IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

YOEL-NATHAN TCHAKOUNTE PETONE, *et al.*,	*	
	*	
Plaintiffs,		
	*	
v.		Civil Action No. 20-CV-3028-CCB
	*	
UBER TECHNOLOGIES, INC, *et al.*,		
	*	
Defendants.		

* *

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Introduction

This case involves the abdication of a duty of care by a multibillion dollar ridesharing company to the drivers who are the backbone and *sine qua non* of its business. Beaudouin Tchakounte was a hardworking father of four who drove for defendant Uber Technologies, Inc. ("Uber"), as much as seven days every week to provide for his family. On the night of August 27, 2019, Uber matched him for a ride with an armed criminal, Aaron Lanier Wilson Jr., who shot Mr. Tchakounte and another passenger to death within moments of entering the car.

Mr. Tchakounte and the Plaintiffs would have been protected from this tragedy had Defendants used basic safety protocols they already had in place to screen out dangerous drivers for the protection of Uber's passengers, or if they had used their state-of-the-art data analysis capabilities on their enormous mass of customer data, a capability known to be "wildly successful," to protect its drivers in additional, readily available ways.

Defendants move to dismiss, however, on the ground that they owed no duty of care at all to Uber drivers like Mr. Tchakounte and hence cannot be liable for the harm that befell him. In fact, Defendants insist throughout their Memorandum in Support of their Motion to Dismiss ("Def. Mem.") that the relationship between Uber and Mr. Tchakounte as an Uber driver was nothing more than a relationship between Uber and any member of the general public.

Prior to making their lack of duty motion in this Court, however, Defendants apparently forgot to check statements they have made in other courts across the country and in their public regulatory filings. Specifically, Defendants insist in other litigation and to the SEC and investing public that their drivers are their "customers," who pay a service fee in exchange for the use of the Uber platform to match them with otherwise unknown riders. These admitted facts mean that under Maryland tort law, Defendants owed a duty to take reasonable precautions against

foreseeable risks to Mr. Tchakounte — as a "customer" — on several independent bases: as a business invitee, as a party in contractual privity with them, and/or as a party relying on them in accepting strangers into his car.

Further, even if the Court does not simply take Uber at its word that Uber drivers are its "customers," the existence of a duty of care from Uber to its drivers arises, on separate grounds, from the specific elements of the Uber/driver relationship, including the parties' contractual privity and the fact that drivers are forced by Uber to rely on Uber to make all of the decisions concerning their personal safety (based on information Uber does not share with drivers and affirmatively withholds from them). Uber, as one of the largest players in the emerging so-called "gig" or "sharing" economy, would like to insulate itself from any duty and potential liability to anyone who does business with Uber as it writes on the clean slate of this emerging form of business. But as discussed herein, existing principles of tort law do in fact impose a duty of care on Uber to its drivers and liability in negligence when it breaches that duty and causes harm.

Defendants do not address the elements of a negligence claim other than duty, perhaps because each other element presents questions of fact not subject to determination on a Rule 12(b)(6) motion. To the extent they would, however, contend that Plaintiffs have failed to allege any other element of a negligence claim, Plaintiffs demonstrate below, for the sake of completeness, that they have alleged all of the elements of their claim clearly and fully.

At bottom, Uber has enormous resources and knows full well the dangers its drivers face. It has described dangers in many forums. It has also explained that those dangers are similar in likelihood and degree to the dangers faced by Uber passengers. Those passengers of course spend only a few minutes in occasional Uber rides, while Uber drivers spend many of their waking hours every day of every week behind the wheel. Yet while Uber deploys extensive

screening and other devices to protect its riders, it does not do the same for its drivers, and as explained below, actually uses its control of all aspects of the Uber/driver relationship to ensure that drivers are in the dark about specific safety issues they would confront in every interaction. At the same time, Uber completely defaults in using any of the enormous data and data analysis resources it has to protect drivers such as Mr. Tchakounte where it so easily could protect them.

For these reasons and all of the other reasons discussed below in detail, Defendants' motion must be denied.

Statement of Facts

Beaudouin Tchakounte came to this country from his native Cameroon twenty years ago. Plaintiffs' Amended Complaint dated December 29, 2020, ECF #13 (the "Complaint" or, for citations, "Compl.") ¶ 12. He lived with his fiancé and three youngest children in northern Maryland, where he drove for Uber[1] to support his family. *Id.* On the evening of August 27, 2019, Mr. Tchakounte was driving for Uber in Prince George's County, Maryland, with an Uber Pool passenger named Casey Robinson already in his car. Compl. ¶ 13. At approximately 9:30 p.m., a 42-year-old local man, Mr. Wilson, used the Uber app to request a ride through the Uber Pool option. Compl. ¶ 15. The Uber app matched Mr. Wilson for a ride with Mr. Tchakounte. *Id.* Within minutes of getting into the car, Mr. Wilson pulled out a gun and shot Mr. Tchakounte and Mr. Robinson at point blank range, killing them both. Compl. ¶¶ 15-16.

This tragic incident was not the first time Mr. Wilson had used a gun illegally in a car. On July 3, 1997, a warrant was issued for his arrest on charges of assault in the first degree,

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[1] Defendant Uber wholly owns Defendant Rasier LLC ("Rasier"). Compl. ¶¶ 10-11. Rasier is the entity that directly contracts with drivers who use the Uber app to be matched with passengers seeking rides. Compl. ¶ 11. Defendants Uber Technologies, Inc. and Rasier may be referred to jointly herein as "Defendants" or simply "Uber."

assault in the second degree and the use of a firearm in a felony or violent crime in connection with a carjacking. Compl. ¶ 18. Because he entered an Alford plea, Mr. Wilson was ultimately sentenced to only five years in prison in connection with those charges. *Id.*

Had Mr. Wilson wanted to use the Uber app as a passenger rather than a driver, he would have been rejected from the app based upon his criminal background and pursuant to the rules and protocols Uber uses to screen drivers to protect its passengers. Compl. ¶¶ 22-23. In its 2017-2018 Safety Report, Uber touts that it conducts criminal background checks on all its drivers to search for felony convictions in the past seven years and other certain serious criminal convictions "at any time in the person's history." Compl. ¶ 23. Yet, despite the fact that Uber notes in this same Safety Report that Uber drivers suffer fatal physical assaults on the Uber platform in nearly the same numbers as passengers, Compl. ¶ 27, Uber fails to extend this same safety measure to screen passengers in the way that they screen drivers. Compl. ¶ 22. In fact, it extends essentially no protection — not what it affords riders, not screening it could accomplish from readily available sources and not use of its enormous body of data that could easily be analyzed with existing capabilities at Uber to avoid risks such as what led to Mr. Tchakounte's murder (even though, as discussed herein, Uber exploits that data in far more elaborate ways to profit and serve its own commercial purposes).

Uber indeed has additional safety protocols that it enforces against drivers but not against passengers. While the array of possible driver protections is discussed in more detail below, for an obvious example, Uber uses facial recognition technology and requires drivers to periodically take a "selfie" through its Internet-based "app" in order to ensure that the person logged in and using the app as a driver is in fact the person Uber contracted with as a driver. Compl. ¶ 26. Uber also has highly sophisticated data analysis capabilities that one analyst hailed as "a wildly

successful data collection on who uses it and how they use it and where they go." Compl. ¶ 32. Uber has used such capabilities to attempt to evade regulators and thwart competitors, *but not to keep its driver users safe*. Compl. ¶¶ 33, 35. Worse, Uber sets up its ride request notification system to drivers so as to provide minimal information as to who is getting into their car, leaving drivers completely reliant on Uber to ensure that the passengers with whom Uber is matching them for rides will not do them harm. Compl. ¶¶ 36-41. The one-sided safety system Uber has established — indeed, its lack of any, meaningful safety system for its drivers, even while it controls its enormous body of relevant to safety information and does not disclose it to its drivers — renders Uber liable for Mr. Tchakounte's death for the reasons discussed below. Compl. ¶ 42.

