 86 makes no reference to taxis and fixed-fare taxis but, as discussed above, represses lucrative activities in the public space not authorized by administration."*

(...). -- Dr. Delgado states in his opinion that "*This standard was added to the Code on Minor Offenses with the clear aim to protect the public space of the proliferation of clandestine trade fairs or unauthorized street vending(...) It is not intended to deal with transit regulations or the transportation of people. ".*--*Someone that conducts a non-authorized lucrative activity, (…) who circulates while driving a vehicle through the streets and avenues intended for transit is not misusing the public space; with or without passengers, regardless of whether they are known to the driver or passengers that hired the means of transportation. Vehicle transit, in such cases, which is the activity carried out by the driver of the vehicle, is authorized in road traffic, that is to say, in the recognized use of public space. It is permissible for any driver to travel, with their private vehicle or those entrusted to them, through streets and avenues intended for the use of vehicles, with or without passengers.* ***If some drivers do so providing a public taxi or fixed-fare taxi service, they must do so with the relevant authorization*** **and** ***licenses. However, failure to do so does not mean an illegal use of public space, but an infringement to the standards that prevent such activities without a license or*** **authorization**.

--- **IV.-**

ON THE ALLEGED INFRINGEMENT. --

The sanction of Art. 6.1.49 paragraph two of Law 451 is reproached in the following, which expresses "Requirements for vehicles intended for the transportation of Cargo and Passengers": *The holder and/or responsible of a vehicle used for the transportation of cargo and/or passengers, who does not have authorization to provide the service, is punishable with a fine of two-thousand (2,000) fixed units."*

In turn, referencing the Observations of the Act of Verification No. I00087868, the infringement stipulated in Article 4.1.7 of Law 451 which indicates that: *"The holder or responsible of a taxi, school or fixed-fare taxi transport service that exercises this service without an authorization to do so, established by the regulations in force, is punishable with a fine of ten-thousand (10,000) fixed units, and immobilization of the vehicle."* ------------------------- Therefore, activity given must be analyzed to determine whether it corresponds to any of the transportation services whose authorization is established by the Government of the Autonomous City, namely: ---------------- 1.- Taxi Service: ---------------------------------- That in view of the foregoing, pursuant to the definition in Art. 12.2.1 of Law 2148, a taxi service is "A non-collective, public transport service of individuals, in cars rented with a taximeter of up to four (4) passengers per vehicle, provided in a vehicle and by a driver authorized by the Authority of Implementation." ------------------Given that the service provided was not done in a car with a taxi authorization, and that he himself could not have been confused with that type of service given it was not done in a car with a fee stipulated by a taximeter - pursuant to the guidelines of the Government of the City- nor was the color painted yellow and black, that could generate confusion, was not in the streets or avenues in search of passengers; is that it must be clarified that the service provided was not that of a taxi, for which the requirement of authorization in this regard must be discarded. --------------------------------------- 2.- Fixed-fare Taxi Service: ---This service is defined in the Code of Allotments in Chapter 8.4., which mentions the Service of Renting Private Cars with a driver (fixed-fare taxis): 8.4.1 *"A fixed-fare taxi agency is defined as one that provides the service of transporting people in cars of particular category, with a driver, bearing the passenger the exclusive use of the vehicle, by means of a compensation in cash agreed between the lender and the borrower. "*, whose activity is regulated by Decree No. 167/1998, Resolution by Judge Title No. 28/010, that created a Unique Record Number for the Service of Hiring Private Cars with a Fixed-fare Taxi Driver. ---

--- The Code of Transit and Transportation of the Autonomous City of Buenos Aires, in its section on "General Definitions" defines a fixed-fare taxi as *"A rental car that is not subject to a predetermined itinerary, with a pre-set rate for the total route, used by the vehicle's total occupation, which does not take or leave passengers with tickets, bills or individual payments."* ---------- This description helps us indicate that the fixed-fare taxi service is offered to an undetermined individual, anyone that calls or personally presents themselves to the agency, may freely use the transport service on an individual basis, as per the price determined by the fixed-fare taxi company. --------------- The difference between the UBER transport service is that this service is not for an undetermined individual, but a determinable one, given that only a person that has downloaded the app, has registered, and uploaded their personal information on the UBER platform may use this service. --- Case No. 11465/2016 entitled "Quevedo, Cristian Damian on Infringement to Article 6.1.52 of Law 451" in an opportunity to argue about an act of verification due to an expired fixed-fare taxi license, Prosecutor Villalba Diaz stated that *"he was charged for having an expired fixed-fare taxi license, but because of the alleged offender's statement, it was not in regards to an expired license, but of a vehicle whose identification card said it was for fixed-fare taxi purposes, however, (...) the accused individual himself explained and proved that he was exercising a different activity, through an UBER platform. (...) this imputation was for an activity different from the one which he was performing and the conduct cannot be charged. That for this only reason, it must be acquitted* (...)." --- The intervening Judge, Dr. Susana Beatriz Parada, in regards to the act of infringement relating to the expired fixed-fare taxi license, expressed that "*the truth is, the action has not been described as stated in subparagraph b of Art. 3 because it wasn't that Mr. Quevedo was driving a vehicle with an expired fixed-fare taxi license, but because he was applying another system, the vehicle was not being used for a fixed-fare taxi service* (...) --

With these ends exposed, it is proven that the activity described by Mr. Corrales - a transport activity through the UBER app - is not within those under which authorization is required for the provision of a fixed-fare taxi service, and the use of such definition must be ruled out. -- **V.- LACK OF RELEVANCE FOR FISCAL INTERVENTION. --------------------------------------** In addition, it is emphasized once more that Prosecutor Coordinator, Dr. Gonzalo VIÑA, on page 39 of the present proceedings, states that: "(...) **neither is it observed that the general interest of the society is compromised, or that the constitutional public order is directly involved (Art. 17, subparagraphs 1, 2 and 5 LOMP) (...) I believe that the intervention of the Public Prosecutor is not relevant" (sic)**. -- Under the manifestations expressed, it is clear that, the one who represents the interests of the society in the name of the State, understands that the issue under study does not constitute a matter that requires direct action on their behalf, since UBER does not compromise the general interest or involves constitutional public order which could therefore, be treated as a public service. --

That being said, if the case went for an offense committed within the framework of the Misdemeanors Act - for any of the grounds provided for in effect on the provision of a public service - the intervention of the same would result mandatory; it is the Prosecutor, on behalf of the police, that holds the State, who must ensure the safety and security of the alleged provision in violation. --- From this it is emphasized that it is a not a matter of impact on the public service of passengers, as stated on record by the Prosecutor. -- **VI.- ON THE LEGAL NATURE OF THE TRANSPORTATION SERVICE BY MEANS OF A WEB PLATFORM.** --- Having already determined that the commercial activity is lawful, that the same does not configure an infringement of the use of public space without authorization, and that the same cannot be incorporated as a taxi or fixed-fare taxi activity - that we have been repeating it is not an offense - the legal nature of the transportation service under analysis must then be clarified and if it requires some type of specific authorization.

- The Public Transport of regular passengers can be defined as a the collective transportation of passengers that the Administration organizes in order to meet the massive demand of transfer of its users. ---

In turn, Private Transport is defined by the National Civil and Commercial Code in Article 1280, as the one under which *"A part called carrier or transporter agrees to move people or objects from one place to another, and the other, called passenger or loader, agrees to pay a price or freight."* -------------------------------- There is no doubt that there is a difference between public transport, which is organized or granted under concession by the State in order to satisfy the general service of transportation in a massive and indeterminate manner, and private transport, which is linked to the one who drives a specific car and the passenger – determined or determinable - in order to be moved from one place to another in exchange for a price and is configured in a transport contract. -- Neither the National Civil and Commercial Code nor the specific regulation on Violations specify that every service of transportation is to be carried out in the suburbs of the city with prior authorization; but instead, a prior authorization is required for specific types of transportation (taxi, fixed-fare taxi, school transport) to function as such. ---------------- **VII.- INNOMINATE CONTRACT. RELATED CONTRACTS** ---

In cases like this one, both the transporter and the passenger are connected by means of an online application - UBER-.

This characteristic is not another type of distinction, it is not in the case of an indeterminate individual that, on the sidewalk, raises his or her arm in order to require transfer by means of a taxi (differentiated with particular colors, taximeter, among others) and/or a fixed-fare taxi service whose tender is indeterminate to the general public (fixed-fare taxi agency of access to the general public in personal form or over the phone); but of individuals whose data are recorded on the platform in order to be the passenger and/or carrier, respectively (making them determinable individuals prior to the acceptance of the transportation contract); and whose characteristics are evaluated by the passenger and carrier to consent or not to the contract - e.g.: amount of stars valued by other users and/or carriers, characteristics of the vehicle in which they will be transported, among others. ---

----- From what has been presented, I am convinced that what is being offered is a private transportation service; however, the use of a digital platform through an intermediate company generates a particularity, which is not provided for in the Civil and Commercial Code, which makes me understand it as an interconnection of legal acts described as a *sui generis* contractual network. The potential passenger, when downloading the app and entering their personal data, and upon requiring the trip, for each and every particular case, allows UBER to mediate in order to obtain a carrier who accepts the offer and carries out the transport service. -- The possible carrier on their part, at the time of registration and when submitting the required documents, such as a license and car insurance; agrees for UBER to connect with bidders of the transportation service at the time this bidder is connected to the app, in order to conclude the contract of the referred transportation contract between the parties. --- This company provides the supply and demand for transport, in order to mediate in the conclusion of a contract for private transport, without there being dependency or representation with any of the parties; and that through this service, the carrier is charged a percentage of 25% per trip. ---------------------

It can thus be said that, in practice, the passenger hires UBER, the carrier outsources to UBER, and finally - by requesting and accepting each trip - generates a transportation contract between passenger and carrier. ---

Thus, there are three linked and necessary contracts that emerge in order to fulfill the objective in common: transportation; a situation which, compliant to market and technology advances, has already been examined in the new National Civil and

Commercial Code in Article 1073 et seq.

From the attributes made in the Related Contracts in this legal text, it can be deduced that "This means that even when it comes to business that are apparently autonomous, all tend to or pursue a common result or unique business, that could not be achieved without the interaction of each one of these contracts. Temporary concurrency or unique instrumentation are not required."[1] ---

Court "M" of the National Civil Appeals Chamber, in its pronouncement on court record "Van Thienen, Guillermo Federico and other w/M.B. Desarrollos Inmobiliarios S.A. on damages and losses", file no. 109, the Civil Court no. 109, has expressed: *"It should be recalled that the issue of related contracts - as is the case of the establishment of a land trust, of adhesion and of transfer of the domain trust fund - and that are regulated in the new Civil and Commercial Code which will come into force in August of this year, is not a new matter in our laws and the question was reflected in the office of Committee No. 3 of the "XVII National Conference of Civil Law" carried out in Santa Fe in 1999, where it was said that "There will be related contracts for when conducting a unique business, a plurality of interlinked contracts are held between the same or different parties... ", adding that the relationship should be measured "...through an economic supracontractual purpose, legally verified in the subjective or objective cause, consent, objective or on the bases of the business"*[2]---

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[1] http://www.saij.gob.ar/docs-f/codigo-comentado/CCyC_TOMO_3_FINAL_completo_digital.pdf The Annotated Civil and Commercial Code - Page 495

[2] http://www.nuevocodigocivil.com/wp-content/uploads/2015/06/Sentencia-23.pdf

The importance of understanding it as a business network, lies in allowing the participants in such legal acts, the possibility of raising exceptions for breach or poor performance, including those actions that are part of a contract that is external to them, in accordance with the provisions of art. 1075 of the CCyCN; as well as the extension of responsibility (Art. 1758 CCyCN and 40 of Law 24240) and the regulation linked to consumer contracts.----------------

In addition, there is a particular feature in this triangulation: it is UBER who - in accordance with geographical area, demand and distance - defines the trip's value for every case. Does this then void the transportation contract? Of course not, this does not preclude the existence of the contract itself. There is nothing to prevent the parties, by reason of the autonomy of willingness that prevails, to have a third party the one to decide the actual price (Article 1006 of the Federal Civil and Commercial Code). ---------------------------------

In consideration of these premises, it is understood that a transportation service through the UBER app is a private transportation service that is generated through an innominate contract connecting the Uber Company, passengers, and carriers, whose regulation - in the face of lack of specific regulations – shall, in substitution, be the Transport Contract, in accordance with the interpretative rules of the National Civil and Commercial Code in Article 970.---

VIII.- CONCERNING RESPONSIBILITY. ---

Much has been discussed in regard to the safety guarantee that should prevail and guaranteed in terms of transporting people. ---

The Civil and Commercial Code itself on this aspect, adopts more and extensive responsibility in the case of Transportation Contracts; considering Article 1291 expresses that this extends to not only a breach of contract - typical situation of all private contracts - but also in regards to incidents involving the passenger and/or loss of their items; not being able to limit this obligation by decision of the parties from having the encoders aware that this would affect the security of the individuals, and thus, public order. --------------------------------------

Lastly, article 1758 of the National Civil and Commercial Code emphasizes that this liability extends not only to the driver but also to those who take advantage of it; thus resulting in accordance with the provisions of art. 40 of Law 24,240 and its amendments, which states that *"if the damage occurred to the consumer is a result of the defect of risk of the service or object provided, the producer, manufacturer, importer, distributor, supplier, seller and whoever has labeled that object or service, shall be the ones to respond. The carrier shall be liable for the damages caused to the object with reason or related to the service."* -------------------

Of all the foregoing, it is deduced that the owner of the car, the carrier, as well as the company UBER shall take action towards to consumer – passenger – without prejudice to the actions that might be repeated between them and/or exceptions. ---

IX.- CONCERNING NEW TECHNOLOGIES. ----------------------------------

In this case, we are dealing with a contractual type involving the use of new technologies, since it is through an app that is downloaded from a mobile phone and/or other digital device in which the consent and further formation of the transportation contract is produced. --

This mode of recruitment is incorporated in the "collaborative economy" framework considering it involves "an interaction between two or more persons, whether through digital media or not, that satisfies a real or potential need, to one or more persons.

It is formerly known as a barter-trade and that, thanks to digital platforms, a framework is established where users can interact with each other and/or with the same platform (...)The movement of collaborative consumption represents a defined cultural and economic change in consumption habits - by the migration of a scenario of individualized consumerism toward new models powered by peer-to-peer social networks and platforms"[3] ---------- For instance "Mercadolibre" where various bidders put up various products (goods such as clothing, shoes, furniture), which will be purchased at the price determined there - or to be agreed upon by the parties - for other users registered on the website and by which the company charges a commission percentage, disrupting the old method of acquisition in physical stores or premises; or, in the case of Glovo, Rappi, Pedidos Ya, through which the consumer can purchase food, pharmaceuticals, among others. --

Court I of the Chamber of Appeals on Disputes, Administrative and Tax Matters, in a judgment on June 22, 2018 in regards to a complaint filed by a user against Mercado Libre, "the judges Mariana Diaz, Fabiana H. Schafrik and Carlos F. Balbin considered that the platform fits under the Consumer Protection Act.

Diaz has quoted jurisprudence saying that Mercado Libre "intervenes - and therefore is liable - from the very moment in which, creating an image, it manages to attract for itself the trust of its clients", which "constitutes the primary source of its obligations" and also "of its profits". "Whichever argument is used, **it is not debatable that Mercado Libre is an intermediary that is part of a commercial chain",** said Diaz, based on the ruling of the National Chamber of Civil Matters, Chamber "K", in the proceedings "Claps, Enrique Martin and others c/ Mercado Libre S.A. on damages and losses."[4]. (Bolding added for emphasis) ---

All of these apps, as well as UBER, link buyers with sellers or service users through a digital system without permission or license required by the Government. -- This new special modality of IT contracting has already been incorporated in the new National Civil and Commercial Code, and is covered by our National Constitution in Article 14 in which the right to work and

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[3] https://www.fundacionaquae.org/wiki-aquae/innovacion/la-economia-colaborativa/

[4] https://www.perfil.com/noticias/sociedad/mercado-libre-debe-cumplir-con-la-ley-de-defensa-del-consumidor-e-indemizara-a-un-usuario.phtml

exercise all licit industry is guaranteed; and Article 19 of the Constitution emphasizes that *"No inhabitant of the Nation will be forced to do what the law does not mandate, nor will he or she be deprived of anything not prohibited by law."* ---

As has been previously described, the activity is considered to be legal in penal terms by the Nation's Supreme Court of Justice, the same service comprises a transportation service that is materialized through an Internet platform and has a supplementary regulation of application regulated by the National Civil and Commercial Code, without any other standard restricting or regulating this private activity in view of safety or public order.

---The absence of administrative regulation of the Government of the Autonomous City of Buenos Aires, or acknowledging that the same does not compromise the general interest of the society, as expressed by the Prosecutor in the present proceedings; cannot go unnoticed by this Court, nor understand, by analogy with another type of transport, the lack of authorization as a prohibition or limitation to exercise lawful business activity; a right guaranteed by the Magna Carta. ---

This, however, does not prevent the State from regulating its exercise, if relevant to a certain degree, in order to preserve public order and safety (Art. 28 and 42 CN). --

On the particular case of the use of the UBER app, the Special Rapporteur for Freedom of Expression, Edison Lanza, has prepared some recommendations in his 2017 Annual Report of the Inter-American Committee on Human Rights - Volume II - stating that Member States should: a. Refrain from applying to the Internet regulatory approaches developed for other means of communication - such as telephone, radio and television services - and *design an alternative policy framework specific to this means, taking into consideration the particular characteristics (...) e. Ensure that data processing and Internet traffic should not be subject to any discrimination based on factors such as devices, content, author, origin and/or destination of the material, service or app, in accordance with the principle of network neutrality.* --

The Special Rapporteur also mentions the importance of incorporating and regulating internal regulations, those particular aspects that have certain legal acts in the face of new technologies and of collaborative economy. -----------------------------------

A first step has been given in tax matters, Law No. 27,430 of Tax Reform encumbering digital services rendered by residents abroad when they are used in the country by end consumers and other subjects currently not included in the VAT in the import of services; built-in mechanism in order to avoid tax evasion and unfair competition between companies. --- This being said, a pioneer in the country on the matter of adequate regulations on transportation through digital platforms has been the province of Mendoza, that, through Law 9,086, creates the classification of the "Private Transport through Electronic Platforms" defined as the service that based on the development of technologies for mobile devices, using a global positioning system and independent platforms, allows to connect users who so require it, point-to-point, with drivers who offer this service by using the same app, to conclude a contract under the terms of Article 1280 et seq. of the National Civil and Commercial Code. ---

In the use of its prerogatives, in accordance with the constitutional principle already referred to, which empowers the State - under its police power and as the guarantor of security **- to adjust their exercise without eliminating the right to exercise the industry**; has prepared this Province in Art. 52 of the aforementioned Law*: "This costly transport of passengers is a private activity of public interest which its compliance shall be governed by the provisions of this section and by the provisions issued by the Enforcement Authority. The recipients of the service must comply with the payment of the charges and tax obligations determined by such regulation. In no case may this type of service affect the delivery of public services of passengers that this Law determines."* -------------------------------

In time, Regulatory Decree No. 1512 of September 13, 2018, which orders, among other obligations, Companies of Transportation Networks (ERT) to enroll in the Provincial Directorate of Transport, in the registry area (Art. 56); and for those who seek to provide private transportation services, these must apply for registration in the Companies of Transportation Networks (ERT) recorded as such, certify their payment of the corresponding fee for registration and oversight, the statutory documentation of the vehicle with which they intend to provide the service with, the documentation that proves the identity of the driver and National Driver's License, subclass D.1., as a minimum, enrollment in the Mendoza Revenue Agency (ATM), enrollment in AFIP, and purchase an automobile insurance required by Law No. 9024, with the maximum coverage limit for passenger transportation, in accordance with the provisions of the Nation's Superintendency of Insurance, or the authority that replace it in the future (Art. 57). ---

X.- AMENDMENT TO THE SYSTEM OF FINES FOR TRAFFIC OFFENDERS IN THE PUBLIC TRANSPORTATION OF PASSENGERS AND CARGO. INAPPLICABILITY IN THE CASE OF TRANSPORTATION SERVICES BY THE UBER PLATFORM. --

At the beginning of the month of November, the Law on Offenses has been amended, including in its clauses that "Taxi, fixed-fare taxi and school transportation, fantasy vehicles and others without authorization. The holder or responsible of a vehicle transporting passengers and that exercises this without authorization and/or permission to provide the service established by the regulations in force, is punishable with a fine of ten thousand (10,000) fixed units and is banned from driving seven (7) to thirty (30) days. ---

It is important to note that the law under analysis does not modify or incorporate rules or regulation of authorizations in the area, but that it modifies the sanction's quantification. -----
In light of the above, it can be discerned, in accordance to the manifestations expressed in the present, that such would be the case of the person performing a transportation service for which a prior authorization is required - fixed-fare taxi, taxi, school transportation - however, does not apply for the person who carries out a private service contract through a digital platform; a classification distinct from the one previously referred to. ----------------------
The State is the constitutional protector of the security of the citizens; but it must also guarantee the right to the exercise of a lawful industry and the free choice of the consumer. Within this regulatory framework, a regulatory legislation can be allocated that contributes to the general well-being, and must adapt to the challenges involving the use of new technologies in commercial and market activity. --

XI.- CONCLUSIONS. ---

That by virtue of the foregoing; I understand that the case under analysis is a lawful business activity which provides a private transportation service through an electronic platform, for the exercise of which at least three related contracts are required of a sui generis character, *thus* making it a private innominate contract. ---------------------------

Now, the character of being innominate does not matter whether the same is not authorized or regulated, because its interpretative rules and regulations arise from the National Civil and Commercial Code itself, mentioning in Article 970 that ***"these are governed in the following order, by: a) the willingness of the parties; b) the general rules on contracts and obligations; c) the uses and practices of venue; d) the provisions relating to the nominate contracts that are compatible and suited to its purpose" (in this case, the general standards on transportation, as well as the provisions set forth in transit matters).*** **-----------------------------------**

The foregoing does not in any way detract from the fact that pursuant to the rights granted by the Magna Carta itself in its article 42 - which compels the State to guarantee the right of consumers and users of goods and services, in the relationship of consumption, protection of security-; whose mandatory nature is reinforced in the provisions of Law 24.240 and amendments - Art. 6: ***The objects and services, (...), whose use of which may present a risk to the health or physical integrity of consumers or users, should be marketed observing the mechanisms, instructions and rules established or reasonable to ensure the safety of the same*** **- the State acknowledges that it is pertinent to regulate some aspects in particular of this type of contracting, in order to ensure that the service is provided with relevant protection and quality; as has been the case already referred to in the province of Mendoza. -----------------------------------**

As Stephen Hawking says, intelligence is the ability to adapt to changes; and we must update to the use of new technologies; adapting and regulating what is relevant to its safe use without undermining the right to commercial activity of the citizens; as well as the choice of transportation users. --

This is why I HEREBY RESOLVE: --

I. - TO ACQUIT Jonathan Facundo CORRALES National ID No. 38.031.042, from the other personal conditions appearing on record, in relation to the offense provided for and repressed in Art. 6.1.49 paragraph two, and 4.1.7 of Law 451 in understanding that the conduct developed becomes atypical in the framework of Law 451. I acknowledge that the same constitutes an innominate private transportation contract with related contracts, according to the considerations of fact and law above made. --------------------

II. - WITHOUT COSTS (Art. 33 and 55 inc. H) of Law 1217). -------------------

III. - Upon acceptance or signing of the foregoing, let notice be sent to the Registry of Misdemeanor Records for its registry and to the Administrative Controller of Misdemeanors No. 61 for their information. **Let it be archived.** -------------------------------------

With there being nothing further to record, at ------------- a.m./p.m., the act is adjourned, signed by the witnesses before me, IN WITNESS WHEREOF. ------------------

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I, Aurora Landman, hereby certify that the document, "***Corrales, Jonathan Facundo About 6.1.4. Driver's License Category*, Court of First Instance for Criminal Misdemeanors and Minor Violations, November 27, 2018**" is, to the best of my knowledge and belief, a true and accurate translation from Spanish into English.

Aurora Landman

Sworn to before me this
June 24, 2019

Signature, Notary Public

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NOTARY PUBLIC
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QUEENS COUNTY
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EXHIBIT C

JUZGADO DE 1RA INSTANCIA EN LO PENAL CONTRAVENCIONAL Y DE FALTAS N° 7

BELLINI MARCO, ALFREDO SOBRE 6.1.49 BIS - PRESTACION DE SERVICIO PUBLICO DE TAXIS SIN HABILITACION

Número: CAU 27617/2018-0 -

CUIJ: CAU J-01-00054609-3/2018-0

Actuación Nro: 12403345/2018

Ciudad de Buenos Aires, 28 de noviembre de 2018

Hora de inicio: 10:30 horas

"BELLINI MARCO, ALFREDO SOBRE 6.1.49 BIS - PRESTACION DE SERVICIO PUBLICO DE TAXIS SIN HABILITACION"

Causa nro. 27617/2018 Registro Interno: 1340/18-F

Tipo de audiencia: Audiencia de juicio.

Juez: Dr. Javier Alejandro Bujan, Titular del Juzgado de Primera Instancia PCyF nro. 7.

ES COPIA

Prosecretaria Coadyuvante: Natalia S. Frenkel

Imputado: Alfredo Bellini Marco D.N.I. 24.776.128

Defensor particular: Dr. Nicolas Castilla Sastre T° 78 F° 961 CPACF

Se deja constancia que la presente audiencia está siendo video-grabada.

Desarrollo de la Audiencia:

Juez: Da inicio a la audiencia de debate oral y público y advierte al encartado que estuviera atento a lo que iba a oír, ordenando que se diera integra lectura por Secretaría a las imputaciones contenidas en las siguientes actas de comprobación, que tramitarán ante la Unidad Administrativa de Faltas nro. 111 del Gobierno de la Ciudad de Buenos Aires, a saber: Acta de Comprobación nro. **N° I00087868** (fs. 05) según el cual el día 16m de julio de 2018 a las 19:29 horas en Av. Córdoba 700, se habría constatado la falta consistente en *"7550 Explotar sin autorización para prestar el servicio"*. -----------
El Juez pregunta al encartado si ha comprendido los hechos y las imputaciones contenidas en las actas y que se reflejan en la resolución

condenatoria de fecha 27 de julio de 2018, así le inquirió a lo que el imputado respondió que sí. --

Posteriormente el Juez le recuerda que como principio de garantía y amparado en la Constitución Nacional, el Código Procesal Penal de la Ciudad de Buenos Aires tiene derecho a negarse a declarar sin que ello cause presunción en su contra, y que su abstención no suspenderá el presente debate oral y público, y le pregunta si comprendió lo antedicho, a lo que el imputado manifestó que sí. ---

Igualmente S.Sa. le recuerda que durante el curso del debate podrá formular todas las aclaraciones que considere oportunas, siempre que se refieran a la Defensa. ---

S.sa. hace saber al encartado que la presente instancia en el proceso de faltas se constituye como primera instancia judicial y que lo sucedido en sede administrativa no compele ni condiciona la actuación del Tribunal, el cual solamente se encuentra limitado por la petición fiscal y que por ende la sanción impuesta puede ser absuelta y/o dispuesta en más o menos respecto de la administrativa, puesto que el principio de la *reformatio in pejus* solo funciona en materia de impedimento dentro de la propia instancia administrativa y/o en la judicial respecto de la primera y segunda instancia.-

El encartado es inquirido sobre si entiende y manifiesta que sí. ----------------

Cuestiones preliminares.--

Defensor Particular: No tengo cuestiones preliminares, ratifico los argumentos en el descargo administrativo; como el escrito de defensa interpuesto.--

Juez: Tiene que reproducirlo en esta audiencia.--------------------------------------

Defensor Particular: se va a reproducir tratando de ordenar como medida preliminar voy a sostener el pedido de absolución de mi cliente por cuestiones de forma y cuestiones de fondo. ---

Por forma sostengo la nulidad del acta por el grave defecto formal que padece la misma y; eventualmente, independientemente de la validez o no del acta como instrumento la sanción impuesta en el acta es inexistente. Por eso se solicita la absolución por inexistencia de la infracción.-------------------

Si se entiende que cumple la validez en el marco del art. 3 y 5 de la Ley 1217, igual sostengo que la infracción es inexistente.-------------------------------------

Hay un nuevo sistema de multas efectuadas por teléfono, que se plasman en un acta de infracción N° I00087868 y después tiene un formulario que difiere en su número. El acta la reconozco como la de fs.5, no así la de fs. 4, hay un número de acta que difiere del acta de comprobación.---------------------------

JUZGADO DE 1RA INSTANCIA EN LO PENAL CONTRAVENCIONAL Y DE FALTAS N° 7

BELLINI MARCO, ALFREDO SOBRE 6.1.49 BIS - PRESTACION DE SERVICIO PUBLICO DE TAXIS SIN HABILITACION

Número: CAU 27617/2018-0 -

CUIJ: CAU J-01-00054609-3/2018-0

Actuación Nro: 12403345/2018

El acta obrante a fs. 5 es nula al no poseer firma, posee los datos del agente Gisela Robledo, es un defecto propio del sistema que no puede ser imputable a mi asistido, tampoco hay firma digital, viola el art. 3 inc. "G" de la ley 1217.---

Motivo por el cual viola el art. 5, porque deben darse los requisitos taxativos del artículo 3.---

Viola el inciso b del art. 3 de la Ley 1217, sanción genérica. Más allá que mi cliente no realiza ni remis, ni taxi ni transporte escolar, no sé la calificación de conducta reprochable. Que hizo para que tenga esa infracción, y cual es la normativa de la que me tengo que defender.--

La explotación sin autorización es por remis, o transportes escolar o taxis; por lo cual atacaré los tres.--

En observaciones refiere "operativo conjunto con gort conductor al momento de ser detenido no contaba con habilitación correspondiente transportaba al pasajero William Paz DNI 5015106445". Refiere entonces a habilitación correspondiente. Ahora me pregunto de que? de remis, de transporte o de taxi? No lo sé, porque no lo dice, por eso se viola el art. 3 de la Ley 1217.-----

En relación al DNI 5015106445 Se tendría que librar oficio, que persona tiene ese tipo de número de DNI?, dio cualquier número. Esto viola el inciso f del art 3 de la Ley 1217, cuando Gisela Robledo tiene la obligación de incorporar testigos o pasajeros, debería haber cotejado si existe y ver el documento. -----

Declara haber solicitado servicio por UBER violando la ley 451 art. 4.1.7, volvemos al castigo genérico, y porque quiere aplicar tratando de dar estricto cumplimiento al art. C de la ley 1217. Habla de habilitación de remis, transportes escolares y de transporte de taxi. El código de Habilitaciones también habla de remis, escolares y taxi; motivo por el cual para no ser confuso me detengo en estos argumentos en cuanto a la forma del acta.--------

Terminando en la aclaración de las observaciones, no se encuadra ni califica la conducta, en ningún momento refiere qué habilitación se le exigió, y cual mi cliente refirió no poseer. No sabemos si fue detenido por no tener habilitación para remis, escolares o taxi; si eventualmente hubiese realizado un transporte comercial sin habilitación, le deberían haber retenido la documentación que no se la retuvieron; si el auto.--------------------------------

Por eso ataco el contenido del acta de comprobación.----------------------------

Este sistema digital ya lo advirtieron en sede administrativa efectuando el archivo de otras actas por defecto formal, porque los controladores advertían que no había firma; hasta que advirtieron que existe en el sistema SAIJ un formulario anexo donde refiere la firma digital de Gisella Mariel Robledo.----

Incorporan a los efectos de subsanar la falta de firma digital, es un formulario (obrante a fs. 4) donde si surge una firma digital. La firma digital quieren subsanarla, entendiendo que se da cumplimiento al art. 9 y 10 de la Ley 1217. La firma digital mencionada son para faltas cometidas en la vía pública, las fotomultas, infracciones. En este caso es una cuestión comercial por no poseer habilitación.--

El inciso c dice, sello, firma y cargo, en cuanto a la firma digital sólo dice el nombre; el número de acta es referencial? No. La de fs. 5 es otra. Todos los demás datos si coinciden, la pregunta es, que tengo que tomar como acta de infracción? La obrante a fs. 4 o la de fs. 5? Entiendo que corresponde que tome como acta de comprobación la de fs. 5 y solicitando la nulidad por defecto formal de la misma.--

