# Betting on Both Sides of the Marketplace (and why Tiger Global is the Keyser Söze of tech investors)

Because neither the press nor the adoring public can seem to get enough of anything Uber-related, I may as well kick off this week's post with one of the more noteworthy news items from this past week in tech.

According to "unnamed sources," Uber is back on the fundraising circuit again. Though reports vary as to the target fundraising amount, the *Wall Street Journal* – again, citing unnamed sources – recently reported that the total fundraising target is likely to exceed US$2 billion on a pre-money valuation of nearly US$65 billion.[1]

A couple points of interest from those reports, including one that's worth some comment here because it comes up every so often even for companies not raising amounts that exceed the GDP of most Central American countries.

According to a December 4 article on Forbes.com, one of the investors keen to lead this latest Uber round is Tiger Global[2]. For those unfamiliar with Tiger Global, I like to think of them as, like, sort of the Keyser Söze of big institutional venture tech investors. And I mean that mostly as a compliment. If you recall from the movie **The Usual Suspects**: "Nobody ever saw [Keyser Söze] or knew anybody that ever worked directly for him, but… anybody could have worked for Söze. You never knew. That was his power." [3]

That's a lot like Tiger Global. Tiger is a massive hedge fund group (something north of US$30 billion in funds under management last I checked – and I'm sure that number is conservative) based in New York and with a focus, at least for the past several years, on doing serious venture investments with significant players in emerging markets. We see their name come up *a lot* in cap tables for market-leading tech companies based in Brazil, Russia, India and elsewhere. But like Keyser Söze (and unlike many other VCs), Tiger operates behind the scenes, unconcerned about whether the outside world recognizes it for what it has to offer. Which, of course, is truckloads of cash. I mean, hell – they don't even have a website, but they probably own the chair I'm sitting on.

Now why is Tiger's reported interest in this latest Uber fundraising round noteworthy? Because Tiger has already made significant investments in some of Uber's competitors in non-US markets, including in India (via the on-demand taxi-app Ola), China (via Didi) and Singapore (via GrabTaxi). The assumption is Uber intends to use the new funds to expand its offering and increase its market share in emerging markets, which puts Tiger Global in the position of having significant equity holdings in both the rival and the incumbent players in those markets. And Tiger's eagerness to play both sides of the marketplace, according to those same reports, has made some of the incumbent-company investors "furious."

I understand the other investors' knee-jerk reaction here: Uber is seen as the biggest threat to the incumbents and Tiger just helped ensure Uber will have almost limitless resources to increase its market share in those territories where it isn't already the undisputed leader. At the same time, Tiger Global continues to hold sizable stakes in the incumbents in those markets – i.e., so long as the on-demand taxi market continues to print money for the marketplaces it serves (likely, at least in the near-term), and assuming one or more new players don't emerge to replace those that already exist (unlikely), Tiger can't really lose. It's just placed bets on both horses in a two-horse race. That's the commercial reality, and it's one that Tiger obviously feels comfortable with.

But if you read the Forbes.com article closely, you'll note the "furious" incumbent investors aren't really questioning the commercial wisdom of Tiger's latest move. Rather, they're claiming Tiger has broken an "unwritten rule" in the world of venture capital investing – that is, Tiger has invested on both sides of a competitive market. According to the article, "When raising money, companies usually do not stipulate that its investors cannot back its competitors, but it is understood – especially among early-stage startups that often share private data with its backers – that such an investment would cross the line."

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1 See http://on.wsj.com/1NsTtTK
2 See http://onforb.es/1NteZfr
3 For those who haven't seen **The Usual Suspects**, then I'm sorry, the analogy is lost on you. Though for the record, you may want to get out of the house a bit more often.

So is that really the case? Do VCs adhere to an unwritten rule or understanding that limits their ability to place multiple bets within the same sector? And is Tiger Global poised to cross the line?

In a word: No.