Standard of Review

Rule 12(b)(6) movants bear the burden of demonstrating that the plaintiffs' claims are legally insufficient and state no claim for relief that is plausible on its face, *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and in considering a Rule 12(b)(6) motion, a court must accept as true all well-pled allegations in the complaint and construe the facts and reasonable inferences that can be drawn from them in the light most favorable to the plaintiff. *Hall v. DIRECTV, LLC*, 846 F.3d 757, 765 (4th Cir. 2017). A complaint need only satisfy the standard of Rule 8(a), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." *Lora v. Ledo Pizza Sys., Inc.*, No. CV DKC 16-4002, 2017 WL 3189406, at *4 (D. Md. July 27, 2017) (citing Fed. R. Civ. P. 8(a)(2)). Further, courts do not "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses" through a Rule 12(b)(6) motion. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999).

Defendants have failed to meet the burden of a Rule 12(b)(6) motion.

Argument

PLAINTIFFS HAVE ADEQUATELY STATED CLAIMS
FOR WRONGFUL DEATH AND SURVIVAL

The Complaint states claims for wrongful death and survival based upon Uber's negligence. In order to state a negligence claim under Maryland law, a plaintiff must plead that: (i) the defendant had a duty to protect the plaintiff from injury; (ii) the defendant breached that duty; (iii) the plaintiff suffered actual injury or loss; and (iv) the loss or injury proximately resulted from the defendant's breach of the duty. *Washington Metro. Area Transit Auth. v. Seymour*, 387 Md. 217, 223 (2005). As discussed below, the first element, the existence of a duty, is a question of law for the court (except that subsidiary fact questions need to be decided by the factfinder before a court can make that determination as to duty (in other words, those subsidiary questions are for a jury)); the other three elements — breach, injury and proximate cause — are fact questions that, once alleged, are questions for a jury and should not be addressed by a Rule 12(b)(6) motion.

As also discussed below, Defendants' Motion appears limited to a challenge only to the first element — whether Uber had a duty of reasonable care to Mr. Tchakounte. But in all events, Plaintiffs demonstrate herein that they have adequately pled each of the four elements.

A. *Uber Had a Duty to Protect Mr. Tchakounte from Injury Which Arose from the Specific Characteristics of the Parties' Relationship*.

In their Motion, Defendants seem to disclaim any type of relationship with Mr. Tchakounte and incredibly argue that imposing upon Uber a duty of care to its drivers would be akin to imposing upon Uber a duty of care to the general public. Def. Mem. 17. This novel argument is belied by Uber's own words in court filings across the country and its Securities and Exchange Commission ("SEC") filings where, as quoted below, Uber itself states plainly and

unequivocally that its drivers are its customers. The Complaint alleges Uber's duty based upon the facts of the relationship between Uber and its drivers. The Complaint also alleges that Uber is engaged in a unique business model — in the emerging so-called "gig" or "sharing" economy — and that through this business model Uber exerts enormous control over its driver/customer relationships and possesses a massive body of information it can use to protect those drivers (just as it protects its rider/customers). Those allegations establish duty; and to the extent of any doubt on the point, at a minimum, raise questions of fact as to the Uber/driver relationship which cannot be resolved on a motion to dismiss.

1. *Uber Admits that Its Drivers Are "Customers" (a Category of Persons to Whom Uber Owes a Duty of Care under Applicable Law).*

Uber denies that it owes its drivers such as Mr. Tchakounte a duty of care. Uber, however, has spent a fortune in litigation and on ballot measures[2, 3] around the country to

[2] Uber explains in its most recent 10-K filing with the SEC (the "Uber 2020 Form 10-K") that it, along with Lyft and other "gig economy" companies, filed a ballot measure in California to overturn Assembly Bill 5, legislation that could have led to Uber drivers being classified as employees in that state. *See* Uber 2020 Form 10-K at 12. Uber's ballot measure succeeded. *See* https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020)

[3] The Court may take judicial notice of public records, including court and regulatory filings, in deciding a 12(b)(6) motion. *Feinberg v. T. Rowe Price Grp., Inc.*, No. CV MJG-17-0427, 2018 WL 3970470, at *4 (D. Md. Aug. 20, 2018) (taking judicial notice of SEC filings on a 12(b)(6) motion); *Dyer v. Maryland State Bd. of Educ.*, 187 F. Supp. 3d 599, 608 (D. Md. 2016), *aff'd,* 685 F. App'x 261 (4th Cir. 2017) (noting that "even at the pleading stage, the Court "may take judicial notice of matters of public record, including court and administrative filings").

To the extent the court determines that any discussion of material quoted from publicly available sources should be alleged in their pleading, Plaintiffs would request leave to amend to their pleading to add that material. It is well-settled that "leave to amend shall be given freely, absent bad faith, undue prejudice to the opposing party, or futility of amendment." *Albert S. Smyth Co. v. Motes*, No. CV CCB-17-677, 2018 WL 1399811, at *1 (D. Md. Mar. 20, 2018)

disclaim any employer-employee relationship with its drivers and instead insist that Uber drivers are its "customers."[4] As discussed in § A.2 below, it is settled law that a business owes a duty of reasonable care to its customers. Plaintiffs discuss here, in this § A.1, the allegations and also Uber admissions as to the Uber/driver relationship giving rise to a duty of care. Uber's statements and admissions about the nature of the Uber/driver relationship establish the basis for this Court to find as a matter of law that Uber owes a duty of care to its drivers as "customers" (or, at a minimum, that questions of fact about the Uber/driver relationship need determination by a factfinder before this Court could hold as a matter of law that Uber has no such duty).

For example, in a recent submission to the U.S. Court of Appeals for the First Circuit, Uber stated:

> "[D]rivers use the Uber platform to arrange for and provide transportation services for riders. … In fact, Plaintiff [an Uber driver] *is an Uber customer, remitting a service fee for using Uber's software to connect with riders.*"

Appellee Uber Technologies, Inc. *et al.*'s Answering Brief at 55, *Capriole v. Uber Technologies, Inc. et al.* (1st Cir. 2021) (No. 20-1386) (emphasis added, internal record citations omitted).[5] In a 2018 submission to the U.S. Court of Appeals for the Third Circuit, Uber argued:

> "Independent transportation companies [black car drivers[6]] who desire to use the Uber App to obtain trip requests for their businesses must first enter into a

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(citing *U.S. v. Pittman*, 209 F.3d 314, 317 (4th Cir. 2000)), and Plaintiffs submit that the liberal rule for amendment of pleadings would apply to any such issue should it arise.

[4] Plaintiffs here take no position on whether Uber drivers should be considered employees and have no need to litigate that issue in this matter. It is unnecessary to reach that issue, because under Uber's own insistence of the type of relationship it has with its drivers — business and customer — Uber owed a duty of care to Mr. Tchakounte which it breached in this case.

[5] A copy of this brief is attached hereto as Exhibit A.

[6] This case involved drivers whom Uber requires to form "independent transportation companies" in order to serve as limo and black car drivers for UberBLACK. *See Razak v. Uber Technologies, Inc.*, 951 F.3d 137, 139-40 (3d Cir. 2020).

> services agreement. … Pursuant to the agreement, the independent transportation companies *are Uber's customers* who contract with Uber (in its capacity as a technology services provider) for the opportunity to use Uber's technology in exchange for a fee for every successfully generated trip request."

Appellee Uber Technologies, Inc., *et al*.'s Answering Brief at 3, *Razak v. Uber Technologies, Inc. et al.* (3d Cir. 2020) (No. 18-1944) (emphasis added, internal citations omitted).[7]

Uber also classifies its drivers as its customers in its sworn filings with the government and disclosures to the investing public through Securities and Exchange Commission ("SEC") filings, including its most recent Form 10-K:

> "In the vast majority of transactions with end-users, we act as an agent of the Driver or Merchant by connecting end-users seeking Mobility [Rides] and Delivery [UberEats] services with Drivers and Merchants looking to provide these services. *Drivers* and Merchants *are our customers* and pay us a service fee for each successfully completed transaction."

