Nos. 15-16178, 15-16181

IN THE

United States Court of Appeals for the Ninth Circuit

ABDUL KADIR MOHAMED, Plaintiff-Appellee, v. UBER TECHNOLOGIES, INC., *et al.*, Defendants-Appellants.	No. 15-16178 No. C-14-5200 EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding
RONALD GILLETTE, Plaintiff-Appellee v. UBER TECHNOLOGIES, INC., Defendant-Appellant.	No. 15-16181 No. C-14-5241 EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding

MOTION OF APPELLANTS UBER TECHNOLOGIES, INC. AND RASIER, LLC TO STAY PROCEEDINGS PENDING APPEAL

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INTRODUCTION

These consolidated appeals arise from the district court's refusal to enforce arbitration agreements between Uber Technologies, Inc. ("Uber") and drivers who use the Uber smartphone application. The two arbitration agreements at issue—a 2013 agreement that plaintiff Gillette signed and a 2014 agreement that plaintiff Mohamed signed—are virtually identical except in one respect: The 2013 agreement contains an opt-out provision that *Uber* drafted before the commencement of this litigation (and related litigation), whereas the 2014 agreement contains an opt-out provision that the *district court* drafted, approved, and required Uber to disseminate to drivers. Hundreds of drivers have opted out of both agreements, but the plaintiffs in these cases did not.

Notwithstanding its participation in drafting the 2014 arbitration agreement, the district court found *both* the 2013 and 2014 agreements to be procedurally and substantively unconscionable. The district court issued a single order denying Uber's motions to compel arbitration in both cases, relying on much of the same reasoning and the same case law for both denials.[1]

[1] *See* Order Denying Motion to Compel Arbitration, *Mohamed v. Uber Technologies, Inc. et al.*, No. C-14-5200-EMC (Dkt. No. 70); *Gillette v. Uber Technologies, Inc.*, No. C-14-5241-EMC (Dkt. No. 48) (Declaration of Joshua S. Lipshutz ("Lipshutz Decl."), ¶ 2, Ex. A) ("Arbitration Order").

Following that ruling, Uber asked the district court to stay both cases pending these appeals. As Uber argued, allowing the district court proceedings to continue while Uber's appeals are pending would deprive Uber and many of the putative class members—those who, like plaintiffs Gillette and Mohamed, agreed to be bound by the arbitration agreements at issue—of the "efficient, streamlined" arbitration process to which they agreed to refer their disputes. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011). In addition, it would force Uber to participate in the very types of litigation—class actions and representative actions under California's Private Attorneys General Act ("PAGA")—that drivers waived when they agreed to arbitrate their claims with Uber.

But despite acknowledging at least *two* "serious legal questions" presented by these appeals, and despite holding that the balance of hardships "tips sharply in [Uber's] favor," the district court refused to stay the *Gillette* proceedings and granted only a partial stay of the *Mohamed* case that will still allow Plaintiffs to pursue discovery while these appeals are pending.[2] Thus, Uber respectfully requests that this Court stay both cases in their entirety pending appeal.

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[2] Order Granting in Part and Denying in Part Motion to Stay (*Mohamed* Dkt. No. 93) (Lipshutz Decl. ¶ 3, Ex. B) ("*Mohamed* Stay Order"); Order Denying Motion to Stay (*Gillette* Dkt. No. 66) (Lipshutz Decl. ¶ 4, Ex. C) (*Gillette* Stay Order").

BACKGROUND

Uber is a technology company that offers a smartphone application connecting riders looking for transportation to independent transportation providers looking for riders (the "Uber App"). *Gillette* Dkt. No. 16 at 2–3. Plaintiffs Abdul Mohamed and Ronald Gillette (collectively, "Plaintiffs") began using the Uber App on or around November 2, 2012, and July 3, 2013, respectively. *Mohamed* Dkt. No. 28-2, ¶ 8 (Lipshutz Decl. ¶ 5, Ex. D); *Gillette* Dkt. No. 16-2, ¶ 8 (Lipshutz Decl. ¶ 5, Ex. D). Plaintiff Gillette accepted the July 2013 Software License and Online Services Agreement,[3] while Plaintiff Mohamed accepted Uber's June 2014 Software License and Online Services Agreement[4] and Rasier's 2014 Software Sublicense and Online Services Agreement[5] (collectively, the "2014 Agreements") (together with the 2013 Agreement, the "Arbitration Agreements" or "Agreements").

Each of the Agreements accepted by Plaintiffs contains an arbitration agreement requiring individual arbitration of "any dispute arising out of or related

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[3] *Gillette* Dkt. No. 16-2, Ex. D (Lipshutz Decl. ¶ 5, Ex. D) (the "2013 Agreement").

[4] *Mohamed* Dkt. No. 28-2, Ex. F (Lipshutz Decl. ¶ 6, Ex. E) (the "2014 Uber Agreement").

[5] *Mohamed* Dkt. No. 28-2, Ex. H (Lipshutz Decl. ¶ 6, Ex. E) ("2014 Rasier Agreement").

to this Agreement." 2013 Agreement § 14.1(i); 2014 Uber Agreement § 14.1(i); 2014 Rasier Agreement at 12. There is no dispute that the claims asserted by Plaintiffs in these cases are covered by the Arbitration Agreements. In addition, the Agreements all contain the same delegation provision discussing gateway questions of arbitrability, which states in part:

> **Except as it otherwise provides, this Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration. . . .** Such disputes include without limitation disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision.

2013 Agreement § 14.3(i); 2014 Uber Agreement § 14.3(i); 2014 Rasier Agreement at 12.

The 2013 Agreement contains a standalone provision entitled "Your Right To Opt Out Of Arbitration," explaining that "[a]rbitration is not a mandatory condition of your contractual relationship with Uber," and that drivers wishing to opt out must do so in writing "**within 30 days** of the date this Agreement is executed by you." 2013 Agreement § 14.3(viii). The 2014 Agreement contains a similar provision drafted and approved by the district court allowing opt-out by email or in writing "**within 30 days of the date this Agreement is executed by**

You."[6] 2014 Agreement § 14.3(viii). Neither Mohamed nor Gillette opted out of the arbitration agreements, but it is undisputed by the parties that hundreds of other drivers did opt out of both agreements, including the plaintiffs in the related *O'Connor* litigation pending before the same district judge.[7]

ARGUMENT

In deciding a motion for a stay pending appeal, the Court weighs the following factors: (1) the likelihood of success on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will "substantially injure" other parties; and (4) where the public interest lies.

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[6] The district court's rewriting of Uber's arbitration agreement, ostensibly under its Rule 23 power to supervise communications between Uber and putative class members, is the subject of a related appeal pending before this Court. *See O'Connor v. Uber Techs., Inc.*, No. 14-16078.

[7] In its Arbitration Order, the district court stated, "Uber presented no evidence to this Court that even a single driver opted-out of the 2013 Agreement's arbitration clause." Arbitration Order at 26. That statement was clearly erroneous; in fact, Uber submitted a hearing transcript in which Uber's counsel explained the undisputed fact that the *O'Connor* plaintiffs opted out of the 2013 Agreement. Hearing Transcript 16:4–7 (Nov. 14, 2013), *Gillette* Dkt. No. 22-1, Ex. C. (Lipshutz Decl. ¶ 8, Ex. F). Moreover, in a filing with this Court just a few weeks ago, Plaintiffs in this appeal acknowledged that "O'Connor, along with hundreds of other drivers, opted out of the [2013] arbitration agreement." Opp'n to Uber's Mot. to Consolidate, *Gillette v. Uber Techs.*, Ninth Cir. Case No. 15-16181, Dkt. No. 9, at 6–7. The parties have never disputed this fact. In any event, the district court subsequently clarified that its erroneous finding had no bearing on its decision. *See Gillette* Stay Order at 7 (the fact that hundreds of drivers opted out "does not undercut this Court's legal conclusion").

Leiva-Perez v. Holder, 640 F.3d 962, 964 (9th Cir. 2011) (citing *Nken v. Holder*, 556 U.S. 418, 433–34 (2009)).[8] These factors are weighed on a "continuum, with the relative hardships to the parties providing the critical element in determining at what point on the continuum a stay pending review is justified." *Id.* at 970. Each of these factors strongly supports a stay of these cases pending appeal.

I. Appellants Are Likely To Succeed On The Merits.

To obtain a stay, a movant need only demonstrate a "minimum quantum of likely success"—*i.e.*, that its appeal has a "reasonable probability or fair prospect" of success or raises "substantial" or "serious" legal questions. *Leiva-Perez*, 640 F.3d at 967–68; *Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1412 (9th Cir. 1990). The movant need not show "that it is more likely than not that [it] will win on the merits." *Leiva-Perez*, 640 F.3d at 966.

Uber's appeals easily meet this test with respect to the district court's holdings regarding enforceability of Uber's delegation clause, procedural unconscionability, and substantive unconscionability. Moreover, Uber need only prevail on *one* of these issues to succeed in these appeals—if the delegation clauses are enforceable requiring the arbitrator to decide arbitrability in the first instance, the Agreements are not procedurally unconscionable, *or* the Agreements are not

[8] Unless explicitly stated otherwise, all internal citations and quotations are omitted from case citations.

substantively unconscionable, then this Court must compel arbitration. *See Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1004 (9th Cir. 2010) ("To defeat an arbitration clause, the litigant must show both procedural and substantive unconscionability").

A. The Agreements Clearly And Unmistakably Delegate Gateway Issues Of Arbitrability To The Arbitrator.

Uber has more than a "fair probability" of prevailing on its argument that the delegation provisions in the Agreements should have been enforced and that the district court accordingly should not have ruled on arbitrability issues. The district court agreed that the language of the delegation provisions unambiguously requires the arbitration of gateway issues such as arbitrability. *See* Arbitration Order at 16 ("Plaintiffs do not appear to contend that the language of the delegation clauses *itself* is ambiguous, and such an argument would be a tough sell."). But the court concluded that the delegation provisions are nevertheless unenforceable based on purportedly conflicting language *outside* the provisions: a forum-selection clause located outside the Arbitration Agreement (§ 14.1), and a provision of the Arbitration Agreement giving courts exclusive jurisdiction to resolve the enforceability of "the Class Action Waiver, Collective Action Waiver and Private Attorney General Waiver" (§ 14.3(v)(c)). Arbitration Order at 16–17, 19–23.

The district court's ruling raises several serious legal questions on which Uber has a fair probability of prevailing. *Leiva-Perez*, 640 F.3d at 967–68. *First*, this Court must decide whether the "clear and unmistakable" test articulated in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), requires that there be no ambiguity *whatsoever* in the entire contract—as the district court held—or whether the test simply requires "'clear and unmistakable' *evidence*" that the parties agreed to delegate arbitrability issues to the arbitrator—as the Supreme Court has held. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 79 (2010) (emphasis added); *see also id.* at 79–80 ("Clear and unmistakable 'evidence' of agreement to arbitrate arbitrability might include . . . an express agreement to do so." (citing *First Options*, 514 U.S. at 946)). If the latter, then the district court's own findings require a ruling in Uber's favor. *See* Arbitration Order at 16 (holding the text of the clause is unambiguous).

Second, even if the "clear and unmistakable" test requires that there be no ambiguity whatsoever, the Court must decide whether a delegation provision can be rendered "ambiguous" by language found ***outside*** the provision, such as a standard forum-selection clause. The California Supreme Court has warned against reaching outside the arbitration provision to find ambiguity. *See Boghos v. Certain Underwriters at Lloyd's of London*, 36 Cal. 4th 495, 503 (2005) (holding

that "[n]o ambiguity exists" when language provides for arbitration "notwithstanding any other item," "even if other provisions, read in isolation, might seem to require a different result").[9] And federal courts, including this Court, agree. *See*, *e.g.*, *Oracle Am., Inc. v. Myriad Grp A.G.*, 724 F.3d 1069, 1075 (9th Cir. 2013) ("The [incorporated arbitral] rules clearly and unmistakably delegate questions of arbitrability to an arbitrator" even though the "rules also contemplate that . . . the arbitrator's jurisdiction may be simultaneously challenged in court."); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 879–80 (8th Cir. 2009) (finding clear and unmistakable delegation even though another provision arguably suggested otherwise); *Hill v. Anheuser-Busch InBev Worldwide, Inc.*, 2014 WL 10100283, at *4 (C.D. Cal. Nov. 26, 2014).[10] As the Supreme Court explained in *Rent-A-Center*, "a party's challenge to another provision of the contract, or to the

[9] The district court described *Boghos* as not "on point" because the question before the court "was not the enforceability of a delegation clause, and thus *Boghos* was not required to (and did not) apply the heightened 'clear and unmistakable' standard." Arbitration Order at 22 & n.19; *Gillette* Stay Order at 5 & n.6. But the California Supreme Court's unequivocal ruling in *Boghos* that "*[n]o* ambiguity exists" makes this a distinction without a difference. 36 Cal. 4th at 503 (emphasis added).

[10] The district court stated that "*Hill* did not apply the correct legal standard to the question presented to it, and likely reached an erroneous result as a consequence." *Gillette* Stay Order at 5. That is incorrect. The court in *Hill* expressly applied the "clear and unmistakable" test, relying on this Court's decision in *Momot v. Mastro*, 652 F.3d 982 (9th Cir. 2011). *See Hill*, 2014 WL 10100283, at *4.

contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate." 561 U.S. at 70.

Third, even if a delegation clause can be rendered "ambiguous" and unenforceable by language contained outside the delegation provision, the Court must decide whether the Arbitration Agreements in *this* case are ambiguous—and they are not. A common-sense reading of the delegation provision and the forum-selection clause demonstrates a clear and unmistakable intent to delegate arbitrability issues to the arbitrator alone. The Agreements' selection of a judicial forum simply acknowledges that certain proceedings will still have to take place in court: the parties will need to confirm an arbitration award in court; they might engage in other post-arbitration litigation; or, as demonstrated by these cases, there might be a dispute in court as to whether gateway issues of arbitrability should be referred to the arbitrator. *See Dream Theater, Inc. v. Dream Theater*, 124 Cal. App. 4th 547, 554 (2004) ("No matter how broad the arbitration clause, it may be necessary to file an action in court to enforce an arbitration agreement, or to obtain a judgment enforcing an arbitration award . . . ."). Nor is there internal ambiguity between the delegation provision and the carve-out for judicial resolution of the validity of several waiver provisions (2013 Agreement § 14.3(v)(c)). The delegation provision does not purport to govern *all* disputes between the parties; it

begins with the qualifying language, "***Except as it otherwise provides.***" 2013 Agreement § 14.3(i) (bolding in original, italics added).

In short, the district court easily could have (and should have) interpreted the Agreements to give effect to the parties' clear and unmistakable delegation of arbitrability issues. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) ("The [Federal] Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"). Uber is likely to prevail on this issue.

B. The Agreements Are Not Procedurally Unconscionable.

Uber is also likely to persuade this Court that the Arbitration Agreements are not procedurally unconscionable. *Leiva-Perez*, 640 F.3d at 967–68. The district court agreed that this issue "presents a 'serious [question] on appeal," at least with respect to the *Mohamed* case. *Mohamed* Stay Order at 7–8.

The district court acknowledged that three decisions from this Court—including a 2013 en banc ruling—have held that a meaningful right to opt out of an arbitration agreement precludes a finding of procedural unconscionability as a matter of law. Arbitration Order at 34 (citing *Kilgore v. KeyBank Nat'l Ass'n*, 718 F.3d 1052 (9th Cir. 2013) (en banc), *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198 (9th Cir. 2002), and *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104 (9th Cir. 2002)). But the district court refused to follow these decisions because, in its view,

they "present an inaccurate picture of California law." Arbitration Order at 34–36 & n.31. Specifically, the district court believed the decisions do not satisfactorily account for the California Supreme Court's decision in *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), even though *Gentry* was decided six years *before Kilgore* and was later overruled by *Concepcion*, 131 S. Ct. at 1747.[11]

There is a substantial likelihood that this Court will follow its three prior rulings—especially the en banc *Kilgore* decision from just two years ago. And the district court acknowledged that if this Court "adheres to *Ahmed*, *Najd*, and *Kilgore*," the "procedural unconscionability finding is unlikely to survive appellate review, and the 2014 arbitration provisions would likely be enforced under California law." *Mohamed* Stay Order at 7–8. That is equally true of the 2013 Agreement.[12] Thus, Uber is likely to succeed on this issue as well.

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[11] Moreover, as even the district court acknowledged, *Gentry* is inapplicable to this case. *Id.* at 39 ("A number of factual distinctions could remove this case from *Gentry*'s ambit."). Most notably, *Gentry* held that "it is not clear that someone in Gentry's position would have felt free to opt out" of the arbitration agreement. *Gentry*, 42 Cal. 4th at 471–72. Here, it is undisputed by the parties that hundreds of drivers *did* opt out of the Agreements. *See supra* p. 5 n.5.

