16-2750 (L)

(consolidated with 16-2752)

United States Court of Appeals
for the Second Circuit

SPENCER MEYER, Individually and on behalf of this similarly situated,

Plaintiff-Counter Defendant-Appellee,

v.

TRAVIS KALANICK,

Defendant-Appellant,

UBER TECHNOLOGIES, INC.,

Defendant-Counter Claimant-Appellant,

ERGO,

Third-Party Defendant.

On Appeal From The United States District Court
For The Southern District Of New York, No. 15-cv-09796

APPELLANTS' APPENDIX VOLUME 2 of 2

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SPENCER MEYER, individually and on behalf of those similarly situated,

Plaintiffs,

-against-

TRAVIS KALANICK and UBER TECHNOLOGIES, INC.

Defendants.

Case No. 1:15-cv-9796 (JSR)

ORAL ARGUMENT REQUESTED

UBER TECHNOLOGIES, INC.'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL ARBITRATION

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June 21, 2016

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Defendant Uber Technologies, Inc. ("Uber") respectfully requests an order compelling arbitration of all of Plaintiff Spencer Meyer's claims against all parties in this action.

PRELIMINARY STATEMENT

The Court has already found (DE 44 at 9), and Plaintiff has never disputed, that Plaintiff agreed to Uber's Terms and Conditions (the "Terms" or "Rider Terms") as a condition of using Uber's services. Those Terms include a clear and conspicuous agreement to arbitrate (the "Arbitration Agreement"), which mandates dismissing this action in favor of arbitration.

Plaintiff admits that to become an Uber rider, "an individual first must agree to Uber's terms and conditions and privacy policy." Am. Compl. ¶ 29. He further admits that he is an Uber rider and that his claims are based on his use of Uber's services in New York. *Id.* ¶¶ 7-8, 16, 131-33, 138-40. In the process of registering to use Uber, Plaintiff was directed to the Rider Terms, including the Arbitration Agreement, via a bright blue "Terms & Conditions" hyperlink, and by registering for Uber he agreed to those Terms. Under binding Second Circuit authority, this constitutes Plaintiff's assent to the Arbitration Agreement.

Having assented to the Arbitration Agreement, Plaintiff is bound by its terms, which are fair—indeed generous—to the rider, as demonstrated below. These terms include the requirement that "any" claim "arising out of or relating to this Agreement … or the use of [Uber's] Service or Application" must be "settled by binding arbitration." DE 29-1 at 8-9. Uber's "Service" includes "any services supplied" by Uber, and its "Application" includes "any associated application supplied to [a rider] by [Uber] which purpose is to enable [a rider] to use the Service." *Id.* at 2. Here, Plaintiff's claims that Uber's business model amounts to price-fixing and that his alleged injuries arise from his use of the application and service fall squarely within the scope of the Arbitration Agreement.

Because the Arbitration Agreement delegates arbitrability issues to the arbitrator, the Court should dismiss this action as to all parties in favor of arbitration and allow the arbitrator to address any such issues in the first instance. Even if the Court addresses arbitrability issues, the agreement is valid and enforceable (*see, e.g.*, *Lanier v. Uber Techs., Inc.*, No. 15-cv-09925-BRO, DE 25 at 4-7 (C.D. Cal. May 11, 2016) (confirming the validity of a similar Uber rider agreement and compelling arbitration)), and encompasses Plaintiff's claims, both as to Uber and as to Uber's CEO, Travis Kalanick. The law is well-settled that a non-signatory employee is covered by his employer's contract providing for arbitration, and Plaintiff should be precluded in any event from avoiding his agreement to arbitrate disputes under principles of equitable estoppel, because his claims are intertwined with the Terms that include his agreement to arbitrate disputes.

For all of these reasons and those discussed further below, the Court should dismiss this action and compel arbitration of Plaintiff's claims.

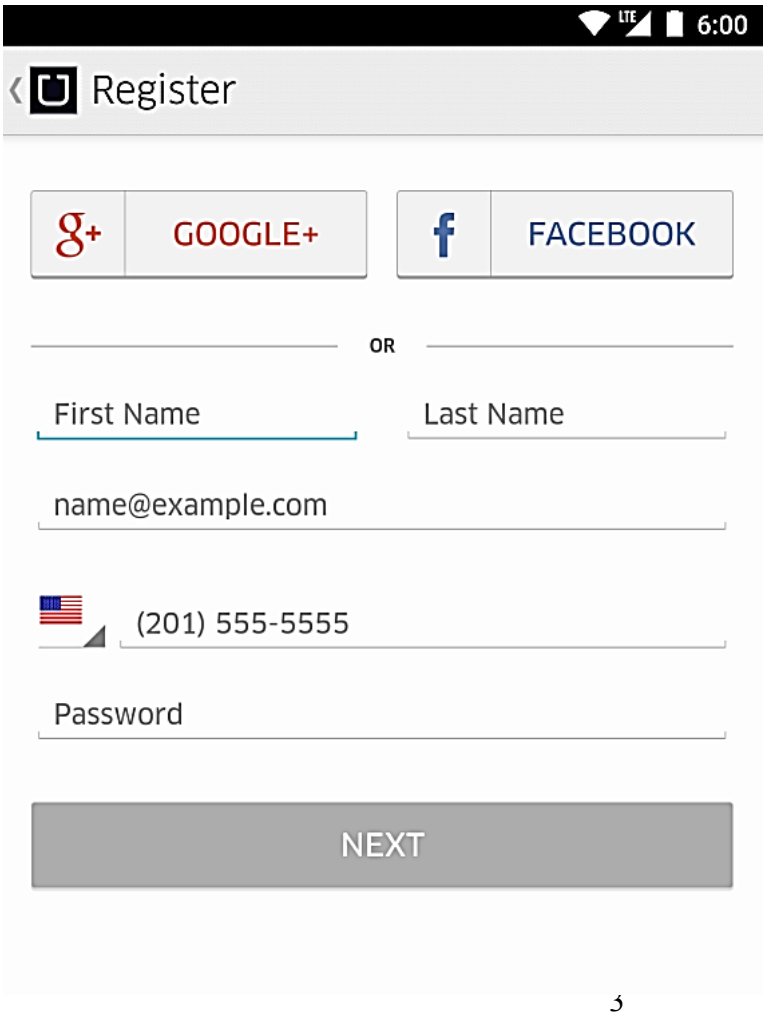
FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed a Complaint against Travis Kalanick, CEO of Uber, for violations of the Sherman Act, 15 U.S.C. § 1, and the Donnelly Act, N.Y. Gen. Bus. Law § 340, based on allegations that he "paid higher prices for car service" requested through Uber's "application for smartphone devices (the 'Uber App')." Am. Compl. ¶¶ 8, 24. When Plaintiff registered for an Uber account, however—a required step in order to use Uber's app or services—he agreed that "any dispute, claim or controversy arising out of or relating to" the agreement governing his use of Uber's services or application "will be settled by binding arbitration." DE 29-1 at 9; Am. Compl. ¶ 29.

A. The Uber Registration Process

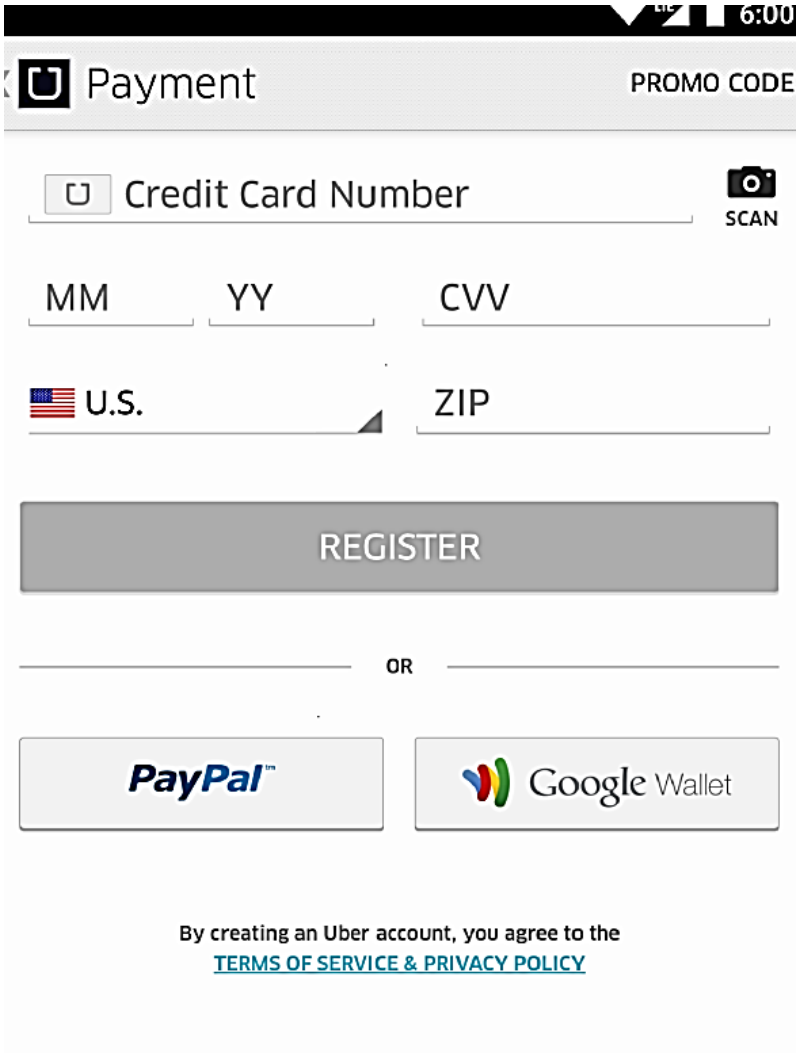
Uber is a technology company that enables riders to request transportation services from third-party transportation providers. Am. Compl. ¶ 2. Mr. Kalanick is the co-founder and CEO of Uber, and an Uber employee. *Id.* ¶¶ 1, 9. Riders can request transportation services by using the Uber App on their smartphones, and these requests are then transmitted to independent transportation providers who are available to receive transportation requests. *Id.* ¶ 24.

Before riders can request transportation services via the Uber App, they must first register by creating an Uber account. *Id.* ¶ 28. Riders can create an account either through the company's website, at https://get.uber.com/sign-up/, or within the Uber App itself. Plaintiff registered with Uber in order to create his user account. *Id.* ¶¶ 7, 29. Uber's records show that Plaintiff registered using the Uber App on his Samsung Galaxy S5 phone with an Android operating system on October 18, 2014. Mi Decl. ¶ 3. Registration using the Uber App is straightforward. During late 2014, when Plaintiff registered for Uber, this process involved two basic steps, each of which was confined to a single screen on the user's smartphone with no scrolling required: (1) Register; and (2) Payment. *Id.*



After successfully downloading the Uber App and clicking the "Register" button, the user was prompted on the first screen, titled "Register," to enter his name, email address, mobile phone number, and a password, or to sign up with the user's Google+ or Facebook account. Mi Decl. ¶ 5a. According to Uber's records, Plaintiff did not sign up using Google+ or Facebook. *Id.* For users who do not sign up using Google+ or Facebook, after filling in the above fields, the user can then advance to the next screen by clicking "Next." *Id.*

On the second and final screen, the user is prompted to enter his credit card information, or to opt to make payments using PayPal or Google Wallet. Mi Decl. ¶ 5b. According to Uber's records, Plaintiff entered his credit card information in the text box provided. *Id.* The second screen includes the following notice: "By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY." *Id.* The phrase "TERMS OF SERVICE & PRIVACY POLICY" is in all-caps, underlined, and in bright blue text, all of which set the text apart from other text on the screen and indicate a hyperlink. *Id.* As demonstrated by the screenshot to the right, the hyperlink is immediately visible when the user



arrives on this second screen. If the hyperlink is clicked, the user is taken to a screen that contains a button that accesses the "Terms and Conditions" and "Privacy Policy" then in effect. *Id*. The user must then click the "Register" button, which appears directly above the link to the terms on the final screen, to complete the registration process. *Id.* ¶ 5c. Plaintiff could not have completed the registration process and requested a ride without completing these steps. *Id.* The Uber App registration process is short and simple, and the screens are easy to read and understand.

B. The Arbitration Agreement

The Uber Rider Terms to which Plaintiff agreed contain several sections, separated by bolded subheadings. The first section provides that the Rider Terms "constitute a legal agreement" between the rider and Uber, and "[i]n order to use the Service … and the associated Application … [the rider] must agree to the terms and conditions that are set out below." DE 29-1 at 2.

Another section, entitled "Dispute Resolution" (DE 29-1 at 8-9), states:

> You and Company agree that any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof or the use of the Service or Application (collectively, **"Disputes"**) will be settled by binding arbitration, except that each party retains the right to bring an individual action in small claims court and the right to seek injunctive or other equitable relief in a court of competent jurisdiction to prevent the actual or threatened infringement, misappropriation or violation of a party's copyrights, trademarks, trade secrets, patents or other intellectual property rights. **You acknowledge and agree that you and Company are each waiving the right to a trial by jury or to participate as a plaintiff or class User in any purported class action or representative proceeding.** Further, unless both you and Company otherwise agree in writing, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of any class or representative proceeding….

The Rider Terms also specify that the American Arbitration Association ("AAA") will oversee any dispute and then identify the particular arbitration rules that will govern:

> Arbitration Rules and Governing Law. The arbitration will be administered by the American Arbitration Association ("AAA") in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (the "AAA Rules") then in effect, except as modified by this "Dispute Resolution" section. (The AAA Rules are available at www.adr.org/arb_med or by calling the AAA at 1-800-778-7879.) The Federal Arbitration Act will govern the interpretation and enforcement of this Section.

Id. at 9.

The terms of the Arbitration Agreement favor the rider; they permit the rider to arbitrate a dispute in the county where he or she resides, and they allow for recovery of attorneys' fees only by the rider, not Uber:

> Arbitration Location and Procedure. Unless you and Company otherwise agree, the arbitration will be conducted in the county where you reside.... If you prevail in arbitration you will be entitled to an award of attorneys' fees and expenses, to the extent provided under applicable law. Company will not seek, and hereby waives all rights it may have under applicable law to recover, attorneys' fees and expenses if it prevails in arbitration.

Id. at 9.

Further safeguarding riders' access to the arbitral forum is Uber's agreement to bear the burden of filing, administrative, and arbitrator fees for certain nonfrivolous claims:

> Fees. Your responsibility to pay any AAA filing, administrative and arbitrator fees will be solely as set forth in the AAA Rules. However, if your claim for damages does not exceed $75,000, Company will pay all such fees unless the arbitrator finds that either the substance of your claim or the relief sought in your Demand for Arbitration was frivolous or was brought for an improper purpose (as measured by the standards set forth in Federal Rule of Civil Procedure 11(b)).

Id.

C. Procedural History

On December 16, 2015, notwithstanding his agreement to arbitrate "any dispute, claim or controversy arising out of or relating to" Uber's services or application (DE 29-1 at 9), Plaintiff filed his Complaint (DE 1), which he then amended on January 29, 2016 (DE 26).

Although all of Plaintiff's claims arise out of or relate to Uber's Rider Terms, application, and services, Plaintiff brought his claims against Mr. Kalanick individually, as co-founder and CEO of Uber. Plaintiff alleges that Mr. Kalanick, in his personal capacity, violated antitrust laws, namely the Sherman Act, 15 U.S.C. § 1, and the Donnelly Act, N.Y. Gen. Bus. Law § 340. Am. Compl. ¶ 1. Plaintiff alleges that "Uber's price-fixed fares" are accomplished by means of the "Uber pricing algorithm," which causes fares charged by "[d]rivers using the Uber app" to surge during times of peak demand, resulting in "Uber-controlled pricing" that allegedly "injure[s]" "Uber riders." *Id.* ¶¶ 2, 5-6, 26, 47, 77-78. Plaintiff purports to bring these claims on behalf of a class comprised of "all persons in the United States who, on one or more occasions, have used the Uber App to obtain rides from Uber driver-partners and paid fares for their rides set by the Uber pricing algorithm." *Id.* ¶ 113.

Mr. Kalanick moved to dismiss the Amended Complaint on February 8, 2016. DE 28. In his motion, Mr. Kalanick asserted that this dispute would be subject to arbitration under the Rider Terms, and he expressly reserved his right to move to compel arbitration. DE 28 at 28 n.10. The Court denied the motion to dismiss on March 31, 2016, concluding that, because Mr. Kalanick had not yet sought to compel arbitration, Plaintiff could continue pursuing his class action. DE 37 at 23 n.8. Mr. Kalanick moved for reconsideration of the class waiver ruling, which the Court denied. DE 44 at 1-2, 7.

On May 20, 2016, Mr. Kalanick filed a Motion for Joinder, requesting that Uber be joined as a necessary party in this action. DE 47. On May 24, 2016, Uber filed a motion requesting that the Court permit it to intervene. DE 58. The Court granted Mr. Kalanick's motion on June 19, 2016, and ordered that Uber be joined as a defendant. DE 90. It denied Uber's motion as moot. *Id.*

ARGUMENT

Congress's "clear intent" in enacting the Federal Arbitration Act (the "FAA") was "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22-25 (1983). The Second Circuit recognizes this "preference for enforcing arbitration agreements applies even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483, 486 (2d Cir. 2013); *Clinton v. Oppenheimer & Co., Inc.*, 824 F. Supp. 2d 476, 482 (Mar. 17, 2011) *report and recommendation adopted by* 824 F. Supp. 2d 476 (Apr. 14, 2011) (Rakoff, J.).

Accordingly, "[an] order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986). "The party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Khanna v. Am. Express Co.*, 2011 WL 6382603, at *2 (S.D.N.Y. Dec. 14, 2011) (citing *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91 (2000)); *see also Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev.*, 55 Cal. 4th 223, 247 (2012) ("The party resisting arbitration bears the burden of proving unconscionability.").

A. Plaintiff's Agreement with Uber Requires Arbitration on an Individual Basis of Plaintiff's Claims

There can be no serious dispute that Plaintiff agreed to be bound by the Arbitration Agreement. Plaintiff created an Uber account on October 18, 2014 (Mi Decl. ¶ 3) and as Plaintiff concedes, "[t]o become an Uber account holder, an individual first must agree to Uber's terms and conditions and privacy policy" (Am. Compl. ¶ 29). Plaintiff is thus bound by the Rider Terms. *See infra* Part B.2. Because the Arbitration Agreement is governed by the FAA,

and because Plaintiff's claims fall within the scope of the Arbitration Agreement, Plaintiff is bound by the agreement's provisions requiring the resolution of disputes by binding arbitration, delegating threshold arbitrability issues to the arbitrator, and waiving any right to representative or class action proceedings.

1. The FAA Governs the Parties' Agreement and This Dispute

Both the express terms of the Arbitration Agreement and the nature of the relationship between Uber and Plaintiff confirm that the FAA governs. First, the Arbitration Agreement's statement that "[t]he Federal Arbitration Act will govern the interpretation and enforcement" of the Agreement (DE 29-1 at 9) mandates that the FAA applies to the Arbitration Agreement. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 442-43, 447 (2006); *Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 96 (2d Cir. 1999). In addition, the FAA applies upon a finding that the transactions at issue affect interstate commerce. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 274-77 (1995) (FAA should be applied coincident with the full reach of Congress's Commerce Clause powers). Where, as here, the transactions involve the use of Internet technologies to transmit user requests across a network of drivers in hundreds of cities across the country, the "affecting commerce" requirement has been met. *See Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 26 n.11 (2d Cir. 2002); Am. Compl. ¶¶ 13, 19 (alleging conduct affecting "interstate trade and commerce").

2. Pursuant to the Arbitration Agreement, the Arbitrator Should Decide Questions of Arbitrability

The Court should honor the parties' agreement to permit the arbitrator to decide the threshold question of arbitrability. Because "arbitration is a matter of contract," "parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center West v.*

Jackson, 561 U.S. 63, 68-69 (2010); *see also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002). Indeed, "[a]n agreement to arbitrate a gateway issue is simply an additional antecedent agreement the party seeking arbitration asks the federal court to enforce." *Rent-A-Center*, 561 U.S. at 70.

The Arbitration Agreement in this case delegates gateway questions of arbitrability to the arbitrator by incorporating the AAA Commercial Arbitration Rules. DE 29-1 at 9. Specifically, Rule 7(a) of the AAA Rules provides: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." AAA Commercial Arbitration Rules and Mediation Procedures at R-7(a) (https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103) (effective October 1, 2013; last accessed May 23, 2016). And the Second Circuit has squarely held, in a case involving this very AAA rule, that when "parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator." *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005); *accord Shaw Grp. v. Triplefine Int'l Corp.*, 322 F.3d 115, 122 (2d Cir. 2003) (same).[1] This Court too has repeatedly acknowledged this well-established principle. *See, e.g.*, *Laumann v. Nat'l Hockey League*, 989 F. Supp. 2d 329, 336 & n.33 (S.D.N.Y. 2013).

Because "[t]here can be no doubt that the parties' Arbitration Agreement delegates issues of arbitrability to an arbitrator, not a court" (*Contec*, 398 F.3d at 208), the Court should leave any arbitrability questions for the arbitrator to decide in the first instance.

[1] The Second Circuit's approach is consistent with the holdings of other circuits. *See Fallo v. High-Tech Inst.*, 559 F.3d 874, 877-78 (8th Cir. 2009); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006); *Apollo Comput., Inc. v. Berg*, 886 F.2d 469, 472-74 (1st Cir. 1989).

B. Even If the Court Were to Address Questions of Arbitrability, a Valid and Enforceable Arbitration Agreement Exists Between Plaintiff and Uber

Given the foregoing, this Court need not proceed any further to determine that disputes between the parties rightfully belong in arbitration. However, if this Court rules on issues of arbitrability, the Court's role under the FAA is to determine "(1) whether there exists a valid agreement to arbitrate at all under the contract in question ... and if so, (2) whether the particular dispute sought to be arbitrated falls within the scope of the arbitration agreement." *Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219, 226 (2d Cir. 2001) (citation omitted). "[T]he [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). "[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25.

1. New York Law Applies to Any Question Regarding the Validity of the Arbitration Agreement

Two considerations require that New York law apply to the Court's analysis of any issues relating to the validity of the Arbitration Agreement, including the issue of unconscionability. *First*, in diversity cases,[2] federal courts must follow the prevailing rules in the state where they sit. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). *Second*, the Court must consider the Arbitration Agreement as a stand-alone agreement, without reference to the other

[2] Plaintiff invokes both federal diversity and subject-matter jurisdiction in his Complaint. Am. Compl. ¶ 10. Even if the Court applied federal choice-of-law principles, the result would be the same. *See, e.g.*, *Loreley Fin. No. 3 Ltd. v. Wells Fargo Sec.*, 797 F.3d 160, 170 & n.5 (2d Cir. 2015) (concluding that because "Defendants transacted business within New York giving rise to Plaintiffs' causes of action," the choice-of-law result is "the same, regardless of whether we analyze choice of law under federal or New York law").

Rider Terms in the broader agreement in which the arbitration provision is contained. *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (per curiam) ("[as a matter of substantive federal arbitration law,] an arbitration provision is severable from the remainder of the contract" (internal quotation marks omitted)).[3]

Because the Arbitration Agreement contains no choice-of-law provision, the forum state's choice of law rules control. *Fieger v. Pitney Bowes Credit Corp.*, 251 F.3d 386, 393 (2d Cir. 2001). New York's "choice-of-law rules require application of the law of the state having the most significant contacts with the matter in dispute." *Philips Credit Corp. v. Regent Health Grp., Inc.*, 953 F. Supp. 482, 501 (S.D.N.Y. 1997) (citing *Auten v. Auten*, 308 N.Y. 155, 160 (1954)). The relevant contacts include: "(1) the place of contracting, (2) the place of the contract negotiations, (3) the place of the performance of the contract, (4) the location of the subject matter of the contract, and (5) the domicile, residence, nationality, place of incorporation and place of business of the parties." *Id.* at 502.

These factors overwhelmingly favor application of New York law to the Arbitration Agreement. Plaintiff emphasized that the "place of performance" and the "subject matter of the contract"—i.e., his use of the Uber App—included New York. Am. Compl. ¶ 7; *see also* Mi Decl. ¶ 4 (explaining that Plaintiff has taken as many rides in New York as he has in any other location, and has not taken any rides in California). Moreover, by his own admission, all of his "claims in this case arise out of activities that relate to New York State." *Id.* ¶ 16.

[3] *See, e.g.*, *Sena v. Uber Techs., Inc.*, 2016 WL 1376445, at *4 (D. Ariz. Apr. 7, 2016) (holding that Arizona law applies to the arbitration provision in a similar agreement, even though the larger agreement contained a California choice-of-law provision, because "the Court must confine its analysis to the Arbitration Provision, which contains no choice of law provision"); *Bruster v. Uber Techs., Inc.*, No. 15-CV-2653, DE 19 at 7-8 (N.D. Ohio May 23, 2016) (same; applying Ohio law); *Suarez v. Uber Techs., Inc.*, 2016 WL 2348706, at *4 (M.D. Fla. May 4, 2016) (same; applying Florida law); *Varon v. Uber Techs., Inc.*, 2016 WL 1752835, at *3 (D. Md. May 3, 2016) (same; applying Maryland law).

He alleges that Uber and Travis Kalanick conduct a significant amount of business in New York (*id.* ¶¶ 7, 12-15, 18 ("New York City is reportedly Uber's biggest market in the United States and its most profitable."), 24-27, 41, 52, 87), claims that *those specific* business activities give rise to his claims (*id.* ¶¶ 16, 87-89, 100-104, 120-27, 134-36), and asserts a claim under New York law (*id.* ¶¶ 134-140). Because New York has the most significant contacts with Plaintiff's case, New York law should apply to the Arbitration Agreement.[4]

2. Plaintiff Assented to the Arbitration Agreement

Plaintiff agreed to the Rider Terms, including the Arbitration Agreement, because he had adequate notice of the Terms when he registered for an Uber account. The Uber App registration process provided "immediately visible notice of the existence of [the] terms" (*Specht*, 306 F.3d at 31), through an all-caps, underlined, bright blue "Terms & Conditions" hyperlink (Mi Decl. ¶ 5b), and its statement that "[b]y creating an Uber account, you agree to the 'Terms of Service & Privacy Policy'" (*id.*) provided "explicit textual notice that" creating an Uber account "will act as a manifestation of the user's intent to be bound" by those terms (*Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014) (citing *Specht*, 306 F.3d at 31)). Plaintiff thus agreed

[4] The Court applied California law in its order on the motion for reconsideration. DE 44 at 5-6 (citing DE 41 at 12 n.3 ("Plaintiff['s Amended Complaint] does not specify . . . where in particular he has used the Uber App . . ."). On the motion to dismiss, Mr. Kalanick did not—and could not—introduce evidence regarding the place of performance, as those facts were not alleged in Plaintiff's Complaint. *See Staehr v. Hartford Fin. Servs. Grp.*, 547 F.3d 406, 425 (2d Cir. 2008) ("a district court must confine itself to the four corners of the complaint when deciding a motion to dismiss"). With the benefit of that evidence, however, it is clear that California law should not apply to the Arbitration Agreement. Indeed, the *only* factor favoring application of California law is that Uber is headquartered in California (and even that factor is diminished by the fact that Uber is incorporated in Delaware). Plaintiff has no relevant contacts with California, and all other relevant factors weigh heavily in favor of applying New York law. But even under California law, this Court should resolve this motion in the same way—compel arbitration. *See infra* Sections B.2-B.5.

to the Arbitration Agreement. *See* Am. Compl. ¶ 29 ("[t]o become an Uber account holder, an individual first must agree to Uber's terms and conditions").

Well-settled principles of contract instruct that "[m]utual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract." *Specht*, 306 F.3d at 29. When determining whether parties assented to contract terms, "courts eschew the subjective and look to objective manifestations of intent as established by words and deeds." *Bar-Ayal v. Time Warner Cable Inc.*, 2006 WL 2990032, at *8 (S.D.N.Y. Oct. 16, 2006) (quoting *Richard BB v. Louis B (In re Estate of Rose B.B.)*, 752 N.Y.S.2d 142, 144 (N.Y. App. Div. 2002)). "[A]n individual who signs or otherwise assents to a contract without reading it (despite having an opportunity to do so) is bound by that contract, including its arbitration provision." *Id*.

When terms and conditions are made available by hyperlink to a separate screen, "the validity of the ... agreement turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract." *Nguyen*, 763 F.3d at 1177 (citing *Specht*, 306 F.3d at 31). Applying New York law, the Ninth Circuit recently identified several factors affecting whether a plaintiff would be bound by hyperlinked terms and conditions, including: "the conspicuousness and placement of the 'Terms of Use' hyperlink, other notices given to users of the terms of use, and the website's general design all contribute to whether a reasonably prudent user would have inquiry notice" of the terms and conditions. *Id*.

Plaintiff admits that "[t]o become an Uber account holder, an individual first must agree to Uber's terms and conditions and privacy policy" (Am. Compl. ¶ 29), and he was put on inquiry notice of those terms, including the Arbitration Agreement, when he completed the clear, simple, two-step account registration process. The second screen of the registration process expressly informed potential registrants: "By creating an Uber account, you agree to the 'Terms of Service & Privacy Policy,'" with the "Terms of Service & Privacy Policy" distinguished in

all-caps, underlined text, and a bright blue color, indicating a hyperlink. Mi Decl. ¶ 5b. The simple registration process ends with a push of a button just above this notice. *Id.* The registration process thus provides "immediately visible notice of the existence of license terms" (*Specht*, 306 F.3d at 31), and "explicit textual notice that" creating an Uber account "will act as a manifestation of the user's intent to be bound" by those terms (*Nguyen*, 763 F.3d at 1177).

Courts in this district, and others throughout the nation, have repeatedly held that users were bound by terms and conditions in similar circumstances. *See, e.g.*, *Lanier v. Uber Techs., Inc.*, No. 15-cv-09925-BRO, DE 25 at 4-7 (C.D. Cal. May 11, 2016) (confirming the validity of a similar Uber rider agreement and compelling arbitration); *Whitt v. Prosper Funding LLC*, 2015 WL 4254062, at *5 (S.D.N.Y. July 14, 2015) (compelling arbitration where a "conspicuous hyperlink" immediately above a "continue" button provided access to agreement terms, including the arbitration provision, citing an "abundance of persuasive authority" on point); *Nicosia v. Amazon.com, Inc.*, 84 F. Supp. 3d 142, 150 (E.D.N.Y. 2015) (same).[5]

Plaintiff admits that he completed the Uber registration process, with its explicit, visible notice of the Rider Terms; accordingly, he must abide by the Arbitration Agreement.

3. The Dispute Falls Within the Scope of the Arbitration Agreement

Under the FAA, a court must compel arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Techs., Inc.*, 475 U.S. at 650.

Here, the Arbitration Agreement provides that "any dispute, claim or controversy arising out of or relating to this Agreement … or the use of the Service or Application (collectively,

[5] *Accord 5381 Partners LLC v. Shareasale.com, Inc.*, 2013 WL 5328324, at *4 (E.D.N.Y. Sept. 23, 2013); *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 837-38 (S.D.N.Y. 2012); *Hubbert v. Dell Corp.*, 835 N.E.2d 113, 122 (Ill. App. Ct. 2005).

'Disputes') will be settled by binding arbitration [or] in small claims court." DE 29-1 at 9. The Court need look no further than Plaintiff's own description of the alleged "Nature of the Suit" to see that this case arises out of and relates to Uber's services and application, both of which are at the heart of the Rider Terms. Plaintiff challenges the very lawfulness of Uber's service and application: "Uber has a simple but illegal business plan" (Am. Compl. ¶ 1); Uber was "designed … to be a price fixer" (*id.* ¶ 2); "Uber's essential role … [is] to fix prices among competing drivers" (*id.* ¶ 4). In fact, all of Plaintiff's allegations, in one way or another, "aris[e] out of or relat[e]" to Uber's services and application. *See, e.g.*, Am. Compl. ¶¶ 8-9, 21-37, 77, 89. Indeed, Plaintiff claims that his injuries flow from overpaying for car service by virtue of the allegedly "price-fixed fares" "set by the Uber algorithm," and that the Uber algorithm is a core function of the Uber App. *See* Am. Compl. ¶ 2 (alleging that Uber's "chief product is a smartphone app" with two functions: to "match[] riders with drivers," and to "provide[] a standard fare formula, the Uber pricing algorithm"); *see also id.* ¶¶ 8, 54 ("[t]hrough the pricing algorithm …. Plaintiff has paid higher prices").

Further, the Arbitration Agreement is consistent with other clauses that courts in this Circuit have characterized as "broad" for purposes of the FAA. *See, e.g.*, *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys*., 369 F.3d 645, 649, 654 (2d Cir. 2004) ("any controversy, claim or dispute between the Parties arising out of or relating in any way to this Agreement"); *Vera v. Saks & Co*., 335 F.3d 109, 117 (2d Cir. 2003) (same). Courts are especially deferential to "broad" arbitration agreements, holding such clauses are "presumptively applicable to disputes involving matters going beyond the interpret[ation] or enforce[ment of] particular provisions of the contract that contains the arbitration clause." *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 172 (2d Cir. 2004). Put differently, "[i]f the allegations underlying the claims touch matters covered by the parties' contracts, then those claims must be

arbitrated, whatever the legal labels attached to them." *Id.* (citation omitted); *see also In re Currency Conversion Fee Antitrust Litig.*, 265 F. Supp. 2d 385, 406 (S.D.N.Y. 2003).

Accordingly, at a minimum, Plaintiff's claims are covered by the broad Arbitration Agreement because they "touch matters" within the Rider Terms. Courts in this Circuit have found that price-fixing claims are "collateral matters" and "touch matters" covered by the underlying agreement between the parties. *See In re Am. Express Merch. Lit.*, 2006 WL 662341 *4-5 (S.D.N.Y. Mar. 16, 2006) (antitrust claim was arbitrable under broad arbitration clause that "covers 'any claim, dispute or controversy between you and us arising from or relating to this Agreement'"), *rev'd on other grounds by In re Am. Express Merch. Lit.*, 667 F.3d 204, 219-20 (2d Cir. 2012); *see also Currency Conversion I*, 265 F. Supp. at 410 (plaintiffs' price-fixing claims "touch matters" covered by cardholder agreements containing arbitration clause); *JLM Indus.*, 387 F.3d at 176 (the term "collateral matters," however defined, encompassed plaintiff's Sherman Act claims). Broad arbitration clauses cover price-fixing claims even where the plaintiff alleges "a conspiracy which was formed *independently* of the specific contractual relations between the parties." *JLM Indus.*, 387 F.3d at 173, 175.

4. The Arbitration Agreement Is Not Unconscionable

Plaintiff cannot establish any basis for avoiding his agreement to arbitrate disputes under New York's law of unconscionability. On the question of unconscionability, the Court's analysis is limited to whether the Arbitration Agreement—standing alone—is unconscionable. *See Rent-A-Center*, 561 U.S. at 70-71. A contract is unconscionable only when it is "so grossly unreasonable … in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms." *Gillman v. Chase Manhattan Bank, N.A.*, 534 N.E.2d 824, 828 (N.Y. 1988). "[U]nconscionability generally requires *both* procedural and substantive elements." *Brennan v. Bally Total Fitness*, 198 F. Supp. 2d 377, 382 (S.D.N.Y.

2002) (emphasis added). Moreover, the party opposing arbitration bears the burden of proving any defense, such as unconscionability. *Bynum v. Maplebear Inc.*, 2016 WL 552058, at *6 (E.D.N.Y. Feb. 12, 2016). Thus, Plaintiff must show a complete "absence of meaningful choice on … [his] part … together with contract terms which are unreasonably favorable to [Uber]." *Desiderio v. Nat'l Assoc. of Sec. Dealers, Inc.*, 191 F.3d 198, 207 (2d Cir. 1999); *accord Gillman*, 534 N.E.2d at 828. Plaintiff cannot meet this heavy burden.[6]

Far from being "unreasonably favorable" to either party, the Arbitration Agreement is bilateral and contains rider safeguards. For example, it permits riders (but not Uber) to collect attorneys' fees and expenses if they prevail in arbitration. DE 29-1 at 9. The Arbitration Agreement also provides that arbitration proceedings "will be conducted in the county" where the rider resides, thus eliminating the threat of prohibitive travel expenses. *Id.* Further, if a rider's claim for damages does not exceed $75,000, Uber will pay ***all*** of the rider's "filing, administrative and arbitrator fees." *Id.* These provisions comprehensively safeguard the rider's access to the arbitral forum on an individual basis and go well beyond what is required to survive an unconscionability challenge.[7]

To the extent Plaintiff contends that the class waiver in the Arbitration Agreement is unconscionable, this claim is squarely foreclosed by the Supreme Court's decision in *AT&T*

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[6] New York law should apply to any arbitrability questions, including unconscionability. *See supra* Part B.1. Even if the Court applied California law, the standards are the same. *See Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899, 914 (2015); *Pinnacle Museum Towers*, 55 Cal. 4th at 246 (explaining that California's unconscionability doctrine requires proof that an arbitration provision is "so one-sided as to 'shock the conscience'").

[7] Even if the Court determines that any provision is unconscionable, "the appropriate remedy … is to sever the improper provision of the arbitration agreement, rather than void the entire agreement." *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 124-25 (2d Cir. 2010); *accord Roman v. Super. Ct.*, 172 Cal. App. 4th 1462, 1477 (2009) ("[T]he strong legislative and judicial preference is to sever the offending term and enforce the balance of the agreement."); *see also* Cal. Civ. Code § 1670.5 (authorizing severance).

Mobility LLC v. Concepcion, 563 U.S. 340, 344 (2011). Indeed, although this Court held that the class waiver as a *stand-alone provision* could be unconscionable under California's *Discover Bank* rule, both Plaintiff and the Court recognized that such state rules are no longer valid with respect to class waivers in arbitration agreements. *See* DE 44 at 17-19 (citing *Concepcion*, 563 U.S. at 352); DE 43 at 11 (same). In any event, under New York law, a "contractual proscription against class actions … is neither unconscionable nor violative of public policy." *Ranieri v. Bell Atl. Mobile*, 759 N.Y.S.2d 448, 449 (N.Y. App. Div. 2003) (citations omitted).

Plaintiff has characterized the Rider Terms as a contract of adhesion, but this is both incorrect and insufficient to render the Arbitration Agreement invalid.[8] Indeed, *even if* the Arbitration Agreement had been offered "on a 'take it or leave it' basis …. [that] is not sufficient under New York law to render the [arbitration] provision procedurally unconscionable." *Ragone*, 595 F.3d at 122; *accord Peng v. First Republic Bank*, 219 Cal. App. 4th 1462, 1470 (2013) ("[even a]ssuming the Agreement here is adhesive in character, this adhesive aspect of an agreement is not dispositive").[9] This is particularly true where Plaintiff simply "could … have chosen another service" rather than consent to the Arbitration Agreement. *Ranieri*, 759 N.Y.S.2d at 449; *accord Desiderio*, 191 F.3d at 207 (requiring proof of complete

[8] The Court suggested—without formally ruling (see DE 44 at 7)—that the Rider Terms might be a contract of adhesion for purposes of the *Discover Bank* analysis, but it did not hold that the Rider Terms constitute a contract of adhesion for purposes of any state's unconscionability doctrine as applied to arbitration agreements (*id.* at 17-19 (noting that the *Discover Bank* rule is preempted by the FAA)).

[9] *Accord Carr v. Credit One Bank*, 2015 WL 9077314, at *3 (S.D.N.Y. Dec. 16, 2015) ("If acceptance of unwanted vendor terms rendered a contract unconscionable, then *any* contract containing a provision that a counterparty insisted upon would be unconscionable"); *Nayal v. HIP Network Servs. IPA, Inc.*, 620 F. Supp. 2d 566, 571 (S.D.N.Y. 2009).

"absence of meaningful choice").[10] The same is true under California law. *See Wayne v. Staples, Inc.*, 135 Cal. App. 4th 466, 482 (2006) ("there can be no oppression establishing procedural unconscionability, even assuming unequal bargaining power and an adhesion contract, when the customer has meaningful choices"); *Dean Witter Reynolds, Inc. v. Super. Ct.*, 211 Cal. App. 3d 758, 771 (1989) (same); *see also McCabe v. Dell, Inc.*, 2007 WL 1434972, at *3 (C.D. Cal. Apr. 12, 2007) (recognizing a distinction between employment agreements and agreements concerning a "consumer *non-essential* good," such as Uber's service). If Plaintiff did not like Uber's Terms, he was free not to use the Uber App or to choose from *any number* of alternative methods for locating transportation services in New York, a city with an unusually diverse array of transportation options—e.g., similar peer-to-peer ridesharing apps, like Lyft, Gett, or Curb, or traditional providers, like taxi, black car, or other private car services. Indeed, Plaintiff identified such alternatives in his Complaint. Am. Compl. ¶¶ 96, 100.

5. Uber Has the Right to Enforce the Arbitration Agreement as to All Claims in the Case, Including Claims Against Mr. Kalanick

Plaintiff has deliberately attempted to skirt his arbitration obligation by filing suit against Mr. Kalanick individually. *See* Mot. to Intervene at 9-14.[11] The Court should not allow Plaintiff

[10] *Accord U1it4Less, Inc. v. FedEx Corp.*, 2015 WL 3916247, at *4 (S.D.N.Y. June 25, 2015) (no unconscionability where "FedEx was not the only provider of shipping services available to plaintiff"); *Anonymous v. JP Morgan Chase & Co.*, 2005 WL 2861589, at *6 (S.D.N.Y. Oct. 31, 2005) (no unconscionability "where plaintiff had the ability to go to other sources of credit"); *Novak v. Overture Servs., Inc.*, 309 F. Supp. 2d 446, 452 (E.D.N.Y. 2004) (same).

[11] Mr. Kalanick has repeatedly asserted that Plaintiff signed a valid arbitration agreement, that this case belongs in an arbitral forum, and that Mr. Kalanick has the right to compel arbitration of Plaintiff's claims. *See, e.g.*, DE 23 at 21 n.9 (reserving right to compel arbitration); DE 28 at 28 n.10 (same); DE 42 ¶¶ 143, 147 (asserting affirmative defenses based on the Arbitration Agreement). Strong federal policy favoring arbitration gives rise to a presumption *against* waiver of a contractual right to arbitrate. *Louis Dreyfus*, 252 F.3d at 229 ("The rule preferring arbitration … has led to its corollary that any doubts concerning whether there has been a waiver are resolved in favor of arbitration."); *Leadertex v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 25 (2d Cir. 1995) ("Given [the]

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to evade his contractual obligations so easily. *See Marcus v. Frome*, 275 F. Supp. 2d 496, 505 (S.D.N.Y. 2003) ("[W]ere claims against employees or disclosed agents not also subject to arbitration, 'it would be too easy to circumvent the agreements by naming individuals as defendants instead of the entity Agents themselves[.]'") (quoting *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1360 (2d. Cir. 1993)); *Mosca v. Doctors Assocs*., 852 F. Supp. 152, 155 (E.D.N.Y. 1993) ("This court will not permit Plaintiffs to avoid arbitration simply by naming individual agents of the party to the arbitration clause and suing them in their individual capacity.").