Uber 2020 Form 10-K, page 100 (emphasis added).[8]

Indeed, Uber earns enormous revenues from what it characterizes as its driver customers. In its 2020 Form 10-K, Uber states that it collected approximately $9.3 billion, $10.7 billion, and $6.1 billion in revenues from service fees paid by drivers in 2018, 2019 and 2020, respectively, on its Mobility platform. *Id*. at 65; *see also id*. at 76 ("We derive our revenue principally from service fees paid by Drivers and Merchants for the use of our platform in connection with our Mobility products and Delivery offering."). As the Complaint alleges, Uber uses its wholly-owned subsidiary, defendant Rasier, to contract directly with driver customers. Compl. ¶ 11.

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[7] A copy of this brief is attached hereto as Exhibit B.

[8] Available at: https://www.sec.gov/Archives/edgar/data/1543151/000154315121000014/uber-20201231.htm

For the reasons discussed below, Uber's admissions as to the customer-nature of its driver relationships establish that its drivers are its customers and that it owes its drivers a duty of care.[9]

2. *Customers Are Owed a Duty of Care by Business Owners Under Maryland Law.*

Under well-established Maryland case law, a customer is a "business invitee" who is owed a duty of care by a business it patronizes. *See Benson v. ALDI, Inc.*, No. 779, 2019 WL 5704532, at *4 (Md. Ct. Spec. App. Nov. 5, 2019) (noting that the plaintiff, "as a customer, was [the defendant's] business invitee" and owed a special duty of care). In *ALDI*, the court reiterated the Maryland standard that, compared to others who may enter upon their land, "[l]andowners owe the highest duty to business invitees, defined as persons 'invited or permitted to enter another's property for purposes related to the landowner's business.'" *Id.* "This duty includes an 'obligation to warn invitees of known hidden dangers, a duty to inspect, and a duty to take reasonable precautions against foreseeable dangers.'" *Id.* (citing *Maans v. Giant of Maryland, LLC*, 871 A.2d 627 (Md. Ct. Spec. App. 2005)). *See also Williams-Stewart v. Shoppers Food Warehouse Corp.*, No. CIV. JKS 13-2518, 2014 WL 4406895, at *2 (D. Md. Sept. 5, 2014) (noting duty of care owed to business invitees under Maryland law); *Southland Corp. v. Griffith*, 332 Md. 704, *715 (Md. 1993) (store owner owed duty of care to protect business invitee from injury); *Smith v. Rite Aid of Maryland, Inc.*, No. 0936 SEPT. TERM 2015, 2016 WL 2945731, at *2-3 (Md. Ct. Spec. App. May 19, 2016) (business owner owed duty of care to business invitee).

Here, as alleged in the Complaint, Mr. Tchakounte was on the Uber digital platform, as, in Uber's own words, a "customer," on the night of August 27, 2019, at approximately 9:30 p.m.

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[9] Again, any conceivable doubt could only be resolved by fact-finding as to the nuances of the Uber/driver relationship.

in order to be matched by Uber with its riders. Compl. ¶¶ 13, 15. As such, under Maryland law, Uber was under a duty "to take reasonable precautions against foreseeable dangers" to Mr. Tchakounte. *ALDI*, 2019 WL 5704532, at *4. Plaintiffs have therefore adequately alleged the existence of a tort duty owed by Uber to Mr. Tchakounte.

Further, the fact that Uber's business exists in a digital form (through its ride-matching app) rather than on physical premises owned by Uber does not relieve it of a duty of care to its self-proclaimed driver customers. In multiple contexts, Maryland courts have found that service providers owe tort duties of care to their customers/business invitees in similar contexts not involving physical, brick-and-mortar premises. *See 100 Inv. Ltd. P'ship v. Columbia Town Ctr. Title Co*., 430 Md. 197, 203 (Md. 2013) (title companies owed duty of care to customers in conducting title searches); *Jacques v. First Nat. Bank of Maryland*, 307 Md. 527, 534-35 (Md. 1986) (bank owed duty of care to customer in processing loan application); *Great N. Ins. Co. v. Recall Total Info. Mgmt., Inc.,* No. CIV.A. TDC-13-1829, 2014 WL 3853968, at *2-4 (D. Md. Aug. 1, 2014) (tort duty of care arose from provision of storage services). Uber's platform, while electronic and virtual, is fully created and controlled by Uber as to the environment and available protections for its driver (and rider) customer-users and presents a setting identical in every material respect to any other customers/business invitee relationship.

3. *Uber Owed Mr. Tchakounte a Similar Duty of Care as Either an Employee or an Independent Contractor.*

If Mr. Tchakounte is seen through the lens of an employee or independent contractor of Uber, rather than as a "customer," the result would be the same. An employer has a duty "to provide his employee with a reasonably safe place in which to work and to warn and instruct his employee concerning the dangers of the work known to him which are not obvious and cannot be discovered by the exercise of reasonable care by the employee." *Bauman v.*

Woodfield, 244 Md. 207, 216 (1966); *Le Vonas v. Acme Paper Bd. Co.*, 184 Md. 16, 20 (1944) ("When the risk to which an employee is exposed arises from causes which are concealed, the employer is bound to notify him of them, provided that he himself knows them, or by the exercise of ordinary care ought to have known of them.") Likewise, a "contractee has a similar duty to warn an independent contractor of dangerous working conditions about which the contractee actually or constructively knows and the contractor could not reasonably discover."[10] *Bauman*, 244 Md. at 217. *See also Baltimore Gas & Elec. Co. v. Thompson*, 57 Md. App. 642, 652 (1984) (noting that the duty on an employer to provide a safe workplace are applicable to independent contractors and their employees engaged by such employers).

Notably, "[t]his 'duty' is little more than that owed any business invitee whatever his designation." *Id.* Uber owed a duty of care to Mr. Tchakounte for these additional reasons.

4. *Uber Owed Mr. Tchakounte a Duty of Care Regardless of the Way Their Relationship Is Labeled.*

In any event, Maryland courts do not require parties' relationships to fit within a specifically labeled category in finding the existence of tort duties of care. Even if this Court were to find that Uber drivers are not "business invitees," employees, or independent contractors for the purposes of Maryland tort law, Uber still would have owed a duty of care to Mr. Tchakounte to take reasonable care to protect him from foreseeable harm based upon the elements of the relationship they had. As this Court explained in *Great N. Ins.*, "there is 'no precise formula' for determining the existence of a tort duty between parties." 2014 WL

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[10] As stated above, a determination on whether Uber drivers are employees or independent contractors is not necessary here, as the negligence-related duty to the drivers would be the same. Notably, while Defendants spend much of their brief disclaiming any sort of defined relationship with Mr. Tchakounte as an Uber driver, in their first footnote, they assert that "Mr. Tchakounte was an independent contractor in business for himself." Def. Mem. at 1 n.1.

3853968, at *3. Rather, in finding such a duty, "the key factors Maryland courts generally consider are: the nature of the harm likely to result from a failure to exercise due care, the foreseeability of the harm, and the relationship between the parties." *Id.* In looking at "the relationship between the parties," the concern is to keep the relationship to a "closed universe," rather than an "indeterminable class of people" or "the public at large." *Id.* at *4 (finding that it was reasonable to require a tort duty of care to a group of people that the plaintiff could compile from its business records, if necessary).

Here, Mr. Tchakounte was one of Uber's drivers — certainly part of a foreseeable, "closed universe" and a clearly defined, and essential, element of Uber's business — in the new and still developing sector often called the gig economy. Courts may recognize a duty of care in the relationship between gig economy workers and gig economy companies by relying on familiar tort law principles that impose a duty of care in relationships sharing similar characteristics, such as business invitor-customer, employer-employee, and independent contractor-contractee, or simply by looking at the factual realities of this Uber/driver relationship. As alleged in the Complaint, the characteristics of the relationship between Mr. Tchakounte and Uber amply support finding that Uber owes a duty of care to its drivers in the position of Mr. Tchakounte. For example, Uber drivers are required to pass background checks before driving for Uber. Compl. ¶ 23. They are further required to enter into services contracts with Uber, Compl. ¶ 11, pursuant to which Uber takes a commission out of each ride fare collected, allocated, administered and disbursed by Uber. Uber 2020 Form 10-K at 100.