[12] The district court held that *Kilgore* does not support Uber's argument with respect to the 2013 Agreement because, in the district court's view, the opt-out provision in the 2013 Agreement was "illusory" and "not conspicuous or 'meaningful.'" *Gillette* Stay Order at 6. But, in light of the fact that hundreds of drivers successfully opted out of the 2013 Agreement (*see supra* p. 5 n.5), the opt-out provision plainly was not illusory. Plaintiffs have not cited a single

C. The Agreements Are Not Substantively Unconscionable.

The district court held that the 2013 and 2014 Agreements are substantively unconscionable because they contain a PAGA waiver, relying on *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), which held that PAGA waivers in arbitration agreements violate California public policy. Arbitration Order at 43–49, 62–63. But the district court recognized that this is a "serious" and "pressing legal issue" on which "there has been significant disagreement at the district court level." *Mohamed* Stay Order at 9. Indeed, numerous California district courts are in agreement with Uber that PAGA waivers *are* enforceable because the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, "displace[s]" any state law that "prohibits outright the arbitration of a particular type of claim." *Concepcion*, 131 S. Ct. at 1747.[13] Moreover, as the district court recognized, "there is currently no Ninth Circuit authority that resolves this issue";

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decision from this Court holding that an opt-out provision is illusory even though there have been successful opt-outs, and the district court cited no such decision. Thus, *Kilgore* applies to both appeals.

[13] *See, e.g.*, *Ortiz v. Hobby Lobby Stores, Inc.*, 52 F. Supp. 3d 1070, 1083–85 (E.D. Cal. 2014); *Mill v. Kmart Corp.*, 2014 WL 6706017, at *6–7 (N.D. Cal. Nov. 26, 2014); *Chico v. Hilton Worldwide, Inc.*, 2014 WL 5088240, at *12–13 (C.D. Cal. Oct. 7, 2014); *Fardig v. Hobby Lobby Stores, Inc.*, 2014 WL 4782618, at *4 (C.D. Cal. Aug. 11, 2014); *see also Marenco v. DirecTV LLC*, 183 Cal. Rptr. 3d 587, 597 n.5 (Cal. Ct. App. 2015) (recognizing that "the majority" of federal district courts "have found PAGA waivers to be enforceable under the FAA and *Concepcion*").

in fact, the matter is currently under submission before this Court in *Sakkab v. Luxottica Retail N. Am.*, No. 13-55184 (9th Cir.). *Mohamed* Stay Order at 9 n.10. The district court thus correctly held that this issue favors a stay in *Mohamed*.

This same legal issue is presented in the *Gillette* case and should have warranted a stay there, too. Nevertheless, the district court ruled otherwise, holding that "the 2013 Agreement's arbitration provision would fail even if it did not contain an illegal PAGA waiver, as it is 'permeated' by four other substantively unconscionable terms." *Gillette* Stay Order at 10. Specifically, the district court ruled that the 2013 Agreement is substantively unconscionable because it (1) provides that arbitration fees may be apportioned between the parties in accordance with applicable law[14]; (2) carves out intellectual property (and other) claims from arbitration; (3) permits Uber to modify the arbitration agreement; and (4) contains an allegedly broad confidentiality provision. Arbitration Order at 53–61. The district court held that these provisions are not sufficient "standing alone" to render the Agreements unconscionable; they make the 2013 Agreement substantively unconscionable only when considered together. Arbitration Order at

[14] The district court also held that the delegation clauses in the 2013 and 2014 Agreements are substantively unconscionable for this reason. Arbitration Order at 27–32. As discussed *infra*, pages 7–11, that ruling is incorrect and raises a serious legal issue warranting a stay.

59–60. Thus, a likelihood of success on Uber's argument as to any *one* of these provisions would require reversal and support a stay.

In fact, the substantive unconscionability of *each* of these four provisions, as well as the propriety of striking down the entire 2013 Agreement because of them, are serious legal questions on which Uber is likely to prevail:

• Fee-sharing: In ruling that the fee-sharing provision is substantively unconscionable, the district court relied on the California Supreme Court's decision in *Armendariz v. Found. Health Psychcare Serv., Inc.*, 6 P.3d 669, 687 (Cal. 2000). Arbitration Order at 27–32, 53–54. But there is a serious legal question as to whether *Armendariz*'s arbitration fee analysis survives FAA preemption in light of *Concepcion*, 131 S. Ct. 1740.[15] Several courts have questioned the continuing validity of *Armendariz*, noting that the FAA likely preempts it. *See Ruhe v. Masimo Corp.*, 2011 WL 4442790, at *2 (C.D. Cal. Sept.

[15] The district court stated, "Uber does not argue that the *Armendariz* rule regarding arbitration fees is preempted by the FAA, and thus any such argument is waived." Arbitration Order at 28 n.22. However, Uber made that *exact* argument in its motion to compel arbitration: "The restrictions established by *Armendariz* fall within this category of restrictions precluded by the FAA. . . . *Concepcion* and *Marmet* make clear[] that such imposed limitations run afoul of the FAA." Mot. to Compel at 11 n.6, *Gillette* Dkt. No. 16 (Lipshutz Decl. ¶ 9, Ex. G); Mot. to Compel at 13 n.2, *Mohamed* Dkt. No. 28 (Lipshutz Decl. ¶ 10, Ex. H). In any event, the Court may exercise its discretion "to consider a purely legal question" where, as here, the relevant record is "fully developed." *United States v. Northrop Corp.*, 59 F.3d 953, 957 n.2 (9th Cir. 1995).

16, 2011); *Beard v. Santander Consumer USA, Inc.*, 2012 WL 1292576, at *9 n.7 (E.D. Cal. Apr. 16, 2012), *adopting report & rec.*, 2012 WL 1576103 (E.D. Cal. May 3, 2012) (acknowledging that courts "have questioned *Armendariz*'s continuing viability after *Concepcion*"); *Baeza v. Super. Ct.*, 135 Cal. Rptr. 3d 557, 568 (Ct. App. 2011). Further, since the arbitration agreements here provided for opt-outs, *Armendariz* does not even apply; its holding is expressly limited to "*mandatory* employment arbitration agreement[s]," 6 P.3d at 689 (emphasis added). *See, e.g., Mill*, 2014 WL 6706017, at *5 ("[I]t is unclear whether *Armendariz* even applies, as this is not a mandatory arbitration agreement, because Plaintiff had an opportunity to opt out . . . .").

Moreover, the plain language of the Agreements ensure that Uber will pay the arbitration fees where "required by law," (2013 Agreement § 14.3(vi); 2014 Agreement § 14.3(vi); 2014 Rasier Agreement at 14), and courts have found similar language not substantively unconscionable. *See*, *e.g.*, *Mill*, 2014 WL 6706017, at *4–6. Indeed, "if California law would require Defendants to assume the costs of the arbitration to avoid unconscionability, that law would apply." *Appelbaum v. AutoNation Inc.*, 2014 WL 1396585, at *9 (C.D. Cal. Apr. 8, 2014).

- Intellectual property carve-out: The district court failed to acknowledge that, in addition to carving out intellectual property claims, the Agreements

(§ 14.3(i)) also carve out claims more likely to be brought by employees, such as claims for employee benefits under the Employee Retirement Income Security Act. Courts have recognized that such carve-outs are not unfairly one-sided and do not create substantive unconscionability. *See*, *e.g.*, *Ruhe*, 2011 WL 442790, at *4; *Farrow v. Fujitsu Am., Inc.*, 37 F. Supp. 3d 1115, 1124 (N.D. Cal. 2014).

• Unilateral modification: As the district court recognized, there is an "absence of controlling authority" from the California Supreme Court on whether a unilateral modification provision supports a finding of unconscionability. Arbitration Order at 58; 2013 & 2014 Uber Agreements § 12.1; 2014 Rasier Agreement at 16. However, just three months ago, this Court held that unilateral modification provisions are "not substantively unconscionable because they are always subject to the limits 'imposed by the covenant of good faith and fair dealing implied in every contract.'" *Ashbey v. Archstone Prop. Mgmt., Inc.*, 2015 WL 2193178, *1 (9th Cir. May 12, 2015).[16]

• Confidentiality: Courts in California have upheld the validity of confidentiality provisions virtually *identical* to the one at issue here. *Compare* 2013 & 2014 Uber Agreements § 14.3(vii) *and* 2014 Rasier Agreement at 16 *with*

[16] Numerous California Court of Appeal cases are in accord. *Serpa v. Cal. Sur. Invest., Inc.*, 215 Cal. App. 4th 695, 706 (Ct. App. 2013) (collecting cases); *Peng v. First Rep. Bank*, 219 Cal. App. 4th 1462, 1474 (Ct. App. 2013); *24 Hours Fitness, Inc. v. Super. Ct.*, 66 Cal. App. 4th 1199, 1214 (Ct. App. 1998).

Andrade v. P.F. Chang's China Bistro, Inc., 2013 WL 5472589, *2, 9 (S.D. Cal. Aug. 9, 2013); *Htay Htay Chin v. Advanced Fresh Concepts Franchise Corp.*, 194 Cal. App. 4th 704, 714 (Ct. App. 2011).

II. Uber Will Suffer Irreparable Harm Absent A Stay

The district court correctly ruled that Uber will suffer irreparable harm if these cases are permitted to proceed unhindered while the appeals are pending. *Mohamed* Stay Order at 12. Yet the entire purpose of arbitration is to provide an "inexpensive and expeditious means of resolving . . . dispute[s]." *Int'l Ass'n of Machinists & Aerospace Workers v. Aloha Airlines*, 776 F.2d 812, 815 (9th Cir. 1985). If this Court denies a stay and subsequently compels arbitration, the substantial time and resources that Uber will have devoted to litigating these disputes in the interim can never be recovered—even if such litigation is limited in the *Mohamed* case to "reasonable discovery," as the district court ordered, *Mohamed* Stay Order at 14. *Pokorny v. Quixtar Inc.*, 2008 WL 1787111, at *2 (N.D. Cal. Apr. 17, 2008). While monetary expenses incurred in litigation are generally not considered irreparable harm, "arbitration is unique in this aspect," because "the anticipated advantages of arbitration—speed and economy—are lost." *Zaborowski v. MHN Gov't Servs.*, 2013 WL 1832638, at *2 (N.D. Cal. May 1, 2013); *see Pokorny*, 2008 WL 1787111, at *2; *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010).

Here, the harm caused by denial of a stay would be magnified because "[t]he burdens associated with discovery in a putative class action are substantially greater than in an individual arbitration." *Roe v. SFBSC Mgmt., LLC*, 2015 WL 1798926, at *3 (N.D. Cal. Apr. 17, 2015); *see also Kaltwasser v. Cingular Wireless, LLC*, 2010 WL 2557379, at *2 (N.D. Cal. June 21, 2010) ("[T]he nature and extent of discovery permissible in private arbitration is fundamentally different from that allowed in class-action litigation."); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013). The Arbitration Agreements contain waiver provisions that preclude the parties from asserting representative and class action claims—the exact claims that Plaintiffs have asserted against Uber.[17]

III. Plaintiffs Will Not Be Prejudiced By A Stay.

The district court correctly rejected Plaintiffs' arguments that they will be irreparably harmed if the cases are stayed pending appeal. Mohamed Order at 12–13. If the Court stays the district court proceedings pending appeal, the only conceivable harm Plaintiffs could suffer is a temporary delay in their relief. But any delay "does not compare to the unjustifiable waste of time and money that would result from proceeding with this litigation [in the district court] before the

[17] For this additional reason, the district court's *Mohamed* ruling, which still allows Plaintiffs to engage in discovery while these appeals are pending (*Mohamed* Stay Order at 14), does not alleviate the substantial and irreparable harm to Uber.

[Court] decides whether this dispute is even subject to judicial resolution." *Mundi v. Union Sec. Life Ins. Co.*, 2007 WL 2385069, at *6 (E.D. Cal. Aug. 17, 2007).

Moreover, Plaintiffs have no need for immediate discovery. As the district court explained, "the parties are all aware of their obligations to preserve evidence, including electronically stored information (ESI), pursuant to the Federal Rules of Civil Procedure and this Court's guidelines regarding the discovery and preservation of ESI." *Mohamed* Stay Order at 13. Thus, "a stay pending appeal will not prejudice Plaintiffs' ability to conduct discovery and prosecute the action should it go forward after the appeal." *Pokorny*, 2008 WL 1787111, at *2.

IV. The Public Interest Favors A Stay.

Finally, public policy interests—particularly the promotion of judicial efficiency and the strong federal policy favoring arbitration, *see Moses H. Cone Mem. Hosp.*, 460 U.S. at 24—also support a stay. "[T]he speed and efficiency of [arbitration] are the foundation for a strong federal policy favoring arbitration over litigation, which would be contravened by requiring the parties to litigate while the appeal is pending." *Pokorny*, 2008 WL 1787111, at *2.

CONCLUSION

This Court should stay both cases in their entirety pending these appeals.

Dated: August 5, 2015

Respectfully submitted,

/s/ Theodore J. Boutrous, Jr.

GIBSON, DUNN & CRUTCHER LLP

Attorneys for Defendant-Appellants Uber Technologies, Inc. and Rasier, LLC

DECLARATION OF JOSHUA S. LIPSHUTZ

I, Joshua S. Lipshutz, hereby declare and state as follows:

1. I am an attorney duly licensed to practice law before all the courts of the State of California and before this Court. I am a partner with the law firm of Gibson, Dunn & Crutcher LLP, and one of the attorneys primarily responsible for the representation of Appellants Uber Technologies, Inc. and Rasier, LLC in this action. I am familiar with the files and records maintained by my firm for this matter. I submit this declaration in support of Appellants' Motion to Stay Proceedings Pending Appeal. I have personal knowledge of the matters stated and, if called upon to do so, I could and would testify competently thereto under oath.

2. Attached hereto as **Exhibit A** is a true and correct copy of the District Court's Order Denying Defendants' Motions to Compel Arbitration, entered in *Mohamed v. Uber Technologies, Inc. et al.*, No. C-14-5200-EMC (Dkt. No. 93), and *Gillette v. Uber Technologies, Inc.*, No. C-14-5241-EMC (Dkt. No. 48), on June 9, 2015.

3. Attached hereto as **Exhibit B** is a true and correct copy of the District Court's Order Granting in Part and Denying in Part Defendants' Motion to Stay Pending Appeal, entered in *Mohamed* (Dkt. No. 93) on July 22, 2015.

4. Attached hereto as **Exhibit C** is a true and correct copy of the District Court's Order Denying Defendant's Motion to Stay Pending Appeal, entered in *Gillette* (Dkt. No. 66) on July 22, 2015.

5. Attached hereto as **Exhibit D** is a true and correct copy of the Declaration of Michael Colman in Support of Defendant's Motion to Compel Arbitration, filed in *Gillette* (Dkt. No. 16-2) on January 23, 2015.

6. Attached hereto as **Exhibit E** is a true and correct copy of the Declaration of Michael Colman in Support of Defendants' Motion to Compel Arbitration, with Exhibits F and H, filed in *Mohamed* (Dkt. No. 28-2) on February 6, 2015.

7. Attached hereto as **Exhibit F** is a true and correct copy of the *O'Connor* Hearing Transcript, dated November 14, 2013, submitted as Exhibit C to Plaintiffs' Request for Judicial Notice In Support Of Consolidated Opposition to Motion to Compel Arbitration in *Gillette* (Dkt. No. 22-1).

8. Attached hereto as **Exhibit G** is a true and correct copy of Defendant's Motion to Compel Arbitration, filed in *Gillette* (Dkt. No. 16) on January 23, 2015.

9. Attached hereto as **Exhibit H** is a true and correct copy of Defendants' Motion to Compel Arbitration, filed in *Mohamed* (Dkt. No. 28) on February 6, 2015.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this Declaration was executed on August 5, 2015, in San Francisco, California.

/s/ Joshua S. Lipshutz

Exhibit A

FOR PUBLICATION

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ABDUL KADIR MOHAMED, *et al.*

Plaintiff,

v.

UBER TECHNOLOGIES, INC., *et al.*,

Defendants.
_____/

RONALD GILLETTE, *et al.*

Plaintiff,

v.

UBER TECHNOLOGIES, *et al.*,

Defendants.
_____/

No. C-14-5200 EMC

No. C-14-5241 EMC

ORDER DENYING DEFENDANTS' MOTIONS TO COMPEL ARBITRATION; DENYING DEFENDANT HIREASE'S JOINDER IN MOTION TO COMPEL ARBITRATION

(*Mohamed* Docket Nos. 28 and 32)

(*Gillette* Docket No. 16)

I. INTRODUCTION

Plaintiff Ronald Gillette began driving for Uber in the San Francisco Bay Area in March 2013. *Gillette* Docket No. 7 at ¶ 12. Gillette's access to the Uber application was "abruptly deactivated" in April 2014. *Id.* at ¶ 15. According to Gillette, an Uber representative told him he was terminated because "'something had come up' on his consumer background report." *Id.*

Gillette filed a lawsuit against Uber Technologies on November 26, 2014. *Gillette* Docket No. 1. Gillette's operative complaint alleges putative class claims under the federal Fair Credit Reporting Act (FCRA), individual claims under California's Investigative Consumer Report

Agencies Act, and representative claims under California's Private Attorneys General Act (PAGA). *See Gillette* Docket No. 7. Generally speaking, Gillette's FCRA and Investigative Consumer Report Agencies Act claims challenge Uber's practices with regards to the use of background checks in its hiring and firing decisions. Gillette's PAGA claims are largely unrelated, and allege that Uber has violated a number of California Labor Code provisions, including failing to provide prompt payment of wages to employees upon termination and resignation, failing to provide itemized wage statements, failing to provide meal and rest breaks, and willfully misclassifying its drivers as independent contractors, rather than employees. *See Gillette* Docket No. 7 at ¶ 79. Uber filed a motion to compel all of Gillette's claims to individual arbitration pursuant to the terms of its 2013 contract with Gillette. *Gillette* Docket No. 16.