Sr. Juez: Estoy en condiciones de resolver la primera incidencia.--------------

No comparto ninguno de los argumentos formulados por la defensa, tengo dicho en reiterados precedentes que tienen naturaleza jurídica de *notitia criminis*, anoticiamiento del hecho; brindada en el acta las circunstancias de hecho, modo y lugar; siendo que con eso es suficiente para el ejercicio de la defensa. No se le puede exigir que califique legalmente el acta porque no es su función, tiene que decir cuál es el hecho que se le enrostra.-----------------

Dado que es un anoticiamiento la interpretación de este tribunal que coincida con el tribunal es que no son requisitos *ad solemnitatem* sino que las mismas son *ad probationem*, con que se puedan identificar los elementos que no impidan el ejercicio de la defensa, el acta es válida.-----------------------------

En relación a la firma digital, esto ha sido objeto de un criterio general de actuación de la Subsecretaria de Justicia respecto de los controladores administrativos de gobierno, me sorprende que esta disposición generaba la invalidez del acta.---

El acta puede estar acompañada, tal es el caso por ejemplo del acta circunstanciada que se acompaña al acta de comprobación; el acta de fs. 4 puede integrarse al acta de fs. 5 y no implica que sean hechos distintos por tener distinta numeración.--

Cuestionar la firma digital, seria estar en contra de las disposiciones de gobierno en relación a la firma digital. Hasta de hecho, los decretos y resoluciones del Poder Ejecutivo se firman con firma digital, sólo basta que la firma permita identificar al funcionario; sólo él tiene ese token o clave habilitada; el contexto de firma digital.---

Las actas son absolutamente válidas, se está defendiendo el ciudadano de no tener habilitación para el transporte de pasajeros, esa habilitación en los términos del art. 4.1.,7 y concordantes. Más allá que no lo diga el acta de comprobación se consolida con el resto de la actividad administrativa, incluso la efectuada por el controlador.--

<u>RESUELVO:</u> NO HACER LUGAR en relación a la invalidez del acta por su contenido formal y continuaremos con la parte material.-------------------------

S.Sa. requiere a la Defensa Particular si habrá de producir prueba alguna.-----

Defensor Particular: No produciré prueba alguna, es una cuestión de pleno derecho.--

Sr. Juez: concede la palabra al Defensor Particular a efectos de alegar.--------

Defensor Particular: Como ya dije en escritos referenciados, el no tener habilitación es una recalificación del controlador administrativo de faltas, porque el acta no debería dar lugar a interpretación. Mi cliente fue sancionada conforme acta de infracción Ley 451 art 4.1.7 de la simple lectura surge que lo que se sanciona es no poseer habilitación para remis, transportes escolares y taxis.--

Mi cliente no realiza ni el servicio de remis, ni de escolares ni taxi, este inexistente pasajero William Paz de DNI 5015106445 refiere haber solicitado el servicio através de la aplicación UBER, y esto es correcto.---------------------

La aplicación denominada "UBER" es un nexo por el cual un pasajero se contacta directamente con mi cliente, en este caso Bellini Marco -quien también tiene la aplicación-, este William Paz no llama por teléfono a una remisería, no pide la asignación del viaje, no es la remisería quien le dice "lleva a William a tal destino", contacta directamente a mi cliente; y mi cliente puede aceptar o no el viaje. Cuando acepta se establece un contrato entre partes, es un contrato privado de pasajeros, de transporte.----------------

Está claramente descripto en el art. 1280 del CCyCN, en 2015 cuando se unifica código civil y comercial se incorpora una nueva figura de Transporte Privado de Transporte.--

Refiere el art. 1280 "*Hay contrato de transporte cuando una parte llamada transportista o porteador se obliga a trasladar personas o cosas de un lugar a otro, y la otra, llamada pasajero o cargador, se obliga a pagar un precio o flete*", y el Artículo 1281 dispone que las normas se aplican ante la ausencia de leyes especiales, no hay Ley en CABA que regula el transporte por aplicación de teléfonos móviles.--

Inicialmente esta aplicación, en CABA trató de tildarla de ilegal, el transporte privado de transporte es lícita en la República Argentina. Este argumento de la actividad ilícita se vio truncada cuando en Mendoza se "legalizo" UBER, que es un error fáctico y jurídico. En la Ley N° 9048 reglamentó el contrato de transporte privado, en la provincia una actividad puede ser lícita e ilícita en el país? Mendoza tomo la iniciativa de reglamentar una actividad lícita en el ámbito de la República Argentina.------

Con esa reglamentación empezaron a existir propagandas en Canal 13, Diario la Nación, cualquier medio de comunicación. Hoy es sponsor de la AFA, están promocionando actividad lícita o están haciendo apología del delito?---

Esta actividad lícita no está reglamentada, el Código de Habilitaciones aclara taxativamente y refiere cuáles son las obligaciones y habilitaciones para remis, taxi y transportes escolares; nada dice sobre lo que debería ser para contrato privado de transporte, en CABA no está reglamentado.---------------

Mi cliente no está reglamentado, en algún momento lo googleo, y yo digo la no reglamentación es prohibitivo para que pueda hacer lo que dice el art. 19 de la Carta Magna, que todo lo que no está prohibido está permitido".---------

Si lo que no está prohibido, está permitido, si en CABA no está Reglamentado, no está prohibido, por el cual ejercicio la actividad.-----------

Podría haber sido distinta la estrategia, no hay modo de probar que el agente haya probado que estaba con la aplicación, podría haber dicho que no había forma de acreditar que el cliente no tenía aplicación; no le puede revisar el teléfono.---

No hay nada que ocultar estabas realizando actividad lícita por arts. 1280 y 1281 del C.C.y C.N aplica ante la falta de reglamentación en CABA.-----------

Asimismo hay un precedente en el Fallo Quevedo de este mismo fuero en la causa 11465/16 resuelto por el Juzgado 31 mediante sentencia firme del 3/2/2017 que determinó que la actividad de una persona que hace UBER es distinta al remis, y que no se le puede exigir la misma.--------------------------

No se puede aplicar a mi cliente analógicamente la actividad de remis, cuando trabaja para si, es monotributista, no trabaja para una remisería, me pregunto, como podemos hacer para que en la calle no tenga problemas? Como no hay reglamentación, le dije, podes ser hipócrita mentir ir al gobierno y pedir una habilitación para remis, pero teniendo que mentir porque no es esa realmente la actividad que se realiza. Para suplir esta omisión tenés que acomodarte a la reglamentación vigente, que es más cercana que es la de remis. Que es lo que pasa, cuando llega al Gobierno le van a preguntar, o solicitar los datos y la habilitación de la remisería en la que trabaja? A lo que mi cliente respondería: no trabajo en una remisería, trabajo para mi. Y la respuesta a ese respecto es; si no trabaja en una remisería, no puede sacar la habilitación.--

Aun siendo hipócrita y querer sacar habilitación que no le corresponde, le merece que tenga una sanción.--

Por lo expuesto, solicito a S.Sa, por inexistencia de la falta enrostrada, la absolución de mi cliente. ---

Sr. Juez: Concede la palabra al Sr. Bellini, a fin de hacer uso de entenderlo pertinente, de su derecho a la última palabra.--------------------------------------

Sr. Bellini: No haré uso de la palabra, comparto lo dicho por mi abogado.----

Sr. Juez: Me encuentro en condiciones de resolver.-----------------------------

COPIA

Hay varias cuestiones, a criterio del juzgado las cuestiones extrínsecas ya se encuentran validadas, me voy a expedir sobre las cuestiones materiales, en tanto ya me he expedido en relación a la validez extrínseca del acta de comprobación. --

Por lo cual, en relación al contenido material del acta de infracción, sostengo que: --------------

I.- APLICACIÓN PLATAFORMA INFORMÁTICA: UBER-----------------------------------

Que, en primer término a fin de resolver las presentes actuaciones se torna de relevancia el análisis del tipo de actividad realizada por el Sr. Bellini Marco Alfredo, quien refiere que se encontraba transportando a un pasajero en virtud de contrato privado con la plataforma UBER.---

-

UBER es una empresa que, por medio de una aplicación de teléfono celular o tableta, enlaza a particulares (previamente registrados) – que deseen utilizar su vehículo para dar transporte – con los clientes potenciales (quienes también deben registrarse y descargar la aplicación). ---

Respecto del procedimiento del mismo; el/la pasajero/a, para solicitar un viaje, debe indicar el origen y el destino y; una vez solicitado, se puede consultar la información del mismo y del conductor; así como el tiempo en que tardará en llegar el automóvil, el tipo de vehículo.-

Para ser transportista, la empresa pide que el conductor se inscriba y acompañe licencia de conducir profesional, póliza de seguro del auto y cédula del vehículo; y mientras el mismo tenga encendida la aplicación, se identifica permanentemente su ubicación. ----------------------

II.- UBER: ACTIVIDAD COMERCIAL LÍCITA. --

Ahora bien, ya se ha expedido la **Corte Suprema de Justicia de la Nación,** rechazando un recurso de queja interpuesto por el Sindicato de Peones de Taxi, **ratificándose así la legalidad de la empresa UBER**, considerada en las instancias previas **como una actividad comercial lícita.** [1]---

La Cámara del Crimen confirmó la decisión del Juez Zelaya y determinó que "*la prestación del servicio de transporte de pasajeros sin contar con habilitación oficial no configura una conducta tipificada por la legislación punitiva. No se advierte cuál sería el delito concreto al que se habría instigado ni los delitos indeterminados que tendría por objeto la supuesta asociación ilícita*".------------

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[1] CSJN "Recurso de hecho deducido por el Sindicato de Peones de Taxis de la Capital Federal en la causa Uber y otros s/ incidente de recurso extraordinario" de fecha 14 de agosto de 2018

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CSJN "Recurso de hecho deducido por el Sindicato de Peones de Taxis de la Capital Federal en la causa Uber y otros s/ incidente de recurso extraordinario" de fecha 14 de agosto de 2018

,

En dicha causa, el fiscal "descartó la hipótesis de la instigación delictiva o de la asociación ilícita, al puntualizar que se trata del desarrollo de una actividad comercial lícita". "(…) busca desarrollar una actividad comercial lícita bajo un modo de asociación con fines legítimos". --

Se resuelve de esta forma, que la actividad descripta en las presentes actuaciones, no configuran un ilícito penal y se trata de una actividad comercial lícita. ----------------------------

III.- USO LUCRATIVO DEL ESPACIO PÚBLICO SIN AUTORIZACIÓN - IMPROCEDENCIA DE LA CONTRAVENCIÓN--

La Justicia Penal, Contravencional y de Faltas de la Ciudad Autónoma de Buenos Aires, tuvo oportunidad de pronunciarse en el Incidente 4790/2016 en los autos caratulados "Nicolás Sajoux s/ infr. al Art. 86 C.C." (anteriormente artículo 83 C.C.)--------------------------------------

En dichas actuaciones, la Cámara de Apelaciones en lo Penal, Contravencional y de Faltas Sala III, resolvió el planteo formulado por la defensa en relación con la imputación de la contravención dispuesta en el art. 83 del CC, relativa a la realización de actividades lucrativas en el espacio público. ---

Sobre el particular, la Dra. Paz afirmó que *" (…) el art. 86 no hace referencia a taxis y remises sino que, como fuera expuesto supra, reprime las actividades lucrativas en el espacio público no autorizadas por la administración". (…)*---

Refiere en su voto El Dr. Delgado que *"Esta norma se incorporó al Código Contravencional con la clara finalidad de proteger el espacio público de la proliferación de ferias clandestinas o de puestos no autorizados de venta callejera (…) No tiene por objeto la regulación del tránsito, ni el transporte de personas. ".*---

No usa indebidamente el espacio público (…) realizando una actividad lucrativa no autorizada, quien circula conduciendo un vehículo por las calles y avenidas libradas al tránsito automotor; con o sin acompañantes, sean estos conocidos del conductor o pasajeros que con él contrataron un transporte.

La circulación automotor, en tales casos, que es la actividad desarrollada por el conductor del vehículo sí está autorizada en tanto tránsito automotor, es decir, en tanto uso admitido del espacio público. Está permitido que cualquier conductor transite con su vehículo particular o el que le ha sido encomendado por las calles y avenidas libradas al uso automotor con o sin pasajeros. ***Si algunos conductores lo hacen prestando el servicio público de taxi o de remises, deberán hacerlo con la habilitación y licencias respectivas. Pero de no hacerlo, no estarán usando ilegalmente el espacio público sino infringiendo las normas que impiden tales actividades sin licencia o habilitación***.--------

IV.- SOBRE LA FALTA REPROCHADA.

Que se le reprocha en las presentes, la sanción prevista por el art. 6.1.49 segundo párrafo de la Ley 451, que expresa "Requisitos de los vehículos de transporte de Carga y de Pasajeros": *El/la titular y/o responsable de un vehículo de transporte de carga y/o de pasajeros, que no posea habilitación para prestar el servicio, es sancionado/a con multa de dos mil (2.000) unidades fijas."* Citándose a su vez, en las Observaciones del Acta de Comprobación N° I00087868, la falta estipulada en el Artículo 4.1.7 Ley 451, del cual se desprende que : *" El/la titular o responsable de un servicio de taxis, de transporte de escolares, o de remises que lo explote sin la autorización para prestar el servicio establecida por la normativa vigente, es sancionado/a con multa de diez mil (10.000) unidades fijas, y la inmovilización del vehículo"*.---

Corresponde analizar entonces, si la actividad esgrimida corresponde a alguno de los servicios de transporte cuya autorización establece el Gobierno de la Ciudad Autónoma, a saber: ---

1.- Servicio de Taxi: --

Que, en virtud de lo expuesto de conformidad a la definición expresada en el art. 12.2.1 de la Ley 2148, el servicio de taxi es "Servicio de transporte público de personas, no colectivo, en automóviles de alquiler con taxímetro de hasta cuatro (4) pasajeros por vehículo, prestado en un vehículo y por un conductor debidamente habilitados por la Autoridad de Aplicación".--- Atento que el servicio brindado no fue efectuado por auto con habilitación de taxi, y que el mismo no pudiera haberse confundido con dicho tipo de servicio por haberse prestado en auto sin tarifa estipulada por taxímetro-conforme los lineamientos del Gobierno de la Ciudad-, ni estar pintando por los colores amarillo y negro que pudieran generar confusión en relación a que se trataba del mismo, no se encontraba en las calles o avenidas en búsqueda de pasajeros; es que debe despejarse con claridad que el servicio brindado no era el de taxi, por lo cual habrá de descartarse el requerimiento de habilitación en dicho aspecto.-------------

2.- Servicio de Remis: --

Este servicio se encuentra definido en el Código de Habilitaciones, en el capítulo 8.4. en el que se prevé el Servicio de alquiler de Automóviles Particulares con conductor (remises): 8.4.1 "*Considérase agencia de remises aquella que presta el servicio de transporte de personas en automóviles de categoría particular, con conductor, detentando el pasajero el uso exclusivo del vehículo, mediante una retribución en dinero pactada entre prestador y prestatario.*", cuya actividad se encuentra regulada por Decreto N° 167/1998, Resolución S.S. Tr. N° 28/010 que creó el Registro Único del Servicio de Alquiler de Automóviles Particulares con Conductor de Remises. --

El Código de Tránsito y Transporte de la Ciudad Autónoma de Buenos Aires, en el acápite de "Definiciones Generales" determina al remis como aquel "*Automóvil de alquiler no sujeto a itinerario predeterminado, con tarifa prefijada para el recorrido total, usado por ocupación total del vehículo, que no toma o deja pasajeros con boletos, billetes o pagos individuales*".-------------------------

De la descripción expuesta, puede desprenderse que el servicio de remis se ofrece a persona indeterminada, cualquiera que llame o se apersone a la agencia, podrá utilizar libremente el servicio de transporte en forma individual, a cambio del precio que se determina con la empresa de remis. --

La diferencia con el servicio de transporte por intermedio de UBER, se desprende en tanto la misma no es ya a persona indeterminada sino determinable, por cuanto sólo podrá ser parte de la operación contractual aquel/la usuario/a que haya descargado la aplicación, registrado y cargado sus datos personales en la base de la plataforma de UBER para utilizar el mismo. --

Se destaca así que en la causa N° 11465/2016 caratulada "Quevedo, Cristian Damián s/ Infracción artículo 6.1.52 de la Ley 451", en oportunidad de alegar sobre un acta de comprobación por licencia de remis vencida, el Fiscal Villalba Diaz refirió que "*se le imputa tener una licencia de remis vencida pero que por los dichos del presunto infractor no se trató de una licencia vencida sino de un vehículo cuya tarjeta de identificación tenía destino remis, pero (...) el mismo encartado explicó y probó <u>que estaba ejerciendo una actividad distinta</u>, que se desarrolla por* *una plataforma UBER. (…) la presente imputación fue por una actividad distinta a la que estaba desarrollando y la conducta no se le podrá imputar. Que solo por eso debe ser absuelto (…)"*-. --------

La Jueza interviniente, Dra. Susana Beatriz Parada, en relación al acta de infracción relativa a la licencia de remis vencida, expresó que *"en realidad no se ha descripto la acción como dice el inciso b del art. 3 porque no se trataba que el Sr. Quevedo estuviera conduciendo un automotor con una licencia de remis vencida sino mediante la aplicación de otro sistema, el vehículo no funcionaba como remis (…)* .---

Con los extremos expuestos, puede demostrarse así que la actividad descripta por el Sr. Bellini – actividad de transporte por intermedio de la aplicación UBER- no se encuentra entra aquellas en virtud de la cual se le requiere al servicio de remis habilitación para prestar el servicio, debiendo descartarse entonces la utilización de dicha figura. ------------------------------

V.- FALTA DE PERTINENCIA DE INTERVENCIÓN FISCAL.------------------------------------

Asimismo, no puede dejar de resaltarse que el Sr. Fiscal Coordinador, Dr. Gonzalo VIÑA, a fs. 39 de las presentes actuaciones, expresa que "(…) **tampoco se advierte que se encuentre comprometido el interés general de la sociedad o esté directamente involucrado el orden público constitucional (art. 17, incs. 1, 2 y 5 LOMP) (…) estimo que no resulta pertinente la intervención del Ministerio Público Fiscal" (sic)**.---

En virtud de las manifestaciones vertidas, claramente se desprende que, quien representa los intereses de la sociedad en nombre del Estado; entiende que el tema traído a estudio, no constituye temática que requiera acción directa de su parte, ya que UBER no compromete el interés general ni involucra el orden público constitucional por lo que mal podría ser tratado como un servicio público. ---

Ahora bien, si el caso fuera por una infracción cometida en el marco de la Ley de Faltas -por alguna de las causales previstas en afectación a la prestación de servicio público-, la intervención del mismo devendría obligatoria; en tanto es el Fiscal en representación del poder de policía que detenta el Estado, quien debe velar por la salvaguarda y seguridad de la supuesta prestación en infracción. ---

De ello se desprende que no se trata en autos, cabe resaltar, por lo manifestado por el Sr. Fiscal, de una afectación a un servicio público de pasajeros.---

VI.- DE LA NATURALEZA JURÍDICA DEL SERVICIO DE TRANSPORTE POR MEDIO DE PLATAFORMA WEB.---

Habiéndose determinado ya que la actividad comercial es lícita, que la misma no configura una contravención por utilización de espacio público sin autorización y que la misma no puede incorporarse como actividad de taxi o remis – que ya venimos diciendo no es una falta-; debe entonces dilucidarse la naturaleza jurídica del servicio de transporte bajo análisis y si la misma requiere de algún tipo de habilitación particular. ---------------------------------------

Se entiende al Transporte Público de pasajeros regular, como el transporte colectivo de pasajeros que la Administración organiza con el objeto de satisfacer las demandas masivas de traslado de sus usuarios/as. ---

Por su parte, el Transporte Privado, es definido por el Código Civil y Comercial de la Nación, en su artículo 1280, como aquel en virtud del cual *"una parte llamada transportista o porteador se obliga a trasladar personas o cosas de un lugar a otro, y la otra, llamada pasajero o cargador, se obliga a pagar un precio o flete"*.--

No cabe duda alguna así que, la diferencia del transporte público, organizado o concesionado por el Estado a fin de satisfacer el servicio general de transporte en forma masiva e indeterminada; del transporte privado en virtud del cual se vincula a quien conduce un auto particular y el pasajero - determinados o determinables-, a fin de ser traslado de un lugar a otro a cambio de un precio; se configura en un contrato de transporte.-

Ni el Código Civil y Comercial de la Nación, ni la regulación específica en materia de Faltas; especifican que todo servicio de transporte deba efectuarse en el ejido de la Ciudad con habilitación previa; sino por el contrario, a ciertos tipos de transporte (taxi, remises, transporte escolar) se les requiere particularmente una habilitación previa para funcionar como tal.--

VII.- CONTRATO INNOMINADO. CONTRATOS CONEXOS.--------------------------------

En casos como el presente, tanto el/la transportista como el/la pasajero/a, se conectan por intermedio de una aplicación electrónica- UBER-. Esta característica no es un distingo más, no se trata en el caso de una persona indeterminada que en la acera levanta su brazo a fin de requerir el traslado por intermedio de un taxi (diferenciado con colores particulares, taxímetro, entre otros) y/o de un servicio de remís cuya oferta es indeterminada al público en general (remisería de acceso al público en general en forma personal o telefónicamente); sino de personas particulares cuyos datos son registrados en la plataforma a fin de poder ser pasajero/a y/o transportista, respectivamente (lo que torna a los mismos determinables en forma previa a la aceptación del contrato de transporte); y cuyas características son valuadas por el/la pasajero/a y el/la transportista para consentir o no el contrato – vgr. cantidad de estrellas valuadas por otros/as usuarios/as y/o transportistas, características del vehículo en el cual será transportado, entre otros. --

Lo hasta aquí expuesto, me convence de entender que se trata de un servicio de transporte privado; ahora bien la utilización de una plataforma digital por intermedio de una empresa intermediaria, genera una particularidad, no prevista en el Código Civil y Comercial, lo que me hace entender a la interconexión de actos jurídicos descripta en una red contractual *sui generis*. --

El/la posible pasajero/a, al descargar la aplicación y cargar sus datos personales, y al requerir el viaje para cada caso concreto permite a UBER mediar a fin de obtener un transportista que acepte la oferta y concluya el transporte. --

El/la posible transportista por su parte, al momento de registrarse y presentar la documentación requerida tales como licencia, seguro del auto, acepta que UBER lo/a conecte con oferentes del servicio de transporte en el momento que el mismo se encuentre conectado a la aplicación; a fin de la conclusión del contrato de transporte referido entre las partes. -----

Esta empresa acerca así oferta y demanda de transporte, a fin de mediar en la conclusión de un contrato de transporte privado, sin tener relación de dependencia o representación con ninguna de las partes; por cuyo servicio cobra al transportista un porcentual del 25% por viaje.---

Puede decirse entonces que, en la práctica, el/la pasajero/a contrata con UBER, el transportista contrata con UBER, y por último -al requerirse y aceptar cada viaje- se genera un contrato de transporte entre pasajero/a y transportista. ---

Se vislumbra así, conexidad entre tres contratos necesarios a fin de cumplirse el objeto común: el transporte; situación que, conforme avances del mercado y tecnología ya ha sido receptada en el nuevo Código Civil y Comercial de la Nación en el artículo 1073 y siguientes.

De la caracterización efectuada a los Contratos Conexos en dicho texto legal, se puede desprender que *"Esto significa que aun cuando se trata de negocios aparentemente autónomos, todos tienden o procuran el logro de un resultado común o negocio único, que no se podría alcanzar sin la interacción de cada uno de dichos contratos. No se exige simultaneidad temporal ni instrumentación única."*[2]---

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[2] http://www.saij.gob.ar/docs-f/codigo-comentado/CCyC_TOMO_3_FINAL_completo_digital.pdf. Código Civil y Comercial Comentado - Página 495

La Sala "M" de la Cámara Nacional de Apelaciones en lo Civil, en su pronunciamiento en los autos "Van Thienen, Guillermo Federico y otro c/M.B. Desarrollos Inmobiliarios S.A. s/daños y perjuicios", expediente n°109, del Juzgado Civil n°109, ha expresado: "*Cabe recordar que el tema de los contratos conexos -como son los de constitución del fideicomiso inmobiliario, de adhesión y de transferencia del dominio fiduciario- y que se encuentran regulados en el nuevo Código Civil y Comercial que entrará a regir en agosto de este año, no es nuevo en nuestro derecho y la cuestión quedó reflejada en el despacho de la Comisión n° 3 de las "XVII Jornadas Nacionales de Derecho Civil" realizadas en Santa Fe en 1999, en donde se dijo que "Habrá contratos conexos cuando para la realización de un negocio único se celebran, entre las mismas partes o partes diferentes, una pluralidad de contratos vinculados entre sí...", agregando que la vinculación debía medirse "...a través de una finalidad económica supracontractual, verificada jurídicamente en la causa subjetiva u objetiva, en el consentimiento, en el objeto o en las bases del negocio"*[3] ------------------------

La importancia de entenderla como una red negocial, radica en brindar a los/as actores de dichos actos jurídicos, la posibilidad de oponer excepciones por incumplimiento o cumplimiento defectuoso, incluso de aquellas acciones que sean de un contrato que les es ajeno, de conformidad a lo dispuesto en el art. 1075 del CCyCN; así como la extensión en el ámbito de responsabilidad´(Art. 1758 CCyCN y 40 Ley 24240) y la normativa vinculada a contratos de consumo. --

Asimismo, en esta triangulación, hay una característica muy particular: es UBER quien -conforme zona geográfica, demanda y distancia- define en cada caso el valor de viaje. Convierte esto al contrato de transporte en nulo? Pues claramente no, esto no es óbice a la existencia del contrato en sí mismo. Nada obsta a que las partes, en razón de la autonomía de

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http://www.saij.gob.ar/docs-f/codigo-comentado/CCyC_TOMO_3_FINAL_completo_digital.pdf. Código Civil y Comercial Comentado - Página 495

[3] http://www.nuevocodigocivil.com/wp-content/uploads/2015/06/Sentencia-23.pdf

http://www.nuevocodigocivil.com/wp-content/uploads/2015/06/Sentencia-23.pdf

la voluntad que les impera, decidan que sea un tercero quien determine el precio cierto (artículo 1006 Código Civil y Comercial de la Nación). ---

En virtud de lo expresado, se entiende que el servicio de transporte por medio de la aplicación UBER, es un servicio de transporte privado; que se genera por intermedio de un contrato innominado en el que se conecta a la Empresa Uber, el/la/los/as pasajeros/as y el/la/los/as transportistas; cuya regulación – ante falta de normativa específica – será supletoriamente la relativa a Contrato de Transporte, conforme las reglas interpretativas del propio Código Civil y Comercial de la Nación en su artículo 970. -------------------------------------

VIII.- SOBRE LA RESPONSABILIDAD. --

Mucho se ha discutido en relación a la garantía de seguridad que debe primar y garantizarse en relación al transporte de personas. ---

Sobre el particular, el propio Código Civil y Comercial, recepta mayor y extensiva responsabilidad para el caso de Contratos de Transporte; atento que dispone en su artículo 1291 que la misma se extienda no sólo al incumplimiento del contrato –situación típica de todo contrato privado-, sino también respecto de siniestros que afecten a la persona del pasajero/a y/o pérdida de sus cosas; no pudiendo limitarse esta obligación por decisión de las partes por entender los codificadores que se afectaría la seguridad de las personas, y con ello el orden público. ---

Por último, destaca el artículo 1758 del Código Civil y Comercial de la Nación que esta responsabilidad, es extensiva no sólo al transportista sino también, a quien obtiene provecho de ella; resultando así en concordancia con lo dispuesto en el art. 40 de la Ley 24.240 y sus modificatorias, el cual establece que "*si el daño al consumidor resulta del vicio o riesgo de la cosa o de la prestación del servicio, responderán el productor, el fabricante, el importador, el distribuidor, el proveedor, el vendedor y quien haya puesto su marca en la cosa o servicio. El transportista responderá por los daños ocasionados a la cosa con motivo o en ocasión del servicio*". ----------------------------------

De todo lo expuesto se desprende que, frente al consumidor – pasajero/a – responderían tanto el dueño del auto, el transportista como la empresa UBER; sin perjuicio de las acciones de repetición que pudieren efectuarse entre ellos y/o las excepciones. ----------------------------

IX.- SOBRE LAS NUEVAS TECNOLOGÍAS.---

En este caso, nos encontramos ante un tipo contractual en el que converge el uso de nuevas tecnologías, ya que es a través de una aplicación que se descarga en los teléfonos celulares y/u otros dispositivos digitales que se produce el consentimiento y formación ulterior del contrato de transporte. ---

Esta modalidad de contratación, se incorpora en el marco de la denominada "economía colaborativa", en virtud de que importa *"una interacción entre dos o más sujetos, a través de medios digitalizados o no, que satisface una necesidad real o potencial, a una o más personas. Es lo que antes se conocía como trueque y que, gracias a las plataformas digitales, se ha sofisticado establecido un marco donde los usuarios pueden interactuar entre ellos y/o con la misma plataforma (...)El movimiento del consumo colaborativo supone un cambio cultural y económico en los hábitos de consumo marcado por la migración de un escenario de consumismo individualizado hacia nuevos modelos potenciados por las redes sociales y las plataformas de tipo peer-to-peer (red-entre-pares o red-entre-iguales)"*[4] --

Tal es el caso por ejemplo de "Mercadolibre", donde diversos oferentes ponen a disposición productos de variada índole (bienes muebles como ropa, zapatos, muebles), que serán adquiridos al precio allí determinado – o a convenir por las partes- por otros/as usuarios/as que se encuentran registrados/as en dicha página y por el cual la empresa cobra un porcentual en comisión, disruptiendo el viejo esquema de adquisición en locales o tiendas físicas; o el caso de Glovo, Rappi, Pedidos Ya, por los cuales el/la consumidor/a adquiere productos alimenticios, farmacéuticos, entre otros.---

La Sala I de la Cámara de Apelaciones en lo Contencioso, Administrativo y Tributario, en un fallo del 22 de junio del 2018 en relación a demanda presentada por una usuaria contra Mercado Libre, "las juezas Mariana Díaz y Fabiana H. Schafrik y el juez Carlos F. Balbín consideraron que a la plataforma le cabe la ley de defensa del consumidor. **Díaz citó jurisprudencia al decir que Mercado Libre "interviene -y por ende es responsable- desde el mismo momento en que, creando apariencia, logra atraer para sí la confianza de sus clientes", la cual "constituye la fuente primaria de sus obligaciones" y también "de sus ganancias".** "Sea cual sea el argumento que se tome, **no es discutible que Mercado Libre es**

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[4] https://www.fundacionaquae.org/wiki-aquae/innovacion/la-economia-colaborativa/

https://www.fundacionaquae.org/wiki-aquae/innovacion/la-economia-colaborativa/

un intermediario que integra una cadena comercial", indicó Díaz en base al fallo de la Cámara Nacional en lo Civil, Sala "K", en los autos "Claps, Enrique Martín y otro c/ Mercado Libre S.A. s/ daños y perjuicios"[5]. (el resaltado nos pertenece).---

Todas estas aplicaciones, al igual que UBER, vinculan compradores/as con vendedores/as o usuarios/as de servicios, por medio de un sistema digital sin que se le haya requerido permiso ni licencia gubernamental. --

Esta nueva modalidad especial de contratación informática, ya ha sido receptada por el nuevo Código Civil y Comercial de la Nación; y se encuentra amparada por nuestra Constitución Nacional en tanto el artículo 14 garantiza el derecho a trabajar y ejercer toda industria lícita; y el artículo 19 de la Carta Magna enfatiza que *"Ningún habitante de la Nación será obligado a hacer lo que no manda la ley, ni privado de lo que ella no prohíbe"*.------------------------

Como se ha descripto previamente, la actividad ha sido considerada lícita en términos penales ya por la Corte Suprema de Justicia de la Nación, la misma encuadra en un servicio de transporte que se concreta por intermedio de una plataforma de internet y la cual cuenta con normativa de aplicación supletoria regulada por el Código Civil y Comercial de la Nación, no existiendo norma alguna que restrinja o regule esta actividad privada en miras a la seguridad o al orden público. --