Notably, the Complaint alleges the immense information and control asymmetry in favor of Uber to the detriment of drivers. Specifically, drivers are not given ride destinations until after they have already accepted a ride and the passenger is in the car. Compl. ¶ 38. Further,

when an Uber driver gets notification of a ride request, he or she is given no photo and information about the rider other than unverified names or initials. Compl. ¶ 37. Uber also penalizes drivers for declining ride requests. Compl. ¶¶ 39-41. Uber thus actively precludes drivers such as Mr. Tchakounte from evaluating safety considerations in making their own personal safety decisions, and, to the extent any decision making is done about the propriety of allowing a stranger into another person's car, it is done by Uber.

Uber's callous attempts to characterize their relationship with their drivers as nothing more than a relationship to "the general public," Def. Mem. at 13-14, is worse than disingenuous. At minimum, as explained by Uber in its Form 2020 10-K, Uber drivers are in contractual privity with Uber,[11] and thus are a defined class that Uber "could compile from its business records." *Great N. Ins.,* 2014 WL 3853968, at *4.

Furthermore, the Maryland Court of Appeals explained in *Jacques v. First Nat. Bank of Maryland*, 307 Md. 527, 537 (Md. 1986) that:

> "We discern from our review of the development of the law of tort duty that an inverse correlation exists between the nature of the risk on one hand, and the relationship of the parties on the other. As the magnitude of the risk increases, the requirement of privity is relaxed — thus justifying the imposition of a duty in favor of a large class of persons where the risk is of death or personal injury."

Here, although the existence of a close relationship is satisfied due to, *inter alia*, the contractual privity between Uber drivers and Uber, Plaintiffs need not even meet this standard because the risk to be guarded against is personal injury or death.

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[11] *See* Uber 2020 Form 10-K at 92, stating that Uber "enters into Master Services Agreements ('MSA") with Drivers and Restaurants to use the platform. The MSA defines the service fee [Uber] charges Drivers and Restaurants for each transaction. Upon acceptance of a transaction, the Drivers and Restaurants agree to perform the Rides or Eats services as requested by an end-user." *See also* Compl. ¶ 11, stating that Rasier, a wholly-owned subsidiary of Uber, is the party that directly contracts with drivers.

Uber's gig economy drivers are not strangers or the "general public," but rather, the *sine qua non* of its unique business model. To develop that model, reduce its costs and insulate itself from possible liabilities, Uber has made and continues to make an enormous legal and logistical effort to run its driver relationships through a metaphorical legal blender. It recharacterizes them in ways suited to its purposes — inconsistently in different circumstances — but always to its benefit as it writes on the gig economy's blank slate. But ultimately, like an employer, contractee of an independent contractor, or commercial business invitor, it is the party in control of the information and decision-making as to driver safety — information and decision-making it actively deprives drivers from having. While the "gig economy" landscape may be new, well-worn principles of tort law impose a duty of care on Uber to its drivers.

5. *To the Extent Plaintiffs Are Required to Plead a "Special Relationship," the Complaint Alleges One.*

Defendants argue at great length that Plaintiffs were required to plead a "special relationship" between Uber and Mr. Tchakounte because this case involved the criminal acts of a third party. *See* Def. Mem. at 12-15.[12] As a preliminary matter, Plaintiffs disagree as discussed

[12] Defendants cite to the Dram Shop liability case *Warr v. JMGM Grp., LLC*, 433 Md. 170, 184 (2013), but Dram Shop issues are inapposite here. In *Warr*, the Plaintiffs sued a tavern for serving a clearly intoxicated patron who then left the premises and drove drunk, killing one of their daughters and severely injuring another daughter. The court noted that Maryland does not recognize Dram Shop liability and that under the "general rule," "there is no duty to control a third person's conduct so as to prevent personal harm to another, unless a 'special relationship' exists either between the actor and the third person or between the actor and the person injured." *Warr*, 70 A.3d at 355. The purpose of this rule is to prevent extending a tort duty from a business to the general public. There can be no serious argument that Uber's relationship with its drivers, who form the backbone of its business model and with whom Uber is in contractual privity, is akin to a relationship with parties injured on a public roadway and completely unknown to the tavern until they sued the tavern for their injuries. For similar reasons, Defendants' reliance on *Valentine v. On Target, Inc.*, 353 Md. 544 (1999) is misplaced. That case involved the liability of a gun shop for the death of a woman shot outside her home by an

below at § I.B., with Defendants' assertions that this case involves the imposition of a duty to prevent the criminal act of a third party. Instead, it involves a duty to implement reasonable precautions to prevent, generally and in the aggregate, Uber drivers' foreseeable exposure to Uber's own dangerous passengers — Uber rider/customers who are of course known to Uber and about whom Uber has collected extensive data (as to each individual customer and as to its customers collectively).

But to the extent a "special relationship" were required for Plaintiffs' case, Plaintiffs *have* in fact alleged facts supporting the existence of such a "special relationship." In *Fried v. Archer*, 139 Md. App. 229 (2001), the Maryland Court of Appeals examined the types of relationships "that, as a matter of law, create a special duty to aid, protect, or rescue" with respect to wrongdoing committed by third parties. These include "carrier and passenger, innkeeper and guest, invitor and business visitor, school and pupil, employer and employee, [and] landlord and tenant." *Id*. at 247. As explained above, Mr. Tchakounte and Uber would at a minimum be in an "invitor and business visitor," or "business invitee" relationship based upon the facts in the Complaint and based upon Uber's own insistence on its characterization of its relationship with its drivers as a customer relationship. Accordingly, even if a "special relationship" were required to impose a duty of care in this case (it is not), Plaintiffs have pled one.

Further, as noted by the *Fried* court, and as especially relevant in this gig economy setting, "there may ... be other relations" beyond those specifically enumerated "which impose a similar duty." *Id. (*citing Restatement (Second) of Torts § 314A [caveat]). In these cases, "whether there is a special relationship creating a private duty in tort is determined on a case-by-

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unknown assailant using the stolen gun. Again, no relationship at all was alleged between the gun shop and the decedent.

case basis." 139 Md. App. at 247 (citing Restatement (Second) of Torts § 314A, cmt. b). In determining the existence of a special duty without a traditionally defined relationship, a court looks at whether the relationship created detrimental and reasonable reliance which would typically arise where there is an information asymmetry. *Fried*, 139 Md. App. at 256 (noting that in the traditionally defined relationship of common carrier-passenger, innkeeper-guest, landowner-business invitee, school-pupil, employer-employee, and landlord-tenant, detrimental and reasonable reliance is presumed as a matter of law); *see also Corinaldi v. Columbia Courtyard, Inc.,* 162 Md. App. 207, 223 (2005) (noting that "[a] court must examine the totality of the circumstances to determine if a duty to prevent the unfortunate occurrence arose.").

Here, as alleged in the Complaint, "Uber's … procedures are set up to provide no meaningful information to drivers about who is getting in their car, which precludes any meaningful decision-making by the drivers as to whether a passenger might be dangerous and as to whether they want to face the risk." Compl. ¶ 36. Uber controls that risk analysis. Uber does not even provide its drivers with a rider's destination until after they have already accepted a ride and the passenger is in the car. Compl. ¶ 38. Uber penalizes drivers for declining ride requests. Compl. ¶¶ 39-41. Further, when an Uber driver gets notification of a ride request, he or she is given little information about the riders requesting trips, which may include no more than rider-inputted and unverified names or initials, the length of time to the requested destination (without telling the driver what the destination is), and the pick-up location. Compl. ¶ 37. These allegations clearly demonstrate that Uber drivers are reliant on and at the mercy of Uber and its control of information.[13]

[13] Uber's unilateral control of information is also implicated where a rider uses their account to request a ride for someone else, another fact that, upon information and belief, is not shared with

The existence of a legal duty in a negligence claim is typically a question of law to be determined by the court, and Plaintiffs have sufficiently alleged facts to establish that duty.[14] Accordingly, Defendants' assertions that the relationship between Uber and the drivers that are the *sine qua non* of its business model is merely a nebulous, undefined relationship, akin to a relationship with the general public, ignore the realities of the driver relationships it has designed for itself and its own benefit and protection as a central figure in the gig economy, and are untenable. Defendants' Motion must be denied.