Plaintiff Abdul Mohamed began driving for Uber's black car service in Boston in 2012, and for uberX around October 2014. *Mohamed* Docket No. 1 at ¶ 31. According to Mohamed, his access to the Uber application was terminated around October 28, 2014, at least in part as a "result of information obtained [by defendants] through [a] Consumer Reporting Agency . . . ." *See id.* at ¶ 32.

On November 24, 2014, Mohamed filed suit against Uber Technologies, Rasier LLC, and Hirease, LLC.[1] *Mohamed* Docket No. 1. Mohamed's complaint alleges that these defendants violated numerous laws that "impose certain strictures on employers' use of consumer background reports as a factor in their decisions to hire, promote, reassign, or terminate employees." *See id.* at ¶ 14. Specifically, Mohamed alleges putative class claims under FCRA, the California Consumer Credit Reporting Agencies Act (CCRAA), and the Massachusetts Consumer Reporting Act (MCRA). Uber and Rasier have moved to compel individual arbitration of Mohamed's claims under the terms of its contracts with him. *Mohamed* Docket No. 28. Hirease filed a joinder in its co-defendants' motion to compel arbitration, contending that Mohamed's putative class claim against it

[1] Rasier is a wholly-owned subsidiary of Uber Technologies that contracts with uberX drivers. *Mohamed* Docket No. 28 at 2. Hirease is a independent company that, according to Mohamed, "contracts with Uber and Rasier to provide background screening services." *Mohamed* Docket No. 1 at ¶ 15. Hirease is a non-signatory to the relevant arbitration agreements Uber and Rasier seek to enforce. Except in certain circumstances where necessary for purposes of clarity, the Court will refer to Uber Technologies and Rasier collectively as Uber.

should also be compelled to individual arbitration pursuant to Mohamed's contracts with Uber. *Mohamed* Docket No. 32.

Having considered the parties' briefs, supplemental briefs, and lengthy oral arguments, the Court denies both motions to compel arbitration, and thus denies Hirease's joinder. First, the Court finds that both Gillette and Mohamed validly assented to be bound to the terms of the various contracts at issue here. Next, the Court finds that the delegation clauses contained in those contracts – which purport to reserve the adjudication of the validity and enforceability of the contracts' arbitration provisions to an arbitrator – are unenforceable. The Court then concludes that the arbitration provisions contained in both the 2013 and 2014 versions of Uber's contracts with its drivers are both procedurally and substantively unconscionable, and therefore unenforceable as a matter of California law. Hence, both Gillette and Mohamed may continue to litigate their actions in this forum.

II. BACKGROUND

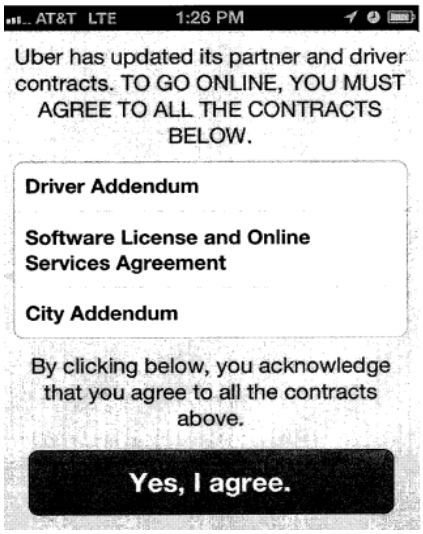
A. Gillette's and Mohamed's Relationships with Uber

Ronald Gillette was hired in February 2013 by Abbey Lane Limousine, which provides limousine and car services within the San Francisco Bay Area. *Gillette* Docket No. 7 at ¶ 11. Abbey's owner opened an Uber account for Gillette shortly thereafter. *Gillette* Docket No. 22-3 (Gillette Decl.) at ¶ 3. Gillette did not have a personal email address or an Abbey-provided email account at this time, and does not know what email address was submitted to Uber in association with his Uber account, if any. *Id.* at ¶ 5. After his application was submitted to Uber, Gillette states that he "met with an Uber representative at one of Uber's San Francisco office locations . . . passed a short test given on a tablet device, and had my picture taken." *Id.* at ¶3. Gillette began driving an Abbey vehicle on the UberBlack service shortly thereafter. *Id.* at ¶¶ 3-4.

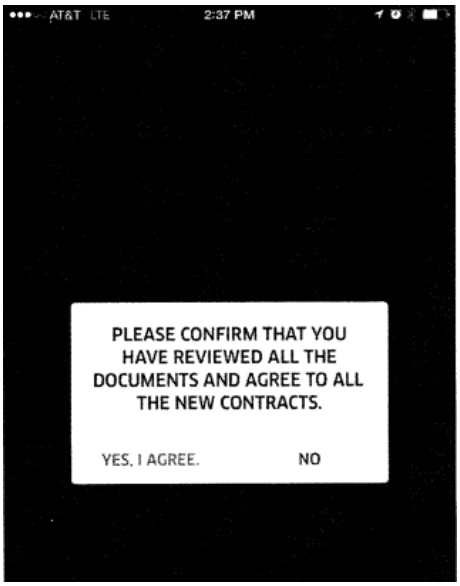
Gillette, like other Uber drivers, used a smartphone to access the Uber application while working as an Uber driver. Gillette Decl. at ¶ 4. The specific phones Gillette used were not his, and they remained permanently in the Abbey vehicles that Gillette drove. *Id.* Gillette would log into the Uber application as soon as he picked up a vehicle from Abbey. *Id.*

Around July 23, 2013, Uber notified its drivers via email that "it was planning on rolling out a Software License and Online Services Agreement . . . and Driver Addendum within the next couple of weeks." *Gillette* Docket No. 16-2 (Colman Decl. *Gillette*) at ¶ 9. Because Gillette did not provide Uber with an email account, Gillette claims he did not receive any such notification. Gillette Decl. at ¶ 5.

Once the relevant agreements were finalized, drivers saw the following message when they attempted to log-on to the Uber application:



Colman Decl. *Gillette*, Ex. B. According to Uber, the words "Driver Addendum," "Software License and Online Services Agreement," and "City Addendum" that appear in the picture above were hyperlinks that "a driver could have clicked in order to review [the relevant agreements] prior to hitting 'Yes, I agree.'" Colman Decl. *Gillette* at ¶ 10. If the driver hit the "Yes, I agree" button, Uber contends that the driver would next see the following screen:



Colman Decl. *Gillette*, Ex. C.

According to Uber's records, Gillette electronically accepted the 2013 Software License and Online Services Agreement (2013 Agreement) on July 29, 2013. Colman Decl. *Gillette* at ¶¶ 11-12. Gillette avers that he does "not recall accepting" the agreements on July 29. Gillette Decl. at ¶ 7. He does not dispute, however, that he continued to drive for UberBlack until April 2014, when Uber allegedly deactivated his account and terminated his employment "without notice or explanation." *Id.* at ¶ 6.

Abdul Mohamed lives and works in Boston. *Mohamed* Docket No. 1 at ¶ 7. He began driving as an UberBlack driver sometime in 2012. *Mohamed* Docket No. 28-2 (Colman Decl. *Mohamed*) at ¶ 8. It is undisputed that on July 31, 2013, Mohamed clicked to accept the 2013 Agreement following the same steps described above. *Id.* at ¶¶ 11, 13. Exactly one year later, Mohamed was prompted to electronically accept Uber's 2014 Software License and Online Services Agreement (2014 Agreement). *Id.* at ¶¶ 12-13. It is undisputed that the process for accepting the 2014 Agreement was the same as for the 2013 Agreement (*i.e.*, clicking "Yes, I agree" when prompted by the Uber application, and then once more confirming agreement on the next application screen), and that Mohamed pressed the relevant buttons. *Id.* at ¶ 12.

Around September 2014, Mohamed applied to drive as an uberX driver, but was told that he needed to get a new car for the position. *Mohamed* Docket No. 1 at ¶ 29. Mohamed subsequently

purchased a new vehicle for approximately $25,000. *Id.* at ¶ 30. On October 3, 2014, Uber claims that Mohamed accepted the 2014 Rasier Software Sublicense & Online Services Agreement (2014 Rasier Agreement) through the same process described above. Colman Decl. *Mohamed* at ¶ 15. He thereafter drove for uberX in Boston. *Mohamed* Docket No. 1. at ¶ 30.

On October 28, 2014, Mohamed received an email from "uberreports@hirease.com" informing him that his "proposal to enter an independent contractor relationship" with Rasier could not be "further consider[ed] . . . at this time." *Mohamed* Docket No. 1 at ¶ 32. The email went on to state that "[t]he decision, in part, is the result of information obtained through the Consumer Reporting Agency identified below." *Id.* Mohamed's access to the Uber application was turned off around the same time he received the email. *Id.* at ¶ 33.

It is undisputed that neither Plaintiff received a paper copy of any of the relevant contracts with either Uber or Rasier. *See, e.g.*, Gillette Decl. at ¶ 8. Uber claims, however, that Plaintiffs could have viewed or downloaded copies of the agreements from their "online driver portals."[2] *Gillette* Docket No. 23-1 (Colman Reply Decl.) at ¶ 3. Plaintiffs contend otherwise. *Mohamed* Docket No. 54 (Maya Supp. Decl.) at ¶¶ 3-5 (stating that plaintiffs counsel and a current Uber driver searched the current version of the driver portal for the relevant agreements but could not find them). Mohamed's counsel further contends that "Mr. Mohamed's ability to speak and understand English is extremely limited, and an interpreter's assistance has been required to communicate with [him]." *Mohamed* Docket No. 37-2 (Maya Decl.) at ¶ 6. Counsel goes on to state an opinion that "based on

[2] The "driver portal" is a website that "stores information (particular to each driver) regarding the services provided by that driver through Uber's various platforms." *See Gillette* Docket No. 36 at ¶ 4. The portal is not accessed through the Uber application. *See id.* Rather, it is accessed separately through any internet-enabled device. *Id.* Uber did not provide any documentary evidence that would verify its declarant's statement that all drivers could view their relevant contracts with Uber or Rasier through their driver portal during the time they were employed with Uber. *Id.* Uber further admits that there was a "bug" in the driver portal that rendered some contracts inaccessible to drivers through their driver portals. *Id.* at ¶ 5. Based on the evidence presented, the Court makes a factual finding that the relevant contracts were not easily or obviously available to drivers through their driver portals.

conversations with Mr. Mohamed . . . if Mr. Mohamed had clicked on a link in the Uber app to open one of the agreements . . . he would not have been able to understand the agreement."[3] *Id.* at ¶ 7.

B. The Applicable Contracts

There are three contracts that are directly relevant to the resolution of the pending motions to compel arbitration; the 2013 Agreement, 2014 Agreement, and the 2014 Rasier Agreement.[4] *See* Colman Decl. *Mohamed*, Ex. D (2013 Agreement); Ex. F (2014 Agreement); and Ex. H (2014 Rasier Agreement).[5] It is undisputed that Gillette could only be bound to the 2013 Agreement – Gillette's relationship with Uber ended before either of the 2014 contracts were presented to drivers. In contrast, Mohamed could be bound to the 2013 Agreement, the 2014 Agreement, and the 2014 Rasier Agreement. However, because the 2014 contracts expressly provide that they "replace[] and supersede[] all prior . . . agreements" between the parties regarding the same subject matter, the Court determines that only the 2014 contracts could actually apply to Mohamed's claims. *See* 2014 Agreement at § 13.3; 2014 Rasier Agreement at 17.

Each of the 2013 and 2014 contracts provide that they will be "governed by California law, without regard to the choice or conflicts of law provisions of any jurisdiction." *See, e.g.*, 2013 Agreement at § 14.1. And each of the contracts also contains an arbitration provision. While there are significant differences between the 2013 Agreement's arbitration provision and the ones contained in each of the 2014 contracts,[6] all of the arbitration provisions share a number of key

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[3] According to counsel, Mohamed's native language is Somali. *Id.* Uber has objected to the form of this evidence as inadmissible hearsay and improper expert opinion. Because the Court does not rely on this evidence in forming the basis of any of its rulings, Uber's objection is overruled.

[4] The Court refers to the 2014 Agreement and the 2014 Rasier Agreement collectively as the 2014 contracts or 2014 agreements.

[5] Uber attached copies of other contracts to its motions, such as the 2013 and 2014 Driver Addenda. These contracts are not independently relevant to the pending motions, however, because these agreements simply incorporate the arbitration provisions of Uber's other contracts by reference. *See, e.g.*, Colman Decl. *Mohamed*, Ex. G (2014 Driver Addendum states that disputes "will be settled by binding arbitration in accordance with the terms set forth in Section 14.3 of the [2014 Agreement]"). Because the Court finds that the arbitration provisions of the 2013 and 2014 contracts are unenforceable, the arbitration provisions of Uber's other contracts that incorporate the unenforceable arbitration provisions are similarly invalid.

[6] The arbitration provisions in the 2014 contracts are largely identical.

features. First, each provision requires all disputes not expressly exempted from the scope of the arbitration provision to be resolved in "final and binding arbitration and not by way of court or jury trial." *See, e.g.*, 2013 Agreement at § 14.3(i). Second, each arbitration provision requires any arbitration to proceed on an individual basis only – drivers are not permitted to pursue class, collective, or representative claims (including PAGA claims) in arbitration. *See, e.g.*, 2014 Agreement at § 14.3(i). Third, each arbitration provision contains a delegation clause that provides that "disputes arising out of or relating to the interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision" shall be decided by the arbitrator.[7] And fourth, each arbitration provision contains an opt-out clause that purports to allow drivers to avoid the arbitration clause altogether. *See* 2013 Agreement at § 14.3(viii).

1. The 2013 Agreement and the *O'Connor* Litigation

This Court previously considered the terms of the arbitration provision of the 2013 Agreement in a related lawsuit, *O'Connor v. Uber Techs., Inc.*, Case No. 13-3826 EMC. Plaintiffs in *O'Connor* filed an emergency motion for a protective order to strike the arbitration provision contained in the 2013 Agreement. *See O'Connor*, 2013 WL 6407583 (N.D. Cal. Dec. 6, 2013); *see also O'Connor*, 2014 WL 1760314 (N.D. Cal. May 2, 2014). The general gist of plaintiffs' motion was that the 2013 Agreement's arbitration provision was unenforceable because drivers had been asked to assent to the 2013 Agreement – and most problematically, its class action waiver – *after* a number of putative class action lawsuits had already been filed against Uber on behalf of its drivers. *O'Connor*, 2013 WL 6407583, at *2.

The Court expressly declined to rule on the alleged unconscionability of the arbitration provision, as the issue was "not properly before the Court at [that] juncture." *O'Connor*, 2013 WL 6407583, at *2. The Court did observe, however, that the arbitration provision in the 2013 Agreement was inconspicuous, that the clause permitting drivers to opt-out of arbitration was itself

[7] As is discussed in more detail below, the 2013 Agreement provides an exception to the delegation clause whereby the Court, and not an arbitrator, is to determine the validity of the class action, collective, and representative action waivers. *See* 2013 Agreement at § 14.5(c).

"buried" in the contract, and that the opt-out procedures provided in the 2013 Agreement were "extremely onerous." *Id.* at *6. The Court therefore concluded that Uber's "promulgation of the [2013] Agreement and its arbitration provision [] runs a substantial risk of interfering with the rights of Uber drivers under Rule 23." *Id.* at *7. In order to minimize that risk, the Court chose to exercise its power under Federal Rule of Civil Procedure 23(d) to assert control over class communications in order to "protect the integrity of the class and the administration of justice." *O'Connor*, 2014 WL 1760314, at *3. Specifically, the Court required Uber to send corrective notices to its drivers (*i.e.*, putative class members) that were intended to insure that all drivers be "given clear notice of the arbitration provision" in the 2013 Agreement, and provide drivers with "reasonable means of opting out of the arbitration provision within 30 days of [receipt of] the notice." *O'Connor*, 2013 WL 6407583, at *7. The Court ordered the parties to meet and confer regarding the appropriate form of any corrective notices. *Id.* While the meet-and-confer process was ongoing, Plaintiff Gillette was terminated by Uber. *Gillette* Docket No. 7 at ¶ 15 (alleging Gillette was terminated in April 2014).