In the first place, ***as CEO of Uber***, Mr. Kalanick is covered by the protections of the Arbitration Agreement in Plaintiff's Rider Terms ***with Uber***. *See Mosca*, 852 F. Supp. at 155 ("Courts have consistently held that the acts of employees of a party to an arbitration agreement are arbitrable 'as long as the challenged acts fall within the scope of the customer agreement.'") (quoting *Scher v. Bear Stearns & Co.*, 723 F. Supp. 211, 211 (S.D.N.Y. 1989)). Additionally, Plaintiff should be estopped from avoiding arbitration of his claims against Mr. Kalanick, because his claims against Mr. Kalanick are intimately entwined with the Rider Terms, and he consistently treats Mr. Kalanick and Uber as interchangeable, both in the Complaint and the nearly identical discovery served on Mr. Kalanick and Uber. *See JLM Indus.*, 387 F.3d at 177 (equitable estoppel applies where a "review of the 'relationship among the parties, the contracts

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presumption of arbitrability, waiver of arbitration is not to be lightly inferred."). In any event, Mr. Kalanick certainly has not waived his right to compel arbitration of any claims asserted by putative class members, who are not parties to this litigation unless and until a class is certified. *See, e.g., Smith v. Bayer Corp*., 131 S. Ct. 2368, 2379 (2011) (rejecting as "sure[] erro[r]" the notion that an unnamed class member "is a party to the class-action litigation before the class is certified"). Uber expressly reserves its right to file a motion to compel arbitration of claims asserted by putative class members if and when a class is certified.

they signed … and the issues that have arisen' among them discloses that the issues … are intertwined with the agreement that the estopped party has signed").

a. *The Agreement Between Plaintiff and Uber Covers Mr. Kalanick, an Employee of Uber*

The law is well-settled that a non-signatory employee is covered by his employer's contract. *See Roby*, 996 F.2d at 1360 ("Courts in this and other circuits consistently have held that employees or disclosed agents of an entity that is a party to an arbitration agreement are protected by that agreement."); *see also Mosca*, 852 F. Supp. at 155 (ruling that "all of the named defendants are bound by the arbitration clause" given that "[e]ach Defendant employee is an agent of [the employer] and is bound by the arbitration agreement since the acts ascribed to them occurred during and as a result of their employment and agency").

As described, Plaintiff alleges that Mr. Kalanick is the co-founder, CEO, board member, and manager of operations of Uber, and, in those capacities, is personally responsible for the alleged antitrust violations. Am. Compl. ¶¶ 1, 3, 9, 86. Accordingly, Mr. Kalanick is covered and protected by the Arbitration Agreement, and Uber—Mr. Kalanick's employer—may compel arbitration of Plaintiff's claims against Mr. Kalanick pursuant to the terms of that agreement. *See Arrigo v. Blue Fish Commodities, Inc.*, 704 F. Supp. 2d 299, 303, 305 (S.D.N.Y. 2010) (compelling plaintiff to arbitrate its claims against corporate defendant's CEO and holding that, while CEO defendant "is not a party to the [arbitration agreement], it nevertheless protects him from the instant suit"); *Roby*, 996 F.2d at 1360 (holding that individual chairs of the governing bodies of defendant's insurance syndicates were entitled to rely on arbitration provisions incorporated into their employers' agreements, though non-signatories); *Brener v. Becker Paribas, Inc.*, 628 F. Supp. 442, 451 (S.D.N.Y. 1985) (same); *see also Dryer v. L.A. Rams*,

40 Cal. 3d 406, 418 (1985) ("If … the individual defendants, though not signatories, were acting as agents for [their principal], then they are entitled to the benefit of the arbitration provisions.").

As a practical matter, if Plaintiff's claims against Mr. Kalanick are not sent to arbitration, Uber will potentially be forced to undergo repetitive litigation to defend its business model in light of any judgment entered or relief granted in this case. *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013) (bilateral arbitration agreements are intended to result in "the prospect of speedy resolution"); *see* Mot. to Intervene at 9-12.

b. *Plaintiff Should Be Estopped from Avoiding Arbitration of His Claims Against Mr. Kalanick*

Plaintiff must also arbitrate his claims against Mr. Kalanick under principles of equitable estoppel, which "estop a signatory from avoiding arbitration with a non-signatory when the issues the non-signatory is seeking to arbitrate are intertwined with the contract." *Currency Conversion I*, 265 F. Supp. 2d at 402; *see also JSM Tuscany, LLC v. Super. Ct.*, 193 Cal. App. 4th 1222, 1237 (2011) ("Under th[e] doctrine [of equitable estoppel] . . . a nonsignatory defendant may invoke an arbitration clause to compel a signatory plaintiff to arbitrate its claims when the causes of action against the nonsignatory are intimately founded in and intertwined with the underlying contract obligations.") (internal quotations omitted). In evaluating "[w]hether the claims are intertwined such that a signatory is estopped from avoiding arbitration with a non-signatory, the court must determine: (1) whether the signatory's claims arise under the 'subject matter' of the underlying agreement; and (2) whether there is a 'close relationship' between the signatory and the non-signatory." *Currency Conversion I*, 265 F. Supp. 2d at 402; *accord JSM Tuscany*, 193 Cal. App. 4th at 1238 ("Courts applying equitable estoppel against a signatory have looked to the relationships of persons, wrongs and issues, in particular whether

the claims that the nonsignatory sought to arbitrate were intimately founded in and intertwined with the underlying contract obligations."). Both factors are satisfied here.

First, Plaintiff's claims are intertwined with the Rider Terms. Specifically, Plaintiff alleges that "[r]iders using the Uber App have suffered by paying artificially increased fares resulting from this price-fixing conspiracy." Am. Compl. ¶ 89. The Uber App is a primary subject matter of the Rider Terms. DE 29-1 at 2 ("In order to use the Service (defined below) and the associated Application (defined below) you must agree to the terms and conditions that are set out below."). Because Plaintiff's claims revolve around allegedly increased fares charged by the Uber App, which is "at the heart of the underlying contract containing the arbitration agreement," Plaintiff's claims arise under the "subject matter" of the underlying agreement. *See Currency Conversion I*, 265 F. Supp. 2d at 403 (holding that plaintiffs' price-fixing claims arise under the "subject matter" of the cardholder agreement where plaintiffs alleged that their credit cards were unlawfully charged fixed-currency conversion fees); *accord Turtle Ridge Media Grp. v. Pac. Bell Directory*, 140 Cal. App. 4th 828, 833 (2006) (concluding that plaintiff's claims were intertwined with the contract where "its claims against [defendant] arose from its business dealings with [defendants], which the contract and subcontract governed").

Second, Plaintiff has undeniably alleged a "close relationship" between Uber and Mr. Kalanick. The Amended Complaint alleges collusion and interdependent conduct by Uber and Mr. Kalanick: "Kalanick, Uber, and Uber's driver-partners have entered into an unlawful agreement, combination or conspiracy in restraint of trade." Am. Compl. ¶ 123. Further, Plaintiff consistently treats Mr. Kalanick and Uber as a single unit. In addition to alleging Mr. Kalanick's various roles at Uber, Plaintiff also alleges that Mr. Kalanick is the "primary facilitator" of Uber's "illegal business plan," and "ultimately controlled" the prices charged through the Uber App. *Id.* ¶¶ 1, 3. Plaintiff's allegations do not differentiate between Uber and

Mr. Kalanick, and treat them as interchangeable. He alleges, for instance, that "Kalanick and Uber are authorized by drivers to control the fares charged to riders. Through the pricing algorithm and its surge pricing component, Kalanick and Uber artificially set the fares for its driver-partners to charge to riders." *Id.* ¶ 54. Although Uber and Mr. Kalanick both deny that they are interchangeable or that any basis exists to disregard Uber's corporate form,[12] it is *Plaintiff's* treatment of Uber and Mr. Kalanick that determines whether it may be estopped from avoiding arbitration. Indeed, the expansive document requests Plaintiff served on Mr. Kalanick make no distinction between Mr. Kalanick and Uber, instead seeking information regarding all aspects of Uber's business operations. Based on his own allegations, Plaintiff should be estopped from avoiding arbitration of his claims against Mr. Kalanick. *See Smith/Enron Cogeneration Ltd. P'ship*, 198 F.3d at 97-98 (applying estoppel principles where plaintiff treated non-signatory companies and their signatory assignees as though they were "interchangeable" and "as a single unit"); *see also Metalclad Corp. v. Ventana Envtl. Organizational P'ship*, 109 Cal. App. 4th 1705, 1718 (2003) (estopping plaintiff from avoiding arbitration where plaintiff alleged an "integral relationship between" the signatory and non-signatory defendant).

CONCLUSION

For the foregoing reasons, the Court should dismiss this action and compel arbitration of Plaintiff's claims.[13]

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[12] *See, e.g.*, DE 42 (Answer) ¶ 2 ("Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf.").

[13] If the Court determines that Uber has the right to compel arbitration of Plaintiff's claims but Mr. Kalanick does not, then Uber requests that the Court stay this action pending completion of arbitration proceedings between Uber and Plaintiff. *See* 9 U.S.C. § 3 ("the court … shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement"); *Katz v. Cellco P'ship*, 794 F.3d 341,

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Dated: June 21, 2016

Respectfully submitted,

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Attorneys for Defendant Uber Technologies, Inc.

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345-47 (2d Cir. 2015) ("the FAA mandate[s] a stay of proceedings when … a stay [is] requested").

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2016, I filed and therefore caused the foregoing document to be served via the CM/ECF system in the United States District Court for the Southern District of New York on all parties registered for CM/ECF in the above-captioned matter.

/s/ Reed Brodsky
Reed Brodsky

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SPENCER MEYER, individually and on behalf of those similarly situated, Plaintiffs, -against- TRAVIS KALANICK, Defendant.	Case No. 1:15-cv-9796 (JSR) **DECLARATION OF VINCENT MI IN SUPPORT OF PROPOSED INTERVENOR UBER TECHNOLOGIES, INC.'S MOTION TO COMPEL ARBITRATION**

I, Vincent Mi, declare under penalty of perjury, as follows:

1. I am over the age of 18 and I submit this declaration in support of Proposed Intervenor Uber Technologies, Inc.'s ("Uber") Motion to Compel Arbitration. I have personal knowledge of each fact stated in this declaration and, if called as a witness, I could and would competently and truthfully testify thereto.

2. I am a Senior Software Engineer at Uber. I am one of the developers on Uber's Android team that designs and implements changes to the Android software application (the "Uber App").

3. In the normal course of its business, Uber maintains records regarding when and how its riders register. As a Senior Software Engineer, I have access to these registration records, and I am familiar with these records and the manner in which they are updated and maintained. At the request of counsel, I reviewed the registration records and was able to identify the dates and methods by which Plaintiff Spencer Meyer registered for Uber: Mr. Meyer registered on October 18, 2014 via the Uber App using a Samsung Galaxy S5 phone with an Android operating system.

4. To date, Mr. Meyer has completed a total of ten trips via the Uber App. Three of these trips took place in New York City and one took place in Connecticut. Three took place in Washington, D.C. and three took place in Paris.

5. I am familiar with the account registration process for Uber users who register using an Android-operated smartphone. Screenshots of the account registration process are attached as **Exhibit A**.

a. After successfully downloading the Uber App and clicking the "Register" button, the user is prompted on the first screen, titled "Register," to enter his name, email address, mobile phone number, and a password, or to sign up with the user's Google+ or Facebook account. According to Uber's records, Mr. Meyer did not sign up using Google+ or Facebook. For users who do not sign up using Google+ or Facebook, after filling in the above fields, the user can then advance to the next screen by clicking "Next."

b. On the second screen, the user is prompted to enter his credit card information, or to opt to make payments using PayPal or Google Wallet. According to Uber's records, Mr. Meyer did not elect to make payments using PayPal or Google Wallet, and instead entered his credit card information in the text box provided. The second screen includes the following notice: "By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY." The phrase "TERMS OF SERVICE & PRIVACY POLICY" is in all-caps, underlined, and in bright blue text, all of which set the text apart from other text on the screen and indicate a hyperlink. As demonstrated by the attached screenshots, the hyperlink is immediately visible when the user arrives on this second screen. When the hyperlink is clicked, the user is taken to a screen that

contains a button that accesses the "Terms and Conditions" and "Privacy Policy" then in effect.

c. The user must then click the "Register" button, which appears directly above the link to the terms on the final screen, to complete the registration process. Mr. Meyer could not have completed the registration process and requested a ride without completing these steps.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

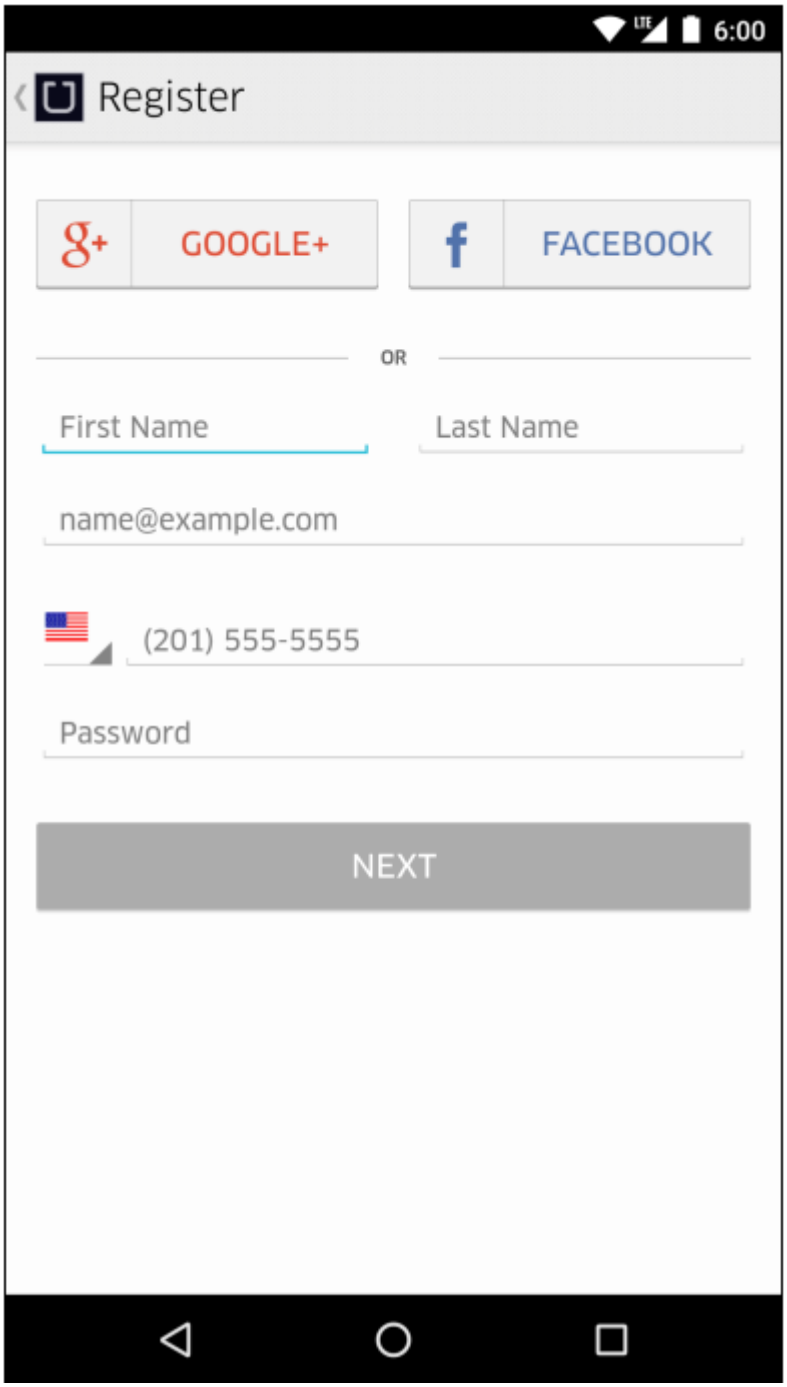
Executed on May 24, 2016 at San Francisco, California.

By: 

Vincent Mi

102122617.4

Exhibit A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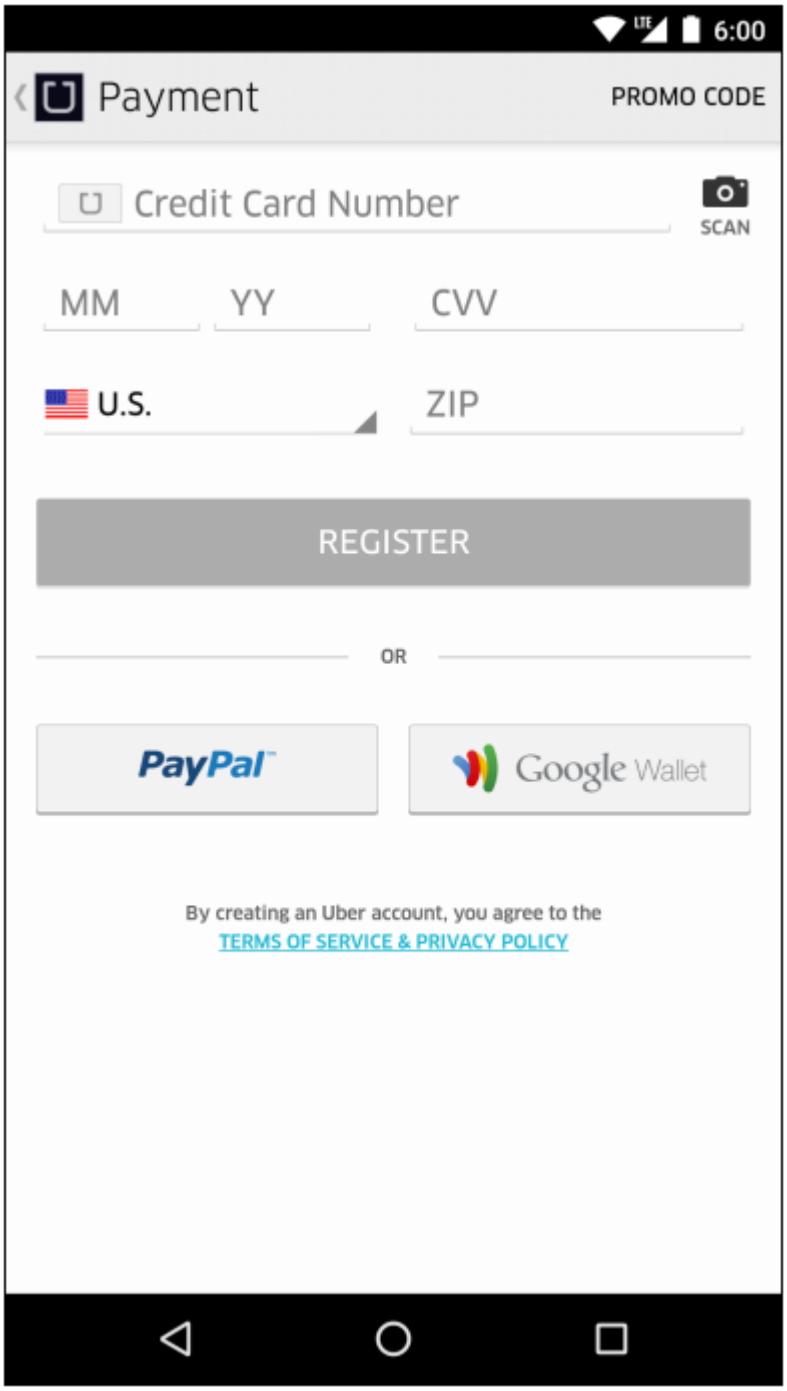
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CVV
U.S.
ZIP
REGISTER
OR
PayPal
Google Wallet
By creating an Uber account, you agree to the
TERMS OF SERVICE & PRIVACY POLICY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SPENCER MEYER, individually and on behalf of those similarly situated,

Plaintiffs,

-against-

TRAVIS KALANICK and UBER TECHNOLOGIES, INC.,

Defendants.

ECF Case

1:15 Civ. 9796 (JSR)

DECLARATION OF SPENCER MEYER

I, SPENCER MEYER, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury as follows:

1. I am the plaintiff in the above-captioned case, and I make this declaration in support of Plaintiff's Memorandum of Law in Opposition to Defendants' Motions to Compel Arbitration.

2. I understand that Uber has indicated that I registered as an Uber user on or about October 18, 2014. That date is consistent with my recollection of when I registered for the Uber App, and I believe that I was in the State of Vermont at the time.

3. In completing the registration process on my smartphone, I do not recall seeing the terms of service hyperlink on the second screen of the registration process as depicted in the May 24, 2016 Declaration of Vincent Mi and the exhibit thereto. Having seen the Mi Declaration and the exhibit, I recall now that I entered my contact information and credit card information, and then clicked the REGISTER button. I do not believe that I ever clicked on the hyperlink to the terms of service & privacy policy. Nor do I recall noticing that hyperlink.

4. In completing the registration process, I did not read any terms and conditions, and I never indicated that I accepted them.

5. I was not aware of any arbitration provision in the terms and conditions, and I never agreed to one.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: June 2016

Spencer Meyer

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SPENCER MEYER, Plaintiff, v. TRAVIS KALANICK and UBER TECHNOLOGIES, INC. Defendants.	Case No. 1:15-cv-9796 (JSR)

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT TRAVIS KALANICK'S MOTION TO COMPEL ARBITRATION

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PRELIMINARY STATEMENT

Plaintiff began this lawsuit by suing only Mr. Kalanick, hoping to avoid his agreement to arbitrate disputes with Uber. *See* DE 90 at 1. He cannot. Because Plaintiff is bound by the terms to which he agreed, because his claim that Mr. Kalanick orchestrated a price-fixing conspiracy is effectively a suit against Uber, and because the law recognizes a weighty presumption in favor of arbitration that Plaintiff is unable to circumvent on the facts of this case, this Court should grant Mr. Kalanick's motion to compel arbitration.

I. Mr. Kalanick May Enforce The Arbitration Agreement

A. Arbitrability Issues Must Be Decided By the Arbitrator

Plaintiff acknowledges that his use of the Uber App was explicitly conditioned on his agreement to Uber's Rider Terms, which contained an agreement to arbitrate all disputes concerning the Uber App (the "Arbitration Agreement").[1] Am. Compl. ¶ 29; DE 29-1 at 2. Plaintiff does not dispute the Arbitration Agreement "clear[ly] and unmistakab[ly]" delegates issues of arbitrability to the arbitrator through its incorporation of the AAA Commercial Arbitration Rules. *Contec Corp. v. Remote Sol.*, 398 F.3d 205, 208, 211 (2d Cir. 2005); *see* DE 102 at 24-25. There is thus no credible dispute that the Arbitration Agreement delegated questions regarding "defenses to arbitrability [such] as waiver [and] estoppel" to the arbitrator. *Mulvaney Mech., Inc. v. Sheet Metal Workers Int'l Ass'n, Local 38*, 351 F.3d 43, 45 (2d Cir. 2003); *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 394 (2d Cir. 2011) ("defenses to arbitrability such as waiver, estoppel, or delay are questions properly decided by arbitrators").

Courts "determine whether the parties have a sufficient relationship to each other and to the rights created under the agreement" before compelling arbitration with a non-signatory.

[1] Mr. Kalanick adopts Uber's arguments in its Opening and Reply Briefs to its Motion to Compel Arbitration that Plaintiff's agreement to arbitrate disputes with Uber is legally enforceable.

Contec, 398 F.3d at 209. This "relational sufficiency" test, however, is a minimal inquiry intended to prevent abuses, lest "*any* non-signatory" force a signatory into arbitration, regardless of the non-signatory's relationship to the signatories or the contract. *Id.* (emphasis added).[2]

That low hurdle is easily met here. Mr. Kalanick is being sued in his capacity as the CEO of Uber. As this Court observed, "[a]ny antitrust violation that defendant Kalanick is claimed to have committed could only have resulted from his orchestration of, and participation in, an alleged conspiracy facilitated by . . . Uber's contracts with drivers." DE 90 at 5. Moreover, the Complaint makes clear that Plaintiff's alleged injuries flow entirely from the Uber App. Am. Compl. ¶¶ 2, 8-9, 21-37, 77, 89. Plaintiff's claims against Mr. Kalanick plainly have "a sufficient relationship" to Plaintiff's Arbitration Agreement with Uber that passes the relational sufficiency test. *See Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 669 (2d Cir. 1997) ("Since appellants' claims against [the non-signatory company executive] arise out of his relationship with [the signatory company], they are also subject to mandatory arbitration.").

B. As an Uber Employee, Mr. Kalanick Is Protected by the Arbitration Agreement

The Second Circuit has squarely held that "employees … of an entity that is a party to an arbitration agreement are protected by that agreement" and thereby "entitled to rely on the contract clauses incorporated into their employers' agreements." *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1360 (2d Cir. 1993); *see also, e.g., Amisil Holdings Ltd. v. Clarium Capital Mgmt.*, 622 F. Supp. 2d 825, 833 (N.D. Cal. 2007) (because an entity "can only act through its

[2] Plaintiff is incorrect that *Contec*'s "relational sufficiency" test requires a full equitable estoppel analysis. Collapsing the two inquiries would be self-defeating where—as here, and in *Contec*—the question whether equitable estoppel permits the non-signatory to enforce the arbitration agreement is itself the question being delegated to the arbitrator. *See Contec*, 298 F.3d at 209 (holding that "neither we nor the district court must reach the question whether [the signatory] is estopped from avoiding arbitration with [the non-signatory] because" there is a sufficient relationship between them such that the arbitrator must decide the equitable estoppel dispute).

employees, an arbitration agreement would be of little value if it did not extend" to them). By definition, this includes employees and officers who "are neither signatories to nor third-party beneficiaries of any agreement" containing an arbitration clause. *Roby*, 996 F.2d at 1360. That the employee is not named in the contract does not suggest the contracting parties intended to preclude enforcement by a non-signatory employee. *Id*.

Plaintiff attempts to evade the plain application of *Roby* and its progeny by erroneously asserting that Mr. Kalanick may only compel arbitration of claims that directly "arise out of the User Agreement." DE 102 at 32. No such limitation can be found in any case binding on this Court.[3] Rather, the only limitation set forth by the Second Circuit in *Roby* is that the non-signatory employee's alleged liability must "aris[e] out of *the same misconduct* charged against"

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[3] New York law applies to questions relating to the enforceability of Plaintiff's Arbitration Agreement not governed by the Federal Arbitration Act. The record shows that a plurality of Plaintiff's uses of the Uber App were in New York, and he never used the App in California. Declaration of Peter M. Skinner ("Skinner Decl."), Ex. A. Plaintiff's Complaint further asserts claims arising under New York law and alleges that all "claims in this case arise out of activities that relate to New York." Am. Compl. ¶ 16. Indeed, the only connection California has to this case is that it is the location of Uber's headquarters. *See Cap Gemini Ernst & Young, U.S., L.L.C. v. Nackel*, 346 F.3d 360, 366 (2d Cir. 2003) (mere location of entity's headquarters is insufficient to control choice-of-law analysis). For these reasons, and the reasons explained in Mr. Kalanick's opening brief, New York law governs any state law contract issues.

The law of the case does not require a different result. As Plaintiff notes, courts may disregard earlier rulings on an issue where the "availability of new evidence" requires a different result. *See* DE 102 at 26-27. The key facts here—that Plaintiff used the Uber App primarily in New York and never used it in California—were not revealed (and, indeed, on a pleading challenge could not have been introduced) until *after* the Court held California law governed. *Staehr v. Hartford Fin. Servs. Grp.*, 547 F.3d 406, 425 (2d Cir. 2008). Nor does the fact that *other* versions of the Rider Terms that Plaintiff concededly did not execute select California law bear on the parties' intent with respect to the Rider Terms that are applicable here.

Regardless, under California law the analysis is no different. An employee of a signatory to a contract may enforce the arbitration agreement where, as here, the dispute falls within the bounds of the arbitration clause. *E.g.*, *Berman v. Dean Witter & Co., Inc.*, 44 Cal. App. 3d 999, 1004 (1975). That is all the more true where, as here, the non-signatory is alleged to be an agent of the signatory. *Westra v. Marcus & Millichap Real Estate Inv. Brokerage Co., Inc.*, 129 Cal. App. 4th 759, 767 (2005) (mere allegation non-signatory defendant was an agent of signatory was sufficient to permit non-signatories to compel arbitration).

the entity that is party to the arbitration agreement. *Id.* (emphasis added); *see Amisil*, 622 F. Supp. 2d at 833 (same). As this Court recognized, any "fair[] reading" of the Complaint includes allegations that Mr. Kalanick participated in "*Uber's* scheme for setting prices." DE 90 at 5. Plaintiff alleges that Mr. Kalanick and Uber have engaged in the same misconduct—namely, designing and deploying the Uber App to unlawfully fix prices. Am. Compl. ¶ 1. Mr. Kalanick therefore has the right to compel arbitration in his capacity as an officer and employee of Uber.[4]

C. Plaintiff Should Be Estopped from Evading His Agreement to Arbitrate

Because his claims are "intertwined" with the Rider Terms, equitable estoppel provides a second, separate basis for compelling Plaintiff to arbitrate. While Plaintiff asserts that equitable estoppel does not apply because he does not specifically seek to "enforce" the Rider Terms, this is not the legal test. Instead, a plaintiff is equitably estopped from avoiding an agreement to arbitrate where "the signatory's claims arise under the 'subject matter' of the underlying agreement." *Currency Conversion Fee Antitrust Litig.*, 265 F. Supp. 2d 385, 402 (S.D.N.Y. 2003). It is undisputed that the "subject matter" of the Rider Terms is the Uber App. DE 29-1 at 2. Moreover, the Rider Terms—in a section entitled "Payment Terms"—contain specific provisions governing prices. *Id.* at 4 (granting Uber "the right to determine final prevailing pricing"). Plaintiff's claims that Uber's prices are supracompetitive relate to "the subject matter" of the Rider Terms. *See United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960) (motion to compel arbitration "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the

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[4] Plaintiff misleadingly relies on language from a different part of the *Roby* opinion, addressing the distinct issue of whether the claims fell within "the scope of the [arbitration] clauses," to suggest that a claim must arise out of a contract for employees to enforce it. *Id.* at 1361; *see* DE 102 at 33. That a claim must "relate to" a contract with an arbitration clause to be within the scope of the clause says nothing about whether a non-signatory may enforce the agreement.

asserted dispute").[5]

D. The Text of the Rider Terms Does Not Preclude Mr. Kalanick From Enforcing the Arbitration Agreement

Finally, Plaintiff's contention that the Arbitration Agreement does not extend to Mr. Kalanick because he is not mentioned in the text of the Rider Terms (DE 102 at 29-31) is foreclosed by well-established law. By definition, the doctrines of non-party enforcement and equitable estoppel apply only where a contract's plain terms do not expressly permit a non-signatory to enforce a signatory's right to arbitrate. *E.g.*, *Marcus v. Frome*, 275 F. Supp. 2d 496, 504 (S.D.N.Y. 2003). Courts uniformly reject Plaintiff's position that an arbitration clause's silence as to a non-signatory precludes the application of equitable doctrines permitting non-party enforcement. In *Roby*, for example, notwithstanding the arbitration clause's limitation to "each party," the Second Circuit stated: "[W]e believe that the parties fully intended to protect the [employees of the signatory]" because "otherwise, it would be too easy to circumvent the agreements by naming individuals as defendants instead of the entity" itself. *Roby*, 996 F.2d at 1359-60; *see also, e.g.*, *Marcus*, 275 F. Supp. 2d at 505 (compelling arbitration where arbitration clause expressly limited to the "parties" to the contract); *JSM Tuscany, LLC v. Superior Court*, 193 Cal. App. 4th 1222, 1233 (2011) (same).[6] This, of course, is precisely what Plaintiff seeks to do. Such maneuvering is expressly foreclosed by the Second Circuit's opinion.

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[5] Plaintiff's strategic attempt to avoid arbitration by not naming Uber as a party to this case also indicates that the claims here "relate to" the Arbitration Agreement. *In re A2P SMS Antitrust Litig.*, 972 F. Supp. 2d 465, 478 (S.D.N.Y. 2013).

[6] Plaintiff is also mistaken that other provisions of the Rider Terms indicate the parties' intent to displace traditional equitable doctrines permitting non-signatories to enforce arbitration clauses. It is well settled that an arbitration clause must be evaluated as a stand-alone agreement even when situated within a broader contract. *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (per curiam); *Amisil*, 622 F. Supp. 2d at 837 (holding that employees are entitled to compel arbitration even though the contract's "indemnification clause does not protect [them]" because "the scope of an indemnification clause is irrelevant to the question of arbitrability").

II. Mr. Kalanick Did Not Waive His Right to Compel Arbitration in this Lawsuit

Mr. Kalanick did not waive his right to compel arbitration in this lawsuit. The Supreme Court has repeatedly ruled that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Thus, an allegation of waiver that is based on purportedly ambiguous language contained in a footnote of a motion to dismiss brief must be construed in favor of arbitration, particularly where such language was accompanied an express reservation of rights. To hold otherwise would flout the Supreme Court's "strong presumption favoring arbitrability." *Nolde Bros., Inc. v. Local No. 358*, 430 U.S. 243, 254 (1977).

A. The Arbitrator Should Decide the Question of Waiver

As an initial matter, the question of whether Mr. Kalanick waived his right to compel arbitration must be decided by the arbitrator. As the Supreme Court held in *Howsam v. Dean Witter Reynolds, Inc.*, procedural questions, including waiver, are "presumptively *not* for the judge, but for an arbitrator to decide." 537 U.S. 79, 84 (2002) (emphasis in original); *see also BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1207 (2014) ("courts presume that the parties intend arbitrators, not courts, to decide disputes about . . . arbitrability" including waiver); *In re Am. Exp. Fin. Advisors Sec. Litig.*, 672 F.3d 113, 131, n.14 (2d Cir. 2011) (same). Plaintiff's arguments to the contrary rely on Second Circuit precedents that predate—and therefore are invalidated by—the Supreme Court's decisions in *Howsam* and *BG Group*.[7] *See* DE 100 at 15.

[7] In *La. Stadium & Exposition Dist. v. Merrill Lynch Pierce Fenner & Smith*, the only Second Circuit case cited by Plaintiff that post-dates *Howsam*, the court was not faced with the argument that an arbitrator and not the court should decide waiver. 626 F.3d 156 (2d Cir. 2010).

B. Mr. Kalanick Did Not Expressly Waive His Right to Compel Arbitration

In any event, even if the issue were properly before this Court and not the arbitrator, no waiver has occurred here. The footnote upon which Plaintiff relies did not contain an express waiver. DE 81 at 12-13. An express waiver must be just that—express. Rather than expressly state that he was waiving his right to arbitrate, Mr. Kalanick was simply setting out his intentions "here"—that is, at the time of the motion to dismiss. Mr. Kalanick asked this Court to reconsider its ruling that he could not enforce the class waiver outside of the arbitration context, stating only (in present tense) that he "does not need to compel arbitration" to "enforce the class waiver"—hardly stating that he would not move to compel arbitration. DE 41 at 5. Aware that the Court could deny that motion and that he would then need to invoke arbitration to enforce the class waiver, Mr. Kalanick—in a document filed that same day—asserted arbitration as a defense in his Answer. DE 42 ¶¶ 143, 147. Such assertions serve as explicit indications of a defendant's intent to arbitrate. *PPG v. Webster Auto Parts, Inc.*, 128 F.3d 103 (2d Cir. 1997).

Plaintiff has cited no case where language intended as a reservation of a party's right to seek arbitration is construed as an explicit *waiver* of that right. Importantly, in *Gilmore v. Shearson/American Exp. Inc.*, the only Second Circuit case cited by Plaintiff to support its express waiver theory, defendant "conceded" the issue of express waiver and it was not decided by the court. 811 F.2d 108, 112-13 (2d Cir. 1987). The remaining cases cited by Plaintiff involve instances where, unlike here, a party explicitly represented to the court that it did not intend or want to arbitrate the instant dispute. DE 102 at 16.[8]

In a last-ditch attempt to find an express waiver, Plaintiff implausibly argues that Mr.

[8] *See Midatlantic Int'l v. AGC Flat Glass N. Am.*, 2014 WL 504701, at *5 (E.D. Va. 2014) ("early in the proceedings the parties, through counsel, agreed that neither side wanted to utilize arbitration"); *Apollo Theater v. Western Int'l*, 2004 WL 1375557, at *1 (S.D.N.Y. June 21, 2004) (defendant informed court it "would gladly keep the parties' disputes before this Court").

Kalanick's purported silence in the face of *Plaintiff's* assertions that he waived arbitration is an express waiver. DE 102 at 17. This gets the express waiver analysis backward—express waiver cannot be inferentially gleaned through a purportedly implied omission. The case law makes clear that a party may litigate a motion to dismiss without expressly (or impliedly) waiving its right to arbitrate. DE 81 at 14-15. Moreover, Plaintiff is wrong that Mr. Kalanick was silent on the issue of arbitration: Mr. Kalanick invoked his right to arbitration as an affirmative defense in his Answer and in his Motion for Reconsideration. DE 41 at 5; DE 42 ¶¶ 143, 147.

In any event, given the strong presumption against waiver of arbitration, "any doubt" must be resolved in favor of arbitration. *Moses H. Cone*, 460 U.S. at 24-25. Plaintiff cannot meet his "heavy burden" by arguing that Mr. Kalanick silently waived his right to arbitrate in the footnote of his motion to dismiss brief, especially where he asserted arbitration as an affirmative defense in his Answer. DE 42 ¶ 143 ("Plaintiff is precluded from proceeding in this action under the terms of his binding User Agreement. Plaintiff expressly agreed to resolve 'any dispute, claim, or controversy arising out of or relating to' the Agreement via binding arbitration. . . ."); *id.* ¶ 147 ("Plaintiff's claims are subject to arbitration by virtue of Plaintiff's agreement to an arbitration clause."). Indeed, the assertion of arbitration as an affirmative defense is a "clear indication" of a defendant's "intention to invoke its arbitration rights." *PPG*, 128 F.3d at 109. Mr. Kalanick did not waive his right to compel arbitration in this lawsuit. The Supreme Court mandates construing ambiguity in favor of arbitration, including the language in the contract itself; this mandate must also extend to an allegedly ambiguous footnote in a motion to dismiss brief. *Moses H. Cone*, 460 U.S. at 24-25.

C. Mr. Kalanick Did Not Impliedly Waive His Right to Arbitrate

In order to find an implied waiver of the right to arbitrate, the party resisting arbitration must have been prejudiced. Plaintiff's argument that the service of discovery constitutes

prejudice misstates the law. A party is only prejudiced by discovery if it has produced meaningful information. Where extensive discovery is served but "no significant information" is discovered, no prejudice attaches. *Leadertex, Inc. v. Morgantown Dyeing & Finishing Corp.*, 67 F.3d 20, 26 (2d Cir. 1995); *PPG*, 128 F.3d at 109. Here, Plaintiff has produced a grand total of five pages of documents, all of which are redacted credit card receipts showing payments to Uber. Skinner Decl., Exs. B and C. Such meager production of information cannot possibly create the prejudice necessary for a finding of implied waiver.

Plaintiff's argument that motions practice constitutes prejudice is likewise wholly without support.[9] Litigating a pleadings challenge does not constitute waiver. *E.g., Mahmoud Shaban & Sons Co. v. Mediterranean Shipping Co., S.A.*, 2013 WL 5303761, at *1-2 (S.D.N.Y. Sept. 20, 2013) ("it is well established that [filing] a motion to dismiss before moving to compel arbitration does not in itself waive [the] right to enforce the arbitration clause after the motion to dismiss is resolved."); *see also id.* (no waiver despite seven depositions). In response, Plaintiff relies on cases involving circumstances far more prejudicial than mere motions practice. For example, in both *PPG* and *Leadertex*, which Plaintiff relies on heavily (DE 100 at 19-23), the party seeking arbitration had also previously obtained replevin, or prejudgment attachment, thereby seriously damaging the businesses of the parties opposing arbitration. *PPG*, 128 F.3d at 105; *Leadertex*, 67 F.3d at 27. Plaintiff cannot credibly contend he has faced anything approaching such prejudice here.

Plaintiff also misleadingly relies upon cases in which the *plaintiff* moved to compel arbitration. In *SATCOM Int'l Grp. v. Orbcomm Int'l Partners*, plaintiff sought to compel

[9] The argument that Plaintiff has been prejudiced from attorneys' fees or expert costs his counsel have incurred is incorrect as a matter of law. Mere "pretrial expense and delay . . . without more do not constitute prejudice sufficient to support a finding of waiver." *Leadertex*, 67 F.3d at 26; *Doctor's Assocs. v. Distajo*, 107 F.3d 126, 134 (2d Cir. 1997).

arbitration after losing a preliminary injunction hearing. 49 F. Supp. 2d 331, 335, 341 (S.D.N.Y. 1999). The fact that the same party that initiated the lawsuit sought arbitration, and only after losing a "mini-trial" on the merits, motivated the court's finding of implied waiver: "Rarely does a plaintiff begin a litigation on the merits and then alter course and attempt to compel arbitration." *Id.* at 340, 342. Similarly, in *La. Stadium and Exposition Dist*, the court found implied waiver largely because the "plaintiff, rather than defendant, mov[ed] for arbitration." 626 F.3d at 161. When a plaintiff moves to compel arbitration, the Second Circuit is more concerned with forum shopping and thus more likely to find an implied waiver. *Id.*

Plaintiff's last argument—his self-serving declaration that he has won a "key victory" regarding class waiver—is built on a faulty premise. Plaintiff did not secure the right to proceed as a class nor did he even win the right to proceed as a class in the context of arbitration; the Court explicitly limited its holding to whether Plaintiff had made a "waiver of the right to pursue a class action *outside the arbitration context*."[10] DE 44 at 9 (emphasis added). Whether Plaintiff's sprawling nationwide class of every Uber rider since the inception of the company can be certified remains a question to be resolved by the Court. *Id.* Plaintiff's complaint survived a motion to dismiss and motion to reconsider that dismissal, no more.

CONCLUSION

For these reasons, this Court should grant Mr. Kalanick's motion to compel arbitration.

[10] It is for this very reason that Plaintiff's argument that Mr. Kalanick's purported waiver also waives his ability to compel arbitration against any class, if one is later certified (DE 102 at 16 n.6), misses the point. Mr. Kalanick has not waived his right to compel arbitration as to putative class members, (DE 81 at 15 n.4) and expressly reserves his right to file a motion to compel arbitration of claims asserted by putative class members if a class is ever certified.