B. *Uber Breached its Duty to Mr. Tchakounte by Failing to Implement Reasonable Protection Measures from Known and Foreseeable Risks.*

Defendants devote most of their brief to arguing that Uber owed no duty to Mr. Tchakounte at all, and notably, do not directly challenge Plaintiffs' pleading of the negligence element of breach or argue that if the Court were to find a duty to Uber drivers, it would not have breached that duty. In any event, the question of whether an actor breached its duty of care is a question of fact for a jury, *see, e.g., Tennant v. Shoppers Food Warehouse Md. Corp.*, 115 Md. App. 381, 394-95 (1997). It cannot, as such, be resolved against Plaintiffs on this Motion. But to be complete, Plaintiffs discuss here that they more than adequately allege facts to establish breach.

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drivers. Defendants have raised this feature as another excuse why they should not have to screen passengers, *see* Def. Mem. at 22-23; however, it merely highlights the additional information asymmetry between Uber and its drivers. In fact, if such information were actually given to drivers, it might be used by them to make their own personal safety decisions.

[14] To the extent there is doubt, it would implicate further details of the Uber/driver relationship that could only be determined through fact-finding. Where the existence of a duty depends on the determination of a dispute of material fact, as discussed above, the facts should first be determined by a jury. *Corinaldi*, 162 Md. App. at 218, citing *Walpert, Smullian & Blumenthal, P.A. v. Katz*, 361 Md. 645, 693 (2000) (noting that an issue such as whether contractual privity existed, giving rise to a duty of care, was an issue for the jury).

Here, Uber breached its duty of care to Mr. Tchakounte by failing to use either the safety measures it already had in place to screen out dangerous drivers (to protect its passengers) or the enormous body of data about its riders it has amassed and uses for other purposes to screen dangerous passengers *for the protection of drivers*. It breached that duty even though a business owner owes its customers (as Uber describes its drivers such as Mr. Tchakounte) a duty to take "reasonable precautions against foreseeable dangers." *Rite Aid of Maryland*, 2016 WL 2945731, at *2-3; *see also Tennant v. Shoppers Food Warehouse Md. Corp.*, 115 Md. App. 381 (Md. Ct. Spec. App. 1997) (noting that "the duties of a business invitor … include the obligation to warn invitees of known hidden dangers, a duty to inspect, and a duty to take reasonable precautions against foreseeable dangers.").

1. *The Measures Uber Could Have Taken to Avert Great Harm to Mr. Tchakounte Were Either Already in Use or Readily Available to It, and Certainly Reasonable*.

The harm that befell Mr. Tchakounte in this case was both foreseeable and preventable had Uber taken reasonable precautions. A man with a violent criminal history, Aaron Wilson Jr., used the Uber app to request an Uber Pool ride and the Uber app matched him with Mr. Tchakounte. Compl. ¶ 15. Uber undertakes various safety protocols to screen out dangerous drivers from its platform, including background checks dating back seven years for certain crimes and without time limits for other violent crimes. Compl. ¶ 23. These safety protocols also include the use of facial recognition technology to ensure that the person logged into and using the Uber app to pick up rides is actually the driver who has the account. Compl. ¶ 26. Mr. Wilson had a criminal history of assault and the use of a firearm in a felony or violent crime in connection with a carjacking. Compl. ¶ 18. Had Uber applied even these two safety protocols — which it already has in practice to screen drivers — to riders, the app should have flagged

and/or blocked Mr. Wilson from riding with Uber drivers and averted the deadly incident that ensued upon his entry into Mr. Tchakounte's car. Compl. ¶ 22.

Defendants' protestations that such practices would be overly burdensome, Def. Mem. at 11, are easily refuted. Again, Uber already uses protocols of this kind to screen out dangerous drivers for the protection of passengers. Notably, Uber's motion does not explain why it could not use similar protocols to protect its drivers — many of whom spend most of their waking hours each day of the week behind the wheel.

a. Reasonable measures Uber could have taken to protect Mr. Tchakounte.

As alleged in the Complaint, Uber has some of the most sophisticated data analysis capabilities in the world. Compl. ¶¶ 30-33. With those capabilities, Uber has innumerable ways, in addition to protocols like those protecting its riders, to protect a driver like Mr. Tchakounte, and flag or block risks of fatal dangers, *but it uses none of them.* Most obviously, Uber could have connected the obvious, self-evident and available dots to the killer's violent criminal history readily knowable through public sources and, likely, not-so-public databases to which Uber has access, and also shared that information with Mr. Tchakounte. Uber's own Uber Engineering blog explains its capabilities:

> "Uber has revolutionized how the world moves by powering billions of rides and deliveries connecting millions of riders, businesses, restaurants, drivers, and couriers. *At the heart of this massive transportation platform is Big Data and Data Science that powers everything that Uber does, such as better pricing and matching, fraud detection, lowering ETAs, and experimentation.* Petabytes of data are collected and processed per day and thousands of users derive insights and make decisions from this data to build/improve these products."[15]

Indeed, Uber utilizes sophisticated data analysis techniques to help weed out fraudsters

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[15] *See* https://eng.uber.com/ubers-journey-toward-better-data-culture-from-first-principles/ (emphasis added)

on its platform. One such example is what it calls "sequence modeling to classify user behavior." The Uber Engineering blog explains:

> "Interaction patterns with Uber apps differ between normal users and fraudsters. When requesting a ride, most users follow a sequence of editing the drop-off location, moving the pin around on the map, viewing the prices of different product types, and clicking the trip request button. Fraudsters follow a different pattern optimized for them to make the most money as quickly as possible. These distinct usage patterns let us use Long Short Term Memory (LSTM) deep learning models to differentiate between the two.
>
> "For example, a good user who is new to Uber typically spends time reviewing the product types, comparing the differences between uberPOOL, uberX, and UberBLACK. However, a fraudster who is offering agent services to other people will spend more time editing addresses, moving pins, and changing payment methods."[16]

Uber had and has the capabilities to identify and flag many facts, any of which could have flagged/blocked this rider and other dangers. Uber's user behavior analysis is translatable to predict other types of bad actors on its platform.

For example, when Mr. Wilson got into Mr. Tchakounte's car, he was terribly high on drugs. Compl. ¶ 15. Given the killer's condition, errors he likely made even in the act of using the Uber app that night would have been a red flag standing alone.

While Plaintiffs need not prove or even allege any single one of these capabilities — in fact, the existing protocols to protect riders and the ability to screen violent criminals from working as drivers discussed above are each sufficient in themselves to defeat this motion — Uber's capabilities to protect its drivers using its existing and available data and data analysis capabilities have grown to a level of sophistication that might have been considered the subject of science fiction a decade ago, but which are now science fact and part of everyone's everyday

[16] *See* https://eng.uber.com/advanced-technologies-detecting-preventing-fraud-uber/

life. The mass of relevant data available to Uber makes protecting drivers easy, even if the fact of that capacity is still surprising to the average citizen.

For example, in many places, known sources of illegal drug trafficking — specific places this killer would have frequently visited — are publicly available information (in some states, by mandate of state law).[17] Data analysis such as a cross-reference of prior ride requests to specific illicit activity locations could have set off red flags, blocked the rider or at least been a piece of information to share with drivers to make their own safety decisions. This example — again, while not necessary to Plaintiffs' case, but illuminating — is in no way speculative or fanciful. The fundamental analytics Uber would need to use are no different from what is used when one visits a buybuy Baby store and then begins to see advertisements for diapers and baby clothes the next time surfing the Internet. Uber has this capability because it collects information about rider pick up and destination locations and can then share that visit information about its rider, collated with its rider's online identifying information, with the universe of marketers that push targeted online advertisements. That and similar phenomena occur innumerable times per day to those who use the Internet and online businesses.[18] They are based upon the same simple procedures Uber has readily at hand to collate red flag behavior so as to protect drivers. *But as discussed above and alleged in the Complaint, ironically, Uber does not even share a rider's destination with its drivers until after the rider is in the driver's car.* Compl. ¶ 38.