On May 9, 2014, Uber provided the Court with proposed corrective notices, as well as a revised version of the 2013 Agreement that included significantly more fulsome disclosures regarding the arbitration provisions. *O'Connor* Docket No. 100. The Court subsequently approved in part, and for Rule 23 purposes only, Uber's proposed language regarding opting-out of arbitration contained in both the corrective notices and the newly proposed Licensing Agreement. *O'Connor* Docket No. 106. The Court insisted on some changes, however, such as Uber allowing drivers to opt-out of arbitration by email, and bolding a subheading "Your Right to Opt Out of Arbitration" in the revised Licensing Agreement. *Id.* at 5. Uber submitted revised corrective notices along with revised versions of what would ultimately become the 2014 Agreement and 2014 Rasier Agreement for this Court's review, *O'Connor* Docket No. 109, and the Court approved them for Rule 23 purposes with a few additional changes on June 18, 2014. *O'Connor* Docket No. 111. Presumably, these corrective notices were subsequently issued to then-current Uber drivers like Mohamed. *Id.* ("Uber shall issue the documents as corrected."). The 2014 contracts were also subsequently issued to all Uber drivers beginning around June 21, 2014. *See* 2014 Agreement.

III. DISCUSSION

Congress passed the American Arbitration Act, later renamed the Federal Arbitration Act[8] (FAA), in 1925. *See* David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. Rev. 605, 613 (2010). Section 2 of the FAA provides, in relevant part, that "[a] written provision in any . . . contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

For decades after its passage, "the FAA lurked in relative obscurity," and case law interpreting or applying its provisions was fairly scarce. *See* Horton, *supra*, at 613-15. In recent decades, however, the FAA has morphed into a "juggernaut," *id.* at 615, and cases discussing and construing the FAA abound. *See generally* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 Stan. L. Rev. 1631, 1631-42 (2005) (discussing the history of the FAA, and some of the U.S. Supreme Court's major decisions interpreting or applying it). It should come as no surprise that as judicial attention has shifted more towards arbitration, the resulting principles of law this Court must apply to determine the validity of arbitration provisions have become increasingly complex. Uber's pending motions to compel arbitration demonstrate just how complicated this area of law has become.

The Court's analysis of Uber's motions to compel arbitration will proceed as follows. *First*, the Court determines whether either Plaintiff validly assented to the terms of the relevant contracts. That is, was an agreement to arbitrate ever formed? *Second*, if there is valid contractual assent, the Court determines whether it has the power to adjudicate the validity of Uber's arbitration provisions. As the U.S. Supreme Court has made clear, parties may contractually agree to arbitrate gateway issues, such as the validity of an arbitration provision itself, as long as the parties' intent to so delegate arbitrability is "clear and unmistakable," and so long as the delegation clause itself is not "invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability." *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68, 70 n.1 (2010) (internal quotation marks and

[8] Codified at 9 U.S.C. §§ 1-16.

citations omitted). This Court must analyze whether either standard is met here. *Third*, if it has the power to decide the question, the Court considers whether the arbitration provisions in any of the relevant contracts are enforceable. This requires the Court to determine whether any of Uber's arbitration provisions are procedurally unconscionable, substantively unconscionable, or both. It also requires the Court to determine whether any substantively unconscionable or otherwise unenforceable terms it identifies in Uber's contracts can be severed from the remainder of those agreements.

Ultimately, as explained below, the Court concludes that while a binding agreement to arbitrate was formed between the parties, Uber's arbitration provisions cannot be enforced against Plaintiffs. Thus, the Court denies Uber's motions to compel arbitration.

A. Plaintiffs Assented to be Bound to the Applicable Contracts

Plaintiffs argue that the arbitration provisions contained in the relevant contracts cannot be enforced against them because they never assented to be bound by those contracts. Put differently, Plaintiffs contend no agreement to arbitrate was ever formed as a matter of law. This argument is rejected.

Plaintiffs initially contend that Uber failed to prove assent by a preponderance of the evidence where it failed to produce signed versions of any contracts, or other "hard evidence"[9] that the Plaintiffs received copies of the contracts and agreed to be bound. This contention is factually incorrect. Uber presented evidence from its business records, including electronic receipts, that indicate that both Gillette and Mohamed clicked the "Yes, I agree" buttons on the Uber application, as depicted in the pictures above. *See* Colman Decl. *Mohamed* at ¶ 13-16; Colman Decl. *Gillette* at ¶ 12. Moreover, it is undisputed that Uber requires drivers to indicate acceptance of the relevant agreements *before* a driver can continue to use the Uber application, and it is similarly undisputed that both Gillette and Mohamed did, in fact, drive for Uber. Thus, Uber has submitted sufficiently probative evidence that Gillette and Mohamed took *some* affirmative step to indicate an assent to be

[9] Plaintiffs suggest such evidence could include, for instance, a personally addressed email to each Plaintiff that attached the relevant contracts.

bound (*i.e.*, they clicked "Yes, I agree" on two separate application screens).[10] *See Tompkins v. 23andMe, Inc.*, 2014 WL 2903752, at *7 (N.D. Cal. Jun. 25, 2014) (Koh, J.) (holding that an individual's access to a service or website that requires an indication of assent to contractual terms before access to the service or website will be granted was "sufficient evidence that the user clicked 'I Accept'") (citing *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 237 (E.D. Pa. 2007)).

The remaining question, then, is whether the specific manifestation of assent Uber can prove – that Plaintiffs clicked a "Yes, I agree" button that appeared near hyperlinks to the relevant contracts, and then clicked another "Yes, I agree" button on a subsequent application screen – was sufficient to form a legally binding contract under California law. *See Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc.*, 89 Cal. App. 4th 1042, 1049-50 (2001) (explaining that "[e]very contract requires mutual assent," and the "existence of mutual assent is determined by objective criteria" designed to measure whether "a reasonable person would, from the conduct of the parties, conclude that there was a mutual agreement"); *see also Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 992 (1972) (explaining that California law is clear that "an offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious").

Judge Koh recently addressed very similar issues about contract formation in the internet era in a persuasive and comprehensive opinion. *See Tompkins*, 2014 WL 2903752, at *3-9. There, as here, plaintiffs "clicked a box or button that appeared near a hyperlink to the [contract] to indicate acceptance of the [contract]." *Id.* at *8. Judge Koh held that a valid and binding agreement had been formed.

The *Tompkins* court first distinguished between two types of contractual scenarios frequently encountered in the digital realm – "clickwrap" and "browsewrap" agreements. *Id.* at *5-6. "A clickwrap agreement 'presents the user with a message on his or her computer screen, requiring that

[10] That Gillette apparently does not specifically remember clicking the appropriate buttons is not dispositive where Gillette has submitted no proof that he would have been permitted to drive for Uber had he not clicked "Yes, I agree."

the user manifest his or her assent to the terms of the license agreement by clicking on an icon.'" *Id.* at *5 (quoting *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 22 n.4 (2d Cir. 2002)). By contrast, 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*." *Id.* at *6 (citation omitted) (emphasis added). Judge Koh explained that courts tend to enforce clickwrap agreements, but not browsewrap agreements.[11] *Id.* at *7; *see also Savetsky v. Pre-Paid Legal Servs., Inc.*, No. 14-cv-3514 SC, 2015 WL 604767, at *3-4 (N.D. Cal. Feb. 12, 2015) (discussing in detail the enforceability of clickwrap and browsewrap agreements).

The *Tompkins* court next considered the situation, presented here, where the actual contract terms were not necessarily presented to the user at the time of formation, but a hyperlink to those terms was conspicuously presented nearby, and the user had to click a button indicating that they agreed to be bound by those hyperlinked terms. The court concluded that such situations "resemble clickwrap agreements, where an offeree receives an opportunity to review terms and conditions and must affirmatively indicate assent. The fact that the [contract was] hyperlinked and not presented on the same screen does not mean that customers lacked adequate notice" of the contract terms. *Id.* at *8. Specifically, the court concluded that users had adequate notice of the contract terms "because courts have long upheld contracts where 'the consumer is prompted to examine terms of sale that are located somewhere else.'" *Id.* (quoting *Fteja v. Facebook*, 841 F. Supp. 2d 829, 839 (S.D.N.Y. 2012); *see also Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 911-12 (N.D. Cal. 2011) (enforcing arbitration clause where "Plaintiff was provided with an opportunity to review the terms of service in the form of a hyperlink immediately under the 'I accept' button"); Mark A. Lemley,

[11] Notably, the critical cases Plaintiffs rely on to argue that no contract was formed here are (or closely resemble) browsewrap cases, and thus not particularly apt or persuasive here. *See Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171, 1173 (9th Cir. 2014) ("[W]e must address whether Nguyen, by merely using Barnes & Noble's website, agreed to be bound by the Terms of Use, even though Nguyen was never prompted to assent to the Terms of Use and never in fact read them."); *Lee v. Intelius, Inc.*, 737 F.3d 1254, 1259 (9th Cir. 2013) (expressing doubt that individual assented to terms hoisted upon him after his purchase of a "family safety report" was already completed, where the hyperlink to those terms was inconspicuous, and where button that user clicked to apparently assent to the terms simply said "Yes and Show My Report").

Terms of Use, 91 Minn. L. Rev. 459, 459-60 (2006) (noting that courts regularly enforce clickwrap agreements, and collecting cases).

Here, it is beyond dispute that Mohamed and Gillette had the opportunity to review the relevant terms of the hyperlinked agreements, and the existence of the relevant contracts was made conspicuous in the first application screen which the drivers were required to click through in order to continue using the Uber application (*i.e.*, driving for Uber). Uber has similarly presented uncontroverted evidence that Mohamed and Gillette clicked "Yes, I Agree." *See* Colman Decl. *Mohamed* at ¶ 13-16; Colman Decl. *Gillette* at ¶ 12. Thus, Plaintiffs cannot successfully argue that a binding contract was not formed here. *See Tompkins*, 2014 WL 2903752, at *7-9. Whether or not the drivers actually clicked the links or otherwise read the terms of the contracts is irrelevant: Under California law "[a] party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing." *Marin Storage & Trucking, Inc.*, 89 Cal. App. 4th at 1049.

Plaintiffs' remaining arguments regarding contract formation are equally without merit. First, Mohamed appears to argue that he could not legally assent to the contract because he does not sufficiently understand English. Mohamed cites no case law in support of this contention, however, and what case law the Court has found does not support it. As the Seventh Circuit has held:

> [I]t is a fundamental principle of contract law that a person who signs a contract is presumed to know its terms and consents to be bound by them. . . . [T]he fact that the rules were in German [does not] preclude enforcement of the contract. In fact, a blind or illiterate party (or simply one unfamiliar with the contract language) who signs the contract without learning of its contents would be bound. Mere ignorance will not relieve a party of her obligations . . . . [A] party who agrees to terms in writing without understanding or investigating those terms does so at his own peril.

Paper Express, Ltd. v. Pfankuch Maschinen GmbH, 972 F.2d 753, 757 (7th Cir. 1992); *see also* Lauren E. Miller, Note, *Breaking the Language Barrier: The Failure of the Objective Theory to Promote Fairness in Language-Barrier Contracting*, 43 Ind. L. Rev. 175, 176 (2009) (arguing against the apparently universal common law rule that "treats non-English speakers the same as people who speak English – they have a duty to read the contract") (citations omitted). As a matter of contract formation, Mohamed is bound by his legal assent.

Plaintiffs also argue that no contract was formed because it is very unlikely that anyone would actually click the hyperlinks presented in the Uber application to actually view Uber's contracts, and that any such review would be particularly difficult on the small screens of drivers' smartphones. This argument misses the mark. As noted above, for the purposes of contract *formation*[12] it is essentially irrelevant whether a party actually reads the contract or not, so long as the individual had a legitimate *opportunity* to review it. *Marin Storage & Trucking, Inc.*, 89 Cal. App. 4th at 1049 ("A party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing."). Here, Plaintiffs had the opportunity to read the agreements on their phones, even if doing so would be somewhat onerous. Plaintiffs cite no authority that holds or suggests that mutual assent should not be found on these facts. Therefore the Court finds that valid and binding contracts were formed between the Plaintiffs and Uber/Rasier.

B. The Delegation Clauses in the 2013 and 2014 Agreements are Not Clear and Unmistakable, and Thus are Unenforceable

All of the agreements at issue here contain arbitration provisions, and each provide that the "Arbitration Provision is intended to apply to the resolution of disputes that would otherwise be resolved in a court of law or before a forum other than arbitration." 2013 Agreement § 14.3(i); 2014 Agreement § 14.3(i); 2014 Rasier Agreement at 12. All of the arbitration provisions contain the following language in the very next paragraph:

> Such disputes include without limitation disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability, or validity of the Arbitration Provision or any portion of the Arbitration Provision.

2013 Agreement § 14.3(i); 2014 Agreement § 14.3(i); 2014 Rasier Agreement at 12. In the two 2014 agreements, the above-quoted language is then followed by this sentence: "All such matters shall be decided by an Arbitrator and not by a court or judge." 2014 Agreement § 14.3(i); 2014

[12] While the fact that Uber drivers allegedly could only review the contracts on the small screens of their smartphones (and thus would have to scroll repeatedly to view the entire contract) is not relevant to contract formation, the Court finds that the argument has at least some relevance to this Court's procedural unconscionability analysis, as discussed below.

Rasier Agreement at 12. Put simply, the contracts contain delegation clauses that purport to delegate threshold issues concerning the validity of the arbitration provisions to an arbitrator.

The first (and often final) step in determining the validity and enforceability of a delegation clause is to decide whether the language of the delegation clause, read in context with other relevant contract provisions, unambiguously calls for the arbitration of gateway issues such as arbitrability. This is because the "default rule is that courts adjudicate arbitrability: 'Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.'" *Tompkins*, 2014 WL 2903752, at *11 (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)). Thus, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is *clear and unmistakable evidence* that they did so." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (emphasis added) (internal quotation marks and modifications omitted) (citation omitted); *see also Tiri v. Lucky Chances, Inc.*, 226 Cal. App. 4th 231, 242 (2014) ("There are two prerequisites for a delegation clause to be effective. First, the language of the clause must be clear and unmistakable. Second, the delegation must not be revocable under state contract defenses such as fraud, duress, or unconscionability") (citations omitted). The "clear and unmistakable" test reflects a "*heightened* standard of proof" that reverses the typical presumption in favor of the arbitration of disputes. *Ajamian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771, 786 (2012) (emphasis in original); *see also First Options of Chi.*, 514 U.S. at 945; *Rent-A-Center*, 561 U.S. at 69 n.1.

Plaintiffs do not appear to contend that the language of the delegation clauses *itself* is ambiguous, and such an argument would be a tough sell. Indeed, the Supreme Court recognized that very similar language to that utilized in the delegation clauses here satisfies the "clear and unmistakable" standard. *See Rent-A-Center*, 561 U.S. at 68 (concluding that the parties' intent to delegate arbitrability was clear and unmistakable where contract provided that "the Arbitrator shall have exclusive authority to resolve any dispute relating to the enforceability of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable") (internal modifications omitted). Rather, Plaintiffs argue that the delegation clauses are ambiguous because they conflict with *other* language in the contracts. Namely, all three contracts provide that:

"any disputes, actions, claims or causes of action arising out of or in connection with this Agreement or the Uber Service or Software shall be subject to the exclusive jurisdiction of the state and federal courts located in the City and County of San Francisco, California."[13] In the same paragraph, all three contracts further provide that "[i]f any provision of this Agreement is held to be invalid or unenforceable, such provision shall be struck and the remaining provisions shall be enforced to the fullest extent under law." *See* 2014 Agreement at § 14.1. Indeed, in the 2013 Agreement, the language regarding contract provisions being struck if held "invalid or unenforceable" appears in the sentence immediately following the "exclusive jurisdiction" clause. *See* 2013 Agreement at § 14.1. Finally, the 2013 Agreement also provides that "[n]otwithstanding any other clause contained in this Agreement," such as the delegation clause, "any claim that all or part of the Class Action Waiver, Collective Action Waiver or Private Attorney General Waiver is invalid, unenforceable, [or] void or voidable may be determined only by a court of competent jurisdiction and not by an arbitrator." 2013 Agreement at § 14.3(v)(c).

A number of California Court of Appeal decisions have analyzed situations similar to the one presented here; an otherwise unambiguous and clear delegation clause is at least somewhat contradicted by other provisions in the relevant contract. *See Ajamian*, 203 Cal. App. 4th at 791-92. As the *Ajamian* court convincingly explained, "[e]ven broad arbitration clauses that *expressly* delegate the enforceability decision to arbitrators may not meet the clear and unmistakable test, where other language in the agreement creates an uncertainty in that regard." *Id.* at 792 (emphasis in original) (citations omitted). This is so because "[a]s a general matter, where one contractual provision indicates that the enforceability of an arbitration provision is to be decided by the arbitrator, but another provision indicates that the *court* might also find provisions in the contract unenforceable, there is not clear and unmistakable delegation of authority to the arbitrator." *Id.* (emphasis in original) (citing *Parada v. Superior Court*, 176 Cal. App. 4th 1554, 1565-66 (2009)).