Dated: July 7, 2016

Respectfully submitted,

/s/ Karen L. Dunn

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Attorneys for Defendant Travis Kalanick

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2016, I filed and therefore caused the foregoing document to be served via the CM/ECF system in the United States District Court for the Southern District of New York on all parties registered for CM/ECF in the above-captioned matter.

/s/ Ryan Y. Park
Ryan Y. Park

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SPENCER MEYER,

Plaintiff,

v.

TRAVIS KALANICK and UBER TECHNOLOGIES, INC.

Defendants.

Case No. 1:15-cv-9796 (JSR)

DECLARATION OF PETER M. SKINNER

I, Peter M. Skinner, declare under penalty of perjury, as follows:

1. I am a member of the bar of this Court and of the firm Boies, Schiller & Flexner LLP, counsel of record for Defendant Travis Kalanick in the above-captioned case.

2. I make this declaration in support of Mr. Kalanick's Motion to Compel Arbitration.

3. Attached hereto as **Exhibit A** is a true and correct copy of Plaintiff's Objections and Responses to Defendant's First Set of Interrogatories served on May 31, 2016.

4. Attached hereto as **Exhibit B** is a true and correct copy of Plaintiff's Objections and Responses to Defendant's Request for Documents served on May 31, 2016.

5. Attached hereto as **Exhibit C** is a true and correct copy of documents bearing the Bates stamps MEYER000001-05 produced by Plaintiff on May 31, 2016.

Executed on: July 7, 2016

/s/ Peter M. Skinner
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EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SPENCER MEYER, individually and on behalf of those similarly situated,

Plaintiffs,

vs. 1:15 Civ. 9796 (JSR)

TRAVIS KALANICK,

Defendant.

PLAINTIFF'S ANSWERS TO DEFENDANT'S FIRST SET OF INTERROGATORIES

Plaintiff Spencer Meyer ("Plaintiff"), by his attorneys, Andrew Schmidt Law PLLC, Harter Secrest & Emery LLP, Constantine Cannon LLP, and McKool Smith, P.C., and pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure and Local Rule 33.3(a) of the Local Rules of the United States District Court for the Southern District of New York, responds and objects to the First Set of Interrogatories of Defendant Travis Kalanick ("Defendant"), dated April 29, 2016, as follows:

Preliminary Statement

1. Plaintiff's investigation of the facts and circumstances relating to this action is ongoing. These answers and objections are made without prejudice to, and are not a waiver of, Plaintiff's right to rely on other facts or documents at trial.

2. By making the accompanying answers and objections to Defendant's Interrogatories, Plaintiff does not waive, and hereby expressly reserves, his right to assert any and all objections as to the admissibility of such responses into evidence in this action, or in any other proceedings,

on any applicable grounds, including but not limited to competency, relevancy, materiality, and privilege. Plaintiff's answers should not be construed as implying that he concedes the relevance or materiality of any request or response to the subject matter of this action.

3. Plaintiff expressly reserves the right to supplement, clarify, revise, or correct any of his answers and objections and to assert additional objections or privileges, in one or more subsequent supplemental answers.

4. Plaintiff specifically notes that any and all documents or information disclosed by Plaintiff are subject to the Stipulated Protective Order that will be entered in this action.

General Objections

1. Plaintiff objects to each instruction, definition, and Interrogatory to the extent they purport to impose any requirement or discovery obligation greater than or different from those under the Federal Rules of Civil Procedure, the applicable Rules and Orders of the Court, or any other rule, law, or order applicable to this action.

2. Plaintiff objects to each Interrogatory that is vague, ambiguous, overly broad, unduly burdensome, unrelated to the subject matter of this litigation, or not reasonably calculated to lead to the discovery of admissible evidence. No response shall be deemed to constitute an agreement or concession that its subject matter is relevant to this action.

3. Plaintiff objects to each definition, instruction, and Interrogatory to the extent that it seeks information protected from disclosure by the attorney-client privilege, deliberative process privilege, attorney work-product doctrine, or any other applicable privilege, immunity, or doctrine under federal law, state law, or other regulation, judicial precedent, or principle. Plaintiff asserts all applicable privileges, protections, and immunities. Any disclosure of

protected information by Plaintiff will be inadvertent and shall not constitute a waiver of any privilege.

4. Plaintiff objects to Instruction No. 4, in particular, to the extent that it seeks information protected from disclosure by the applicable privileges, protections, and immunities detailed in paragraph 3 above.

5. Plaintiff objects to each definition, instruction, and Interrogatory as overbroad and unduly burdensome to the extent that it seeks information that is already in Defendant's possession, custody, or control, that is readily or more accessible to Defendant from his own files or documents, or that is a matter of public record, already known to Defendants, or obtainable from some other source that is more convenient, less burdensome, or less expensive than obtaining the documents or information from Plaintiff.

6. Plaintiff objects to the Interrogatories to the extent that they seek information that is the subject of expert testimony.

7. Plaintiff objects to the Interrogatories, including but not limited to Instruction No. 8, to the extent that they are overbroad and unduly burdensome by failing to limit the Interrogatories to a reasonable time period. Without in any way limiting or qualifying this objection, Plaintiff further objects to the Interrogatories to the extent that they seek documents or information created after the commencement of this litigation.

8. Plaintiff incorporates by reference every general objection set forth above into each specific answer below.

ANSWERS TO INTERROGATORIES

Interrogatory No. 1:

Please identify all persons with whom you have had communications concerning prices or pricing for rides requested through the Uber App, including but not limited to Uber driver-partners and Uber riders.

Response to Interrogatory No. 1:

Plaintiff objects to this Interrogatory to the extent that it seeks information protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Subject to this objection, and construing this Interrogatory as seeking the identification of persons other than legal counsel with whom Plaintiff has communicated, Plaintiff states the following: He has had conversations with some Uber driver-partners, names and contact information unknown, but does not recall discussing Uber pricing specifically. Plaintiff has had conversations with others, whose identities he cannot recall, about his use of Uber but does not recall discussing Uber pricing specifically. Plaintiff discussed the Uber pricing system with his wife after being charged surge pricing when leaving an event.

Interrogatory No. 2:

Please describe your method for computing the monetary damages alleged in the Complaint, including but not limited to the computational method supporting the allegation in paragraph 109 of the Complaint that "Uber ride-share service fares would have been substantially lower" in the absence of the pricing algorithm. In doing so, please identify the specific parts of the damages calculation, including the source for each number or approximation.

Response to Interrogatory No. 2:

To the extent this Interrogatory seeks information that would include expert material, Plaintiff objects to it as premature. Plaintiff also objects to this Interrogatory as contravening Local Rule 33.3(a) to the extent that it seeks more than "the computation of each category of damage alleged." Subject to these objections, Plaintiff responds that he has not personally performed a computation of damages.

Interrogatory No. 3:

Please verify that the document, bates labeled TKA000001-TKA000009, and attached hereto as Exhibit 1 is a true, correct, and genuine copy of the User Agreement to which Meyer agreed when he signed up for the Uber App.

Response to Interrogatory No. 3:

Plaintiff is unable to respond to this Interrogatory because he has no record of which version of the Uber user agreement may have been current at the time he clicked "OK" upon first installing the Uber app on his smartphone.

Interrogatory No. 4:

Please identify and describe all documents concerning your use of the Uber App, including, but not limited to, where you used the Uber App; the state or states in which you booked your trip(s) and the state or states in which you traveled during your ride(s); when you used the Uber App, including the date and time of each use; what fare you paid for each trip requested through the Uber App; and for each trip you requested using the Uber App, whether the trip was subject to surge pricing, and if so what surge multiplier was used to calculate the fare.

Response to Interrogatory No. 4:

Plaintiff objects to this Interrogatory to the extent that it seeks information protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Subject to this objection, the plaintiff states that his only record of his use of the Uber app consists of digital documents that appear in the "History" section of the Uber app, which shows the following information:

1. 7:04 p.m. on 4.4.15: A ride within Washington, DC. $17.82
2. 8:57 p.m. on 4.4.15: A ride within Washington, DC. $14.98 with surge pricing
3. 2:27 p.m. on 9.26.15: A ride in New York City. $18.38
4. 3:28 p.m. on 9.26.15: A ride in New York City. $23.63
5. 10:45 p.m. on 9.26.15: A ride in New York City. $40.09 with surge pricing
6. 3:04 p.m. on 10.4.15: A ride in Arlington, VA. $5.03
7. 6:15 p.m. on 10.22.15: A ride in New Haven, CT. $6.38
8. 8:33 p.m. on 12.5.15: A ride within Paris, France. 9.46 euros
9. 6:26 p.m. on 12.6.15: A ride within Paris, France. 12.68 euros
10. 9:56 p.m. on 12.6.15: A ride within Paris, France. 16.57 euros

Interrogatory No. 5:

Please identify all persons with whom you have had communications concerning the two "studies" of "pricing using personal transportation apps" described in your Initial Disclosures and describe when those communications took place. *See* Le Chen, Alan Mislove, and Christo Wilson, *Peeking Beneath the Hood of Uber*, October 2015, available at http://www.ccs.neu.edu/home/cbw/pdf/chen-imc15.pdf; Nicholas Diakopoulos, How Uber surge

pricing really works, Wash. Post, available at https://www.washingtonpost.com/news/wonk/wp/2015/04/17/how-uber-surge-pricing-really-works/.

Response to Interrogatory No. 5:

Plaintiff objects to this Interrogatory to the extent that it seeks information protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff has not discussed these studies with any persons other than his attorneys.

Interrogatory No. 6:

Please identify and describe all documents concerning all local modes of transportation (including but not limited to public modes of transport, such as bus and train; private modes of transport, such as driving your personal car, biking, or walking; taxi services; hired car services; and mobile ride-generated software applications other than the Uber App) you have used during the time period covered by these Interrogatories, including the number of times each mode of transportation was used, the miles traveled, and the time period for that travel.

Response to Interrogatory No. 6:

Plaintiff objects to this Interrogatory as overbroad, unduly burdensome, invasive, unrelated to the subject matter of this litigation, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to these objections, Plaintiff states that he uses Metro North Railroad (commuter line) approximately four times per year between New Haven and New York City. When in larger cities, Plaintiff has also used subways. Plaintiff walks, bikes, or drives his car locally. With respect to the plaintiff's use of these local modes of transportation, there are no documents to identify. Plaintiff is unable to state the number of times he has driven his car, ridden a bicycle, walked, or used other private modes of transport, or the miles traveled, or the times or dates private modes of transport were used.

Interrogatory No. 7:

Please identify all persons with knowledge of information relevant to the allegations contained in the Complaint and which paragraphs in the Complaint their knowledge pertains.

Response to Interrogatory No. 7:

See Plaintiff's Rule 26(a)(1) Initial Disclosures, dated April 22, 2016, Items 1 and 2. It is not possible for Plaintiff to identify particular paragraphs in the First Amended Complaint to which the knowledge of the particular persons identified in his Rule 26(a)(1) Initial Disclosures pertains, because Plaintiff has not yet obtained discovery from Defendant.

May 31, 2016

HARTER SECREST & EMERY LLP

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Counsel for Plaintiff

VERIFICATION

I, Spencer Meyer, verify under penalty of perjury (28 U.S.C. § 1746) that the foregoing Plaintiff's Answers to Defendant's First Set of Interrogatories are true and correct.

May 31, 2016

Spencer Meyer

CERTIFICATE OF SERVICE

I, Jeffrey A. Wadsworth, an attorney at Harter Secrest & Emery LLP, hereby certify that on May 31, 2016, I caused a copy of the foregoing Plaintiff's Answers to Defendant's First Set of Interrogatories to be served by email upon the following:

William A. Isaacson, Karen L. Dunn, and Ryan Young Park
Boies, Schiller & Flexner LLP
5301 Wisconsin Avenue, NW, Suite 800
Washington, DC 20015

Peter M. Skinner, Alanna Cyreeta Rutherford
Boies, Schiller & Flexner LLP
575 Lexington Avenue
New York, New York 10022

Dated: May 31, 2016
Rochester, New York

By: /s/ Jeffrey A. Wadsworth
Jeffrey A. Wadsworth

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SPENCER MEYER, individually and on behalf of those similarly situated,

Plaintiffs,

vs. 1:15 Civ. 9796 (JSR)

TRAVIS KALANICK,

Defendant.

PLAINTIFF'S OBJECTIONS AND RESPONSES TO DEFENDANT'S REQUEST FOR DOCUMENTS

Plaintiff Spencer Meyer ("Plaintiff"), by his attorneys, Andrew Schmidt Law PLLC, Harter Secrest & Emery LLP, Constantine Cannon LLP, and McKool Smith, P.C., pursuant to Rule 34 of the Federal Rules of Civil Procedure and the Local Rules of this Court, objects and responds to the Request for Documents of Defendant Travis Kalanick ("Defendant"), dated April 29, 2016, as follows:

Preliminary Statement

1. Plaintiff's investigation of the facts and circumstances relating to this action is ongoing. These responses and objections are made without prejudice to, and are not a waiver of, Plaintiff's right to rely on other facts or documents as the case proceeds and at trial.

2. By making the accompanying responses and objections to Defendant's requests for production, and by producing documents, Plaintiff does not waive, and hereby expressly reserves, his right to assert any and all objections as to the admissibility of such responses into evidence in this action, or in any other proceedings, on any applicable grounds, including but not

limited to competency, relevancy, materiality, and privilege. Plaintiff's responses should not be construed as implying that he concedes the relevance or materiality of any request or response to the subject matter of this action.

3. Plaintiff's responses that certain documents will be produced should not be construed as representations that such documents exist, but as an undertaking to locate and produce relevant, non-privileged documents, if they exist and can be found. Similarly, Plaintiff's specific objections to specific document requests should not be construed as representations that the requested documents exist.

4. Plaintiff expressly reserves the right to supplement, clarify, revise, or correct any of his responses and objections and to assert additional objections or privileges, in one or more subsequent supplemental responses.

General Objections

1. Plaintiff objects to each instruction, definition, and document request to the extent that it purports to impose any requirement or discovery obligation greater than or different from those under the Federal Rules of Civil Procedure, the applicable Rules and Orders of the Court, or any other rule, law, or order applicable to this action.

2. Plaintiff objects to each document request that is overly broad, unduly burdensome, unrelated to the subject matter of this litigation, or not reasonably calculated to lead to the discovery of admissible evidence. No response shall be deemed to constitute an agreement or concession that its subject matter is relevant to this action.

3. Plaintiff objects to each definition, instruction, and document request, to the extent that it seeks documents protected from disclosure by the attorney-client privilege, deliberative process privilege, attorney work-product doctrine, or any other applicable privilege,

immunity, or doctrine under federal law, state law, or other regulation, judicial precedent, or principle. Plaintiff asserts all applicable privileges, protections, and immunities. Any such disclosure by Plaintiff will be inadvertent and shall not constitute a waiver of any privilege.

4. Plaintiff objects to each definition, instruction, and document request as overbroad and unduly burdensome to the extent that it seeks information that is already in Defendant's possession, custody, or control, that is readily or more accessible to Defendant from his own files or documents, or that is a matter of public record, already known to Defendants, or obtainable from some other source that is more convenient, less burdensome, or less expensive than obtaining the documents or information from Plaintiff. Responding to such requests would be oppressive, unduly burdensome and unnecessarily expensive, and the burden of responding to such requests is substantially the same or less for Defendant as for Plaintiff.

5. Plaintiff objects to the document requests, including but not limited to Instruction No. 3, to the extent that they are overbroad and unduly burdensome by failing to limit the document requests to a reasonable time period. Without in any way limiting or qualifying this objection, Plaintiff further objects to the document requests to the extent that they seek documents or information created after the commencement of this litigation.

6. To the extent any of Defendant's document requests seek documents that include expert material, Plaintiff objects to any such requests as premature and expressly reserves the right to supplement, clarify, revise, or correct any or all responses to such requests, and to assert additional objections or privileges, in one or more subsequent supplemental responses in accordance with the time period for exchanging expert reports to be determined by the Court.

7. Plaintiff incorporates by reference every general objection set forth above into each specific response below.

DOCUMENT REQUESTS AND RESPONSES

Responsive documents will be produced together with service of these Plaintiff's Objections and Responses to Defendant's Request for Documents.

1. All documents concerning communications between you and Uber, including but not limited to transaction receipts and emails.

Response to Request No. 1:

There are no responsive documents other than the receipts stored in Plaintiff's account in the Uber app. Plaintiff will produce copies of those documents.

2. All documents concerning communications between you and any Uber driver-partner.

Response to Request No. 2:

Plaintiff has no responsive documents.

3. All documents concerning communications between you and any Uber rider, who could be members of the putative class or classes alleged in paragraphs 113-119 of the Complaint, concerning any allegation set forth in the Complaint.

Response to Request No. 3:

Plaintiff has no responsive documents.

4. All documents and/or communications concerning any and all agreements entered into between you and Uber, including but not limited to Meyer's User Agreement.

Response to Request No. 4:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine.

Plaintiff has no responsive, discoverable documents. Plaintiff does not have a record of which version of the Uber user agreement may have been current at the time he clicked "OK" upon first installing the Uber app on his smartphone.

5. All documents and/or communications concerning your use of the Uber App.

Response to Request No. 5:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff will produce responsive, discoverable documents.

6. All documents and/or communications concerning any and all instances in which you were driven by an Uber driver-partner.

Response to Request No. 6:

Plaintiff has no responsive documents other than the receipts that will be produced in response to Request No. 1.

7. All documents and/or communications concerning any and all instances in which you used the Uber App but were not ultimately driven by an Uber driver-partner.

Response to Request No. 7:

Plaintiff has no responsive documents.

8. All documents and/or communications concerning your financial transactions with Uber including but not limited to credit card statements, receipts, and emails.

Response to Request No. 8:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to the extent that this Request seeks information protected from

disclosure under applicable state and federal privacy laws. Subject to these objections, responsive, discoverable documents will be produced.

9. All documents and/or communications concerning the relevant market alleged in the Complaint.

Response to Request No. 9:

To the extent this Request seeks documents that include expert material, Plaintiff objects to this Request as premature. Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff has no responsive, discoverable documents.

10. All documents and/or communications concerning any anticompetitive or procompetitive effect resulting from Uber.

Response to Request No. 10:

To the extent this Request seeks documents that include expert material, Plaintiff objects to this Request as premature. Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff has no responsive, discoverable documents.

11. All documents and/or communications concerning or supporting the allegations in the Complaint, including but not limited to the language quoted in the Complaint.

Response to Request No. 11:

To the extent this Request seeks documents that include expert material, Plaintiff objects to this Request as premature. Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that

discovery is not complete and potentially responsive documents are still within Defendant's possession, custody or control. Plaintiff has no responsive, discoverable documents other than the documents that will be produced in response to Request No. 1.

12. All documents and/or communications concerning your payment of surge pricing as alleged in paragraph 7 of the Complaint.

Response to Request No. 12:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff has no responsive, discoverable documents other than the documents that will be produced in response to Request No. 1.

13. All documents and/or communications concerning your use of UberX as alleged in paragraph 7 of the Complaint.

Response to Request No. 13:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff has no responsive, discoverable documents other than the documents that will be produced in response to Request No. 1.

14. All documents and/or communications concerning any dispute or disagreement you have had with Uber or any driver-partner concerning prices or pricing.

Response to Request No. 14:

Plaintiff has no responsive documents.

15. All documents and/or communications concerning your payment of higher prices for car services as a result of Uber as alleged in paragraph 8 of the Complaint.

Response to Request No. 15:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff has no responsive, discoverable documents other than the documents that will be produced in response to Request No. 1.

16. All documents and/or communications concerning Kalanick's alleged co-conspirators and acts and statements made in furtherance of the alleged conspiracy as alleged in paragraph 20 of the Complaint.

Response to Request No. 16:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within Defendant's possession, custody or control. Plaintiff has no responsive, discoverable documents.

17. All documents and/or communications concerning the allegation that Uber driver-partners and users cannot negotiate fares as alleged in paragraph 34 of the Complaint.

Response to Request No. 17:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff has no responsive, discoverable documents.

18. All documents and/or communications concerning the allegations in paragraphs 40-41 of the Complaint that Uber holds meetings and organizes events for its driver-partners or potential driver-partners to get together.

Response to Request No. 18:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within Defendant's possession, custody or control. Plaintiff has no responsive, discoverable documents.

19. All documents and/or communications concerning the allegation in paragraph 50 of the Complaint that Kalanick "conceived of and implemented the surge pricing model into the Uber algorithm."

Response to Request No. 19:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within Defendant's possession, custody or control. Plaintiff has no responsive, discoverable documents.

20. All documents and/or communications concerning the allegation in paragraph 59 of the Complaint that Uber manipulates its pricing algorithm.

Response to Request No. 20:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within Defendant's possession, custody or control. Plaintiff has no responsive, discoverable documents.

21. All documents and/or communications concerning the allegation in paragraph 60 of the Complaint that Uber driver-partners manipulate the pricing algorithm by "staying offline with UberX during non-surge times to trigger surges."

Response to Request No. 21:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within Defendant's possession, custody or control. Plaintiff has no responsive, discoverable documents.

22. All documents and/or communications concerning the allegation in paragraph 69 of the Complaint that Uber driver-partners cannot depart downward from the fare set by the Uber algorithm and that Uber driver-partners all understand and agree that Uber controls the fare.

Response to Request No. 22:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within Defendant's possession, custody or control. Plaintiff has no responsive, discoverable documents.

23. All documents and/or communications concerning the allegation in paragraph 70 of the Complaint that Uber driver-partners understand and agree that they will not compete with other driver-partners on price and that they agree to participate in a combination, conspiracy, or contract to fix prices.

Response to Request No. 23:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff has no responsive, discoverable documents.

24. All documents and/or communications concerning the lost business opportunities Uber driver-partners allegedly incur as alleged in paragraph 72 of the Complaint.

Response to Request No. 24:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff has no responsive, discoverable documents.

25. All documents and/or communications concerning the allegation in paragraph 73 of the Complaint that Uber driver-partners have "lamented that Uber's surge pricing component can result in greater rider dissatisfaction and fewer rides for drivers."

Response to Request No. 25:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff has no responsive, discoverable documents.

26. All documents and/or communications concerning Kalanick's personal participation in the alleged price-fixing conspiracy, including all documents and/or communications concerning Kalanick's actions in furtherance of the causes of action set forth in the Complaint or any injury caused by, act, or omission of Kalanick that you rely upon as a basis for any claim in this action.

Response to Request No. 26:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within Defendant's possession, custody or control. Plaintiff has no responsive, discoverable documents.

27. All documents and/or communications concerning the allegation that Kalanick has "colluded and agreed with driver-partners to raise fares" as alleged in paragraph 86 of the Complaint.

Response to Request No. 27:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within Defendant's possession, custody or control. Plaintiff has no responsive, discoverable documents.

28. All documents and/or communications concerning the allegations in paragraphs 87–89 of the Complaint that Kalanick "directed or ratified negotiations between Uber and these co-conspirators, in which Uber ultimately agreed to raise fares."

Response to Request No. 28:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within Defendant's possession, custody or control. Plaintiff has no responsive, discoverable documents.

29. All documents and/or communications concerning the allegation in paragraphs 92 of the Complaint that Uber driver-partners have "reinforced and reaffirmed their mutual commitments to this unlawful arrangement."

Response to Request No. 29:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within Defendant's possession, custody or control. . Plaintiff has no responsive, discoverable documents.

30. All documents and/or communications concerning the allegation in paragraphs 93 of the Complaint that were Uber driver-partners acting independently, "some significant portion would not agree to adhere to the Uber pricing algorithm."

Response to Request No. 30:

To the extent this Request seeks documents that include expert material, Plaintiff objects to this Request as premature. Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within the Defendant's possession, custody or control. Plaintiff has no responsive, discoverable documents.

31. All documents and/or communications concerning the allegation in paragraph 95 of the Complaint that Uber has approximately 80% market share in the U.S. in the mobile app- generated ride-share service market.

Response to Request No. 31:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within Defendant's possession, custody or control. Plaintiff has no responsive, discoverable documents.

32. All documents and/or communications concerning the allegation in paragraph 96 of the Complaint that Uber's chief competitor is Lyft.

Response to Request No. 32:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within Defendant's possession, custody or control. Plaintiff has no responsive, discoverable documents.

33. All documents and/or communications concerning the allegation in paragraph 97 of the Complaint that a third competitor, Sidecar, left the market in 2015.

Response to Request No. 33:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within Defendant's possession, custody or control. Plaintiff has no responsive, discoverable documents.

34. All documents concerning Uber's market penetration, including but not limited to the study referred to in paragraph 100 of the Complaint.

Response to Request No. 34:

To the extent this Request seeks documents that include expert material, Plaintiff objects to this Request as premature. Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within Defendant's possession, custody or control. Plaintiff further objects to this Request as overbroad, unduly burdensome, and not proportional to the needs of this case. Plaintiff has no responsive, discoverable documents.

35. All documents and/or communications concerning Uber's alleged "dominant position in the market" and the alleged effect of "higher prices in the market as a whole" as alleged in paragraph 101 of the Complaint.

Response to Request No. 35:

To the extent this Request seeks documents that include expert material, Plaintiff objects to this Request as premature. Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within Defendant's possession, custody or control. Plaintiff has no responsive, discoverable documents.

36. All documents and/or communications concerning the allegation that Uber's "market position has already helped force Sidecar out of the marketplace" as alleged in paragraph 102 of the Complaint.

Response to Request No. 36:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within Defendant's possession, custody or control Plaintiff has no responsive, discoverable documents.

37. All documents and/or communications concerning alleged barriers to entry in the alleged market, including documents and/or communications that support the allegation that "Uber's dominant position and considerable name recognition has also made it difficult for potential competitors to enter the marketplace" as alleged in paragraph 103 of the Complaint.

Response to Request No. 37:

To the extent this Request seeks documents that include expert material, Plaintiff objects to this Request as premature. Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within Defendant's possession, custody or control. Plaintiff has no responsive, discoverable documents.

38. All documents concerning any anticompetitive effect resulting from Uber, including but not limited to purported increased prices and decreased output as alleged in paragraphs 109–110 of the Complaint.

Response to Request No. 38:

To the extent this Request seeks documents that include expert material, Plaintiff objects to this Request as premature. Plaintiff objects to this Request to the extent that it calls for

documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within Defendant's possession, custody or control. Plaintiff further objects to this Request as overbroad, unduly burdensome, and not proportional to the needs of this case. Plaintiff has no responsive, discoverable documents.

39. All documents and/or communications concerning the alleged nationwide geographic market with respect to the First Cause of Action in the Complaint.

Response to Request No. 39:

To the extent this Request seeks documents that include expert material, Plaintiff objects to this Request as premature. Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within Defendant's possession, custody or control. Plaintiff has no responsive, discoverable documents.

40. All documents and/or communications concerning the alleged product market for "mobile app-generated ride-share service" as set forth in paragraph 104 of the Complaint, including but not limited to identification of participants in such market, performance projections of participants in such market, definition of "mobile app-generated ride-share service" and/or identification of the facilities and entities existing in such market, and documents concerning or tending to show the non-existence of such market or the existence of markets that overlap with that alleged in the Complaint.

Response to Request No. 40:

To the extent this Request seeks documents that include expert material, Plaintiff objects to this Request as premature. Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within Defendant's possession, custody or control. Plaintiff has no responsive, discoverable documents.

41. All documents and/or communications concerning Plaintiff's use of subways, buses, taxi services, hired car services, a personal vehicle (including a car, bike or other mode of transportation owned, leased or rented by Plaintiff), and mobile ride-generated software applications other than the Uber App in the locations in which Plaintiff took Uber as a means of transportation, including but not limited to receipts for such trips, anything that indicates the timing, locations, duration, and dates for those trips, and the prices for such trips.

Response to Request No. 41:

Plaintiff objects to this request as overly broad, unduly burdensome, unrelated to the subject matter of this litigation, not reasonably calculated to lead to the discovery of admissible evidence, and not proportional to the needs of this case. Plaintiff has no other responsive documents.

42. All documents and/or communications concerning why taxi and car-for-hire services are not reasonable substitutes for "mobile app-generated ride-share service" as alleged in paragraphs 106 and 107 of the Complaint.

Response to Request No. 42:

To the extent this Request seeks documents that include expert material, Plaintiff objects to this Request as premature. Plaintiff objects to this Request to the extent that it calls for

documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within Defendant's possession, custody or control. Plaintiff further objects to this Request on the ground that the issue of "reasonable substitutes" is one of law, not of fact. Plaintiff has no responsive, discoverable documents.

43. All documents and/or communications concerning why public transportation is not a reasonable substitute for "mobile app-generated ride-share service" as alleged in paragraph 108 of the Complaint.

Response to Request No. 43:

To the extent this Request seeks documents that include expert material, Plaintiff objects to this Request as premature. Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within Defendant's possession, custody and control. Plaintiff further objects to this Request on the ground that the issue of "reasonable substitutes" is one of law, not of fact. Plaintiff has no responsive, discoverable documents.

44. All documents and/or communications concerning the competitive position of Uber and other "mobile app-generated ride-share service", in any geographic or product market, including but not limited to any comparisons, analyses, or projections of performance of Uber and/or Lyft.

Response to Request No. 44:

To the extent this Request seeks documents that include expert material, Plaintiff objects to this Request as premature. Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within Defendant's possession, custody or control. Plaintiff further objects to this Request as overbroad, unduly burdensome, and not proportional to the needs of this case. Plaintiff has no responsive, discoverable documents.

45. All documents and/or communications concerning the Northeastern Study by Le Chen, Alan Mislove, and Christo Wilson, published in October 2015, and identified in Plaintiff's Rule 26 Disclosures.

Response to Request No. 45:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff has no responsive, discoverable documents.

46. All documents and/or communications concerning the publication or article "Peeking Beneath the Hood of Uber" by Le Chen, Alan Mislove, and Christo Wilson, and identified in Plaintiff's Rule 26 Disclosures.

Response to Request No. 46:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff has no responsive, discoverable documents.

47. All documents and/or communications concerning the University of

Maryland study by Nicholas Diakopoulos identified in Plaintiff's Rule 26 Disclosures.

Response to Request No. 47:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff has no responsive, discoverable documents.

48. All documents and/or communications concerning the Washington Post article "How Uber Surge Pricing Really Works" identified in Plaintiff's Rule 26 Disclosures.

Response to Request No. 48:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff has no responsive, discoverable documents.

49. All documents and/or communications concerning the tweets by Kalanick on February 21 and 22, 2014 identified in Plaintiff's Rule 26 Disclosures.

Response to Request No. 49:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within Defendant's possession, custody or control. Plaintiff has no responsive, discoverable documents.

50. All documents and/or communications concerning the news article, "Man and Uber Man," in Vanity Fair on November 30, 2014 identified in Plaintiff's Rule 26 Disclosures.

Response to Request No. 50:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff has no responsive, discoverable documents.

51. All documents and/or communications concerning the Wired.com news article, "Uber boss says surging prices rescue people from the snow," posted on December 17, 2013 identified in Plaintiff's Rule 26 Disclosures.

Response to Request No. 51:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff has no responsive, discoverable documents.

52. All documents and/or communications concerning the transcript of Kalanick's appearance on the Late Show with Stephen Colbert on September 10, 2015 as identified in Plaintiff's Rule 26 Disclosures.

Response to Request No. 52:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within Defendant's possession, custody or control. Plaintiff has no responsive, discoverable documents.

53. All documents and/or communications concerning the May 24, 2015 article, "Lyft vs. Uber: Just How Dominant Is Uber in the Ridesharing Business?," by Daniel Miller as identified in Plaintiff's Rule 26 Disclosures.

Response to Request No. 53:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within Defendant's possession, custody or control. Plaintiff has no responsive, discoverable documents.

54. All documents and/or communications concerning, reflecting, or constituting acts or omissions that you rely upon as a basis for any claim in this action.

Response to Request No. 54:

See Plaintiff's Rule 26(a)(1) Initial Disclosures, dated April 22, 2016, Item 2. Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within Defendant's possession, custody or control. Plaintiff has no other responsive, discoverable documents.

55. All documents and/or communications that you may use to support the claims against Kalanick in this action.

Response to Request No. 55:

To the extent this Request seeks documents that include expert material, Plaintiff objects to this Request as premature. Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine. See Plaintiff's Rule 26(a)(1) Initial Disclosures, dated April 22, 2016, Item 2. Plaintiff further objects to this Request on the ground that discovery is not

complete and potentially responsive documents are still within Defendant's possession, custody or control. Plaintiff has no other responsive, discoverable documents.

56. All documents and/or communications about the allegations in the Complaint or the Complaint itself with any Uber driver-partners, past or present.

Response to Request No. 56:

Plaintiff has no responsive documents.

57. All documents and/or communications concerning any financial interest in mobile app-generated ride-share services or other transportation services, including but not limited to any stock holdings, business contracts with, or other compensation received by mobile app- generated ride-share services or other transportation services.

Response to Request No. 57:

Plaintiff interprets this Request as having to do with "any financial interest" that he personally might have in entities that provide the services specified in the Request. Plaintiff has no responsive documents.

58. All documents and/or communications about the allegations in the Complaint or Complaint itself with any Uber users, past or present.

Response to Request No. 58:

Plaintiff has no responsive, discoverable documents.

59. All documents and/or communications concerning information about any Uber users, past or present.

Response to Request No. 59:

Plaintiff objects to this Request to the extent that it calls for documents protected from disclosure by the attorney-client privilege or other applicable privilege, immunity, or doctrine.

Plaintiff further objects to this Request as vague and ambiguous. Plaintiff further objects to this Request on the ground that discovery is not complete and potentially responsive documents are still within Defendant's possession, custody or control. Plaintiff has no responsive, discoverable documents.

May 31, 2016

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Counsel for Plaintiff

CERTIFICATE OF SERVICE

I, Jeffrey A. Wadsworth, an attorney at Harter Secrest & Emery LLP, hereby certify that on May 31, 2016, I caused a copy of the foregoing Plaintiff's Objections and Responses to Defendant's Request for Documents to be served by email upon the following:

William A. Isaacson, Karen L. Dunn, and Ryan Young Park
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5301 Wisconsin Avenue, NW, Suite 800
Washington, DC 20015

Peter M. Skinner, Alanna Cyreeta Rutherford
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575 Lexington Avenue
New York, New York 10022

Dated: May 31, 2016
Rochester, New York

By: /s/ Jeffrey A. Wadsworth
Jeffrey A. Wadsworth

EXHIBIT C

Blue Cash Preferred® from American Express

SPENCER R MEYER
Closing Date 04/14/15

Account Ending [redacted]

Detail Continued

[redacted]

04/04/15	UBER UBER 8665761039	866-576-1039	CA	$17.82

[redacted]

04/05/15	UBER UBER [redacted]	866-576-1039	CA	$14.98

[redacted]

Detail Continued

[redacted]

09/26/15	UBER UBER 3665761039	866-576-1039	CA	$13.38
09/26/15	UBER UBER [redacted]	866-576-1039	CA	$23.63

[redacted]

Blue Cash Preferred® from American Express

SPENCER R MEYER
Closing Date 10/15/15

Account Endi [redacted]

Detail Continued

Amount

[redacted]

09/27/15	UBER UBER 8665761039	866-576-1039	CA	$40.09

[redacted]

10/04/15	UBER UBER 8665761039	866-576-1039	CA	$5.03

[redacted]

Detail Continued

Amount

[redacted]

10/22/15 UBER UBER 866-576-1039 CA $6.38
866-576-1039 CA
8665761039

[redacted]

Detail Continued

			Foreign Charge	Amount
[redacted]				
12/05/15	UBER UBER 866-576-1039 CA 8665761039		9.46 European Union Euro	$10.30
[redacted]				
12/06/15	UBER UBER 866-576-1039 CA 8665761039		12.68 European Union Euro	$13.81
12/06/15	UBER UBER 866-576-1039 CA 8665761039		9.37 European Union Euro	$10.15
[redacted]				

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SPENCER MEYER, individually and on behalf of those similarly situated,

Plaintiffs,

-against-

TRAVIS KALANICK and UBER TECHNOLOGIES, INC.

Defendants.

Case No. 1:15-cv-9796 (JSR)

ORAL ARGUMENT REQUESTED

UBER TECHNOLOGIES, INC.'S REPLY IN SUPPORT OF MOTION TO COMPEL ARBITRATION

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Attorneys for Defendant Uber Technologies, Inc.

July 7, 2016

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PRELIMINARY STATEMENT

"[P]laintiff here had a contract with Uber. That contract has an arbitration clause." DE 94 [Hearing Tr. (June 16, 2016)] at 15. These words, uttered by Plaintiff's own counsel mere weeks ago, underscore precisely why Uber's motion to compel should be granted. Plaintiff must abide by his agreement to arbitrate, and has offered no valid argument why he should not. *First*, the hyperlink to the User Terms to which he agreed was presented in a clear and conspicuous format that is both ubiquitous in the digital realm and routinely enforced by courts. *Second*, because Uber promptly moved to compel arbitration upon entry into the case, and the statements and conduct of other parties—which also do not amount to waiver—cannot be imputed to Uber, Plaintiff's waiver claim fails. *Third*, Plaintiff cannot use artful pleading to avoid arbitrating his claims—which, as this Court noted, "go[] to [Uber's] entire business operation." *Id*. at 16. This Court should grant Uber's motion to compel arbitration.

ARGUMENT

A. Plaintiff Assented to the Arbitration Agreement

Plaintiff mischaracterizes the User Terms to which he agreed in connection with registering to use the Uber App as an inconspicuous "browsewrap" agreement, and further claims that he is not bound by the Arbitration Agreement or any other terms because he chose not to read them before giving his assent. Plaintiff is wrong on all counts.[1]

[1] Plaintiff wrongly asserts that California law applies to the issue of assent. As Uber's Motion explains, the interest analysis favors New York law. DE 92 at 11-13; *see also* DE 110 at 3 n.3. Even under California law, however, Plaintiff validly assented to the arbitration agreement. *See Tompkins v. 23andMe, Inc.*, 2014 WL 2903752, at *7-9 (N.D. Cal. June 25, 2014); *Swift v. Zynga Game Network*, 805 F. Supp. 2d 904, 911-12 (N.D. Cal. 2011); *Guadagno v. E*Trade Bank*, 592 F. Supp. 2d 1263, 1267-71 (C.D. Cal. 2008).

First, the User Terms constitute a "clickwrap" or "hybrid-clickwrap" agreement, which require a user to indicate assent by ***affirmatively clicking a button*** after being presented with the terms or a hyperlink to the terms. *See Nicosia v. Amazon.com, Inc.*, 84 F. Supp. 3d 142, 151 (E.D.N.Y. 2015); *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 837-38 (S.D.N.Y. 2012). With a "browsewrap" agreement, by contrast, assent is imputed by mere continued use of the website. *Nicosia*, 84 F. Supp. 3d at 151. Here, Plaintiff concedes that he ***clicked*** the "REGISTER" button on the registration screen confirming that, "By creating an Uber account, you agree to the 'TERMS OF SERVICE & PRIVACY POLICY.'" *See* DE 92 at 3-5, 13-15; DE 102 at 11-13. Thus, Plaintiff's assent was affirmatively manifested—a hallmark feature of "clickwrap" and "hybrid-clickwrap" contracts. *See Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 22 n.4 (2d Cir. 2002).

Second, courts in this district and throughout the country[2] *routinely* enforce agreements consummated under virtually identical circumstances—against businesses *and* consumers alike—holding that hyperlinks alone provide sufficient inquiry notice of contractual terms. In *Fteja*, for instance, a judge in this District found that a user assented to an arbitration agreement where Facebook's signup page "require[d] the user to click on 'Sign Up' to assent," but did not contain "any mechanism that forces the user to actually examine the terms before assenting," and "the terms [were] only visible via a hyperlink" below the "Sign Up" button in a

[2] For example, applying California law, the federal district court in *Mohamed v. Uber Techs., Inc.*, 109 F. Supp. 3d 1185, 1195-98 (N.D. Cal. 2015), enforced a similar Uber agreement and rejected virtually all of the same assent arguments asserted by Plaintiff here. *See also Vernon v. Qwest Commc'ns. Int'l.*, 925 F. Supp. 2d 1185 (D. Colo. 2013); *Snap-on Bus. Solutions Inc. v. O'Neil & Assocs., Inc.*, 708 F. Supp. 2d 669, 683 (N.D. Ohio 2010); *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229 (E.D. Pa. 2007); *Major v. McCallister*, 302 S.W.3d 227, 229-31 (Mo. Ct. App. 2009); *Hubbert v. Dell Corp.*, 835 N.E.2d 113,118-21 (Ill. App. Ct. 2005).

sentence stating "By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service." *Fteja*, 841 F. Supp. 2d at 835, 838. Relying on *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), and other authorities, the court reasoned that a digital contract incorporating hyperlinked terms is no different than a paper contract incorporating separate, written terms. *Fteja*, 841 F. Supp. 2d at 839-40; *accord Whitt v. Prosper Funding LLC*, 2015 WL 4254062, at *4 (S.D.N.Y. July 14, 2015); *Nicosia*, 84 F. Supp. 3d at 151-52; *5381 Partners LLC v. Shareasale.com*, 2013 WL 5328324, at *4-8 (E.D.N.Y. Sept 23, 2013).

Plaintiff suggests it was unclear that clicking "REGISTER" was mandatory or would have the effect of "creating an Uber account," and thereby assenting to the User Terms. Yet, ***by his own admission***, Plaintiff clearly understood that "[t]o become an Uber account holder, an individual ***first must agree to Uber's terms and conditions***." Am. Compl. ¶ 29 (emphasis added). And he concedes that he did so. DE 94 at 15. Indeed, the confirmation screen states in all-capitalized text that "By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY," with "TERMS OF SERVICE & PRIVACY POLICY" underlined in bright-blue font, indicating a hyperlink to the terms. DE 92 at 3-5, 13-15; Decl. of Vincent Mi, DE 59-3 ("Mi Decl.") ¶ 5. This provision, which is mere *millimeters* below the "REGISTER" button on a single screen that completes the account-registration progress (*see* DE 92 at 4), provided "immediately visible notice of the existence of [the] terms," *Specht*, 306 F.3d at 31, and "explicit textual notice," which should have put a "reasonably prudent user on inquiry notice" of the contract terms, *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014).

Finally, it is well-settled law that Plaintiff cannot avoid the arbitration agreement on the ground that he elected not to read the terms or was not required to read them before accepting. *See, e.g.*, *Whitt*, 2015 WL 4254062, at *5 ("Whitt suggests that he was not even constructively

aware of the terms of the Agreement because those terms were viewable only by following a hyperlink. . . . Whitt simply ignores an abundance of persuasive authority . . . to the contrary.") (collecting cases); *accord Zaltz v. JDATE*, 952 F. Supp. 2d 439, 454-55 (E.D.N.Y. 2013); *Fteja*, 841 F. Supp. 2d at 839-41; *5381 Partners*, 2013 WL 5328324, at *1, *6-7.[3]

B. Uber Has Not Waived the Right to Compel Arbitration

Plaintiff contends that Uber has waived its right to compel arbitration: (1) expressly, based on the entirely unsupported argument that Mr. Kalanick's purported waiver should be imputed to Uber, and (2) impliedly, even though Uber moved to compel arbitration within a day of being joined as a party and Plaintiff cites no precedent whatsoever for finding waiver based on pre-joinder litigation conduct.