Uber can also flag disconnects between its accountholders and an actual user. If the killer did not even maintain his own account or required credit card or other payment information, he would be using the account of another (again, detectable by requiring users to upload "selfies" to

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[17] *See, e.g.,* https://dec.alaska.gov/applications/spar/publicmvc/publicdruglabs/

[18] *See* https://www.nytimes.com/interactive/2018/12/10/business/location-data-privacy-apps.html

demonstrate that the person requesting the ride is the person on the account — as Uber requires of its drivers) or otherwise setting off numerous warning signs that something is not right. Those signs are readily detectable, but not flagged to protect drivers from risk, even though Uber deploys similar techniques to protect passengers. Compl. ¶ 26.

These are of course but examples of what Uber is capable of even beyond its existing rider-side protections and ability to screen for known violent criminals. And do these things it could. In fact, *Uber already crunches an enormous wealth of data to exploit it for its own, less benign, commercial purposes, such as to evade regulators or disadvantage its rival Lyft*, in programs known internally at Uber as "Greyball" and "Hell" which involved predicting regulator and driver behavior. Compl. ¶ 33.

Given the size of Uber's business, its data analysis capability and the resources available to it, to do what it did not do would have taken minimal effort. Uber is not a "mom and pop" business. As noted above, Uber collected approximately $9.3 billion, $10.7 billion, and $6.1 billion in revenues from its Mobility (Rides) platform in 2018, 2019 and 2020, respectively. *See* Uber 2020 Form 10-K at 65.

b. *The "reasonableness" analysis is specific to Uber and its peers.*

Defendants' argument that finding a duty to screen Uber passengers would extend such screening duties to any "gig economy" business regardless of its resemblance to Uber's core ridesharing business is irrelevant. *See* Def. Mem. at 9 (analogizing Uber to Opentable.com and arguing that "[b]y Plaintiffs' standard, every technology platform like Uber, Lyft, Instacart, Grubhub, Doordash or Airbnb would have to investigate and scrutinize every individual"). If such duty is warranted under the law, then the law imposes it. But the argument also defies logic in other ways. All but one of the other gig economy businesses Defendants list involve a much

lower risk than ridesharing. Matching restaurants and diners through OpenTable.com does not result in putting two complete strangers in a small, enclosed space with one having his back to the other to operate a vehicle. Even delivery workers for Instacart, Grubhub, and Doordash do not have strangers enter their cars, but merely drop off grocery and food deliveries to end users. What protections those other workers are owed by their employer/contractees will be determined in other cases and reflect the particular foreseeable risk in each scenario.

But further, Uber does not do what one notable peer listed in its brief, Airbnb, already does. Customers of Airbnb, among the companies Uber lists, face a level of risk from the Airbnb business model arguably closest to that faced by Uber's drivers. In any assessment of the reasonableness of protection for Uber drivers in the emerging gig economy, the Court should take note that Airbnb performs background checks on users on both sides of its transactions.[19] Airbnb allows residential property owners ("hosts") to rent out rooms or full properties to traveling guests and matches the hosts and guests on their online platform. Hosts may or may not be present at the property at the time the guests stay. Yet, Airbnb still can and does screen both guests and hosts. According to Airbnb's Global Head of Trust and Risk Management:

> "While no system is infallible, we screen all hosts and guests globally against regulatory, terrorist, and sanctions watch lists. For United States residents, we also run checks looking for prior felony convictions, sex offender registrations, and significant misdemeanors. We are working with additional governments around the world to identify where we can do more background checks."[20]

If Mr. Wilson, Mr. Tchakounte's killer, had used Airbnb, he would have been screened.

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[19] *See* Airbnb 2020 Form 10-K at 22, available at: https://sec.report/Document/0001559720-21-000010/#ic710263be7bc4f28bbfc4b988de000e2_19

[20] *See* https://www.airbnbforwork.com/resource/how-airbnb-builds-trust-and-helps-keep-hosts-and-guests-safe/

Airbnb is not too burdened to use its data and resources to perform such background checks on *both* its guests and hosts, despite bringing in only a fraction of the revenues Uber does on its Mobility platform alone in one year.[21] More, as discussed above, Uber has far more data to exploit, noted by analysts as a "wildly successful collection on who uses it and how they use it and where they go," Compl. ¶ 32, in addition to its greater breadth and financial resources. Uber's argument about burden, for it or for others, thus rings hollow.

Uber's additional suggestion that finding a duty to screen arising from the Uber business model would likewise impose an identical duty on traditional brick-and-mortar businesses, *see* Def. Mem. at 10 (noting that Nordstrom, gas stations, and grocery stores do not screen their customers), is so off the point as to be irrelevant. For one thing, a department store or grocery store worker is not placed in a small, enclosed space with a stranger, back turned to that stranger to focus on operating a vehicle. But more than that, department and grocery stores operate in a very different physical setting with different needs such that they generally *do* employ protections for their invitees — they have on-site security staff who are there to intervene in the event of a problem, have extensive security and surveillance cameras and deploy an array of other measures designed for their brick-and-mortar setting. Similarly, gas station workers typically have those same kinds of protections and others (for example, customer payment by credit card with no contact with staff and, in many locations, bullet-proof glass separations from customers), and hence are not simply put into a small, enclosed space with strangers as are Uber drivers with no reasonable protections at all. Thus, the brick-and-mortar examples invoked by Uber actually defeat its argument — they illustrate that context-specific protections *are* common

[21] For the years ended 2018, 2019, and 2020, Airbnb's total revenues were approximately $3.7 billion, $4.8 billion, and $3.4 billion, respectively, *see* Airbnb 2020 Form 10-K at 59 compared to Uber's $9.3 billion, $10.7 billion, and $6.1 billion, respectively, from its Mobility platform.

and required in *all* business settings, and that context-specific protections for Uber drivers similarly are required and not somehow exempt.

c. *The reasonableness of measures Uber could have taken for driver safety are questions of fact for the jury.*

As discussed above, the factual intricacies of these various scenarios highlight that the question of whether Uber took reasonable safety measures under its own business model, or breached that duty, is a question of fact for a jury and inappropriate for determination on a Rule 12(b)(6) motion to dismiss. *See Giant Food, Inc. v. Mitchell,* 334 Md. 633 (1994) at 636 (noting that "conduct, which under one set of circumstances would constitute ordinary care, might under others be wholly insufficient to gratify the demands of that term"); *Tennant*, 115 Md. App. at 394-95 (holding that whether the appellant had exercised the requisite degree of care under the circumstances "was a question of fact for the jury and not of law for the Court").

But significantly, Uber is in fact no stranger to courts determining that the question of whether its duty of care has been breached is one for a jury, not a Rule 12(b)(6) motion. In *Doe et al. v. Uber Technologies, Inc.*, a case involving the sexual assault of two Uber passengers by two Uber drivers in California in 2015, the court considered the Uber drivers to be employees of Uber. 184 F. Supp. 3d 774 (N.D. Cal. 2016). One of the drivers had a criminal history of domestic violence and had been convicted of assault in 2003. The plaintiffs advanced a tort theory of liability against Uber of negligent hiring, supervision and retention for failure to screen out the driver with a criminal history through an adequate background check. Specifically, they alleged that Uber's seven-year time span in searching for certain criminal offenses was inadequate. Uber argued that in any event, the prior conviction was 12 years old and was merely a "disorderly-persons offense that could have been expunged." 184 F. Supp.3d at 788. The Court rejected Uber's invitation to make a determination on the adequacy of the background

check or the seriousness of the past criminal offense at the pleading stage, ruling that, "[t]aking the facts in the Amended Complaint as true, the Court finds that plaintiffs have sufficiently alleged that Uber should have known about [the driver's] criminal history" and denied Uber's motion to dismiss. *Id.*