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[13] In the two Uber contracts, this language appears in the section 14.1, titled "Governing Law and Jurisdiction." *See* 2013 Agreement at § 14.1; 2014 Agreement at § 14.1. The arbitration provision begins two sections later, in section 14.3. In the Rasier contract, the relevant language appears on the final page of the contract, under the header "General." 2014 Rasier Agreement at 17.

Applying the above-described "heightened standard," the Court of Appeal in *Baker v. Osborne Development Corp*. refused to enforce an express delegation clause that read "[a]ny disputes concerning the interpretation or enforceability of this arbitration agreement, including without limitation, its revocability or voidability for any cause . . . shall be decided by the arbitrator." 159 Cal. App. 4th 884, 888-89 (2008). Despite such seemingly clear and unmistakable language, the Court of Appeal concluded that the issue of delegation was ambiguous in light of a different clause in the arbitration provision that allowed for severance if "any provision of this arbitration agreement shall be determined by the arbitrator or *by any court* to be unenforceable." *Id.* at 891 (emphasis in original). The *Baker* court concluded that "in the absence of a clear, *consistent*, and unambiguous reservation of [arbitrability] to the arbitration, it is properly decided by the court." *Id.* (emphasis added) (citation omitted); *see also id.* at 893-94 ("[A]lthough one provision of the arbitration agreement stated that issues of enforceability or voidability were to be decided by the arbitrator, another provision indicated that the court might find a provision unenforceable. Thus, we conclude the arbitration agreement did not 'clearly and unmistakably' reserve to the arbitrator the issue of whether the arbitration agreement was enforceable."). This was so despite the fact that the claimed inconsistency was relatively minor (only four additional words that could well have been a typo or a simple drafting error), and there were no additional contractual terms or evidence to suggest any arguable inconsistency with the delegation clause. *See id.* at 893-94.

Another panel of the Court of Appeal reached a similar conclusion in *Hartley v. Superior Court*, 196 Cal. App. 4th 1249 (2011). There, the relevant contract expressly provided that "any and all disputes, claims or controversies arising out of or relating to any transaction between [the parties] . . . including the determination of the scope and applicability of this agreement to arbitrate . . . shall be submitted to final and binding arbitration . . . ." *Id.* at 1256 (emphasis omitted). A later provision of the contract, however, provided that "[n]othing contained in this Agreement shall in any way deprive a party of its right to obtain provisional, injunctive, or other equitable relief from a court of competent jurisdiction, pending dispute resolution and arbitration," and provided that any such request could only be brought in either a federal or state court "located in Orange County, California." *Id.* at 1257 (emphases omitted). The contract also contained a severability clause that

provided that "[i]n the event that any provision of this Agreement shall be determined by a *trier of fact of competent jurisdiction* to be unenforceable in any jurisdiction," the "remainder of this Agreement shall remain binding." *Id.* (emphasis in original). The *Hartley* court concluded that the delegation clause was ambiguous because it was at least somewhat inconsistent with other contractual language providing that a court in Orange County could "decide all equitable issues" and language indicating that a "trier of fact of competent jurisdiction" might decide issues of severability. *Id.* at 1257-58. Hence, the Court of Appeal concluded that the "agreements do not meet the heightened standard that must be satisfied to vary from the general rule that the court decides the gateway issue of arbitrability." *Id.* at 1257-58.

Finally, the Court of Appeal in *Parada* held that an express delegation clause[14] was not sufficiently clear and unmistakable to be enforced where another provision of the contract intimated that a "trier of fact of competent jurisdiction" could determine that a portion of the agreement was unenforceable. 176 Cal. App. 4th 1554, 1566 (2009). The Court of Appeal reasoned that in order to meet the heightened "clear and unmistakable" standard, the severability clause needed to be drafted in complete consistency with the delegation clause, and should have provided that only an arbitrator could decide issues of severability. *Id.*

This Court finds that the reasoning of the California Court of Appeal in the above-described cases is persuasive, and equally applicable to the facts presented here. Indeed, the inconsistencies between the various clauses in Uber's contracts are arguably more serious than those discussed in either *Baker*, *Hartley*, or *Parada*. In fact, the inconsistencies in the 2013 Agreement are particularly obvious. Most notably, the delegation clause in the contracts provides that "*without limitation*[,] disputes arising out of or relating to interpretation or application of this Arbitration Provision" shall be decided by an arbitrator. 2013 Agreement at § 14.3(i) (emphasis added). But the 2013 Agreement's arbitration provision later stipulates that "only a court of competent jurisdiction and

[14] The relevant clause read: "The parties agree that any and all disputes, claims or controversies arising out of or relating to any transaction between them or to the breach, termination, enforcement, interpretation or validity of this Agreement, including the determination of the scope or applicability of this agreement to arbitrate, shall be submitted to final and binding arbitration . . . ." *Parada*, 176 Cal. App. 4th at 1565 (emphasis omitted).

not [] an arbitrator" may determine the validity of the arbitration provision's class, collective and representative action waivers. *See id.* at § 14.3(v)(c). These two clauses in the 2013 Agreement are facially inconsistent with each other and thus, for this reason alone, the heightened "clear and unmistakable" test is not met with respect to the delegation clause contained in the 2013 Agreement. *See, e.g.*, *Baker*, 159 Cal. App. 4th at 893-94.

The same result obtains with respect to the 2014 contracts. Both of the 2014 agreements – and the 2013 Agreement as well – provide that the state or federal courts in San Francisco will have "*exclusive jurisdiction*" of "*any* disputes, actions, claims or causes of action arising out of or in connection with this Agreement . . . ." 2014 Agreement at § 14.1 (emphases added); *see also* 2014 Rasier Agreement at 17. This language is inconsistent and in considerable tension with the language of the delegation clauses, which provide that "without limitation" arbitrability will be decided by an arbitrator. *See* 2014 Agreement at § 14.3(i). Moreover, the language of the delegation clauses is also in some tension with a provision, appearing in the same paragraph as the "exclusive jurisdiction" proviso, that provides for severance if "any provision of this Agreement is held to be invalid or unenforceable." *See* 2014 Agreement at § 14.1. Especially given its placement in the very same paragraph[15] that provides that all disputes arising out of the Uber contracts will be settled *in court*, it is reasonable to assume that the typical Uber driver[16] might read this severability

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[15] In the 2013 Agreement, the inference is even stronger because the severability clause appears in the very next sentence after the forum-selection language. *See* 2013 Agreement at § 14.1.

[16] The Court requested supplemental briefing on the issue of whether the "clear and unmistakable" test announced by the Supreme Court is informed by the relative sophistication of the parties. That is, would it matter if the intent to delegate threshold issues was "clear and unmistakable" to an attorney, judge, or otherwise legally sophisticated party (such as a large corporation) reviewing the contract, but not so clear to an unsophisticated party? The parties' submissions indicate that this is still largely a debated question. For instance, in *Oracle America, Inc. v. Myriad Group A.G.*, the Ninth Circuit expressly refused to answer whether a delegation clause that it found to be "clear and unmistakable" when incorporated into an arbitration agreement between two large and sophisticated corporations would be similarly clear and unmistakable in a consumer contract. 724 F.3d 1069, 1075 n.2; *see also Zenelaj v. Handybook Inc.*, -- F. Supp. 3d --, 2015 WL 971320, at *3-5 (N.D. Cal. 2015) (citing cases on both sides of the debate, and declining to decide for itself whether the proper test must take into account the relative sophistication of the parties). Other courts, however, have held that delegation language (or other contract language in an arbitration provision) that might otherwise be clear and unmistakable to sophisticated entities may not be so obvious to less sophisticated parties. *See Tompkins*, 2014 WL 2903752, at *11 (finding "good reason" not to hold to consumers to the same standard as sophisticated commercial entities vis-a-vis delegation clauses); *see also Lou v. Ma Labs., Inc.*, No. 12-cv-5409 WHA, 2013 WL

language to provide further evidence that Uber intended any determination as to whether "any provision of this Agreement is . . . invalid or unenforceable" to be made in court, and not arbitration. *See* 2014 Agreement at § 14.1. Thus, the delegation clause in the 2014 contracts is similarly not "clear and unmistakable," and cannot be enforced. *See First Options of Chi.*, 514 U.S. at 944-45.

Uber argues that any facial tension there might be between the above-described clauses is artificial, and that the intent of the parties to delegate arbitrability to an arbitrator is ultimately clear and unmistakable. For instance, Uber argues that the language providing for "exclusive jurisdiction" in San Francisco courts is merely a standard forum-selection clause that provides the appropriate forum for disputes *should* those disputes not otherwise be found subject to arbitration. This, Uber argues, is obvious because the forum-selection language appears in an earlier provision of the contract – not within the arbitration provision itself[17] – and "it is a well-settled cannon of contract interpretation that when a general and particular provision are inconsistent, the particular and specific provision is paramount to the general provision." Reply Br. at 11 (internal quotation marks and citation omitted). Similarly, Uber argues that the language in the 2013 Agreement that allows a court to decide the validity of class, collective, or representative action waivers, can be easily read in

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2156316, at *3 (N.D. Cal. May 17, 2013) (finding that language in arbitration provision that might be clear to a lawyer or judge was not necessarily clear to unsophisticated employees who were not attorneys). To the extent this Court has to weigh in on the issue, the Court is persuaded by *Tompkins* and other cases that recognize that whether the language of a delegation clause is "clear and unmistakable" should be viewed from the perspective of the particular parties to the specific contract at issue. What might be clear to sophisticated counterparties is not necessarily clear to less sophisticated employees or consumers. Here, however, it makes little difference because the Court concludes that Uber's delegation clauses are not sufficiently clear and unmistakable to be enforced even against a legally sophisticated entity.

[17] Uber also argues that a key distinguishing factor between this case and cases like *Parada*, *Baker*, and *Hartley* is that here the putatively conflicting language appears outside the arbitration provision, whereas in the Court of Appeal cases the putatively conflicting language appeared within the arbitration provisions themselves. First, Uber overlooks the fact that with respect to the 2013 Agreement, there *is* tension within the arbitration provision itself. Second, in two of the Court of Appeal cases cited by this Court, the putatively conflicting language was contained in other provisions of the contract. *See Hartley*, 196 Cal. App. 4th at 1257 (conflicting language appeared both within and without the arbitration provision); *Ajamian*, 203 Cal. App. 4th at 777 (potentially conflicting language appeared in different section of contract from arbitration provision). In any event, the Court does not believe that this distinction is legally relevant – the question of whether delegation language is clear and unmistakable should be determined in context of the contractual language as a whole – not by artificially restricting the Court's review solely to the provisions of the arbitration clause.

harmony with the delegation clause, because the carve-out provision for court adjudication of the validity of the waivers starts with the language "[n]otwithstanding any other clause contained in this Agreement . . . ." 2013 Agreement at § 14.3(v)(c). These arguments, however, ignore the Supreme Court's heightened requirement that delegation language be "clear and unmistakable" to be enforceable. *First Options of Chi.*, 514 U.S. at 944.

Indeed, simply to state the premise of Uber's argument is to prove that it fails: At bottom, Uber argues that the language of the contract it drafted is "clear and unmistakable" because this Court can easily resolve any putative conflicts or ambiguities in its contract by resorting to standard rules of contract interpretation.[18] But a court should only turn to rules of construction where the contract language under consideration is at least somewhat ambiguous or open to two or more reasonable constructions. If, as the Supreme Court requires, the language of the delegation clauses here was truly "clear and unmistakable," there would be no need to resort to rules of construction whatsoever. *See, e.g.*, *Natural Res. Def. Council, Inc. v. Cnty. of L.A.*, 725 F.3d 1194, 1204-05 (9th Cir. 2013) (noting that a court should only turn to interpretative aids where a contract's language is not plain); *Klamath Water Users Protective Ass'n. v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999) (explaining that "[w]henever possible, the plain language of the contract should be considered first" and rules of construction applied only "if reasonable people could find its terms susceptible to more than one interpretation"); *Boghos v. Certain Underwriters at Lloyd's of London*, 36 Cal. 4th 495, 501 (2005)[19] (explaining that a court first looks to the plain text of a contract, and turns to

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[18] Notably, Uber argues that this Court should apply the principle of interpretation that the specific controls the general. Plaintiffs, however, argue persuasively that the Court would be obligated to apply a different cannon of contract interpretation – that "ambiguities in a form contract are resolved against the drafter." *Oceanside 84, Ltd. v. Fid. Fed. Bank*, 56 Cal. App. 4th 1441, 1448 (citing Cal. Civ. Code § 1654; *Victoria v. Superior Court*, 40 Cal. 3d 734, 747 (1985)). Thus even if this Court accepted Uber's invitation to use tools of contract interpretation to determine the meaning of the delegation clauses, the Court would likely find that the delegation clauses here are not enforceable.

[19] At the hearing, counsel for Uber suggested that *Boghos* supports its argument that the delegation clauses here are enforceable. But *Boghos* is not on point because the question before the California Supreme Court there was *not* the enforceability of a delegation clause, and thus *Boghos* was not required to (and did not) apply the heightened "clear and unmistakable" standard. *See id.* at 502. In fact, *Boghos* applied the "presumption *favoring* arbitration" – a presumption that does not apply here. *Id.* (emphasis added). Uber's other cited case, *Hill v. Anheuser Busch InBev Worldwide, Inc.*, No. 14-cv-6289 PSG, 2014 U.S. Dist LEXIS 168947, at *11-13 (C.D. Cal. Nov.

interpretative aids only where the intent of the parties is at least somewhat ambiguous); *Ticor Title Ins. Co. v. Emp'r Ins. of Wausau*, 40 Cal. App. 4th 1699, 1707-08 (1995) (same). As the California Court of Appeal correctly and persuasively explained, following the U.S. Supreme Court's decision in *First Options*, "it is not enough that ordinary rules of contract interpretation simply yield the result that arbitrators have power to decide their own jurisdiction. Rather, the result must be clear and unmistakable, because the law is solicitous of the parties actually *focusing* on the issue [of delegation]. Hence silence or ambiguity is not enough." *Ajamian*, 203 Cal. App. 4th at 789 (emphasis in original) (quoting *Gilbert St. Developers, LLC v. La Quinta Homes, LLC*, 174 Cal. App. 4th 1185, 1191-92 (2009)).[20] This Court concludes that if the "clear and unmistakable" test means anything, it means that the parties' intent to delegate threshold issues must be undeniably apparent from the text of the contract, and the text alone, without resort to subtle interpretive aids. Because that standard is not met here, the Court cannot enforce the delegation clauses.

C. Even if the 2013 Agreement's Delegation Clause Was Clear and Unmistakable, it is Nevertheless Unconscionable and Therefore Unenforceable

In the alternative, the Court finds that the delegation clauses in Uber's contracts are unenforceable because they are unconscionable. As noted above, if a delegation clause is "clear and unmistakable," the Court must still decline to enforce the clause if the delegation clause itself is unconscionable or otherwise unenforceable under the FAA. *See Rent-A-Center*, 561 U.S. at 71-74. Critically, the party must show that the delegation clause *specifically* is unenforceable under the FAA. *Id.* at 71-73 (requiring any unconscionability challenge to be "specific to the delegation

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26, 2014), is on point, but not persuasive. There, the district court found that an express delegation provision was "clear and unmistakable" notwithstanding a broader contractual term that provided that "a court may determine that any provision of the [contract] is invalid or unenforceable." *Id.* at * 11 (internal brackets omitted). Notably, the *Hill* court did not cite *First Options* or *Rent-A-Center*, nor did it mention or apply the proper "heightened standard" for finding a delegation clause "clear and unmistakable." Put simply, it appears the court in *Hill* applied the wrong legal standard and erred in enforcing the delegation clause before it.

[20] The "clear and unmistakable" test is a matter of federal law. *See Tompkins*, 2014 WL 2903752, at *9. However, California courts have suggested that arbitrability should be analyzed similarly under California and federal law. *See id.* at *9 n.3; *Tiri*, 226 Cal. App. 4th at 239-40 (explaining that California test for delegation clauses is the same as under federal law).

provision"). It is not sufficient to prove that the arbitration provision as a whole, or other parts of the contract, are unenforceable. *Id.* at 71-74.

Gillette argues that the 2013 Agreement's delegation clause is unenforceable because it is unconscionable. "[T]he core concern of unconscionability doctrine is the absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1145 (2013) (quotations and citations omitted). As the party opposing arbitration, Gillette "bears the burden of proving any defense, such as unconscionability." *Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal. 4th 223, 236 (2012). Unconscionability requires a showing of both procedural and substantive unconscionability, "balanced on a sliding scale." *Tompkins*, 2014 WL 2903752, at *13 (citation omitted); *see also Gentry v. Superior Court*, 42 Cal. 4th 443, 469 (2007) (holding that "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa"), *abrogated on different grounds by Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 348 (2014).

1. Procedural Unconscionability

As the California Supreme Court has explained, procedural unconscionability focuses on "oppression" and "surprise." *Armendariz v. Found. Health Psychare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000). "'Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice. Surprise involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms.'" *Tompkins*, 2014 WL 2903752, at *14 (quoting *Tiri*, 226 Cal. App. 4th at 245).