La inexistencia de regulación administrativa del Gobierno de la Ciudad Autónoma de Buenos Aires, o el entendimiento de que la misma no compromete el interés general de la sociedad, conforme ha expresado el Sr. Fiscal en las presentes actuaciones; no puede pasar inadvertido por este Tribunal, ni entender -por analogía con otro tipo de transporte- la falta de habilitación como prohibición o limitante para ejercer la actividad comercial lícita; derecho garantizado por la Carta Magna. --

Ahora bien, esto en nada obsta a que el Estado, entienda pertinente reglamentar su ejercicio en cierta medida en miras a preservar el orden público y la seguridad (art. 28 y 42 CN). ---

Sobre el caso particular de la utilización de la aplicación de UBER, ha elaborado recomendaciones el Relator Especial para la Libertad de Expresión, Edison Lanza, en su Informe Anual de la Comisión Interamericana de Derechos Humanos 2017 – volumen II – expresando que los Estados miembros deben: ---

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[5] https://www.perfil.com/noticias/sociedad/mercado-libre-debe-cumplir-con-la-ley-de-defensa-del-consumidor-e-indemizara-a-un-usuario.phtml

https://www.perfil.com/noticias/sociedad/mercado-libre-debe-cumplir-con-la-ley-de-defensa-del-consumidor-e-indemizara-a-un-usuario.phtml

a. Abstenerse de aplicar a Internet enfoques de reglamentación desarrollados para otros medios de comunicación – como telefonía o radio y televisión–, y diseñar un marco normativo alternativo y específico para este medio, atendiendo a sus particularidades (…)--

e. Garantizar que el tratamiento de los datos y el tráfico de Internet no debe ser objeto de ningún tipo de discriminación en función de factores como dispositivos, contenido, autor, origen y/o destino del material, servicio o aplicación, de conformidad con el principio de neutralidad de la red.-----

Destaca el Relator así, la importancia de incorporar y reglamentar en la normativa interna, aquellos aspectos particulares que han de tener determinados actos jurídicos ante el advenimiento de nuevas tecnologías y de la economía colaborativa.----------------------------------

Un primer paso se ha dado en materia tributaria, la Ley N° 27.430 de Reforma Tributaria grava los servicios digitales prestados por residentes en el exterior cuando son utilizados en el país por consumidores finales y otros sujetos actualmente no alcanzados por el IVA en la importación de servicios; mecanismo incorporado a fin de evitar la evasión fiscal y la competencia desleal entre empresas. --

Ahora bien, pionera en el país en la materia de adecuación normativa en materia de transporte por plataforma digital, ha sido la Provincia de Mendoza, quien por Ley 9.086, crea la figura del "Transporte Privado a través de Plataformas Electrónicas" definido como aquel servicio que con base en el desarrollo de tecnologías de dispositivos móviles, utilizando el sistema de posicionamiento global y plataformas independientes, permite conectar a usuarios que lo demanden, punto a punto, con conductores que ofrecen dicho servicio mediante el uso de la misma aplicación, para celebrar un contrato en los términos del artículo 1280 y siguientes del Código Civil y Comercial de la Nación. -------------------------------

En el uso de sus prerrogativas, conforme el principio constitucional ya referido en el cual se faculta al Estado a -en virtud de su poder de policía y como garante de la seguridad-, **reglar su ejercicio más no cercenar el derecho a ejercer la industria**; ha dispuesto dicha Provincia al respecto en el Art. 52 de la Ley referida que: "*Este transporte oneroso de pasajeros constituye* *una actividad privada de interés público cuyo cumplimiento se regirá por las disposiciones de la presente sección y por la reglamentación que al efecto dicte la Autoridad de Aplicación. Deberán los prestatarios cumplir con el pago de las tasas de contraprestación y las obligaciones impositivas que determine dicha normativa. En ningún caso podrá este tipo de servicio afectar la prestación de los servicios públicos de pasajeros que esta Ley determina."* --

A su tiempo, el Decreto Reglamentario N° 1512 del 13 de septiembre del 2018, que ordena, entre otras obligaciones; a las Empresas de Redes de Transporte (ERT) inscribirse en la Dirección Provincial de Transporte, en el área de registros (art. 56); y a quienes pretendan prestar el servicio privado de transporte deberán solicitar su inscripción en las Empresas de Redes de Transporte (ERT) registradas como tal, acreditando el pago de la tasa de inscripción y fiscalización correspondiente, la documentación reglamentaria del vehículo con el que se pretenda la prestación del servicio, la documentación que acredite la identidad del conductor y la Licencia Nacional de Conducir subclase D.1., como mínimo, inscripción en la Agencia de Administración Tributaria de Mendoza (ATM), Inscripción en AFIP y contratar seguro del automotor exigido por Ley N° 9024, con el límite de cobertura máximo para transporte de pasajeros, conforme con las disposiciones de la Superintendencia de Seguros de la Nación, o la autoridad que en el futuro la reemplace (art. 57).--

X.- MODIFICACIÓN AL SISTEMA DE SANCIONES PARA INFRACTORES DE TRÁNSITO DEL TRANSPORTE PÚBLICO DE PASAJEROS Y DE CARGAS. INAPLICABILIDAD AL CASO DE SERVICIO DE TRANSPORTE POR PLATAFORMA UBER.--

A principios del mes de noviembre, se ha modificado la Ley de Faltas, entre cuyas cláusulas se expresa que "Taxi, transporte de escolares, remises, vehículos de fantasía y otros sin autorización. El/la titular o responsable de un vehículo que transporte pasajeros y que lo explote sin la autorización y/o habilitación para prestar servicio establecida por la normativa vigente, es sancionado/a con multa de diez mil (10.000) unidades fijas e inhabilitación para conducir de siete (7) a treinta (30) días. --

Se entiende importante destacar que, la normativa bajo análisis, no modifica ni incorpora normativa o reglamentación de habilitaciones en la materia sino que modifica la cuantificación de la sanción. ---

A todas luces puede vislumbrarse, de conformidad a las manifestaciones vertidas en el presente, que tal sería el caso de aquel que estuviere efectuando un servicio de transporte para el cual se requiera habilitación previa – remis, taxi, transporte escolar- más no podría aplicarse por analogía a quien efectúa un contrato de servicio privado por intermedio de plataforma digital; figura distinta a las referidas previamente. --

El Estado, es el garante constitucional de la seguridad de la ciudadanía; pero también debe garantizarse el derecho al ejercicio de una industria lícita y a la libre elección del/de la consumidor/a. Dentro de esta marco podrá disponerse normativa regulatoria que confluya al bienestar general; debiendo adaptarse a los desafíos que importan el uso de las nuevas tecnologías en la actividad comercial y de mercado. ---

XI.- CONCLUSIONES.

Que en virtud de todo lo expuesto; entiendo que el caso bajo análisis se trata de una actividad comercial lícita por la cual se brinda un servicio de transporte privado a través de plataforma electrónica, para cuyo ejercicio se requiere de, al menos, tres contratos conexos; que motivan entender al mismo con carácter *sui generis*, convirtiéndolo así en un contrato privado innominado. ---

Ahora bien, el carácter de innominado, no importa que el mismo no se encuentra autorizado o reglamentado, pues sus reglas interpretativas y normativa aplicable surgen del propio Código Civil y Comercial de la Nación, en tanto dispone en su artículo 970 que *"están regidos, en el siguiente orden, por: a) la voluntad de las partes; b) las normas generales sobre contratos y obligaciones; c) los usos y prácticas del lugar de celebración; d) las disposiciones correspondientes a los contratos nominados afines que son compatibles y se adecuan a su finalidad" (para el caso las normas generales de transporte; así como las disposiciones dispuestas en materia de tránsito).*---

Lo antedicho, en nada obsta a que en virtud de las prerrogativas otorgadas por la propia Carta Magna en su artículo 42- que impone al Estado garantizar el derecho a los/as consumidores/as y usuarios/as de bienes y servicios, en la relación de consumo, a la protección de seguridad-; cuyo imperativo se refuerza en las disposiciones de la Ley 24.240 y modificatorias- Art. 6: *Las cosas y servicios, (...), cuya utilización pueda suponer un riesgo para la salud o la integridad física de los consumidores o usuarios, deben comercializarse observando los mecanismos, instrucciones y normas establecidas o razonables para garantizar la seguridad de los mismos-* **el Estado entienda pertinente**

reglamentar algunos aspectos particulares de este tipo de contratación, en miras a asegurar que el servicio se brinde con la protección y calidad pertinentes; como ha sido el caso ya referido de la Provincia de Mendoza.---

Como expresa Sthephen Hawking, la inteligencia es la habilidad de adaptarse a los cambios; debiendo entonces agiornarse al uso de las nuevas tecnologías; adaptando y reglamentando lo pertinente para la utilización segura de las mismas sin menoscabar el derecho a la actividad comercial de los/as ciudadanos/as; así como de elección de los/as usuarios/as de transporte. ---

Por todo ello, RESUELVO: --

I.- ABSOLVER a BELLINI MARCO, ALFREDO DNI 24.776.128, de las demás condiciones personales obrantes en autos, en relación con la infracción prevista y reprimida en el art. 6.1.49 segundo párrafo y 4.1.7 de la Ley 451 por entender que la conducta desarrollada deviene atípica en el marco de la Ley 451, entendiendo que la misma se constituye en un contrato de transporte privado innominado con contratos conexos, de acuerdo con las consideraciones de hecho y de derecho precedentemente formuladas.

II.- SIN COSTAS.---

III.- Consentida la misma o firme que fuere, líbrese oficio al registro de antecedentes de faltas para su registro y al Controlador Administrativo de Faltas Nro. 31 para su conocimiento.---

No siendo para más, a las 11:50 hs., se da por finalizado el acto, firmando los comparecientes después de S.Sa. por ante mí, de lo que DOY FE.--------

Dra. Natalia S. Frenkel
Prosecretaria Coadyuvante

FMDO
Dr. Javier Alejandro Bujan
Juez

PARA CONSTANCIA.////

La Defensa Particular y el encartado BELLINI CONSIENTEN expresamente la sentencia por lo que la misma adquiere FIRMEZA.-

FMDO.
Dra. Natalia S. Frenkel
Prosecretaria Coadyuvante

[seal:] * JUDGED IN THE COURT OF FIRST INSTANCE FOR CRIMINAL MISDEMEANORS AND MINOR VIOLATIONS No. 7 * OF THE CITY OF BUENOS AIRES JUDICIAL BRANCH OF THE CITY OF BUENOS AIRES

COURT OF FIRST INSTANCE FOR CRIMINAL MISDEMEANORS AND MINOR VIOLATIONS No. 7

"BELLINI MARCO, ALFREDO ABOUT 6.1.49 BIS – PROVISION OF A PUBLIC TAXI SERVICE WITHOUT A PERMIT"

Number: CAU 27617/2018-0 -

CUIJ: CAU J-01-00054609-3/2018-0

Proceedings No: 12403345/2018

City of Buenos Aires, November 28, 2018

Starting time: 10:30 a.m.

"BELLINI MARCO, ALFREDO ABOUT 6.1.49 BIS – PROVISION OF A PUBLIC TAXI SERVICE WITHOUT A PERMIT"

Case No. 27617/2018 Internal Record: 1340/18-F

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Type of Hearing: Final Hearing
Judge: Dr. Javier Alejandro Bujan, Member of the First Instance Court PCyF no. 7.
Assistant Undersecretary: Natalia S. Frenkel
Defendant: Alfredo Bellini Marco D.N.I. 24.776.128
Private defense counsel: Dr. Nicolas Castilla Sastre T° 78 F° 961 CPACF
For the record, the present hearing is being videotaped.

Development of the Hearing:

Judge: The hearing of oral and public debate is initiated and the defendant is cautioned to be attentive of what he is about to hear. It is hereby ordered that the accusations contained in the following evidence documents, which shall be processed before the Criminal Administrative Unit No. 111 of the Government of the City of Buenos Aires, shall be read by the Secretariat in full, namely: Certificate of Findings No. **No. I00087868** (page 05) according to which on July 16, 2018 at 7:29 p.m. at 700 Cordoba Avenue, the offence *"7550 Operating without a license to provide the service"*. --

The judge asked the defendant if he had understood the facts and the accusations contained in the records and which are reflected in the ruling of July 27, 2018. To this question, the defendant replied, yes.--

Afterwards the Judge reminded him that under the principle of guarantee and protected by the National Constitution, the Criminal Procedural Code of the City of Buenos Aires, he has the right to refuse to testify without it causing any presumption against him, and that his refusal shall not suspend the present oral and public debate, and asked him if he

understood the aforementioned, to which the defendant said yes. --------------------------------
Likewise, the Honorable Judge reminded him that during the course of the debate he may provide any clarifications he deems appropriate, as long as they concern the Defense. -------
The Honorable Judge informed the defendant that the present instance in the offense proceedings is constituted as a first instance trial and that what happened in the public prosecutor's office neither compels nor conditions the actions of the Court, which is only limited by the fiscal motion and that therefore the sanction imposed can be acquitted and/or disposed to a greater or lesser extent with respect to the administrative one, since the principle of *reformatio in pejus* only applies in matters of impediment within the administrative instance itself and/or in the judicial instance with respect to the first and second instance.- --
The defendant is asked if he understands and declares that he does. -----------------------------
Preliminary questions. ---

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Private Defense Counsel: I have no preliminary questions. I confirm the arguments contained in the administrative acquittals, as the defense brief filed. ---------------------------

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Judge: It has to be played in this hearing. ---------------------------------------

Private Defense Counsel: it will be reproduced in an attempt to order, as a preliminary measure. I will uphold my client's request for acquittal based on procedural and material issues.--

On the procedural grounds, I maintain the lack of validity of the document because of the serious formal error it contains; eventually, regardless of the validity or lack thereof as an instrument, the sanction imposed in the document is non-existent. For that reason, it is requested the absolution based on the non-existence of the infraction. ----------------------------

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If it is understood that it complies with the provisions of art. 3 and 5 of Law 1217, again, I maintain that the infraction is non-existent. --

There is a new system of fines made by telephone, which are documented in an infraction report No. I00087868 and then there is a form that differs in number. The report recognizes it as that of page 5, not so that of page 4, there is a record number which differs from the record of verification. ----------------------------

The record of page 5 is void as it does not have a signature, it has the data of the agent Gisela Robledo, it is a characteristic flaw of the system that cannot be imputable to my client, neither is there a digital signature, it violates art. 3 inc. "G" of law 1217.-- ---

The reason why it is a violation of art. 5, because the taxative requirements of Article 3 must be met. --

It is a violation of paragraph b of art. 3 of Law 1217, generic penalty. Furthermore, my client does not perform any service of “remis”, taxi or school transportation, I do not know what reprehensible conduct. He committed to be charged with that infraction, and what legislation I have to defend against.---

Unauthorized exploitation is for “remis”, or school transport or taxis; therefore I will tackle all three of them.---

In observations, there is a reference to "joint operation with gort, the driver at the time of arrest did not have the corresponding permit to transport the passenger William Paz DNI 5015106445". This refers to the corresponding permit. But now I ask, for what? “Remis”, transport or taxi? I don't know, because it doesn't say so. That's why it is a violation of art. 3 of Law 1217.---- --

Regarding DNI 5015106445 One would have to issue an official statement. Who has this type of DNI number? A random number was given. This is in violation of paragraph f of art. 3 of Law 1217, as Gisela Robledo has the obligation to include witnesses or passengers, she should have checked whether it exists and inspected the document.- --------------------------

He declared to have asked for a UBER service, violating law 451 art. 4.1.7. We return to generic punishment, and because it seeks to apply strict compliance with art. C of law 1217. It refers to the permits for remis, school and taxi transportation. The code of Permits also mentions remis, school and taxi transportation; which is why, in order not to be confusing, I pause upon these arguments as to the form of the record. ---

To conclude in clarifying the observations, the conduct is not defined nor qualified, at no time does it refer to what permit was required of him, and which my client referred to not having. We do not know if he was arrested for not having a license for remis, school or taxi transportation; if he had eventually made a business transportation without a license, the documentation should have been confiscated from him which was not. Yes, the order.--

That's why I'm undermining the contents of the verification report..-----------------------------

This digital system had already warned him at the administrative headquarters by filing other records due to a formal flaw, because the supervisors warned that there was no signature; until they warned that there is an attached form in the SAIJ system referring to the digital signature of Gisella Mariel Robledo.---------------------------------

They include it to the effects of rectifying the lack of digital signature. It's a form (on page 4) where, in fact, there is a digital signature. They want to rectify the digital signature, it being understood that it complies with art. 9 and 10 of Law 1217. The digital signature mentioned is for offences committed on public roads, photographic fines, infringements. In this case, it is a business matter as it refers to the lack of a license.--------------- ------------------------------

Paragraph c reads, “seal, signature and title”; as for digital signatures, it merely states the name; Is the record number a reference? No. The one from page 5 is a different one. If all the other data coincides, the question is, what do I have to consider as a record of infringement? The one from page 4 or the one from page 5? I understand that the appropriate procedure is to consider the verification of page 5 and to request the annulment due to a formal flaw of the same.--

Honorable Judge: I find myself in a position to resolve the first incident.-----------------

I do not agree with any of the arguments made by the defense. I have said in repeated precedents that they have the juridical nature of *notitia criminis,* notice of the fact; given in the record the circumstances of fact, mode and place; being that with that it is sufficient for the exercise of the defense. One cannot be required to legally certify the record because that is not its purpose. Its function is to state the fact in question.-------------------------

Since it is a notice, the interpretation of this court which coincides with the (other) court is that they are not *ad solemnitatem* requirements but that rather *ad probationem,* with which it is possible to identify the elements which do not impede the exercise of the defense, the record is valid..----------------------------------

Regarding the digital signature, this has been the object of a general criterion of action of the Deputy Secretary of Justice with respect to the administrative controllers of government. I'm surprised that this provision resulted in the record being void.--------------------------------

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The record may be accompanied, as is the case, for example, of the circumstantial record which accompanies the record of verification.; the record of page 4 may be added to the record of page 5 and it does not imply that they are different facts because they have different numbers.--

To question the digital signature would be to oppose the governmental provisions regarding digital signatures. In fact, decrees and resolutions of the Government are signed with a digital signature; it is enough that the signature allows the identification of the official; only the official has that token or authorized password; the context of the digital signature. ---

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The records are absolutely valid, the citizen is defending himself from not having a permit for the transport of passengers, a permit pursuant to article . 4.1., 7 and others. Apart from the fact that the verification record does not say so, it is consolidated with the rest of the administrative activity, including that which is carried out by the prosecutor. ---

<u>I HEREBY DECIDE:</u> TO DISREGARD the claim regarding the lack of validity of the report due to its formal content and we will continue with the material part..--------------------------

The Honorable Judge asks if the Private Defense Counsel will submit any evidence. ----

Private Defense Counsel: I will not be submitting evidence, it's a matter of right. ---

Honorable Judge: gives the floor to the Private Defense Counsel for the purposes of pleading.---------

Private Defense Counsel: As I have already mentioned in documents under reference, not having a permit is a re-qualification of the administrative supervisor of offences, because the record should not give rise to any interpretation. My client was fined according to the infraction record of Law 451 art 4.1.7. From the simple reading it turns out that the sanction is due to not having a permit for remis, school and taxi transports.---

My client does not offer remis, school or taxi transportation services. This non-existent passenger, William Paz , with the DNI 5015106445 reported having requested the service through the UBER application, and this is correct.----------------------

The application known as "UBER " is a link by which a passenger contacts directly with my client, in this case Bellini Marco -who also has the application-, this William Paz does not call a remis provider by telephone, he does not ask for the assignment of the trip, It is not the remis provider that says "take William to this destination", but he rather contacts my client directly; and my client may or may not accept the trip. When he accepts it, he establishes a contract between the parties. It is a private contract of passengers, of transportation. --

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It is clearly described in art. 1280 of the CCyCN, in 2015 when the civil and commercial code are unified, a new concept of Private Transport is incorporated. ----------------------------

In art. 1280 "There is a transportation contract when a party known as a transporter or carrier undertakes to move people or things from one place to another, and the other, called a passenger or shipper, undertakes to pay a price or cargo", and Article 1281 establishes that the regulations apply in the absence of special laws. There is no law in CABA that regulates transportation via the use of smartphone applications.---

In CABA, this application was initially attempted to be labeled as illegal; private transportation is legal in the Republic of Argentina. This argument of illicit activity was thwarted when UBER was "legalized" in Mendoza, which is a factual and legal error. Law No. 9048 regulated the contract of private transportation. Can an activity be legal in the province and illegal in the country? Mendoza took the initiative to regulate a legal activity in the Republic of Argentina. ---

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As a result of this regulation, we began to see advertisements on Canal 13, Diario la Nación, and any other media outlet. It is currently a sponsor of the AFA [Argentinian Football Association]. Are they promoting a legal activity or making an apology for the crime?------

This legal activity is not regulated, the Code of Permits clarifies it exhaustively and refers which are the obligations and permits for remis, taxi and school transports; it says nothing about what establishes a private transport contract. It is not regulated in CABA. -------------

My client is not regulated. At some point I have googled it, and I say no regulation is prohibitive in order that I may do what art. 19 of the Magna Carta says, that everything that is not prohibited is permitted. ---

If what is not prohibited, is permitted, if in CABA it is not Regulated, it is not prohibited, by which he pursued the activity. ---

The strategy could have been different, there is no way to prove that the agent proved that he was using the application. He could have said that there was no way to prove that the client didn't have an application; he can't check his phone. ---

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There is nothing to hide, he was engaged in a legal activity under arts. 1280 and 1281 of the C.C. and C.N. applicable in the absence of regulation in CABA. -----------

There is also a precedent in the Quevedo Trial of this same jurisdiction in case 11465/16 resolved by Court 31 through a final verdict of 2/3/2017 which determined that the activity of a person providing a UBER service is different from the remis, and that the same cannot be demanded of that person. ---------------------------

You cannot analogically apply the activity of remis to my client, when he works for himself, he is an individual tax payer, he does not work for a remis provider. So I ask myself, how can we ensure that he doesn't have problems on the street? Since there is no regulation, I told him, you can be hypocritical and lie to the government to ask for a permit for a remis, but you have to lie because that is not really the activity that is being carried out. In order to compensate for this omission, you have to adapt to the current regulation, which is closer to the remis regulation. Which is the case. When you get to the Government, will they ask, or request, the data and permit of the remis provider you work for? To which my client would respond: I don't work for a remis provider, I work for myself. And the answer in that regard is; if you don't work in a remis provider, you can't get the permit. ---

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Even though he is being hypocritical and wanting to get permit that does not suit him, he deserves a fine. ---

For the foregoing, and due to the non-existence of the willful offense, I ask Your Honor for the acquittal of my client. --

Honorable Judge: I give the floor to Mr. Bellini, in order to use as he sees fit, his right to a final statement. ---------------------------------------

Mr. Bellini: I shall not address the court, I share my lawyer's remarks.----

Honorable Judge: I consider that I am competent to give my consent. ----------------------

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There are several issues. In the opinion of the court the extrinsic issues are already validated. I am going to give my opinion on the material issues since I have already given my opinion on the extrinsic validity of the verification record. -----------------------

Therefore, with regard to the material content of the infringement report, I sustain that: ---

<u>I.- SOFTWARE APPLICATION: UBER</u>-------------------------------------

That, first of all, in order to resolve the present proceedings, the analysis of the type of activity carried out by Mr. Bellini Marco Alfredo, who states that he was transporting a passenger under a private contract with the UBER platform, becomes relevant. ---

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UBER is a company that, by means of a cell phone or tablet application, links individuals (previously registered) - who wish to use their vehicle for transportation - with potential customers (who must also register and download the application). -------------------------------

Regarding its procedure; the passenger, in order to request a trip, must indicate the origin and destination and; once requested, it is possible to check his/her information as well as the driver's information; as well as the time it will take for the car to arrive, the type of vehicle.- In order to be a driver, the company requires the driver's registration in the platform and he/she must have a professional driver's license, auto insurance and vehicle identification; and as long as the application is turned on, its location is permanently identified. --

<u>II.- UBER: LEGAL BUSINESS ACTIVITY.</u>---

Well then, the **National Supreme Court of Justice has already ruled on this matter,** rejecting a complaint filed by the Taxi Workers Union, **thus validating the legality of the UBER company,** considered in the previous instances **as a legal commercial activity.**[1] --

The Chamber of Crime confirmed the decision of Judge Zelaya and determined that "<u>the provision of passenger transport service without an official permit does not constitute a conduct categorized by the punishable legislation.</u>. No caution is given as to the specific offense to which the alleged illicit organization would have instigated or the indeterminate offenses that would be the object of the

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1 CSJN "Appeal on points of fact raised by the Taxi Workers' Union of the Federal Capital in the proceedings concerning Uber and Others re. extraordinary appeal incident" of August 14, 2018

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CSJN "Appeal on points of fact raised by the Taxi Workers' Union of the Federal Capital in the proceedings concerning Uber and Others re. extraordinary appeal incident" of August 14, 2018

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alleged illicit organization". --------

In this case, the prosecutor "dismissed the hypothesis of criminal instigation or illicit organization, pointing out that it is the development of a legitimate commercial activity". "(...) it seeks to engage in a legitimate commercial activity under a form of organization with legitimate purposes". --

Therefore, it is decided that the activity described in these proceedings does not constitute a criminal offense and is a legal commercial activity. ------------------------

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III.- LUCRATIVE USE OF PUBLIC SPACE WITHOUT A PERMIT - INADMISSIBILITY OF THE INFRINGEMENT --

The Criminal, Infringement and Misdemeanor Courts of the Autonomous City of Buenos Aires, had the opportunity to rule on the Incident 4790/2016 in the proceedings entitled "Nicolás Sajoux re/ infr. of Art. 86 C.C." (formerly article 83 C.C.) -------------------------

In these proceedings, the Criminal, Infringement and Misdemeanor Chamber of Appeals, Section III, decided on the motion filed by the defense in relation to the accusation of the infringement provided for in art. 83 of the CC, relating to the carrying out of lucrative activities in a public space. ---

On this matter, Dr. Paz stated that" (...) art. 86 makes no reference to taxis and remis but, as stated above, prohibits lucrative activities in public spaces not authorized by the government". (...) ---

Dr. Delgado stated in his opinion that "This law was incorporated into the Infringement Code with the clear purpose of protecting public spaces from the proliferation of clandestine fairs or unauthorized street vendors (...)It is not intended to regulate transit or the transportation of passengers. ".--

There is no improper use of public space (...) when carrying out an unauthorized lucrative activity, someone driving a vehicle through the streets and avenues reserved for automobile traffic; with or *without passengers, whether they are acquaintances of the driver or passengers who have hired him or her for transportation.*

Vehicle circulation, in such cases, which is the activity carried out by the driver of the vehicle, is authorized as a motor traffic, that is, as a permitted use of public spaces. It is permitted for any driver to drive his private vehicle, or the vehicle entrusted to him/her, through the streets and avenues reserved for automobile use with or without passengers. ***If some drivers do it while providing a public taxi or remis service, they must do so with the corresponding permit and licenses. However, if they fail to do so, they are not using public spaces in an illegal manner, but in violation of the rules that prevent such activities without a license or permit.*****--------**

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IV.- REGARDING THE IMPUTED OFFENSE.

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That is hereby claimed, the sanction provided by art. 6.1.49 second paragraph of Law 451, which states "Requirements for Cargo and Passenger Transportation Vehicles: The owner and/or person in charge of a cargo and/or passenger transportation vehicle that does not have the permit to provide the service, shall be punished with a fine of two thousand (2,000) fixed units." Citing also, in the Observations of the Verification Record No. I00087868, the offense stipulated in Article 4.1.7 Law 451, from which it is clear that "*The owner or person in charge of a transportation service of taxis, school buses, or remis that exploits it without the permit to provide the service established by the regulations in force, shall be punished with a fine of ten thousand (10,000) fixed units, and the immobilization of the vehicle*".--

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It is therefore necessary to analyze whether the activity in question corresponds to one of the transport services authorized by the Government of the Autonomous City, namely: --

1.- Taxi Service: ---

That, by virtue of the foregoing in accordance with the definition provided in article 12.2.1 of Law 2148, the taxi service is a "Service of public transportation of persons, not collective, in rental cars equipped with a taximeter of up to four (4) passengers per vehicle, provided in a vehicle and by a driver duly authorized by the Competent Authority. ".---

Please note that the service provided was not done by a car with a taxi license, and that it could not have been confused with this type of service because it was provided by car not equipped with a taximeter that establishes a fare -pursuant to the guidelines of the City Government-, nor was it painted in yellow and black, which could generate confusion in relation to what it was, nor was it found in the streets or avenues in search of passengers; the thing is that it must be clear that the service provided was not a taxi service, so it will be necessary to dismiss the requirement of certification in this aspect. --------

2.- Remis Service: ---

This service is defined in the Qualifications Code, in chapter 8.4. which establishes the

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Private Car Rental Service with driver (remises): 8.4.1 "*A remises agency is considered to be one that provides the transportation of persons in private category automobiles, with a driver, with the passenger having the exclusive use of the vehicle, by means of a remuneration in money agreed between the provider and the recipient.*", whose activity is regulated by Decree No. 167/1998, Resolution S.S. Tr. N° 28/010 which created the Single Registry of the Private Car Rental Service with a Remises Driver. ---

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The Transit and Transportation Code of the Autonomous City of Buenos Aires, in the section of "General Definitions" establishes the remis as a "*Rental car not subject to a predetermined itinerary, with a prefixed fare for the total trip, used for total occupation of the vehicle, which does not take or drop passengers with vouchers, tickets or individual payments*". --

From the above description, it can be gathered that the remis service is offered to an indeterminate person, anyone who calls or comes to the agency may freely use the transport service individually, in exchange for the price determined with the remis company. --

The difference with the transport service through UBER arises from the fact that it is no longer an indeterminate person but a determinable one, since only the user who has downloaded the application, registered and uploaded his or her personal data to the UBER platform base can be part of the contractual transaction. - It is important to note that in case No. 11465/2016, entitled "Quevedo, Cristian Damián re/ Infringement of Article 6.1.52 of Law 451," Prosecutor Villalba Diaz referred to the following on the occasion of alleging a verification report for an expired remis permit." *he is charged with having an expired remis license but, according to the alleged infringer's statements, it was not an expired license but a vehicle whose identification card was intended for remis, but (...) the same defendant explained and proved* <u>*that he was carrying out a different activity*</u>*, which is done via a UBER* platform. *(...)* <u>*the present charge was for an activity other than that which he was engaged in and the conduct cannot be*</u>

attributed to him. That alone is enough to acquit him (...)"-. ---

The intervening Judge, Dr. Susana Beatriz Parada, regarding the infringement report related to the expired remis license, stated that " In reality, the action has not been described as stated in paragraph b of article 3 because it was not that Mr. Quevedo was driving a car with an expired remis license, but rather through the application of another system, the vehicle was not operating as a remis (...) .---

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From the above, it can thus be shown that the activity described by Mr. Bellini - transport activity by means of the UBER application - is not part of those which require the permit of a remis permit in order to provide the service, in which case the use of that concept should be disregarded. --

V.- LACK OF PERTINENCE FOR FISCAL INTERVENTION.--------------------------------

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Likewise, it is important to point out that the Coordinating Prosecutor, Dr. Gonzalo VIÑA, on page 39 of the present proceedings, states that "(...) **nor is it noticeable that the general interest of society is compromised or that constitutional public order is directly involved (art. 17, paragraphs 1, 2 and 5 LOMP) (...) I consider that the intervention of the Public Prosecutor's Office is not pertinent." (sic). ---**

From the statements made, it is clear that whoever represents the interests of society on behalf of the State; understands that the subject under consideration does not constitute a subject that requires direct action on their part, since UBER does not compromise the public interest or involve constitutional public order and thus could not be treated as a public service.