1. Mr. Kalanick's alleged waiver cannot be imputed to Uber. Uber attached a proposed motion to compel arbitration to its *first* filing in this case, and filed this motion immediately when joined as a party. Even assuming Mr. Kalanick expressly waived arbitration (and—as his Reply makes clear—he did not), a waiver on his part cannot be imputed to Uber. *See* DE 94 at 29 (acknowledging that waiver by Mr. Kalanick is not necessarily waiver by Uber). Plaintiff cites no case holding, or even suggesting, that such a waiver could be imputed to Uber. DE 102 at 16-18; *see Caytrans BBC, LLC v. Equip. Rental & Contrs. Corp.*, 2010 WL 1541444, at *4 n.7 (S.D. Ala. Apr. 16, 2010) (refusing to impute waiver "[a]bsent any factual or legal analysis" explaining why doing so is permissible). Instead, Plaintiff erroneously asserts, without citing a single case to support his unprecedented theory, that Uber's corporate counsel's physical

[3] *Accord Mohamed*, 109 F. Supp. 3d at 1198 ("Whether or not the [user] actually clicked the links or otherwise read the terms of the contracts is irrelevant[.]"); *Marin Storage & Trucking v. Benco Contracting & Eng'g, Inc.*, 89 Cal. App. 4th 1042, 1049 (2001) ("A party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing.").

appearance in court on behalf of Mr. Kalanick should somehow be construed as *Uber's* abandonment of its contractual right to arbitration. DE 102 at 17; *see Beth Israel Med. Ctr. v. Horizon Blue Cross & Blue Shield of New Jersey, Inc.*, 448 F.3d 573, 585 (2d Cir. 2006) (holding that waiver of a contractual right must be "voluntary and intentional") (alterations omitted). But courts have explicitly held that even where parties share counsel (which is not the case here), that does not demonstrate an interrelationship sufficient to impute waiver. *See Al Rushaid v. Nat'l Oilwell Varco, Inc.*, 757 F.3d 416, 423 (5th Cir. 2014) (declining to "[i]mput[e] to a party the actions of its codefendants merely on the ground that the entities are jointly owned or controlled or share representation," where co-defendants were not alter egos and no grounds existed for piercing their corporate veils); *see also Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 454 (2d Cir. 1995) (explaining that waiver could be imputed only if co-defendants are alter egos that "should be treated as one and the same"). There is simply no basis for imputing any alleged waiver by Mr. Kalanick to Uber in this case, particularly where Plaintiff has *conceded* that Uber and Mr. Kalanick are *not* alter egos. DE 94 at 22 ("Kalanick is not the alter ego of Uber; we don't say that anywhere; that's not our position here.").

2. Uber has not impliedly waived its right to compel arbitration. With respect to Uber's own conduct, every factor weighs against implied waiver, which "is not to be lightly inferred." *Sweater Bee by Banff, Ltd. v. Manhattan Indus., Inc.*, 754 F.2d 457, 461 (2d Cir. 1985) (internal quotation marks omitted).

First, Uber moved to compel arbitration immediately when joined as a party. Therefore, delay is no basis for inferring waiver here. Plaintiff provides no support whatsoever for its novel

argument that the time *before* Uber was joined as a party can be counted as delay *by Uber*.[4] In any event, as the Court has recognized, "as a practical matter . . . [w]e're still relatively in the preliminary stages of this case" (DE 94 at 42), and courts have declined to find waiver after much longer delays. *See, e.g.*, *Becker v. DPC Acquisition Corp.*, 2002 WL 1144066, at *12-13 (S.D.N.Y. May 30, 2002) (14 months); *Thomas v. A.R. Baron & Co.*, 967 F. Supp. 785, 789 (S.D.N.Y. 1997) (18 months). Even Plaintiff's own cases hold that such a brief time period is insufficient. DE 102 at 19 (citing *PPG Indus., Inc. v. Webster Auto Parts, Inc.*, 128 F.3d 103, 108 (2d Cir. 1997) (five months, "by itself, is not enough to infer waiver"); *Satcom Int'l Grp. PLC v. Orbcomm Int'l Partners, L.P.*, 49 F. Supp. 2d 331, 339 (S.D.N.Y.), *aff'd*, 205 F.3d 1324 (2d Cir. 1999) (four months "is not, by itself, long enough to infer waiver")).

Second, the minimal litigation activity in which Uber participated is an insufficient basis to find waiver. *Cf. Rush v. Oppenheimer & Co.*, 779 F.2d 885, 888 (2d Cir. 1985) (no waiver despite motion to dismiss); *Scott v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 1992 WL 245506, at *3 (S.D.N.Y. Sept. 14, 1992) (no waiver despite motion to dismiss, document productions, interrogatory responses, document demands, and answer to complaint). Uber's only discovery served to date expressly noted that Uber is participating in discovery solely to comply with the court's case management plan, as the dispute belongs in arbitration. Plaintiff asserts that Uber has served discovery that would not be available in arbitration (DE 102 at 21), but has done nothing to show prejudice by "convincingly demonstrate[ing] some unique or material way

[4] Plaintiff complains that Uber did not "announce[] its intention to compel arbitration" until "more than five months after it learned that Plaintiff filed his antitrust claims [against Mr. Kalanick] in this case." DE 102 at 19. The motions for joinder and intervention, however, were filed before the Court's deadline. And requiring Uber to move to intervene immediately or risk an inference of waiver would be absurd, and, in many cases, would waste judicial resources, which likely explains why Plaintiff can cite no authority for this notion.

in which [he] would be placed at a substantial disadvantage by" the discovery. *Brownstone Inv. Grp., LLC v. Levey*, 514 F. Supp. 2d 536, 543 (S.D.N.Y. 2007); *see also Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 26 (2d Cir. 1995) ("Although [defendant] did pursue various avenues of discovery, it does not follow that [plaintiff] was prejudiced.").

Third, Plaintiff has not been prejudiced by his financial expenditures since Uber was joined as a party, and any financial burden to Plaintiff would be the result of Plaintiff's unilateral choice to bring his dispute in a judicial, rather than arbitral, forum. This Circuit has repeatedly made clear that "legal expenses inherent in litigation, without more, do not constitute prejudice requiring a finding of waiver." *Doctor's Associates, Inc. v. Distajo*, 107 F.3d 126, 134 (2d Cir. 1997) (internal quotation marks omitted); *Leadertex*, 67 F.3d at 26 (same). *Plaintiff* decided to sue Uber's CEO in an attempt to avoid arbitration with Uber, to resist Uber's joinder by "pretend[ing] that he 'seeks no relief whatsoever against Uber'" (DE 90 at 5), and to aggressively litigate this case even as arbitration looms. "Having commenced this suit to resolve claims that could have been properly asserted in arbitration, [Plaintiff] cannot now seek to lay at [Uber's] doorstep alone the full weight of [Plaintiff's] litigation expenses and claim resulting prejudice, a large measure for which [Plaintiff] itself may be responsible." *Brownstone*, 514 F. Supp. 2d at 540-41.

Finally, the procedural prejudice Plaintiff alleges is a red herring—even if pre-joinder activities could be attributed to Uber (which they cannot). Plaintiff's "key victory on class waiver" (DE 102 at 22) is inapplicable in the arbitration context. The court's ruling on class waiver concluded that "the User Agreement does not contain an independent class action waiver ***outside the arbitration context***." DE 44 at 9 (emphasis added).

C. Uber Has the Right to Compel Arbitration

As this Court has observed, Plaintiff "named only Mr. Kalanick in the suit, and not Uber itself, possibly in order to avoid an arbitration clause in the User Agreement between plaintiff and Uber." DE 90 at 1. Now that Uber has been joined as a defendant, Plaintiff takes the illogical position that Uber is *still* not a true party to the litigation—merely an interested observer. DE 102 at 37-40. Joinder notwithstanding, Plaintiff maintains the view that because "the complaint asserts no claims against Uber," Uber has no basis for compelling arbitration. DE 102 at 37. The Court already has recognized that Plaintiff's attempts to mischaracterize his claims are "hyper-technical" and "awfully artificial" (DE 94 at 23, 25-26), and it should reject such artifice here again.

First, although Plaintiff stubbornly maintains he has pled claims "only against Kalanick, not against Uber" (DE 102 at 37), this argument is belied by Plaintiff's own complaint and the Court's findings to the contrary, *see, e.g.*, DE 90 at 5 ("fairly read, the Amended Complaint alleges that Uber's scheme for setting prices, as well as the terms of Uber's contracts with drivers, constitute an antitrust violation"); *id.* (Plaintiff's assertion that he "seeks no relief whatsoever against Uber" is "at odds with any fair reading of plaintiff's claim"); *id*. at 5 n.4 (Plaintiff has made "amply clear that plaintiff's basic demand for relief is, to a significant extent, directed against Uber"; *id.* at 5 n.5 (Plaintiff could not amend its complaint to seek relief only against Kalanick, and not against Uber, "while maintaining the essential elements of its antitrust claim").

Second, Plaintiff is wrong to contend that an indispensable party under Rule 19 may not compel arbitration. *See McCowan v. Sears, Roebuck and Co*., 908 F.2d 1099, 1102, 1106-07 (2d Cir. 1990) (reversing order holding that an "indispensable party to the action pursuant to Fed. R.

Civ. P. 19" could not invoke the arbitration agreement). Plaintiff cites no case to support his view. At most, they demonstrate that a party need not assert a cause of action against a party joined under Rule 19.

Third, the absence of formal claims against Uber—which should not be confused with a practical and "fair reading of plaintiff's claim[s]" (DE 90 at 5)—does not strip it of its status as an "aggrieved" party entitled to compel arbitration under the plain language of 9 U.S.C. § 4. *See Doctor's Assocs., Inc. v. Hollingsworth*, 949 F. Supp. 77, 83 (D. Conn. 1996) ("[t]he fact that the franchisees sued the owners and agents of DAI and did not name DAI as a party does not prevent DAI from being an aggrieved party" entitled to compel arbitration); *Konvalinka*, 2011 WL 13070859, at *3 (compelling plaintiff to arbitrate with non-defendant because "[p]arties to contractual arbitration clauses cannot avoid arbitration by suing entities related to the counterparty to the contract"). Indeed, this Court has left no doubt that Uber is aggrieved by Plaintiff's complaint, finding that, if the litigation proceeds without Uber, the possibilities that "Uber might be bound by an injunction against Mr. Kalanick, and/or might be collaterally estopped from contesting antitrust liability in other suits against it" are "by no means difficult to envisage." DE 90 at 6-7.

Finally, courts have roundly rejected attempts by parties to avoid arbitration by suing entities related to a contracting party, rather than the entities with which they have an arbitration agreement. *Hollingsworth*, 949 F. Supp. at 80, 83-84 (granting DAI's petitions to compel arbitration despite contention that "since DAI is not a defendant in the state court action there is nothing to arbitrate"); *Konvalinka*, 2011 WL 13070859 at *3 (granting non-defendant's motion because, "[b]y naming a [non-signatory parent] but seeking to litigate the very thing that would have to be submitted to arbitration, [plaintiff] has sought to evade his obligation to arbitrate the

dispute with . . . the party with which he is in privity"). Plaintiff's cited cases (DE 102 at 40) do not support his argument—at most, they stand for the proposition that a motion to compel arbitration cannot be granted when no genuine dispute exists.[5] As this Court has found, that is plainly not the case here.

CONCLUSION

The Court should dismiss this action and compel arbitration of all of Plaintiff's claims. Alternatively, if the Court grants Uber's motion to compel arbitration but denies Mr. Kalanick's motion, Uber requests that the Court stay the claims against Mr. Kalanick pending completion of arbitration proceedings between Uber and Plaintiff (*see* 9 U.S.C. § 3) in order to avoid the "unnecessary duplication and risk of inconsistent results that might ensue if claims against [Mr. Kalanick] are not stayed." *Moore v. Interracciones Global, Inc.*, 1995 WL 33650, at *6-7 (S.D.N.Y. Jan. 27, 1995) (staying claims "which arise out of exactly the same facts" against non-arbitrating defendant).[6]

[5] *See Rosenthal v. Emanuel, Deetjen & Co.*, 516 F.2d 325, 327 (2d Cir. 1975) (motion denied because, after defendants' claim contesting declaratory relief failed, there was no "controversy or claim arising out of or relating to [the partnership contract] or breach thereof"); *In re Prudential Secs. Inc.*, 1993 U.S. Dist. LEXIS 1362, at *6 (N.D. Ill. Feb. 4, 1993) (motion denied after action voluntarily dismissed because "there [was] no live controversy to arbitrate between the parties"); *AmeriSteel Corp. v. Int'l Bhd. of Teamsters*, 267 F.3d 264, 276 (3d Cir. 2001) (motion denied where party refusing to arbitrate was not bound by the contract containing the arbitration agreement).

[6] Alternatively, this Court can issue a stay "pursuant to the power inherent in every court to control the disposition of the case on its docket with economy of time and effort for itself, for counsel, and for litigants." *Barton Malow Enters., Inc. v. Steadfast Ins. Co.*, 2014 WL 10297613, at *3 (S.D.N.Y. Dec. 31, 2014).

Dated: July 7, 2016

Respectfully submitted,

/s/ Reed Brodsky
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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2016, I filed and therefore caused the foregoing document to be served via the CM/ECF system in the United States District Court for the Southern District of New York on all parties registered for CM/ECF in the above-captioned matter.

/s/ Reed Brodsky
Reed Brodsky

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
------------------------------x
SPENCER MEYER ,

Plaintiff,

v. 15 CV 9796 (JSR)

TRAVIS KALANICK, ET AL.,

Defendants.
------------------------------x

New York, N.Y.
July 14, 2016
3:45 p.m.

Before:

HON. JED S. RAKOFF

District Judge

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MR. BRODSKY: Your Honor, before I spend Uber's money we would like the opportunity to go back and discuss.

THE COURT: Yes. I understand. Why don't you think about that. I'm not going to be deciding this motion for a while, in any event, because I have another motion that we're going to deal with in five or ten minutes. But why don't you let me know, we'll say within a week, Uber's views on that issue.

MR. BRODSKY: Very good. Thank you.

THE COURT: Very good. We're going to take a break. And then resume in about ten minutes to deal with the arbitration motion.

(Recess)

(Case called)

THE COURT: Actually I don't think we need to go through this. It's part of the same transcript. So it's all the usual players.

So, by the way, one of my law clerks told me, which I hadn't realized, that there was a hurricane-like thunderstorm during the previous argument outside and he failed to see a single red flag.

Okay. I think there are too many issues here to have oral argument on all of them. This is the motion -- the motions to compel arbitration filed by the respective defendants. And, moreover, the fact that I promised to take my

wife ballroom dancing tonight does enter into the court's consideration. So, what I think makes sense is let me give each side a half-hour. So the two defendants can decide right now among themselves whether they want to do a fifteen and fifteen or any other way. Plaintiff will then have a half-hour to respond. And I will give each side maybe a five-minute rebuttal and a five-minute surrebuttal. And you should all be aware that I've very, very carefully read the papers here and I -- for which I'm very grateful to counsel for. So you don't have to feel you have to repeat everything that was in your papers. It's all before me.

So, with that introduction how do defendants want to divide it?

MR. BRODSKY: If you're willing, it would be helpful if you identified some of the core issues.

THE COURT: I will identify -- these aren't the only issues by any means but first -- well let me say -- here are all the issues and I'll tell you where I think I need argument.

The first is the choice of law issue. Frankly, I don't think I need argument on that but that is an issue.

Second is whether plaintiff actually did not enter into an agreement with Uber to arbitrate either because he was on insufficient notice or there were other, if you will, technical defects in the way the contract was presented, things of that nature. And there I do have a kind of factual

question, among other things, which is exactly what did the notice -- when you became an Uber rider, and there's that little notice at the bottom about you agree to the terms and conditions, what font was that in? How did it appear, for example, on a telephone, iPad -- a telephone, computer or whatever, things of that kind of technical nature.

There's a question that relates to that and to several of these issues, whether these issues are for the court or for the arbitrator. I don't think I need argument on that, which is not to say that's an unimportant issue just I feel it's been fully briefed.

Then there's the issue of whether, assuming plaintiff did enter into such an agreement, it was enforceable.

Then there's the issue of whether if the agreement was otherwise enforceable, either Mr. Kalanick -- how does he pronounce his name?

MR. SKINNER: Judge, it's Kalanick. I always think of California.

THE COURT: Kalanick and/or Uber waived the right to enforce it. And there, one thing I'm interested in hearing about is whether Mr. Kalanick expressly waived his right to arbitration in a manner that constitutes judicial estoppel.

Then, a fifth issue is whether Mr. Kalanick, as a nonsignatory to the Uber user agreement, can enforce the arbitration clause. There I think you've -- both sides have

briefed it pretty fully.

Next, whether assuming Mr. Kalanick either can't compel arbitration or has waived arbitration or whatever, the Court should also deny Uber's motion to compel arbitration or conversely should stay the suit against Mr. Kalanick while the Uber suit goes forward to arbitration. And an issue -- that's an issue generally I want to hear a little bit more on. But a subordinate issue which I don't think was briefed is whether the Court in such a circumstance would have the power to place a time limit on the arbitration.

So, believe it or not those are not all the issues but those -- I think that's a fair summary of some of the main issues here and the ones -- I tried to indicate the ones that I might have more interest in. Okay.

MR. SKINNER: Your Honor, I think we're just going to split our time fifteen and fifteen.

THE COURT: Okay.

MR. SKINNER: If one of us finishes a little early or something, sobeit.

THE COURT: So it's just 6 o'clock so we can start now. So this is defendant's motion. So you go first.

MR. SKINNER: One moment, your Honor. Given the way your Honor ordered those it may make sense for us to --

(Counsel confer)

MR. BRODSKY: Uber will start first, your Honor, to

address the initial issue of whether the plaintiff actually did or did not agree to the --

THE COURT: You might want to come up to the rostrum.

MR. BRODSKY: I thought what might be helpful, your Honor, handing out some slides which we have copies of that directly address this issue.

So, moving beyond the fundamental issue of whether or not -- if you start, your Honor, which is we would ask you to start with what appears to be undisputed to us, paragraph 28 and 29 of the plaintiff's amended complaint, which is basically an admission that if you create an Uber account you agree to the terms and conditions. And from our perspective, in the specific words on paragraph 29, "To become an Uber accountholder an individual must first agree to Uber's terms and conditions and privacy policy."

(Continued on next page)

MR. BRODSKY: It appears to be a very clear, unambiguous concession that there's an understanding that if you are going to sign up an Uber account, you're agreeing to those terms and conditions.

THE COURT: Just on that, forgive me. I'm looking at your first slide.

MR. BRODSKY: Yes, your Honor.

THE COURT: Although I think this is, and we'll get to this in a second, larger than you would see if you were on a phone. But, in any event, what you see is a request for credit card number and so forth. And then it says at the bottom, by creating an Uber account, you agree to the terms and service and privacy policy. And the terms of service and privacy policy are in blue suggesting that if you hit it, it's a link.

MR. BRODSKY: It's a hyperlink, correct.

THE COURT: So this may or may not make a difference, but that's different from the common situation where you are forced to go to a link and then say I agree or do not agree and affirmatively show your acceptance. Here it's, if you will, an implicit agreement, yes?

MR. BRODSKY: Well, I wouldn't use the word implicit, your Honor. Certainly it is not an "I agree," but it is quite comparable. And the reason I say that, your Honor, is if you compare it to the recent decision in *Cullinane* by Judge Woodlock in the District of Massachusetts, which is on slide 3,

slide 2 and 3 of our PowerPoint, it's quite comparable. It's obviously quite comparable to that because that's another example from Uber.

It's comparable to Judge Holwell's decision on slide 5 which is in the *Fteja v. Facebook* case where Judge Holwell in an excellent thorough analysis was looking at a forum selection clause and he went through all the history, including the *Specht* case which is from the Second Circuit. And he looked at this. And this is from the actual case, the Facebook screen. And he found there that when they hit "sign up," that was clear and unambiguous.

And then if you compare it to *Nicosia v. Amazon.com*, which is an Eastern District of New York case, on slide 6, which is an Amazon.com case and a disclosure, we feel it's quite comparable.

THE COURT: So first a couple things about that.

First, most of those cases are applying the laws of states other than California. If California law applies, then it may not be quite the same standard that the courts in those cases were applying. For example, in *Cullinane*, the court was applying Massachusetts law.

Secondly, in *Cullinane*, and as shown by your slide, the words "by creating an Uber account you agree to the," which are of course the critical words, are quite prominent.

I had my law clerk play out what, if you were on a

standard home computer, what the words that correspond to the slide that's your first slide on page 1 would look like. Most of the words are in 12-point and 10-point font. But the critical words, "by creating an Uber account you agree to the," are in 6-point font, which makes them perhaps if not illegible certainly far from prominent. So what about that?

MR. BRODSKY: Well, I'm not sure about the font size and so I don't --

THE COURT: We could have an evidentiary hearing on that.

MR. BRODSKY: We could.

THE COURT: But just for today's purposes, assume it's six.

MR. BRODSKY: Here's why I think it's conspicuous and here's why I think it meets the reasonably prudent person on equal notice. It's a single screen. It's far more simple and straightforward and less buried than if you compare it to slides 5 and 6 in the *Facebook* case and the *Amazon* case, the *Fteja* case and *Nicosia* case where you have to really, really look for it.

The terms of service and the privacy policy are in bold. They're underlined. They're in hyperlinked in blue and very, very clear. It's on one screen. You don't have to scroll down and look for it, unlike the *Specht* case. It lacks clutter. It's conspicuous. It's very close to "register."

And I think the reasonably prudent person who's signing up and registering, they first go to a first page where you enter your name and email address and mobile number and password and then you go to this page and you enter your credit card information. The reasonably prudent person who's signing up this way, entering their credit card and very little information and sees "register," directly right underneath "register," not very far away, in very clear language, you agree to these terms of service by creating an Uber account.

And so under Second Circuit case law -- which is the leader. I know you talked about choice of law provision. Judge Woodlock followed Second Circuit case law. There are courts in California that look to Second Circuit case law and the Southern District of New York because the Second Circuit and the Southern District of New York, like in other areas, has been leading the way. If you look at the lesson learned from the *Specht* case --

THE COURT: You'll do anything to win a case.

MR. BRODSKY: I just tell the truth, your Honor.

If you look at the *Specht* case, which is a case in which they struck it down and they said it was not reasonable inquiry notice, that case is very interesting because the plaintiffs were downloading Netscape smart download, which if you wanted to find the terms of service, you have to scroll down and it wasn't on the same page. And once you downloaded

it, it would electronically track you any time you downloaded information from the internet. So that's sort of a big brother kind of approach and the Court struck it down by saying very critical things, which Judge Holwell distinguished when looking at *Fteja v. Facebook*.

THE COURT: What about the fact that the words "terms of service and privacy policy," which are in larger and more prominent type, to the everyday person would not suggest anything about giving up your right to go to court and agreeing to arbitration. Privacy policy clearly would not. And terms of service sounds like to the everyday person, you know, here's what we're going to provide in terms of our services and what we're not going to provide. But there's no suggestion in those terms, is there, that what we're talking about here are terms of what will happen if you and we get into a dispute.

MR. BRODSKY: Terms of service seems to be the consistent approach time after time by people who are using click wrap or hybrid click wrap notices. It's what's used in Amazon. It's what's used in Facebook that have been approved by courts. Courts time after time have approved those terms. The reasonably prudent person who uses the internet knows that times of service means something and that's what they mean. They govern your use of, in this case, the service or the application. And it would be far different and something different than any other case if your Honor found that it

shouldn't be terms of service.

And in terms of the hyperlink, that you have to go to a hyperlink, that's the equivalent, the 21st century equivalent of the *Sun Lines* case which Judge Holwell talked about when there was promotional material talking about a cruise line ticket and people who bought the cruise line ticket before seeing it agreed to those terms as soon as they bought it. If you had to flip to find the terms of service of a cruise line ticket before buying it, you'd have to visit the office and turn over the ticket.

Here it's even better. It's the equivalent of turning over the ticket, but you can click on that before agreeing, before registering.

THE COURT: You are right that the case law -- and this is part of the questions I have for your adversary -- I think is largely supportive of your position in that regard. But much of it is not binding on this Court and looking at it sort of with a fresh eye, so to speak, we start with what is a contract with the agent. Everyone agrees that's what's involved here. We start with a legalistic document that even if someone reads, the everyday citizen may not understand. And we start with something that -- and here I think it is different under computerization than previously -- we start with something that realistically the overwhelming majority of people are not going to read.

That doesn't mean the company doesn't have the right to protect itself and impose terms of service and so forth. It shouldn't be in the position of just saying, well, because you didn't read it, you get to violate any contractual condition you've at least nominally agreed to.

But it does mean perhaps and according to some of the cases -- and a lot of these are in California -- that if there's something really fundamental that's being taken away from you, that according to some California courts, it becomes unconscionable. Even short of that, it maybe has to be brought to your attention with a greater prominence than is done here.

Now, once you get to the terms of service, there is a considerable prominence to the arbitration agreement. So that's why I'm focusing on whether you're even on notice that anything like that you're agreeing to when the words of "agreement" are very small and the words that are slightly larger are simply "terms of service and privacy policy."

Would you say, for example, if Uber had in their provision that said in order to protect against the possibility that we will be held responsible for conversations that just occur between you and your driver, you hereby agree that you giver up all First Amendment rights that you otherwise might have under the Constitution?

MR. BRODSKY: Well, that's not what --

THE COURT: No, it's a much more extreme situation.

But my point is it can't be that everything you otherwise are entitled to and waive is okay just because it's attached to one of these contracts of adhesion, can it?

MR. BRODSKY: Well, look, what the law says if you have -- if there's an agreement and we believe that this is a reasonably prudent person once they click register has agreed to these terms -- and, again, we believe the plaintiffs have conceded that. But once there's an agreement, in terms of unconscionability, if you read the arbitration provision and *Rent-a-Center* and the Supreme Court is very clear, that determination about whether or not it's unconscionable or not is a decision that's decided by the arbitrator and it's a particular decision with respect to each individual who clicked on register.

But the Supreme Court seems to me to be very, very clear and Judge Woodlock, it may not have been his personal preference when he explains what the law was, but the law is clear there is a strong presumption in favor of arbitration. There's a strong presumption if there's clarity in terms of the terms of service and there's -- and it's not buried somewhere and it's not on a different screen and you don't have to go roaming around for it and you have to click something as opposed to browsing, then you are -- it is a reflection that you've reached an agreement.

And then if you go to the terms of service and you

look at the actual agreement, it's actually in fairly good plain English. I think you'd give them an A in legal writing class for plain English. And I think you'd find --

THE COURT: Which means they'll never make it in the legal profession.

MR. BRODSKY: Maybe it's not interesting enough. But it may be that people don't click on the terms of service. It may just be that the way society works is nobody does. It may just be the way society is nobody reads the Constitution today. Nobody reads the First Amendment. You know, nobody goes to school anymore and actually reads a book. It may just be the way our society is.

But the law says that if you've provided the terms of service, you can clearly find it and you click on register or sign up in the case of Facebook, then you've agreed to the terms.

THE COURT: Let me ask you a slightly different question. You said that whether or not the contract is unconscionable is an issue for the arbitrator. But the issue of whether Mr. Meyer has even entered into an agreement is for the Court, yes?

MR. BRODSKY: Formation, the Court must find that there's -- that Mr. Meyer did enter into an agreement. Now, we would -- our view is that paragraph 28 and 29, you can stop at paragraphs 28 and 29 of the amended complaint. Their

concession that he did click on register --

THE COURT: I understand you're saying they conceded. I just want to make sure I have your position. Your position is that once the contract has been agreed to, then issues about unconscionability, any of the other issues under that are all for the arbitrator.

MR. BRODSKY: Yes, your Honor.

THE COURT: But formation of the contract itself is for the Court.

MR. BRODSKY: Yes. I would point out respectfully that the plaintiff has not raised unconscionability.

THE COURT: I agree. That was going to be my first question to them and now you've taken away my thunder, but I think that's correct. They don't seem to have raised unconscionability.

MR. BRODSKY: And I think that the case law, thankfully, for us is clear in terms of this is not a browser app. This is not like I went on Yankees.com, the official Yankees website. I'm sure you've been on there, your Honor. They have roster --

THE COURT: You didn't want to look at a real baseball team?

MR. BRODSKY: Where would I find that?

THE COURT: Well, my clerks will tell me it's on Mets.com.

MR. BRODSKY: They may be wrong, respectfully.

If you go to that website and you see the roster and the news, you can scroll and look for all that. Try to find the terms. If the terms of use, you have to scroll through many pages. You find it in the finest points and you have to click on it and that's a browse wrap.

This is very, very different. When you hit that register button, you are clicking on something and agreeing to the terms and it says by agreeing to creating an Uber account, and that is what you do when you register, you're creating an Uber account. The reasonably prudent person when they get to this, they know they're creating an Uber account; therefore, they're agreeing to the terms of service.

THE COURT: Let me ask you and I apologize because I'm interrupting you and time is going away, but in a question that I don't think the parties address, assuming for the sake of argument that I were to find that Mr. Meyer, that Uber had a right to compel arbitration here but Mr. Kalanick did not and so I were to stay the case as to him while it went forward with arbitration as to Uber, is there anything that would prevent me from saying to the arbitration panel you must decide this case within six months or nine months or something like that?

MR. BRODSKY: I know of nothing that would preclude you from doing it. I don't know of precedent, but I don't know of any reason why the Court could not do that. Arbitration is

supposed to be faster.

THE COURT: That's what they say.

MR. BRODSKY: That is what they say. And often it's finding an available arbitrator that is the most difficult challenge for people because they're very busy, or so I'm told, and then the arbitrator often acts quickly and expeditiously. So I don't know of a reason why your Honor couldn't impose that.

THE COURT: I'm going to, because we've now used up almost 25 minutes, I want to hear from your colleagues or at least a short opportunity.

MR. BRODSKY: Thank you, your Honor.

MR. SKINNER: Thank you, your Honor. Hearing your questions, it sounds like I may be swimming upstream.

THE COURT: No, no. There's so many interesting issues here, it's going to take me a while to get you a decision because there are so many interesting issues.

But I guess I was struck by the fact that Mr. Kalanick -- yes, I'll get it right one of these days -- seemingly waived arbitration in his brief on the motion to dismiss, he stated, "although Mr. Kalanick does not seek to compel arbitration here, arbitration would be mandated for the reasons explained below if Mr. Kalanick sought to enforce the arbitration provision of the user agreement. Mr. Kalanick does not waive and expressly reserves his right to move to compel

arbitration in other cases arising under the user agreement." And I relied on that in a decision I wrote in the motion to dismiss.

So why isn't that an express binding judicially estoppable waiver of arbitration so far as Mr. Kalanick is concerned?

MR. SKINNER: Well, your Honor, I can tell you what the intent was with the footnote and I think what we're really talking about is what is meant by the word "here." We had been intending with the footnote primarily to be communicating to others who might be saying oh, free game on the CEO, he's not going to be seeking to enforce the arbitration agreement. We intended to communicate to others don't think this is a green light to sue the CEO, our client.

When we said "here," we, and perhaps it could have been clear -- and I'm not going to say perhaps. I will say it could have been clearer -- but we were referring to the motion to dismiss, that we were not doing here at this stage in the litigation. And the reason for that was and what was important to us at that point is that we address what we thought were compelling 12(b)(6) arguments that the plaintiff failed to state a claim upon which relief may be granted, but that we also believed that even if we lost that, the plaintiff had waived his right to seek a class action in the litigation.

Now, your Honor disagreed with both those arguments.

You rejected the second part, the class action waiver, in a footnote, and then we moved for reconsideration. And on the same day that we filed our motion for reconsideration, we filed our answer. And in our answer we asserted an affirmative defense that we believed that we could compel arbitration.

Now, the Second Circuit has made clear that really the first opportunity in a case where you can have an express waiver is in the answer. And we didn't waive in the answer. To the contrary, we made absolutely clear that we were reserving our right to seek arbitration.

And then in the motion for reconsideration we asked your Honor to reconsider the ruling with respect to the class action waiver and your Honor did and told us no, I got it right the first time. These two things are bound together in the arbitration clause and you can't effectuate the class action waiver outside of arbitration.

So at that point in time we wanted the benefit of the class action waiver, which we ultimately determined to be an important thing for us, but we decided we had to move to compel arbitration, which is what we did.

So the question is --

THE COURT: Well, I agree with you there may be a question as to what was meant by "here." But I just want to make sure I understand your legal position. Supposing you come into court in my hypothetical, this is more extreme than

anything presented by this case, and you say to the judge, your Honor, we're about to bring a motion to dismiss. As you know, though, there's an arbitration clause. We think we're entitled to arbitration, but we have decided for the purposes of this case -- we don't want to waive in any other case -- but for the purposes of this case, we are prepared to waive totally forever our arbitration right. And the judge says great. Now I can go ahead and decide the motion to dismiss. And then after he or she decides the motion to dismiss contrary to the way you were hoping it would come out, you come back and say oh, no, we want arbitration.

Is it your position that you are not estopped from coming back and changing your position? It's different from -- there's lots of cases that say where there's kind of a circumstantial suggestion of waiver, it's never too late or at least has to be much, much later in the case to come back. I'm talking about where there's, in my hypothetical, an express explicit unconditional unambiguous waiver. At that point are you saying you can still come back?

MR. SKINNER: No.

THE COURT: Okay. So your position essentially is this is ambiguous because of the term "here."

MR. SKINNER: It's ambiguous. The Supreme Court has made clear that any doubts should be resolved in favor of arbitration. The cases that plaintiffs cites -- *Mid-Atlantic*

International, *Apollo Theater*, *Gilmore* -- these are all cases where there were the equivalents of the express waiver that your Honor is referring to at early stages in the proceeding.

And it happens all the time. The filing of a motion to dismiss does not waive your right to seek arbitration if you lose the motion to dismiss. That happens routinely. And it's viewed as some benefit by the courts that the motion to dismiss may educate the plaintiffs as to potential weaknesses in their case before it goes to arbitration.

Our position here is simply, as you know, that this footnote at the end of our brief was not a clear and unambiguous waiver of our right for this case.

THE COURT: And let me ask you one other question. Assuming for the sake of argument that I were to decide you hadn't waived, is the right remedy to put you on hold while we send Uber to arbitration or do you say there's some other approach the Court then should take?

MR. SKINNER: No, I think that would be the right remedy. We haven't formally asked your Honor to do that. If that's the outcome, I can tell you we will be doing that. And I think that is a remedy under Section 3 of the FAA. It permits a nonsignatory to an arbitration agreement to request a stay of litigation if the issue involved in such suit is referable to arbitration.

Obviously, we can brief that more fully. But I think

the stay under the FAA is automatic. And I frankly don't know the answer to your Honor's question as to whether the Court has the authority to put a time limit on the arbitrators. I just don't know that off the top of my head.

THE COURT: The reason that at least occurs to me is although one of the main original benefits of arbitration was speed and efficiency, and the sad truth is many arbitrations now go on for years and years, and since ultimately a case before this court under my hypothetical would be held up by the fact of a parallel case going on before the arbitrator, I would want to make sure that the arbitrator acted expeditiously.

I mean I could do it, I suppose, by saying take as long as you want, Mr. Arbitrator, but if you're not finished in nine months, we're going forward with the case against Mr. Kalanick. But that seems like a less desirable way to approach it than just simply saying the arbitrator is hereby directed to complete its proceedings by date X, if I have that power. I don't know if I do.

MR. SKINNER: If you do. As I said, I don't know the answer. I do know arbitrations are private proceedings. The parties can reach agreements as to how those proceedings are going to go forward, so perhaps there is something that could be done.

I also know that the parties here all I think jointly sought to have these issues resolved expeditiously. So it's

not like a transferal is for purposes of undue delay or anything like that.

I know from the perspective of my client this class action waiver is an important part of the case. And your Honor told us that we were mistaken as to our reading of the contract and that the class action waiver has to be implemented in the context of arbitration, which is why arbitration is now what we seek.

THE COURT: All right. So I'm going to unfortunately have to cut you off now and we'll heard from plaintiff's counsel. And since defendants had 35 minutes, you'll have 35 minutes as well.

MR. FELDMAN: Good evening, your Honor. Thank you. Brian Feldman for plaintiff. Let me start where Mr. Skinner left off. There has been an express waiver in this case. To the extent he argues and defendant Kalanick argues that "here" was ambiguous, which I think is a stretch, that was clarified by the last sentence of that same footnote which appeared in both versions of the memorandum of law in support of the motion to dismiss which delineated that their waiver extended to this case versus, quote, other cases, meaning what it says, that 15 CV 9796 --

THE COURT: Your point, I take it, is if they were only waiving it as to the motion to dismiss, they would have said that in that clarification, and instead they just

distinguish it from all other cases across the board, which by negative inference means they were waiving it across the board in the first sentence.

MR. FELDMAN: Precisely, your Honor. In fact, in other cases they've made that exactly that sort of reservation. I would refer the Court to *Ricardo Del Rio v. Uber Technologies*. It's a case in the Northern District of California, case No. 15 Civil 3667. Document 16 is a brief submitted by defendant Uber and footnote 1 says, that's on page 1, "Defendants do not by this motion seek to compel arbitration of the plaintiff's particular cause of action at this time and defendants reserve all rights to do so."

That's the language lawyers use to reserve the right to raise a defense later in the case. And we know that not only because of what Uber has said in other cases when they intended to do precisely this, but what Uber did in this very case -- excuse me -- defendant Kalanick did in this case. I'll tell you why I can talk about the two of them together.

But defendant Kalanick in this case was confronted in a single paragraph of the user agreement with three different clauses -- the ability to arbitrate, the ability to get a class action waiver, and the ability to get a jury waiver. And he made a different decision about what to do with each of those purported rights.

And I'll get to why there's no contract in a minute,

but assuming arguendo there was. With respect to the class waiver, of course, they raise that at the outset and that's the first choice you could make. They did that and they were unsuccessful.

The second choice one could make is to hold off on raising the defense and reserve it for later. You could do that silently by not saying a thing or quite noisily. And Mr. Skinner stood up at the first conference on January 6 and with respect to the jury waiver he was clear to the Court, "I know the plaintiff is seeking a jury trial. I just want to note defendant reserves his right to oppose that request."

They did something very different, obviously, with the purported right to arbitrate which is to tell this Court over and over again in motion to dismiss briefing that he did not seek to compel arbitration here. So the words speak for themselves. There is not ambiguity. Regardless of what was intended, that is not what got into the briefing before this Court.

A very important point here, your Honor, is that defendant Uber is also bound by that express waiver. Uber is bound because Uber was part of the legal team making this motion to dismiss. How do we know that? Your Honor --

THE COURT: But the point is you chose to only sue Kalanick, and you were suing him in connection with his activities with Uber. So, of course, as the CEO of Uber, he's

going to be intimately involved with their counsel, as well as his own, in figuring out strategy and all like that. But that doesn't mean, does it, that Uber is then bound. You've made the choice in your complaint to separate the two. Why shouldn't that estop you from saying, oh, they're really one for purposes of this waiver?

MR. FELDMAN: Your Honor, it depends on whether there's actually a claim in this case against Uber, which is the last argument in our brief. But to the extent Uber and Mr. Kalanick's position appears to be that there's been a claim in this case, there's always been a claim in this case, and for purposes of the Federal Arbitration Act, it's always been an arbitrable issue, which is the position I believe they are taking, then that issue and that right was the right that Uber waived at the very outset.

And we know that Uber was controlling or participating in the control of the litigation for at least four reasons. One was that the in-house director of litigation, I believe we heard today, Lindsey Haswell, appeared formally in this courtroom at defense counsel's bench on behalf of Mr. Kalanick and she entered her appearance as Uber Technologies for Mr. Kalanick. There's no more formal way to show evidence that you are participating in the control of the litigation strategy.

The Court also notes secondly that Uber was consulted

at this phase of the litigation. We ended up getting a lot more information about that than we normally would because of the Ergo investigation. Even today it came out that Mr. White and Mr. Skinner were contacts and in touch at this phase of the litigation, which is the same time which Mr. Skinner was able to just pick up the phone and talk to Mr. White in house about the Ergo issues. I believe that if you asked defense counsel they won't deny for Uber that Uber was participating and knew about this motion and the strategy.

In any event, they certainly saw the first motion in support of the dismissal, which included in footnote 9 this very waiver, and it reappeared in the second motion which Ms. Haswell appeared on.

THE COURT: Let me pursue that a little bit. So supposing you had named both Uber and Mr. Kalanick and they appeared by separate counsel, but counsel announced at the beginning we have a joint defense for purposes of attorney-client privilege or whatever, and then in my hypothetical Mr. Kalanick says we waive arbitration and I'll take it first Uber stands up and says through their counsel we do not waive. They're not then bound, are they?

MR. FELDMAN: If they preserve their right at that time, no, they would be able.

THE COURT: Now let's take the next possibility in my hypothetical. Mr. Kalanick's counsel in my hypothetical stands

up and says we waive arbitration and Uber says nothing. Have they waived?

MR. FELDMAN: Your Honor, let me try to answer the question as best I can because it's bound up in what the actual posture of the case is and what the basis for Uber's motion is, which really is not articulated in their motion papers.

THE COURT: What I'm getting at is a waiver has to be a knowing and voluntary relinquishment of a known right, and there's no question that there was close cooperation between Uber and Mr. Kalanick at all stages of this litigation. It could hardly be otherwise. But I don't see that it necessarily follows that when Mr. Kalanick announces he's waiving arbitration, that is somehow binding on Uber just because Uber has involvement in his legal strategy, if you will.

MR. FELDMAN: In your hypothetical, your Honor, your first hypothetical, there were claims asserted. Under Rule 18, the plaintiff would have chosen to assert claims against both Mr. Kalanick and Uber. And the basis for the motion to arbitrate made at that time, motion to compel, would have been those claims.

In this particular case, under Rule 18, plaintiff is still free to chose his claims, has not chosen claims against Uber. Uber is not arguing to the Court, I don't believe, that plaintiff is compelled to raise claims against Uber and that because of those claims, Uber is seeking to compel arbitration.

It's an important distinction.