The oppression element is nearly always satisfied when the contract is one of adhesion. *Armendariz*, 24 Cal. 4th at 113. An adhesion contract is a "standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates the subscribing party *only the opportunity to adhere to the contract or reject it*." *Id.* (emphasis added) (internal quotation marks and citation omitted).

Uber argues that the 2013 Agreement's arbitration clause – and specifically the delegation clause contained therein – does *not* take the form of an adhesion contract because the 2013 Agreement contained an opt-out provision that allowed drivers to avoid arbitration entirely, including the delegation clause, while still availing themselves of the other contract terms. *See Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1199 (9th Cir. 2002) (applying California law and concluding that "Ahmed was not presented with a contract of adhesion because he was given the opportunity to opt-out of the Circuit City arbitration program by mailing in a simple one-page form"). As this Court discusses below, however, *Ahmed* was abrogated by the California Supreme Court and is no longer good law. *See Gentry*, 42 Cal. 4th at 471-72 & n.10 (holding that *Ahmed*'s conclusion that the presence of an opt-out clause rendered a contract necessarily procedurally conscionable under California law was "not persuasive"). But even more fundamentally, while the 2013 Agreement *does* contain an opt-out clause, this Court has already determined for Rule 23 purposes that the opt-out clause is highly inconspicuous, and the "opt-out procedure is extremely onerous." *O'Connor*, 2013 WL 6407583, at *6. That is, the Court found the opt-out right in the 2013 Agreement to be largely illusory. As this Court previously explained:

> While the [2013] Licensing Agreement did afford Uber drivers thirty (30) days to opt out of the arbitration provision, the opt-out provision is buried in the agreement. It is part of the arbitration provision, which itself is part of the larger, overall Licensing Agreement. The opt-out clause itself is ensconced in the penultimate paragraph of a fourteen-page agreement presented to Uber drivers electronically in a mobile phone application interface. In sum, it is an inconspicuous clause in an inconspicuous provision of the Licensing Agreement to which drivers were required to assent in order to continue operating [for] Uber.

Id.

The Court sees no reason to depart from its earlier stated views now that it is considering unconscionability: Drivers' opt-out right under the 2013 Agreement was illusory because the opt-out provision was buried in the contract. The opt-out provision was printed on the second-to-last page of the 2013 Agreement, and was not in any way set off from the small and densely packed text surrounding it. 2013 Agreement § 14.3(viii). Furthermore, the fact that those drivers who actually discovered the opt-out clause (if any) could only opt-out by a writing either hand-delivered to

Uber's office in San Francisco or delivered there by a "nationally recognized overnight delivery service," renders the opt-out in the 2013 Agreement additionally meaningless. 2013 Agreement § 14.3(viii).

At oral argument, Uber contended that the opt-out right provided under the 2013 Agreement was meaningful because at least some drivers successfully opted-out of the 2013 Agreement's arbitration provision. *See* Oral Arg. Tr. at 36:19-37:15. Indeed, Uber argued that so long as just one driver opted-out of the 2013 Agreement's arbitration provision, the opt-out right necessarily must have been "real," and thus the arbitration provision (and importantly for this discussion, the delegation clause) was not oppressive or otherwise procedurally unconscionable. *Id.* at 37:7-15. But critically, Uber presented no evidence to this Court that even a single driver opted-out of the 2013 Agreement's arbitration clause, and certainly not before this Court ordered conspicuous corrective notices be sent to current and future drivers to alert them to their opt-out rights. And even if Uber had presented such evidence, this Court has significant doubts that the California Supreme Court would vindicate an opt-out clause simply because a few signatories out of thousands were able to (and did) successfully opt-out. *See Gentry*, 42 Cal. 4th at 471-72 (finding that even the presence of a conspicuous opt-out provision did not render an arbitration provision entirely without procedural unconscionability or oppression); *see also Duran v. Discover Bank*, 2009 WL 1709569, at *5 (Cal. Ct. App. 2009) (unpublished) (concluding that *Gentry* held generally that "even a contract with an opt-out provision can be a contract of adhesion").

At bottom, the opt-out right in the 2013 Agreement was illusory, and thus there is no evidence that drivers could *actually* reject the arbitration provision, and thereby avoid the delegation clause. Thus, the Court concludes that the delegation clause in the 2013 Agreement was "oppressive" under California law in that it was "imposed and drafted by the party of superior bargaining strength" and drivers could not meaningfully reject that term. *Armendariz*, 24 Cal. 4th at 113.

The "surprise" element of procedural unconscionability is also met. Like the opt-out clause discussed above, the delegation clause in the 2013 Agreement is essentially "hidden in the prolix printed form drafted by [Uber]." *Tiri*, 226 Cal. App. 4th at 245. The delegation clause appears on

the eleventh page of a form agreement, without a separate header or any other indicator (*e.g.*, bold or relatively larger typeface) that would call a reader's attention to the provision. Put simply, Gillette and other drivers would have no reason to know or suspect that arbitrability would be decided by an arbitrator under the 2013 Agreement. Thus, the delegation clause specifically is procedurally unconscionable.

2. Substantive Unconscionability

Substantive unconscionability arises when a provision is overly harsh, unduly oppressive, so one-sided as to shock the conscience, or unfairly one-sided. *See Tompkins*, 2014 WL 2903752, at *15; *Tiri*, 226 Cal. App. at 243; *see also id.* at 243 n.6 (recognizing that California Supreme Court is currently considering the "appropriate standard for determining whether a contract or contract term is substantively unconscionable"). Gillette contends the delegation clause in the 2013 Agreement is substantively unconscionable because it requires arbitration costs and fees to be shared between Uber and the driver, unless otherwise "required by law." Opp. Br. at 14; 2013 Agreement § 14.3(vi). Specifically, the relevant clause provides: "[I]n all cases where required by law, Uber will pay the Arbitrator's and arbitration fees. If under applicable law Uber is not required to pay all of the Arbitrator's and/or arbitration fees, such fee(s) will be apportioned between the Parties in accordance with said applicable law, and any disputes in that regard will be resolved by the Arbitrator." 2013 Agreement § 14.3(vi).

Under California law, any clause in an employment agreement that would impose "substantial forum fees" on an employee in her attempt to vindicate her unwaivable statutory rights is contrary to public policy and therefore substantively unconscionable. *Armendariz*, 24 Cal. 4th at 110. As the California Supreme Court made clear, "we conclude that when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court."[21] *Id.* at 110-11 (emphasis in

[21] As the Court previously explained, the 2013 Agreement's opt-out provision was illusory, and thus the arbitration provision – and specifically the delegation clause – foisted on the signatories to that contract was "mandatory" as that term is used in *Armendariz*. Indeed, Uber admits that drivers could not drive for Uber unless they accepted the terms of the 2013 Agreement. *See* Colman

original); *see also Sonic-Calabasas A*, 57 Cal. 4th at 1144 (reaffirming *Armendariz*'s prohibition on contractual terms that require an "equal division of costs between employer and employee" in arbitration, and further explaining persuasively that the *Armendariz* rule is not pre-empted by the FAA or *Concepcion*).[22]

Indeed, the United States Supreme Court has repeatedly suggested that a court may refuse to enforce a delegation clause, or otherwise refuse to compel statutory claims to arbitration, if the party resisting arbitration would be subject to an "unfair" fee-splitting arrangement or would otherwise be required to pay significant forum fees in arbitration. For instance, in *Green Tree Fin. Corp.-Alabama v. Randolph*, the Court recognized that "[i]t may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum." 531 U.S. 79, 90 (2000). Ultimately, however, the Court sidestepped the issue because Randolph "failed to support" her assertion that "arbitration costs are high" with probative evidence. *Id.* at 90 n.6.

In *Rent-A-Center*, the Court once again recognized that a sufficiently robust challenge to arbitration fee-splitting could invalidate an arbitration clause, and specifically a delegation clause. *See Rent-A-Center*, 561 U.S. at 74 (holding that litigant could have challenged substantive unconscionability of delegation clause by showing that he was subject to an "unfair[] . . . fee-splitting arrangement" but noting that the plaintiff "did not make any arguments specific to the delegation provision"). And in *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013), the Court expressly acknowledged that a provision in an arbitration agreement that provides for "administrative fees attached to arbitration that are so high as to make access to the forum impracticable" may well be unenforceable. *Id.* at 2310-11 (citing *Green Tree Fin.*, 531 U.S. at 90). Once again, however, because there was no evidence of such prohibitive fees before the Court, the Justices did not have occasion to flesh out the rule. *Id.* at 2311.

Decl. *Mohamed*, at ¶ 6.

[22] The Court notes that Uber does not argue that the *Armendariz* rule regarding arbitration fees is preempted by the FAA, and thus any such argument is waived.

Unlike the litigants in *Green Tree*, *Rent-A-Center*, and *Italian Colors*, Plaintiffs here *have* made a sufficient showing that they would be subject to hefty fees of a type they would not face in court if they are forced to arbitrate arbitrability pursuant to the delegation clause of the 2013 Agreement. Specifically, Plaintiffs presented fee schedules and invoices from JAMS[23] that show JAMS arbitrators charge substantial "retainer fees" at the outset of an arbitration. Maya Decl. Ex. A. (invoice for $5,000 "retainer fee" to be "applied to reading, research, preparation, etc."). A fee schedule for a JAMS arbitrator shows that litigants will further be charged a hearing fee of $7,000 per full day, and that "[o]ther professional time, including additional hearing time, pre and post hearing reading and research, and conference calls, will be billed at $700 per hour." *Id.* Put simply, if Gillette is forced to arbitrate even the gateway question of arbitrability at JAMS, he will have to pay a number of hefty fees of a type he would not pay in court, such as a fee for "reading and research" and "award preparation." *Id.* Importantly, the evidence also suggests Gillette would have to advance his *pro rata* portion of these fees just to get the arbitration started, and just to determine whether he needs to arbitrate his claims at all. *Id*; *see also* Maya Decl. Ex. C at Rule 26 (JAMS rule requiring each party "to pay its *pro rata* share of JAMS fees and expenses as set forth in the JAMS fee schedule in effect at the time of the commencement of the Arbitration"). Gillette has stated in a declaration that his sole source of income is Social Security ($775 per month), and that he therefore could not afford to pay the arbitration fees that would be required even to litigate the limited issue of arbitrability under the delegation clause. Gillete Decl. at ¶ 11. The Court finds that Gillette would be unable to access the arbitral forum to even litigate delegation issues if the fee-splitting clause is enforced. Thus, under *Armendariz* the delegation clause is substantively unconscionable. *See Armendariz*, 24 Cal. 4th at 110; *see also Italian Colors Rest.*, 133 S. Ct. at 2310-11.

Uber's numerous arguments to the contrary are not persuasive. First, Uber suggests that *Armendariz* does not apply here because the drivers are not its employees. But if putative employers

[23] While the 2013 Agreement does not require arbitration at JAMS, if the parties cannot mutually agree on a neutral, the contract provides that a JAMS arbitrator will be selected and JAMS arbitration rules will apply. 2013 Agreement § 14.3(iii). Uber presented no evidence that other potential arbitration providers charge fees of a different type, or in significantly lesser amounts, than those charged by JAMS.

could avoid the rule of *Armendariz* simply by *claiming* that a laborer is not their employee, the rule of *Armendariz* would be effectively nullified. It remains to be seen whether drivers like Gillette are, or are not, Uber's employees under California law. In the meantime, the Court finds that the policy rationale undergirding *Armendariz* can only be vindicated if individuals who can colorably claim to be an entity's employees are not required to pay substantial arbitral forum fees simply to obtain a determination of that precise issue (or threshold questions necessary to reach that determination).[24] If the rule were otherwise, companies could impose substantial forum costs on adverse litigants with impunity merely by denying the existence of an employment relationship. Moreover, such a rule would also significantly chill drivers in the exercise of their rights under the relevant agreements. A driver reviewing the "Paying for the Arbitration" section of the contracts could easily conclude that she would be required to pay arbitral fees simply to begin arbitration – a conclusion which could seriously discourage the driver from attempting to vindicate his or her rights as a putative employee in any forum. The Court cannot sanction such a result. *See Iskanian*, 59 Cal. 4th at 382-83 (explaining public policy is frustrated where individuals cannot effectively litigate claims related to their unwaivable statutory rights).

Uber next argues that drivers are *not* responsible for paying arbitration fees under the 2013 Agreement because the contract expressly states that "in all cases where required by law, Uber will pay the Arbitrator's and arbitration fees," and Uber understands *Armendariz* to require that employers cover its employees' arbitration fees.[25] *See Armendariz*, 24 Cal. 4th at 113 (holding that where an arbitration agreement between an employer and employee does not specifically provide for the handling of arbitration costs, California courts should "interpret the arbitration agreement . . . as providing . . . that the employer must bear the arbitration forum costs"). As should be obvious from

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[24] The Court notes that the drivers' claims to employment status are colorable here. Indeed, this Court has already determined that the drivers are Uber's *presumptive* employees as a matter of California law, and the burden is now on Uber to prove an independent contractor relationship. *See O'Connor v. Uber Techs., Inc.*, -- F. Supp. 3d --, 2015 WL 1069092, at *9 (N.D. Cal. 2015).

[25] It is not immediately apparent this is a correct reading of the case. Uber reads *Armendariz* to require employers to pay their employees' arbitration costs, but a more accurate reading is that *Armendariz* simply renders unenforceable employment contracts that purport to require employees to bear those costs.

the Court's discussion in the preceding paragraph, this argument is disingenuous. Uber adamantly contends that the drivers are *not* its employees. That is what this litigation is all about. To argue that the words "where required by law" impose an obligation on Uber to pay its drivers' arbitration fees because *Armendariz* requires such fees to be paid on behalf of *employees* is tantamount to doublespeak.[26] Uber's former counsel in the *O'Connor* matter admitted as much:

> The Court: Okay. In California, who pays [for arbitration]?
>
> Mr. Hendricks: Well, it would depend – in this context, given we're dealing with independent contractors, I believe absent a showing of employee status, each party would probably bear their own expenses.

O'Connor Hr. Tr. at 10:5-9, Nov. 14, 2013. This Court will not permit Uber to try to "'gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory'" in this case. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4477, p. 782 (1981)).[27]

Finally, Uber seeks to walk back its contention that drivers, as its claimed independent contractors, would be responsible for paying their respective share of arbitration fees by now offering to pay any such fees. Reply Br. at 20 (claiming that since litigation commenced "Defendants have offered to pay the arbitration fees" pursuant to *Armendariz*). This after-the-fact concession cannot render the delegation clause conscionable. As the Supreme Court in *Armendariz* explained, whether a party is now willing to excise an unconscionable clause in a contract "does not change the fact that the arbitration agreement as written is unconscionable and contrary to public policy. Such a willingness can be seen, at most, as an offer to modify the contract; an offer that was never accepted. No existing rule of contract law permits a party to resuscitate a legally defective contract merely by offering to change it." *Armendariz*, 24 Cal. 4th at 125 (internal quotation marks

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[26] The JAMS fee schedule provided by Plaintiffs further states that "[f]or arbitrations arising out of *employer*-promulgated plans, the only fee that an *employee* may be required to pay is the $400 per party fee for a one-day case." Maya Decl., Ex. A (emphases added). But again, this carve out would only apply if Uber agreed that it was the drivers' employer, and they its employees.

[27] Even if Plaintiffs were not employees, requiring parties with insufficient resources to arbitrate arbitrability could well be problematic.

and citation omitted); *see also Sonic-Calabasas A*, 57 Cal. 4th at 1134 (explaining that under California law, unconscionability is measured by "whether a contract provision was unconscionable at the time it was made") (internal quotation marks and citation omitted).

Put simply, Gillette has adequately proved that the delegation clause in the 2013 Agreement is substantively unconscionable because in order to arbitrate arbitrability, he would have to pay hefty fees of a type he would not have to pay if he was permitted to challenge arbitrability in court. Thus, the Court holds that the delegation clause in the 2013 Agreement cannot be enforced under the FAA because it is both procedurally and substantively unconscionable as a matter of California law. Hence, this Court, and not an arbitrator, has the power to consider whether the 2013 Agreement's arbitration provision is enforceable.

D. Even if the 2014 Agreements' Delegation Clauses Were Clear and Unmistakable, They are Nevertheless Unconscionable and Therefore Unenforceable

The Court similarly concludes that even if the delegation clauses in the 2014 contracts were "clear and unmistakable" – and they are not – those delegation clauses are unenforceable because they are unconscionable under California law.

The Court's analysis of the enforceability of the 2014 delegation clauses and the 2013 Agreement's delegation clause is similar in some respects. Indeed, because the 2014 contracts all contain nearly identical[28] fee-splitting provisions to the one contained in 2013 Agreement, the Court's substantive unconscionability analysis of the 2014 contracts is exactly the same as it is with respect to the 2013 Agreement. Because the 2014 contracts impermissibly subject Uber drivers to the risk of having to pay significant forum fees, and because drivers are required to advance their share of such fees simply to start the arbitration, the delegation clauses in the 2014 agreements are substantively unconscionable to a significant degree. *See* Section III.C.2, *supra*.