Well then, if the case concerned an infringement committed within the scope of the Misdemeanor Law - for any of the reasons provided for in connection with the provision of public services - the intervention of the same would become obligatory; given that it is the Public Prosecutor who represents the police power held by the State, who must ensure the safeguarding and security of the alleged provision rendered in infringement.. ---

It is clear from the foregoing that it is not a matter in the proceedings, it should be pointed out, in the words of the Public Prosecutor, that it concerns a public passenger service. ---

VI.- THE LEGAL NATURE OF THE WEB-BASED TRANSPORT SERVICE. --

Since it has already been determined that the commercial activity is legal, that it does not

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constitute a crime for the use of public spaces without authorization and that it cannot be incorporated as a taxi or remis activity -which we have already said to not be a misdemeanor-; The legal nature of the transport service under analysis must then be clarified as well as whether it requires any particular type of permit. ------------------------

Regular Public Passenger Transport is understood as the collective transport of passengers that the Government arranges in order to satisfy the massive transportation demands of its users. --

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On the other hand, Private Transportation, is defined by the National Civil and Commercial Code, in its article 1280, as that under which " *a party called the transporter or carrier undertakes to move people or things from one place to another, and the other, called the passenger or shipper, undertakes to pay a price or cargo*". --

There is therefore no doubt that the difference of public transport, organized or licensed by the State in order to satisfy the general transport service in a massive and indeterminate way; of private transport which is linked to the person who drives a particular car and the passenger - determined or determinable - in order to be moved from one place to another in exchange for a payment; it is established in a transport contract. - Neither the National Civil and Commercial Code, nor the specific regulations regarding misdemeanors, specify that all transportation services must be carried out in the communal area of the City with prior authorization; on the contrary, certain types of transportation (taxi, remises, school transportation) require a prior certification to operate as such. -------------------------------------

<u>VII.- INNOMINATE CONTRACT. RELATED CONTRACTS.</u>-----------------------------

In cases like this one, both the transporter and the passenger are connected by means of an online application - UBER-. This characteristic is not just another distinction, it is not a case of an indeterminate person raising his arm on the sidewalk in an attempt to get around by taxi (differentiated with particular colors, taximeter, among others) and/or a remise service whose offer is indeterminate to the general public (remis provider of public access in person or by telephone); but of private persons whose data are registered in the platform in order to be able to be a passenger and/or driver, respectively (which makes them determinable prior to the acceptance of the transportation agreement); and whose characteristics are assessed by the passenger and the driver to consent or not to the contract - e.g. number of stars assessed by other users and/or drivers, characteristics of the vehicle in which they will be transported, among others. --

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The abovementioned is sufficient to convince me that this is a private transport service; however, the use of a digital platform through an intermediary company generates a particularity, not foreseen in the Civil and Commercial Code, which makes me understand the connection of legal proceedings described in a *sui generis* contractual network. --

The potential passenger, by downloading the application and uploading his or her personal data, and by requiring the trip in each specific case, allows UBER to mediate in order to obtain a driver that accepts the offer and concludes the transportation. ----------------------------

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On the other hand, the potential driver, at the time of registration and presentation of the required documentation such as a driver's license, car insurance, accepts that UBER will connect him/her with transport service providers at the time he/she is logged on to the application; in order to conclude the transport contract referred to between the parties. ----------------------------------

Therefore, this company combines supply and demand of transportation, in order to mediate in the conclusion of a private transportation contract, without having a relationship of dependence or representation with any of the parties; for which the service charges the driver a percentage of 25% per trip. ---

It can therefore be said that, in practice, the passenger enters into a contract with UBER, the driver enters into a contract with UBER, and finally - when each trip is requested and accepted - a transport contract is generated between the passenger and the driver. -----------

Therefore, there is a connection between three contracts which are necessary in order to comply with the common purpose: transportation; a situation which, as the market and technology advances, has already been embraced in the new National Civil and Commercial Code in article 1073 and subsequent articles. From the definition given to the Related Contracts in said legal text, it can be deduced that "*This means that even when it is a question of an apparently autonomous business, everyone tends or tries to achieve a common result or unique business, which could not be achieved without the interaction of each one of said contracts. It does not require temporal simultaneity or unique instrumentality.*"[2]------------------------------

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[2] http://www.saij .gob.ar/docs-f/codigo-comentado/CCyC_TOMO_3_FINAL_completo_digital.pdf. The Annotated Civil and Commercial Code - Page 495

http://www.saij.gob.ar/docs-f/codigo-comentado/CCyC_TOMO_3_FINAL_completo_digital.pdf. The Annotated Civil and Commercial Code - Page 495

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The Chamber "M" of the National Court of Appeals in Civil Matters, in its ruling in the proceedings "Van Thienen, Guillermo Federico and others c/M.B. Desarrollos Inmobiliarios S.A. on damages and losses", case file No. 109, of the Civil Court No. 109, has declared: "*It is important to remember that the issue of related contracts -such as the creation of the real estate trust, adhesion and transfer of the trust domain- and which are regulated in the new Civil and Commercial Code that [illegible] to govern in August of this year, is not new in our law and the issue was included in the dispatch of Commission No. 3 of the "XVII National Conference on Civil Law" held in Santa Fe in 1999, where it was said that "There will be related contracts when, for the performance of a single business, a plurality of contracts are entered into between the same or different parties...", with the addition that the connection must be measured "...through a supra-contractual economic purpose, verified legally in the subjective or objective cause, in the consent, in the object or in the bases of the business...*"[3]--------- --

The importance of understanding it as a business network, lies in allowing the participants in such legal acts, the possibility of raising exceptions for breach or poor performance, including those actions that are part of a contract that is external to them, in accordance with the provisions of art. 1075 of the CC and CN, as well as the extension in the scope of liability' (Art. 1758 CCyCN and 40 Law 24240) and the regulations related to consumer contracts. ---

Likewise, in this triangle, there is a very particular characteristic: it is UBER who - according to geographical area, demand and distance - defines in each case the travel value.

Does this void the transportation contract? Of course not, this does not preclude the existence of the contract itself. There is nothing to prevent the parties, due to the autonomy of the will incumbent upon them, from deciding that it is a third party that determines the

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[3] http://www.nuevocodigocivil.com/wp-content/uploads/2015/06/Sentencia-23.pdf

http://www.nuevocodigocivil.com/wp-content/uploads/2015/06/Sentencia-23.pdf

right price. (Article 1006 National Civil and Commercial Code). -------------------------------

As a result of the foregoing, it is to be understood that the transportation service via the UBER application is a private transportation service; it is generated via an innominate contract in which the Uber Company, the passenger(s) and the driver(s) are connected; whose regulation - in the absence of specific regulations - will be supplemented by that relating to the Transportation Contract, in accordance with the interpretative rules of the National Civil and Commercial Code itself in article 970. --

VIII.- REGARDING LIABILITY. ---

There has been much discussion regarding the guarantee of safety that must prevail and be guaranteed in relation to the transportation of people. ---

On this point, the Civil and Commercial Code itself, accepts a greater and more comprehensive liability in the case of Transport Contracts; considering that its article 1291 provides that the same extends not only to the breach of the contract - typical situation of any private contract - but also with respect to claims affecting the passengers and/or loss of their belongings; this obligation cannot be limited by the decision of the parties because the codifiers are understood to affect the safety of persons, and thus public order. -----------------

Lastly, article 1758 of the National Civil and Commercial Code emphasizes that this liability extends not only to the driver but also to those who take advantage of it; thus resulting in accordance with the provisions of art. 40 of Law 24.240 and its amendments, which establishes that " *if the damages to the consumer result from the defect or risk of the thing or the provision of the service, the producer, the manufacturer, the importer, the distributor, the supplier, the seller and the person who has put his name on the thing or service shall be liable. The driver* shall be liable *for damages caused to the thing caused by or in connection with the service*". ---------------

From the foregoing it is clear that, vis-à-vis the consumer - passenger - the owner of the car, the driver and the UBER company would be liable; without prejudice to any repetitive actions which might be taken between them and/or the exceptions. -----------------------------

IX.- REGARDING NEW TECHNOLOGIES.---

In this case, we are faced with a type of contract in which there is a convergence of the use of new technologies, since it is through an application that is downloaded to mobile phones and/or other digital devices that the consent and subsequent establishment of the transport contract is produced. ---

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This type of contracting is incorporated into the scope of the so-called "collaborative economy", because it is important" to have "*an interaction between two or more subjects, through digitized or non-digitized means, that satisfies a real or potential need, of one or more people.. This is what used to be known as barter and, thanks to digital platforms, a structure has been established where users can interact with each other and/or with the same platform. (...)The collaborative consumption movement represents a cultural and economic change in consumption habits characterized by the migration from a scenario of individualized consumerism to new models powered by social networks and peer-to-peer platforms. (network-to-peer or network-to-equal)*"[4] -----------------

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Such is the case, for example, of "Mercadolibre", where various suppliers make available products of various kinds (movable goods such as clothing, footwear, furniture), which will be acquired at the price established there - or to be agreed upon by the parties - by other users who are registered on said page and for which the company charges a percentage in commission, thus disrupting the old acquisition scheme in premises or physical stores; or the case of Glovo, Rappi, Pedidos Ya, for which the consumer acquires food products, pharmaceuticals, among others. --

The Chamber I of the Court of Appeals in Litigation, Administrative and Tax Matters, in a ruling of June 22, 2018 in relation to a lawsuit filed by a user against Mercado Libre, "Judges Mariana Díaz and Fabiana H. Schafrik and Judge Carlos F. Balbín considered that the platform is liable for the legislation on consumer protection. **Diaz has quoted jurisprudence saying that Mercado Libre "intervenes - and therefore is liable - from the very moment in which, creating an image, it manages to attract for itself the trust of its clients", which "constitutes the primary source of its obligations" and also "of its profits".** "Whichever argument is used, **it is not debatable that Mercado Libre is an intermediary that is part of a commercial chain",** said Diaz, based on the ruling of the National Chamber

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[4] https://www.fundacionaquae.org/wiki-aquae/innovacion/la-economia-colaborativa/

https://www.fundacionaquae.org/wiki-aquae/innovacion/la-economia-colaborativa/

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of Civil Matters, Chamber "K", in the proceedings "Claps, Enrique Martin and others c/ Mercado Libre S.A. on damages and losses."[5]. (the highlighting is ours). ------------------------

All these applications, just like UBER, link buyers with sellers or users of services, via a digital system which does not require government permission or license. -----------------------

This new special modality of digital contracting, has already been accepted by the new National Civil and Commercial Code; and it is protected by our National Constitution to the extent that article 14 guarantees the right to work and to exercise any lawful industry; and Article 19 of the Magna Carta emphasizes that" *No citizen of the Nation shall be forced to do what the law does not command, nor deprived of what it does not prohibit"* .----------------------------------

As previously described, the activity has been considered legal in criminal terms and by the National Supreme Court of Justice. It is part of a transportation service that is carried out through an Internet platform and which has supplementary provisions regulated by the National Civil and Commercial Code, without any rule restricting or regulating this private activity in the interests of security or public order. ---

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The lack of any administrative regulation by the Government of the Autonomous City of Buenos Aires, or the understanding that such regulation does not compromise the general interest of the society, as expressed by the Public Prosecutor in the present proceedings; cannot go unnoticed by this Court, nor can it understand - through an analogy with another type of transport - the lack of permit as a prohibition or limitation to exercise a legal commercial activity; a right guaranteed by the Magna Carta. --

Well then, this does not in any way prevent the State from considering it appropriate to regulate its exercise to a certain extent in order to preserve public order and security (art. 28 and 42 CN). --

On the particular case of the use of the UBER application, the Special Rapporteur for Freedom of Expression, Edison Lanza, in his Annual Report of the Inter-American Commission on Human Rights 2017 - volume II - has prepared some recommendations stating that member states should: ---

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[5] https://www.perfil.com/noticias/sociedad/mercado-libre-debe-cumplir-con-la-ley-de-defensa-del-consumidor-e-indemizara-a-un-usuario.phtml

https://www.perfil.com/noticias/sociedad/mercado-libre-debe-cumplir-con-la-ley-de-defensa-del-consumidor-e-indemizara-a-un-usuario.phtml

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a. Refrain from applying to the Internet any regulatory methods developed for other media - such as telephones or radio and television -, *and develop an alternative and specific regulatory structure for this medium, taking into account its specificities. (...)*---------------------------------------

e. Ensure that the processing of data and Internet traffic should not be subject to any discrimination on the basis of factors such as devices, content, author, origin and/or destination of the material, service or application in conformity with the principle of network neutrality. ----------------

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Thus, the Rapporteur emphasizes the importance of incorporating and regulating in the internal regulations those specific aspects that certain legal acts must contain in view of the emergence of new technologies and the collaborative economy. ------------------------------------

The first steps have been taken in tax matters, Law No. 27,430 on Tax Reform taxes digital services provided by residents abroad when they are used in the country by end consumers and other subjects not currently covered by VAT on the import of services; a mechanism incorporated in order to avoid tax evasion and unfair competition between companies. ------

Well then, the Mendoza Province has been a pioneer in the country in the matter of regulatory adaptation in transportation matters through digital platforms which, through Law 9.086, created the concept of "Private Transportation through Digital Platforms", defined as that service which, based on the development of mobile device technologies, by using the global positioning system and independent platforms, allows connecting users who demand it, point by point, with drivers who offer said service through the use of the same application, in order to enter into a contract in the terms of article 1280 and following of the National Civil and Commercial Code. ---

In accordance with the constitutional principle referred to above, which empowers the State, by virtue of its police power and as a guarantee of security, to **regulate the exercise of its rights, but not to restrict the right to exercise the industry;** the aforementioned Province has provided for this purpose in Article 52 of the aforementioned Law: *"This costly transportation of passengers constitutes a private activity in the public interest, whose compliance* *shall be governed by the provisions of this* section *<u>and by the regulations issued for that purpose by the Competent Authority.</u>. The recipients of the service must comply with the payment of the charges and tax obligations determined by such regulation. Under no circumstances may this type of service affect the provision of the public passenger transportation services determined by this Law."* ----------

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At the same time, Regulatory Decree No. 1512 of September 13, 2018, which mandates, among other obligations, that Transportation Network Companies (ERT) register with the Provincial Directorate of Transportation, in the registers department (art. 56); and those who intend to provide the private transportation service must apply for registration in the Transport Network Companies (ERT) registered as such, proving the payment of the registration fee and corresponding inspection, the regulatory documentation of the vehicle with which the service is to be provided, documentation proving the identity of the driver and the National Driver's License subclass D.1. as a minimum requirement, registration with the Tax Administration Agency of Mendoza (ATM), registration with AFIP and automobile insurance required by Law No. 9024, with the limit of maximum coverage for passenger transportation, in accordance with the provisions of the National Superintendence of Insurances, or the authority that replaces it in the future (art. 57). ---------

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<u>X.- AMENDMENT TO THE SYSTEM OF FINES FOR TRAFFIC OFFENDERS IN THE PUBLIC TRANSPORTATION OF PASSENGERS AND CARGO. UNAPPLICABLE TO THE CASE OF AN UBER PLATFORM TRANSPORT SERVICE.</u>--

At the beginning of November, the Misdemeanor Law was modified, including clauses such as "Taxi, school bus, remis transportation services, recreational vehicles and others without a permit. The owner or person in charge of a vehicle that transports passengers and that operates it without the permit and/or license to provide the service established by current regulations, shall be punished with a fine of ten thousand (10,000) fixed units and an ineligible to drive from seven (7) to thirty (30) days.---

It is important to point out that the regulations under analysis do not modify or incorporate regulations or licenses in the matter but rather modify the amount of the fine. --

It is obvious, in accordance with the statements made herein, that such would be the case of one who is carrying out a transportation service for which prior authorization is required - remis, taxi, school bus transportation - but could not be applied through analogy to whoever performs a private service contract through a digital platform; it is different from those previously mentioned. --

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The State is the constitutional protector of the security of the citizens; but it must also guarantee the right to the exercise of a lawful industry and the free choice of the consumer. Within this context, regulatory standards can be established that contribute to the overall public interest; they must be adapted to the challenges posed by the use of new technologies in commercial and market activity. ---

XI.- CONCLUSIONS.

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In view of the foregoing; I understand that the case under analysis concerns a lawful commercial activity by which a private transportation service is provided through a digital platform, for the exercise of which at least three linked contracts are required; which motivates a *sui generis,* understanding of the same, thus converting it into an innominate private contract. ---

Well then, the character of innominate, regardless of the fact that it is not authorized or regulated, since its interpretative rules and applicable regulations originate from the National Civil and Commercial Code itself, to the extent that article 970 provides that "they are governed, in the following order, by: a) the consent of the parties; b) the general rules on contracts and obligations; c) the uses and practices of the location of where the service is provided; d) the provisions corresponding to the related named contracts which are compatible and appropriate to their purpose". (in the case of general transportation rules, as well as the provisions on transit).---

The foregoing does not in any way detract from the fact that pursuant to the rights granted by the Magna Carta itself in its article 42 - which compels the State to guarantee the right of consumers and users of goods and services, in the relationship of consumption, protection of security-; whose mandatory nature is reinforced in the provisions of Law 24.240 and amendments - Art. 6: *Objects and services (...), the use of which may pose a risk to the health or physical integrity of consumers or users, must be marketed according to the mechanisms, instructions and norms established or reasonable to guarantee their safety-* **the State understands it pertinent to regulate some particular**

aspects of this type of contracting, in order to ensure that the service is provided with the appropriate protection and quality; as has already been the case mentioned in the Province of Mendoza.---

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As Stephen Hawking argues, intelligence is the ability to adapt to change; it must then be adapted to the use of new technologies; adapting and regulating what is relevant for the safe use of these technologies without undermining the right of citizens to commercial activity; as well as the choice of the users of transportation. ----------------------

Therefore, <u>**I HEREBY DECIDE TO:**</u> ---

I. - ACQUIT BELLINI MARCO, ALFREDO DNI 24.776.128, of the other personal conditions of the case, in relation to the infringement provided for and repressed in art. 6.1.49 second paragraph and 4.1.7 of Law 451 since it is considered that the conduct performed is not typical within the scope of Law 451, on the understanding that it constitutes a private innominate transportation contract with linked contracts, in accordance with the considerations of fact and law previously formulated.

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II. - WITHOUT COURT COSTS. --

III. - Once there is consent with the same or it is, whichever is applicable, let it be notified to the Register of Misdemeanors for registration and to the Administrative Supervisor of Misdemeanors No. 31 for information purposes.---

There being no further business to discuss, at 11:50 a.m., the proceedings are concluded, with signatures of the attendees followed by Your Honor's signature, before me, to which I HEREBY TESTIFY. ---

[signature]

[stamp:] Dr. Natalia S. Frenkel

Assistant Undersecretary

[signature]

[stamp:] Dr. Javier Alejandro Bujan

Judge

IN WITNESS WHEREOF.////

The Private Defense Counsel and the defendant BELLINI expressly CONSENT with the sentence and therefore it acquires FIRMNESS.-

[signature]

[stamp:] Dr. Natalia S. Frenkel

Assistant Undersecretary

TRANSPERFECT

City of New York, State of New York, County of New York

I, Aurora Landman, hereby certify that the document, "**Bellini Marco, Alfredo About 6.1.49 BIS - Provision of a Public Taxi Service Without a Permit, Court of First Instance for Criminal Misdemeanors and Minor Violations, November 28, 2018**" is, to the best of my knowledge and belief, a true and accurate translation from Spanish into English.

Aurora Landman

Sworn to before me this
June 24, 2019

Signature, Notary Public

WENDY POON
NO. 01PO6356754
QUALIFIED IN
QUEENS COUNTY
COMM. EXP.
04-03-2021

Stamp, Notary Public

EXHIBIT D

JUZGADO DE 1RA INSTANCIA EN LO PENAL CONTRAVENCIONAL Y DE FALTAS N° 7
GIMENO, JACINTO ANIBAL SOBRE 6.1.53 - ESTACIONAMIENTO MEDIDO
Número: CAU 25862/2018-0 -
CUIJ: CAU J-01-00050512-5/2018-0
Actuación Nro: 12405234/2018

Ciudad de Buenos Aires, 28 de noviembre de 2018

Hora de inicio: 12:30 horas

"GIMENO, JACINTO ANIBAL SOBRE 6.1.53 - ESTACIONAMIENTO MEDIDO"

Causa nro. 25862/2018 Registro Interno: 1338/18-F

Tipo de audiencia: Audiencia de juicio.

Juez: Dr. Javier Alejandro Bujan, Titular del Juzgado de Primera Instancia PCyF nro. 7.

ES COPIA

Prosecretaria Coadyuvante: Natalia S. Frenkel

Imputado: Jacinto Aníbal Jimeno D.N.I. 11.858.963

Defensor particular: Dr. Nicolas Castilla Sastre T° 78 F° 961 CPACF

Desarrollo de la Audiencia:

Juez: Da inicio a la audiencia de debate oral y público y advierte al encartado que estuviera atento a lo que iba a oír, ordenando que se diera integra lectura por Secretaría a las imputaciones contenidas en las siguientes actas de comprobación, que tramitaran ante la Unidad Administrativa de Faltas nro. 61 del Gobierno de la Ciudad de Buenos Aires, a saber: **nro. I00045575** (fs. 5) según el cual el día 6 de febrero de 2018, a las 16:16 horas, en Av. Costanera Rafael Obligado entre Av. Sarmiento y La Pampa, de esta Ciudad, se habría constatado la falta consistente en "*6877 No cumplir normas/requisitos* *vehículos de transporte sin habilitación* "; nro. **R 20171005** (fs. 6) según el cual el día 9 de abril de 2018, a las 10:00 horas, Av. Regimiento de Patricios 1142, de esta Ciudad, se habría constatado la falta consistente en " *Ley 3708 art.2 S/obligatoriedad del grabado de autopartes RVA*" ------------------------

El Juez pregunta al encartado si ha comprendido los hechos y las imputaciones contenidas en las actas y que se reflejan en la resolución condenatoria de fecha 27 julio de 2018, así le inquirió a lo que el imputado respondió que sí. ---

Posteriormente el Juez le recuerda que como principio de garantía y amparado en la Constitución Nacional, el Código Procesal Penal de la Ciudad de Buenos Aires tiene derecho a negarse a declarar sin que ello cause presunción en su contra, y que su abstención no suspenderá el presente debate oral y público, y le pregunta si comprendió lo antedicho, a lo que el imputado manifestó que sí. ---

Igualmente S.Sa. le recuerda que durante el curso del debate podrá formular todas las aclaraciones que considere oportunas, siempre que se refieran a la Defensa. ---

S.Sa. hace saber al encartado que la presente instancia en el proceso de faltas se constituye como primera instancia judicial y que lo sucedido en sede administrativa no compele ni condiciona la actuación del Tribunal, el cual solamente se encuentra limitado por la petición fiscal y que por ende la sanción impuesta puede ser absuelta y/o dispuesta en más o menos respecto de la administrativa, puesto que el principio de la *reformatio in pejus* solo funciona en materia de impedimento dentro de la propia instancia administrativa y/o en la judicial respecto de la primera y segunda instancia.---

El encartado es inquirido sobre si entiende y manifiesta que sí. ----------------

S.Sa. refiere al encartado sobre el planteamiento de cuestiones preliminares---

Defensor Particular: No tengo cuestiones preliminares, ratifico los argumentos en el descargo administrativo; como el escrito de defensa interpuesto.---

Juez: Tiene que reproducirlo en esta audiencia.---------------------------------

Defensor Particular: se va a reproducir tratando de ordenar como medida preliminar voy a sostener el pedido de absolución de mi cliente por cuestiones de forma y cuestiones de fondo. ---------------------------------------

Por forma sostengo la nulidad del acta por el grave defecto formal que padece la misma y; eventualmente, independientemente de la validez o no del acta como instrumento la sanción impuesta en el acta es inexistente. Por eso se solicita la absolución por inexistencia de la infracción.--------------------

Si se entiende que cumple la validez en el marco del art. 3 y 5 de la Ley 1217, igual sostengo que la infracción es inexistente.-------------------------------------

Hay un nuevo sistema de multas efectuadas por teléfono, que se plasman en un acta de infracción **nro. I00045575** (fs. 5).--------------------------------------

El acta obrante a fs. 5 es nula al no poseer firma, posee los datos del agente Juan Carlos Rey, es un defecto propio del sistema que no puede ser imputable a mi asistido, viola el art. 3 inc. "G" de la ley 1217.--------------------

Motivo por el cual viola el art. 5, porque deben darse los requisitos taxativos del artículo 3.--

Viola el inciso b del art. 3 de la Ley 1217, sanción genérica. Más allá que mi cliente no realiza ni remis, ni taxi ni transporte escolar, no sé la calificación de conducta reprochable. Que hizo para que tenga esa infracción, y cual es la normativa de la que me tengo que defender.---------------------------------------

La explotación sin autorización es por remis, o transportes escolar o taxis; por lo cual atacaré los tres.--

Refiere entonces a habilitación correspondiente. Ahora me pregunto de que? de remis, de transporte o de taxi? No lo sé, porque no lo dice, por eso se viola el art. 3 de la Ley 1217.---

Habla de habilitación de remis, transportes escolares y de transporte de taxi. El Código de Habilitaciones también habla de remis, escolares y taxi; motivo por el cual para no ser confuso me detengo en estos argumentos en cuanto a la forma del acta.---

No se agrega en la misma los datos del pasajero, lo cual es violatorio del art. 3 inc. "f" de la Ley 1217.---

Asimismo, no califica ni encuadra conducta, violentando así lo dispuesto en el art. 3 inc. b y c de la Ley 1217.---

Por eso ataco el contenido extrínseco del acta de comprobación.----------------

El inciso c dice, sello, firma y cargo; en cuanto a la firma digital sólo dice el nombre y apellido, no hay firma ni cargo.--

Sr. Juez: Estoy en condiciones de resolver la primera incidencia.--------------

No comparto ninguno de los argumentos formulados por la defensa, tengo dicho en reiterados precedentes que tienen naturaleza jurídica de *notitia criminis*, anoticiamiento del hecho; brindada en el acta las circunstancias de hecho, modo y lugar; siendo que con eso es suficiente para el ejercicio de la defensa. No se le puede exigir que califique legalmente el acta porque no es su función, tiene que decir cuál es el hecho que se le enrostra.-----------------

Dado que es un anoticiamiento la interpretación de este tribunal que coincida con el tribunal es que no son requisitos *ad solemnitatem* sino que las mismas son *ad probationem*, con que se puedan identificar los elementos que no impidan el ejercicio de la defensa, el acta es válida.----------------------------

En relación a la firma digital, esto ha sido objeto de un criterio general de actuación de la Subsecretaria de Justicia respecto de los controladores administrativos de gobierno, me sorprende que esta disposición generaba la invalidez del acta.--

El acta puede estar acompañada, tal es el caso por ejemplo del acta circunstanciada que se acompaña al acta de comprobación; el acta de fs. 4 puede integrarse al acta de fs. 5 y no implica que sean hechos distintos por tener distinta numeración.--

Cuestionar la firma digital, seria estar en contra de las disposiciones de gobierno en relación a la firma digital. Hasta de hecho, los decretos y resoluciones del Poder Ejecutivo se firman con firma digital, sólo basta que la firma permita identificar al funcionario; sólo él tiene ese token o clave habilitada; el contexto de firma digital.--

Las actas son absolutamente válidas, se está defendiendo el ciudadano de no tener habilitación para el transporte de pasajeros, esa habilitación en los términos del art. 4.1.,7 y concordantes. Más allá que no lo diga el acta de comprobación se consolida con el resto de la actividad administrativa, incluso la efectuada por el controlador.---

En relación al Acta R20171005, nada ha objetado en relación a la validez extrínseca de la misma, siendo por tanto que del juego armónico de los artículos 3 y 5 de la Ley 1217 debe entender la validez de la misma.