Uber is arguing, as far as I can tell, that the issue under the FAA first came up in the suit against Mr. Kalanick, that the reason Uber can compel arbitration of the claim against Mr. Kalanick is because it's the same issue. And that issue was raised in our complaint at the very first instance against Mr. Kalanick. And I would just cite because we didn't have this point in a surreply that this control concept --

THE COURT: You're saying, actually going back to my point about the bifurcation, you're saying there's nothing to send to an arbitrator in terms of this lawsuit. It's still a lawsuit only against Mr. Kalanick. Uber is there as a necessary party, but that's not the same as saying that the claims of the plaintiff are claims against Uber. At least arguably the claims of the plaintiff are only against Mr. Kalanick. They so in effect intertwine with the conduct of Uber's business that Uber becomes a necessary party, as I've already held. But that doesn't mean that there's a lawsuit against Uber that gets referred to an arbitrator. So it's really only Mr. Kalanick, you're saying, as to whom the ultimate waiver issue applies.

MR. FELDMAN: That's correct, your Honor, that's correct. And I don't know if that -- I can't tell from the reply brief at page 19, Uber's reply brief, it does not appear they contest the notion that a party need not assert a claim

against a necessary party. As we explained in our brief with examples, it happens all the time.

In fact, in cases cited in our brief, courts have held it's fine to have a necessary party against whom the other party could never raise a claim and it does happen because Rule 18 operates independently from Rule 19. Rule 18 allows a plaintiff to choose his case. Rule 19 requires that plaintiff or the court to join the necessary party to the case. An advisory committee note from 1966 to Rule 18 says that they operate independently.

So in that context we do come back to the only claim that could be sent to arbitration -- and this is to answer the question you posed to everyone else -- isn't there. There is no claim against Uber asserted by plaintiff.

As for the concept that Uber's control waives any right they may have to compel the arbitration of the only claims in this case, I point the Court to *United States v. Montana*, a Supreme Court case from 1979, which explains that the test in an analogous collateral estoppel context for control is that a nonparty will be bound by a decision made by another party if they held a sufficient laboring oar. And that case cites the New York Court of Appeals decision in *Watts* that explains that could mean sharing in control of the litigation.

THE COURT: Of course, that's only a Supreme Court case. As I learned from your adversary Mr. Brodsky, that's not

nearly as good a citation as the Southern District of New York. But I will consider it.

MR. FELDMAN: If you care for a Second Circuit citation, I would give you *Ferris v. Cuevas*.

THE COURT: I don't know if that's better or worse.

MR. FELDMAN: I don't need to venture it. That's at 118 F.3d 122, your Honor, that says this concept attaches to those who control litigation even from the shadows.

So Uber is bound by this waiver. I have limited time so I will address the implied waiver arguments if you'd like. If not, I will move on to the formation questions, your Honor.

THE COURT: Yes, go ahead.

MR. FELDMAN: So with respect to formation, there are three key points I would like to address. The first is what the Second Circuit case law really means right now because there's a good deal of guidance that defendants are ignoring in their presentation.

The second is the suggestion, respectfully, that Judge Weinstein from the Eastern District had it right in *Berkson* and there doesn't seem to be any argument that under -- if you follow Judge Weinstein, you get to the result that we are arguing.

And the third is to talk about the *Cullinane* decision. And I guess a fourth, which I anticipate from you, is what about paragraph 29. Maybe I'll start there, your Honor.

On paragraph 29, it is not a concession. It is not even a paragraph that mentions the plaintiff. It's a paragraph that does not specify a time. It does not in any terms say that the plaintiff agreed to arbitrate this case or agreed to the terms of service. It does not say that at the time the plaintiff got started using Uber that the world at that time was a world in which you needed to agree to the terms of service. It is a very vague allegation because it really doesn't matter for our complaint, as we've been over in the equitable estoppel arena. It's not important to the complaint because our claims don't depend on anything in the user agreement.

To the extent the Court is concerned that paragraph 29 could operate as a stipulation as Uber and Mr. Kalanick suggest, there is a rule that deals with that and it's Federal Rule of Civil Procedure 15(a)(2) which provides that leave shall freely be given by this Court. We're happy to amend. We can stipulate on the record that we can amend. We can strike out paragraph 29. It really has no meaning for our complaint.

Likewise, the next subdivision of Rule 15 which allows the parties even at trial to conform the pleadings to the evidence certainly suggests that that's what we should do here when all of this evidence about formation came into this case through the affirmative defense by defendants to move to compel.

THE COURT: Let me ask you this. I totally agree with you that given the free leave to amend, that assuming for the sake of argument that Paragraph 29 is some sort of concession or stipulation or whatever, at this stage of the case you're more than free to amend and change it or eliminate it. Why isn't that equally true of the alleged waiver of arbitration, which is a footnote, no less. It's not even a whole paragraph of a complaint. It's a footnote in a brief. And let's assume it's unequivocal for the issue we were arguing a minute ago. But, you know, this is still a young litigation. Why shouldn't that -- sorry about that, Judge. We really didn't mean to, and the policy in favor of arbitration should allow us to withdraw that concession. What about that?

MR. FELDMAN: The answer is simple. There are different standards. Rule 15 allows parties to amend their pleadings -- and in this case particularly apt because the amendment we have proposed follows the facts and the evidence rather than a strategic decision. The Second Circuit's case in *Gilmore*, which is the leading express waiver case, which just as an aside is a case in which the party moved to compel arbitration, withdrew their motion to compel -- I believe that was pre-answer -- and, nevertheless, was held to have expressly waived the right to arbitrate. It wasn't even contested by the time it got up to the Second Circuit. This is a much more drastic example than the leading case in *Gilmore*.

But *Gilmore* says that when a party is making an important strategic decision like that they will be held to it. The language the court uses in *Gilmore* is a party is not free to play fast and loose with the courts. That was a strategic decision they made presumably in order to get a ruling on the merits that they could then use if they won, and presumably they made that strategic decision in order to avoid a question from your Honor as to why we didn't dispose of this case on a motion to compel or to avoid the thorny formation issues they have.

So turning to the rest of the formation argument, the Second Circuit has helpfully provided a test, guidance, and a policy rationale to use to look at this question of formation and the test was by then Judge Sotomayor in the *Specht v. Netscape* case where she specifically says this is a concern, formation, when products are free on the internet for downloading. And that's at page 32 of that opinion. The test is two-fold. There must be reasonably conspicuous notice of the existence of contract terms and, second, there must be unambiguous manifestation of assent. So that's the two-part test -- conspicuous notice of contract and unambiguous manifestation of assent.

The guidance comes in Judge Leval's decision in the *Register.com* case where Judge Leval says "no doubt in many circumstances" that clicking on an I agree box, which I can

show your Honor what that looks like, very different from here, to accept terms is "essential to the formation of a contract." So the presumption stated by Judge Leval is that no doubt in many circumstances that's exactly what is needed. Of course, that didn't happen here.

And the explanation comes in *Schnabel v. Trilegiant*, the Second Circuit's latest statement on this issue, from 2012. There Judge Sack talked about outside of the internet or online app contexts, this *Lucent* standard for acceptance, including shrink-wrap and the often cited case that "cashiers cannot be expected to read legal documents to customers before ringing them up," which comes from the *Gateway* case in the Seventh Circuit.

And Judge Sack explained that it's different online and that, quote, there's no policy rationale that would justify those *Lucent* standards. He said there are, quote, a plethora of other ways such as requiring express acknowledgment of receipt of terms to meet the minimum requirements.

So we have all this guidance from the Second Circuit which applies here. What Uber could have done and in fact has done in other contexts is provide the express acknowledgment that the Second Circuit referenced in *Schnabel* with the I agree box that the *Registered.com* court talked about.

And if I may approach the bench with -- I don't have a slide, but I have a sample. This is a copy, your Honor, of the

Uber page for drivers. And this is in the case Uber cites, *Mohammed v. Uber*, you can see the case up at the top. Here's the screen. It's a picture, which is probably worth a thousand words in this context. There is conspicuous notice of a contract. It says, please confirm you've agreed... to this contract. And there is an unambiguous manifestation of assent. We would not be here if this is what they said -- yes, I agree. That's what they rely on in pages 3 and 4 in their reply brief.

If I could provide one more to your Honor, which is in the *Whitt* case by Judge Woods recently. Thank you, your Honor. This is another case that Uber relies on in its reply brief. And this case was decided just in 2015 in this very court, the Southern District of New York, so I will place great reliance on explaining it to you.

The court in this case explained that a user could not complete this website, this form, the loan terms page, without clicking the box at the bottom. So it is a small box, your Honor. What it says, click the box below. And by requiring a click, necessarily that is conspicuous. The user has to. Their eye is drawn to that box. It is also an unambiguous manifestation of assent. But it's very different from what Uber did in this case.

We have the slides from Uber and the Mi declaration. As your Honor knows, the button register is large. It's well defined. It's user friendly. It's prominent compared to the

much smaller fine print, including the smallest of all on the page, the terms of service. It's not adjacent. Counsel has said it's right below it. It's not right below it. There's a box. There's space, a line, two boxes, and more space before you get to the terms. This is not reasonably conspicuous.

And the other half of that first test, it's also not notice of a contract. And this is discussed extensively by Judge Weinstein, but the word here "terms of service," the phrase doesn't include the term agreement or the term contract. I submit that a user would not understand what that means.

The second question from the Second Circuit, is there unambiguous manifestation of assent, the answer is no. There's no requirement that the user take any action to specifically agree to that term in contrast to the two pictures I just showed you in *Mohammed* and *Whitt*. And, moreover, there's a mismatch, there's a mismatch between what that fine print says by creating an account on Uber and what the user actually does on the page, which is they hit the button register. They don't hit any button that says create an account. And that's an important distinction between the two other cases in the slide deck that are cited by Uber.

They provided us on page 5 with the *Facebook* case. In the *Facebook* case, there's a match of the language. It says by clicking sign up, and the button is "sign up." And in *Facebook*, it's also notable that that warning is immediately

below. Now I'm quoting the court in *Facebook* -- it is immediately below the button. Not so here.

The same is true on slide six, the *Nicosia v. Amazon.com* case. In that case too, as you can see, the language is "place your order" on the button. And the language of the terms of service is by placing your order you've agreed. Again, it's a match.

I'm not submitting those are perfect examples, but they're certainly much clearer than the case here. And the court in *Amazon* also noted that like *Carnival Cruise*, where the customer was told pay attention to this, the first bold language on that page says review your order. And the *Amazon.com* court said the first line of text immediately below that precaution tells customers they're agreeing to the terms. None of that is true here.

What Uber has chosen to do is clearly insufficient under *Berkson*, and I won't go through that because I don't think it's contested. And in Judge Woodlock's decision in *Cullinane*, it is by Judge Woodlock's own admission not following *Berkson* because "it's contrary to the test in Massachusetts."

Now, all the case I've cited -- *Berkson*, *Specht*, *Schnabel*, *Register.Com* -- are decided under either California or New York law. And those are the choice of law disputes we're having is which of those apply.

MR. FELDMAN: (Continuing) So those should be followed.

Your Honor, if I could, if I have time, there is an evidentiary defect as well.

THE COURT: You actually have ten minutes. Before I forget though the question I said I would put to you. Am I correct, I certainly didn't see it in the brief, you're not arguing that the waiver is unconscionable.

MR. FELDMAN: We have not made that argument, no.

THE COURT: Very good.

MR. FELDMAN: So there is an evidentiary problem as well in this case, which frankly we noticed when we received the supplemental submission in the *Cullinane* case. If you look at the declaration submitted in *Cullinane*, it's the Holden declaration, that's docket 32-1 in that case. Mr. Holden describes from personal knowledge the fact that the user, the plaintiff, actually experienced and saw the screen that's attached as Exhibit A. And I won't go through it in detail. But there is great detail in that declaration about that fact.

It's conspicuously absent from the declaration submitted here. And that is an evidentiary problem we raised to defendants and asked them about it. We have not received more evidence. They've assured us that that, in fact, is true but it's not in the record. And we are raising that objection, your Honor.

There is a similar case that is strikingly similar in layout to the Uber app where you have this -- the same two issues as this: An evidentiary defect in the declaration plus a very similar screen. And it was decided across the street, at New York State Supreme, it would be the last thing I pass up, if I may, your Honor.

This is the *Resorb Networks* case. I will pass up the declaration. And I'm going to be referring to the exhibit on page three of the declaration.

So this is *Resorb Networks v. Younow.com*. And it's report at 2016 New York Misc. LEXIS 1194 -- I should say it's not reported there but it could be found there. And the question here was whether or not on page three above paragraph eight the screen on the left provided sufficient notice under the cases we have been discussing. It looks again strikingly like what the purported Uber interface would be with a, "By signing in you agree to our terms of use below," a number of different ways you can sign in. I'd submit this is actually a much clearer version for a number of reasons we've discussed.

This screen was presented to the court along with an evidentiary problem which is the absence of or questions surrounding whether that link, in terms of use, actually connected to the correct terms of use. And the court therefore didn't ultimately reach the question whether this screen was sufficient but noted some doubts about whether it would be and

ultimately denied the motion to compel in light of primarily, admittedly, the evidentiary defect which we also have here and the screen it was presented with.

Your Honor at the end of the day, especially with the logic and rationale laid out by Judge Sack in the *Schnabel* decision, it's very easy even with a contract of adhesion to form -- excuse me, to form a contract over the internet. And Uber has done that with its drivers in the *Mohamed* case. Many vendors do that with the separate "I agree" click box. And that draws users to those terms.

What Uber has decided here is instead of using that simple, easy way to get users' attention on the terms of service, they've created a register button that obscures, as Judge Weinstein said, obscures the terms of service at the bottom of the page. That fails the test set out by Judge Sotomayor. It's not conspicuous. It's not unambiguous assent. It avoids what the *Register.com* court said would be required or be essential in many cases, which is a separate box. And as the *Schnabel* court explains, there is no pragmatic reason to do it that way. There is no policy rationale for a company to be allowed to hide a term of service at the bottom of a screen when it's very simple to add a click box or a scroll box or a number of other ways to do that. We submit that Judge Weinstein is correct, that this court should follow *Berkson* and that under *Berkson* and, more importantly, the Second Circuit

cases we've cited, there could be no contract formed here to arbitrate this case.

THE COURT: Thank you very much. That was very helpful. I will give each of the defendants five minutes. I'm sorry to cut it so short but I have time constraints as well, and I will give then plaintiff's counsel ten minutes on rebuttal and surrebuttal respectively.

MR. BRODSKY: Your Honor, the plaintiffs are simply just wrong that Uber -- Uber can compel arbitration here even though there is no claim against Uber. We laid out in our brief. We cite the cases. Uber is an aggrieved party. As your Honor had stated, essentially they have sued Uber. They just have not named Uber. The relief they seek is fundamentally about Uber's business. So their claims are against Uber. We are an aggrieved party. They're wrong to contend that an indispensable party must, under Rule 19 --

THE COURT: So I --

MR. BRODSKY: We cite cases to that effect.

THE COURT: I understand that as an abstract point. But exactly what would the arbitrator be asked to decide?

MR. BRODSKY: First of all, we would respectfully ask, your Honor, is that you compel arbitration and you also find that Mr. Kalanick and claims against Mr. Kalanick should go to arbitration.

THE COURT: I understand. For the sake of argument,

if we were in this bifurcated situation, what would -- so I'm referring to you but I'm not referring to Kalanick -- hypothetically, what is it that the arbitrator would be asked to decide.

MR. BRODSKY: The claims they have are fundamentally claims about Uber's business and those are the claims that the arbitrator will decide. Whether or not Uber's business --

THE COURT: They are claims -- some of this goes -- it's a conspiracy, an antitrust conspiracy. And so the intent of the various parties is critical. And Mr. Kalanick's intent, how would that be the subject of that arbitration?

MR. BRODSKY: Whether or not Mr. Kalanick's intent would be a subject for the arbitration, you know, as your Honor found, "Fairly read, the amended complaint alleges that Uber's scheme for setting prices as well as the terms of Uber's contracts with drivers constitute an antitrust violation." That would be resolved. They assert, "He seeks no relief whatsoever against Uber" is at odds. This is what your Honor found. "His assertion that he seeks no relief whatsoever against Uber is 'at odds with any fair reading of plaintiff's claim.'"

THE COURT: I have no question that they sought relief against Uber. But if it were only relief, the relief only comes about if the claim was established. And if the claim can -- if the claim to be established turns on Mr. Kalanick's

intent, then I'm not quite sure what the arbitrators decide.

MR. BRODSKY: Respectfully, your Honor, I think then that puts them in a box where there is no other choice that this goes to arbitration with claims against Kalanick. If they're going to sue Kalanick only and fundamentally sue Uber, Uber is now a necessary party. We believe we've established that arbitration is compelled. And, therefore, the entire case, including their claims against Kalanick, should go to arbitration despite their arguments on waiver which cannot be imputed to Uber.

THE COURT: Well if -- and I'm not saying this is where I come out at all on any of these issues. I'm still very much thinking them through.

Supposing Uber is a necessary party only in terms of relief. Assume that for the moment. Then maybe the thing to do is if Uber has the right to arbitration and Kalanick does not hypothetically, go forward with the case against Kalanick but not impose any relief until then, once liability is established, if it is, then send it to the arbitrator to determine relief.

MR. BRODSKY: Your Honor, respectfully, fundamentally at odds with what their claims are; fundamentally at odds with the case law *Hollingsworth* and *Konvalinka*.

THE COURT: If the claims are really disguised claims against Uber, which is certainly a plausible possibility, then

I see your point. If claims only involve Uber in terms of relief, then I think it's a different situation.

MR. BRODSKY: If your Honor compels arbitration then the case against Kalanick would have to be stayed, we admit for some limited period of time, but would have to be stayed.

THE COURT: All right.

MR. BRODSKY: I did want to address one thing your Honor. Mr. Cantor says that he finds interesting arguments as to why your Honor shouldn't find his paragraphs in 28 and 29 to be an admission. In 29 the same sort of rules and interpretation of the footnote that they want you to interpret with respect to Mr. Kalanick should be applied back to them.

In paragraph 29 they say, "To become an Uber accountholder an individual first must agree to Uber's terms and conditions." They never say, they never say: But I didn't. They never say me, Mr. Meyer, which is what -- I am the plaintiff here didn't agree. I was talking about "individual" abstractly having nothing to do with me.

And then what's very interesting is if you go to Mr. Cantor's own statements at the last hearing, and I'm sorry to do this but I have to. June 16, 2016 page 15 of the transcript lines 14 and 15.

"Mr. Cantor: Yes, your Honor. The plaintiff here had a contract with Uber. The contract -- that contract has an arbitration clause."

There is no getting around that admission that the plaintiff has acknowledged he had a contract with Uber and, therefore, the case should be arbitrated.

Finally, your Honor, he cites the *Specht* case but doesn't read it because if he reads the *Specht* case, everything about the *Specht* case was distinguished in Judge Holwell's decision and subsequent decisions. That case does not help him. It hurts him. That was a case where you had to browse and bury and find where the terms of service are.

The *Register.com* case is a browse rap case. Judge Leval was looking at a browse-wrap case not anything where you clicked. Here you have to click something so it's a click-wrap case or at least a hybrid click-wrap case.

The *Mohamed* case is essentially pointing to a completely different set of an agreement and saying how come you didn't have that. That's not the law. I mean you could -- they could actually ask: Why didn't you sit down every user and have them sign an agreement? Why didn't you do ten other possibilities? That's not really the law. The law is whether or not the agreement that Mr. Meyer entered into was something that a reasonably prudent person would recognize as an agreement.

What they're trying to do is distract with other examples which they think are clearer. But that's not the law. The law is that's let's not find other examples. The law is

let's apply the objective test to what he actually clicked on.

Terms of service, your Honor. If their position is that terms of service doesn't reflect a contract, then that's a revolutionary concept which you can't find anywhere in the law. I don't think any judge has found that. And that would change every corporation in America that has an internet website requiring to click, they'd all have to change, almost all, would have to change what they put on there.

And the *Cullinane* decision, finally, your Honor -- I know you're short on time -- but they said in *Berkson* that Judge Woodlock distinguished *Berkson* based on Massachusetts law. But they forget to tell you the previous sentence. Because when Judge Woodlock talked about *Berkson* and page 19 and 20 of the opinion, which I know you have, he started the paragraph by saying the plaintiffs rely heavily on Judge Weinstein's decision in *Berkson*. And then he said, he laid out the steps by Judge Weinstein. And then he said that step, however, referring to Judge Weinstein's step, which is the step saying you need substantial evidence that the user was bidding themselves more than just an offer of services or goods. That step, however, quoting Judge Woodlock, "obliquely disregards the customary contract analysis applied by the vast majority of courts." Then he says it also doesn't apply to Massachusetts. And he has a footnote which cites Southern District of New York cases. So I don't think it's fair to say *Cullinane* is

distinguishable based on Massachusetts laws.

THE COURT: Okay. Thank you very much. That was very helpful but unfortunately you've left your colleague about two minutes. But let's see how he does.

MR. BRODSKY: He was tired anyway.

MR. SKINNER: Judge, I have to object he keeps taking all of my time. This is fun.

MR. BRODSKY: It's always good to go first.

THE COURT: I will give you at least five minutes.

MR. SKINNER: I appreciate that. I actually -- I don't think I have that much to say. I will note for the record that this is Mr. Feldman, not Mr. Cantor.

THE COURT: I noticed that and --

MR. CANTOR: I'm Mr. Cantor.

MR. BRODSKY: Both handsome men. I acknowledge that.

THE COURT: It is very strange when a Brodsky can't tell a Cantor from a Feldman.

Go ahead.

MR. SKINNER: Thank you, your Honor. So I just want to respond briefly to a few of the points that Mr. Feldman made with respect to the expressed waiver.

First, it's the same point they made in their brief. They can't find an expressed waiver in the first sentence of this footnote. So they try to look to the second sentence to say, Oh, well, there's a reservation of rights here. We imply

from the second sentence what the first sentence means. But that, of course, turns the standard on its head. We have a presumption here. We know what happens when there's a tie. The tie goes to the runner in this case. The presumption goes in favor of arbitration. So you can't say that the first sentence is unclear but we know what it means by looking at the second sentence. You have to have an expressed waiver and they don't have that.

And really the same thing applies with respect to their cites to something that Uber said, not Mr. Kalanick but Uber said.

THE COURT: Wait a minute. I'm not sure I agree with the point you've just made.

It is frequent in contractual analysis that courts will find -- and also statutory analysis, that courts will find that what is an arguable ambiguity if you look at just one sentence is resolved by some subsequent sentences. Sometimes in contract analysis it's resolved by a paragraph that's five pages away. And even in statutory construction it's often resolved by sentences that come up several pages later. Here it's the very next sentence that they say resolves the ambiguity.

It may not resolve the ambiguity. That's a different question. If it doesn't resolve the ambiguity then everything else you've been arguing falls into place. But if it resolves

the ambiguity, the fact that it comes in a subsequent sentence doesn't matter, I don't think.

MR. SKINNER: Well if it's a contract for statutory interpretation, your Honor, you have to have language that is related to the same thing. Here we have a first sentence which they're saying is an expressed waiver of a right to arbitrate, one that we know that the Supreme Court says is of fundamental importance and the presumption goes in favor of arbitration. The second sentence has nothing to do with that. It's a reservation --

THE COURT: The argument, I take it, they were making was you said that the word "here" is ambiguous because it's unclear whether that means for purposes of this motion to dismiss or it means for purposes of this case.

And they say the second sentence shows that what you meant by "here" was for purposes of this case because in the second sentence you say we reserve our right in other cases to still assert our right to arbitration.

Now, whether that resolves it as clearly as they're arguing is an interesting question. I think that's the argument they're making.

The other point which Mr. Brodsky raised, and which the Court raised as well, is how can paragraph 29 of the complaint not be binding if the footnote is binding. The response was well there are rules that govern. The complaint

can be amended freely. A waiver of arbitration, it's a different story. But I don't think that's really the distinction. I think the distinction may be that the court relied on the arbitration waiver and the court did not rely on paragraph 29 of the complaint so there was judicial estoppel.

But that doesn't necessarily resolve the whole issue because you could argue that the court relied upon the waiver only for purposes of the motion to dismiss which is all you say you're waiving.

So, I'll have to sort all of that out. But I think it's a little more complicated than we've been able to get into in this very short discussion.

MR. SKINNER: I think at its core if we're going to have a waiver of arbitration it should be a clear and unequivocal waiver of arbitration.

Let's go to the case that they say is the leading case on this issue which is *Gilmore* for the Second Circuit 811 F.2d 108. Let's see what happened there. In that case first at oral argument, I'm reading from the case, counsel for Shearson conceded that Shearson would not have been entitled to move to compel arbitration of the common law claims if Gilmore had not amended its complaint.

So what happened there was you had a complaint. You had a motion to compel arbitration. You had a withdrawal of that motion. And you had everyone in the courtroom, the

defense table, the plaintiff table, the judge, everyone agreeing that that withdrawal was a waiver. And then you had a subsequent concession by defense counsel saying, no, we -- that's right, it was a waiver; what mattered here was the fact that they filed an amended complaint.

You have nothing like that here. To the contrary, you have the party that wrote the footnote saying that they're intent was never to waive for the purposes the whole case; that their intent was to explain to the court what they were doing with respect to this motion to dismiss. And we've explained why. We've now come in and asked for arbitration.

THE COURT: I don't think the intent matters. I guess you want -- you really are determined to be a witness in this case.

MR. SKINNER: Again, I don't want to conflict myself because this is so much funny. I want to be back for the next one.

And then later in the case the court says: As noted above, Shearson concedes that it waived its right to move to compel arbitration with respect to the original complaint. There is no equivalent concession here.

And despite all of that, the Second Circuit concluded that the amended complaint could have changed things sufficient that that waiver would not -- that they could have gone back against that waiver and sought arbitration.

And they said that Shearson must show that the amended complaint conceded charges that in fairness would nullify its earlier waiver and allow it to reassess its strategies, for example, that the amended complaint changed the scope of the theory, etc.

So even in that extreme example there was still the opportunity for the party who was alleged to have waived to come back and have said no. There are things that have changed here and we should be permitted to change strategy.

That's not what we've done here. We haven't changed strategy. Our strategy has been consistent. But, nevertheless, even under the case the plaintiffs rely, what we could do, what we're doing here, because of the fact that or -- the court ruled unequivocally that in order to invoke the waiver of the class, of the class action we have to do it through the arbitration context.

THE COURT: All right. I need to regretfully cut you off at this point.

Let me hear from plaintiff's counsel.

MR. FELDMAN: Thank you, your Honor.

I will be as brief as possible to address both points. With respect to the question about what's -- what would be in arbitration if Uber won on its motion to compel and Mr. Kalanick did not. It sounds like, from what I heard, that defense counsel is struggling to come up with any claims

against Uber; and that the idea, instead, is that there have been claims in this case against Mr. Kalanick. Those were the claims at the motion to dismiss stage and those claims will be pushed into arbitration. I think that's the only logical rationale if you buy their motion to compel argument. But one reason you shouldn't is because those were the very claims before this court when the defendants jointly made the decision to waive arbitration. This is the distinction I was trying to make in your Honor's first question. This is the same complaint today as it was at the time of the motion to dismiss. Nothing has changed.

The second point that I want to respond to is that if your Honor is concerned about people getting out of things they've said, go ahead, if you hold them to their concessions on the motion to compel arguments being waived, we never get to the problem about paragraph 29. So as a logical principle if everybody is held to their positions, and I've explained I think why the law wouldn't allow you to do that; but if you were, we would still come out with the motions to compel being denied.

Finally -- yes, I will say finally. Counsel for Uber said it would be extraordinary and outrageous if this court were to find that the word terms of use did not mean contract and was not understood that way and this would be semi-revolutionary. But that's exactly what Judge Weinstein

said. In fact, he went through a whole analysis of who understands what these terms mean and came to the conclusion, at page 380 of *Berkson*, that an average user wouldn't understand terms of use. At page 404 in his holding, part of the explanation for why there's not reasonably conspicuous notice of the existence of a contract, in that discussion Judge Weinstein cites the actual terms which talk about -- excuse me, actual language which points to terms of use and says that's insufficient, a user wouldn't understand that. The way I read that decision, and I would submit it is the proper way, is that he's tying those two themes together; otherwise, why would he have gone through the discussion about the uncertainty of the word terms of use.

THE COURT: And we all know that Judge Weinstein is a cautious and conservative judge and this could hardly be revolutionary. I'm sorry.

Anything else?

MR. FELDMAN: I'd like to go over, your Honor, if I could. The defendants try to divorce the first and second sentence within a footnote. I submit that's improper even under defense counsel's own explanation for why it was in there -- and this is something I didn't know until earlier this evening -- but defense counsel has submitted, if I heard him correctly, that the purpose, the unnamed purpose for making this representation to the court, which is a waiver, but the

purpose was to send a warning to people in other cases that there will not be an opportunity to sue Mr. Kalanick and not face a motion to compel. That's entirely consistent with what that last sentence says and what we submit is the only way to read that waiver.

The last point, your Honor, is it goes to the judicial estoppel argument that you've made. That principle that it would be unfair at this point for the defendants to move to compel is exactly what we've briefed in the implied waiver section of our briefs. And the prejudice comes down to the fact that the defendants have received discovery in this case that they would not receive in arbitration; that there's been incredible expense. Not only did your Honor rely on the waiver they made, but we did. Plaintiff did. We wouldn't have five firms on plaintiff's side litigating this case to the hilt if that waiver had not been made.

For those and the other reasons in our brief we respectfully submit that the Court should deny the motions to compel.

THE COURT: All right. Well I want to thank all counsel for what was really terrific arguments throughout the afternoon and early evening. You've left a lot for me to decide so I'm not going to get you the decisions that quickly. But I certainly understand nevertheless the need for some expedition with respect to both of these motions. So I will

give it very high priority and hopefully get you decisions reasonably soon and I thank you again for all your many helpful arguments.

MR. BRODSKY: Your Honor, as we leave, I just wanted to note with respect to the letter that we're going to be submitting, we've talked to counsel for plaintiff. They're going to provide us with a sum total of the amount that we would have to pay. Then we have an agreement that if -- and if we get Uber's approval and we would make this offer, it would be contingent on them providing us with time sheets and detail which we would want to verify as the costs being reasonable.

THE COURT: That makes perfect sense.

MR. BRIODY: That's fine.

(Adjourned)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SPENCER MEYER, individually and on behalf of those similarly situated,

Plaintiff,

-v-

TRAVIS KALANICK and UBER TECHNOLOGIES, INC.,

Defendants.

15 Civ. 9796

OPINION AND ORDER

7/29/16

JED S. RAKOFF, U.S.D.J.

Since the late eighteenth century, the Constitution of the United States and the constitutions or laws of the several states have guaranteed U.S. citizens the right to a jury trial. This most precious and fundamental right can be waived only if the waiver is knowing and voluntary, with the courts "indulg[ing] every reasonable presumption against waiver." Aetna Ins. Co. v. Kennedy to Use of Bogash, 301 U.S. 389, 393 (1937); Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc., 500 F.3d 171, 188 (2d Cir. 2007). But in the world of the Internet, ordinary consumers are deemed to have regularly waived this right, and, indeed, to have given up their access to the courts altogether, because they supposedly agreed to lengthy "terms and conditions" that they had no realistic power to negotiate or contest and often were not even aware of.

This legal fiction is sometimes justified, at least where mandatory arbitration is concerned, by reference to the "liberal federal policy favoring arbitration," AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (internal quotation marks omitted). Application of this policy to the Internet is said to inhere in the Federal Arbitration Act, as if the Congress that enacted that Act in 1925 remotely contemplated the vicissitudes of the World Wide Web. Nevertheless, in this brave new world, consumers are routinely forced to waive their constitutional right to a jury and their very access to courts, and to submit instead to arbitration, on the theory that they have voluntarily agreed to do so in response to endless, turgid, often impenetrable sets of terms and conditions, to which, by pressing a button, they have indicated their agreement.

But what about situations where the consumer is not even asked to affirmatively indicate her consent? What about situations in which the consumer, by the mere act of accessing a service, is allegedly consenting to an entire lengthy set of terms and conditions? And what about the situation where the only indication to the consumer that she is so consenting appears in print so small that an ordinary consumer, if she could read it at all, would hardly notice it? Writing for the Second Circuit Court of Appeals in 2002, then-Circuit Judge Sonia Sotomayor presciently held that "[r]easonably conspicuous

notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility." Specht v. Netscape Communications Corp., 306 F.3d 17, 35 (2002). Applying these principles to the matter at hand, the Court finds that the plaintiff here never agreed to waive his right to a jury trial or to submit to mandatory arbitration.

The background of this case is set forth in prior written decisions of this Court, familiarity with which is here assumed. See Opinion and Order dated March 31, 2016, Dkt. 37; Opinion and Order dated May 7, 2016, Dkt. 44; Memorandum Order dated June 19, 2016, Dkt. 90. By way of brief background, on December 16, 2015, plaintiff Spencer Meyer filed suit against defendant Travis Kalanick, alleging that Mr. Kalanick had orchestrated and participated in an antitrust conspiracy arising from the algorithm that co-defendant Uber Technologies, Inc. ("Uber") uses to set ride prices. See Complaint, Dkt. 1. Mr. Kalanick did not, at that time, make any motion to compel arbitration. Instead, he filed a motion to dismiss plaintiff's First Amended Complaint, which was denied on March 31, 2016, as well as a motion to reconsider the Court's determination that plaintiff could seek to proceed via class action, which was denied on May 9, 2016. See Opinion and Order dated March 31, 2016; Opinion and Order dated May 7, 2016. Following these Court rulings, Mr.

Kalanick, on May 20, 2016, moved to join Uber as a defendant in this case, see Notice of Motion for Joinder, Dkt. 46, and that motion was granted. See Memorandum Order dated June 19, 2016, Dkt. 90.

Uber had also moved to intervene, see Notice of Motion to Intervene, Dkt. 58, and, once Mr. Kalanick's motion to join Uber was granted, Uber's motion to intervene was denied as moot. See Memorandum Order dated June 19, 2016. But attached to Uber's motion to intervene was a motion to compel arbitration. See Proposed Intervenor Uber Technologies, Inc.'s Memorandum of Law in Support of Motion to Compel Arbitration, Dkt. 59-2. Uber argued that Mr. Meyer was required to arbitrate his claims pursuant to a contract formed when he signed up to use Uber. See id. at 1. On June 7, 2016, defendant Kalanick also moved to compel arbitration. See Memorandum of Law in Support of Defendant Travis Kalanick's Motion to Compel Arbitration ("Kalanick Br."), Dkt. 81. Mr. Kalanick claimed that even though he was not a signatory to the contract that plaintiff had formed with Uber, he could enforce the arbitration provision of that contract against plaintiff. See id. at 1. After Uber was joined as a defendant, it re-filed its motion to compel arbitration. See Uber Technologies, Inc.'s Memorandum of Law in Support of Motion to Compel Arbitration ("Uber Br."), Dkt. 92.

As the motions to compel arbitration were then ripe, the Court ordered full briefing. By papers filed on June 29, 2016, plaintiff opposed the motions to compel arbitration filed by defendants Kalanick and Uber. See Memorandum of Law in Opposition to Defendants' Motion to Compel Arbitration ("Pl. Opp. Br."), Dkt. 102. On July 7, 2016, Mr. Kalanick and Uber filed separate replies to plaintiff's opposition. See Reply Memorandum of Law in Support of Defendant Travis Kalanick's Motion to Compel Arbitration ("Kalanick Reply Br."), Dkt. 110; Uber Technologies, Inc.'s Reply in Support of Motion to Compel Arbitration ("Uber Reply Br."), Dkt. 113. Thereafter, on July 14, 2016, the Court held oral argument. See Transcript dated July 14, 2016 ("Tr."), Dkt. 124.

Having now carefully considered all these submissions and arguments, the Court hereby denies the motions to compel arbitration filed by Uber and by Mr. Kalanick. It should be noted at the outset that the parties' submissions raise a number of important but subsidiary questions, such as, for example, whether Mr. Kalanick is permitted to enforce an alleged arbitration agreement to which he is not a signatory and whether Mr. Kalanick and/or Uber have waived any right to compel arbitration through their prior statements and participation in litigation in this Court. At this juncture, however, the Court need not decide these questions, since it finds that the motions

are resolved by the threshold question of whether plaintiff actually formed any agreement to arbitrate with Uber, let alone with Mr. Kalanick.

Plaintiff denies that such an agreement was ever formed, on the ground that when he registered to use Uber, he did not have adequate notice of the existence of an arbitration agreement. See Pl. Opp. Br. at 10-14. The question of whether an arbitration agreement existed is for the Court and not an arbitrator to decide, as Uber acknowledged at oral argument. See Tr. 75:2-10; see also Republic of Ecuador v. Chevron Corp., 638 F.3d 384, 392 (2d Cir. 2011); Celltrace Communs. Ltd. v. Acacia Research Corp., 2016 U.S. Dist. LEXIS 78620, *5-6 (S.D.N.Y. June 16, 2016).

The parties argue, however, over which state's law should be applied to the issue of whether plaintiff agreed to arbitrate his claims. The Court previously indicated that California law would apply to the User Agreement between Uber and its riders - i.e., the agreement that contains the arbitration clause and to which plaintiff is alleged to have assented.[1] See Opinion dated May 7, 2016, at 5-6. Plaintiff supports the application of California law, see Pl. Opp. Br. at 25-27, and in fact,

[1] Defendants Kalanick and Uber refer to this agreement as Uber's "Rider Terms." The Court refers to the agreement as the "User Agreement" for the sake of consistency with the Court's previous rulings, but no substantive point depends on this terminological choice.

defendant Kalanick expressly stated in previous briefing in this case that California law applied. See Defendant's Memorandum of Law in Support of Defendant Travis Kalanick's Motion to Dismiss, Dkt. 28, at 23 ("In this case, the relevant contract law is the law of California."); see also Memorandum of Law in Support of Defendant Travis Kalanick's Motion for Reconsideration of the Court's Holding Regarding Plaintiff's Class Action Waiver, Dkt. 41, at 7 n.3 ("Given the facts pled in the Complaint, California law would appear to apply given Uber's connections to California; the only other alternative is New York."). Yet Mr. Kalanick and Uber now contend that New York law should apply to the User Agreement, citing "evidence now available" concerning Uber rides that plaintiff Meyer has taken. See Kalanick Br. at 15-17; Uber Br. at 12-13.

Although the Court does not view the choice between California law and New York law as dispositive with respect to the issue of whether an arbitration agreement was formed, the Court confirms its prior decision to apply California law to the User Agreement. To reach this result, the Court first employed (and again employs) New York's "interest analysis" for deciding which state law to apply in these circumstances. According to that analysis, a court "must consider five factors: (1) the place of contracting; (2) the place of the contract negotiations; (3) the place of the performance of the contract;

(4) the location of the subject matter of the contract; and (5) the domicile, residence, nationality, places of incorporation, and places of business of the parties." Philips Credit Corp. v. Regent Health Grp., Inc., 953 F. Supp. 482, 502 (S.D.N.Y. 1997).

Here, the fact that Uber - one of the parties to the alleged contract, and the contract's drafter - is located in California weighs heavily in favor of the application of California law. Consistent with this finding is the fact that although Uber's May 17, 2013 User Agreement (the one to which plaintiff is alleged to have assented) contains no explicit choice-of-law clause, that agreement indicates that the arbitrator referenced in the agreement's arbitration provision "will be either a retired judge or an attorney licensed to practice law in the state of California," see User Agreement, Dkt. 29-1, at 8. Moreover, later versions of the User Agreement contain an explicit California choice-of-law clause. See Declaration of Jeffrey A. Wadsworth ("Wadsworth Decl."), Exhibit 1, Dkt. 101-1, at UBER-00000221; Wadsworth Decl., Exhibit 2, Dkt. 101-2, at UBER-00000233.

The other interest analysis factors do not favor any other state's law more strongly than that of California. According to the uncontested representation of Uber's Senior Software Engineer Vincent Mi, the plaintiff has taken three Uber rides in New York City; one in Connecticut; three in Washington, D.C.;

and three in Paris. See Uber Br., Exhibit 1, Dkt. 92-1 ("Mi Decl."), ¶ 4. Plaintiff Meyer lives in Connecticut, see First Amended Complaint, Dkt. 26, ¶ 7, and he recalls being in Vermont when he registered to use Uber. See Declaration of Spencer Meyer ("Meyer Decl."), Dkt. 100, ¶ 2. None of these features of the case, or any others, supports the choice of New York law over California law. Accordingly, the Court reaffirms its prior holding that California law applies to the User Agreement.[2]

Turning, then, to the question of whether plaintiff agreed to arbitrate his claims, defendants first argue that plaintiff conceded that he had so agreed through a statement made in his Amended Complaint. See Kalanick Br. at 7; Uber Br. at 8. Specifically, plaintiff stated in his Amended Complaint that "[t]o become an Uber account holder, an individual first must agree to Uber's terms and conditions and privacy policy." Amended Complaint, ¶ 29. But defendants read this statement out of context, as the statement does not specifically reference the plaintiff. And plaintiff's counsel clarified at oral argument that the statement was not intended as some kind of implicit waiver, and that, if required, he could amend the complaint to so clarify. See Tr. 92:1-25. The Federal Rules of Civil

[2] Nevertheless, as indicated above, the Court does not see the choice between California law and New York law as dispositive with regard to the issue of whether plaintiff formed an agreement to arbitrate. Even if the Court were to apply New York law, it would hold that plaintiff had not formed such an agreement.

Procedure provide that "[t]he court should freely give leave [to amend a pleading] when justice so requires," Fed. R. Civ. P. 15(a)(2), and so, for instant purposes, the Court will deem the complaint so amended. Moreover, even without the amendment, the Court does not construe this one sentence of the complaint as somehow a knowing and voluntary waiver of the right to argue that Mr. Meyer was never adequately notified of the alleged agreement to arbitrate.[3]

The Court therefore turns to the heart of plaintiff's argument that he did not agree to arbitrate his claims. As previously indicated, guidance from the Court of Appeals was provided in Specht v. Netscape Commc'ns Corp., 306 F.3d 17 (2d Cir. 2002), and that decision is particularly apt because it applied California law. Applying that law, the Specht court found that certain plaintiffs had not assented to a license agreement containing a mandatory arbitration clause because adequate notice and assent were not present on the facts of that case. See id. at 24, 32, 35.

In the instant case, the essentially undisputed facts relevant to the issue of whether plaintiff assented to the arbitration agreement are as follows. According to a declaration submitted by Uber engineer Mi, plaintiff Meyer registered for

[3] The same is even more true of a passing remark plaintiff's counsel made at oral argument in one of the hearings before the Court on another issue. See Transcript dated June 16, 2016, Dkt. 94, at 15:14-15.