[28] The 2014 Agreement provides in relevant part: "If under applicable law Uber is not required to pay all of the Arbitrator's and/or arbitration fees, such fee(s) will be apportioned equally between the Parties or as otherwise required by applicable law." *See* 2014 Agreement at § 14.3(vi). This language is the same in the 2014 Rasier Agreement, except the word "Uber" has been replaced with "the Company." *See* 2014 Rasier Agreement at 14.

The Court's review of the "surprise" element of the procedural unconscionability test is also the same under both the 2013 and 2014 agreements. The delegation clause in the 2014 agreements is as hidden in Uber's "prolix form" as it is in the 2013 Agreement, and thus the surprise element is satisfied. Thus the only question remaining is whether the "oppression" element of California's procedural unconscionability test is met, such that the Court should conclude the delegation clauses in the 2014 contracts present at least some minimal amount of procedural unconscionability.

1. Oppression of the Delegation Clauses Under the 2014 Agreements

The Court's analysis of the "oppression" element of procedural unconscionability is materially different under the 2014 contracts. Unlike the 2013 Agreement, the 2014 contracts provide drivers a meaningful opportunity to opt-out of the arbitration provision, and, consequently, the delegation clause. The 2014 agreements contain opt-out notices on their very first pages, in boldface and all-caps type that is considerably larger than the surrounding text. *See* 2014 Agreement at 1; 2014 Rasier Agreement at 1;[29] *see also O'Connor v. Uber Techs., Inc.*, No. 13-cv-3826 EMC, 2014 WL 2215860, at *3 (N.D. Cal. May 29, 2014) (stating that "the Revised Licensing Agreement gives clear notice of the arbitration provision, in bold caps at the beginning of the Revised Licensing Agreement"). The arbitration clauses themselves, which appear towards the end of the contracts, also contain bolded opt-out notices in very large and capitalized type. Indeed, before the substance of the arbitration provisions is laid-out, the 2014 Agreement and 2014 Rasier Agreement contain additional notices that attempt to make clear the importance of the opt-out right. *See, e.g.*, 2014 Agreement § 14.3 ("WHETHER TO AGREE TO ARBITRATION IS AN IMPORTANT BUSINESS DECISION"). Finally, the opt-out provision itself is contained in its own subsection bearing the header "Your Right to Opt Out of Arbitration." *See id.* at § 14.3(viii). In contrast to surrounding contract terms, the contents of the opt-out subsection are presented entirely in boldface type, as required by this Court. *Id.* Put simply, it would be hard to draft a more

[29] The opt-out notice is conspicuous in the 2014 Agreement, but is admittedly less so in the Rasier Agreement. Nevertheless, the opt-out right is bolded in larger text on the first page of the Rasier Agreement. Put differently, the opt-out is conspicuous in the Rasier Agreement, and more conspicuous in the 2014 Agreement with Uber.

visually conspicuous opt-out clause even if the Court were to aid in the drafting process, which it actually did.

The actual opt-out procedures in the 2014 contracts are also significantly more reasonable than those provided in the 2013 Agreement. At the Court's request, drivers can opt-out of the arbitration provisions in the 2014 contracts via email by simply sending Uber a message containing their name and expressing "an intent to opt-out." *See* 2014 Agreement § 14.3(viii). Alternatively, drivers can opt-out by letter which can be delivered to Uber by regular mail, overnight delivery, or hand delivery. Put simply, the "Revised Arbitration Provision gives [drivers] a reasonable means of opting out." *O'Connor*, 2014 WL 2215860, at *3.

Uber argues that the existence of a meaningful right to opt-out of the 2014 arbitration clauses necessarily renders those clauses (and the delegation clause specifically) procedurally conscionable as a matter of law, citing Ninth Circuit decisions in *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198 (9th Cir. 2002), *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104 (9th Cir. 2002), and *Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052 (9th Cir. 2013) (en banc).[30] It cannot be denied that each of the cited decisions stand for the precise proposition of law that Uber advocates. But it is also undeniable that each of those decisions failed to apply California law as announced by the California Supreme Court. *See Gentry*, 42 Cal. 4th at 466-73. It is beyond dispute that the unconscionability of the contracts at issue here is a matter of state law. And because "the highest state court is the final authority on state law," *Fid. Union Trust Co. v. Field*, 311 U.S. 169, 177 (1940), and further because "no federal court interpreting California law could change the California Supreme Court's [ruling on an issue]," this Court cannot follow the Ninth Circuit cases cited by Uber in the face of directly contradicting California Supreme Court authority. *Bruno v. Eckhart Corp.*, 280 F.R.D. 540, 546 (C.D. Cal. 2012); *see also Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (noting that the United States Supreme Court "repeatedly has held that state courts are the ultimate expositors of state law"); *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 889 (9th Cir. 2010) (recognizing that

[30] Uber also cites *Johnmohammadi v. Bloomingdale's, Inc.*, for the proposition that a meaningful opt-out right in a contract renders the contract procedurally conscionable as a matter of California law. 755 F.3d 1072 (9th Cir. 2014). But *Johnmohammadi* does not discuss procedural unconscionability at all, and thus the case is not on point. *See id.*

federal courts "are bound by pronouncements of the California Supreme Court on applicable state law").

In *Ahmed*, the plaintiff was hired to work as a sales counselor at Circuit City. *Ahmed*, 283 F.3d at 1199. One month after he was hired, Circuit City sent Ahmed a contract that called for the "binding arbitration of legal disputes." *Id.* Along with the contract, Circuit City also provided Ahmed with a "simple one-page" opt-out form. *Id.* If Ahmed had returned the opt-out form to Circuit City within the allotted thirty day period, "he would have been allowed to keep his job and not participate in the [arbitration] program." *Id.* Ahmed, however, did not return the opt-out form. *Id.* He later sought to sue Circuit City for violations of the California Fair Employment and Housing Act, and Circuit City moved to compel arbitration pursuant to their agreement. *Id.* Ahmed opposed the motion to compel, and argued that the arbitration clause was unconscionable as a matter of California law. *Id.* The Ninth Circuit concluded, however, that because "Ahmed was given a meaningful opportunity to opt out of the arbitration program," he could not "satisfy even the procedural unconscionability prong" of California law. *Id.* at 1199-1200. Thus the panel affirmed the district court's order compelling arbitration without even "reach[ing] his arguments that the agreement is substantively unconscionable." *Id.* at 1200.

The Ninth Circuit was presented with the same situation in *Najd*. Najd was employed by Circuit City, and received the same arbitration contract and opt-out form the Ninth Circuit discussed in *Ahmed*. *Najd*, 294 F.3d at 1106. Like Ahmed, Najd "did not exercise his right to opt out." *Id.* He later sued Circuit City, and Circuit City moved to compel arbitration. *Id.* Again like Ahmed, Najd resisted the motion by arguing that the agreement was unconscionable under California law. *Id.* at 1108. The panel rejected this contention, however, finding that it "is foreclosed by our recent decision in [*Ahmed*]" which "dictates that the [contract] is not procedurally unconscionable." *Id.*

Finally, an en banc panel of the Ninth Circuit recently followed *Ahmed*, and held that an arbitration clause that allowed "students to reject arbitration within sixty days of signing the [contract]" was simply not procedurally unconscionable as a matter of California law. *Kilgore*, 718 F.3d at 1059.

The problem with these cases is the California Supreme Court's 2007 decision in *Gentry*. *See Gentry*, 42 Cal. 4th at 466-73. There, the Supreme Court was faced with the exact same issue the Ninth Circuit analyzed in *Ahmed* and *Najd*: A Circuit City employee (Gentry) sued Circuit City in court despite the fact that Gentry had agreed to arbitrate such claims with Circuit City, and failed to exercise his right to opt-out of the arbitration provision. *Gentry*, 42 Cal. 4th at 451. The California Court of Appeal had previously held, consistent with *Ahmed* and *Najd*, that the contract was simply not procedurally unconscionable "because of the 30-day opt-out provision." *Id.* at 452. The Supreme Court reversed, finding that the exact same contract that formed the basis of the *Ahmed* and *Najd* decisions "has an element of procedural unconscionability notwithstanding the opt-out provision." *Id.* at 451; *see also id.* at 470 ("[T]he Court of Appeal erred in finding the present agreement free of procedural unconscionability."). In doing so, the Supreme Court also expressly rejected *Ahmed* and *Najd*.[31] *Id.* at 472 n.10 (discussing *Ahmed* and *Najd* and concluding that "[w]e find neither case persuasive").

The *Gentry* court began its discussion of procedural unconscionability by noting that "a conclusion that a contract contains no element of procedural unconscionability is tantamount to saying that, no matter how one-sided the contract terms, a court will not disturb the contract because of its confidence that the contract was negotiated or chosen freely, that the party subject to a seemingly one-sided term is presumed to have obtained some advantage from conceding the term or that, if one party negotiated poorly, it is not the court's place to rectify these kinds of errors or asymmetries." *Gentry*, 42 Cal. 4th at 470. "Accordingly, if we take the Court of Appeal in this case at its word that there was no element of procedural unconscionability in the arbitration agreement because of the 30-day opt-out provision, then the logical conclusion is that a court would have no basis under common law unconscionability analysis to scrutinize or overturn even the most unfair or exculpatory of contractual terms." *Id.* The Supreme Court concluded, however, that the Court of

[31] While *Kilgore* was decided after *Gentry*, the decision never cites *Gentry* or otherwise recognizes the rule of procedural unconscionability announced by the California Supreme Court therein. *See Kilgore*, 718 F.3d at 1059. Instead, it cites *Ahmed*, which is not good law, and was not good law at the time *Kilgore* was decided. *Id.* Thus *Kilgore* presents an inaccurate picture of California law and is equally inapposite here.

Appeal was mistaken in so concluding because there were "several indications that Gentry's failure to opt out of the arbitration agreement did not represent an authentic informed choice." *Id.*

First, the *Gentry* court noted that the "explanation of the benefits of arbitration" in the contract was "markedly one-sided." *Gentry*, 42 Cal. 4th at 470. Specifically, the opt-out clause failed to "mention the . . . significant disadvantages that *this particular arbitration agreement* had compared to litigation." *Id.* (emphasis in original). For instance, the arbitration agreement provided a one-year statute of limitations for recovering overtime wages, as opposed to the three-year limitations period under California law, and similarly limited the availability of backpay to a one year period. *Id.* at 470-71. The arbitration agreement also contained a punitive damages limitation, and provided that the parties will "generally be liable for their own attorney fees" despite the fact that prevailing employees were typically entitled to an award of reasonable attorney fees and costs under California statutory law. *Id.* at 471. Put simply, the arbitration agreement contained a number of substantively unconscionable or otherwise unfavorable terms from the point of view of the employee.

The Supreme Court held that failure to bring these specific substantively unconscionable or otherwise unfavorable features of the arbitration clause to Gentry's attention in connection with the opt-out clause rendered the entire arbitration provision at least somewhat *procedurally* unconscionable. *Id.* By neglecting to mention "the many disadvantages to the employee that Circuit City had inserted into the agreement . . . the employee would receive a highly distorted picture of the arbitration Circuit City was offering." *Id.* Thus despite the fact that an employee who had read the arbitration provision "would have encountered the above [one-sided] provisions, only a legally sophisticated party would have understood that these rules and procedures are considerably less favorable to an employee than those operating in a judicial forum." *Id.* Put simply, the Supreme Court determined that the opt-out right was not sufficiently meaningful to render the contract without *any* procedural unconscionability where the employee was not given sufficient information about one-sided terms that might make that employee more likely to opt-out of arbitration.

The Supreme Court further reasoned that the opt-out right could not cure the agreement of *all* procedural unconscionability because "it is not clear that someone in Gentry's position would have

felt free to opt out." *Gentry*, 42 Cal. 4th at 471. According to the Court, the "materials provided to Gentry made unmistakably clear that Circuit City preferred that the employee participate in the arbitration program." *Id.* at 471-72. For instance, a handbook distributed with the opt-out form "touted the virtues of arbitration, including use of the all-capitalized subheading – WHY ARBITRATION IS RIGHT FOR YOU AND CIRCUIT CITY – that left no doubt about Circuit City's preference" for arbitration. *Id.* at 472. Moreover, the fact that the arbitration agreement "was structured so that arbitration was the default dispute resolution procedure from which the employee had to opt out underscored Circuit City's pro-arbitration stance." *Id.* This was important, the Supreme Court explained, because "[g]iven the inequality between employer and employee and the economic power that the former wields over the latter it is likely that Circuit City employees felt at least some pressure not to opt out of the arbitration agreement." *Id.* (citing *Armendariz*, 24 Cal. 4th at 115). Thus, the Court concluded that "[t]he lack of material information about the disadvantageous terms of the arbitration agreement, combined with the likelihood that employees felt at least some pressure not to opt out of the arbitration agreement, leads to the conclusion that the present agreement was, at the very least, not entirely free from procedural unconscionability." *Id.*

The holding of *Gentry* regarding procedural unconscionability applies to this Court's analysis of the 2014 agreements.[32] Specifically with respect to the delegation clause, the first portion of the *Gentry* test is met because the 2014 agreements utterly failed to notify drivers of a specific drawback presented by the delegation clause – namely, that drivers may be required to pay

[32] This Court recognizes that *Gentry* was abrogated in part by the California Supreme Court in *Iskanian*. *See Iskanian*, 59 Cal. 4th at 366 (holding that "[t]he *Gentry* rule runs afoul of" the FAA and is thus preempted). However, "*the* [singular] *Gentry* rule" that the California Supreme Court recognized was preempted in light of *Concepcion* is *not* the procedural unconscionability rule discussed in this Order. The lion's share of the *Gentry* opinion was devoted to a discussion of the validity of class action waivers in arbitration. The *Gentry* rule that the *Iskanian* court recognized has been abrogated is the Court's rule that invalidated class action waivers in arbitration proceedings where a court concluded "that a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees . . . [and] disallowance of the class action will likely lead to a less comprehensive enforcement of [labor laws]." *Gentry*, 42 Cal. 4th at 463. The *Gentry* court's procedural unconscionability discussion, however, was an additional holding that was not addressed (or even acknowledged) by the *Iskanian* court. Put simply, there is no reason to believe that the California Supreme Court has cast the separate procedural unconscionability holding of *Gentry* into doubt. Nor is there reason to suspect that *Gentry*'s procedural unconscionability rule would be preempted because the rule is not specific to arbitration agreements, but appears to apply generally to all California contracts that contain opt-out provisions.

considerable forum fees to arbitrate arbitrability, whereas they would not be required to pay such fees if they opted-out of arbitration (and thus the delegation clause).[33] *See* Section III.C.2, *supra*.

It is less clear, however, whether the second part of the *Gentry* test – which asks whether an employee would feel at least some pressure not to opt out of the arbitration agreement – similarly applies to Uber drivers like Mohamed. A number of factual distinctions could remove this case from *Gentry*'s ambit. For instance, there are no terms in the 2014 contracts analogous to the solicitous subheading "Why Arbitration is Right for You and Circuit City." *See Gentry*, 42 Cal. 4th at 472. Moreover, the 2014 agreements specifically provide that "You will not be subject to retaliation if You exercise Your right to assert claims or opt-out of coverage under this Arbitration Provision." 2014 Agreement at § 14.3(viii). But on the other side of the ledger, Uber drivers are likely subject to the same general economic pressures that concerned the Court in *Gentry*. Like any other lower-level laborer, Uber drivers likely have a fairly urgent need to obtain employment, and may feel pressure to appease their putative employer by assenting to contractual terms the laborer has reason to believe are important to the company. *See Gentry*, 42 Cal. 4th at 471 (explaining that it is "unrealistic to expect anyone other than higher echelon employees" to negotiate contractual terms in an employment agreement or otherwise push back against an employer by, for instance, hiring an attorney to review an employment agreement). As the California Supreme Court noted in *Armendariz*, in a discussion explicitly cited by the *Gentry* court, "in the case of preemployment arbitration contracts, the economic pressures exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement." *Armendariz*, 24 Cal. 4th at 115. And, like the employee in *Gentry*, Uber drivers here could reasonably assume that Uber prefers arbitration because "arbitration was the default dispute resolution procedure from which the employee had to opt out." *Gentry*, 42 Cal. 4th at 472.

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[33] As the Court discusses in more detail below, the 2014 agreements further failed to specifically discuss other substantively unfavorable terms of the arbitration provision in connection with the opt-out. The Court does not discuss these issues here, however, because under *Rent-A-Center* the Court must focus on the features of the delegation clause specifically when deciding the enforceability of a delegation clause, and not other substantively unconscionable terms in the contract. *See Rent-A-Center*, 561 U.S. at 72.

Ultimately, while acknowledging that it is an extremely close question, the Court concludes that the second element of the *Gentry* test is met. Consequently, the Court finds that despite the conspicuous opt-out provisions in the 2014 agreements, the Court cannot conclude that the 2014 delegation clauses are without procedural unconscionability altogether; Mohamed's ability to opt-out of the delegation clause was not sufficiently meaningful to eliminate *all* oppression from the contract. *See Gentry*, 42 Cal. 4th at 451 (concluding that arbitration agreement had "an element of procedural unconscionability notwithstanding the opt-out provision"); *see also Duran*, 2009 WL 1709569, at *5 (concluding that *Gentry* held generally that "even a contract with an opt-out provision can be a contract of adhesion"). And when combined with the substantial amount of "surprise" drivers would face given the highly inconspicuous nature of the delegation clauses specifically, the Court finds that the 2014 agreements' delegation clauses contain some procedural unconscionability.