As noted above, Defendants' Motion does not directly challenge the pleading of the breach of the duty of reasonable care. But as in *Doe*, to the extent Uber would attempt to have this Court assess whether Uber's efforts — or more accurately here, its utter lack of any effort — to screen for Mr. Wilson's criminal history or other signals of his risk of violence to Uber drivers — would have flagged or blocked this murderer,[22] Def. Mem. at 24, is untenable at this motion to dismiss stage. These are questions for a jury, after discovery. This discovery would include more of the specifics of Uber's capacities for background checks and on Uber's massive data collection and its ability to analyze it, as well as a fully developed record as to what Uber in fact does know but does not disclose to its drivers (and even an understanding of what is done by other, similarly situated, companies in the gig/sharing economy such as Airbnb). To the extent Defendants would attempt here to obtain dismissal based on what are at bottom factual

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[22] Defendants claim that if the Court were to find a legal duty to screen users' criminal history past a certain timeframe, "it would inextricably mean that the new standard is to assume that anyone with any criminal history would be guaranteed to commit future crimes." Def. Mem. at 24. If Defendants are arguing that a person's criminal history past a specific timeframe is irrelevant, then there is no explanation for Uber's performance of background checks on drivers for "certain serious criminal convictions … at any time in the person's history." Compl. ¶ 23, citing 2017-2018 Uber Safety Report. More, as discussed above, there are innumerable other red flags Uber can and should take into account when processing ride requests, such as riders not matching an accountholder (determined by facial recognition software Uber already uses for drivers), Compl. ¶ 26, looking at ride location patterns, and payment method types. As discussed above, this information should be used by Uber to protect its drivers and also shared with drivers so they can make their own decisions about what riders they will allow into their cars.

arguments — and in most instances incorrect factual arguments — concerning its breach of its duty to deploy reasonable safety measures, the attempt must be denied.

2. *The Harm to Mr. Tchakounte Was Foreseeable.*

While the foreseeability of the harm Mr. Tchakounte suffered is also not directly challenged by Defendants, Plaintiffs point out that the danger posed to an Uber driver picking up a stranger to sit in his back seat while the driver operates the vehicle is entirely foreseeable — just as are Uber's passengers' risks against which Uber goes to great lengths to protect and as are similar risks (such as those of Airbnb customers against which Airbnb protects). It is immaterial whether or not Uber had any notice that Mr. Wilson himself was going to commit a crime or know that Mr. Tchakounte himself would be his particular victim on that one particular night. The foreseeability of harm of this sort to all of Uber's drivers is manifest and more than sufficient for Uber to be in breach of its duty of care to its drivers by implementing *no* general safety measures whatsoever from the resources it had to do so to prevent such harm — this incident and incidents like it — from occurring. The legal standard is not that a business owner must guard against any one particular incident, but rather, that that the business owner must take reasonable precautions for those to whom it owes a duty of care against a foreseeable danger from third-party harm if it knows or has reason to know "from past experience, that there is a likelihood of conduct on the part of *third persons in general which is likely to endanger the safety of the visitor even though he has no reason to expect it on the part of any particular individual*."[23] Restatement (Second) of Torts § 344, Comment f (emphasis added).

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[23] This principle also moots Uber's argument that Plaintiffs are seeking to impose "an affirmative duty of absolute protection against the criminal conduct of any individual that may enter [an Uber driver's] vehicle," and that Uber cannot "promise" "absolute protection" because even screened users may bring others on their trips. *See* Def Mem. at 16. Uber's duty is to take

As alleged in the Complaint, Uber's own safety research showed that fatal physical assaults happened to Uber drivers on the platform almost as frequently as to riders on the platform. Compl. ¶ 27. Thus, Uber knew that all Uber drivers were facing the kinds of risks that killed Mr. Tchakounte and that some Uber drivers would die as the result of them. Uber knew that a similar percentage of passengers face that kind of risk, and Uber acknowledged in its conduct that the risk was significant enough to establish its complex safety measures to protect those passengers. The foreseeability of harm to drivers is not meaningfully different, and Uber cannot be allowed to pick and choose its duties of care differently for drivers.

Separately, in some of its general discussion of duty, Uber insinuates that Plaintiffs are asking the Court to hold Uber responsible for physically removing the gun from Mr. Wilson's hand before he pulled the trigger or for performing CPR on Mr. Tchakounte while he was bleeding out. *See* Def. Mem. at 14 (claiming that Uber had no duty to "control" Mr. Wilson's conduct), 25 (attempting to analogize this case to a "duty to aid" case).[24] Such theories were

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reasonable precautions against risks known from past experience. The law does not allow Uber to simply do nothing because no steps are perfect or 100% certain to work. This is akin to a grocery store placing netting or similar protection around its banana display to decrease the likelihood that any bananas will fall and cause a slipping hazard, knowing that they often slide and fall. Uber/a store owner is not relieved of a duty because it does not know with certainty which banana will fall or because some may slip through the protection. The likelihood of harm is precisely what is foreseeable and what imposes the duty.

[24] Uber cites a case providing no guidance whatsoever as to the type of the screening duty implicated in a "gig economy" setting, *Jackson v. A.M.F. Bowling Ctrs., Inc.*, 128 F. Supp. 2d 307 (D. Md. 2001), which involved a plaintiff who had a physical altercation at a bowling alley dance. The bowling alley asked everyone to leave and locked the doors, but the plaintiff was further attacked outside the premises. The Court found that the bowling alley had no duty to "aid" the plaintiff when he had not previously told the security guards that he had been injured. The court also noted that the fact that the owner was aware of "minor incidents" at prior dances did not constitute notice of unreasonable risk of injury necessitating special security measures. 128 F. Supp. 2d at 313. The case had nothing to do with a duty to screen on an enormous

never advanced in the Complaint and are straw man arguments. Uber implements its passenger safety measures in favor of the foreseeable, known aggregate risk that some passengers will suffer harm, despite not knowing in advance which specific passengers will actually face danger in the back of an Uber. It owed Mr. Tchakounte at least that much.

In the premises liability context, it is well-established tort law that prior crimes make the risk of future harm sufficiently foreseeable to impose a duty to implement safety measures. *See Butler v. Acme Markets, Inc.*, 177 N.J. Super. 279, 288 (App. Div. 1981), *aff'd*, 89 N.J. 270 (1982) (history of attacks in defendant's parking lot and defendant's employment of security guards, indicating an awareness of the potential for criminal activity on its property, were sufficient for a jury to conclude that continued assaults on customers using the parking lot reasonably should have been foreseen by defendant, and that defendant failed to take reasonable steps to protect its customers from such a risk); *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 643 (1981) (allegations of prior criminal incidents in mall parking lot supported foreseeability element of negligence claim for failure to provide adequate security); *Daniel v. Days Inn of Am., Inc.*, 292 S.C. 291, 296-302 (Ct. App. 1987) (allegations of past break-ins at hotel and the fact that the hotel had night auditors walk the premises and the sheriff's department patrol the parking area were sufficient to allege that harm to guest was foreseeable).

Here, Plaintiffs' allegations of foreseeability include that Uber's own Safety Report alerted Defendants to the risk of physical assaults on their drivers, including in particular the fact that drivers are almost as likely as passengers to suffer a fatal physical assault during an Uber

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Internet-based platform such as Uber's. Notably, *Jackson* was also decided on a full record at summary judgment, not at the motion to dismiss stage.

ride.[25] Compl. ¶ 27. That same Safety Report also notes that drivers are victims of sexual assault at approximately the same rate as passengers. Specifically, Uber writes:

> "The issues in this report are bigger than Uber and impact every corner of society as a whole. The data itself may challenge assumptions. For example, while media coverage of the issue of sexual assault related to Uber has almost entirely portrayed drivers as the alleged offenders, our data shows that *drivers report assaults at roughly the same rate* as riders across the 5 most serious categories of sexual assault. Drivers are victims, too."