RESUELVO: **NO HACER LUGAR** en relación a la invalidez del acta I00045575 por su contenido formal y continuaremos con la parte material. ----

S.Sa. requiere a la Defensa Particular si habrá de producir prueba alguna.-----

JUZGADO DE 1RA INSTANCIA EN LO PENAL CONTRAVENCIONAL Y DE FALTAS N° 7

GIMENO, JACINTO ANIBAL SOBRE 6.1.53 - ESTACIONAMIENTO MEDIDO

Número: CAU 25862/2018-0 -

CUIJ: CAU J-01-00050512-5/2018-0

Actuación Nro: 12405234/2018

Defensor Particular: No produciré prueba alguna, es una cuestión de pleno derecho.--

Sr. Juez: concede la palabra al Defensor Particular a efectos de alegar.--------

Defensor Particular: --

Como ya dije en escritos referenciados, el no tener habilitación es una recalificación del controlador administrativo de faltas, porque el acta no debería dar lugar a interpretación. Mi cliente fue sancionado conforme acta de infracción Ley 451 art 4.1.7 de la simple lectura surge que lo que se sanciona es no poseer habilitación para remis, transportes escolares y taxis.--

Mi cliente no realiza ni el servicio de remis, ni de escolares ni taxi, ni se especifica ni agrega datos de pasajero alguno.--------------------------------------

La aplicación denominada "UBER" es un nexo por el cual un pasajero se contacta directamente con mi cliente, en este caso GIMENO -quien también tiene la aplicación-, no se llama por teléfono a una remisería, no pide la asignación del viaje, no es la remisería quien le dice "lleva a este pasajero a tal destino", contacta directamente a mi cliente; y mi cliente puede aceptar o no el viaje. Cuando acepta se establece un contrato entre partes, es un contrato privado de pasajeros, de transporte.--------------------------------------

Está claramente descripto en el art. 1280 del CCyCN, en 2015 cuando se unifica código civil y comercial se incorpora una nueva figura de Transporte Privado de Transporte.---

Refiere el art. 1280 *"Hay contrato de transporte cuando una parte llamada transportista o porteador se obliga a trasladar personas o cosas de un lugar a otro, y la otra, llamada pasajero o cargador, se obliga a pagar un precio o flete"*, y el Artículo 1281 dispone que las normas se aplican ante la ausencia de leyes especiales, no hay Ley en CABA que regula el transporte por aplicación de teléfonos móviles.---

Inicialmente esta aplicación, en CABA trató de tildarla de ilegal, el transporte privado de transporte es lícita en la República Argentina. Este argumento de la actividad ilícita se vio truncada cuando en Mendoza se "legalizo" UBER, que es un error fáctico y jurídico. En la Ley N° 9048 reglamentó el contrato de transporte privado, en la provincia una actividad puede ser lícita e ilícita en el país? Mendoza tomo la iniciativa de reglamentar una actividad lícita en el ámbito de la República Argentina.-----

Con esa reglamentación empezaron a existir propagandas en Canal 13, Diario la Nación, cualquier medio de comunicación. Hoy es sponsor de la AFA, están promocionando actividad lícita o están haciendo apología del delito?---

Esta actividad lícita no está reglamentada, el Código de Habilitaciones aclara taxativamente y refiere cuáles son las obligaciones y habilitaciones para remis, taxi y transportes escolares; nada dice sobre lo que debería ser para contrato privado de transporte, en CABA no está reglamentado.----------------

Mi cliente, en algún momento lo googleo para ver si había reglamentación, y yo digo la no reglamentación es prohibitivo para que pueda hacer lo que dice el art. 19 de la Carta Magna, que todo lo que no está prohibido está permitido".--

Si lo que no está prohibido, está permitido, si en CABA no está Reglamentado, no está prohibido, por el cual ejercicio la actividad.------------

Podría haber sido distinta la estrategia, no hay modo de probar que el agente haya probado que estaba con la aplicación, podría haber dicho que no había forma de acreditar que el cliente no tenía aplicación, no se puede revisar el teléfono.---

No hay nada que ocultar estabas realizando actividad lícita por arts. 1280 y 1281 del C.C.y C.N aplica ante la falta de reglamentación en CABA.-----------

Asimismo hay un precedente en el Fallo Quevedo de este mismo fuero en la causa 11465/16 resuelto por el Juzgado 31 mediante sentencia firme del 3/2/2017 que determinó que la actividad de una persona que hace UBER es distinta al remis, y que no se le puede exigir la misma.--------------------------

No se puede aplicar a mi cliente analógicamente la actividad de remis, cuando trabaja para si, es monotributista, no trabaja para una remisería, me pregunto, como podemos hacer para que en la calle no tenga problemas? Como no hay reglamentación, le dije, podes ser hipócrita mentir ir al gobierno y pedir una habilitación para remis, pero teniendo que mentir porque no es esa realmente la actividad que se realiza. Para suplir esta omisión tenés que acomodarte a la reglamentación vigente, que es más cercana que es la de remis. Que es lo que pasa, cuando llega al Gobierno le van a preguntar, o solicitar los datos y la habilitación de la remisería en la que trabaja? A lo que mi cliente respondería: no trabajo en una remisería,

trabajo para mi. Y la respuesta a ese respecto es; si no trabaja en una remisería, no puede sacar la habilitación.---
Aun siendo hipócrita y querer sacar habilitación que no le corresponde, no le merece que tenga una sanción.--
Por lo expuesto, solicito a S.Sa, por inexistencia de la falta enrostrada, la absolución de mi cliente. ---

Sr. Juez: Concede la palabra al Sr. Gimeno, a fin de hacer uso de entenderlo pertinente, de su derecho a la última palabra.---------------------------------------
Sr. Gimeno: No haré uso de la palabra, comparto lo dicho por mi abogado.---
Sr. Juez: Me encuentro en condiciones de resolver.-----------------------------

Hay varias cuestiones, a criterio del juzgado, las cuestiones extrínsecas ya se encuentran validadas, me voy a expedir sobre las cuestiones materiales, en tanto ya me he expedido en relación a la validez extrínseca del acta de comprobación. --

Por lo cual, en relación al contenido material del acta de infracción **nro. I00045575** (fs. 5), sostengo que: ---

I.- APLICACIÓN PLATAFORMA INFORMÁTICA: UBER------------------------------------

Que, en primer término a fin de resolver las presentes actuaciones se torna de relevancia el análisis del tipo de actividad realizada por el Sr. Gimeno, Jacinto Aníbal, quien refiere que se encontraba transportando a un pasajero en virtud de contrato privado con la plataforma UBER.--
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UBER es una empresa que, por medio de una aplicación de teléfono celular o tableta, enlaza a particulares (previamente registrados) – que deseen utilizar su vehículo para dar transporte – con los clientes potenciales (quienes también deben registrarse y descargar la aplicación). ---

Respecto del procedimiento del mismo; el/la pasajero/a, para solicitar un viaje, debe indicar el origen y el destino y; una vez solicitado, se puede consultar la información del mismo y del conductor; así como el tiempo en que tardará en llegar el automóvil, el tipo de vehículo.-- Para ser transportista, la empresa pide que el conductor se inscriba y acompañe licencia de conducir profesional, póliza de seguro del auto y cédula del vehículo; y mientras el mismo tenga encendida la aplicación, se identifica permanentemente su ubicación. ----------------------

II.- UBER: ACTIVIDAD COMERCIAL LÍCITA. ---

Ahora bien, ya se ha expedido la **Corte Suprema de Justicia de la Nación,** rechazando un recurso de queja interpuesto por el Sindicato de Peones de Taxi, **ratificándose así la legalidad de la empresa UBER**, considerada en las instancias previas **como una actividad comercial lícita.** [1]---

La Cámara del Crimen confirmó la decisión del Juez Zelaya y determinó que "*la prestación del servicio de transporte de pasajeros sin contar con habilitación oficial no configura una conducta tipificada por la legislación punitiva. No se advierte cuál sería el delito concreto al que se habría instigado ni los delitos indeterminados que tendría por objeto la supuesta asociación ilícita*".------------

En dicha causa, el fiscal "descartó la hipótesis de la instigación delictiva o de la asociación ilícita, al puntualizar que se trata del desarrollo de una actividad comercial lícita". "(...) busca desarrollar una actividad comercial lícita bajo un modo de asociación con fines legítimos". ---

Se resuelve de esta forma, que la actividad descripta en las presentes actuaciones, no configuran un ilícito penal y se trata de una actividad comercial lícita. ----------------------------

III.- USO LUCRATIVO DEL ESPACIO PÚBLICO SIN AUTORIZACIÓN - IMPROCEDENCIA DE LA CONTRAVENCIÓN---

La Justicia Penal, Contravencional y de Faltas de la Ciudad Autónoma de Buenos Aires, tuvo oportunidad de pronunciarse en el Incidente 4790/2016 en los autos caratulados "Nicolás Sajoux s/ infr. al Art. 86 C.C." (anteriormente artículo 83 C.C.)--------------------------------------

En dichas actuaciones, la Cámara de Apelaciones en lo Penal, Contravencional y de Faltas Sala III, resolvió el planteo formulado por la defensa en relación con la imputación de la

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[1] CSJN "Recurso de hecho deducido por el Sindicato de Peones de Taxis de la Capital Federal en la causa Uber y otros s/ incidente de recurso extraordinario" de fecha 14 de agosto de 2018

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CSJN "Recurso de hecho deducido por el Sindicato de Peones de Taxis de la Capital Federal en la causa Uber y otros s/ incidente de recurso extraordinario" de fecha 14 de agosto de 2018

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contravención dispuesta en el art. 83 del CC, relativa a la realización de actividades lucrativas en el espacio público. ---

Sobre el particular, la Dra. Paz afirmó que *" (…) el art. 86 no hace referencia a taxis y remises sino que, como fuera expuesto supra, reprime las actividades lucrativas en el espacio público no autorizadas por la administración". (…)* ---

Refiere en su voto El Dr. Delgado que *"Esta norma se incorporó al Código Contravencional con la clara finalidad de proteger el espacio público de la proliferación de ferias clandestinas o de puestos no autorizados de venta callejera (…) No tiene por objeto la regulación del tránsito, ni el transporte de personas.*

"---

No usa indebidamente el espacio público (…) realizando una actividad lucrativa no autorizada, quien circula conduciendo un vehículo por las calles y avenidas libradas al tránsito automotor; con o sin acompañantes, sean estos conocidos del conductor o pasajeros que con él contrataron un transporte.---

La circulación automotor, en tales casos, que es la actividad desarrollada por el conductor del vehículo, sí está autorizada en tanto tránsito automotor, es decir, en tanto uso admitido del espacio público. Está permitido que cualquier conductor transite con su vehículo particular o el que le ha sido encomendado por las calles y avenidas libradas al uso automotor con o sin pasajeros. Si algunos conductores lo hacen prestando el servicio público de taxi o de remises, deberán hacerlo con la habilitación y licencias respectivas. Pero de no hacerlo, no estarán usando ilegalmente el espacio público sino infringiendo las normas que impiden tales actividades sin licencia o habilitación. --------

IV.- SOBRE LA FALTA REPROCHADA. --

Que se le reprocha en las presentes, la sanción prevista por el art. 6.1.49 segundo párrafo de la Ley 451, que expresa "Requisitos de los vehículos de transporte de Carga y de Pasajeros": *El/la titular y/o responsable de un vehículo de transporte de carga y/o de pasajeros, que no posea* *habilitación para prestar el servicio, es sancionado/a con multa de dos mil (2.000) unidades fijas."* Citándose a su vez, en las Observaciones del Acta de Comprobación N° I00045575, la falta estipulada en el Artículo 4.1.7 Ley 451, del cual se desprende que : *" El/la titular o responsable de un servicio de taxis, de transporte de escolares, o de remises que lo explote sin la autorización para prestar el servicio establecida por la normativa vigente, es sancionado/a con multa de diez mil (10.000) unidades fijas, y la inmovilización del vehículo"*.---

Corresponde analizar entonces, si la actividad esgrimida corresponde a alguno de los servicios de transporte cuya autorización establece el Gobierno de la Ciudad Autónoma, a saber: ---

1.- Servicio de Taxi: ---

Que, en virtud de lo expuesto de conformidad a la definición expresada en el art. 12.2.1 de la Ley 2148, el servicio de taxi es "Servicio de transporte público de personas, no colectivo, en automóviles de alquiler con taxímetro de hasta cuatro (4) pasajeros por vehículo, prestado en un vehículo y por un conductor debidamente habilitados por la Autoridad de Aplicación".---

Atento que el servicio brindado no fue efectuado por auto con habilitación de taxi, y que el mismo no pudiera haberse confundido con dicho tipo de servicio por haberse prestado en auto sin tarifa estipulada por taxímetro-conforme los lineamientos del Gobierno de la Ciudad-, ni estar pintando por los colores amarillo y negro que pudieran generar confusión en relación a que se trataba del mismo, no se encontraba en las calles o avenidas en búsqueda de pasajeros; es que debe despejarse con claridad que el servicio brindado no era el de taxi, por lo cual habrá de descartarse el requerimiento de habilitación en dicho aspecto.--------------

2.- Servicio de Remis: ---

Este servicio se encuentra definido en el Código de Habilitaciones, en el capítulo 8.4. en el que se prevé el Servicio de alquiler de Automóviles Particulares con conductor (remises): 8.4.1 *"Considérase agencia de remises aquella que presta el servicio de transporte de personas en automóviles de categoría particular, con conductor, detentando el pasajero el uso exclusivo del vehículo, mediante una retribución en dinero convenida entre prestador y prestatario."*, cuya actividad se encuentra regulada por Decreto N° 167/1998, Resolución S.S. Tr. N° 28/010 que creó el Registro Único del Servicio de Alquiler de Automóviles Particulares con Conductor de Remises. ---

El Código de Tránsito y Transporte de la Ciudad Autónoma de Buenos Aires, en el acápite de "Definiciones Generales" determina al remis como aquel *"Automóvil de alquiler no sujeto a itinerario predeterminado, con tarifa prefijada para el recorrido total, usado por ocupación total del vehículo, que no toma o deja pasajeros con boletos, billetes o pagos individuales"*.-------------------------

De la descripción expuesta, puede desprenderse que el servicio de remis se ofrece a persona indeterminada, cualquiera que llame o se apersone a la agencia, podrá utilizar libremente el servicio de transporte en forma individual, a cambio del precio que se determina con la empresa de remis. ---

La diferencia con el servicio de transporte por intermedio de UBER, se desprende en tanto la misma no es ya a persona indeterminada sino determinable, por cuanto sólo podrá ser parte de la operación contractual aquel/la usuario/a que haya descargado la aplicación, registrado y cargado sus datos personales en la base de la plataforma de UBER para utilizar el mismo. --

Se destaca así que en la causa N° 11465/2016 caratulada "Quevedo, Cristian Damián s/ Infracción artículo 6.1.52 de la Ley 451", en oportunidad de alegar sobre un acta de comprobación por licencia de remis vencida, el Fiscal Villalba Diaz refirió que "*se le imputa tener una licencia de remis vencida pero que por los dichos del presunto infractor no se trató de una licencia vencida sino de un vehículo cuya tarjeta de identificación tenía destino remis, pero (...) el mismo encartado explicó y probó que estaba ejerciendo una actividad distinta, que se desarrolla por una plataforma UBER. (...) la presente imputación fue por una actividad distinta a la que estaba desarrollando y la conducta no se le podrá imputar. Que solo por eso debe ser absuelto (...)*"-. --------

La Jueza interviniente, Dra. Susana Beatriz Parada, en relación al acta de infracción relativa a la licencia de remis vencida, expresó que "*en realidad no se ha descripto la acción como dice el inciso b del art. 3 porque no se trataba que el Sr. Quevedo estuviera conduciendo un automotor con una licencia de remis vencida sino mediante la aplicación de otro sistema, el vehículo no funcionaba como remis (...)* .---

Con los extremos expuestos, puede demostrarse así que la actividad descripta por el Sr. Gimeno– actividad de transporte por intermedio de la aplicación UBER- no se encuentra entra aquellas en virtud de la cual se le requiere al servicio de remis habilitación para prestar el servicio, debiendo descartarse entonces la utilización de dicha figura. ---------------------------

V.- FALTA DE PERTINENCIA DE INTERVENCIÓN FISCAL---------------------------------

Asimismo, no puede dejar de resaltarse que el Sr. Fiscal Coordinador, Dr. Gonzalo VIÑA, a fs. 25 de las presentes actuaciones, expresa que "(...) **tampoco se advierte que se encuentre comprometido el interés general de la sociedad o esté directamente involucrado el orden público constitucional (art. 17, incs. 1, 2 y 5 LOMP) (...) estimo que no resulta pertinente la intervención del Ministerio Público Fiscal" (sic).**---

En virtud de las manifestaciones vertidas, claramente se desprende que, quien representa los intereses de la sociedad en nombre del Estado; entiende que el tema traído a estudio, no constituye temática que requiera acción directa de su parte, ya que UBER no compromete el interés general ni involucra el orden público constitucional por lo que mal podría ser tratado como un servicio público. --

Ahora bien, si el caso fuera por una infracción cometida en el marco de la Ley de Faltas -por alguna de las causales previstas en afectación a la prestación de servicio público-, la intervención del mismo devendría obligatoria; en tanto es el Fiscal en representación del poder de policía que detenta el Estado, quien debe velar por la salvaguarda y seguridad de la supuesta prestación en infracción. ---

De ello se desprende que no se trata en autos, cabe resaltar, por lo manifestado por el Sr. Fiscal, de una afectación a un servicio público de pasajeros.---

VI.- DE LA NATURALEZA JURÍDICA DEL SERVICIO DE TRANSPORTE POR MEDIO DE PLATAFORMA WEB.---

Habiéndose determinado ya que la actividad comercial es lícita, que la misma no configura una contravención por utilización de espacio público sin autorización y que la misma no puede incorporarse como actividad de taxi o remis - que ya venimos diciendo no es una falta-; debe entonces dilucidarse la naturaleza jurídica del servicio de transporte bajo análisis y si la misma requiere de algún tipo de habilitación particular. -------------------------------------

Se entiende al Transporte Público de pasajeros regular, como el transporte colectivo de pasajeros que la Administración organiza con el objeto de satisfacer las demandas masivas de traslado de sus usuarios/as. ---

Por su parte, el Transporte Privado, es definido por el Código Civil y Comercial de la Nación, en su artículo 1280, como aquel en virtud del cual "*una parte llamada transportista o porteador se obliga a trasladar personas o cosas de un lugar a otro, y la otra, llamada pasajero o cargador, se obliga a pagar un precio o flete*".--

No cabe duda alguna así que, la diferencia del transporte público, organizado o concesionado por el Estado a fin de satisfacer el servicio general de transporte en forma masiva e indeterminada; del transporte privado en virtud del cual se vincula a quien conduce un auto particular y el pasajero – determinados o determinables-, a fin de ser traslado de un lugar a otro a cambio de un precio; se configura en un contrato de transporte.- Ni el Código Civil y Comercial de la Nación, ni la regulación específica en materia de Faltas; especifican que todo servicio de transporte deba efectuarse en el ejido de la Ciudad con habilitación previa; sino por el contrario, a ciertos tipos de transporte (taxi, remises, transporte escolar) se les requiere particularmente una habilitación previa para funcionar como tal.---

<u>VII.- CONTRATO INNOMINADO. CONTRATOS CONEXOS</u>-----------------------------

En casos como el presente, tanto el/la transportista como el/la pasajero/a, se conectan por intermedio de una aplicación electrónica– UBER-. Esta característica no es un distingo más, no se trata en el caso de una persona indeterminada que en la acera levanta su brazo a fin de requerir el traslado por intermedio de un taxi (diferenciado con colores particulares, taxímetro, entre otros) y/o de un servicio de remís cuya oferta es indeterminada al público en general (remisería de acceso al público en general en forma personal o telefónicamente); sino de personas particulares cuyos datos son registrados en la plataforma a fin de poder ser pasajero/a y/o transportista, respectivamente (lo que torna a los mismos determinables en forma previa a la aceptación del contrato de transporte); y cuyas características son valuadas por el/la pasajero/a y el/la transportista para consentir o no el contrato – vgr. cantidad de estrellas valuadas por otros/as usuarios/as y/o transportistas, características del vehículo en el cual será transportado, entre otros. ---

Lo hasta aquí expuesto, me convence de entender que se trata de un servicio de transporte privado; ahora bien la utilización de una plataforma digital por intermedio de una empresa intermediaria, genera una particularidad, no prevista en el Código Civil y Comercial, lo que me hace entender a la interconexión de actos jurídicos descripta en una red contractual *sui generis*. --

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El/la posible pasajero/a, al descargar la aplicación y cargar sus datos personales, y al requerir el viaje para cada caso concreto permite a UBER mediar a fin de obtener un transportista que acepte la oferta y concluya el transporte. --

El/la posible transportista por su parte, al momento de registrarse y presentar la documentación requerida tales como licencia, seguro del auto; acepta que UBER lo/a conecte con oferentes del servicio de transporte en el momento que el mismo se encuentre conectado a la aplicación; a fin de la conclusión del contrato de transporte referido entre las partes. ------

Esta empresa acerca así oferta y demanda de transporte, a fin de mediar en la conclusión de un contrato de transporte privado, sin tener relación de dependencia o representación con ninguna de las partes; por cuyo servicio cobra al transportista un porcentual del 25% por viaje.--

Puede decirse entonces que, en la práctica, el/la pasajero/a contrata con UBER, el transportista contrata con UBER, y por último -al requerirse y aceptar cada viaje- se genera un contrato de transporte entre pasajero/a y transportista. --

Se vislumbra así, conexidad entre tres contratos necesarios a fin de cumplirse el objeto común: el transporte; situación que, conforme avances del mercado y tecnología ya ha sido receptada en el nuevo Código Civil y Comercial de la Nación en el artículo 1073 y siguientes. De la caracterización efectuada a los Contratos Conexos en dicho texto legal, se puede desprender que *"Esto significa que aun cuando se trata de negocios aparentemente autónomos, todos tienden o procuran el logro de un resultado común o negocio único, que no se podría alcanzar sin la interacción de cada uno de dichos contratos. No se exige simultaneidad temporal ni instrumentación única."*[2]---

La Sala "M" de la Cámara Nacional de Apelaciones en lo Civil, en su pronunciamiento en los autos "Van Thienen, Guillermo Federico y otro c/M.B. Desarrollos Inmobiliarios S.A. s/daños y perjuicios", expediente n°109, del Juzgado Civil n°109, ha expresado: "*Cabe recordar que el tema de los contratos conexos -como son los de constitución del fideicomiso inmobiliario, de adhesión y de transferencia del dominio fiduciario- y que se encuentran regulados en el nuevo Código Civil y Comercial que entrará a regir en agosto de este año, no es nuevo en nuestro derecho y la cuestión quedó reflejada en el despacho de la Comisión n° 3 de las "XVII Jornadas Nacionales de Derecho Civil" realizadas en Santa Fe en 1999, en donde se dijo que "Habrá contratos conexos cuando para la realización de un negocio único se celebran, entre las mismas partes o partes diferentes, una*

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[2] http://www.saij.gob.ar/docs-f/codigo-comentado/CCyC_TOMO_3_FINAL_completo_digital.pdf. Código Civil y Comercial Comentado - Página 495

http://www.saij.gob.ar/docs-f/codigo-comentado/CCyC_TOMO_3_FINAL_completo_digital.pdf. Código Civil y Comercial Comentado - Página 495

pluralidad de contratos vinculados entre sí...", agregando que la vinculación debía medirse "...a través de una finalidad económica supracontractual, verificada jurídicamente en la causa subjetiva u objetiva, en el consentimiento, en el objeto o en las bases del negocio"[3]------------------------------------

La importancia de entenderla como una red negocial, radica en brindar a los/as actores de dichos actos jurídicos, la posibilidad de oponer excepciones por incumplimiento o cumplimiento defectuoso, incluso de aquellas acciones que sean de un contrato que les es ajeno, de conformidad a lo dispuesto en el art. 1075 del CCyCN; así como la extensión en el ámbito de responsabilidad´(Art. 1758 CCyCN y 40 Ley 24240) y la normativa vinculada a contratos de consumo. --

Asimismo, en esta triangulación, hay una característica muy particular: es UBER quien -conforme zona geográfica, demanda y distancia- define en cada caso el valor de viaje. Convierte esto al contrato de transporte en nulo? Pues claramente no, esto no es óbice a la existencia del contrato en sí mismo. Nada obsta a que las partes, en razón de la autonomía de la voluntad que les impera, decidan que sea un tercero quien determine el precio cierto (artículo 1006 Código Civil y Comercial de la Nación). ---

En virtud de lo expresado, se entiende que el servicio de transporte por medio de la aplicación UBER, es un servicio de transporte privado; que se genera por intermedio de un contrato innominado en el que se conecta a la Empresa Uber, el/la/los/as pasajeros/as y el/la/los/as transportistas; cuya regulación – ante falta de normativa específica – será supletoriamente la relativa a Contrato de Transporte, conforme las reglas interpretativas del propio Código Civil y Comercial de la Nación en su artículo 970. ------------------------------------

VIII.- SOBRE LA RESPONSABILIDAD. --

Mucho se ha discutido en relación a la garantía de seguridad que debe primar y garantizarse en relación al transporte de personas. --

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[3] http://www.nuevocodigocivil.com/wp-content/uploads/2015/06/Sentencia-23.pdf

http://www.nuevocodigocivil.com/wp-content/uploads/2015/06/Sentencia-23.pdf

Sobre el particular, el propio Código Civil y Comercial, recepta mayor y extensiva responsabilidad para el caso de Contratos de Transporte; atento que dispone en su artículo 1291 que la misma se extienda no sólo al incumplimiento del contrato – situación típica de todo contrato privado-, sino también respecto de siniestros que afecten a la persona del pasajero/a y/o pérdida de sus cosas; no pudiendo limitarse esta obligación por decisión de las partes por entender los codificadores que se afectaría la seguridad de las personas, y con ello orden público. --

Por último, destaca el artículo 1758 del Código Civil y Comercial de la Nación que esta responsabilidad, es extensiva no sólo al transportista sino también, a quien obtiene provecho de ella; resultando así en concordancia con lo dispuesto en el art. 40 de la Ley 24.240 y sus modificatorias, el cual establece que *"si el daño al consumidor resulta del vicio o riesgo de la cosa o de la prestación del servicio, responderán el productor, el fabricante, el importador, el distribuidor, el proveedor, el vendedor y quien haya puesto su marca en la cosa o servicio. El transportista responderá por los daños ocasionados a la cosa con motivo o en ocasión del servicio"*.----------------------------------

De todo lo expuesto se desprende que, frente al consumidor – pasajero/a – responderían tanto el dueño del auto, el transportista como la empresa UBER; sin perjuicio de las acciones de repetición que pudieren efectuarse entre ellos y/o las excepciones.-----------------------------

IX.- SOBRE LAS NUEVAS TECNOLOGÍAS.--

En este caso, nos encontramos ante un tipo contractual en el que converge el uso de nuevas tecnologías, ya que es a través de una aplicación que se descarga en los teléfonos celulares y/u otros dispositivos digitales que se produce el consentimiento y formación ulterior del contrato de transporte. ---

Esta modalidad de contratación, se incorpora en el marco de la denominada "economía colaborativa", en virtud de que importa *"una interacción entre dos o más sujetos, a través de medios digitalizados o no, que satisface una necesidad real o potencial, a una o más personas. Es lo que antes se conocía como trueque y que, gracias a las plataformas digitales, se ha sofisticado establecido un marco donde los usuarios pueden interactuar entre ellos y/o con la misma plataforma (…)El movimiento del consumo colaborativo supone un cambio cultural y económico en los hábitos de consumo marcado por la migración de un escenario de consumismo individualizado hacia nuevos modelos potenciados por las redes sociales y las plataformas de tipo peer-to-peer (red-entre-pares o red-entre-iguales)"*[4] ---

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[4] https://www.fundacionaquae.org/wiki-aquae/innovacion/la-economia-colaborativa/

https://www.fundacionaquae.org/wiki-aquae/innovacion/la-economia-colaborativa/

Tal es el caso por ejemplo de "Mercadolibre", donde diversos oferentes ponen a disposición productos de variada índole (bienes muebles como ropa, zapatos, muebles), que serán adquiridos al precio allí determinado – o a convenir por las partes- por otros/as usuarios/as que se encuentran registrados/as en dicha página y por el cual la empresa cobra un porcentual en comisión, disruptiendo el viejo esquema de adquisición en locales o tiendas físicas; o el caso de Glovo, Rappi, Pedidos Ya, por los cuales el/la consumidor/a adquiere productos alimenticios, farmacéuticos, entre otros.---

La Sala I de la Cámara de Apelaciones en lo Contencioso, Administrativo y Tributario, en un fallo del 22 de junio del 2018 en relación a demanda presentada por una usuaria contra Mercado Libre, "las juezas Mariana Díaz y Fabiana H. Schafrik y el juez Carlos F. Balbín consideraron que a la plataforma le cabe la ley de defensa del consumidor. **Díaz citó jurisprudencia al decir que Mercado Libre interviene -y por ende es responsable- desde el mismo momento en que, creando apariencia, logra atraer para sí la confianza de sus clientes", la cual "constituye la fuente primaria de sus obligaciones" y también "de sus ganancias".** "Sea cual sea el argumento que se tome, **no es discutible que Mercado Libre es un intermediario que integra una cadena comercial"**, indicó Díaz en base al fallo de la Cámara Nacional en lo Civil, Sala "K", en los autos "Claps, Enrique Martín y otro c/ Mercado Libre S.A. s/ daños y perjuicios"[5]. (el resaltado nos pertenece)---

Todas estas aplicaciones, al igual que UBER, vinculan compradores/as con vendedores/as o usuarios/as de servicios, por medio de un sistema digital sin que se le haya requerido permiso ni licencia gubernamental. ---

Esta nueva modalidad especial de contratación informática, ya ha sido receptada por el nuevo Código Civil y Comercial de la Nación; y se encuentra amparada por nuestra

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[5] https://www.perfil.com/noticias/sociedad/mercado-libre-debe-cumplir-con-la-ley-de-defensa-del-consumidor-e-indemizara-a-un-usuario.phtml

https://www.perfil.com/noticias/sociedad/mercado-libre-debe-cumplir-con-la-ley-de-defensa-del-consumidor-e-indemizara-a-un-usuario.phtml

Constitución Nacional en tanto el artículo 14 garantiza el derecho a trabajar y ejercer toda industria lícita; y el artículo 19 de la Carta Magna enfatiza que *"Ningún habitante de la Nación será obligado a hacer lo que no manda la ley, ni privado de lo que ella no prohíbe"*.-----------------------

Como se ha descripto previamente, la actividad ha sido considerada lícita en términos penales ya por la Corte Suprema de Justicia de la Nación, la misma encuadra en un servicio de transporte que se concreta por intermedio de una plataforma de internet y la cual cuenta con normativa de aplicación supletoria regulada por el Código Civil y Comercial de la Nación, no existiendo norma alguna que restrinja o regule esta actividad privada en miras a la seguridad o al orden público. ---

La inexistencia de regulación administrativa del Gobierno de la Ciudad Autónoma de Buenos Aires, o el entendimiento de que la misma no compromete el interés general de la sociedad, conforme ha expresado el Sr. Fiscal en las presentes actuaciones; no puede pasar inadvertido por este Tribunal, ni entender -por analogía con otro tipo de transporte- la falta de habilitación como prohibición o limitante para ejercer la actividad comercial lícita; derecho garantizado por la Carta Magna. --

Ahora bien, esto en nada obsta a que el Estado, entienda pertinente reglamentar su ejercicio en cierta medida en miras a preservar el orden público y la seguridad (art. 28 y 42 CN). --

Sobre el caso particular de la utilización de la aplicación de UBER, ha elaborado recomendaciones el Relator Especial para la Libertad de Expresión, Edison Lanza, en su Informe Anual de la Comisión Interamericana de Derechos Humanos 2017 – volumen II – expresando que los Estados miembros deben: --

a. Abstenerse de aplicar a Internet enfoques de reglamentación desarrollados para otros medios de comunicación – como telefonía o radio y televisión –, y diseñar un marco normativo alternativo y específico para este medio, atendiendo a sus particularidades (…)--

e. Garantizar que el tratamiento de los datos y el tráfico de Internet no debe ser objeto de ningún tipo de discriminación en función de factores como dispositivos, contenido, autor, origen y/o destino del material, servicio o aplicación, de conformidad con el principio de neutralidad de la red.---

Destaca el Relator así, la importancia de incorporar y reglamentar en la normativa interna, aquellos aspectos particulares que han de tener determinados actos jurídicos ante el advenimiento de nuevas tecnologías y de la economía colaborativa.---------------------------------

Un primer paso se ha dado en materia tributaria, la Ley N° 27.430 de Reforma Tributaria grava los servicios digitales prestados por residentes en el exterior cuando son utilizados en el país por consumidores finales y otros sujetos actualmente no alcanzados por el IVA en la importación de servicios; mecanismo incorporado a fin de evitar la evasión fiscal y la competencia desleal entre empresas. ---

Ahora bien, pionera en el país en la materia de adecuación normativa en materia de transporte por plataforma digital, ha sido la Provincia de Mendoza, quien por Ley 9.086, crea la figura del "Transporte Privado a través de Plataformas Electrónicas" definido como aquel servicio que con base en el desarrollo de tecnologías de dispositivos móviles, utilizando el sistema de posicionamiento global y plataformas independientes, permite conectar a usuarios que lo demanden, punto a punto, con conductores que ofrecen dicho servicio mediante el uso de la misma aplicación, para celebrar un contrato en los términos del artículo 1280 y siguientes del Código Civil y Comercial de la Nación. ------------------------------

En el uso de sus prerrogativas, conforme el principio constitucional ya referido en el cual se faculta al Estado a -en virtud de su poder de policía y como garante de la seguridad-, **reglar su ejercicio más no cercenar el derecho a ejercer la industria**; ha dispuesto dicha Provincia al respecto en el Art. 52 de la Ley referida que: "*Este transporte oneroso de pasajeros constituye una actividad privada de interés público cuyo cumplimiento se regirá por las disposiciones de la presente sección y por la reglamentación que al efecto dicte la Autoridad de Aplicación. Deberán los prestatarios cumplir con el pago de las tasas de contraprestación y las obligaciones impositivas que determine dicha normativa. En ningún caso podrá este tipo de servicio afectar la prestación de los servicios públicos de pasajeros que esta Ley determina.*"---

A su tiempo, el Decreto Reglamentario N° 1512 del 13 de septiembre del 2018, que ordena, entre otras obligaciones; a las Empresas de Redes de Transporte (ERT) inscribirse en la Dirección Provincial de Transporte, en el área de registros (art. 56); y a quienes pretendan prestar el servicio privado de transporte deberán solicitar su inscripción en las Empresas de Redes de Transporte (ERT) registradas como tal, acreditando el pago de la tasa de inscripción y fiscalización correspondiente, la documentación reglamentaria del vehículo con el que se pretenda la prestación del servicio, la documentación que acredite la identidad del conductor y la Licencia Nacional de Conducir subclase D.1., como mínimo, inscripción en la Agencia de Administración Tributaria de Mendoza (ATM), Inscripción en AFIP y contratar seguro del automotor exigido por Ley N° 9024, con el límite de cobertura máximo para transporte de pasajeros, conforme con las disposiciones de la Superintendencia de Seguros de la Nación, o la autoridad que en el futuro la reemplace (art. 57).---

X.- MODIFICACIÓN AL SISTEMA DE SANCIONES PARA INFRACTORES DE TRÁNSITO DEL TRANSPORTE PÚBLICO DE PASAJEROS Y DE CARGAS. INAPLICABILIDAD AL CASO DE SERVICIO DE TRANSPORTE POR PLATAFORMA UBER.--

A principios del mes de noviembre, se ha modificado la Ley de Faltas, entre cuyas cláusulas se expresa que "Taxi, transporte de escolares, remises, vehículos de fantasía y otros sin autorización. El/la titular o responsable de un vehículo que transporte pasajeros y que lo explote sin la autorización y/o habilitación para prestar servicio establecida por la normativa vigente, es sancionado/a con multa de diez mil (10.000) unidades fijas e inhabilitación para conducir de siete (7) a treinta (30) días.--

Se entiende importante destacar que, la normativa bajo análisis, no modifica ni incorpora normativa o reglamentación de habilitaciones en la materia sino que modifica la cuantificación de la sanción. ---

A todas luces puede vislumbrarse, de conformidad a las manifestaciones vertidas en el presente, que tal sería el caso de aquel que estuviere efectuando un servicio de transporte para el cual se requiera habilitación previa - remis, taxi, transporte escolar- más no podría aplicarse por analogía a quien efectúa un contrato de servicio privado por intermedio de plataforma digital; figura distinta a las referidas previamente. -------------------------------------