Uber on October 18, 2014 via the Uber smartphone application (the "Uber app") using a Samsung Galaxy S5 phone with an Android operating system. See Mi Decl. ¶ 3. At the time that Mr. Meyer registered to use Uber, Uber rider registration using a smartphone involved a two-step process. See Mi Decl., ¶ 5; Uber Br. at 14. At the first screen, potential Uber riders were prompted either to register using Google+ or Facebook, or to enter their name, email address, phone number, and password and click "Next." See Mi Decl., Exhibit A, Dkt. 92-2, at 001. Potential riders who clicked "Next" at the first screen were directed to a second screen, where they could make payment and register to use Uber. See Mi Decl., Exhibit A, at 002. Uber has provided an image of this second screen - the crucial one for the purposes of determining plaintiff's assent to the arbitration agreement - that is considerably larger than the screen that would be faced by the user of a Samsung Galaxy S5 phone. Therefore, the Court attaches to this opinion an image of the second screen scaled down to reflect the size of such a phone (with a 5.1" or 129.4 mm display size).[4]

The second screen of the Uber registration process features, at the top of the screen, fields for users to insert

[4] See Tech Specs, Samsung Galaxy S5, http://www.samsung.com/uk/consumer/mobile-devices/smartphones/galaxy-s/SM-G900FZKABTU.

their credit card details. See Mi Decl., Exhibit A, at 002. Beneath these fields is a large, prominent button whose width spans most of the screen; it is labeled "Register." See id. Beneath this button are two additional buttons, with heights similar to that of the "Register" button, labeled "PayPal" and "Google Wallet." See id. These buttons indicate that a user may make payments using PayPal or Google Wallet instead of entering his or her credit card information. See id.; Uber Br. at 4; Pl. Opp. Br. at 3.

Beneath these two additional buttons, in considerably smaller font, are the words "By creating an Uber account, you agree to the Terms of Service & Privacy Policy." See Mi Decl., Exhibit A, at 002. While the phrase "Terms of Service & Privacy Policy" is in all-caps, the key words "By creating an Uber account, you agree to" are not in any way highlighted and, indeed, are barely legible.[5]

Although the fact that the phrase "Terms of Service & Privacy Policy" is underlined and in blue suggests that the phrase is a hyperlink, see Uber Br. at 4; Mi Decl. ¶ 5(b), a potential user may click on the "Register" button and complete the Uber registration process without clicking on this

[5] In the Court's reckoning, the word "Register" is in approximately 10-point font, the phrase "Terms of Service & Privacy Policy" is in approximately 6-point font, and the words "By creating an Uber account, you agree to" may be in even smaller font and certainly no greater than 6-point font.

hyperlink. See Pl. Opp. Br. at 12. Even if a potential user does click on the hyperlink, she is not immediately taken to the actual terms and conditions. Rather, in the words of Uber engineer Mi, "the user is taken to a screen that contains a button that accesses the 'Terms and Conditions' and 'Privacy Policy' then in effect." Mi Decl. ¶ 5(b); see also Uber Br. at 5.[6] Thus, it is only by clicking first the hyperlink and then the button - neither of which is remotely required to register with Uber and begin accessing its services - that a user can even access the Terms and Conditions.

Further still, even if a user were to arrive at the Terms and Conditions, these terms (which the Court calls the "User Agreement") consist of nine pages of highly legalistic language that no ordinary consumer could be expected to understand. And it is only on the very bottom of the seventh page that one finally reaches the following provision:

> **Dispute Resolution**
>
> You and Company agree that any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof or the use of the Service or Application (collectively, "**Disputes**") will be settled

[6] In fact, unlike a declaration that Uber submitted in another recent case, Mr. Mi's declaration does not attest that "[t]he Terms & Conditions then in effect would be displayed when the 'Terms & Conditions' button was clicked." Declaration of Paul Holden, Cullinane v. Uber Techs., Inc., No. 14-cv-14750, 2016 WL 3751652 (D. Mass. July 11, 2016) (Dkt. 32-1); see also Resorb Networks, Inc. v. YouNow.com, 30 N.Y.S.3d 506 (N.Y. Sup. Ct. 2016). (Docket numbers in parentheticals refer to docket entries in other cases, usually containing screenshots of websites or other interfaces referenced in other court decisions.)

> by binding arbitration, except that each party retains the right to bring an individual action in small claims court and the right to seek injunctive or other equitable relief in a court of competent jurisdiction to prevent the actual or threatened infringement, misappropriation or violation of a party's copyrights, trademarks, trade secrets, patents or other intellectual property rights. **You acknowledge and agree that you and Company are each waiving the right to a trial by jury or to participate as a plaintiff or class User in any purported class action or representative proceeding.** Further, unless both you and Company otherwise agree in writing, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of any class or representative proceeding. If this specific paragraph is held unenforceable, then the entirety of this "Dispute Resolution" section will be deemed void. Except as provided in the preceding sentence, this "Dispute Resolution" section will survive any termination of this Agreement.

User Agreement at 7-8 (boldface in the original). The bolded sentence in the middle of this paragraph is the only bolded sentence in the User Agreement that is not part of a header, although other statements in the User Agreement are in all-caps. See, e.g., id. at 6 ("Limitation of Liability").

Plaintiff Meyer states that he does not recall noticing the Terms of Service hyperlink when he registered to use Uber and does not believe that he clicked on the hyperlink. See Meyer Decl., ¶ 3. Uber does not contest this statement, and the Court finds no basis for a claim that plaintiff Meyer had "actual knowledge of the agreement." Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1177 (9th Cir. 2014) (applying New York law). However, an individual may still be said to have assented to an

electronic agreement if "a reasonably prudent user" would have been put "on inquiry notice of the terms of the contract." Barnes & Noble, 763 F.3d at 1177; see also Schnabel v. Trilegiant Corp., 697 F.3d 110, 120 (2d Cir. 2012); Specht, 306 F.3d at 20.[7]

Courts addressing electronic contract formation have at times distinguished between two types of agreements: "'clickwrap' (or 'click-through') agreements, in which website users are required to click on an 'I agree' box after being presented with a list of terms and conditions of use; and 'browsewrap' agreements, where a website's terms and conditions of use are generally posted on the website via a hyperlink at the bottom of the screen." Barnes & Noble, 763 F.3d at 1175-76. "The defining feature of browsewrap agreements is that the user can continue to use the website or its services without visiting the page hosting the browsewrap agreement or even knowing that such a webpage exists." Be In, Inc. v. Google Inc., No. 12-cv-03373, 2013 WL 5568706, at *6 (N.D. Cal. Oct. 9, 2013); see also Long v. Provide Commerce, Inc., 200 Cal. Rptr. 3d 117, 123 (Cal. Ct. App. 2016) (internal quotation marks omitted).

[7] Much of the case law on electronic bargaining relates to the context of Internet transactions, while the alleged agreement in the instant case was formed via a mobile application. However, the Court sees little reason to distinguish between the two contexts, and neither does existing case law. See, e.g., Cullinane, 2016 WL 3751652, at *6.

"Clickwrap" agreements are more readily enforceable, since they "permit courts to infer that the user was at least on inquiry notice of the terms of the agreement, and has outwardly manifested consent by clicking a box." Cullinane, 2016 WL 3751652, at *6; see also Specht, 306 F.3d at 22 n.4; Savetsky v. Pre-Paid Legal Servs., Inc., 14-cv-03514, 2015 WL 604767, at *3 (N.D. Cal. Feb. 12, 2015); Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 397 (E.D.N.Y. 2015); United States v. Drew, 259 F.R.D. 449, 462 n.22 (C.D. Cal. 2009). "Browsewrap agreements are treated differently under the law than 'clickwrap' agreements." Schnabel, 697 F.3d at 129 n.18. Courts will generally enforce browsewrap agreements only if they have ascertained that a user "'had actual or constructive knowledge of the site's terms and conditions, and . . . manifested assent to them.'" Id. (quoting Cvent, Inc. v. Eventbrite, Inc., 739 F. Supp. 2d 927, 937 (E.D. Va. 2010)). This is rarely the case for individual consumers. In fact, courts have stated that "the cases in which courts have enforced browsewrap agreements have involved users who are businesses rather than, as in Specht . . . consumers." Fjeta v. Facebook, Inc., 841 F. Supp. 2d 829, 836 (S.D.N.Y. 2012); see also Berkson, 97 F. Supp. 3d at 396 ("Following the ruling in Specht, courts generally have enforced browsewrap terms only against knowledgeable accessors, such as corporations, not against individuals."); Mark A. Lemley, Terms of Use, 91 Minn.

L. Rev. 459, 472 (2006) ("An examination of the cases that have considered browsewraps in the last five years demonstrates that the courts have been willing to enforce terms of use against corporations, but have not been willing to do so against individuals.").

Here, the User Agreement to which plaintiff Meyer allegedly assented was clearly not a clickwrap agreement. Mr. Meyer did not need to affirmatively click any box saying that he agreed to Uber's "Terms of Service." On the contrary, he could sign up for Uber by clicking on the "Register" button without explicitly indicating his assent to the terms and conditions that included the arbitration provision. See Mi Decl., Exhibit A, at 002. As with a browsewrap agreement, an Uber user could access Uber's services "without visiting the page hosting the browsewrap agreement or even knowing that such a webpage exists." Be In, 2013 WL 5568706, at *6.

Nevertheless, Uber's User Agreement differs from certain browsewrap agreements in which "by visiting the website - something that the user has already done - the user agrees to the Terms of Use not listed on the site itself but available only by clicking a hyperlink." Barnes & Noble, 763 F.3d at 1176 (internal quotation marks omitted); see also Fjeta, 841 F. Supp. 2d at 838 ("Facebook's Terms of Use are somewhat like a browsewrap agreement in that the terms are only visible via a

hyperlink, but also somewhat like a clickwrap agreement in that the user must do something else - click 'Sign Up' - to assent to the hyperlinked terms."). Uber's User Agreement might be characterized as a "sign-in wrap," since a user is allegedly "notified of the existence and applicability of the site's 'terms of use' when proceeding through the website's sign-in or login process." Berkson, 97 F. Supp. 3d at 399; see also Cullinane, 2016 WL 3751652, at *6. Sign-in wraps have been described as "[a] questionable form of internet contracting." Berkson, 97 F. Supp. 3d at 399. Here, as indicated, the notification was in a font that was barely legible on the smartphone device that a would-be Uber registrant could be expected to use.

Of course, all these labels can take courts only so far. The issue of whether plaintiff Meyer agreed to arbitrate his claims "turns more on customary and established principles of contract law than on newly-minted terms of classification." Cullinane, 2016 WL 3751652, at *6. For while the Internet may have reduced ever further a consumer's power to negotiate terms, "it has not fundamentally changed the principles of contract." Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 403 (2d Cir. 2004). One of these principles is that "[m]utual manifestation of assent . . . is the touchstone of contract." Specht, 306 F.3d at 29. Moreover, "[a]rbitration agreements are no exception to

the requirement of manifestation of assent," id. at 30, and "[c]larity and conspicuousness of arbitration terms are important in securing informed assent." Id. The Specht standard provides a way for courts to ascertain whether this fundamental principle of contract law has been vindicated, and it is this standard - whether plaintiff Meyer had "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms" - that the Court will apply. Id. at 35.

While every case is different, the Court has examined the decisions of other courts that have considered issues of electronic contract formation, even where, as in many cases, these decisions are not binding on this Court. In numerous cases in which electronic contracts were held to have been properly formed, notice of the existence of those contracts was more conspicuous - in some cases, much more conspicuous - than in the instant case, and indications of assent were much more express. For example, in Mohamed v. Uber Technologies, Inc., a case cited by Uber, see Uber Reply Br. at 2 n.2, a court in the Northern District of California concluded that a binding contract had been formed between Uber drivers and Uber. See Mohamed v. Uber Techs., Inc., 109 F. Supp. 3d 1185, 1197 (N.D. Cal. 2015). There, Uber drivers could not access the Uber app without clicking a button marked "Yes, I agree" beneath the phrase "By

clicking below, you acknowledge that you agree to all the contracts above," with those contracts hyperlinked above, and then clicking "Yes, I agree" on a screen containing text stating "Please confirm that you have reviewed all the documents and agree to all the new contracts." Id. at 1190-91. In the instant case, by contrast, plaintiff Meyer did not have to click any button explicitly indicating assent to Uber's User Agreement, and the hyperlink to Uber's "Terms of Service" was nowhere near as prominent as in Mohamed.

In Cullinane v. Uber Techs., Inc., on which Uber also relies, a court held that Uber users had formed an agreement to arbitrate their claims. See Cullinane, 2016 WL 3751652, at *7. There, the applicable version of Uber's registration screen for users, like in the instant case and unlike in Mohamed, did not require users to affirmatively click "I agree." See id. (Dkts. 32-2, 32-3). However, in the user interface that some of the Cullinane plaintiffs faced, the clickable box with the phrase "Terms of Service & Privacy Policy" was clearly delineated, and the words appeared in bold white lettering on a black background, in a size similar to, if not larger than, the size of the "Done" button that users clicked in order to register. See Cullinane, 2016 WL 3751652 (Dkts. 32-3, 32-5). In the instant case, by contrast, the phrase "Terms of Service &

Privacy Policy" is much smaller and more obscure, both in absolute terms and relative to the "Register" button.[8]

A review of numerous other cases finding that an electronic agreement was formed highlights the point that the Uber registration process in plaintiff Meyer's case involved a considerably more obscure presentation of the relevant contractual terms.[9] Further, by contrast to the situation in

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[8] In fact, in the user interface that other Cullinane plaintiffs faced, the phrase "Terms of Use & Privacy Policy" was placed between the field in which the user's credit card number would appear and the numbers that users would tap in order to enter their credit card information - a clearly prominent location. See Cullinane, 2016 WL 3751652 (Dkts. 32-2, 32-4).

[9] See, e.g., DeFilippis v. Oerl Fin. Servs., 14-cv-115, 2016 WL 384003, at *3 (M.D. Pa. Jan. 29, 2016) ("an applicant had to affirmatively click a box agreeing: 'I have read and agree to the Privacy Policy and Terms & Conditions, which contain important account information.'"); Bassett v. Elec. Arts, Inc., 93 F. Supp. 3d 95, 99 (E.D.N.Y. 2015) ("Plaintiff would have been presented with four buttons, two of which are the links to the terms of service and privacy policy, one which reads 'I Do Not Accept,' and one which reads 'I Have Read And Accept Both Documents.' . . . If the registrant . . . does not click the button reading "I ... Accept . . ." . . . the registration process stops and the online features cannot be activated."); Nicosia v. Amazon.com, Inc., 84 F. Supp. 3d 142, 150 (E.D.N.Y. 2015) (Dkt. 53-3) (the statement "By placing your order, you agree to Amazon.com's privacy notice and conditions of use" appears directly under "Review your order" and higher on the page than the button to click to "Place your order," so that "[t]o place his orders, Plaintiff had to navigate past this screen by clicking a square icon below and to the right of this disclaimer, which states: 'Place your order.'"); Whitt v. Prosper Funding, LLC, 15-cv-136, 2015 WL 4254062, at *1 (S.D.N.Y. July 14, 2015) (Dkt. 41-1) ("An applicant could not complete a loan application without clicking the box indicating his or her acceptance of the Agreement."); Tompkins v. 23andMe, Inc., 13-cv-05682, 2014 WL 2903752, at *3 (N.D. Cal. June 25, 2014) ("The account creation page requires customers to check a box next to the line, 'Yes, I have read and agree to the Terms of Service and Privacy Statement' . . . Similarly, during the registration process, . . . [c]ustomers must then click a large blue icon that reads 'I ACCEPT THE TERMS OF SERVICE' before finishing the registration process"); Swift v. Zynga Game Network, Inc., 805 F. Supp. 2d 904, 911 (N.D. Cal. 2011) ("Plaintiff admits that she was required to and did click on an 'Accept' button directly above a statement that clicking on the button served as assent to the YoVille terms of service along with a blue hyperlink directly to the terms of service."); Zaltz v. JDATE, 952 F. Supp. 2d 439, 453-54 (E.D.N.Y. 2013) ("defendant's reference to its Terms and Conditions of Service appear above the button" that "a prospective user had to click in order to assent"); 5863 Partners LLC v. Shareasale.com, 12-cv-4263, 2013 WL

Register.com, 356 F.3d 393 at 401-02, there is no evidence that plaintiff Meyer repeatedly visited Uber's registration screen.[10]

Rather, Uber's interface here shares certain characteristics in common with instances in which courts have declined to hold that an electronic agreement was formed. Most obviously, Uber riders need not click on any box stating "I agree" in order to proceed to use the Uber app – a feature that courts have repeatedly made note of in declining to find that an

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5328324, at *7 & n.4 (E.D.N.Y. Sept 23, 2013) ("defendant's reference to its Merchant Agreement appears adjacent to the activation button . . . in determining that the forum selection clause was reasonably communicated to plaintiff, [the Court] is solely relying on the second page of the sign up process (in which a prospective merchant must click to activate its account and is informed that 'By clicking and making a request to Activate, you agree to the terms and conditions in the Merchant Agreement.'"); Vernon v. Qwest Comm'ns Int'l, Inc., 925 F. Supp. 2d 1185, 1191 (D. Colo. 2013) ("At each stage of the enrollment process the consumer was referred to the Subscriber Agreement and, in some instances, specifically to the existence of an arbitration clause."); Fteta, 841 F. Supp. 2d (Dkt. 12 at 17)(the phrase "By clicking Sign Up, you are indicating that you have read and agree to the Terms of Policy" appeared directly below the button marked "Sign Up," and, this Court finds, the symmetry between the "Sign Up" phrases would help to catch the reader's eye); Guadagno v. E*Trade Bank, 592 F. Supp. 2d 1263, 1264, 1271 (C.D. Cal. 2008) (Dkt. 31-2) (users had to check a box acknowledging that they had reviewed the Account Agreement); Feldman v. Google, Inc., 513 F. Supp. 2d 229, 233, 237 (E.D. Pa. 2007) (Dkt. 16-2) (in order to activate their accounts, users had to click a box stating "**Yes**, I agree to the above terms and conditions" displayed in a scrollable text box); Major v. McCallister, 302 S.W.3d 227 (Mo. Ct. App. 2009) (the party seeking to enforce the contract "did put 'immediately visible notice of the existence of 'license terms' – i.e., 'By submitting you agree to the Terms of Use' and a blue hyperlink – right next to the button that Appellant pushed.").

[10] In Register.com, the Second Circuit drew an analogy between an electronic contract and an apple stand with a sign, visible only as one turns to exit, naming the price of apples. The Second Circuit indicated that an individual who eats an apple without paying might avoid contractual liability the first time he did so, but he would not be able to do so if he thereafter visited the stand and ate apples several times a day. See Register.com, 356 F.3d at 401-02. Other courts have since extended the Register.com analogy in different directions, see Fteta, 841 F. Supp. 2d at 839; Cullinane, 2016 WL 3791652, at *7, but Register.com itself focuses on the repetition of the activity of seeing the sign.

electronic contract was formed. See, e.g., Barnes & Noble, 763 F.3d at 1176; Specht, 306 F.3d at 22-23; Savetsky v. Pre-Paid Legal Servs., Inc., 14-cv-03514, 2015 WL 604767, at *4 (N.D. Cal. Feb. 12, 2015). Nor do the license terms in the instant case appear on the screen in view of the user. See Motise v. Am. Online, Inc., 346 F. Supp. 2d 563, 565 (S.D.N.Y. 2004). As the Seventh Circuit has stated, a court "cannot presume that a person who clicks on a box that appears on a computer screen has notice of all contents not only of that page but of other content that requires further action (scrolling, following a link, etc.)." Sgouros v. TransUnion Corp., 817 F.3d 1029, 1035 (7th Cir. 2016).

Significantly for the purposes of determining whether plaintiff was on inquiry notice, the hyperlink here to the "Terms of Service & Privacy Policy" is by no means prominently displayed on Uber's registration screen. While the payment information and "Register" button are "very user-friendly and obvious," Berkson, 97 F. Supp. 3d at 404, Uber's statement about "Terms of Service" appears far below and in much smaller font. As a result, "the design and content of" Uber's registration screen did not "make the 'terms of use' (i.e., the contract details) readily and obviously available to the user." Id. at 402; see also Long, 200 Cal. Rptr. 3d at 126 (recognizing "the practical reality that the checkout flow is laid out in such a

manner that it tended to conceal the fact that placing an order was an express acceptance of [defendant's] rules and regulations.") (internal quotation marks and alterations omitted).

Indeed, the Terms of Service hyperlink in the instant case is less conspicuous than the one found not to give rise to an electronically-formed contract in Berkson. In that case, the statement "By clicking 'Sign In' I agree to the terms of use and privacy policy" appeared above the most prominent "Sign In" button on the web page. See Berkson, 97 F. Supp. 3d at 373-74, 403-04. This statement, while plausibly providing inadequate notice, was actually more likely to disrupt viewers' experiences in some way and draw their attention to the terms and conditions than the interface in the instant case, where the hyperlink stating "Terms of Service & Privacy Policy" is located far beneath the "Register" button and takes on the appearance of an afterthought. See Mi Decl., Exhibit A, at 002. Moreover, unlike in Berkson, the registration screen here does not contain parallel wording as between the "Register" button and the statement "By creating an Uber account, you agree to the Terms of Service & Privacy Policy." See Berkson, 97 F. Supp. 3d at 373-74; see also Fjeta, 841 F. Supp. 2d (Dkt. 12 at 17). The relative obscurity of the reference to "Terms of Service" in the Uber interface is significant; courts have declined to hold that

a valid electronic contract was formed when "the website did not prompt [a party] to review the Terms and Conditions and because the link to the Terms and Conditions was not prominently displayed so as to provide reasonable notice of the Terms and Conditions." Hines v. Overstock.com, Inc., 668 F. Supp. 2d 362, 367 (E.D.N.Y. 2009), aff'd, 380 F. App'x 22 (2d Cir. 2010).

As this brief review suggests, electronic agreements fall along a spectrum in the degree to which they provide notice, and it is difficult to draw bright-line rules because each user interface differs from others in distinctive ways. Consequently, courts must embark on a "fact-intensive inquiry," Sgouros, 817 F.3d at 1034-35, in order to make determinations about the existence of "[r]easonably conspicuous notice" in any given case. Specht, 306 F.3d at 35.

Here, the Court finds that plaintiff Meyer did not have "[r]easonably conspicuous notice" of Uber's User Agreement, including its arbitration clause, or evince "unambiguous manifestation of assent to those terms." Id. Most importantly, the Uber registration screen, as explained supra, did not adequately call users' attention to the existence of Terms of Service, let alone to the fact that, by registering to use Uber, a user was agreeing to them. Like in Long, the "Terms of [Service] hyperlink[] - [its] placement, color, size and other qualities relative to the [Uber app registration screen's]

overall design - [is] simply too inconspicuous to meet [the Specht] standard." Long, 200 Cal. Rptr. 3d at 125-26. When to this is coupled the fact that the key words "By creating an Uber account, you agree to" are even more inconspicuous, it is hard to escape the inference that the creators of Uber's registration screen hoped that the eye would be drawn seamlessly to the credit card information and register buttons instead of being distracted by the formalities in the language below. And this, the Court finds, is the reasonably foreseeable result.

Further still, the wording of Uber's hyperlink adds to the relative obscurity of Uber's User Agreement. The Court cannot simply assume that the reasonable (non-lawyer) smartphone user is aware of the likely contents of "Terms of Service," especially when that phrase is placed directly alongside "Privacy Policy." There is, after all, a "breadth of the range of technological savvy of online purchasers" (and smartphone users). Barnes & Noble, 763 F.3d at 1179; see also Long, 200 Cal. Rptr. 3d at 127; Berkson, 97 F. Supp. 3d at 400. The reasonable user might be forgiven for assuming that "Terms of Service" refers to a description of the types of services that Uber intends to provide, not to the user's waiver of his constitutional right to a jury trial or his right to pursue

legal redress in court should Uber violate the law.[11] In other words, "the importance of the details of the contract" was "obscured or minimized by the physical manifestation of assent expected of a consumer seeking to purchase or subscribe to a service or product." Berkson, 97 F. Supp. 3d at 402. There is a real risk here that Uber's registration screen "made joining [Uber] fast and simple and made it appear - falsely - that being a [user] imposed virtually no burdens on the consumer besides payment." Schnabel, 697 F.3d at 127-28.

Additionally, the hurdles for Uber users were not at an end even if they did click on the initial hyperlink. Such users were "taken to a screen that contains a button that accesses the 'Terms and Conditions' and 'Privacy Policy' then in effect." Mi Decl., ¶ 5(b). Once users reached the "Terms of Service" (i.e., the User Agreement), they had to scroll down several pages in order to come across the arbitration provision, located in a "dispute resolution" section. See Sgouros, 817 F.3d at 1033;

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[11] It may be noted, à propos the expectations of the ordinary consumer, that according to a 2015 study carried out by the Consumer Financial Protection Bureau, "[o]ver three quarters of those who said they understood what arbitration is acknowledged they did not know whether their credit card agreement contained an arbitration clause. Of those who thought they did know, more than half were incorrect about whether their agreement actually contained an arbitration clause. Among consumers whose contract included an arbitration clause, fewer than 7 percent recognized that they could not sue their credit card issuer in court." See Consumer Financial Protection Bureau Study Finds That Arbitration Agreements Limit Relief for Consumers, Consumer Protection Financial Bureau, March 10, 2015, http://www.consumerfinance.gov/about-us/newsroom/cfpb-study-finds-that-arbitration-agreements-limit-relief-for-consumers.

Savetsky, 2015 WL 604767, at *4. While the "dispute resolution" heading in the User Agreement is bolded, as is the waiver (in the arbitration context) of the right to a jury trial or class proceeding, users would have had to reach this part of the agreement to discover the bolded text at all (unlike, for example, the prominent warning about the existence of an arbitration clause in Guadagno v. E*Trade Bank, 592 F. Supp. 2d 1263, 1271 (C.D. Cal. 2008)). Though "[a] party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing," Specht, 306 F.3d at 30 (internal quotation marks omitted), the placement of the arbitration clause in Uber's User Agreement constituted, as a practical matter, a further barrier to reasonable notice.

At bottom, what is at stake is the "integrity and credibility" of "electronic bargaining." Specht, 306 F.3d at 35. When contractual terms as significant as the relinquishment of one's right to a jury trial or even of the right to sue in court are accessible only via a small and distant hyperlink titled "Terms of Service & Privacy Policy," with text about agreement thereto presented even more obscurely, there is a genuine risk that a fundamental principle of contract formation will be left in the dust: the requirement for "a manifestation of mutual assent." Schnabel, 697 F.3d at 119 (internal quotation marks omitted). One might be tempted to argue that the nature of

electronic contracts is such that consumers do not read them, however conspicuous these contracts are, and that consumers have resigned themselves simply to clicking away their rights. But that would be too cynical and hasty a view, and certainly not the law. The purveyors of electronic form contracts are legally required to take steps to provide consumers with "reasonable notice" of contractual terms. See Specht, 306 F.3d at 20. User interfaces designed to encourage users to overlook contractual terms in the process of gaining access to a product or service are hardly a suitable way to fulfill this legal mandate.

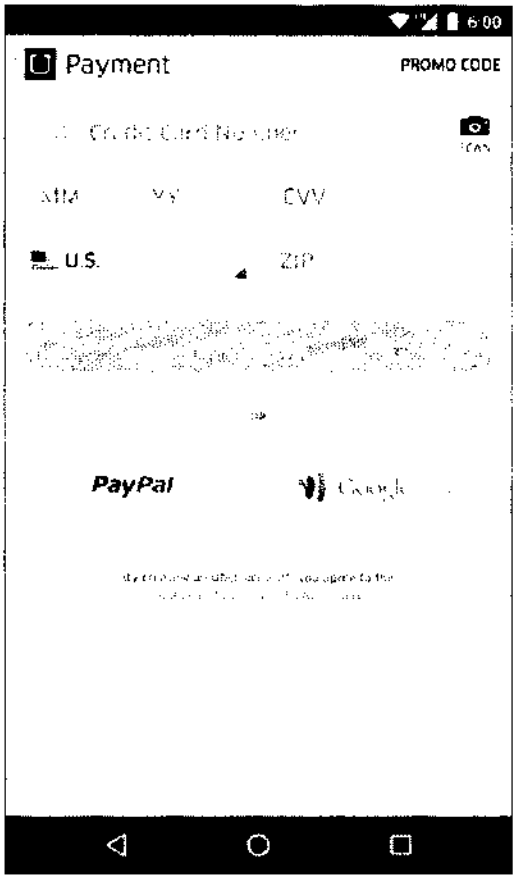
"[T]he Federal Arbitration Act . . . does not require parties to arbitrate when they have not agreed to do so." Schnabel, 697 F.3d at 118 (internal quotation marks omitted). The Court finds that, in light of all the relevant facts and circumstances, plaintiff Meyer did not form such an agreement here. Consequently, defendant Uber may not enforce the arbitration clause against Mr. Meyer. As a result, even if defendant Kalanick were entitled to enforce this arbitration clause and had not waived such a right - issues that the Court does not now decide - he too would be unable to enforce the arbitration clause. The Court hence denies the motions to compel arbitration filed by both Mr. Kalanick and Uber.

The Clerk of Court is directed to close docket entries 80 and 91.

SO ORDERED.

Dated: New York, NY
July 29, 2016

JED S. RAKOFF, U.S.D.J.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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SPENCER MEYER, individually and on behalf of those similarly situated, Plaintiffs, vs. TRAVIS KALANICK and UBER TECHNOLOGIES, INC. Defendants.	Case No. 1:15-cv-9796 (JSR)

ANSWER OF UBER TECHNOLOGIES, INC. TO THE FIRST AMENDED COMPLAINT

Defendant Uber Technologies, Inc. ("Uber"), by and through its undersigned attorneys, and for its Answer to the First Amended Complaint ("Complaint") filed by Plaintiff Spencer Meyer ("Meyer") states and alleges as follows. To the extent not specifically admitted, each factual assertion by Plaintiff is denied. To the extent that the headings and non-numbered statements in the Complaint contain any averments, Uber denies each and every such averment.

ANSWER TO ALLEGATIONS REGARDING NATURE OF THE SUIT

1. Uber admits this is a civil antitrust action against Mr. Kalanick and admits that the action is also against Uber. Uber also admits that Mr. Kalanick is the co-founder and CEO of Uber but denies all other allegations of Paragraph 1.

2. To the extent that the allegations in Paragraph 2 are legal conclusions, no responsive pleading is required. Subject to and notwithstanding the foregoing, Uber admits that it is not a transportation company, that it does not employ drivers, and that it offers a smartphone application that connects riders looking for transportation with independent transportation providers (the "Uber App"). Uber denies the remaining allegations of Paragraph 2.

3. Uber admits that Mr. Kalanick is the co-founder and CEO of Uber, and admits that he live tweeted about his experience when he drove a vehicle while using the Uber App to receive transportation requests in San Francisco, California, on one night—starting at 9:19 p.m. on February 21, 2014, and ending at 1:57 a.m. on February 22, 2014. Uber denies the remaining allegations in Paragraph 3.

4. To the extent that the allegations in Paragraph 4 are legal conclusions, no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 4.

5. To the extent that the allegations in Paragraph 5 are legal conclusions, no responsive pleading is required. To the extent an answer is required, Uber admits that its

"business model [is] procompetitive" and admits that Mr. Kalanick has stated that Uber's business model is procompetitive. Uber admits it is not a transportation company and that it does not provide transportation services itself. Uber denies the remaining allegations in Paragraph 5 and specifically denies that "Uber's price fixing is classic anticompetitive behavior."

6. To the extent that the allegations in Paragraph 6 are legal conclusions no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 6. Uber is without knowledge or information sufficient to form a belief as to the truth or falsity of the assertion that notice of commencement of this action was served upon the New York State Attorney General and therefore denies it.

ANSWER TO ALLEGATIONS REGARDING PARTIES

7. Uber admits, on information and belief, that Plaintiff has used the Uber App on more than one occasion. Uber further admits that Plaintiff purports to be a resident of Connecticut. Uber is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 7, and therefore denies them.

8. Uber denies the allegations in Paragraph 8.

9. To the extent that the allegations in Paragraph 9 are legal conclusions, no responsive pleading is required. To the extent an answer is required, Uber admits that Mr. Kalanick is a resident of California, Uber's CEO, an Uber Board member, its co-founder, and has, in San Francisco, California, on one night—starting at 9:19 p.m. on February 21, 2014, and ending at 1:57 a.m. on February 22, 2014—driven a vehicle while using the Uber App to receive transportation requests. Uber denies the remaining allegations in Paragraph 9.

ANSWER TO ALLEGATIONS REGARDING JURISDICTION AND VENUE

10. Paragraph 10 contains legal conclusions as to which no response is required. To the extent an answer is required, Uber admits that Plaintiff purports to base subject matter

jurisdiction on 28 U.S.C. §§ 1331, 1337 and 15 U.S.C. §§ 4 and 15. To the extent a further answer is required, Uber denies any remaining allegations in Paragraph 10.

11. The allegations in Paragraph 11 are legal conclusions and/or are directed to Mr. Kalanick, and no responsive pleading is required.

12. To the extent that the allegations in Paragraph 12 are legal conclusions or are directed to Mr. Kalanick, no responsive pleading is required.

13. The allegations in Paragraph 13 are legal conclusions and/or are directed to Mr. Kalanick, and no responsive pleading is required.

14. To the extent that the allegations in Paragraph 14 are legal conclusions no responsive pleading is required. To the extent an answer is required, Uber denies that Mr. Kalanick committed wrongful acts.

15. To the extent that the allegations in Paragraph 9 are legal conclusions, no responsive pleading is required. Subject to and notwithstanding the foregoing, Uber admits that Mr. Kalanick appeared as a guest on the Late Show with Stephen Colbert in September 2015, he has made public statements and provided interviews regarding Uber, and that Uber has engaged in "lobbying efforts" in the state of New York, but denies the remaining allegations in Paragraph 15.

16. Paragraph 16 contains legal conclusions to which no response is required. To the extent an answer is required, Uber denies the allegations in Paragraph 16.

17. To the extent that the allegations in Paragraph 17 are legal conclusions or are directed at Mr. Kalanick, no responsive pleading is required. To the extent an answer is required, Uber denies the allegations of Paragraph 17.

18. Paragraph 18 asserts a legal conclusion, to which no response is required. To the extent an answer is required, Uber admits that it does business in New York City. Uber admits that Plaintiff purports to base venue in this district on 28 U.S.C. § 1391. Uber denies any remaining allegations in Paragraph 18.

19. To the extent that the allegations in Paragraph 19 are legal conclusions or are directed at Mr. Kalanick, no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 19.

ANSWER TO ALLEGATIONS REGARDING CO-CONSPIRATORS

20. Uber denies the allegations in Paragraph 20.

ANSWER TO ALLEGATIONS REGARDING BACKGROUND

21. Uber admits the allegations in Paragraph 21.

22. Uber admits that it offers a smartphone application that connects riders looking for transportation with independent transportation providers. Uber denies any remaining allegations in Paragraph 22.

23. Uber admits the allegations in Paragraph 23.

24. Uber admits that it offers a smartphone application that connects riders looking for transportation with independent transportation providers. Uber denies the remaining allegations in Paragraph 24.

25. Uber admits that it generally offers different transportation request products, and specifically offers uberX, UberBLACK, UberSUV, and UberLUX in the United States. Uber understand the term "Uber car service" as used in the complaint to refer to these specific products.

26. Uber denies the allegations in Paragraph 26.

27. Uber denies the allegations in Paragraph 27.

28. The terms "in exchange for Uber accounts" and "access to the Uber App" are, as used in this allegation, vague and ambiguous. Based on Uber's understanding of those terms, Uber admits Uber riders must provide certain information before they can use the Uber App to request transportation services. Uber denies the remaining allegations in Paragraph 28.

29. Uber admits the allegations in Paragraph 29.

30. Uber admits that a "Fare Quote" may be obtained by entering pickup location and destination in the Uber App but denies the remaining allegations in Paragraph 30.

31. Uber admits that the Uber App facilitates payment between a rider and an independent transportation provider. Uber denies the remaining allegations in Paragraph 31.

32. Uber admits that Paragraph 32 describes one way that Uber facilitates the collection of a fare.

33. Uber is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 33 and on that basis denies them.

34. Uber denies the allegations in Paragraph 34.

35. Uber admits that when agreed between the rider and the driver-partner, riders pay driver-partners through the Uber App.

36. Uber is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 36 and on that basis denies them.

37. The terms "actively recruit" and "partners" are, as used in this allegation, vague and ambiguous. Based on Uber's understanding of those terms, Uber admits that it attracts drivers to sign up as driver-partners.

38. Uber admits that a driver-partner is an independent transportation provider who has a written agreement with Uber or one of its affiliates.

39. To the extent that the allegations in Paragraph 39 purport to recite from an alleged document, Uber admits that, if and to the extent the document is ever held to be admissible, it would speak for itself. Uber denies any remaining allegations in Paragraph 39.

40. Uber denies this allegation to the extent it seeks an implied admission that Uber and Mr. Kalanick are one in the same. Uber further denies that Mr. Kalanick "and his subordinates decide to offer Uber App services" as it conflates Mr. Kalanick and Uber. Subject to and notwithstanding the foregoing, Uber admits that when it decides to offer the Uber App in a new geographic location, Uber may use social media as one of several ways to attract new independent transportation providers to drive with Uber. Uber denies any remaining allegations in Paragraph 40.

41. Uber responds that the terms "events for its driver-partners to get together" and "'partner appreciation events,'" as used in this allegation, are vague and ambiguous. Based on Uber's understanding of those terms, Uber admits that it has, on occasion, hosted driver-partner events. Uber denies that the events alleged are representative examples and denies the remaining allegations in Paragraph 41.

42. Uber admits that the language quoted in Paragraph 42 has appeared on Uber's website.

43. Uber admits that independent transportation providers who use the Uber App have discretion to accept or decline an Uber rider request.

44. Uber admits that on October 6, 2015, it published a report on the growth of the uberX transportation request product in New York City and further admits that the report, which is publicly available, speaks for itself. Uber otherwise denies the allegations in Paragraph 44.

45. Uber responds that the terms "mobilize" and "lobby" are, as used in this allegation, vague and ambiguous, and, for that reason, Uber is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraph 45 and on that basis denies them.

46. Uber responds that the term "steadfastly maintained," as used in this allegation, is vague and ambiguous, and, for that reason, Uber lacks knowledge sufficient to admit or deny this allegation, and on that basis denies the allegation. Subject to and notwithstanding the foregoing, Uber admits that it has maintained that the independent transportation providers who use the Uber App are not employees of Uber. Uber denies the remaining allegations in Paragraph 46.

47. Uber admits that, for the transportation request products defined as "Uber car service" in Am. Compl. ¶ 25, the Uber rider and driver Apps display fares for specific trips for riders and independent transportation providers based on the time and distance rates and other fees published on https://www.uber.com/cities/ for each U.S. city where Uber operates. These fares are calculated by servers in Uber's data centers based on the published rates and Uber driver-partners may depart downward from these fares. Uber further admits that the calculation of specific fares based on the applicable published rates is dynamic, and when demand outstrips supply in a specific neighborhood area, Uber's pricing algorithm temporarily increases the factor applied to the calculation of the fare based on the published rates in that area to encourage more independent transportation providers to become available to offer rides and therefore expand supply. Except as so admitted, Uber denies the remaining allegations of Paragraph 47.

48. Uber denies the allegations in Paragraph 48.

49. Uber is without sufficient knowledge or information to form a belief as to the truth or falsity as to Mr. Kalanick's unidentified "comments." Uber responds that the terms

"specifics" and "pricing algorithm," as used in this allegation, are vague and ambiguous. Based on Uber's understanding of those terms, Uber denies the allegations of Paragraph 49.

50. Uber admits that Mr. Kalanick has described the procompetitive benefits of the "surge pricing" model. Except as so admitted, Uber denies the remaining allegations in Paragraph 50.

51. Uber admits that the allegations in Paragraph 51 purport to recite from a Wired.com article, and that, if and to the extent the document is ever held to be admissible, it would speak for itself. Except as so admitted, Uber is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraph 51 and on that basis denies them.

52. Uber admits that the allegations in Paragraph 52 purport to recite from a "website post" and that, if and to the extent the document is ever held to be admissible, it would speak for itself.

53. Uber denies the allegations in Paragraph 53.

54. Uber denies the allegations in Paragraph 54.

55. Uber admits that the allegations in Paragraph 55 purport to recite from FAQs included in a "driver guide," and that, if and to the extent the document is ever held to be admissible, it would speak for itself. Uber denies any remaining allegations in Paragraph 55.

56. Uber admits that driver-partners are independent transportation providers. Uber objects that the term "control," as used in this allegation, is vague and ambiguous. Based on Uber's understanding of the term, Uber denies the allegations in Paragraph 56.

57. Uber admits that if and when demand outstrips supply in a given area, Uber's pricing algorithm temporarily increases the factor applied to the calculation of the fare in that

area to encourage more independent transportation providers to become available to offer rides and therefore expand supply. Uber further admits that the Uber App may notify independent service providers of these fares. Uber denies the remaining allegations in Paragraph 57.

58. Uber admits the allegations in Paragraph 58.

59. Uber objects that the term "manipulate," as used in this allegation, is vague and ambiguous, and, for that reason, Uber lacks knowledge sufficient to admit or deny this allegation, and on that basis denies the allegations in Paragraph 58.

60. Uber objects that the term "manipulate," as used in this allegation, is vague and ambiguous. Uber is without knowledge or information about the "reports" or specific driver-partners referenced sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 60. Based on Uber's understanding of these terms, Uber denies the allegations in Paragraph 60.

61. Uber admits that the allegations in Paragraph 61 appear to recite from a Vanity Fair magazine article, and that, if and to the extent the document is ever held to be admissible, it would speak for itself.

62. Uber admits that the allegations in Paragraph 62 appear to recite from remarks made by Mr. Kalanick during his appearance on the Late Show with Stephen Colbert and to the extent the video or transcript of the appearance is ever held to be admissible, it would speak for itself.

63. Uber denies this allegation to the extent it seeks an implied admission that Mr. Kalanick and Uber are one in the same, or requires Uber to answer on Mr. Kalanick's behalf. Uber admits that the allegations in Paragraph 63 appear to recite from remarks made by Mr.

Kalanick during his appearance on the Late Show with Stephen Colbert and to the extent the video or transcript of the appearance is ever held to be admissible, it would speak for itself.

64. Uber denies this allegation to the extent it seeks an implied admission that Mr. Kalanick and Uber are one in the same, or requires Uber to answer on Mr. Kalanick's behalf. Uber denies the remaining allegations in Paragraph 64.

65. Uber denies the allegations in Paragraph 65.

66. Uber denies this allegation to the extent it seeks an implied admission that Mr. Kalanick and Uber are one in the same, or requires Uber to answer on Mr. Kalanick's behalf. Uber responds that the terms "in some U.S. cities" and "standard fare" are vague and ambiguous, and Uber is also without knowledge or information about the "reports" referenced; therefore Uber is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraph 66 and on that basis denies them.