The big concern cited by the author of the Forbes article – and presumably voiced by the angry investors – is Tiger's ability to receive proprietary and confidential info from each rival company, and the potential for… if not info-sharing, then perhaps a certain amount of "information leakage" of one company's info into the hands of its rival, thereby giving one company a competitive advantage over the other. And certainly it's a valid concern… in theory. But there are plenty of ways to address the issue, and plenty of VCs can manage (and have managed) to operate perfectly fine on both sides. Let's discuss how.

**Rights to Information**

First, let's look at what types of information investors are typically entitled to receive from portfolio companies.

Private investment rounds nearly always include a set of terms granting preferred investors (or, at the very least, "Major Investors," however that term is defined) certain rights to receive company financial information. In a typical preferred financing round, you can expect to see a provision granting investors access to:

- Annual audited statements (or unaudited for very early-stage companies)
- Quarterly audited or unaudited statements
- Monthly cash flows and income statements and balance sheets
- Perhaps an annual budget submitted just prior to the start of the new fiscal year
- Occasionally a sort of "catch-all" category if certain investors require specific reports per the fund's partnership agreement, or to comply with applicable disclosure laws in the jurisdiction in which the fund is established

Obviously, this is precisely the type of information Uber would prefer to keep out of its competitors' hands and vice versa. And if Tiger Global is entitled to receive such information from each, then both it and the companies are in a potentially awkward position where Tiger could, potentially, cross-compare financials and – worst-case scenario – allow one's information to be known to the other and used for strategic purposes.

But beyond financial information, there's also commercial, strategic, operational and other proprietary information (e.g., intellectual property) that's potentially accessible by the investor. A lot of that information tends to come up in meetings of the board of directors or advisory board meetings, which is where a lot of the really juicy stuff is made available to the directors and certain board observers – the user stats, the monthly recurring revenue and customer acquisition numbers, the customer churn figures, the growth statistics, the hiring statistics and growth strategies. There's a lot of key info in those meetings; would Tiger Global be entitled to such information? And, if so, could either Uber or its rivals withhold it from Tiger?

**The Solution**

In truth, the first issue (i.e., access to financial information) tends to be addressed in the financing documents themselves, usually in the investors' rights agreement or stockholders' agreement under a section called, strangely enough, "Confidentiality" or something along those lines. (It usually – but not always – follows the section that addresses the rights to financial info). It often reads something like this:

> Each Investor agrees and acknowledges that notwithstanding Section X.X above, the Company may elect to limit (either by redaction or by withholding from disclosure) the disclosures identified therein to the extent it may be reasonably necessary to prevent the disclosure of proprietary or confidential strategic, operational or financial information to such Investor if, in the Company's reasonable judgment, such Investor is deemed to be, or to be affiliated or engaged with, directly or indirectly, a provider of goods or services that directly compete with those offered or provided by the Company as of the date on which such information is due in accordance with the above. Furthermore, each Investor covenants that it will keep confidential and will not disclose, divulge, or use for any purpose (other than to monitor its investment in the Company) any confidential information obtained from the Company pursuant to the terms of this Agreement (including notice of the Company's intention to file a registration statement), unless such confidential information (a) is known or becomes known to the public in general (other than as a result of a breach of this Section X.X by such Investor), (b) is or has been independently developed or conceived by the Investor without use of the Company's confidential information, or (c) is or has been made known or disclosed to the Investor by an unaffiliated third party without a breach of any obligation of confidentiality such third party may have to the Company.

Now let's break the above into two parts. The second sentence (beginning with "Furthermore, each Investor covenants…"), which is the less important of the two, is a standard confidentiality clause and it says that, once disclosed to the investor, the investor cannot disclose the contents of any confidential info it receives from the Company as a consequence of its rights to disclosure under the agreement unless such information is otherwise learned through permitted means (already known to the public, independently developed, made known by unaffiliated third party…). That's pretty standard. Bear in mind, though, these sorts of confidentiality provisions only offer limited protection; I mean, after all, you cannot "unring the bell," as we say, and undo any damage that disclosure may pose. Once the genie is out of the bottle, you cannot stuff it back in. So while it's an important provision to include in order to ensure you have standing in case the investor is a bit naughty, and to prove the investor was on notice as to its confidentiality obligations, in practical terms this sort of provision doesn't offer the company much in the way of preventative protection.