El Estado, es el garante constitucional de la seguridad de la ciudadanía; pero también debe garantizarse el derecho al ejercicio de una industria lícita y a la libre elección del/de la consumidor/a. Dentro de esta marco podrá disponerse normativa regulatoria que confluya al bienestar general; debiendo adaptarse a los desafíos que importan el uso de las nuevas tecnologías en la actividad comercial y de mercado. ---

XI.- CONCLUSIONES.---

Que en virtud de todo lo expuesto; entiendo que el caso bajo análisis se trata de una actividad comercial lícita por la cual se brinda un servicio de transporte privado a través de plataforma electrónica, para cuyo ejercicio se requiere de, al menos, tres contratos conexos; que motivan entender al mismo con carácter *sui generis*, convirtiéndolo así en un contrato privado innominado. --

Ahora bien, el carácter de innominado, no importa que el mismo no se encuentra autorizado o reglamentado, pues sus reglas interpretativas y normativa aplicable surgen del propio Código Civil y Comercial de la Nación, en tanto dispone en su artículo 970 que *"están regidos, en el siguiente orden, por: a) la voluntad de las partes; b) las normas generales sobre contratos y obligaciones; c) los usos y prácticas del lugar de celebración; d) las disposiciones correspondientes a los contratos nominados afines que son compatibles y se adecuan a su finalidad"* (*para el caso las normas generales de transporte; así como las disposiciones dispuestas en materia de tránsito*).---

Lo antedicho, en nada obsta a que en virtud de las prerrogativas otorgadas por la propia Carta Magna en su artículo 42- que impone al Estado garantizar el derecho a los/as consumidores/as y usuarios/as de bienes y servicios, en la relación de consumo, a la protección de seguridad-; cuyo imperativo se refuerza en las disposiciones de la Ley 24.240 y modificatorias- Art. 6: *Las cosas y servicios, (...), cuya utilización pueda suponer un riesgo para la salud o la integridad física de los consumidores o usuarios, deben comercializarse observando los mecanismos, instrucciones y normas establecidas o razonables para garantizar la seguridad de los mismos*- el Estado entienda pertinente reglamentar algunos aspectos particulares de este tipo de contratación, en miras a asegurar que el servicio se brinde con la protección y calidad pertinentes; como ha sido el caso ya referido de la Provincia de Mendoza. ---

Como expresa Sthephen Hawking, la inteligencia es la habilidad de adaptarse a los cambios; debiendo entonces agiornarse al uso de las nuevas tecnologías; adaptando y reglamentando lo pertinente para la utilización segura de las mismas sin menoscabar el derecho a la actividad comercial de los/as ciudadanos/as; así como de elección de los/as usuarios/as de transporte.--

En otro orden, en cuanto al acta de comprobación nro. R 20171005, en relación a la presente, se tiene por bien jurídico protegido, el evitar que la sustracción de autopartes permitan o incentiven el mercado negro.------------------------

Nada ha objetado la Defensa en relación a su validez extrínseca, y como ya fuera dicho ut supra por el juego armónico de los arts. 3 y 5 ley 1217, de la cual surge una presunción iuris tantum -que admite prueba en contrario-; era éste el momento para que la Defensa demostrara en esta audiencia, que la misma era falsa o inexacta, por ejemplo acompañando factura de grabación con fecha anterior para probar que se había cumplido la ley; o que el rodado era nuevo y que la grabación venía con el auto..---

Voy a entender que la fuerza probatoria dispuesta por el legislador se mantiene incólume y en su consecuencia corresponde reprochar al encartado sobre esta circunstancia y proceder a su sanción.---

Debe estarse entonces a la normativa dispuesta en el art. 6.1.12.1 de la Ley 451, Código de Faltas, que es la Ley de punibilidad aplicable por el incumplimiento a la Ley de Autopartes.--

Por todo ello, **RESUELVO:**

I.- Declarar la validez del acta de comprobación nro. **I00045575** y en su consecuencia **ABSOLVER a JACINTO ANIBAL GIMENO, DNI 11.858.963**, de las demás condiciones personales obrantes en autos, en relación con la infracción prevista y reprimida en el art. 6.1.49 segundo párrafo y 4.1.7 de la Ley 451 por entender que la conducta desarrollada deviene atípica en el marco de la Ley 451, entendiendo que la misma se constituye en un contrato de transporte privado innominado con contratos conexos, de acuerdo con las consideraciones de hecho y de derecho precedentemente formuladas. -------------

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II.- Declarar la validez del acta de comprobación nro. **R20171005** y en su consecuencia **CONDENAR a JACINTO ANIBAL GIMENO, DNI 11.858.963**, de las demás condiciones personales obrantes en autos, por resultar autor infraccionalmente responsable de la falta prevista y reprimida por el art. 6.1.12.1 de la Ley 451, **a la pena de MULTA de CIENTO CINCUENTA unidades fijas (150 UF)** de **EFECTIVO CUMPLIMIENTO**.-----------------------

III.- CON COSTAS.---

III.- Consentida la misma o firme que fuere, líbrese oficio al registro de antecedentes de faltas para su registro y al Controlador Administrativo de Faltas Nro. 61 para su conocimiento.---

No siendo para más, se da por finalizado el acto, firmando los comparecientes después de S.Sa. por ante mí, de lo que DOY FE.--------

Dra. Natalia S. Frenkel
Prosecretaria Coadyuvante

Dr. Javier Alejandro Bujan
Juez

JUZGADO DE 1RA INSTANCIA EN LO PENAL CONTRAVENCIONAL Y DE FALTAS N° 7

GIMENO, JACINTO ANIBAL SOBRE 6.1.53 - ESTACIONAMIENTO MEDIDO

Número: CAU 25862/2018-0 -

CUIJ: CAU J-01-00050512-5/2018-0

Actuación Nro: 12405234/2018

//CONSTANCIA:

Que la Defensa Particular y el encartado Jacinto Anibal GIMENO CONSIENTEN la Resolución, retirando boleta para el pago multa y de costas del proceso. CONSTE.

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Javier Alejandro Bujan
JUEZ/A
JUZGADO DE 1RA
INSTANCIA EN LO
PENAL
CONTRAVENCIONAL Y
DE FALTAS N° 7

COURT OF FIRST INSTANCE FOR CRIMINAL MISDEMEANORS AND MINOR VIOLATIONS No. 7

GIMENO, JACINTO ANIBAL ABOUT 6.1.53 – METERED PARKING

Number: CAU 25862/2018-0 -

CUIJ: CAU J-01-00050512-5/2018-0

Proceedings No: 12405234/2018

[seal:] * JUDGED in the COURT OF FIRST INSTANCES FOR CRIMINAL MISDEMEANORS AND MINOR VIOLATIONS No. 7 * OF THE CITY OF BUENOS AIRES JUDICIAL BRANCH OF THE CITY OF BUENOS AIRES

City of Buenos Aires, November 28, 2018

Starting time: 12:30 a.m.

"GIMENO, JACINTO ANIBAL ABOUT 6.1.53 – METERED PARKING"

Case No. 25862/2018 Internal Record: 1338/18-F

[stamp:] COPY

Type of Hearing: Final Hearing

Judge: Dr. Javier Alejandro Bujan, Member of the First Instance Court PCyF no. 7.

Assistant Undersecretary: Natalia S. Frenkel

Defendant: Jacinto Aníbal Jimeno D.N.I. 11.858.963

Private defense counsel: Dr. Nicolas Castilla Sastre T° 78 F° 961 CPACF

Development of the Hearing:

Judge: The hearing of oral and public debate is initiated and the defendant is cautioned to be attentive of what he is about to hear. It is hereby ordered that the accusations contained in the following evidence documents, which shall be processed before the Criminal Administrative Unit No. 61 of the Government of the City of Buenos Aires, shall be read by the Secretariat in full, namely: **No. I00045575** (page 5) according to which on February 6, 2018, at 4:16 p.m., at Av. Costanera Rafael Obligado entre Av. Sarmiento y La Pampa, of this City, the offence *"6877 Failure to comply with standards/requirements for transport vehicles without a permit.*"; No. **R 20171005** (page 6) according to which on April 9, 2018, ar 10:00 a.m., at Av. Regimiento de Patricios 1142, of this City, the offence " *Law 3708 art.2 re/obligatory* *engraving of auto parts RVA"*--------------------

The judge asked the defendant if he had understood the facts and the accusations contained in the records and which are reflected in the ruling of July 27, 2018. To this question, the defendant replied, yes. --------------------

Subsequently, the Judge reminds him that according to the principle of guarantee and within the National Constitution, the Criminal Procedural Code of the City of Buenos Aires has the right to refuse to testify without presumption against them, and that their abstention does not suspend the present oral and public debate, and is asked whether he understands the aforementioned, to what the defendant responds yes. --------------------

The Judge also reminds him that during the course of the debate, he may pose any questions he deems appropriate, as long as they are referring to the Defense.

The Honorable Judge informed the defendant that the present instance in the offense proceedings is constituted as a first instance trial and that what happened in the public prosecutor's office neither compels nor conditions the actions of the Court, which is only limited by the fiscal motion and that therefore the sanction imposed can be acquited and/or disposed to a greater or lesser extent with respect to the administrative one, since the principle of *reformatio in pejus* **only applies in matters of impediment within the administrative instance itself and/or in the judicial instance with respect to the first and second instance.** --------------------

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The defendant is asked whether he understands and states that he does. ---

The Honorable Judge addresses the defendant on the raising of preliminary questions ---

Private Defense Counsel: I have no preliminary questions. I confirm the arguments contained in the administrative acquittals, as the defense brief filed. --------------------

Judge: It has to be played in this hearing. --------------------

Private Defense Counsel: it will be reproduced in an attempt to order, as a preliminary measure. I will uphold my client's request for acquittal based on procedural and material issues. --------------------

On the procedural grounds, I maintain the lack of validity of the document because of the serious formal error it contains; eventually, regardless of the validity or lack thereof as an instrument, the sanction imposed in the document is non-existent. For that reason, it is requested the absolution based on the non-existence of the infraction. --------------------

If it is understood that it complies with the provisions of art. 3 and 5 of Law 1217, again, I maintain that the infraction is non-existent. --------------------

There is a new system of fines made by telephone, which are documented in an infraction report **No. I00045575** (page 5). --------------------

The record of page 5 is void as it does not have a signature, it has the data of the agent Gisela Robledo, it is a characteristic flaw of the system that cannot be imputable to my client, neither is there a digital signature, it violates art. 3 inc. “G” of law 1217.------------

The reason why it is a violation of art. 5, because the taxative requirements of Article 3 must be met. --------------------

It is a violation of paragraph b of art. 3 of Law 1217, generic penalty. Furthermore, my client does not perform any service of “remis”, taxi or school transportation, I do not know what reprehensible conduct. He committed to be charged with that infraction, and what legislation I have to defend against. --------------------

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Unauthorized exploitation is for “remis”, or school transport or taxis; therefore I will tackle all three of them. --------------------

This refers to the corresponding permit. But now I ask, for what? “Remis”, transport or taxi? I don't know, because it doesn't say so. That's why it is a violation of art. 3 of Law 1217. --------------------

It refers to the permits for remis, school and taxi transportation. The code of Permits also mentions remis, school and taxi transportation; which is why, in order not to be confusing, I pause upon these arguments as to the form of the record. --------------------

The aforementioned does not include the passenger's data, which is a violation of art. 3 inc. "f" of Law 1217. --------------------

Therefore, the conduct does not qualify or apply, thus violating the provisions of Art. 3 paragraphs b and c of Law 1217. --------------------

That's why I'm undermining the extrinsic contents of the verification report. --------------------

Paragraph c reads, “seal, signature and title”; as for the digital signature, it merely states the name and last name, there is no signature nor title. --------------------

Honorable Judge: I find myself in a position to resolve the first incident

I do not agree with any of the arguments made by the defense. I have said in repeated precedents that they have the juridical nature of *notitia criminis*, notice of the fact; given in

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the record the circumstances of fact, mode and place; being that with that it is sufficient for the exercise of the defense. One cannot be required to legally certify the record because that is not its purpose. Its function is to state the fact in question.------------

Since it is a notice, the interpretation of this court which coincides with the (other) court is that they are not *ad solemnitatem* requirements but that rather *ad probationem*, with which it is possible to identify the elements which do not impede the exercise of the defense, the record is valid. --------------------

Regarding the digital signature, this has been the object of a general criterion of action of the Deputy Secretary of Justice with respect to the administrative controllers of government. I'm surprised that this provision resulted in the record being void.---------

The record may be accompanied, as is the case, for example, of the circumstantial record which accompanies the record of verification.; of the record of page 4 may be added to the record of page 5 and it does not imply that they are different facts because they have different numbers. --------------------

To question the digital signature would be contrary to Government provisions in regards to digital signatures. In fact, decrees and resolutions of the Government are signed with a digital signature; it is enough that the signature allows the identification of the official; only the official has that token or authorized password; the context of the digital signature.---------

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The records are absolutely valid, the citizen is defending himself from not having a permit for the transport of passengers, a permit pursuant to article . 4.1., 7 and others. Apart from the fact that the verification record does not say so, it is consolidated with the rest of the administrative activity, including that which is carried out by the prosecutor.---

Regarding Record R20171005, there has been no objection to its extrinsic validity, and therefore the harmonic play of articles 3 and 5 of Law 1217 must be considered valid.

I HEREBY DECIDE: **TO DISREGARD** the claim regarding the lack of validity of the record I00045575 due to its formal content and we will continue with the material part. ---

The Honorable Judge asks if the Private Defense Counsel will submit any evidence.---

Private Defense Counsel: I will not be submitting evidence, it's a matter of right. -------

Honorable Judge: gives the floor to the Private Defense Counsel for the purposes of pleading. --------------------

Private Defense Counsel: --------------------

As I have already mentioned in documents under reference, not having a permit is a re-qualification of the administrative supervisor of offences, because the record should not give rise to any interpretation. My client was fined according to the infraction record of Law 451 art 4.1.7. From the simple reading it turns out that the sanction is due to not having a permit for remis, school and taxi transports. --------------------

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My client does not offer remis, school or taxi transportation services, nor there is specification or addition of any passenger data. --------------------

The application known as "UBER " is a link by which a passenger contacts directly with my client, in this case GIMENO -who also has the application-, there is no calling a remis provider by telephone, no request for the assignment of the trip, it is not the remis provider that says "take this passenger to this destination", but he rather contacts my client directly; and my client may or may not accept the trip. When he accepts it, he establishes a contract between the parties. It is a private contract of passengers, of transportation. ----------------

It is clearly described in art. 1280 of theCCyCN, in 2015 when the civil and commercial code are unified, a new concept of Private Transport is incorporated. --------------------

In art. 1280 "There is a transportation contract when a party known as a transporter or carrier undertakes to move people or things from one place to another, and the other, called a passenger or shipper, undertakes to pay a price or cargo", and Article 1281 establishes that the regulations apply in the absence of special laws. There is no law in CABA that regulates transportation via the use of smartphone applications. -------------------

In CABA, this application was initially attempted to be labeled as illegal; private transportation is legal in the Republic of Argentina. This argument of illicit activity was

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thwarted when UBER was "legalized" in Mendoza, which is a factual and legal error. Law No. 9048 regulated the contract of private transportation. Can an activity be legal in the province and illegal in the country? Mendoza took the initiative to regulate a legal activity in the Republic of Argentina. -----------

As a result of this regulation, we began to see advertisements on Canal 13, Diario la Nación, and any other media outlet. It is currently a sponsor of the AFA [Argentinian Football Association]. Are they promoting a legal activity or making an apology for the crime? ---

This legal activity is not regulated, the Code of Permits clarifies it exhaustively and refers which are the obligations and permits for remis, taxi and school transports; it says nothing about what establishes a private transport contract. It is not regulated in CABA. -------

My client is not regulated. At some point I have googled it, and I say no regulation is prohibitive in order that I may do what art. 19 of the Magna Carta says, that everything that is not prohibited is permitted. -----------------------------

If what is not prohibited, is permitted, if in CABA it is not Regulated, it is not prohibited, by which he pursued the activity. --------------------------

The strategy could have been different, there is no way to prove that the agent proved that he was using the application. He could have said that there was no way to prove that the client didn't have an application; he can't check his phone. --------------------------

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There is nothing to hide, he was engaged in a legal activity under arts. 1280 and 1281 of the C.C. and C.N. applicable in the absence of regulation in CABA. --------------------------

There is also a precedent in the Quevedo Trial of this same jurisdiction in case 11465/16 resolved by Court 31 through a final verdict of 2/3/2017 which determined that the activity of a person providing a UBER service is different from the remis, and that the same cannot be demanded of that person. --------------------------

You cannot analogically apply the activity of remis to my client, when he works for himself, he is an individual tax payer, he does not work for a remis provider. So I ask myself, how can we ensure that he doesn't have problems on the street? Since there is no regulation, I told him, you can be hypocritical and lie to the government to ask for a permit for a remis, but you have to lie because that is not really the activity that is being carried out. In order to compensate for this omission, you have to adapt to the current regulation, which is closer to the remis regulation. Which is the case. When you get to the Government, will they ask, or request, the data and permit of the remis provider you work for? To which my client would respond: I don't work for a remis provider, I work for myself. And the answer in that regard is; if you don't work in a remis provider, you can't get the permit. --------------------------

Even though he is being hypocritical and wanting to get permit that does not suit him, he deserves a fine. --------------------------

For the foregoing, and due to the non-existence of the willful offense, I ask Your Honor for the acquittal of my client. --------------------------

Honorable Judge: I give the floor to Mr Gimeno, in order to use as he sees fit, his right to a final statement. --------------------------

Mr. Gimeno: I shall not address the court, I share my lawyer's remarks. -------------------

Honorable Judge: I consider that I am competent to give my consent. ----------------

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There are several issues, at the discretion of the Court, the extraneous issues are already validated, I will address the material issues, as I have already addressed the extrinsic validity of the act of verification. --------------------------

Therefore, with regard to the material content of the infringement report **No. I00045575** (page 5), I sustain that: --------------------------

I.- SOFTWARE APPLICATION: UBER

That, first of all, in order to resolve the present proceedings, the analysis of the type of activity carried out by Sr. Gimeno, Jacinto Aníbal, who states that he was transporting a passenger under a private contract with the UBER platform, becomes relevant. ----------------
-

UBER is a company that, by means of a cell phone or tablet application, links individuals (previously registered) - who wish to use their vehicle for transportation - with potential customers (who must also register and download the application). -----------------

Regarding its procedure; the passenger, in order to request a trip, must indicate the origin and destination and; once requested, it is possible to check his/her information as well as the driver's information; as well as the time it will take for the car to arrive, the type of vehicle.---

In order to be a driver, the company requires the driver's registration in the platform and he/she must have a professional driver's license, auto insurance and vehicle identification;

and as long as the application is turned on, its location is permanently identified.-------------------------

II.- UBER: LEGAL BUSINESS ACTIVITY

Well then, the **National Supreme Court of Justice has already ruled on this matter,** rejecting a complaint filed by the Taxi Workers Union, **thus validating the legality of the UBER company,** considered in the previous instances **as a legal commercial activity.[1]----**

The Chamber of Crime confirmed the decision of Judge Zelaya and determined that *"the provision of passenger transport service without an official permit does not constitute a conduct categorized by the punishable legislation.. No caution is given as to the specific offense to which the alleged illicit organization would have instigated or the indeterminate offenses that would be the object of the alleged illicit organization"*-----------------

In this case, the prosecutor "dismissed the hypothesis of criminal instigation or illicit organization, pointing out that it is the development of a legitimate commercial activity". "(...) it seeks to engage in a legitimate commercial activity under a form of organization with legitimate purposes".----------------

Therefore, it is decided that the activity described in these proceedings does not constitute a criminal offense and is a legal commercial activity. ------------------

III.- LUCRATIVE USE OF PUBLIC SPACE WITHOUT A PERMIT - INADMISSIBILITY OF THE INFRINGEMENT -----------------------

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The Criminal, Infringement and Misdemeanor Courts of the Autonomous City of Buenos Aires, had the opportunity to rule on the Incident 4790/2016 in the proceedings entitled "Nicolás Sajoux re/ infr. of Art. 86 C.C." (formerly article 83 C.C.) ---------------

In these proceedings, the Criminal, Infringement and Misdemeanor Chamber of Appeals, Section III, decided on the motion filed by the defense in relation to the accusation of the infringement provided for in art. 83 of the C.C. regarding carrying out income-generating activities in the public space. ------------

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[1] CSJN "Appeal on points of fact raised by the Taxi Workers' Union of the Federal Capital in the proceedings concerning Uber and Others re. extraordinary appeal incident" of August 14, 2018

CSJN "Appeal on points of fact raised by the Taxi Workers' Union of the Federal Capital in the proceedings concerning Uber and Others re. extraordinary appeal incident" of August 14, 2018

On this matter, Dr. Paz stated that " *(...) art. 86 makes no reference to taxis and remis but, as stated above, prohibits lucrative activities in public spaces not authorized by the government". (...)* ---------------

Dr. Delgado stated in his opinion that "This law was incorporated into the Infringement Code with the clear purpose of protecting public spaces from the proliferation of clandestine fairs or unauthorized street vendors (...)It is not intended to regulate transit or the transportation of passengers. ---------------

" ---

There is no improper use of public space (...) when carrying out an unauthorized lucrative activity, someone driving a vehicle through the streets and avenues reserved for automobile traffic; with or without passengers, whether they are acquaintances of the driver or passengers who have hired him or her for transportation.

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Vehicle circulation, in such cases, which is the activity carried out by the driver of the vehicle, is authorized as a motor traffic, that is, as a permitted use of public spaces. It is permissible for any driver to travel, with their private vehicle or those entrusted to them, through streets and avenues intended for the use of vehicles, with or without passengers. ***If some drivers do it while providing a public taxi or remis service, they must do so with the corresponding permit and licenses. However, if they fail to do so, they are not using public spaces in an illegal manner, but in violation of the rules that prevent such activities without a license or permit.***

IV.- REGARDING THE IMPUTED OFFENSE. -----------------------------

That is hereby claimed, the sanction provided by art. 6.1.49 second paragraph of Law 451, which states "Requirements for Cargo and Passenger Transportation Vehicles: *The owner and/or person in charge of a cargo and/or passenger transportation vehicle that does not have the permit to provide the service, shall be punished with a fine of two thousand (2,000) fixed units. "* Citing also, in the Observations of the Verification Record No. I00045575, the offense stipulated in Article 4.1.7 Law 451, from which it is clear that *"The owner or person* *in charge of a transportation service of taxis, school buses, or remis that exploits it without the permit to provide the service established by the regulations in force, shall be punished with a fine of ten thousand (10,000) fixed units, and the immobilization of the vehicle*". --------------------

It is therefore necessary to analyze whether the activity in question corresponds to one of the transport services authorized by the Government of the Autonomous City, namely: -------

1.- Taxi Service: --------------------

That, by virtue of the foregoing in accordance with the definition provided in article 12.2.1 of Law 2148, the taxi service is a "Service of public transportation of persons, not collective, in rental cars equipped with a taximeter of up to four (4) passengers per vehicle, provided in a vehicle and by a driver duly authorized by the Competent Authority".-------

Please note that the service provided was not done by a car with a taxi license, and that it could not have been confused with this type of service because it was provided by car not equipped with a taximeter that establishes a fare -pursuant to the guidelines of the City Government-, nor was it painted in yellow and black, which could generate confusion in relation to what it was, nor was it found in the streets or avenues in search of passengers; the thing is that it must be clear that the service provided was not a taxi service, so it will be necessary to dismiss the requirement of certification in this aspect. --------------------

2.- Remis Service: --------------------

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This service is defined in the Qualifications Code, in chapter 8.4. which establishes the Private Car Rental Service with driver (remises): 8.4.1 *"A remises agency is considered to be one that provides the transportation of persons in private category automobiles, with a driver, with the passenger having the exclusive use of the vehicle, by means of a remuneration in money agreed between the provider and the recipient."*, whose activity is regulated by Decree No. 167/1998, Resolution S.S. Tr. Judge Title No. 28/010, that created a Unique Record Number for the Service of Hiring Private Cars with a Fixed-fare Taxi Driver. ----

The Transit and Transportation Code of the Autonomous City of Buenos Aires, in the section of "General Definitions" establishes the remis as a *"Rental car not subject to a predetermined itinerary, with a prefixed fare for the total trip, used for total occupation of the vehicle, which does not take or drop passengers with vouchers, tickets or individual payments"*. ------

From the above description, it can be gathered that the remis service is offered to an indeterminate person, anyone who calls or comes to the agency may freely use the transport service individually, in exchange for the price determined with the remis company. -------

The difference with the transport service through UBER arises from the fact that it is no longer an indeterminate person but a determinable one, since only the user who has downloaded the application, registered and uploaded his or her personal data to the UBER platform base can be part of the contractual transaction. -----------------------

It is important to note that in case No. 11465/2016, entitled "Quevedo, Cristian Damián re/ Infringement of Article 6.1.52 of Law 451," Prosecutor Villalba Diaz referred to the following on the occasion of alleging a verification report for an expired remis permit." *he is charged with having an expired remis license but, according to the alleged infringer's statements, it was not an expired license but a vehicle whose identification card was intended for remis, but (...) the same defendant explained and proved <u>that he was carrying out a different activity</u>, which is done via a UBER platform. (...)<u>the present charge was for an activity other than that which he was</u>* <u>engaged in and the conduct cannot be attributed to him. That alone is enough to acquit him</u> (...)"-.---------------------

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The intervening Judge, Dr. Susana Beatriz Parada, regarding the infringement report related to the expired remis license, stated that " In reality, the action has not been described as stated in paragraph b of article 3 *because it was not that Mr. Quevedo was driving a car with an expired remis<u> license, but rather through the application of another system, the vehicle was not operating as a remis</u> (...).*--------------------

From the above, it can thus be shown that the activity described by Mr Gimeno - transport activity by means of the UBER application - is not part of those which require the permit of a remis permit in order to provide the service, in which case the use of that concept should be disregarded. ---------------------

<u>V.- LACK OF PERTINENCE FOR FISCAL INTERVENTION</u> --------------------

Likewise, it is important to point out that the Coordinating Prosecutor, Dr. Gonzalo VIÑA, on page 25 of the present proceedings, states that "(...) **nor is it noticeable that the general interest of society is compromised or that constitutional public order is directly**

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involved (art. 17, paragraphs 1, 2 and 5 LOMP) (...) I consider that the intervention of the Public Prosecutor's Office is not pertinent." (sic). --------------------

From the statements made, it is clear that whoever represents the interests of society on behalf of the State; understands that the subject under consideration does not constitute a subject that requires direct action on their part, since UBER does not compromise the public interest or involve constitutional public order and thus could not be treated as a public service. ----------

Well then, if the case concerned an infringement committed within the scope of the Misdemeanor Law - for any of the reasons provided for in connection with the provision of public services - the intervention of the same would become obligatory; given that it is the Public Prosecutor who represents the police power held by the State, who must ensure the safeguarding and security of the alleged provision rendered in infringement. ------------------

It is clear from the foregoing that it is not a matter in the proceedings, it should be pointed out, in the words of the Public Prosecutor, that it concerns a public passenger service. -------------

VI.- THE LEGAL NATURE OF THE WEB-BASED TRANSPORT SERVICE. --------

Since it has already been determined that the commercial activity is legal, that it does not constitute a crime for the use of public spaces without authorization and that it cannot be incorporated as a taxi or remis activity -which we have already said to not be a misdemeanor-; The legal nature of the transport service under analysis must then be clarified as well as whether it requires any particular type of permit. --

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Regular Public Passenger Transport is understood as the collective transport of passengers that the Government arranges in order to satisfy the massive transportation demands of its users. ---

On the other hand, Private Transportation, is defined by the National Civil and Commercial Code, in its article 1280, as that under which *“a party called the transporter or carrier undertakes to move people or things from one place to another, and the other, called the passenger or shipper, undertakes to pay a price or cargo”*. -------------------------------------

There is therefore no doubt that the difference of public transport, organized or licensed by the State in order to satisfy the general transport service in a massive and indeterminate way; of private transport which is linked to the person who drives a particular car and the passenger - determined or determinable - in order to be moved from one place to another in exchange for a payment; it is established in a transport contract.

- Neither the National Civil and Commercial Code, nor the specific regulations regarding misdemeanors, specify that all transportation services must be carried out in the communal area of the City with prior authorization; on the contrary, certain types of transportation (taxi, remises, school transportation) require a prior certification to operate as such. ----------------

<u>VII.- INNOMINATE CONTRACT. RELATED CONTRACTS.</u> ----------------------------

In cases like this one, both the transporter and the passenger are connected by means of an online application - UBER-. This characteristic is not just another distinction, it is not a case of an indeterminate person raising his arm on the sidewalk in an attempt to get around by taxi (differentiated with particular colors, taximeter, among others) and/or a remise service whose offer is indeterminate to the general public (remis provider of public access in person or by telephone); but of private persons whose data are registered in the platform in order to be able to be a passenger and/or driver, respectively (which makes them determinable prior to the acceptance of the transportation agreement); and whose characteristics are assessed by the passenger and the driver to consent or not to the contract - e.g. number of stars assessed by other users and/or drivers, characteristics of the vehicle in which they will be transported, among others. --

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The abovementioned is sufficient to convince me that this is a private transport service; however, the use of a digital platform through an intermediary company generates a particularity, not foreseen in the Civil and Commercial Code, which makes me understand the connection of legal proceedings described in a *sui generis* contractual network. -----------

The potential passenger, by downloading the application and uploading his or her personal data, and by requiring the trip in each specific case, allows UBER to mediate in order to obtain a driver that accepts the offer and concludes the transportation. ------------------------

On the other hand, the potential driver, at the time of registration and presentation of the required documentation such as a driver's license, car insurance, accepts that UBER will connect him/her with transport service providers at the time he/she is logged on to the application; in order to conclude the transport contract referred to between the parties.