67. Uber responds that the terms "standard fare" and "reportedly" are vague and ambiguous and therefore Uber is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraph 67 and on that basis denies them.

68. Uber denies the allegation in Paragraph 68.

69. Uber objects that the term "depart downward," as used in this allegation, is vague and ambiguous. Based on Uber's understanding of that term, Uber denies the allegations in Paragraph 69.

70. To the extent that the allegations in Paragraph 70 are legal conclusions, no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 70.

71. To the extent that the allegations in Paragraph 71 are legal conclusions, no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 71.

72. Uber denies the allegations in Paragraph 72.

73. Uber is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraph 73 and on that basis denies them.

74. Uber admits that the allegations in Paragraph 74 appear to recite from a Facebook comment posted by Mr. Kalanick and to the extent a copy of the post is ever held to be admissible, it would speak for itself.

75. Uber denies the allegations in Paragraph 75.

76. To the extent that the allegations in Paragraph 76 contain legal conclusions, no responsive pleading is required. To the extent that a response is required, Uber denies the allegations in Paragraph 76.

77. Uber denies the allegations in Paragraph 77.

78. Uber denies the allegations in Paragraph 78.

79. Uber admits that the allegations in Paragraph 79 appear to quote blog posts and to the extent copies of these posts are ever held to be admissible, they would speak for themselves. Uber denies any remaining allegations in Paragraph 79.

80. Uber admits that Mr. Kalanick is the CEO and co-founder of Uber and that in San Francisco, California, on one night—starting at 9:19 p.m. on February 21, 2014, and ending at 1:57 a.m. on February 22, 2014—Mr. Kalanick drove a vehicle while using the Uber App to receive transportation requests. Uber denies any remaining allegations in Paragraph 80.

81. Uber admits that the allegations in Paragraph 81 appear to quote "tweets" posted by Mr. Kalanick and to the extent copies of the tweets are ever held to be admissible, they would speak for themselves. Uber further admits that Mr. Kalanick live tweeted about his experience when he drove a vehicle while using the Uber App to receive transportation requests in San Francisco, California, on one night—starting at 9:19 p.m. on February 21, 2014, and ending at 1:57 a.m. on February 22, 2014. Uber denies any remaining allegations in Paragraph 81.

82. Uber denies the allegations in Paragraph 82.

83. Uber denies the allegations in Paragraph 83.

84. Uber denies the allegations in Paragraph 84.

85. Uber denies the allegations in Paragraph 85.

86. To the extent that the allegations in Paragraph 86 are legal conclusions, no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 86.

87. To the extent that the allegations in Paragraph 87 are legal conclusions, no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 87.

88. To the extent that the allegations in Paragraph 88 are legal conclusions, no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 88.

89. Uber denies the allegations in Paragraph 89.

90. To the extent that the allegations in Paragraph 90 are legal conclusions, no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 90.

91. Paragraph 91 contains legal conclusions and hypotheses to which no response is required. To the extent an answer is required, Uber denies the allegations in Paragraph 91.

92. To the extent that the allegations in Paragraph 92 are legal conclusions, no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 92.

93. Paragraph 93 contains legal conclusions and hypotheses to which no response is required.

94. The allegations in Paragraph 94 are legal conclusions to which no responsive pleading is required. Uber also responds that the term "mobile app-generated ride-share service market" is vague and ambiguous and therefore Uber is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraph 94. To the extent an answer is required, Uber denies the remaining allegations in Paragraph 94.

95. To the extent that the allegations in Paragraph 95 are legal conclusions, no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 95.

96. To the extent that the allegations in Paragraph 96 are legal conclusions, no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 96.

97. To the extent that the allegations in Paragraph 97 are legal conclusions, no responsive pleading is required. To the extent an answer is required, Uber admits that Sidecar ceased business at some point in time. Uber denies any remaining allegations in Paragraph 97.

98. Uber admits that the allegations in Paragraph 98 purport to recite from an article and that, if and to the extent the document is ever held to be admissible, it would speak for itself. Uber denies any remaining allegations in Paragraph 98.

99. Uber admits that the allegations in Paragraph 99 purport to recite from an article and that, if and to the extent the document is ever held to be admissible, it would speak for itself. Uber denies any remaining allegations in Paragraph 99.

100. Uber admits that the allegations in Paragraph 100 purport to recite from an article in Forbes magazine and that, if and to the extent the document is ever held to be admissible, it would speak for itself. Uber denies the remaining allegations in Paragraph 100.

101. To the extent that the allegations in Paragraph 101 are legal conclusions, no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 101.

102. Uber denies the allegations in Paragraph 102.

103. Uber denies the allegations in Paragraph 103.

104. Uber admits that using a mobile app-generated ride-share request service like the Uber App means that riders can "arrange for rides at the push of a button," that the rider's smartphone displays an icon representing the driver's vehicle on a moving map and allows the rider to watch the driver approach, that they need not have cash or credit card on hand, that they can simply get out of the car when they reach their destination without further delay, and that the Uber App allows a rider to rate his or her driver and view their driver's name, headshot, the make and model of his car, and overall rating before entering the vehicle. Uber denies the remaining allegations in this paragraph.

105. To the extent that the allegations in Paragraph 105 are legal conclusions, no responsive pleading is required. Uber responds that the allegations in Paragraph 105 purport to recite from a document and that, if and to the extent the document is ever held to be admissible, it would speak for itself. Uber objects that the term "market," as used in this allegation, is vague and ambiguous. Based on Uber's understanding of that term in this context, Uber denies the allegations in Paragraph 105.

106. To the extent that the allegations in Paragraph 106 are legal conclusions, no responsive pleading is required. Uber objects that the term "substitutes," as used in this allegation, is vague and ambiguous. Based on Uber's understanding of that term in this context, Uber denies the allegations in Paragraph 106.

107. To the extent that the allegations in Paragraph 107 are legal conclusions, no responsive pleading is required. Uber responds that the allegations in Paragraph 107 purport to recite from "Uber's own experts" and that, if and to the extent this document or testimony is ever held to be admissible, it would speak for itself. Uber objects that the term "substitutes," as used in this allegation, is vague and ambiguous. Based on Uber's understanding of that term in this context, Uber denies the allegations in Paragraph 107.

108. To the extent that the allegations in Paragraph 108 are legal conclusions, no responsive pleading is required. Uber objects that the term "substitutes," as used in this allegation, is vague and ambiguous. To the extent an answer is required, Uber denies the allegations in Paragraph 108.

109. To the extent that the allegations in Paragraph 109 are legal conclusions, no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 109.

110. To the extent that the allegations in Paragraph 110 are legal conclusions, no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 110.

111. To the extent that the allegations in Paragraph 111 are directed at Mr. Kalanick and/or are legal conclusions, no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 111.

112. To the extent that the allegations in Paragraph 112 are legal conclusions, no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 112.

113. Uber admits that Plaintiff seeks to sue "on behalf of a class of persons pursuant to Federal Rule of Civil Procedure 23." Uber denies that this case can be maintained as a class action in part because Plaintiff agreed to be bound by Uber's Terms and Conditions, including the arbitration agreement and class waiver provisions contained therein. Plaintiff has thus agreed to arbitrate this dispute on an individual basis and has waived his right to bring a class action or participate as a class member in a class action. Uber further denies the remaining allegations set forth in Paragraph 113.

114. Uber admits that Plaintiff also seeks to "bring certain of the claims on behalf of himself and a portion of the Class described as the Surge Pricing Subclass." Uber denies that this case can be maintained as a class action, in part because Plaintiff agreed to be bound by Uber's Terms and Conditions, including the arbitration agreement and class waiver provisions contained therein. Plaintiff has thus agreed to arbitrate this dispute on an individual basis and has waived his right to bring a class action or participate as a class member in a class action. Uber further denies the remaining allegations set forth in Paragraph 114.

115. To the extent that the allegations in Paragraph 115 are legal conclusions, no responsive pleading is required. To the extent an answer is required, Uber is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations in Paragraph 115 and on this basis denies them.

116. To the extent that the allegations in Paragraph 116 are legal conclusions, no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 116.

117. To the extent that the allegations in Paragraph 117 are legal conclusions, no responsive pleading is required. To the extent that an answer is required, Uber denies the allegations in Paragraph 117.

118. To the extent that the allegations in Paragraph 118 are legal conclusions, no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 118.

119. To the extent that the allegations in Paragraph 119 are legal conclusions, no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 119.

ANSWER TO ALLEGATIONS REGARDING FIRST CAUSE OF ACTION
(Violation of the Sherman Act, 15 U.S.C. § 1)

120. Uber incorporates its response to Paragraphs 1 through 119 as if fully set forth herein.

121. The allegations in Paragraph 121 are legal conclusions and no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 121.

122. The allegations in Paragraph 122 are legal conclusions and no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 122.

123. The allegations in Paragraph 123 are legal conclusions and no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 123.

124. The allegations in Paragraph 124 are legal conclusions and no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 124.

125. The allegations in Paragraph 125 are legal conclusions and no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 125.

126. The allegations in Paragraph 126 are legal conclusions and no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 126.

127. The allegations in Paragraph 127 are legal conclusions and no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 127.

128. The allegations in Paragraph 128 are legal conclusions and no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 128.

129. The allegations in Paragraph 129 are legal conclusions and no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 129.

130. The allegations in Paragraph 130 are legal conclusions and no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 130.

131. To the extent that the allegations in Paragraph 131 are legal conclusions, no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 131.

132. To the extent that the allegations in Paragraph 132 are legal conclusions, no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 132.

133. The allegations in Paragraph 133 are legal conclusions and as such, no responsive pleading is required. To the extent that an answer is required, Uber denies the allegations in Paragraph 133.

ANSWER TO ALLEGATIONS REGARDING SECOND CAUSE OF ACTION
(Violation of the Donnelly Act, N.Y. Gen. Bus. Law § 340)

134. Uber incorporates its responses to Paragraphs 1 through 133 as if fully set forth herein.

135. The allegations in Paragraph 135 are legal conclusions and no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 135.

136. The allegations in Paragraph 136 are legal conclusions and no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 136.

137. The allegations in Paragraph 137 are legal conclusions and no responsive pleading is required. To the extent an answer is required, Uber denies the allegations in Paragraph 137.

138. To the extent that the allegations in Paragraph 138 are legal conclusions, no responsive pleading is required. Uber denies the allegations in Paragraph 138.

139. To the extent that the allegations in Paragraph 139 are legal conclusions, no responsive pleading is required. Uber denies the allegations in Paragraph 139.

140. The allegations in Paragraph 140 are legal conclusions and as such, no responsive pleading is required. To the extent that an answer is required, Uber denies the allegations in Paragraph 140.

JURY DEMAND AND ANSWER TO PRAYER FOR RELIEF

141. Uber admits that "Plaintiff requests a jury trial of all issues triable of right to a jury" but in answer to Plaintiff's Petition for Relief (including paragraphs A through I inclusive), Uber responds that Plaintiff has expressly waived "the right to a trial by jury, to participate as a plaintiff or class User in any purported class action or representative proceeding." Moreover, Plaintiff also expressly agreed to resolve "any dispute, claim, or controversy arising out of or relating to" the Agreement via binding arbitration, on an individual basis and not as a class action. Accordingly, Uber believes that all of Plaintiff's claims in this case, must be arbitrated pursuant to the Arbitration Agreement between Uber and Plaintiff, as set forth in the motion to compel arbitration that Uber previously filed. Nonetheless, in the event this Court's denial of Uber's motion to compel arbitration is affirmed on appeal, Uber requests jury trial of all issues

raised by Plaintiff's claims that are so triable. Uber also denies specifically that Plaintiff is entitled to any relief. Accordingly, Uber denies generally and specifically each and every factual allegation contained in Plaintiff's Petition for Relief.

SEPARATE AND ADDITIONAL DEFENSES

Without assuming any burden of proof that it would not otherwise bear, Uber also asserts the following additional defenses:

FIRST SEPARATE AND ADDITIONAL DEFENSE

Plaintiff is precluded from proceeding in this action under the terms of his binding User Agreement. Plaintiff expressly agreed to resolve "any dispute, claim, or controversy arising out of or relating to" the Agreement via binding arbitration, on an individual basis and not as a class action. Plaintiff also agreed to waive "the right to a trial by jury, to participate as a plaintiff or class User in any purported class action or representative proceeding."

SECOND SEPARATE AND ADDITIONAL DEFENSE

Plaintiff's proposed class definition is vague and overly broad, and otherwise fails to satisfy the requirements for maintaining a class action.

THIRD SEPARATE AND ADDITIONAL DEFENSE

Plaintiff cannot satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure for a class action.

FOURTH SEPARATE AND ADDITIONAL DEFENSE

This action is not a proper class action under Federal Rule of Civil Procedure 23 because, inter alia, Plaintiff's claims are futile, Plaintiff's claims are not typical or common of those of the putative class, Plaintiff is not an adequate representative of the putative class, common issues do not predominate over individual issues, damages cannot be proven on a class-wide basis, the

class is based on a faulty definition of the relevant market, a class action is not a superior method of adjudication of this case, and class-wide adjudication of Plaintiff's claims would violate both the Rules Enabling Act and Uber's due process rights.

FIFTH SEPARATE AND ADDITIONAL DEFENSE

Plaintiff's claims are subject to arbitration by virtue of Plaintiff's agreement to an arbitration clause.

SIXTH SEPARATE AND ADDITIONAL DEFENSE

Plaintiff has failed to state a cause of action for which relief may be granted in whole or in part.

SEVENTH SEPARATE AND ADDITIONAL DEFENSE

The claims of Plaintiff are barred, in whole or in part, by the statute of limitations. *See* 15 U.S.C. § 15b; N.Y. Gen. Bus. Law § 340(5).

EIGHTH SEPARATE AND ADDITIONAL DEFENSE

To the extent Plaintiff and the alleged class seek relief on behalf of purported class members who have not suffered any damages, the Complaint and each of its claims for relief therein violate Uber's rights to due process under the United States Constitution.

NINTH SEPARATE AND ADDITIONAL DEFENSE

The claims of Plaintiff are barred, in whole or in part, by the state action doctrine, *see Parker v. Brown*, 317 U.S. 341 (1943).

TENTH SEPARATE AND ADDITIONAL DEFENSE

The claims of Plaintiff are barred, in whole or in part, by the filed rate doctrine, *see Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922).

ELEVENTH SEPARATE AND ADDITIONAL DEFENSE

The claims of Plaintiff are barred, in whole or in part, by the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36.

TWELFTH SEPARATE AND ADDITIONAL DEFENSE

The claims of Plaintiff are barred, in whole or in part, to the extent that they seek double or duplicative recovery.

THIRTEENTH SEPARATE AND ADDITIONAL DEFENSE

The claims of Plaintiff are barred, in whole or in part, by the doctrine of laches.

FOURTEENTH SEPARATE AND ADDITIONAL DEFENSE

The claims of Plaintiff are barred, in whole or in part, by the doctrine of waiver and/or estoppel.

FIFTEENTH SEPARATE AND ADDITIONAL DEFENSE

The claims of Plaintiff are barred, in whole or in part, by the doctrine of setoff.

SIXTEENTH SEPARATE AND ADDITIONAL DEFENSE

To the extent that any actionable conduct occurred, Plaintiff's claims against Uber are barred to the extent that such conduct was committed by individuals acting *ultra vires*.

SEVENTEENTH SEPARATE AND ADDITIONAL DEFENSE

The claims of the Plaintiff are barred, in whole or in part, insofar as they challenge the exercise of rights protected by the First Amendment of the United States Constitution and by the *Noerr-Pennington* doctrine.

EIGHTEENTH SEPARATE AND ADDITIONAL DEFENSE

The claims of the Plaintiff are barred insofar as Plaintiff or putative class members lack standing to sue.

NINETEENTH SEPARATE AND ADDITIONAL DEFENSE

Plaintiff is barred from recovery for any alleged damages because of and to the extent of his failure to mitigate damages.

TWENTIETH SEPARATE AND ADDITIONAL DEFENSE

The application of the Donnelly Act to commerce that is not intra-state commerce or interstate commerce between New York and another State is preempted by the Sherman Act and the Supremacy Clause and, to the extent it imposes an excessive burden on interstate commerce, is preempted by the Commerce Clause.

TWENTY-FIRST SEPARATE AND ADDITIONAL DEFENSE

The claims of Plaintiff are barred due to settlement, accord and satisfaction, and/or release.

TWENTY-SECOND SEPARATE AND ADDITIONAL DEFENSE

Because Plaintiff's Amended Complaint is phrased in conclusory terms, Uber cannot fully anticipate all affirmative defenses that may be applicable to this action. Accordingly, Uber has done its best to anticipate the possible affirmative defenses consistent with the requirements of FRCP 8(c). Uber reserves the right to assert additional defenses, including any defense asserted by any co-defendant, to the extent such defenses are or become applicable, as well as to develop facts in support of its affirmative defenses. To the extent any affirmative defense is, ultimately, not applicable, in whole or in part, it will be, in good faith, amended or withdrawn.

UBER'S COUNTER COMPLAINT

For its counterclaim against Plaintiff Spencer Meyer, Uber Technologies, Inc. ("Uber") avers as follows:

SUMMARY OF THE ACTION

1. This dispute is the subject of the purported class action lawsuit filed by Plaintiff on December 16, 2015. *See* DE 1. Plaintiff asserts that Uber's pricing algorithm is part of a "scheme to fix prices among direct competitors," and that "[t]hrough the pricing algorithm and its surge pricing component, Kalanick and Uber artificially set the fares for its driver-partners to charge to riders." Am. Compl. at ¶¶ 5, 54. Based on allegations that he "paid higher prices for car service" requested through the Uber App, *id*. at ¶ 8, Plaintiff brought an action for violation of the Sherman Act, 15 U.S.C. § 1. Uber maintains that Plaintiff's claims are baseless and that, in fact, Uber has behaved pro-competitively. Given this, an actual case or controversy exists between the parties. However, Plaintiff stubbornly insists that "the Complaint asserts no claims against Uber," merely because he originally named only Uber's CEO, Travis Kalanick. DE 102 at 37. Plaintiff's position is incorrect given the Court recognized that "plaintiff's basic demand for relief is, to a significant extent, directed against Uber" and ordered Uber to be joined as a defendant. DE 90 at 5 n.4, 7. Plaintiff's erroneous contention necessitates Uber's countercomplaint for declaratory relief; therefore, Uber brings this countercomplaint pursuant to 28 U.S.C. §§ 2201-2202 to resolve the underlying dispute with Plaintiff.

THE PARTIES

2. Upon information and belief, Plaintiff Spencer Meyer is a resident of Connecticut.

3. Uber is a technology company that connects independent transportation providers and riders through its smartphone application (the "Uber App"). Uber is a Delaware corporation and is headquartered in San Francisco, California.

JURISDICTION AND VENUE

4. This Counterclaim is filed pursuant to 28 U.S.C. § 2201(a) to resolve an actual controversy between the parties. The parties' dispute arises under Section 1 of the Sherman Act, 15 U.S.C. § 1.

5. This Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

6. An actual and ripe case or controversy exists between Uber and Plaintiff as to all matters alleged herein. Plaintiff's claims go to the heart of Uber's business, challenging the very lawfulness of Uber's services, the Uber App, and Uber's pricing algorithm (including "surge pricing") under the antitrust laws. For example, Plaintiff asserts that Uber's pricing algorithm is part of a "scheme to fix prices among direct competitors," and that "[t]hrough the pricing algorithm and its surge pricing component, Kalanick and Uber artificially set the fares for its driver-partners to charge to riders." Am. Compl. at ¶¶ 5, 54. He contends that "the fares set by the Uber algorithm" and "which are uniformly charged by drivers using the Uber app" are therefore "price-fixed fares." *Id*. at ¶ 2. Uber maintains that it did not violate any antitrust laws and, in fact, behaved pro-competitively. Given this, an actual case or controversy exists. Uber's countercomplaint for declaratory relief is necessitated by Plaintiff's erroneous contention that he "has pled claims only against Kalanick, not against Uber," and "[t]here is thus no claim against Uber in this proceeding" (DE 102 at 38-39)—despite the fact that Uber has been joined as a defendant and the Court has recognized that Plaintiff's attempts to mischaracterize his claims are "hyper-technical" and "awfully artificial" (DE 94 at 23, 25-26).

7. This Court has personal jurisdiction over Plaintiff.

8. Plaintiff has purposely availed himself of the benefits of the State of New York and has brought claims in this district which are the subject of this countercomplaint.

9. Uber also is subject to personal jurisdiction in New York and it consents to that jurisdiction.

10. The claims in this case arise out of transactions with Plaintiff that relate to New York State. Plaintiff contends that, *inter alia*, he has been injured as a result of prices he has paid for transportation service requested through the Uber App while in New York City.

11. Venue in the Southern District of New York is proper under 28 U.S.C. § 1391 in that a substantial part of the events giving rise to the claims occurred in this district. Uber transacts business and is found in the Southern District of New York. A substantial part of the interstate trade and commerce involved and affected by the alleged violations of the antitrust laws was and is carried on within the Southern District of New York.

FACTUAL ALLEGATIONS

12. Uber is an innovative technology company that enables riders to request transportation services from independent transportation providers. Riders can request transportation services by using the Uber App on their smartphones, and these requests are then transmitted to independent transportation providers who are available to receive transportation requests. As a new entrant, Uber has vastly increased options, reduced prices and improved service for millions of Americans.

13. Before riders can request transportation services via the Uber App, they must first register by creating a rider account with Uber ("an Uber Account"). Plaintiff created such an Uber Account in late 2014 to become an Uber rider. In the process of registering to use Uber, Plaintiff agreed to Uber's Rider Terms, which include an Arbitration Agreement mandating that "any" claim "arising out of or relating this Agreement … or the use of [Uber's] Service or Application" must be "settled by binding arbitration." DE 29-1 at 8-9. Uber's "Service"

includes "any services supplied" by Uber, and its "Application" includes "any associated application supplied to [a rider] by [Uber] which purpose is to enable [a rider] to use the Service." *Id*. at 2.

14. Plaintiff brought suit on December 16, 2015 on behalf of himself and a purported class of persons consisting of "all persons in the United States who, on one or more occasions, have used the Uber App to obtain rides from Uber driver-partners and paid fares for their rides set by the Uber pricing algorithm." Am. Compl. ¶ 113. Plaintiff alleged that "Uber has a simple but illegal business plan: to fix prices among competitors and take a cut of the profits." *Id*. at ¶ 1. Plaintiff further alleged that "Uber [is] a price fixer," *id*. at ¶ 2, and that "Uber's essential role [is] to fix prices among competing drivers," *id*. at ¶ 4. According to Plaintiff, Uber's price-fixing is accomplished via the Uber app and Uber's pricing algorithm: "[E]ach time they accept a rider using the Uber App," "[d]river-partners . . . participate in a combination, conspiracy, or contract to fix prices" with Uber and Mr. Kalanick, *id.* at ¶ 71, and "[t]hrough the pricing algorithm and its surge pricing component, Kalanick and Uber artificially set the fares for its driver-partners to charge to riders," *id*. at ¶ 54. Based on allegations that he "paid higher prices for car service" requested through the Uber App, *id*. at ¶ 8, Plaintiff brought an action for violation of the Sherman Act, 15 U.S.C. § 1. Although styled as an action against Uber's CEO only in order to evade Plaintiff's arbitration obligation with Uber, as this Court has recognized, "fairly read, the Amended Complaint alleges that ***Uber's scheme for setting prices, as well as the terms of Uber's contracts with drivers, constitute an antitrust violation***." DE 90 at 5 (emphasis added). Thus, Plaintiff's allegations are, in all but name, directed against Uber.

15. The claims in Plaintiff's Amended Complaint are meritless.

16. To prove its various claims against Uber, Plaintiff would need to show certain elements that are necessary for relief under the legal standards applicable to each count. Plaintiff cannot prove the necessary elements of its claims.

17. As an example, Plaintiff cannot show any concerted action that could have unreasonably restrained trade in any relevant market. Additionally, Plaintiff has not alleged a plausible relevant market and, further, cannot show that trade has been restrained unreasonably in any legally cognizable relevant market. Nor can Plaintiff show a restraint of trade on a *per se* basis or under a "quick look" analysis. Plaintiff's factual allegations are also groundless; accordingly, Uber denies them. *See* Uber's Answer to the First Amended Complaint.

18. Uber maintains that Plaintiff's claims lack merit. Uber did not violate any antitrust laws and, in fact, behaved pro-competitively.

19. A declaratory judgment in Uber's favor and against Plaintiff is necessary to finally resolve the dispute between the parties.

20. The dispute between the parties is ripe and justiciable, and conservation of judicial resources weighs strongly in favor of resolving it now.

21. To resolve the parties' dispute, Uber seeks a declaration that, during the time period for which Plaintiff seeks damages in its Amended Complaint, Uber's conduct in, among other things, operating the Uber App and Uber's pricing algorithm, including the "surge pricing" element, did not violate Section 1 of the Sherman Act.

22. Uber includes this counterclaim in its Answer as required under the Federal Rules of Civil Procedure, so as not to waive its right to assert this counterclaim in the event this litigation proceeds in court. However, Uber believes that this counterclaim, like all of Plaintiff's claims in this case, must be arbitrated pursuant to the Arbitration Agreement between Uber and

Plaintiff, as set forth in the motion to compel arbitration that Uber previously filed. Uber expressly reserves all rights to arbitration pursuant to its Arbitration Agreement with Plaintiff and nothing contained herein should be deemed or construed as a waiver of those rights. In the event this Court's denial of Uber's motion to compel arbitration is reversed on appeal, Uber would not proceed with this counterclaim in litigation but would instead pursue this counterclaim as part of the arbitration.

COUNT I

(Declaratory Judgment – No Violation of Section 1 of the Sherman Act)

23. Uber re-alleges and fully incorporates herein by reference each and every allegation contained in paragraphs 1 through 22 above.

24. Plaintiff asserts that Uber's app and Uber's pricing algorithm, including the "surge pricing" element, violate Section 1 of the Sherman Act.

25. By reason of the foregoing, there is an actual, substantial, and continuing justiciable controversy between Uber and Plaintiff regarding the lawfulness of Uber's app and Uber's pricing algorithm under Section 1 of the Sherman Act.

26. Plaintiff is unable to establish that Uber is liable under Section 1 of the Sherman Act based upon Uber's App or Uber's pricing algorithm, including the "surge pricing" element.

27. Uber seeks and is entitled to a declaration that Uber's App and Uber's pricing algorithm, including the "surge pricing" element, do not violate Section 1 of the Sherman Act.

28. In addition to the aforesaid declaration, Uber seeks such additional and further relief as the Court deems appropriate.

PRAYER FOR RELIEF

29. WHEREFORE, Uber respectfully requests that this Honorable Court enter judgment in its favor and against the Plaintiff on Count I, granting:

(a) A declaration pursuant to 28 U.S.C. § 2201 that Uber is not liable under Sherman Act Section 1; and

(b) Any such other and further relief as justice and equity may require.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Uber hereby demands a trial by jury as to all issues so triable, whether raised by Plaintiff's claims or by Uber's Counter Complaint. Uber includes this demand in its Counter Complaint as required under the Federal Rules of Civil Procedure, so as not to waive its right to a trial by jury in the event this litigation proceeds in court. However, Uber believes that its counterclaim, like all of Plaintiff's claims in this case, must be arbitrated pursuant to the Arbitration Agreement between Uber and Plaintiff, as set forth in the motion to compel arbitration that Uber previously filed. Uber expressly reserves all rights to arbitration pursuant to its Arbitration Agreement with Plaintiff and nothing contained herein should be deemed or construed as a waiver of those rights. In the event this Court's denial of Uber's motion to compel arbitration is reversed on appeal, Uber would not proceed with this counterclaim or Plaintiff's claims in litigation, would relinquish its right to a trial by jury as to all issues raised by such claims and counterclaim, and would instead pursue its counterclaim as part of the arbitration.

Dated: July 29, 2016

Respectfully submitted,

/s/ Daniel G. Swanson

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2016, I filed and therefore caused the foregoing document to be served via the CM/ECF system in the United States District Court for the Southern District of New York on all parties registered for CM/ECF in the above-captioned matter:

/s/ Daniel G. Swanson
Daniel G. Swanson

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SPENCER MEYER, individually and on behalf of those similarly situated, Plaintiffs, -against- TRAVIS KALANICK and UBER TECHNOLOGIES, INC., Defendants.	Case No. 1:15-cv-9796 (JSR)

UBER TECHNOLOGIES, INC. AND TRAVIS KALANICK'S MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION TO STAY JUDICIAL PROCEEDINGS

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August 5, 2016

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Defendants Uber Technologies, Inc. ("Uber") and Travis Kalanick (collectively "Defendants") respectfully move this Court for a stay of all proceedings pending their appeals of the Court's July 29, 2016 order denying Defendants' motions to compel arbitration. *See* Def. Uber's Notice of Appeal, DE 131; Def. Kalanick's Notice of Appeal, DE 132.

PRELIMINARY STATEMENT

Defendants' appeals present extremely "serious questions" warranting a stay pending appeal. *See Sutherland v. Ernst & Young LLP*, 856 F. Supp. 2d 638, 640–41 (S.D.N.Y. 2012) (citing *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 34–38 (2d Cir. 2010)); *Jock v. Sterling Jewelers, Inc.*, 738 F. Supp. 2d 445, 447 (S.D.N.Y. 2010) (Rakoff, J.). This Court's order denying Defendants' motions to compel arbitration touches on fundamental issues regarding assent to electronic agreements that implicate the very "'integrity and credibility' of 'electronic bargaining.'" DE 126 at 28 (quoting *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 35 (2d Cir. 2002)). The Second Circuit has yet to weigh in on the standards that courts should apply when evaluating so-called "hybrid" click wrap or "sign-in wrap" agreements like the one at issue here, nor has the Second Circuit had the opportunity to weigh in on the emerging frontier of contracts reached over a mobile phone or via a mobile application. The standards this Court applied implicate an untold number of electronic agreements of Uber and countless other companies.

Moreover, a stay is warranted because Defendants have a high probability of succeeding on appeal. This Court announced that it was "indulg[ing] every reasonable presumption against" the validity of the contract at issue, purely because the agreement contains an arbitration provision, which—like every other arbitration agreement—forces the parties to forego their right to a jury trial. DE 126 at 1 (quoting *Aetna Ins. Co. v. Kennedy to Use of Bogash*, 301 U.S. 389, 393 (1937)). The Court's holding, which expressly *disfavors* arbitration, is in direct conflict with

well-established law holding that federal courts must *favor* arbitration under the Federal Arbitration Act ("FAA"), and that the FAA preempts any rule that "does not place arbitration contracts 'on equal footing with all other contracts.'" *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)). Applying this erroneous presumption against arbitration, the Court scrutinized the "placement of the arbitration clause in Uber's User Agreement" and criticized Uber's failure to draw special attention to the arbitration portion of the User Agreement. DE 126 at 28. As the Supreme Court has "several times said," however, the Federal Arbitration Act was enacted to prevent precisely this kind of "singling out [of] arbitration provisions for suspect status." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (holding that the FAA preempted a state statute requiring arbitration clauses to be prominently identified in underlined capital letters on the first page of a contract). Indeed, even under California law, on which the Court relied against Defendants' objections, a company may not be "oblig[ed] to highlight the arbitration clause of its contract . . . [or] to specifically call that clause to [another party's] attention." *Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899, 914 (2015). The direct conflict between the Court's order and the law both within and outside the Second Circuit means that Defendants have a strong likelihood of success on their appeals.

Defendants are also likely to prevail on their arguments regarding the validity of "hybrid clickwrap" electronic agreements. *First*, this Court held that courts have "repeatedly" "declin[ed] to find that an electronic contract was formed" where the agreement did not require a user to click a button explicitly labeled "I agree." DE 126 at 22–24. Not so. Courts in this Circuit have consistently held that users manifest assent by clicking "Sign Up" or "Place your order" buttons just like the "Register" button at issue here. *See, e.g.*, *Starke v. Gilt Grp., Inc.*, No. 13-cv-5497-LLS, 2014 WL 1652225, at *2 (S.D.N.Y. Apr. 24, 2014) (plaintiff assented by

clicking "Sign Up" button); *Nicosia v. Amazon.com, Inc.*, 84 F. Supp. 3d 142, 150 (E.D.N.Y. 2014) (plaintiff assented by clicking "Place your order" button); *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 834 (S.D.N.Y. 2012) (plaintiff assented by clicking "Sign Up" button).

Second, the Court found that "[t]he Uber registration screen . . . did not adequately call users' attention to the existence of Terms of Service." DE 126 at 25. But that holding is at odds with numerous district court decisions that have enforced electronic agreements with far *less* conspicuous hyperlinks to the terms of service. *See*, *e.g.*, *Fteja*, 841 F. Supp. 2d 829; *Nicosia*, 84 F. Supp. 3d 142; *Gilt Grp.*, 2014 WL 1652225.

Third, the Court's conclusion that the text of Uber's hyperlink was "ambiguous"—notwithstanding that it was accurately labeled "Terms of Service"—is inconsistent with numerous district court decisions enforcing electronic agreements accessed by hyperlinks bearing the exact same text. *See*, *e.g.*, *Cullinane v. Uber Techs., Inc.*, No. 14-14750, 2016 WL 3751652, at *2 (D. Mass. July 11, 2016) (enforcing Uber agreement with riders where riders were directed to hyperlink labeled "Terms of Service"); *Fteja*, 841 F. Supp. 2d at 835 (enforcing agreement with hyperlink labeled "Terms of Service").

Allowing these proceedings to continue while Defendants' appeals are pending would deprive the parties—perhaps permanently—of the "efficient, streamlined procedures" they agreed to when Meyer registered to use the Uber App, *see AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). Indeed, if a party "must undergo the expense and delay of a trial before being able to appeal, the advantages of arbitration—speed and economy—are lost forever." *Alascom, Inc. v. ITT North Elec. Co.*, 727 F.2d 1419, 1422 (9th Cir. 1984).

Because the overwhelming weight of authority from courts nationwide supports Defendants' arguments that Plaintiff—as he alleged in his complaint and subsequently reaffirmed before disavowing—entered into a contract with Uber, this Court should stay this

action. This is true even if the Court "remains confident in the soundness of" its reasoning. *Jock*, 738 F. Supp. 2d at 447; *see also Cendant Corp. v. Forbes*, 72 F. Supp. 2d 341, 343 (S.D.N.Y. 1999) (Rakoff, J.) (finding a stay appropriate although "the Court has previously found [defendant's] arguments for arbitration wholly unconvincing").

LEGAL STANDARD

This Court has "judicial discretion" to stay the proceedings pending Defendants' appeals. *Nken v. Holder*, 556 U.S. 418, 433 (2009) (internal quotation marks omitted); *see also Kaltman v. Petroleo Brasileiro S.A. Petrobras*, No. 16-1914, DE 169 (2d Cir. Aug. 2, 2016) (granting motion to stay in interlocutory appeal where district court (Rakoff, J.) had previously denied a motion to stay); *In re World Trade Ctr. Disaster Site Litig.*, 2007 U.S. App. LEXIS 8728 (2d Cir. Mar. 9, 2007) (granting motion for a stay of trial as well as pre-trial proceedings pending appeal); *Plummer v. Quinn*, No. 07-6154-WHP, 2008 WL 383507, at *2 (S.D.N.Y. Feb. 12, 2008) (granting stay pending defendant's appeal); *Sutherland v. Ernst & Young LLP*, 856 F. Supp. 2d 638, 644 (S.D.N.Y. 2012) (staying discovery during pendency of appeal of order denying motion to compel arbitration); *Jock*, 738 F. Supp. 2d at 447 (granting stay where the "appeal presents issues of first impression" regarding Federal Arbitration Act).

A motion for a stay "is a motion, not to [the court's] inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *Nken*, 556 U.S. at 434 (internal quotation marks omitted). Accordingly, in determining whether to issue a stay pending appeal, this Court examines four factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 426 (internal quotation marks omitted). "While stated in these terms, the test contemplates that a movant may be granted relief even if it demonstrates something less than a likelihood of success on the merits of its appeal." *Sutherland*, 856 F. Supp. 2d at 640. To warrant a stay, Defendants must show only that they have "a substantial possibility, although *less than a likelihood*, of success on appeal." *LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir. 1994) (emphasis added) (internal quotations omitted); *see also Citigroup Global Mkts.*, 598 F.3d at 37 (*Nken* "did not suggest that this factor requires a showing that the movant is 'more likely than not' to succeed on the merits"); *Jock*, 738 F. Supp. at 447 (reasoning that, while plaintiffs' appeal rested on "immaterial" distinctions with binding precedent, "the Court of Appeals may disagree, and for that reason alone the plaintiffs have sufficiently demonstrated a likelihood of success on the merits"). Alternatively, a party may obtain a stay "if it shows 'serious questions' going to the merits of its appeal as well as irreparable harm," and "the balance of hardships 'tips decidedly' in [its] favor." *Sutherland*, 856 F. Supp. 2d at 640 (quoting *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.,* 598 F.3d 30, 36 (2d Cir. 2010)).

"The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff[] will suffer absent the stay." *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002). Thus, "the stronger the showing that the movant makes as to its likelihood of success on the merits, the less compelling need be the movant's demonstration of harm." *Sutherland*, 856 F. Supp. 2d at 640.[1]

[1] At least five Courts of Appeals have held that the filing of a notice of interlocutory appeal pursuant to § 16 of the FAA automatically stays any related proceedings before the district court. *E.g.*, *Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 263 (4th Cir. 2011) ("[A]n appeal regarding arbitrability of claims does divest the district court of jurisdiction over those claims, as long as the appeal is not frivolous."); *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 215 n.6 (3d Cir. 2007) (same); *McCauley v. Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1162–63 (10th Cir. 2005) (same); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249,

(Cont'd on next page)

ARGUMENT

I. DEFENDANTS' APPEALS PRESENT SERIOUS QUESTIONS THAT THE SECOND CIRCUIT IS LIKELY TO RESOLVE IN THEIR FAVOR

As this Court has recognized, a stay may be warranted where a party's appeal "presents an issue of first impression," even if the Court "remains confident in the soundness of" its reasoning, so long as "the Court of Appeals *may* disagree." *Jock*, 738 F. Supp. 2d at 447 (emphasis added) (granting stay pending appeal to resolve open question regarding authority of arbitrator to permit class certification in arbitration). Although the overwhelming majority of courts nationwide, including numerous district courts both inside and outside this Circuit, have enforced electronic agreements nearly identical to the agreement at issue here, the Second Circuit has yet to weigh in on the validity of electronic contracts formed under these circumstances (where users are asked to assent to terms and conditions by registering for an account and/or clicking a button), or how electronic contract formation may be impacted by presentation over mobile phones or applications. Given the ample case law supporting Defendants' position, there is a strong likelihood that the Second Circuit will resolve these important issues of first impression in Defendants' favor and conclude that Plaintiff agreed to arbitrate his claims.

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1253 (11th Cir. 2004) (same); *Bombadier Corp. v. Nat'l R.R. Passenger Corp.,* No. 02-7125, 2002 WL 31818924, at *1 (D.C. Cir. Dec. 12, 2002) (same); *Bradford-Scott Data Corp. v. Physician Computer Network*, 128 F.3d 504, 507 (7th Cir. 1997) (same). Defendants respectfully submit that the Second Circuit's adherence to a contrary rule, *Motorola v. Uzan*, 388 F.3d 39, 54 (2d Cir. 2004), is mistaken and reserve their rights to challenge that rule in the appropriate forum. *See Griggs v. Provident Consumer Discount Co*., 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.").

A. Uber's Sign-Up Process Provided Adequate Notice Of The Rider Terms

There is a strong probability that the Second Circuit will reach a decision at odds with the Court's conclusion that the hyperlink to the Rider Terms was not "readily and obviously available to the user." DE 126 at 23. Ample case law—indeed, the weight of authority—supports Uber's position that the hyperlink and accompanying text were sufficiently conspicuous to put a reasonable consumer on inquiry notice that he or she was agreeing to Uber's Terms of Service by creating an Uber account.

As an initial matter, any evaluation of the "conspicuousness and placement of the 'Terms of Use' hyperlink" (*Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014)) must account for the extensive experience of the average consumer of mobile applications with this form of electronic contracting. "[C]onsumers are regularly and frequently confronted with non-negotiable contract terms, particularly when entering into transactions using the Internet . . . ." *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 127 (2d Cir. 2012); *see also Salameno v. Gogo, Inc.*, No. 16-0487, 2016 WL 4005783, at *4 (E.D.N.Y. July 25, 2016) ("In today's electronic world, online retailers often offer their services pursuant to terms of use shown on the computer used to order a product or services."). In particular, registering for electronic services, either by downloading an application or creating an account, is virtually always subject to terms and conditions of use, and users are generally asked to accept such terms and conditions at either the point of download or registration. A reasonably prudent user would be aware of the significant likelihood that a link to the terms and conditions of use would be among the text displayed during the registration process. *Cf. Schnabel*, 697 F.3d at 127 ("[I]nasmuch as consumers are regularly and frequently confronted with non-negotiable contract terms, particularly when entering into transactions using the Internet, the presentation of these terms at a place and time that the consumer will associate with the initial purchase or enrollment . . . indicates to the

consumer that he or she is . . . employing such services subject to additional terms and conditions that may one day affect him or her.").

At the very least, a reasonably prudent user would have read the very minimal amount of text featured on Uber's registration screen before entering his or her credit card information, if only to ascertain whether the credit card would be charged. This screen contained only 32 words. The admonition "By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY" was the only complete sentence on the page and comprised nearly half of all the words on the screen. It was visible without scrolling, centered on the screen, set off from the rest of the text and buttons by ample negative space, and contrasted sharply with the white background. Moreover, the hyperlink "TERMS OF SERVICE & PRIVACY POLICY" was underlined and capitalized, and was the only bright blue text on the screen.

The Court's conclusion that the text and hyperlink were "barely legible" (DE 11) appears to have been based on a "scaled down," low resolution, black and white image *the Court itself* created. DE 126 at 11; *compare id*. at 31, *with* Mi Decl., Ex. A, DE 92-2 at 1. No party has authenticated this image as a representative example of how the text of Uber's app would have appeared.[2] On its face, the image is at odds with how text appears on a high resolution, backlit, color screen, such as that of the Samsung Galaxy S5 smartphone Plaintiff used to register with Uber. *See* Decl. of Vinctent Mi in Support of Defs.' Motion to Stay. The text and hyperlink Plaintiff encountered would have been—and were—perfectly legible on his smartphone, *see id*., and Plaintiff has never argued that he was unable to read the text on Uber's registration screen. Indeed, that position would be difficult to square with his operation of a smartphone, since users

[2] Uber has submitted a higher resolution, color image of the confirmation screen, scaled to the same size as the Samsung Galaxy S5's screen. Decl. of Vinctent Mi in Support of Defs.' Motion to Stay, at 3 & Ex. A.

frequently must view small text in order to successfully operate the phone and its applications. The extraordinarily high resolution of modern smartphones means that even substantially smaller text would have been perfectly legible. For this reason, courts' experience with paper contracting is inapt when applied to users' interactions with smartphones and the legibility of smartphone text. *See* DE 126 at 12 (observing that the text in Uber's confirmation screen was rendered in "no greater than 6-point font").