Uber 2017-2018 Safety Report at 10 (emphasis in original).[26]

Yet, despite these findings,[27] Uber here, switching positions dramatically to attempt to defeat this case, contends that while it concedes it has a duty to screen drivers to protect passengers, it nonetheless has no similar duty, reason or need to screen passengers to protect

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[25] Defendants' contention that Plaintiffs' foreseeability allegations fail "[w]ithout a causal link" between the incidents in the Safety Report and Mr. Tchakounte's murder," Def. Mem. at 21, makes no sense. The aggregate numbers regarding assaults on drivers publicly disclosed by Uber — equivalent to passenger risk — are what matter. Just as the aggregate risks require protection for riders, those risks require protection for drivers. The independent incidents cited to in the Safety Report served as notice that assaults of both riders and drivers occurred with similar frequency on the Uber platform in 2017-2018. Presumably, the murder of Mr. Tchakounte will be included in the assault numbers if Uber puts together a 2019-2020 Safety Report. When a mall has several car thefts in its parking lot, the aggrieved owner of a second stolen car is not required to show that the first car theft was the causal factor in the second car theft. Defendants have cited no case law to support this argument, nor could they.

[26] *See* Uber 2017-2018 Safety Report, available at: https://www.uber-assets.com/image/upload/v1575580686/Documents/Safety/UberUSSafetyReport_201718_FullReport.pdf?uclick_id =50161b09-dbb7-40b0-b24b-e925caac5961 On a 12(b)(6) motion, a court may consider documents incorporated by reference into a complaint, which includes documents integral to a complaint. *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016). The Uber Safety Report is heavily quoted and hyperlinked in the Complaint. Compl. ¶ 23.

[27] Defendants' argument that under Plaintiffs' theory, "Defendants would somehow be liable for *anything* that happened to Mr. Tchakounte while he used the Driver App," Def. Mem. at 20, is a desperate head-scratcher. Plaintiffs allege that Defendants' duty of care requires implementing safety measures to prevent dangerous passengers from using the Uber platform in order to mitigate the risk of physical assault from passengers, which has been documented by Uber itself to occur on Uber rides. Plaintiffs have not alleged that Uber should be responsible for 100% protection from every danger at any cost.

drivers, despite Uber's acknowledgment that those drivers face at least equivalent, similar risk. Indeed, drivers are at magnitudes greater risk because drivers are in the car for much of a day, most days of every week, unlike passengers who face a risk only for minutes at a time on the occasions they take an Uber. Compl. ¶ 24. Although Uber aggressively markets its "Safety" measures with its CEO proclaiming that "safety is at the heart of everything we do,"[28] it callously refuses to deploy the same measures it uses to protect passengers to protect its drivers.

Relatedly, Uber's argument that the "general lack of statistical probability" for assaults to occur overall, Def. Mem. at 20, somehow relieves it of any obligation to take safety measures is belied by the fact it has chosen to adopt a comprehensive program of safety measures to protect riders even though the vast majority of Uber rides occur without incident and each rider is only exposed to the risk of harm for a few minutes during occasional rides. But more, what Uber argues is not the law. As discussed above, tort law provides that prior incidents create foreseeability of future incidents without any need to meet a statistical threshold. *See Butler*, 177 N.J. Super. at 288; *Foster*, 303 N.C. at 643; *Daniel*, 292 S.C. at 302.

Above all, however, again, Uber does not directly attack the sufficiency of Plaintiffs' pleading as to foreseeability and the foreseeability of the risk to Mr. Tchakounte in this case is in all events a fact question for the jury, not subject to determination on a motion to dismiss. *Sutton-Witherspoon v. S.A.F.E. Mgmt., Inc.*, 240 Md. App. 214, 239-40 (2019) (foreseeability of risk of harm is a factual dispute not for the court to resolve in the first instance); *Tennant*, 115 Md. App. at 394 (foreseeability on negligence claim is a question of fact for the jury).

[28] *See* https://www.uber.com/newsroom/raisingthebar/

C. *Plaintiffs Suffered Loss*.

Plaintiffs suffered incalculable loss as result of Uber's failure to exercise its duty of care. Compl. ¶¶ 42-53. Defendants do not dispute that Plaintiffs suffered loss, noting that "Defendants do not minimize the severity or impact of these events upon Plaintiffs." *See* Def. Mem. at 29.

D. *Uber's Breach of Duty Was the Proximate Cause of Plaintiffs' Loss*.

Proximate cause is of course also a question of fact for the jury. *Griffith v. Southland Corp.*, 94 Md. App. 242 (1992), *aff'd* (1993). Whether Uber's complete abdication of its duty of care constitutes proximate cause therefore cannot be determined on a motion to dismiss. Once again, Defendants failed to challenge this element of Plaintiffs' pleading of a negligence case, and barely even mention proximate cause in their Motion.

But again, to be complete in their discussion, Plaintiffs point out that they have adequately pled that Uber's negligence was the proximate cause of their loss. A party may be liable in negligence for harm caused to another even in the face of an intervening third party criminal act. *Winffel v. Westfield Prop. Mgmt., LLC*, 435 F. Supp. 3d 686, 693 (D. Md. 2020). Such liability may arise when, "'at the time of [the actor's] negligent conduct [he] realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.'" *Id*. at 693 (quoting *Scott v. Watson*, 278 Md. 160, 172-73 (1976) (quoting Restatement (Second) of Torts § 448)). Along these lines, liability may be found where the breach of duty enhanced (or failed to protect against) the likelihood of the particular criminal act that occurred. *Id.*

As here, the ultimate perpetrator was not known, but the risk and the need to protect against it was. Proximate cause has been found in the breach of duty that failed to reduce the likelihood of criminal activity and harm to the plaintiff in cases where "'inadequate maintenance

of the common area enhanced the likelihood of an assault in the vestibule' of a building, where 'the lack of repair of a defective lock enhanced the likelihood of a theft,' and where 'the absence of a lock on the front door enhanced the likelihood of the robbery of the tenant in the common area' of a building." *Winffel*, 435 F. Supp. 3d at 693 (citing *Scott*, 278 Md. 160, 172 (collecting cases from various jurisdictions)). Likewise, proximate cause has been found against the non-criminal actor in the face of a criminal act where a nightclub failed to provide adequate security during a "college night" promotion and a patron was beaten in a rowdy crowd; a union failed to provide adequate security at its picnic where guests were served "all you can drink" alcohol all day and one of the attendees drove his car into the crowd; and a convenience store employee failed to call police while a customer was being beaten in the parking lot. *Troxel v. Iguana Cantina, LLC*, 201 Md. App. 476, 504-09 (2011) (citing *Merhi v. Becker,* 164 Conn. 516 (1973), and *Griffith,* 94 Md. App. 242 (1992)).

In light of Uber's size and the breadth and scope of its business and the enormity of the information and data it controls, the proximate cause principles in these cases apply to the facts presented here with far greater force — and a reasonable jury could so find. As alleged in the Complaint, Uber knew and publicly states that their riders and drivers sometimes suffer physical assaults. Uber even takes precautions to protect riders from these assaults, using its enormous array of tools and data. Yet it does not deploy any of the same and similar tools and data to protect drivers. Compl. ¶¶ 23, 27.

Uber's failure to apply any of its available safety and screening protocols or data analysis capabilities to screen out dangerous passengers from the platform effectively provided an opportunity for Mr. Wilson to murder Mr. Tchakounte. *See Winffel*, 435 F. Supp. 3d at 69 (finding adequate allegations of proximate causation where security company should have

realized that the failure to provide certain security measures was providing an opportunity for, and enhancing the likelihood of, an assault or murder in a mall parking lot); *see also* Compl. ¶¶ 15, 22. At the same time, Uber's enforced information asymmetry and control also deprived Mr. Tchakounte of any meaningful ability to make safety decisions for himself. Compl. ¶¶ 36-41. These allegations, seen in the light most favorable to the Plaintiffs as they must be on a 12(b)(6) motion, are sufficient to plead proximate cause, *Winffel*, 435 F. Supp. 3d at 69, and would be sufficient for a jury to find proximate cause.

As discussed above, Defendants do not even directly challenge Plaintiffs' pleading of proximate cause. But this element in any event, as with breach of duty, "is an issue to be decided at trial by the trier of fact," not on a motion to dismiss. *Griffith*, 94 Md. App. at 250. Thus, Uber's Motion to Dismiss must be denied for this reason as well.

Conclusion

For the foregoing reasons, Defendants' Motion to Dismiss should be denied, and Plaintiffs should be granted such other and further relief as the Court deems just and proper.

Dated: May 18, 2021

Respectfully submitted,

/s/

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