Therefore, this company combines supply and demand of transportation, in order to mediate in the conclusion of a private transportation contract, without having a relationship of dependence or representation with any of the parties; for which the service charges the driver a percentage of 25% per trip. --

It can therefore be said that, in practice, the passenger enters into a contract with UBER, the driver enters into a contract with UBER, and finally - when each trip is requested and accepted - a transport contract is generated between the passenger and the driver. -----------

Therefore, there is a connection between three contracts which are necessary in order to comply with the common purpose: transportation; a situation which, as the market and technology advances, has already been embraced in the new National Civil and Commercial Code in article 1073 and subsequent articles. From the definition given to the Related Contracts in said legal text, it can be deduced that *"This means that even when it is a question of an apparently autonomous business, everyone tends or tries to achieve a common result or unique business, which could not be achieved without the interaction of each one of said contracts. It does not require temporal simultaneity or unique instrumentality."*[2]-------------

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The Chamber "M" of the National Court of Appeals in Civil Matters, in its ruling in the proceedings "Van Thienen, Guillermo Federico and others c/M.B. Desarrollos Inmobiliarios S.A. on damages and losses", case file No. 109, of the Civil Court No. 109, has declared: *"It is important to remember that the issue of related contracts -such as the creation of the real estate trust, adhesion and transfer of the trust domain- and which are regulated in the new Civil and Commercial Code that [illegible] to govern in August of this year, is not new in our law and the issue was included in the dispatch of Commission No. 3 of the "XVII National Conference on Civil Law" held in Santa Fe in 1999, where it was said that "There will be related contracts when, for the performance of a single business, a plurality of contracts are entered into between the same or different parties… ", with the addition that the connection must be measured "...through a supra-contractual economic purpose, verified legally in the*

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[2] http://www.saij.gob.ar/docs-f/codigo-comentado/CCyC_TOMO_3_FINAL_completo_digital.pdf. The Annotated Civil and Commercial Code - Page 495

http://www.saij.gob.ar/docs-f/codigo-comentado/CCyC_TOMO_3_FINAL_completo_digital.pdf. The Annotated Civil and Commercial Code - Page 495

subjective or objective cause, in the consent, in the object or in the bases of the business”[3]----
The importance of understanding it as a business network, lies in allowing the participants in such legal acts, the possibility of raising exceptions for breach or poor performance, including those actions that are part of a contract that is external to them, in accordance with the provisions of art. 1075 of the CC and CN, as well as the extension in the scope of liability’ (Art. 1758 CCyCN and 40 Law 24240) and the regulations related to consumer contracts.---
Likewise, in this triangle, there is a very particular characteristic: it is UBER who - according to geographical area, demand and distance - defines in each case the travel value. Does this then void the transportation contract? Of course not, this does not preclude the existence of the contract itself. There is nothing to prevent the parties, due to the autonomy of the will incumbent upon them, from deciding that it is a third party that determines the right price (Article 1006 National Civil and Commercial Code). ---

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As a result of the foregoing, it is to be understood that the transportation service via the UBER application is a private transportation service; it is generated via an innominate contract in which the Uber Company, the passenger(s) and the driver(s) are connected; whose regulation - in the absence of specific regulations - will be supplemented by that relating to the Transportation Contract, in accordance with the interpretative rules of the National Civil and Commercial Code itself in article 970. ---

VIII.- REGARDING LIABILITY. ---

There has been much discussion regarding the guarantee of safety that must prevail and be guaranteed in relation to the transportation of people. ---

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[3] http://www.nuevocodigocivil.com/wp-content/uploads/2015/06/Sentencia-23.pdf

http://www.nuevocodigocivil.com/wp-content/uploads/2015/06/Sentencia-23.pdf

On this point, the Civil and Commercial Code itself, accepts a greater and more comprehensive liability in the case of Transport Contracts; considering that its article 1291 provides that the same extends not only to the breach of the contract - typical situation of any private contract - but also with respect to claims affecting the passengers and/or loss of their belongings; this obligation cannot be limited by the decision of the parties because the codifiers are understood to affect the safety of persons, and thus public order. ---------------

Lastly, article 1758 of the National Civil and Commercial Code emphasizes that this liability extends not only to the driver but also to those who take advantage of it; thus resulting in accordance with the provisions of art. 40 of Law 24.240 and its amendments, which establishes that " if the damages to the consumer result from the defect or risk of the thing or the provision of the service, the producer, the manufacturer, the importer, the distributor, the supplier, the seller and the person who has put his name on the thing or service shall be liable. The driver shall be liable for damages caused to the thing caused by or in connection with the service". ----------------------------------

From the foregoing it is clear that, vis-à-vis the consumer - passenger - the owner of the car, the driver and the UBER company would be liable; without prejudice to any repetitive actions which might be taken between them and/or the exceptions. ----------------------------

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IX.- REGARDING NEW TECHNOLOGIES. ---

In this case, we are faced with a type of contract in which there is a convergence of the use of new technologies, since it is through an application that is downloaded to mobile phones and/or other digital devices that the consent and subsequent establishment of the transport contract is produced. --

This type of contracting is incorporated into the scope of the so-called "collaborative economy", because it is important" to have "an interaction between two or more subjects, through digitized or non-digitized means, that satisfies a real or potential need, of one or more people.. This is what used to be known as barter and, thanks to digital platforms, a structure has been established where users can interact with each other and/or with the same platform. (...)The collaborative consumption movement represents a cultural and economic change in consumption habits characterized by the migration from a scenario of individualized consumerism to new models powered by social networks and peer-to-peer platforms. (network-to-peer or network-to-equal)"[4] ---

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[4] https://www.fundacionaquae.org/wiki-aquae/innovacion/la-economia-colaborativa/

https://www.fundacionaquae.org/wiki-aquae/innovacion/la-economia-colaborativa/

Such is the case, for example, of "Mercadolibre", where various suppliers make available products of various kinds (movable goods such as clothing, footwear, furniture), which will be acquired at the price established there - or to be agreed upon by the parties - by other users who are registered on said page and for which the company charges a percentage in commission, thus disrupting the old acquisition scheme in premises or physical stores; or the case of Glovo, Rappi, Pedidos Ya, for which the consumer acquires food products, pharmaceuticals, among others. ---

The Chamber I of the Court of Appeals in Litigation, Administrative and Tax Matters, in a ruling of June 22, 2018 in relation to a lawsuit filed by a user against Mercado Libre, "Judges Mariana Díaz and Fabiana H. Schafrik and Judge Carlos F. Balbín considered that the platform is liable for the legislation on consumer protection. **Diaz has quoted jurisprudence saying that Mercado Libre "intervenes - and therefore is liable - from the very moment in which, creating an image, it manages to attract for itself the trust of its clients", which "constitutes the primary source of its obligations" and also "of its profits". "** Whichever argument is used, **it is not debatable that Mercado Libre is an intermediary that is part of a commercial chain",** said Diaz, based on the ruling of the National Chamber of Civil Matters, Chamber "K", in the proceedings "Claps, Enrique Martin and others c/ Mercado Libre S.A. on damages and losses."[5]. (the highlighting is ours) ------------

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All these applications, just like UBER, link buyers with sellers or users of services, via a digital system which does not require government permission or license. ----------------------

This new special modality of digital contracting, has already been accepted by the new National Civil and Commercial Code; and it is protected by our National Constitution to the extent that article 14 guarantees the right to work and to exercise any lawful industry; and Article 19 of the Magna Carta emphasizes that" *No citizen of the Nation shall be forced to do*

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[5] https://www.perfil.com/noticias/sociedad/mercado-libre-debe-cumplir-con-la-ley-de-defensa-del-consumidor-e-indemizara-a-un-usuario.phtml

https://www.perfil.com/noticias/sociedad/mercado-libre-debe-cumplir-con-la-ley-de-defensa-del-consumidor-e-indemizara-a-un-usuario.phtml

what the law does not command, nor deprived of what it does not prohibit". ------

As has been previously described, the activity is considered to be legal in penal terms by the Nation's Supreme Court of Justice, the same service comprises a transportation service that is materialized through an Internet platform and has a supplementary regulation of application regulated by the National Civil and Commercial Code, without any other standard restricting or regulating this private activity in view of safety or public order. -----------------------------

The lack of any administrative regulation by the Government of the Autonomous City of Buenos Aires, or the understanding that such regulation does not compromise the general interest of the society, as expressed by the Public Prosecutor in the present proceedings; cannot go unnoticed by this Court, nor can it understand - through an analogy with another type of transport - the lack of permit as a prohibition or limitation to exercise a legal commercial activity; a right guaranteed by the Magna Carta. ------------------------------------

Well then, this does not in any way prevent the State from considering it appropriate to regulate its exercise to a certain extent in order to preserve public order and security (art. 28 and 42 CN). --

On the particular case of the use of the UBER application, the Special Rapporteur for Freedom of Expression, Edison Lanza, in his Annual Report of the Inter-American Commission on Human Rights 2017 - volume II - has prepared some recommendations stating that member states should: ---

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a. Refrain from applying to the Internet any regulatory methods developed for other media - such as telephones or radio and television -, and develop an alternative and specific regulatory structure for this medium, taking into account its specificities. (...) -----------------

e. Ensure that the processing of data and Internet traffic should not be subject to any discrimination on the basis of factors such as devices, content, author, origin and/or destination of the material, service or application in conformity with the principle of network neutrality. ---

Thus, the Rapporteur emphasizes the importance of incorporating and regulating in the internal regulations those specific aspects that certain legal acts must contain in view of the emergence of new technologies and the collaborative economy. -------------------------------

The first steps have been taken in tax matters, Law No. 27,430 on Tax Reform taxes digital services provided by residents abroad when they are used in the country by end consumers and other subjects not currently covered by VAT on the import of services; a mechanism incorporated in order to avoid tax evasion and unfair competition between companies. -------

Well then, the Mendoza Province has been a pioneer in the country in the matter of regulatory adaptation in transportation matters through digital platforms which, through Law 9.086, created the concept of "Private Transportation through Digital Platforms", defined as that service which, based on the development of mobile device technologies, by using the global positioning system and independent platforms, allows connecting users who demand it, point by point, with drivers who offer said service through the use of the same application, in order to enter into a contract in the terms of article 1280 and following of the National Civil and Commercial Code. ---

In accordance with the constitutional principle referred to above, which empowers the State, by virtue of its police power and as a guarantee of security, to ***regulate the exercise of its rights, but not to restrict the right to exercise the industry;*** *the aforementioned Province has provided for this purpose in Article 52 of the aforementioned Law: "This costly transportation of passengers constitutes a private activity in the public interest, whose compliance shall be governed by the provisions of this section and by the regulations issued for that purpose by the Competent Authority.. The recipients of the service must comply with the payment of the charges and tax obligations determined by such regulation. Under no circumstances may this type of service affect the provision of the public passenger transportation services determined by this Law."* --

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At the same time, Regulatory Decree No. 1512 of September 13, 2018, which mandates, among other obligations, that Transportation Network Companies (ERT) register with the Provincial Directorate of Transportation, in the registers department (art. 56); and those who intend to provide the private transportation service must apply for registration in the Transport Network Companies (ERT) registered as such, proving the payment of the registration fee and corresponding inspection, the regulatory documentation of the vehicle with which the service is to be provided, documentation proving the identity of the driver and the National Driver's License subclass D.1. as a minimum requirement, registration with the Tax Administration Agency of Mendoza (ATM), registration with AFIP and automobile insurance required by Law No. 9024, with the limit of maximum coverage for passenger transportation, in accordance with the provisions of the National Superintendence of

Insurances, or the authority that replaces it in the future (art. 57). ----------

X.- AMENDMENT TO THE SYSTEM OF FINES FOR TRAFFIC OFFENDERS IN THE PUBLIC TRANSPORTATION OF PASSENGERS AND CARGO. UNAPPLICABLE TO THE CASE OF AN UBER PLATFORM TRANSPORT SERVICE. --

At the beginning of November, the Misdemeanor Law was modified, including clauses such as "Taxi, school bus, remis transportation services, recreational vehicles and others without a permit. The owner or person in charge of a vehicle that transports passengers and that operates it without the permit and/or license to provide the service established by current regulations, shall be punished with a fine of ten thousand (10,000) fixed units and an ineligible to drive from seven (7) to thirty (30) days. ---

It is important to point out that the regulations under analysis do not modify or incorporate regulations or licenses in the matter but rather modify the amount of the fine. -----------------

It is obvious, in accordance with the statements made herein, that such would be the case of one who is carrying out a transportation service for which prior authorization is required - remis, taxi, school bus transportation - but could not be applied through analogy to whoever performs a private service contract through a digital platform; it is different from those previously mentioned. ---

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The State is the constitutional protector of the security of the citizens; but it must also guarantee the right to the exercise of a lawful industry and the free choice of the consumer. Within this context, regulatory standards can be established that contribute to the overall public interest; they must be adapted to the challenges posed by the use of new technologies in commercial and market activity. ---

XI.- CONCLUSIONS. ---

In view of the foregoing; I understand that the case under analysis concerns a lawful commercial activity by which a private transportation service is provided through a digital platform, for the exercise of which at least three linked contracts are required; which motivates a *sui generis*, understanding of the same, thus converting it into an innominate private contract. --

Well then, the character of <u>innominate, regardless of the fact that it is not authorized or regulated,</u> since its interpretative rules and applicable regulations originate from the National Civil and Commercial Code itself, to the extent that article 970 provides that *"they are governed, in the following order, by: a) the consent of the parties; b) the general rules on contracts and obligations; c) the uses and practices of the location of where the service is provided; d) the provisions corresponding to the related named contracts which are compatible and appropriate to their purpose". (in the case of general transportation rules, as well as the provisions on transit).* ---

The foregoing does not in any way detract from the fact that pursuant to the rights granted by the Magna Carta itself in its article 42 - which compels the State to guarantee the right of consumers and users of goods and services, in the relationship of consumption, protection of security-; whose mandatory nature is reinforced in the provisions of Law 24.240 and amendments - Art. 6: *Objects and services (...), the use of which may pose a risk to the health or physical integrity of consumers or users, must be marketed according to the mechanisms, instructions and norms established or reasonable to guarantee their safety-* the State understands it pertinent to regulate some particular aspects of this type of contracting, in order to ensure that the service is provided with the appropriate protection and quality; as has already been the case mentioned in the Province of Mendoza. --

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As Stephen Hawking argues, intelligence is the ability to adapt to change; it must then be adapted to the use of new technologies; adapting and regulating what is relevant for the safe use of these technologies without undermining the right of citizens to commercial activity; as well as the choice of the users of transportation. -----------------

[seal:] * JUDGED in the COURT OF FIRST INSTANCE FOR CRIMINAL MISDEMEANORS AND MINOR VIOLATIONS No. 7 * OF THE CITY OF BUENOS AIRES
JUDICIAL BRANCH OF THE CITY OF BUENOS AIRES

On the other hand, regarding verification record No. R 20171005, in relation to these proceedings, the prevention of the theft of auto parts that would allow or encourage the black market is considered a protected legal right. -----------------------------

The Defense did not object in relation to its extrinsic validity, and as it was already said ut supra by the harmonic play of the arts. 3 and 5 Law 1217, from which arises a iuris tantum presumption - that admits proof to the contrary -; this was the moment for the Defense to demonstrate in this hearing, that the claim was false or inaccurate, accompanied, for example, by a recording invoice with an earlier date to prove that the law had been complied with; or that the film was new and that the recording was included with the indictment. ---------------

I will assume that the probative strength provided by the legislator remains intact and, consequently, it is up to the defendant to refute this circumstance and to proceed with its punishment. ---

The regulations set forth in art. 6.1.12.1 of Law 451, Code of Misdemeanors, which is the applicable Punishment Law for non-compliance with the Auto Parts Law, must be complied with. -----

Therefore, <u>**I HEREBY DECIDE TO:**</u>

I.- Declare the validity of the verification record No.. **I00045575** and as a result, to **ACQUIT JACINTO ANIBAL GIMENO, DNI 11.858.963,** of the other personal conditions of the case, in relation to the infringement provided for and repressed in art. 6.1.49 second paragraph and 4.1.7 of Law 451 since it is considered that the conduct performed is not typical within the scope of Law 451, on the understanding that it constitutes a private innominate transportation contract with linked contracts, in accordance with the considerations of fact and law previously formulated. -----------------

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II.- Declare the validity of the verification record No. R20171005 and as a result, to **CONVICT JACINTO ANIBAL GIMENO, DNI 11.858.963,** for the other personal conditions of the case, in relation to the infringement provided for and repressed in art. **6.1.12.1** of the Law **451, a la pena de MULTA de CIENTO CINCUENTA unidades fijas (150 UF) to be PAID IN CASH. --------------------**

III.- WITH COURT COSTS --------------------------

III.- Once there is consent with the same or it is, whichever is applicable, let it be notified to the Register of Misdemeanors for registration and to the Administrative Supervisor of Misdemeanors No. 61 for their information.

There being no further business to discuss, the proceedings are concluded, with signatures of the attendees followed by Your Honor's signature, before me, to which I HEREBY TESTIFY.

[signature]
[stamp:] Dr. Natalia S. Frenkel
Assistant Undersecretary

[signature]
[stamp:] Dr. Javier Alejandro Bujan
Juez

COURT OF FIRST INSTANCE FOR CRIMINAL MISDEMEANORS AND MINOR VIOLATIONS No. 7

[seal:] * JUDGED in the COURT OF FIRST INSTANCES FOR CRIMINAL MISDEMEANORS AND MINOR VIOLATIONS No. 7 * OF THE CITY OF BUENOS AIRES JUDICIAL BRANCH OF THE CITY OF BUENOS AIRES

GIMENO, JACINTO ANIBAL ABOUT 6.1.53 – METERED PARKING

Number: CAU 25862/2018-0 -

CUIJ: CAU J-01-00050512-5/2018-0

Proceedings No: 12405234/2018

//IN WITNESS WHEREOF:

That the Private Defense Counsel and the defendant Jacinto Anibal GIMENO CONSENT with the Sentence and have collected the voucher for the payment of the fine and the costs of the proceedings. Be it hereby stated and recorded.

[stamp:] COPY

[stamp:] COPY

Javier Alejandro Bujan
JUEZ/A
FIRST INSTANCE
COURT OF
THE CRIMINAL
INFRINGEMENT AND
MISDEMEANORS COURT No. 7

TRANSPERFECT

City of New York, State of New York, County of New York

I, Aurora Landman, hereby certify that the document, "***Gimeno, Jacinto Anibal About 6.1.53 - Metered Parking*, Court of First Instance for Criminal Misdemeanors and Minor Violations, November 28, 2018**" is, to the best of my knowledge and belief, a true and accurate translation from Spanish into English.

Aurora Landman

Sworn to before me this
June 24, 2019

Signature, Notary Public

WENDY POON
NO. 01PO6356754
QUALIFIED IN
QUEENS COUNTY
COMM. EXP.
04-03-2021

Stamp, Notary Public

No. 20-16796

In The

United States Court of Appeals for the Ninth Circuit

MICHAEL R. RATTAGAN,

Plaintiff-Appellant,

v.

UBER TECHNOLOGIES, INC.

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 3:19-CV-01988 (Chen, J.)

SUPPLEMENTAL EXCERPTS OF RECORD VOLUME 2 OF 2 - Pages 298 to 327

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MICHAEL R. RATTAGAN,

Plaintiff,

v.

UBER TECHNOLOGIES, INC.

Defendant.

Civil Case No.: 3:19-CV-01988-EMC

DEFENDANT'S NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: August 8, 2019
Time: 1:30 PM
Location: Courtroom 5 - 17th Floor
Judge: Hon. Edward M. Chen

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on Thursday, August 8, 2019, at 1:30 p.m., or as soon thereafter as the matter may be heard, before the Honorable Edward M. Chen in Courtroom 5 of the United States District Court, Northern District of California, San Francisco Division, 450 Golden Gate Avenue, San Francisco, California, Defendant Uber Technologies, Inc., will, and hereby does, move pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss Plaintiff Michael Rattagan's Amended Complaint for failure to state a claim upon which relief may be granted. The Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, the Request for Judicial Notice, documents on file with the Court, and such further evidence and argument as the Court may permit.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

One day after Uber Technologies, Inc. ("Uber Technologies")[1] filed for its initial public offering, Plaintiff Michael Rattagan sued Uber International BV, and Uber International Holding BV (the "Uber International Entities"), along with their California parent corporation, Uber Technologies, asserting claims ranging from intentional infliction of emotional distress to breach of fiduciary duty based on events that occurred more than three years ago. Rattagan is a lawyer in Argentina who, in 2013, voluntarily agreed to be the "legal representative" on behalf of the Uber International Entities, a largely ministerial appointment required by Argentine law for international companies seeking to establish an Argentine business presence. Rattagan alleges that California-based Uber Technologies owes him millions of dollars because in April 2016, after "Uber launched its service in Buenos Aires with the help of different advisors," local law enforcement authorities and news media blamed Rattagan for Uber's operations in Argentina, which they incorrectly claimed were unlawful. The Court of Appeals of the City of Buenos Aires has held, however, that Uber's operations in Argentina were lawful in all respects.

Rattagan's original complaint alleged claims against both the Uber International Entities and Uber Technologies, but he withdrew the claims against the Uber International Entities when he was

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[1] In the Amended Complaint, Rattagan defines "Uber" as "Uber Technologies, Inc." Dkt. 1 at 1. In this Motion, Uber Technologies, Inc., is referred to as "Uber Technologies," and the group of subsidiaries and affiliates that conducts Uber's global operations is referred to as "Uber."

notified that including them destroyed diversity jurisdiction (this Court does not have jurisdiction over claims by foreign plaintiffs such as Rattagan against foreign defendants such as the Uber International Entities). Rather than dismissing the Complaint or refiling in an appropriate forum, as he should have done, Rattagan filed an Amended Complaint that omitted the Uber International Entities as plaintiffs but otherwise left the factual allegations untouched. The effect of this change is that the Amended Complaint now incorrectly imputes all of the allegations previously lodged against the Uber International Entities to Uber Technologies, an entity with which Mr. Rattagan alleges no contractual or other legal relationship. On this basis—that the Amended Complaint asserts against Uber Technologies relationships it did not have and acts it did not perform—Uber Technologies is separately moving for sanctions pursuant to Federal Rule of Civil Procedure 11(c).

But even taking Rattagan's false allegations as true for purposes of this Motion, they fail to state a claim as a matter of law. *First*, two of the five claims are time-barred on the face of the Amended Complaint. Rattagan's claims for intentional infliction of emotional distress and negligence accrued shortly after Uber launched its operations in Argentina in April 2016, and were extinguished by the two-year statute of limitations in April 2018, a year before the complaint was filed. *Second*, the remaining claims for breach of fiduciary duty, fraud, and deceit fail at the threshold because Rattagan alleges that Uber failed to disclose certain information to him about its launch in Argentina, but does not plausibly allege that Uber Technologies owed him any legal duty to disclose the purportedly concealed information. *Third*, each of the claims fails because all of Rattagan's supposed injuries arise from his treatment by third-party actors such as Argentine governmental authorities, media, and trade unions. Uber Technologies had no control over these actors, and their treatment of Rattagan was an unforeseeable, intervening cause of his alleged injuries. *Fourth*, Rattagan's alleged fraud and deceit claims do not satisfy the heightened pleading standard of Federal Rule of Civil Procedure 9(b). *Fifth*, Rattagan's various theories of injury fail as a matter of law. The Amended Complaint does not plausibly allege the "severe emotional distress" required to state a claim for intentional infliction of emotional distress. Nor can the tort claims of fraud, deceit, and negligence proceed in the absence of physical or property injury under the economic loss rule. Finally, Rattagan fails to adequately plead any basis for his punitive damages claims.[2]

Rattagan has already amended his complaint, and it still fails to state a claim. The Court should dismiss the Amended Complaint in its entirety and with prejudice.

BACKGROUND[3]

A. Uber's Operations In Argentina

As with virtually all multinational companies, Uber is structured as a group of separate corporate entities connected through subsidiary and affiliate relationships. Uber Technologies, a Delaware corporation headquartered in California, is the ultimate parent company of the corporate group. Generally, when the Uber service is launched in a new country, a new Uber affiliate company is formed to support operations in that jurisdiction. This structure is necessary and appropriate, among other reasons, to facilitate compliance with local laws, to limit liability and protect shareholders, to manage risk, and for tax purposes.

In 2013, Uber began to lay the groundwork to launch operations in Argentina. Am. Compl. (Dkt. 15) ¶ 12. The "first step" in this process was the "creation of an Argentine subsidiary . . . for Uber's future operations in Buenos Aires." *Id.* ¶¶ 13-14. That new Argentine limited liability company, Uber Argentina SRL, would support Uber operations in Argentina. The participation interests of Uber Argentina SRL were to be owned by two Dutch corporations—Uber International BV and Uber International Holding BV—which would be responsible for conducting Uber's operations in Argentina. *See id.* ¶¶ 1, 14-15.

Argentine law requires that each foreign shareholder of an Argentine company name a local resident to act as its "legal representative." *Id.* ¶ 15. The Amended Complaint alleges a number of

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[2] Appendix A to this Motion summarizes which grounds for dismissal apply to each of the five counts in the Amended Complaint.

[3] Although many of the allegations in the Amended Complaint are incorrect, for purposes of this Rule 12(b)(6) Motion, Uber Technologies assumes the allegations to be true and demonstrates why they are legally insufficient. *See Sgarlata v. PayPal Holdings, Inc.*, No. 17-cv-06956-EMC, 2018 WL 6592771, at *4 (N.D. Cal. Dec. 13, 2018) (Chen, J.) (court must accept as true all factual allegations in complaint when evaluating motion to dismiss).

duties that the legal representative owes to the foreign shareholder—*e.g.*, "to register a shareholder locally" and to "attend shareholder meetings upon written instructions." *Id.*

Rattagan served as the legal representative for the Uber International Entities, *i.e.*, the foreign shareholders of an Argentine Uber entity that was to be formed. *Id.* ¶¶ 13-17. According to Rattagan, he is "an experienced business lawyer" with "nearly 30 years in practice" in Argentina. *Id.* ¶¶ 4, 10. Rattagan agreed to act as the legal representative for the Uber International Entities knowing that Uber's previous "entr[ies] into new markets" had at times been "tumultuous," *id.* ¶ 1, but ultimately successful and "peaceful," *see id.* ¶ 31, and knowing that this role would require him to "act as the face of the shareholder[s] at any legal proceedings," *id.* ¶ 15.

On April 12, 2016—an important date for limitations purposes, as discussed below—Uber "officially launched its operations" in Buenos Aires. *Id.* ¶ 25.

B. Rattagan's Claims

The Amended Complaint alleges five causes of action: (1) breach of fiduciary duty; (2) deceit; (3) fraud; (4) intentional infliction of emotional distress; and (5) negligence. Each of these causes of action is based on the same general theory of liability: that Uber launched operations in Argentina, without warning Rattagan and with the help of "other advisors"; that Argentine local law enforcement authorities subsequently claimed Uber's operations in Buenos Aires were unlawful; and that those local authorities targeted Rattagan with legal proceedings that purportedly caused him emotional distress and harmed his reputation because, as the Uber International Entities' legal representative, his name was publicly associated with Uber's Argentina operations.

Rattagan alleges that in March 2016—a month before Uber's operations in Argentina began—Rattagan attended a conference in Rio de Janeiro at which "Uber's Latin America Legal Director," Enrique Gonzalez, spoke. Am. Compl. ¶¶ 22-23. Mr. Gonzalez purportedly indicated during his talk that he had "met with all of Uber's legal advisors in the region" the day before. *Id.* ¶ 23. Displeased that he had not been invited to that meeting, Rattagan emailed Mr. Gonzalez to pitch for Uber's legal work in Argentina. *Id.* ¶ 24. The pitch was not successful. *Id.*

When Uber launched its operations in Argentina on April 12, 2016, Rattagan's name and office address were associated with those operations in certain public records, since he was the registered legal representative for the Uber International Entities. *Id.* ¶ 29. Upset that Uber had retained other attorneys to assist in the launch preparations, Rattagan "tendered [his] resignation[]" as legal representative "immediately" after the April launch. *Id.* ¶¶ 30, 34. Rattagan's removal and replacement as legal representative were effective approximately two months later. *Id.* ¶ 49. During the intervening time period, Uber operations continued in Argentina and authorities "claimed" that those operations did not comport with local regulations. *See id.* ¶¶ 48, 50.

According to Rattagan, local law enforcement and media in Buenos Aires reacted in a "confrontational" and aggressive manner during the two months he served as legal representative after Uber's operations in Argentina began. *Id.* ¶ 31. It is the conduct of these third parties—law enforcement authorities and the media—that Rattagan alleges caused him emotional distress and reputational harm. *Id.* Rattagan alleges that, on April 15, 2016, "City inspectors and police officers" raided Rattagan's offices, *id.* ¶ 37, and "prime-time news programs . . . falsely reported" information about his relationship to Uber, *id.* ¶ 38. Soon thereafter, authorities allegedly "searched the homes of Mr. Rattagan's trusted colleagues." *Id.* ¶ 39. In April 2017, a Buenos Aires prosecutor "charged" Rattagan with "unauthorized use of public space with a commercial aim" based on his role as former legal representative of the Uber International Entities. *Id.* ¶ 53. Rattagan alleges that Uber Technologies owes him "millions of dollars" in tort damages for the purported "emotional trauma and serious damages to his reputation" inflicted by third-party prosecutors, police, and news media. *Id.* ¶ 68. Rattagan also seeks punitive damages. *Id.* ¶ 69.

Buenos Aires law enforcement's alleged vilification and abuse of Uber's Argentina operations and Rattagan was, in Rattagan's own words, "unimaginable"—and legally unsupported. *Id.* ¶ 1. In point of fact, Uber's operations in Argentina were and are legal, as has been confirmed repeatedly by Argentine courts and legal commentators. *See* Request for Judicial Notice ("RJN") Exs. A-D (Argentine trial and appeals court rulings affirming legality of Uber's operations in Buenos Aires). Multiple trial courts have determined that the operation of Uber in Argentina "does not constitute a criminal offense and is a lawful business activity." *Id.* Exs. B-D. The "claimed" illegality of Uber's operations was put to rest most recently by the Court of Appeals of the City of Buenos Aires, which cleared Uber, its executives, and its drivers of any wrongdoing and held that Uber's operations in Argentina did not violate any law or municipal ordinance. *Id.* Ex. A. As a consequence, there is no substantial argument that Uber's Argentine operations violated any law, and Rattagan's claims depend entirely on assigning to Uber Technologies in California responsibility for the false assertions of illegality made by Argentine prosecutors, police officers, and journalists.

LEGAL STANDARD

"[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss" under Rule 12(b)(6). *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). A complaint must contain more than "unadorned, the-defendant-unlawfully-harmed-me accusation[s]" or "labels and conclusions," because "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are not enough to survive a motion to dismiss. *Id.* at 678. Instead, a plaintiff must allege "sufficient factual matter" that, taken as true, "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Moreover, these "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 545 (citation omitted). Thus, "for a complaint to survive a motion to dismiss, the nonconclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (citing *Iqbal*, 556 U.S. at 556).

Claims that "sound in fraud" must satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b) in order to survive a motion to dismiss. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). To satisfy Rule 9(b), a plaintiff must allege "the who, what, when, where, and how" of the misconduct charged. *Id.* at 1124 (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)). The central purpose of Rule 9(b)'s more stringent pleading requirements is to ensure that defendants accused of fraudulent conduct receive adequate notice of the allegations in order to defend against them. *Id.* at 1124-25.

ARGUMENT

I. Rattagan's Claims For Intentional Infliction Of Emotional Distress And Negligence Are Time-Barred [Counts 4 and 5].

Claims for intentional infliction of emotional distress and negligence are subject to a two-year statute of limitations. Cal. Code Civ. Proc. § 335.1; *id.* § 339(1); *see also Rae v. Bank of Am., N.A.*, No. CV 16-8932 PA, 2017 WL 447306, at *3 (C.D. Cal. Feb. 1, 2017) (dismissing negligence and intentional infliction of emotional distress claims as time-barred). A district court "may dismiss a claim 'if the running of the statute [of limitations] is apparent on the face of the complaint.'" *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1045 (9th Cir. 2011). The two-year limitations period "commences when a cause of action 'accrues,' and it is generally said that an action accrues on the date of injury," or "upon the occurrence of the last element essential to the cause of action." *Vaca v. Wachovia Mortg. Corp.*, 198 Cal. App. 4th 737, 743 (2011). The elements essential to a cause of action for intentional infliction of emotional distress are "extreme and outrageous conduct," causation, and "severe or extreme emotional distress." *Hughes v. Pair*, 46 Cal. 4th 1035, 1050 (2009) (quoting *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1001 (1993)). The elements essential to a negligence claim are "duty, breach of duty, causation, and damages." *Averbach v. Vnescheconombank*, 280 F. Supp. 2d 945, 960 (N.D. Cal. 2003).

Rattagan's claims for intentional infliction of emotional distress and negligence accrued at the latest on April 15, 2016, the date on which Rattagan alleges that Uber's purported misconduct first caused him injury—*i.e.*, "the occurrence of the last element essential to the cause of action." *Vaca*, 198 Cal. App. 4th at 743. Both the intentional infliction of emotional distress and negligence claims are premised on purported injuries that resulted from Rattagan's being "expos[ed]," as legal representative for the Uber International Entities, "to police raids, serious criminal charges, public humiliation, and reputational harm" following the April 2016 launch of Uber's operations in Argentina. Am. Compl. ¶ 92; *see also id.* ¶¶ 101-02. Those purported injuries first occurred on April 15, 2016, when Buenos Aires "inspectors and police officers" allegedly raided Rattagan's offices, and the raid was subsequently televised, causing him severe emotional distress and reputational injury. *Id.* ¶¶ 37-38. As of that date—

nearly three years before this lawsuit was filed—Rattagan's intentional infliction of emotional distress and negligence claims, as alleged, were fully formed, and the two-year limitations clock began ticking.