The first sentence, though, is a lot more helpful to the company (and, in the Uber/Tiger case, it's the one the angry investors need to remember). The first sentence grants the company the right to *withhold* specific information from a particular investor if it reasonably believes the investor directly competes with the company (unlikely in this case – most VCs aren't all that interested in running on-demand taxi services, because building and running companies is hard; investing in others is a lot easier) or – and here's the kicker – is "affiliated or engaged with" another party that competes with the company's products or services. In other words, if Uber includes a provision like this one in their investment agreement with Tiger Global (and let's assume they have), then Uber can make the decision to not disclose key information to Tiger Global. And if Ola, Didi and/or GrabTaxi include this sort of provision as well, then each of those can decide not to disclose confidential information to Tiger Global as well.

By the way, one boring – but very important – drafting point: Notice which party has the upper hand here? It's the company's right to withhold and, if they do, then the investor's only recourse is to challenge the company's judgment (which, after all, must be reasonable). If you're the company, that's how you want things. Put the onus to challenge on the investor – because that's a long, expensive argument, and so long as the argument is continuing (and made in good faith), you're not in breach of your contractual obligations.

Would the investor accept this? Maybe. If I was representing the investor in a typical investment round (i.e., where my client didn't have multiple investments in competing portfolio companies), I might initially object, or I may attempt to draft some curtailing language permitting the company to redact or withhold only very specific sensitive info, and only to the limited extent necessary to ensure its proprietary or trade-secret status (if applicable). But it wouldn't be my top priority during negotiations. In this situation, however, if I advised Tiger Global (and, for the record, I do not), I might have a discussion with Tiger about how it's not necessarily the worst thing in the world to put the onus for redaction or withholding on the company itself. In some ways it re-allocates the burden on my client for info leakage which may occur, whether my client's fault or otherwise, and shares it with the company itself. In other words, if the company provides information to me – and had the option to redact or withhold it – then it puts the company in the position of bearing at least some of the responsibility for the information it provided, and at least an argument of an implicit understanding that the information they shared wasn't critical, confidential info (and may make it less likely my client would be accused of being naughty with confidential information).

As for the board of directors information, that's also an easy one (though requires some discipline on the part of both the company and the investor). First, not all investors get seats at the board of directors table. (And if they do, then there's a whole other discussion about separating out fiduciary duties for directors and for the investors appointing them, but that's another topic for another day.) And second, directors meetings can easily be divided up into "General" sessions and "Confidential" sessions, and the information disclosed and discussed in each can easily be tailored to be attendee-appropriate. So most complaints on this score are much ado about not very much.

**Conclusion**

Hey, I sympathize with the incumbent investors' plight. I get it – those investors went from owning a piece of a high-flying market leader in a fantastic sector to suddenly facing the very real possibility of watching their investments go up in flames over the next 12-24 months. I'd be angry, too. But arguing it from a legal and "unwritten rule of venture investing" perspective is probably the wrong way to go about it. There is no such rule.

So the next time you see a news article quoting an angry investor about some sort of "unwritten rule" to which VCs supposedly subscribe, remember that (i) it's unlikely any such unwritten rule exists, (ii) chances are the investors are angry not because some unwritten rule was broken, but rather because that VC stands to lose a heap of money, and (iii) if your lawyers are experienced in such matters, then many of the issues raised by these so-called "unwritten rules" are already addressed in a good set of investment documents.

As for the next time you see reports that Tiger Global has placed yet another big bet on a market leader somewhere off the beaten path, remember: "The greatest trick [Keyser Söze] ever pulled was convincing the world he didn't exist."

"And like that ... <pffff> … he's gone."





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