1. Uber's Hyperlink Was Sufficiently Conspicuous

The text and hyperlink on Uber's registration screen are much more conspicuous than others that district courts in this Circuit have held create valid electronic agreements. The district court in *Fteja v. Facebook* enforced an electronic agreement containing an admonition and hyperlink that were far less conspicuous than the admonition and hyperlink in this case. The court summarized Facebook's sign-up process as follows:

> A putative user is asked to fill out several fields containing personal and contact information. *See* http://www.facebook.com. The putative user is then asked to click a button that reads "Sign Up." After clicking this initial "Sign Up" button, the user proceeds to a page entitled "Security Check" that requires a user to reenter a series of letters and numbers displayed on the page. Below the box where the putative user enters that letter-number combination, the page displays a second "Sign Up" button similar to the button the putative user clicked on the initial page. The following sentence appears immediately below that button: "By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service." The phrase "Terms of Service" is underlined, an indication that the phrase is a hyperlink . . . .

Id. at 834–35. The phrase "By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service" was rendered in small text that does not appear to have been any larger than the text of Uber's analogous admonition in this case. *See Fteja*, No. 11-cv-918 (RJH), DE 12 at 17; *Fteja*, 841 F. Supp. 2d at 834 (relying on screenshots submitted at Docket Entry 12). Facebook's registration screen contained over 70 words and multiple complete sentences that did not pertain to the Terms of Service. *See Fteja*, No. 11-918-RJH, DE 12 at 17 (S.D.N.Y. Apr. 18,

2011). The hyperlink was not set off from the rest of the text, and there is no indication it was displayed in a different color than the rest of the text. *See id*. A court in this district nonetheless enforced a forum selection clause contained in Facebook's Terms of Use, noting that "[s]everal other courts have reached a similar conclusion on similar facts." *Fteja*, 841 F. Supp. 2d at 840 (citing cases).

In addition, the placement of the hyperlink to the Rider Terms within the Uber App is virtually identical to the placement of the hyperlink in the electronic agreement in *Starke v. Gilt Groupe, Inc.* *Compare Gilt Grp.*, No. 13-cv-5497-LLS, DE 14-1 at 2 (S.D.N.Y. Apr. 24, 2014) (Ex. A to Decl. in Support of Def.'s Motion to Dismiss), *with* Decl. of Vincent Mi in Support of Uber's Motion to Compel Arbitration, DE 92-1, ¶¶ 3–5 & Ex. A. In *Gilt Groupe*, the plaintiff was prompted to "Sign up for a free, exclusive membership" by entering his email address in a field located directly above an orange button that read "Shop Now!" *See* 2014 WL 1652225, at *1; *Gilt Grp.*, No. 13-cv-5497-LLS, DE 14-1 at 2 (Ex. A to Decl. in Support of Def.'s Motion to Dismiss). At the bottom of the registration screen, below both the orange button and a blue button reading "Login with Facebook," and below text reading "We will never post on your behalf without first obtaining your permission," was a statement that "By joining Gilt through email or Facebook sign-up, you agree to the **Terms of Membership** for all Gilt Groupe sites." *See id*. The text reading "**Terms of Membership**" was a hyperlink that would bring up the "Gilt Terms and Conditions." *Gilt Grp.,* 2014 WL 1652225, at *1. The text was significantly smaller than the other text on the Gilt Groupe registration screen. *See Gilt Grp.*, No. 13-cv-5497-LLS, DE 14-1 at 2 (Ex. A to Decl. in Support of Def.'s Motion to Dismiss). The Court nonetheless enforced an arbitration agreement contained in the terms of membership, reasoning that "[r]egardless of whether he actually read the contract's terms, Starke was directed

exactly where to click in order to review those terms, and his decision to click the 'Shop Now' button represents his assent to them." *Gilt Grp.*, 2014 WL 1652225, at *3.

Similarly, in *Nicosia v. Amazon.com, Inc.*, 84 F. Supp. 3d 142, the placement of the hyperlink on Amazon's checkout page was much more obscure than the hyperlink in Uber's registration screen. *See Nicosia*, No. 14-4513-SLT, DE 53-3, ¶ 8 & Ex. C (E.D.N.Y. Dec. 24, 2014). Amazon's checkout page was cluttered with multiple promotional offers, buttons, and hyperlinks, all competing for the user's attention. It contained fields completely unrelated to any terms or conditions, allowing the user to change the shipping address and payment method; choose a delivery option and shipping preference; and asked whether the user wanted to "Use Chase Ultimate Rewards," or "try Amazon Locker," or sign up for "Amazon Prime." *See Nicosia*, No. 14-cv-4513 (SLT), DE 53-3, ¶ 8 & Ex. C. In all, the page contained well over 200 words of text. *See id.* A user had to sift through several admonitions and offers on the page to discover two sentences regarding Amazon's conditions of use. One read "By placing your order, you agree to Amazon.com's privacy notice and conditions of use." The other read, simply, "By placing your order, you agree to all terms found here," and included a hyperlink to Amazon's Conditions of Use. *See id.* Neither sentence was anywhere near the "Place your order" button. *See id.* The relative font size of this text compared to other text on Amazon's page is not meaningfully distinguishable from the relative font size of Uber's hyperlink. *Compare Nicosia*, No. 14-cv-4513 (SLT). DE 53-3, ¶ 8 & Ex. C, *with* Decl. of Vincent Mi in Support of Uber's Motion to Compel Arbitration, DE 92-1, ¶¶ 3–5 & Ex. A. The district court nonetheless described Amazon's hyperlink as "conspicuous," and held that the plaintiff "assented, each time he made a purchase on Amazon.com, to be bound to the terms of the then-current Conditions of Use," including an arbitration clause contained therein. *Nicosia*, 84 F. Supp. 3d at 152–53.

Because Uber's admonition and hyperlink were no less conspicuous than the admonitions and hyperlinks in these and several other cases, *see, e.g.*, *Cullinane*, 2016 WL 3751652; *Fagerstrom v. Amazon.com, Inc.*, 141 F. Supp. 3d 1051, 1069 (S.D. Cal. 2015); *Crawford v. Beachbody, LLC*, No. 14-1583-GPC-KSC, 2014 WL 6606563, at *2–3 (S.D. Cal. Nov. 4, 2014), it is likely that the Second Circuit will conclude that Plaintiff was on inquiry notice of the existence of the Rider Terms.

2. The Wording of Uber's Hyperlink Was Not Ambiguous

There also was nothing "obscur[e]" about the wording of the hyperlink to the Terms, which was accurately labeled "Terms of Service." DE 126 at 26. The Court reasoned that it could not "simply assume that the reasonable (non-lawyer) smartphone user is aware of the likely contents of 'Terms of Service,'" and faulted Uber because its hyperlink did not inform users that the Terms contained an arbitration clause. DE 126 at 26–27. However, Defendants are aware of no cases holding that a hyperlink must disclose that the contract contains an arbitration clause. Nor are Defendants aware of any cases requiring a separate admonishment that a company's terms of use contain an arbitration clause. To the contrary, any such requirement would be preempted by the FAA, as both the U.S. and California Supreme Courts have held. *See DIRECTV*, 136 S. Ct. at 471; *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308–12 (2013); *Sanchez*, 61 Cal. 4th at 914–15. As Defendants argued in their motions to compel arbitration, requiring special, more stringent disclosure rules for arbitration agreements runs afoul of the FAA's command that "courts must place arbitration agreements on an equal footing with other contracts." *Concepcion*, 563 U.S. at 339. The relevant inquiry is whether Uber's electronic agreement placed users on inquiry notice that by registering for an account they were assenting to the Rider Terms. After receiving such notice, it was incumbent

on users to read those terms.[3] *See Specht*, 306 F.3d at 30 ("A party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing.") (internal quotation marks omitted).

Numerous cases arising in nearly identical contexts support Uber's position that it was not required to include a reference to the arbitration clause in the text of its confirmation page, as long as it both included a conspicuous link to the Rider Terms and provided constructive notice that creating an Uber account conveyed assent to those terms. *See, e.g.*, *Cullinane*, No. 14-14750, 2016 WL 3751652 at *2 (enforcing agreement with hyperlink labeled "Terms of Service"); *Fteja*, 841 F. Supp. 2d at 835 (enforcing agreement with hyperlink labeled "Terms of Service").

B. Plaintiff Affirmatively Assented By Clicking "Register"

The Court focused on the fact that Uber users "need not click on any box stating 'I agree' in order to proceed to use the Uber app," asserting that "courts have repeatedly made note of [this feature] in declining to find that an electronic contract was formed." DE 126 at 22–23 (citing *Nguyen*, 763 F.3d at 1176; *Specht*, 306 F.3d at 22–23; *Savetsky v. Pre-Paid Legal Servs., Inc.*, 14-cv-03514, 2015 WL 604767, at *4 (N.D. Cal. Feb. 12, 2015)). However, none of the cases the Court cited considered the kind of agreement at issue here, nor did those courts broadly conclude that an "I Agree" checkbox is a necessary prerequisite to valid contract formation. All of the cases the Court cited in this passage involved agreements that "do[] not require the user to

[3] The Court faulted Uber because the hyperlink labeled "TERMS OF SERVICE & PRIVACY POLICY" took users to a page containing a link to the Rider Terms and a link to the Privacy Policy, rather than directly to the Rider Terms. The Second Circuit is unlikely to conclude that this was a meaningful "hurdle[]" to a user's ability to access the terms, since a user who clicked on the hyperlink would undoubtedly have constructive notice, and would likely have actual notice, that registering for an account conveyed assent to the Rider Terms. So informed, a user could not plausibly contend that being forced to click on an additional, clearly labeled hyperlink vitiated her assent.

manifest assent to the terms and conditions"—classic browsewrap agreements. *Nguyen*, 763 F.3d at 1176. The agreements in the cases relied on by the Court are readily distinguishable from the agreement presented here, where, as the Court acknowledged, a user must click a "Register" button to complete the Uber registration process, and the button is accompanied by the admonition that "By creating an Uber account, you agree to the Terms of Service & Privacy Policy." DE 126 at 12.

Moreover, in one case the Court cited, *Nguyen v. Barnes & Noble Inc.*, 763 F.3d at 1175–76, the Ninth Circuit explicitly *distinguished* cases like this one, "where the browsewrap agreement resembles a clickwrap agreement." The Ninth Circuit observed that "[w]ere there any evidence in the record that [plaintiff] . . . was required to affirmatively acknowledge the Terms of Use before completing his online purchase, the outcome of this case might be different." In support, it cited *Fteja v. Facebook, Inc*. as a case where "the user [was] required to affirmatively acknowledge the agreement before proceeding with use of the website." *Nguyen*, 763 F.3d at 1176 (citing *Fteja*, 841 F. Supp. 2d. at 838–40). The agreement in *Fteja* was a hybrid clickwrap agreement that closely resembles the agreement in this case. The agreement there did not require that a user click "I agree," but instead featured a notice stating that "By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service." The court found that the user assented to a forum selection clause by clicking "Sign Up." *Fteja*, 841 F. Supp. 2d. at 838–40. Thus, the Second Circuit is likely to conclude that *Nguyen supports* Defendants' argument that Uber's electronic agreement *does not* include the features of browsewrap agreements that courts have viewed with skepticism.

Contrary to the Court's assertion that courts have "repeatedly" declined to enforce agreements where a user was not explicitly required to click "I agree," numerous district courts have enforced electronic agreements that closely mirror the electronic agreement in this case.

See, e.g., *Fagerstrom*, 141 F. Supp. 3d at 1068 (plaintiff assented by clicking "Place your order" button); *Gilt Grp., Inc.*, No. 13-cv-05497-LLS, 2014 WL 1652225, at *2 (S.D.N.Y. Apr. 24, 2014) (plaintiff assented by clicking "Sign Up" button); *Crawford*, No. 14-1583-GPC-KSC, 2014 WL 6606563, at *2–3 (plaintiff assented by clicking "Place Order" button); *Nicosia*, 84 F. Supp. 3d at 150 (plaintiff assented by clicking "Place your order"); *Fteja*, 841 F. Supp. 2d at 834 (plaintiff assented by clicking "Sign Up" button).

The sheer number of district court decisions supporting Uber's position alone strongly suggests that the Second Circuit may resolve this issue of first impression in Uber's favor.

C. The FAA Preempts Any Purported Requirement That An Agreement Draw Special Attention To An Arbitration Provision

In addition, there is a substantial possibility that the Second Circuit will conclude—consistent with the overwhelming weight of authority, including the Supreme Court's statements on this point—that an agreement need not draw special attention to the fact that it contains an arbitration agreement to be deemed enforceable. Indeed, such a requirement would be preempted by the Federal Arbitration Act, and would flatly contradict both federal and California law. *See DIRECTV*, 136 S. Ct. at 471; *Italian Colors Rest.*, 133 S. Ct. at 2308–12; *Concepcion*, 563 U.S. at 339; *Sanchez*, 61 Cal. 4th at 914–15.[4]

The Court's order suggests repeatedly that Plaintiff did not assent to the Rider Terms, in part, because the admonition and hyperlink to the Terms on the registration screen did not draw special attention to that fact that Plaintiff was agreeing to arbitrate disputes. *See, e.g.*,

[4] Defendants dispute the Court's ruling that "California law applies to the User Agreement." DE 126 at 9. However, given the Court's finding that it "does not view the choice between California law and New York law as dispositive with respect to the issue of whether an arbitration agreement was formed," and that the same result would be reached under New York law, DE 126 at 7, Defendants assume that California law applies for purposes of this motion. Defendants expressly reserve their rights to assert that New York law applies for any other purpose.

DE 126 at 17 ("[Meyer] could sign up for Uber by clicking on the 'Register' button without explicitly indicating his assent to the terms and conditions that included the arbitration provision."), 26–27 ("The reasonable user might be forgiven for assuming that 'Terms of Service' refers to a description of the types of services that Uber intends to provide, not to the user's waiver of his constitutional right to a jury trial or his right to pursue legal redress in court."). The order further states that the arbitration provision's placement "several pages" into the Terms without a special heading—other than "Dispute Resolution" in boldface—was not sufficiently "prominent" and constituted "a further barrier to reasonable notice." *Id.* at 27–28.

In *Concepcion*, however, the Supreme Court repudiated rules "that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue" as preempted by the FAA. 563 U.S. at 339. This prohibition applies to any rule purporting to require *special placement* of an arbitration provision within a contract or *special formatting* to draw more attention to an arbitration provision than to other provisions of the contract. *See, e.g.*, *Doctor's Assocs.*, 517 U.S. at 684, 687–88 (holding that the FAA preempted a state statute requiring arbitration clauses to be prominently identified in underlined capital letters on the first page of a contract). The California Supreme Court also has rejected the notion that a company has any "obligation to highlight the arbitration clause of its contract . . . [or] to specifically call that clause to [another party's] attention," describing any such requirement as "preempted by the FAA." *Sanchez*, 61 Cal. 4th at 914–15.

This Court's ruling contravenes the FAA's purpose to place arbitration agreements on equal footing with other contracts and the requirement that federal courts resolve "any doubts concerning the scope of arbitrable issues . . . in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). This is because the FAA enacted "a liberal federal policy favoring arbitration agreements" (*id.* at 24), and rendered unlawful the

"widespread judicial hostility to arbitration," *Italian Colors Rest.*, 133 S. Ct. at 2308–09; *see also Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 475–76 (1989) ("[when] applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act . . . due regard must be given to the federal policy favoring arbitration"). California law of arbitrability reflects an equally "strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution." *Saint Agnes Med. Ctr. v. PacifiCare of Cal.*, 31 Cal. 4th 1187, 1204 (2003).

II. DEFENDANTS WILL SUFFER IRREPARABLE HARM ABSENT A STAY

If litigation proceeds in this Court while Defendants' appeals are pending, Defendants will face serious and irreparable harm that far outweighs any inconvenience to Plaintiff. The "basic purposes of arbitration" are "to resolve disputes speedily and to avoid the expense and delay of extended court proceedings." *Fed. Com. & Nav. Co. v. Kanematsu-Gosho, Ltd.*, 457 F.2d 387, 389 (2d Cir. 1972). Yet if this Court denies a stay, and the Second Circuit reverses the Court's order and compels arbitration, the substantial time and resources that Defendants and this Court will have devoted to litigating this dispute during the appeal can never be recovered.

While monetary expenses incurred in litigation are generally not considered irreparable harm, *see F.T.C. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980), requiring parties to proceed to trial on potentially arbitrable claims pending appeal imposes injuries on appellants that are fundamentally different from the normal "expense and annoyance of litigation," *id.* It is precisely this "expense and annoyance" parties seek to *avoid* by agreeing to bilateral arbitration. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010) ("In bilateral arbitration, parties forego the procedural rigor and appellate review of the courts in order to

realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."). Therefore, it is not "[m]ere litigation expense" (*Standard Oil*, 449 U.S. at 244) that will injure Defendants if this litigation proceeds; Defendants will be injured by the loss of the opportunity to reap the advantages of arbitration their appeal seeks to secure—advantages that federal policy emphatically favors, *Moses H. Cone*, 460 U.S. at 24. If a party "must undergo the expense and delay of a trial before being able to appeal, the advantages of arbitration—speed and economy—are lost forever." *Alascom*, 727 F.2d at 1422. For this reason, if this litigation proceeds while Defendants' appeals are pending, "there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied," *Brenntag Int'l Chems., Inc. v. Bank of India*, 175 F.3d 245, 249 (2d Cir. 1999).[5] If the Second Circuit concludes that Plaintiff agreed to arbitrate this dispute, Defendants will have lost irretrievably the benefits of arbitration to which they were entitled.

As this Court has suggested, Congress recognized that orders related to arbitration—which touch on the fundamental question of which forum has jurisdiction to hear the claims—differ in kind from ordinary interlocutory orders.

> [T]he fact that Congress made provision in section 16 for an interlocutory appeal from a denial of a stay pending arbitration will usually tilt the balance in favor of granting such a stay whenever doing otherwise would effectively deprive the appellant of the possibility of having the underlying controversy presented to an arbitrator in the first instance. A district court must be careful not to undermine

[5] *See also Kansas Gas & Elec. Co. v. Westinghouse Elec. Corp.*, 861 F.2d 420, 422 (4th Cir. 1988) ("We hold that orders denying arbitration do have an injunctive effect and have 'serious, perhaps irreparable, consequence.' The order is injunctive because it enjoins proceedings in another tribunal. It has serious consequences because of the 'irreparable harm that exists when arbitration is denied ab initio'") (citation omitted); *Alascom*, 727 F.2d at 1422 (if a party "must undergo the expense and delay of a trial before being able to appeal, the advantages of arbitration—speed and economy—are lost forever. We find this consequence serious, perhaps irreparable") (citations and internal quotation marks omitted).

> this policy by pushing forward with a case in the face of a pending appeal from the denial of arbitration, except in more compelling circumstances than are here presented.

Cendant Corp., 72 F. Supp. 2d at 343; *see also Jock*, 738 F. Supp. 2d at 447 ("[T]he likelihood of unnecessary, duplicative litigation can warrant a stay.").

The irreparable harm that Defendants will suffer in the absence of a stay is well illustrated by *Jock v. Sterling*, where this Court wisely stayed proceedings pending the Second Circuit's resolution of a significant arbitration-related legal issue. 738 F.Supp.2d at 447. Nine months later, a divided panel of the Second Circuit reversed the order that was the subject of the interlocutory appeal and remanded to this Court with instructions to confirm the arbitration award and thereby close the case. *Jock v. Sterling Jewelers, Inc.*, 646 F.3d 113, 115 (2d Cir. 2011). Had this Court not stayed proceedings pending appeal in *Jock*, the parties and the Court might have expended considerable time and expense litigating issues later rendered moot by the Second Circuit's intervening order. *See Sutherland*, 856 F. Supp. 2d at 644 ("[C]onsiderations of judicial economy counsel, as a general matter, against investment of court resources in proceedings that may prove to have been unnecessary.").

The potential harm to Defendants is even greater where, as here, Plaintiff intends to seek class certification. The arbitration clause at issue contains a waiver of class arbitration, which is valid and enforceable under Supreme Court precedent, *see Italian Colors Rest.*, 133 S. Ct. at 2309; *Concepcion*, 563 U.S. at 344. Therefore, the "failure to grant a stay may irrevocably deprive [Defendants] of at least a portion of that which [they] unquestionably bargained for, a proceeding designed (at least in theory if not always in practice) to avoid the far greater expenses and other burdens attendant on class litigation (or even class-wide arbitration)." *Sutherland*, 856 F. Supp. 2d at 643. Absent a stay, Uber and Mr. Kalanick face the enormous expense of class certification discovery, motion practice, and, regardless of whether a class is certified, likely

appellate review. The delay and expense of such litigation is immeasurably more burdensome than the efficient and relatively inexpensive individual arbitration process that would follow a successful appeal. This significant expenditure of judicial and party resources will be lost irrevocably if the Second Circuit concludes that Plaintiff agreed to arbitrate his claims. *Satcom Int'l Grp. PLC v. Orbcomm Int'l Partners, L.P.*, 55 F. Supp. 2d 231, 236–37 (S.D.N.Y. 1999).

III. PLAINTIFF WILL SUFFER NO HARM SHOULD THE COURT STAY PROCEEDINGS

On the other hand, should the Court stay this case pending appeal, the only conceivable harm Plaintiff Spencer Meyer could suffer is delay in recovering his requested monetary relief in connection with the handful of trips he has booked through the Uber app. As Meyer presumably no longer uses the Uber app, any delay in issuance of the declaratory and other relief claimed in his Complaint cannot possibly impair a concrete, identifiable, personal interest of Meyer's. And any delay in Meyer recovering a small, monetary judgment "does not compare to the unjustifiable waste of time and money that would result from proceeding with this litigation before the [Second] Circuit decides whether this dispute is even subject to judicial resolution." *Mundi v. Union Security Life Ins. Co.*, No. F-06-1493-OWW-TAG, 2007 WL 2385069, at *6 (E.D. Cal. Aug. 17, 2007). Moreover, such an argument presumes that Plaintiff will prevail on the merits of his claim—a presumption that, at this point, would operate with "extreme unfairness to the defendant," as courts have recognized. *See, e.g.*, *Roe v. SFBSC Management, LLC*, No. 14-03616-LB, 2015 WL 1798926, at *4 (N.D. Cal. Apr. 17, 2015) (accepting defendant's argument that "without having received any merits evidence, the Court cannot reasonably predicate the denial of a stay on a prediction that Plaintiffs will prevail on the merits"). For this same reason, any claim by Plaintiff that the Court should weigh the supposed interests of unnamed, putative class members is without merit. Plaintiff has not yet moved to

certify a class, and any presumption that Plaintiff will ultimately succeed in doing so would subvert the carefully constructed requirements of Rule 23.

IV. THE PUBLIC INTEREST FAVORS A STAY

Public policy interests also support a stay. First, the public has an interest in the judicial economy and efficiency that would result from a stay. *See Estate of Heiser v. Deutsche Bank Trust Co.*, No. 11-1608-AJN MHD, 2012 WL 2865485, at *5 (S.D.N.Y. July 10, 2012). All parties and the judiciary risk wasting enormous amounts of time and resources preparing for trial while the determination regarding arbitration is under appellate review. *See, e.g.*, *In re United Health Care Org.*, 210 B.R. 228, 234 (S.D.N.Y. 1997) (finding denial of exemption from injunction staying future claims to be in the public interest of "conserving judicial resources," particularly where the case involved a number of "thorny legal issues," meaning "there can be no guarantee that [the court's] decisions would be upheld on appeal"). Defendants acknowledge that there is also a "public interest in prompt resolution of litigation." *Jock*, 738 F. Supp. 2d at 449. But that interest is far from dispositive where, as here, Defendants' appeal presents a serious question of first impression concerning important issues that the Second Circuit has yet to address. *See id*. If the Second Circuit ultimately determines that this dispute is subject to arbitration, any determination by this Court of the antitrust claims would be irrelevant, and the use of scarce judicial resources expended to reach that determination wasted.

Furthermore, proceeding with this lawsuit may ultimately involve additional motions to compel arbitration. *See Estate of Heiser v. Deutsche Bank Trust Co. Ams.*, No. 11-1608-AJN-MHD, 2012 WL 2865485, at *4–5 (S.D.N.Y. July 10, 2012) (granting stay pending resolution of two related appeals where they could provide "guidance as to the quality, nature, and validity of [plainitffs'] claims, effectively expediting the resolution of . . . this proceeding" and "avoid the need for unnecessary litigation"). Plaintiff has moved to join additional plaintiffs in this lawsuit,

some of whom may contend that they registered for accounts with Uber under similar circumstances (and some of whom may have registered under circumstances this Court has already suggested may be materially distinguishable). The Court's resolution of any future motions to compel arbitration may benefit from the Second Circuit's guidance. In addition, the question whether Plaintiff's proposed class may be certified will turn, in part, on the validity of absent class members' arbitration agreements. And if a class were to be certified (which it should not be, particularly in light of the arbitration agreements), Defendants will move to compel arbitration of the absent class members' claims. The parties will have to brief, and this Court would have to rule on, all such motions. The significant effort, time, and expense this will entail will all be wasted if the Court decides these motions before the Second Circuit decides whether Mr. Meyer agreed to arbitrate with Uber. Granting a stay pending appeal therefore would be "entirely in keeping with the principle of judicial economy." *Satcom Int'l Grp.*, 55 F. Supp. 2d at 236–37; *see also Sutherland*, 856 F. Supp. 2d at 644; *Payne v. Jumeirah Hosp. & Leisure (USA) Inc.*, 808 F. Supp. 2d 604, 604 (S.D.N.Y. 2011).

Second, the public interest in promoting arbitration, protected by Congress in the FAA after "centuries of judicial hostility to arbitration agreements," *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 225 (1987) (internal quotations omitted), favors a stay here. *See Arciniaga v. GMC*, 460 F.3d 231, 234 (2d Cir. 2006) ("[I]t is difficult to overstate the strong federal policy in favor of arbitration, and it is a policy we 'have often and emphatically applied.'") (quoting *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 25 (2d Cir. 1995)). Granting a stay pending appeal would promote the FAA's often-espoused, Congressionally mandated public policy of conserving resources. Moreover, Congress' enactment of the immediate right of appeal of the denial of arbitration under the FAA speaks volumes as to its view that the public would best be served by having that issue decided before

the litigation itself proceeds apace. *See Cendant Corp.*, 72 F. Supp. 2d at 343 ("[T]he fact that Congress made provision in section 16 for an interlocutory appeal from a denial of a stay pending arbitration will usually tilt the balance in favor of granting such a stay whenever doing otherwise would effectively deprive the appellant of the possibility of having the underlying controversy presented to an arbitrator in the first instance.").

For these reasons, the public interest heavily favors a stay pending appeal.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant Defendants' motion and stay all proceedings until the conclusion of the pending appeals.

Dated: August 5, 2016

Respectfully submitted,

/s/ Theodore J. Boutrous, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2016, I filed and therefore caused the foregoing document to be served via the CM/ECF system in the United States District Court for the Southern District of New York on all parties registered for CM/ECF in the above-captioned matter.

/s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SPENCER MEYER, individually and on behalf of those similarly situated, Plaintiffs, -against- TRAVIS KALANICK, Defendant.	Case No. 1:15-cv-9796 (JSR) **DECLARATION OF VINCENT MI IN SUPPORT OF DEFENDANTS UBER TECHNOLOGIES, INC. AND TRAVIS KALANICK'S JOINT MOTION TO STAY PENDING APPEAL**

I, Vincent Mi, declare under penalty of perjury, as follows:

1. I am over the age of 18 and I submit this declaration in support of Defendants Uber Technologies, Inc. ("Uber") and Travis Kalanick's Joint Motion to Stay Judicial Proceedings. I have personal knowledge of each fact stated in this declaration and, if called as a witness, I could and would competently and truthfully testify thereto.

2. I am a Senior Software Engineer at Uber. I am one of the developers on Uber's Android team that designs and implements changes to the Android software application (the "Uber App").

3. In the normal course of its business, Uber maintains records regarding when and how its riders register. As a Senior Software Engineer, I have access to these registration records, and I am familiar with these records and the manner in which they are updated and maintained. At the request of counsel, I reviewed the registration records and was able to identify the dates and methods by which Plaintiff Spencer Meyer registered for Uber: Mr. Meyer registered on October 18, 2014 via the Uber App using a Samsung Galaxy S5 phone with an Android operating system.

4. As a Senior Software Engineer, I am familiar with the specifications of various smartphones, including the Samsung Galaxy S5.

5. The Samsung Galaxy S5 has a 5.10-inch touchscreen display of 1080 pixels by 1920 pixels, with a resolution of 432 pixels per inch.

6. A user of a Samsung Galaxy S5 may increase the phone's default text size by changing the settings. The user's individual settings would affect the size of the text that appears on the screen during the Uber registration process. Even when set to the manufacturer's default settings, individual phones, including the Samsung Galaxy S5, may differ in resolution and the intensity of the background light, leading to differences in how the same image may be perceived by different users of the same model phone.

7. The text on the second screen of Uber's account registration process reading "By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY" was designed to be clearly legible when displayed on a variety of smartphones. I have viewed this text on a Samsung Galaxy S5 and it is clearly legible. The text is comparable in size to text displayed on smartphones in several other contexts. For example, the text is comparable in size to the text labeling applications—including the Uber App—on the Samsung Galaxy S5 home screen, as well as to text labeling numerous features within the Uber App itself.

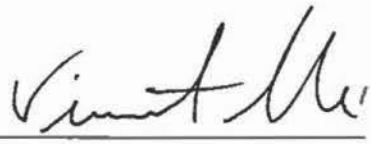
8. I have reviewed the image located on page 31 of the Court's July 29, 2016 Opinion and Order. DE 126 at 31. The image does not resemble how Uber's confirmation screen would have appeared on a Samsung Galaxy S5's screen. The text in the image located on page 31 is in black and white and appears blurry, whereas the text would have appeared in color at a very high resolution, which would have been clear on a Samsung Galaxy S5's screen.

Further, the dimensions of the image located on page 31, once printed, may vary from the actual dimensions of the Samsung Galaxy S5 screen, because default scaling settings for Adobe Acrobat and physical printers vary from person to person.

9. A color image of the October 2014 account registration screen is attached as **Exhibit A**. The image is scaled to the same size as the Samsung Galaxy S5's screen.

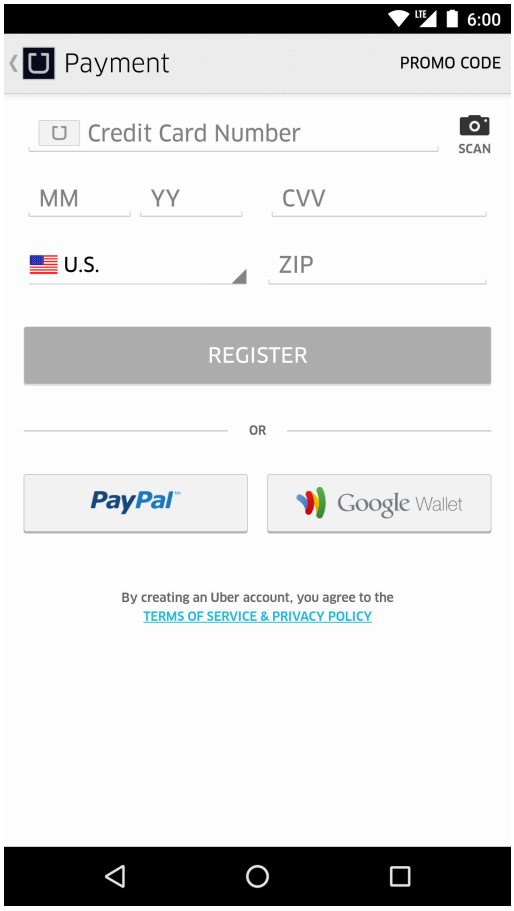
I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 5, 2016 at San Francisco, California.

By: 

Vincent Mi

Exhibit A


6:00
Payment
PROMO CODE
Credit Card Number
SCAN
MM
YY
CVV
U.S.
ZIP
REGISTER
OR
PayPal
Google Wallet
By creating an Uber account, you agree to the
TERMS OF SERVICE & PRIVACY POLICY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SPENCER MEYER, individually and on behalf of those similarly situated,

Plaintiff,

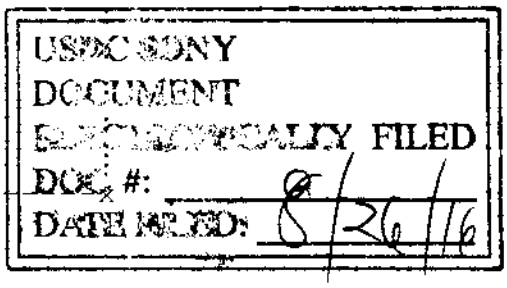
-v-

TRAVIS KALANICK and UBER TECHNOLOGIES, INC.,

Defendants.

15 Civ. 9796

MEMORANDUM ORDER



JED S. RAKOFF, U.S.D.J.

On July 29, 2016, the Court denied the motions to compel arbitration filed by defendants Travis Kalanick and Uber Technologies, Inc. ("Uber"). See Opinion and Order dated July 29, 2016, ECF No. 126 (the "Order"). On August 5, 2016, pursuant to statutory authority that permits an interlocutory appeal from a denial of arbitration, 9 U.S.C. § 16(a)(1)(B), defendants filed notices of appeal from the Order. ECF Nos. 131, 132. On the same day, defendants filed a joint motion to stay all proceedings in this Court until the Second Circuit Court of Appeals resolves their appeal. See Notice of Motion to Stay Pending Appeal, ECF No. 133; Memorandum of Law in Support of Joint Motion to Stay Judicial Proceeding ("Joint Mem."), ECF No. 134. On August 19, Plaintiff Spencer Meyer filed an opposition to that motion. See Memorandum of Law in Opposition to Defendants' Motion to Stay Judicial Proceedings, ECF No. 142.

Now, after careful consideration of what the Court finds to be a close call, the Court hereby grants the stay, effective August 27, 2016.

Although the grant or denial of such a stay involves "an exercise of judicial discretion," Virginia Ry. Co. v. United States, 272 U.S. 658, 672 (1926), the Supreme Court, in Nken v. Holder, 556 U.S. 418 (2009), held that such discretion must focus on four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." See id. at 434 (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)). In deciding whether to grant the stay, moreover, the first and second factors are the "most critical," id. at 434. What makes the instant motion a close call is that this is the unusual case where the first and second factors cut in opposite directions.

As to the first factor, the defendants have failed to make the requisite "strong showing" that they will succeed on the merits. Admittedly, a district court that issued an order that is being challenged on appeal may be predisposed to be unimpressed by the challenges to that ruling. Cf. Evans v. Buchanan, 435 F. Supp. 832, 843 (D. Del. 1977) ("The above-

quoted standard would seem to require that a district court confess to having erred in its ruling before issuing a stay."). Still, even after making every effort to indulge defendants' point of view, the Court here is distinctly unpersuaded by their showing on the first factor.

Indeed, such a showing as they have made is materially premised on mischaracterizations of the Order's holding. For example, the defendants assert, at the very outset of their papers, that the Order posited that the Court must indulge every reasonable presumption against an agreement to arbitrate because it involves a waiver of constitutional rights. (Joint Mem. at 1.) This is an inaccurate account of the Court's holding. For while the Court noted the tension between the standard for waiver of a constitutional right and the presumption in favor of arbitration, the Court nonetheless acceded to, and applied, that presumption in reaching its decision. It nonetheless found that plaintiff could not be compelled to arbitrate because, under established Second Circuit precedent, he "did not have '[r]easonably conspicuous notice' of Uber's User Agreement, including its arbitration clause, or evince 'unambiguous manifestation of assent to those terms.'"[1] Order at 25 (quoting Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 35 (2d Cir.

[1] As noted in the Order, the Court will refer to this agreement as the User Agreement to be consistent with prior orders.

2002)). Similarly, in another of their several mischaracterizations, defendants argue that the Court treated the arbitration clause differently from other provisions of the User Agreement in violation of the preemption principles applied in cases such as AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011). (Joint Mem. at 15-17.) To the contrary, the Court found that plaintiff was not on inquiry notice of the entire User Agreement, "including its arbitration clause." Order at 25 (emphasis added).

Indeed, the straightforward legal principles the Court applied were reaffirmed by the Second Circuit as recently as yesterday morning, in a case bearing some similarities to the instant case. See Nicosia v. Amazon.com, Inc., No. 15-423 (2nd Cir. Aug. 25, 2016). There, applying Washington state law, the Court of Appeals held that whether the plaintiff was on inquiry notice of contract terms (and in particular an arbitration clause) was a question of fact where, as in this case, the user was not required to "specifically manifest assent to the additional terms" by clicking "I agree," and where the hyperlink to the contract terms was not "conspicuous in light of the whole webpage." See id., slip op. at 32.[2]

[2] While Nicosia involved disputed facts, the key facts relating to whether there was objective consent to arbitrate in the instant case are essentially undisputed. See Order at 10.

While, therefore, defendants have failed to carry their burden with respect to the first factor,[3] the Court, turning to the second factor, finds that defendants have made a strong showing of irreparable harm. This is true, however, not so much for the reasons defendants put forward in their papers as because of the Congressional determination that is implicit in 9 U.S.C. § 16(a)(1)(B). By authorizing an interlocutory appeal from a denial of arbitration, that provision evidences a congressional determination that a wrongful denial of the right to have the case sent promptly to arbitration is a harm that cannot be adequately remedied by an appeal at the end of the case. Of course, there may be unusual cases where this implicit Congressional finding would be inapplicable. For example, if the party seeking the stay has only the remotest chance of prevailing on its appeal, the degree of irreparable harm is correspondingly diminished. But while defendants' arguments here as to why they will prevail on appeal are unpersuasive to this Court, their argument cannot fairly be said to be frivolous. Accordingly, defendants have met their burden as to the second factor.

As to the third factor, the Court recognizes that plaintiff has an interest in promptly resolving the case and that this

[3] "The party requesting a stay bears the burden of showing that the circumstances justify [the stay]." Nken, 556 U.S. at 433-34.

interest is harmed by a stay. But whether that harm is material or immaterial largely depends on how long it takes the Court of Appeals to render a decision on defendants' interlocutory appeal, which no one can predict. In any event, Congress has implicitly rejected plaintiff's argument by having determined, as suggested above, that the potential harm to a party whose motion to compel arbitration was denied is greater than the harm a stay would cause to the non-movant.

Finally, as to the fourth factor, this case, even though a putative class action, is an essentially private dispute that does not implicate the public interest in any immediate sense.

So what are we left with? Of the two "most critical" factors (the first and the second), the defendants have carried their burden on one factor (the second factor) and have failed to carry it on the other (the first factor). And the other two factors prove to be largely irrelevant. In this unusual situation, the Court believes that, notwithstanding Nken, it can take account of still another factor: the need for further appellate clarification of what constitutes adequate consent to so-called "clickwrap," "browsewrap," and other such website agreements. Even if defendants do not prevail on their appeal, such a clarification will be materially helpful to this Court in the further conduct of the litigation. For example, there is a pending motion here to add other plaintiffs, who, defendants

assert, may be differently situated from Mr. Meyer in terms of what they confronted on the Uber smartphone application.[4] The Court's future consideration of class certification could also be affected, both because the agreement that is the subject of the Order also contains a class action waiver and because the outcome of the appeal might also bear on who determines the validity of that waiver. In these and other respects, the conduct of this lawsuit will be materially affected by the Second Circuit's ruling on the pending appeal, regardless of whether the appeal is ultimately successful or not.

Because of this additional factor, and for the foregoing reasons, the Court grants defendants' motion for a stay. The stay will take effect on August 27, 2016, in order to allow for the parties to complete taking discovery that they agreed to complete by close of business today.[5] The stay will continue until the Second Circuit issues its decision in the pending appeal.[6]

The Clerk of Court is directed to close docket entry 133.

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[4] Accordingly, the Court will defer ruling on the motion to add plaintiffs until the conclusion of the pending appeal.

[5] However, the Court's ruling on a pending request to extend certain discovery beyond that deadline will be deferred until after the resolution of the pending appeal.

[6] However, if the appeal is denied, discovery and all other proceedings will immediately re-commence without waiting for the issuance of the appellate mandate or appellate resolution of any petition for rehearing, or the like.

SO ORDERED.

Dated: New York, NY
August 26, 2016

JED S. RAKOFF, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SPENCER MEYER, individually and on behalf of those similarly situated, Plaintiffs, -against- TRAVIS KALANICK and UBER TECHNOLOGIES, INC. Defendants.	Case No. 1:15-cv-9796 (JSR)

NOTICE OF APPEAL

Notice is hereby given that Defendant Uber Technologies, Inc. ("Uber") appeals to the United States Court of Appeals for the Second Circuit from the Opinion and Order signed by Judge Jed S. Rakoff of this Court on July 29, 2016 (Dkt. 126) (the "Order") denying Uber's motion to compel arbitration, and from any and all of the Court's rulings adverse to Uber incorporated in, antecedent to, or ancillary to the Order. *See* 9 U.S.C. § 16(a)(1)(B).

Dated: August 5, 2016

Respectfully submitted,

/s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.

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Attorneys for Uber Technologies, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2016, I filed and therefore caused the foregoing document to be served via the CM/ECF system in the United States District Court for the Southern District of New York on all parties registered for CM/ECF in the above-captioned matter:

/s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SPENCER MEYER, individually and on behalf of those similarly situated, Plaintiffs, -against- TRAVIS KALANICK and UBER TECHNOLOGIES, INC. Defendants.	Case No. 1:15-cv-9796 (JSR)

NOTICE OF APPEAL

Notice is hereby given that Defendant Travis Kalanick appeals to the United States Court of Appeals for the Second Circuit from the Opinion and Order entered by Judge Jed S. Rakoff of this Court on July 29, 2016 (Dkt. 126) (the "Order") denying Mr. Kalanick's motion to compel arbitration, and from any and all of the Court's rulings adverse to Mr. Kalanick incorporated in, antecedent to, or ancillary to the Order. *See* 9 U.S.C. § 16(a)(1)(B).

Dated: August 5, 2016

Respectfully submitted,

/s/ Karen L. Dunn_

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Counsel for Defendant Travis Kalanick

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2016, I filed and therefore caused the foregoing document to be served via the CM/ECF system in the United States District Court for the Southern District of New York on all parties registered for CM/ECF in the above-captioned matter:

/s/ Ryan Y. Park
Ryan Y. Park