Though Rattagan refers vaguely and in passing to Uber's "continuing conduct," *see, e.g.*, *id.* ¶ 92, Rattagan concedes that the only tie between Uber's purported misconduct and Rattagan's alleged injuries—*i.e.*, Rattagan's "exposure" to public scrutiny as legal representative for the Uber International Entities—was dissolved in June 2016, when Uber replaced Rattagan as legal representative. *Id.* ¶¶ 30, 49. That Rattagan allegedly continued to suffer harm in the more recent past, for example through subsequent actions by Argentine law enforcement authorities, as a result of allegedly wrongful conduct that occurred over two years ago, before he was replaced as legal representative, does not suffice to restart the limitations clock. *See Rae*, 2017 WL 447306, at *3 ("That Plaintiff may continue to suffer the ill effects from [the defendant's] allegedly tortious conduct does not toll or extend the applicable statutes of limitations." (citation omitted)); *Powell v. Wells Fargo Home Mortg*, No. 14-cv-04248-MEJ, 2015 WL 4719660, at *8 (N.D. Cal. Aug. 7, 2015) ("the fact that [the plaintiff] purportedly continues to experience damage as a result of the alleged wrongdoing underlying these claims does not save them from the applicable statutes of limitations"). If it were otherwise, statutes of limitations would be illusory—that is, "if continuing injury from a completed act generally extended the limitations periods, those periods would lack meaning. Parties could file suit at any time, as long as their injuries persisted. This is not the law." *Vaca*, 198 Cal. App. 4th at 745.

Rattagan's claims for intentional infliction of emotional distress and negligence accrued when he was allegedly injured by Uber's purported misconduct on April 15, 2016. The applicable statutes of limitations for those claims therefore expired on April 15, 2018—nearly a year before this lawsuit was filed. The claims are time-barred and should be dismissed.

II. Rattagan's Claims For Breach Of Fiduciary Duty, Deceit, And Fraud Fail As A Matter Of Law Because Uber Technologies Did Not Owe Any Legal Duty To Rattagan [Counts 1-3].

Rattagan's claims for breach of fiduciary duty, deceit, and fraud all depend on the existence of legal duties owed by Uber Technologies to Rattagan. Because the Amended Complaint fails to allege the plausible existence of such duties, or a plausible scope of any such duties, the claims should be dismissed as a matter of law.

A. Rattagan Fails To Allege A Plausible Fiduciary Duty [Count 1].

Rattagan's breach of fiduciary duty claim depends on his allegation that Uber Technologies owed him a fiduciary duty because he was the "legal representative" for the foreign shareholders of the to-be-formed Uber Argentina entity—*i.e.*, for the Uber International Entities. *See* Am. Compl. ¶ 73; *Tribeca Cos. v. First Am. Title Ins. Co.*, 239 Cal. App. 4th 1088, 1114 (2015) (identifying existence of fiduciary duty as required element of claim). At the outset, the Amended Complaint does not plausibly allege the relationship on which the existence of the purported fiduciary duty is based. Any duty arising from Rattagan's engagement as a legal representative would flow to the *Uber International Entities*, which were the foreign shareholders that Rattagan registered with the Argentine government. Am. Compl. ¶ 17. Rattagan does not allege that he acted as legal representative for *Uber Technologies*—nor could he, as that entity was not a foreign shareholder of the contemplated Uber Argentina entity.

Even if plausibly alleged, the legal representative relationship does not give rise to a fiduciary duty. "[B]efore a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law." *Comm. on Children's Television, Inc. v. Gen. Foods Corp.*, 35 Cal. 3d 197, 221 (1983) (citation omitted). Only certain types of "recognized legal relationship[s]"—for example, a "guardian and ward, trustee and beneficiary, principal and agent, or attorney and client" qualify as fiduciary relationships carrying fiduciary duties. *Richelle L. v. Roman Catholic Archbishop*, 106 Cal. App. 4th 257, 271 (2003). Mere contractual relationships, without more, are not fiduciary relationships. *Oakland Raiders v. Nat'l Football League*, 131 Cal. App. 4th 621, 633-34 (2005).

There are no allegations in the Amended Complaint that suggest that any Uber entity "knowingly under[took] to act on behalf of and for the benefit of" *Rattagan* as a result of Rattagan's voluntary agreement to serve as the legal representative to the Uber International Entities. Indeed, while the Amended Complaint alleges that Rattagan assumed certain responsibilities *toward the Uber International Entities* in his role as legal representative—including to "act as the face of the shareholder[s] at any legal proceedings," Am. Compl. ¶ 15—the Amended Complaint does not allege that the Uber International Entities, let alone Uber Technologies, knowingly undertook any fiduciary obligation *toward Rattagan*. Rather, the Uber International Entities engaged and paid Rattagan—an experienced lawyer familiar with local practices and customs, who had "nearly 30 years in practice" "counseling large multinational companies in various business matters, with an emphasis on transactions, investments, and interests in Argentina," *see id.* ¶¶ 9-10—to act on *their* behalf as foreign shareholders of the contemplated Uber Argentina entity. What Rattagan has alleged is an "ordinary contract[ing]" relationship, not a fiduciary one, and certainly not one where Rattagan would be the beneficiary of any fiduciary duties. *Wolf v. Superior Court*, 107 Cal. App. 4th 25, 30 (2003). Tellingly, courts have found no fiduciary duty arising even from relationships far more dependent than the ones alleged by Rattagan here. *See Solomon v. N. Am. Life & Cas. Ins. Co.*, 151 F.3d 1132, 1138 (9th Cir. 1998) (no fiduciary duty of insurer to insured); *Nymark v. Heart Fed. Sav. & Loan Ass'n*, 231 Cal. App. 3d 1089, 1093 n.1, 1095-96 (1991) ("[t]he relationship between a lending institution and its borrower-client is not fiduciary in nature" (citation omitted)); *Hernandez v. Cate*, No. EDCV 11-00627 R(AJW), 2014 WL 6473769, at *3 (C.D. Cal. Oct. 16, 2014) (no fiduciary duty as a matter of law between state prison official and state prisoner with respect to the prisoner's conditions of confinement).

Moreover, even if the purported relationship between Rattagan and Uber Technologies could give rise to *some* duty on the part of Uber Technologies, the alleged *scope* of that duty is facially implausible. Rattagan claims that Uber owed him a duty to cease its operations in the entire country of Argentina in order to protect Rattagan—an experienced lawyer who knowingly agreed to work with Uber and serve as legal representative to the Uber International Entities—from the unforeseeable and legally unsupported actions of Buenos Aires law enforcement. *See* Am. Compl. ¶¶ 73-74. This assertion is unsupportable, and Uber Technologies is aware of no case requiring companies to close up business in an entire country for the benefit of a service provider.

B. Rattagan Fails To Allege That Uber Technologies Had A Special Duty To Disclose Certain Alleged Facts To Rattagan [Counts 2-3].

Counts two and three for deceit and fraud fail for essentially the same reasons. Those claims are based on Rattagan's allegations that Uber Technologies "suppress[ed] the fact that Uber: (a) had hired legal counsel and advisors in the country; (b) was preparing to launch in Buenos Aires in a manner that authorities claimed was illegal; and (c) would neither cease operations nor change its practices to comply with directives of Argentine authorities before replacing him as legal representative." Am. Compl. ¶ 78; *see also id.* ¶ 79 (alleging that "Uber further concealed that it intended to continue operating in violation of directives from Argentine authorities that its operations were in violation of the law during such period"); *id.* ¶¶ 85-86 (same). Rattagan's fraud and deceit claims are based only on omissions; he does not allege any affirmative misrepresentation by Uber. *See id.*

Because the law does not typically impose a duty to speak, a failure to disclose information, as opposed to an affirmative misrepresentation, is generally not a valid basis for a fraud claim. Rattagan's fraud and deceit claims therefore could be sustained only if Rattagan alleged the existence of a cognizable legal duty to disclose the allegedly concealed information. *See Moncada v. W. Coast Quartz Corp.*, 221 Cal. App. 4th 768, 775 (2013) (stating that "a duty to disclose the fact to the plaintiff" is a required element for fraud and deceit actions based on concealment).

There are four circumstances in which a defendant may have a duty to disclose information, such that the withholding of that information may constitute actionable fraud or deceit:

> (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts.

Deteresa v. Am. Broad. Cos., 121 F.3d 460, 467 (9th Cir. 1997) (quoting *LiMandri v. Judkins*, 60 Cal. App. 4th 326, 336 (1997)). None of these circumstances apply here. As explained above, Uber Technologies did not owe Rattagan a fiduciary duty. For the three circumstances other than a fiduciary relationship, a duty "presupposes the existence of some other relationship . . . in which a duty to disclose can arise." *Id.* (quoting *LiMandri*, 60 Cal. App. 4th at 336-37). "As a matter of common sense, such a relationship can only come into being as a result of some sort of *transaction* between the parties." *LiMandri*, 60 Cal. App. 4th at 337 (citation omitted, emphasis in original).

Rattagan identifies three purported transactions to support his allegation that Uber Technologies owed him a duty to disclose: (1) his role as legal representative for the foreign shareholders of Uber Argentina; (2) a purported "attorney-client relationship" between Uber Technologies and Rattagan; and (3) an undefined "contractual relationship" between Uber Technologies and Rattagan. *See* Am. Compl. ¶¶ 80, 87. But Rattagan does not plausibly allege that these relationships even *existed*, let alone that they could give rise to a duty to disclose. As described above, Rattagan does not allege that he was the legal representative for Uber Technologies, the sole defendant in this case. Rattagan instead alleges that he was the legal representative for the Uber International Entities, *see id.* ¶¶ 14-15, which are not named as defendants. Next, Uber Technologies will demonstrate in its forthcoming Rule 11 motion that the Amended Complaint's assertion that Uber Technologies had any attorney-client relationship with Rattagan is false. But for purposes of this Motion, even if, as the Amended Complaint wrongly alleges, there was an attorney-client relationship, the notion that Uber Technologies—the purported client—would owe a fiduciary duty to Rattagan—the purported attorney—has the attorney-client relationship exactly backward. *See Knight v. Aqui*, 966 F. Supp. 2d 989, 996 (N.D. Cal. 2013) (under California law, an *attorney* owes fiduciary duties to his *client*). Finally, although Rattagan also purports to base Uber Technologies' duty to disclose on a supposed "contractual relationship" with Uber Technologies, Am. Compl. ¶¶ 80, 87, he does not specify what contract he might be referring to. Accordingly, Rattagan fails to plausibly allege any transaction between him and the California parent company that could give rise to a duty to disclose facts to him.

Moreover, as a matter of California law, any duty to disclose could not extend to the second and third alleged omissions, in which Rattagan essentially alleges that Uber Technologies failed to disclose to him its supposed intention to commit wrongful acts. *See id.* ¶¶ 78-79, 85-86 (alleging that Uber Technologies failed to disclose it was preparing to launch in a way authorities would claim was illegal, that it would not comply with authorities' directives, and that it would continue to operate in violation of authorities' directives). Assuming the alleged conduct could constitute a tort, the California courts and the Ninth Circuit have held that there is no duty to disclose one's intention to commit a tort. *See Deteresa*, 121 F.3d at 467-68 (holding that even if audiotaping or videotaping without notice "were wrongful under tort principles or a statute," the plaintiff was "not liable for failing to disclose its intention to commit those wrongful acts"); *LiMandri*, 52 Cal. App. 4th at 338 ("We are aware of no authority supporting the imposition of additional liability on an intentional tortfeasor for failing to disclose his or her tortious intent before committing a tort.").

III. Rattagan Fails To Plausibly Allege That Uber Technologies Caused His Purported Damages [Counts 1-5].

To adequately plead each of the five causes of action, Rattagan must plausibly allege that Uber Technologies' conduct was the proximate cause of his purported harm. *See Tribeca Cos.*, 239 Cal. App. 4th at 1102-03 (stating that breach of fiduciary duty, fraud, and negligence claims require proof of causation in fact and proximate causation); *Fletcher v. W. Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 394 (1970) (same for intentional infliction of emotional distress); *O'Hara v. W. Seven Trees Corp.*, 75 Cal. App. 3d 798, 804 (1977) (same for deceit). "The term 'proximate cause' is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 693 (2011). Of particular relevance here, when an "independent intervening force"—*i.e.*, a third-party actor—"actively operates to produce the injury," that third-party act is a superseding cause, and the defendant is not liable. 9 Witkin, *Summary of California Law*, § 1348 (11th ed. 2018).

All of Rattagan's alleged injuries arose from what he refers to as "unimaginable" conduct by intervening third parties, including Argentine governmental entities. Am. Compl. ¶ 1; *see also id.* ¶ 37 (raid by "City inspectors and police officers"); *id.* ¶ 38 ("false[] report[s]" by reporters on "prime-time news programs"); *id.* ¶ 57 (humiliation and interrogation by prosecutor); *id.* ¶ 58 (labeling Rattagan as "flight risk" by prosecutor); *id.* ¶ 59 ("smear[ing]" by local media). The actions by these third parties were unforeseeable superseding causes of Rattagan's alleged damages. *See Lopez v. Nissan N. Am. Inc.*, No. 17-cv-1625-EDL, 2017 WL 10338593, at *5 (N.D. Cal. Nov. 6, 2017) (dismissing negligence and other claims with prejudice due to "intervening and superseding cause" of alleged injuries). Even as alleged by Rattagan, Uber could not reasonably have foreseen that Argentine law enforcement would take unsupported legal positions and prosecute unsubstantiated claims against Rattagan. Court rulings confirming the legality of Uber's operations reinforce this conclusion. *See* RJN Exs. A-D.

Rattagan seems to contend that Uber should have ceased its (entirely legal) operations in response to certain Argentine authorities' alleged reaction to Uber's Argentina launch. *See* Am. Compl. ¶ 62 (faulting Uber for not "stopping its operations that officials were charging were illegal"). It cannot be that every time a commentator or prosecutor "perceive[s]" or "claims" a business's operations to be unlawful, *see* Am. Compl. ¶¶ 30, 50, or raises "the prospect of potential civil and criminal liability," *id.* ¶ 42, the business must cease operations or face civil liability to its contractors and vendors for any consequences of the commentator or prosecutor's misguided actions.

IV. Rattagan's Claims For Deceit And Fraud Fail Because They Do Not Satisfy The Heightened Pleading Requirements Of Rule 9(b) [Counts 2-3].

Even if Uber Technologies owed Rattagan a duty to disclose certain information, and even if any failure to disclose was the proximate cause of Rattagan's alleged injuries, Rattagan's fraud and deceit claims should be dismissed because Rattagan does not plead them with the specificity required by Federal Rule of Civil Procedure 9(b). Rule 9(b)'s heightened pleading standard applies to claims for deceit and fraud, even when, as here, the claims are based solely on omissions. *See Kearns*, 567 F.3d at 1125-26. To comply with Rule 9(b), a plaintiff must specifically allege "the who, what, when, where, and how" of the misconduct charged. *Id.* at 1124 (quoting *Cooper*, 137 F.3d at 627). In addition, a plaintiff must allege that the defendant had actual knowledge of the purportedly withheld information. *See Hauck v. Advanced Micro Devices, Inc.*, No. 18-CV-00447-LHK, 2019 WL 1493356, at *11 (N.D. Cal. Apr. 4, 2019).

As described above, Rattagan's claims for fraud and deceit are based on his allegations that Uber Technologies "suppress[ed] the fact that Uber: (a) had hired different legal counsel and advisors in the country; (b) was preparing to launch in Buenos Aires in a manner that authorities claimed was illegal; and (c) would neither cease operations nor change its practices to comply with directives of Argentine authorities before replacing him as legal representative." Am. Compl. ¶ 78; *id.* ¶¶ 85-86 (same). Rattagan fails to specifically allege "what" facts Uber Technologies should have disclosed to him; and "how," "where," and "when" Uber Technologies allegedly could have done so.

First, given that Rattagan was aware of Uber's other "legal advisors in the region" a month before the Uber Argentina launch, *see id.* ¶¶ 23-24, Rattagan's vague allegation that Uber "suppress[ed] the fact that Uber . . . had hired different legal counsel and advisors in the country," *id.* ¶¶ 78, 85, fails both the plausibility and the Rule 9(b) test. *See Med Vets Inc. v. VIP Petcare Holdings, Inc.*, No. 18-cv-02054-MMC, 2019 WL 1767335, at *5 (N.D. Cal. Apr. 22, 2019) (dismissing with prejudice claims based on "inconsistent" allegations). Rattagan does not specifically allege what additional information about those other advisors Uber Technologies purportedly failed to disclose—let alone that any additional disclosure would have had any impact on Rattagan's decision to continue serving as legal representative for the Uber International Entities. Indeed, upon learning about Uber's other "advisors in the region" in March 2016, Rattagan emailed Uber to offer his law firm's "expertise to help Uber navigate the issues surrounding the launch." *Id.* ¶ 24. In other words, instead of seeking to resign as legal representative, Rattagan sought to expand his business relationship with Uber.

Second, Rattagan's allegations that Uber Technologies concealed the fact that it "was preparing to launch in Buenos Aires in a manner that authorities claimed was illegal" similarly does not meet Rule 9(b)'s requirements. *Id.* ¶ 78. Though Rattagan alleges that previous Uber launches in other unidentified countries resulted in some "tension and conflict with local officials and unions," *see, e.g.*, *id*. ¶ 20, nowhere does he allege that Uber Technologies specifically knew that certain Argentine authorities would "claim" (incorrectly) that its operations were illegal before Rattagan knew that fact. Nor could he—Uber Technologies had no way of knowing that Argentine prosecutors would engage in a series of purported actions against Uber that were, from the start, legally unwarranted. *See* RJN Exs. A-D (Argentine cases upholding lawfulness of Uber operations). Indeed, it was only after the launch that the Argentine authorities allegedly claimed that Uber's operating model was unlawful. *See* Am. Compl. ¶¶ 26, 35-37. Rattagan therefore learned of this information at the same time as Uber, nullifying any claim that Uber Technologies "concealed" the information from him.

Third, Rattagan alleges that Uber Technologies concealed the fact that it "would neither cease operations nor change its practices to comply with directives of Argentine authorities before replacing him as legal representative." *Id.* ¶ 78. This amounts to a failure to disclose the open and obvious fact that Uber would continue its operations, and does not plausibly state an actionable omission.

V. Rattagan's Claim For Intentional Infliction Of Emotional Distress Fails Because Rattagan Does Not Allege Outrageous Conduct Or Severe Emotional Distress [Count 4].

To state a claim for intentional infliction of emotional distress under California law, Rattagan must plausibly allege: (1) "extreme and outrageous conduct by [Uber Technologies] with the intention of causing, or reckless disregard of the probability of causing, emotional distress"; (2) that he suffered severe or extreme emotional distress; and (3) that Uber Technologies' "outrageous conduct" was the proximate cause of his extreme emotional distress. *Hughes*, 46 Cal. 4th at 1050 (quoting *Potter*, 6 Cal. 4th at 1001). As described above, the Amended Complaint does not plausibly allege causation for any of the claims. Nor does Rattagan sufficiently allege either of the other required elements of his intentional infliction of emotional distress cause of action.

A. Rattagan Fails to Plausibly Allege That Uber Technologies' Conduct Was Extreme And Outrageous.

Rattagan first fails to plausibly allege that Uber Technologies' actions in bringing ride-sharing to Argentina were somehow "so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." *Melorich Builders, Inc. v. Superior Court*, 160 Cal. App. 3d 931, 936 (1984) (citation omitted).

Rattagan alleges that Uber's conduct met this extraordinary standard because certain Argentine law enforcement authorities purportedly claimed after Uber's launch that aspects of the service were unlawful. *See* Am. Compl. ¶¶ 92-95. But Rattagan's claims are doomed by the fact that Uber's operations in Argentina are entirely lawful, as confirmed by the Argentine courts themselves. *See* RJN Exs. A-D. The lawful operation of a business cannot, as a matter of law, be considered "outrageous conduct." *See Jackson v. Silicon Valley Animal Control Auth.*, No. C 07-5667 RS, 2008 WL 5130746, at *5 (N.D. Cal. Dec. 5, 2008) (lawful seizure of animals was not outrageous as a matter of law); *Trerice v. Blue Cross of Cal.*, 209 Cal. App. 3d 878, 885 (1989) ("Blue Cross cannot be subject to liability for infliction of emotional distress when it has merely pursued its own economic interests and asserted its legal rights." (citation omitted)).

Even if Uber had been wrong about the legality of its operations, proceeding with its operations on a good faith but mistaken belief of legality would not constitute outrageous conduct as a matter of law, even if doing so risked causing Rattagan harm. *See Melorich Builders*, 160 Cal. App. 3d at 936-37 (holding that acting in reliance on advice of counsel, even if the advice proves incorrect, is a complete defense to a claim of outrageous conduct); *Moncada*, 221 Cal. App. 4th at 780-81 ("allegations of defendants' conduct" of misleading employees so that they continued to work "demonstrate a callous disregard for plaintiffs' professional and personal well-being, [but] the alleged conduct as stated is not extreme or outrageous to support a cause of action for intentional infliction of emotional distress").

B. Rattagan Fails to Plausibly Allege That His Purported Emotional Distress Was Severe.

Nor has Rattagan plausibly alleged that he suffered *severe* emotional distress. Severe emotional distress is that "of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it." *Fletcher*, 10 Cal. App. 3d at 397. According to the California Supreme Court, this is "a high bar." *Hughes*, 46 Cal. 4th at 1051. In *Wong v. Jing*, for example, the California Court of Appeal held that lost sleep, upset stomach, and generalized anxiety were not severe enough to sustain an intentional infliction of emotional distress claim. 189 Cal. App. 4th 1354 (2010). Similarly, in *Hughes*, the California Supreme Court held that a plaintiff's allegation that she had "suffered discomfort, worry, anxiety, upset stomach, concern, and agitation" were likewise insufficient. 46 Cal. 4th at 1051. By contrast, the allegations found sufficient in *Kelly-Zurian v. Wohl Shoe Co.*, 22 Cal. App. 4th 397, 410 (1994)—depression, insomnia, alcohol abuse, a diagnosis of post-traumatic stress disorder, and panic attacks that resulted in physical symptoms of tightness in the chest and heart palpitations—are illustrative of the "high bar" for such claims.

The emotional distress that Rattagan vaguely alleges is: (1) the "constant fear" that he "will be exposed to" raids by law enforcement of his home; (2) "the deeply unsettling prospect of devoting years to defend himself from criminal charges"; and (3) "serious[] harm[]" to "his reputation in the community." Am. Compl. ¶ 96. Although Rattagan offers some detail on the *source* of his fear and anxiety, he includes no allegations that go to their *severity*, such as physical symptoms or how they affect his daily life. Generalized allegations of fear and anxiety, let alone being "unsettl[ed]," do not satisfy the "high bar" of extreme emotional distress allegations required by California law. *See Hughes*, 46 Cal. 4th at 1051; *Wong*, 189 Cal. App. 4th at 1377. That is even more true here, where the likelihood of these fears being realized decreases every day as time elapses and courts repeatedly hold Uber's operations to be legal. As to the alleged harm to Rattagan's reputation, he similarly fails to allege how such reputational harm has caused him distress, how that distress purportedly manifests, or its severity.

Accordingly, Rattagan has not sufficiently pled that he has suffered distress that "no reasonable man in a civilized society should be expected to endure." *Fletcher*, 10 Cal. App. 3d at 397.

VI. The Claims For Fraud, Deceit, And Negligence Are Barred By The Economic Loss Rule [Counts 2-3, 5].

Rattagan alleges the existence of a "contractual relationship" with Uber Technologies. *See* Am. Compl. ¶¶ 80, 87, 100. Because the supposed contractual relationship is not plausibly alleged, *see* Section II.B above, Rattagan's claims premised on such a relationship must fail. But if Rattagan's allegations of such a relationship were deemed sufficient, then his deceit, fraud, and negligence claims would be barred by the economic loss doctrine, which prohibits recovery in tort of the economic damages Rattagan seeks.

Under California's economic loss rule, "no tort cause of action will lie where the breach of duty is nothing more than a violation of a promise which undermines the expectations of the parties to an agreement." *JMP Sec. LLP v. Altair Nanotechnologies Inc.*, 880 F. Supp. 2d 1029, 1042 (N.D. Cal. 2012) (quoting *Oracle USA, Inc. v. XL Glob. Servs., Inc.*, No. C 09-00537 MHP, 2009 WL 2084154, at *4 (N.D. Cal. July 13, 2009)). Thus, when a plaintiff who is party to a contract with a defendant suffers only economic damages, but not physical injury or injury to property, the plaintiff's remedy is limited to what he can claim in contract. The economic loss rule is a critical bulwark "prevent[ing] the law of contract and the law of tort from dissolving one into the other." *Id.* (quoting *Robinson Helicopter Co. v. Dana Corp.*, 34 Cal. 4th 979, 988 (2004)). The rule is particularly strong when a party alleges "commercial activities that negligently or inadvertently [went] awry." *Robinson Helicopter*, 34 Cal. 4th at 991 n.7.[4]

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[4] This Court previously followed *North American Chemical Co. v. Superior Court*, 59 Cal. App. 4th 764 (1997), to hold that the economic loss rule does not apply in services cases, as opposed to products cases. *See Ladore v. Sony Computer Entertainment Am., LLC*, 75 F. Supp. 3d 1065, 1075-76 (N.D. Cal. 2014). *North American Chemical Co.*'s holding was based on its determination that a separate six-factor test from *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799 (1979), governed cases involving contracts for services. *See N. Am. Chem. Co.*, 59 Cal. App. 4th at 781-82. However, intervening California Supreme Court and Court of Appeal cases have read *J'Aire* to govern when a duty of care is owed to a third party without mentioning any distinction between contracts for products and services. *See Centinela Freeman*

Rattagan alleges only economic loss—*e.g.*, reputational harm, lost business opportunities, lost revenues—not physical injury or injury to property.[5] Am. Compl. ¶¶ 83, 90, 103. Accordingly, economic losses are recoverable, if at all, in contract. Thus, if his conclusory allegation of a "contractual relationship" with Uber Technologies is credited, then Rattagan's tort claims must be dismissed. *See UMG Recordings, Inc. v. Glob. Eagle Entm't, Inc.*, 117 F. Supp. 3d 1092, 1106 (C.D. Cal. 2015) (dismissing fraud claims under economic loss rule).

VII. Rattagan Cannot Recover Punitive Damages For Any Of His Claims As A Matter Of Law.

Rattagan seeks punitive damages for each of the five alleged causes of action. Am. Compl. ¶¶ 75, 83, 90, 98, 103; *see also id.* Prayer for Relief. Each of the punitive damages claims should be dismissed because Rattagan fails to plead that Uber Technologies' officers, directors, or managing agents acted with the "willful and malicious" intent that is required to sustain a punitive damages claim. *Taiwan Semiconductor Mfg. Co. v. Tela Innovations, Inc.*, No. 14-cv-00362-BLF, 2014 WL 3705350, at *6 (N.D. Cal. July 24, 2014).

Under California law, because "[c]orporations are legal entities which do not have minds capable of recklessness, wickedness, or intent to injure or deceive[, a]n award of punitive damages against a corporation . . . must rest on the malice of the corporation's employees." *Cruz v. HomeBase*, 83 Cal. App. 4th 160, 167 (2000); *see also Taiwan Semiconductor*, 2014 WL 3705350, at *6 ("Under California punitive damages law, a company simply cannot commit willful and malicious conduct—only an individual can."). Moreover, corporations are only liable for punitive damages if the corporate leaders—*i.e.*, the "officers, directors, or managing agents"—acted with the requisite intent. *Cruz*, 83 Cal. App. 4th at 167 (quoting Cal. Civ. Code § 3294(b)). Failure to allege such conduct on the part of corporate leaders requires dismissal of a punitive damages claim against the corporate employer.

Emergency Med. Assocs. v. Health Net of Cal., Inc., 1 Cal. 5th 994, 1013-14 (2016); *S. Cal. Gas Leak Cases v. Superior Court*, 18 Cal. App. 5th 581, 588-89 (2017); *see also, e.g.*, *Bannaoun Engineers Constructors Corp. v. CivilSource, Inc.*, 2017 WL 2472598, at *6-7 (Cal. Ct. App. June 8, 2017) (applying *Robinson Helicopter* to dismiss tort claim based on alleged negligence in city planning services).

[5] Nor could Rattagan recover his alleged damages for "severe emotional distress" under a negligence theory, even in the absence of an alleged contract, when there is no alleged physical injury. *See Faulks v. Wells Fargo & Co.*, No. 13-cv-02871-MEJ, 2015 WL 4914986, at *6 (N.D. Cal. Aug. 17, 2015).

See, e.g., *McMurray v. Merck & Co., Inc.*, No. C 07-1007 MMC, 2007 WL 1456042, at *2 (N.D. Cal. May 17, 2007) (striking prayer for punitive damages for failure "to plead the allegedly wrongful conduct was authorized or ratified by an officer, director, or managing agent of defendant"); *Xerox Corp. v. Far W. Graphics, Inc.*, No. C-03-04059-JFPVT, 2004 WL 2271587, at *2 (N.D. Cal. Oct. 6, 2004) (striking request for punitive damages based on plaintiff's failure to allege any conduct by defendant corporation's officer, director, or managing agent).

Rattagan does not allege any facts to support his claim for punitive damages against Uber Technologies. Tellingly, Rattagan alleges that he "seeks punitive damages . . . to punish *Uber* for *its* intentional and malicious conduct." Am. Compl. ¶ 69 (emphasis added). As a matter of California law, "Uber" cannot act intentionally or maliciously, and the only "officer" whose conduct is mentioned in the Amended Complaint is Salle Yoo, "Chief Legal Officer, General Counsel, and Corporate Secretary." Am. Compl. ¶ 46. Rattagan alleges that he asked Ms. Yoo to "promptly designate someone" to talk to Rattagan about "handing over all [of his] files in an orderly manner" and to instruct her team to refrain from mentioning Rattagan's law firm in future communications with the Argentine government. *Id.* Rattagan further alleges that Ms. Yoo responded to his request *that same day*, "expressed concern" for Rattagan, and "assigned Todd Hamblet (Uber's Managing Counsel, Corporate)" to address Rattagan's requests. *Id.* ¶ 47. Nowhere in the Amended Complaint does Rattagan contend that Ms. Yoo failed to adequately respond to Rattagan's specific requests, let alone that she acted with "malice" or "oppression." Cal. Civ. Code § 3294(a). Nor does the Amended Complaint allege such conduct by any other "officer, director, or managing agent" of Uber Technologies. *McMurray*, 2007 WL 1456042, at *2. Accordingly, Rattagan's claims for punitive damages should be dismissed. *Id.* (striking prayer for punitive damages).

CONCLUSION

For the above reasons, and as summarized in Appendix A to this Motion, the Court should dismiss Rattagan's Amended Complaint with prejudice. A with-prejudice dismissal is warranted because Rattagan has already amended his complaint once, and because the current amended complaint came after extensive pre-litigation communications in which the defects in Rattagan's claims were brought to his attention.

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Respectfully submitted,

/s/ Clara J. Shin

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APPENDIX A: SUMMARY OF GROUNDS FOR DISMISSAL

Count 1: Breach of Fiduciary Duty

- Rattagan fails to allege a plausible fiduciary duty owed to him by Uber Technologies. Section II.A.
- Rattagan fails to allege that Uber Technologies' purported breach of any fiduciary duty proximately caused his alleged injuries. Section III.
- Rattagan cannot recover punitive damages as a matter of law. Section VII.

Counts 2 and 3: Deceit and Fraud

- Rattagan fails to allege a plausible duty to disclose the allegedly concealed information owed to him by Uber Technologies. Section II.B.
- Rattagan fails to allege that Uber Technologies' purported concealment proximately caused his alleged injuries. Section III.
- Rattagan fails to allege these claims with the specificity required by Rule 9(b). Section IV.
- The economic loss rule bars these claims. Section VI.
- Rattagan cannot recover punitive damages as a matter of law. Section VII.

Count 4: Negligence

- This claim is time-barred. Section I.
- Rattagan fails to allege that Uber Technologies' purported negligence proximately caused his alleged injuries. Section III.
- The economic loss rule bars this claim. Section VI.
- Rattagan cannot recover emotional distress or punitive damages as a matter of law. Section VII & footnote 5.

Count 5: Intentional Infliction of Emotional Distress

- This claim is time-barred. Section I.
- Rattagan fails to allege outrageous conduct by Uber Technologies. Section V.A.
- Rattagan fails to allege severe emotional distress. Section V.B.
- Rattagan fails to allege that Uber Technologies' purported intentional infliction of emotional distress proximately caused his alleged injuries. Section III.
- Rattagan cannot recover punitive damages as a matter of law. Section VII.