2. Conclusion

In sum, the Court determines that the delegation clauses in the 2014 contracts are procedurally unconscionable. And because the delegation clauses would force drivers to pay exorbitant fees just to arbitrate arbitrability – fees which drivers would not need to pay to litigate arbitrability in Court – the Court finds the 2014 delegation clauses to be significantly substantively unconscionable; enforcing the delegation clauses could effectively deprive Mohamed of any forum for him to pursue his claims whatsoever. *See Armendariz*, 24 Cal. 4th at 114 (explaining that where a contract contains less procedural unconscionability, the court must find significantly more evidence of substantive unconscionability before holding a contract term unenforceable, and vice versa). Thus, the Court concludes that the delegation clauses in the 2014 agreements are unenforceable under California law.

E. The 2013 Agreement's Arbitration Provision is Unenforceable

The Court determined above that the delegation clause in the 2013 Agreement is ineffective. Consequently, it falls to this Court to decide whether the arbitration provision in the 2013

Agreement is enforceable under California law and the FAA.[34] As previously noted, the FAA requires courts to enforce arbitration provisions in written contracts such as the 2013 Agreement "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The U.S. Supreme Court has interpreted the FAA's "saving clause" to permit "agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 131 S. Ct. at 1746 (internal quotation marks and citations omitted).

Plaintiffs argue that the 2013 Agreement's arbitration provision is unenforceable in its entirety because it is unconscionable under California law. The Court agrees.

1. Procedural Unconscionability

For largely the same reasons that this Court held the delegation clause in the 2013 Agreement was procedurally unconscionable, the entire 2013 arbitration provision is procedurally unconscionable as well. Under any standard, the 2013 Agreement's opt-out provision was illusory because it was highly inconspicuous and incredibly onerous to comply with. Hence, the Court concludes that the arbitration provision in the 2013 Agreement was presented to drivers on a take-it-or-leave it basis, and was adhesive and oppressive. *See Armendariz*, 24 Cal. 4th at 113 (holding that a standardized contract which is imposed and drafted by the party of superior bargaining strength and that "relegates the subscribing party only the opportunity to adhere to the contract or reject it" is necessarily oppressive); *see also* Section III.C.1, *supra*.

Similarly, there can be no real dispute that the arbitration provision itself was a "surprise" to drivers like Gillette and Mohamed. The arbitration clause in the 2013 Agreement first appears on

[34] The Court notes that even if it were incorrect in holding the 2013 delegation clause is unenforceable, the Court would still be required to evaluate the validity of the PAGA waiver in the 2013 Agreement under the express terms of the contract. *See* 2013 Agreement at § 14.3(v)(c) ("Notwithstanding any other clause contained in this Agreement, any claim that all or part of the Class Action Waiver, Collective Action Waiver or Private Attorney General Waiver is invalid, unenforceable, unconscionable, [or] void or voidable may be determined only by a court of competent jurisdiction and not by an arbitrator.").

the eleventh page of the printed document.[35] *See* 2013 Agreement at § 14.3. Unlike the 2014 agreements, there is no warning anywhere earlier in the 2013 Agreement that the document contains an arbitration clause. Moreover, the arbitration clause itself is inconspicuous in the context of the surrounding provisions. The size of the text of the arbitration provision is invariably the same as the surrounding text. And with the exception of only one paragraph of the pages-long arbitration provision, the text is not bolded or otherwise distinguished from the surrounding contractual terms. Put simply, the 2013 arbitration provision as a whole is highly inconspicuous, surprising, and oppressive. It is procedurally unconscionable.

2. Substantive Unconscionability

The 2013 Agreement's arbitration clause is also significantly unconscionable as a substantive matter. First, the 2013 Agreement's arbitration provision is substantively unconscionable and unenforceable because it purports to waive Gillette's right to bring representative PAGA claims in any forum. And because the 2013 Agreement expressly provides that the PAGA waiver is not severable from the rest of the arbitration provision, the Court concludes that the entirety of the arbitration agreement fails because the PAGA waiver fails.

Alternatively, the 2013 Agreement's arbitration clause fails because it is "permeated" with other substantively unconscionable terms. *Armendariz*, 24 Cal. 4th at 122 (citing Cal. Civ. Code § 1670.5(a)). Specifically, the Court finds that in addition to the substantively unconscionable PAGA waiver, the 2013 Agreement's arbitration clause contains a substantively unconscionable fee-shifting clause (*see* Section III.C.2, *supra*), confidentiality provision, carve-out proviso that permits Uber to litigate the claims most valuable to it in court (*i.e.*, intellectual property claims) while requiring its drivers to arbitrate those claims (*i.e.*, employment claims) they are most likely to bring against Uber, and a provision allowing Uber to unilaterally modify contract terms at any time.

[35] Plaintiffs note that drivers were prompted to view the relevant contracts, and accept them, while using their smartphones or other mobile devices. Given the relatively small screen sizes on such devices, it is likely drivers would have had to scroll through the 2013 Agreement a number of times in order to come across the arbitration provision towards the end of contract. This further supports a procedural unconscionability finding.

a. The PAGA Waiver is Unconscionable

In a section misleadingly titled "How Arbitration Proceedings are Conducted," the 2013 Agreement provides that "You and Uber agree to bring any dispute in arbitration on an individual basis only, and not on a class, collective, or private attorney general representative action basis." 2013 Agreement § 14.3(v). The provision goes on to explain that "[t]here will be no right or authority for any dispute to be brought, heard, or arbitrated as a private attorney general representative action ('Private Attorney General Waiver')." *Id.* at § 14.3(v)(c). Gillette's complaint pleads a number of representative PAGA claims against Uber. *Gillette* Docket No. 7 at ¶¶ 76-83.

i. PAGA Lawsuits Generally

Under PAGA, "an 'aggrieved employee' may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations." *Arias v. Superior Court*, 46 Cal. 4th 969, 980 (2009). Any penalties recovered go largely to the state; "[o]f the civil penalties recovered, 75 percent goes to [California's] Labor and Workforce Development Agency, leaving the remaining 25 percent for the 'aggrieved employees.'" *Id.* at 980-81. Hence, the "government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit." *Iskanian*, 59 Cal. 4th at 382. Because the state is the real party in interest, an allegedly aggrieved employee may only proceed with a PAGA claim after providing written notice to the Labor and Workforce Development Agency (LWDA), which notice permits the agency to decide whether to investigate or prosecute the alleged violation(s) itself. *See* Cal. Lab. Code § 2699.3(a). Thus, LWDA retains "primacy over private enforcement efforts," *Arias*, 46 Cal. 4th at 980, and will be bound by any final judgment entered against its deputized plaintiff. *Iskanian*, 59 Cal. 4th at 387 (observing that a "judgment in a PAGA action is binding on the government"). In this way, a "PAGA representative action is [] a type of *qui tam* action." *Id.* at 382.

Against this background, it is clear that a PAGA representative suit, like Gillette's, differs significantly from class actions and other suits in which a private plaintiff seeks relief on behalf of himself, fellow class members, or even the public. *See, e.g.*, *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 934-38 (9th Cir. 2013) (holding that the FAA preempts California's *Broughton-Cruz* rule, which prohibited mandatory arbitration of three particular types of claims if the plaintiff sought

a public injunction). Unlike these other types of suit, a PAGA claim "functions as a substitute for an action brought *by the government itself*." *Arias*, 46 Cal. 4th at 986 (emphasis added); *see also Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1123 (9th Cir. 2014) (discussing the distinct *qui tam* nature of PAGA representative suits and concluding that "a PAGA suit is fundamentally different than a class action"), *cert. denied*, 135 S. Ct. 870 (2014).

ii. PAGA Waivers Violate Public Policy

In light of the significant differences described above, and the fundamental role representative PAGA suits play to the vigorous enforcement of California's Labor Code,[36] the California Supreme Court recently held that "an agreement by employees to waive their right to bring a PAGA action serves to disable one of the primary mechanisms for enforcing the Labor Code. Because such an agreement has as its object indirectly to exempt the employer from responsibility for its own violation of law it is against public policy and may not be enforced." *Iskanian*, 59 Cal. 4th 348 at 383. Put simply, *Iskanian* prohibits the pre-dispute waiver of an employee's right to bring a representative PAGA action in *any* forum (either court or arbitration). *See id.* at 359 ("[W]e conclude that an arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy."); *see also Securitas Sec. Servs. USA v. Superior Court.*, 234 Cal. App. 4th 1109, 1122 (2015); *Hernandez v. DMSI Staffing, LLC*, -- F. Supp. 3d --, 2015 WL 458083, at *4-6 (N.D. Cal. 2015).

The California Supreme Court further determined that California's state-law rule outlawing pre-dispute PAGA representative action waivers was not preempted by the FAA because the real party in interest for any PAGA claim is the State of California, and the FAA's focus is "on private disputes." *Iskanian*, 59 Cal. 4th at 385. According to *Iskanian*, "a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the state, which alleges directly or through its agents – either the Labor and Workplace Development Agency or aggrieved

[36] *See Iskanian*, 59 Cal. 4th at 378-79 (explaining that PAGA was passed to compensate for the lack of resources and prosecutions brought by government enforcement agencies against Labor Code violators).

employees – that the employer has violated the Labor Code." *Id.* at 386-87. *Iskanian* also suggested there was no FAA preemption because principles of federalism counsel against finding preemption of state laws dealing with matters traditionally within a state's police powers unless Congress's intent to preempt such laws was "clear and manifest." *See id.* at 388-89. The *Iskanian* majority could discern no such purpose in the FAA. *Id.* at 388. The United States Supreme Court subsequently denied certiorari. *CLS Transp. L.A., LLC v. Iskanian*, 135 S. Ct. 1155 (2015).

iii. The *Iskanian* Rule is Not Preempted by the FAA

The question of FAA preemption is a matter of federal law, and as this Court previously recognized, *Iskanian*'s holding on that point is not binding on this Court. *See Hernandez*, 2015 WL 458083, at *6. Nevertheless, this Court recently determined that *Iskanian*'s discussion of preemption is "persuasive" and held, as a matter of federal law, that *Iskanian*'s anti-waiver rule is not preempted by the FAA. *See id.* at *6-9; *see also Zenelaj*, 2015 WL 971320, at *7 (following *Hernandez* and finding FAA does not preempt the *Iskanian* rule as a matter of federal law). In doing so, the Court adopted both of the rationales advanced by *Iskanian* (*i.e.*, (1) the FAA only applies to "private disputes," and (2) the FAA expresses no clear and manifest intent to preempt laws, such as PAGA, that come within the broad authority of the state's police powers) and advanced an additional rationale: litigating PAGA claims in arbitration would not "undermine the fundamental attributes of arbitration" by imposing complicated or formal procedural requirements on arbitrators. *See Concepcion*, 131 S. Ct. at 1748-53 (concluding *Discover Bank* rule was preempted by FAA because any state law rule that would require arbitrators to apply rigorous, time consuming, and formal procedures "interferes with the fundamental attributes of arbitration").

Uber asks this Court to reconsider its preemption decision in *Hernandez*. In the absence of Ninth Circuit authority on point,[37] the Court declines to do so. First, the Court notes that Uber does not argue that either *Iskanian* or *Hernandez* were incorrect in concluding that the FAA only applies to "private disputes." Nor does Uber argue that either *Iskanian* or *Hernandez* incorrectly invoked federalism principles in concluding that the FAA does not preempt *Iskanian*'s anti-waiver rule.

[37] The issue is currently pending before the Ninth Circuit in the consolidated appeal of *Sakkab v. Luxottica Retail N. Am.*, lead Ninth Circuit Case No. 13-55184.

Rather, Uber argues that this Court was mistaken in concluding that the litigation of PAGA claims in arbitration would not "interfere" with the fundamental attributes of arbitration – namely the speedy and informal resolution of disputes. For instance, Uber argues that to "recover penalties, a PAGA plaintiff must 'prove Labor Code violations with respect to each and every individual on whose behalf Plaintiff seeks to recover civil penalties.'" Reply Br. at 4 (quoting *Hibbs-Rines v. Seagate Techs., LLC*, 2009 U.S. Dist LEXIS 19283, at *4 (N.D. Cal. 2009)). Uber also argues that Gillette would need to establish each predicate PAGA violation as to each aggrieved driver – here likely numbering in the thousands – thereby rendering the proceedings significantly more complicated than the typical arbitration. *Id.*

As an initial matter, the grounds stated by *Iskanian* are persuasive and sufficient to carry the conclusion here. In any event, as to this Court's additional observation in *Hernandez*, the Court finds that Uber has not sufficiently established that representative PAGA claims cannot be adjudicated in arbitration in a speedy and informal manner. The lone case Uber cites in support of this argument, *Hibbs-Rines*, is not persuasive. As another district court has properly recognized, *Hibbs-Rines* "stands for the unremarkable proposition that Plaintiff is required to prove every Labor Code violation in order to obtain a civil penalty therefore. Exactly why Defendants believe this requires live witness testimony rather than evidence presented in a representative fashion or via documentary evidence, is unclear." *Medlock v. Host Int'l, Inc.*, No. 12-cv-2024-JLT, 2013 WL 2278095, at *5 (E.D. Cal. May 22, 2013). Indeed, a number of courts, including the *Medlock* court, have recognized that PAGA plaintiffs can often satisfy their burdens of proof without undue reliance on individualized evidence. *See id.*; *see also Plaisted v. Dress Barn, Inc.*, No. 12-cv-1679-ODW, 2012 WL 4356158, at *2 (C.D. Cal. Sept. 20, 2012) (recognizing that individualized or fact-intensive evidence of damages is not required under PAGA, because PAGA only permits recovery of "statutory penalties in fixed amounts per violation"); *Alcantar v. Hobart Serv.*, No. 11-cv-1600 PSG, 2013 WL 146323, at *3-4 (C.D. Cal. Jan. 14, 2013) (holding that there was little risk litigation of representative PAGA claim would "require a series of highly individualized, fact intensive, mini trials" because the burden would be on Defendants to prove that the Labor Code was not violated, and such proof could be drawn easily from Defendant's own records). Uber does not explain why

Gillette cannot establish Uber's PAGA liability in an efficient manner, by, for instance, the use of representative evidence or Uber's own records.[38]

Even more fundamentally, the Court is not persuaded that the *Iskanian* anti-waiver rule is preempted under the FAA simply because adjudicating a representative PAGA claim in arbitration could be complicated or time consuming *because of the merits*. Disputants engage in lengthy and complicated arbitrations quite frequently. *See, e.g.*, *Bear, Stearns & Co. v. Buehler*, 432 F. Supp. 2d 1024, 1026-29 (C.D. Cal. 2000) (affirming arbitration award regarding Bear Stearns' negligence and breach of fiduciary duty that required arbitrators to "sit[] through 81 hearings"); *Am. Nat'l Ins. Co. v. Everest Reinsurance Co.*, 180 F. Supp. 2d 884, 885 (S.D. Tex. 2002) (confirming arbitration award entered in complex commercial case where hearing lasted six days, and where parties "submitted well over 200 pages of briefs, over 500 exhibits . . . expert reports and an audit report" and copious deposition testimony to the arbitrators); *Hodge v. Columbia Univ. in City of New York*, No. 05-cv-7622 (LAK), 2008 WL 2686684, at *6 (S.D.N.Y. July 2, 2008) (discussing arbitration of discrimination claim that required seventeen hearings and the arbitrator's review of copious briefs and evidence). What *Concepcion* forbids is not complicated or time-consuming arbitration on the merits, but state rules that foist onerous *procedural* requirements on arbitrators, such as the due-process procedures required by Rule 23. *See Concepcion*, 131 S. Ct. at 1751 (explaining *Discover Bank* rule was preempted because it would "generate *procedural* morass" and impose "*procedural* formality" on arbitrators) (emphases added). As Justice Liu persuasively explained in *Iskanian*, states are permitted to craft "an unconscionability rule that considers whether arbitration is an effective dispute resolution mechanism for wage claimants *without* regard to any advantage inherent to a *procedural device* that interferes with fundamental attributes of arbitration." *Iskanian*, 59 Cal. 4th at 365 (emphases added). What *Concepcion* does not permit, however, is a state-law rule that

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[38] Plaintiff notes, for instance, that Uber's PAGA liability for failing to provide drivers with itemized wage statements will be essentially "automatic" if a jury concludes that drivers were "employees" under California law, and thus entitled to such statements. There appears to be no dispute that Uber does not provide such statements to its drivers because Uber has taken the position it is not required to do so because its drivers are not "employees." Thus, according to Plaintiffs, a determination that Uber drivers *are* employees will result in a proved PAGA violation without resort to any individualized evidence whatsoever.

"considers whether individual arbitration is an effective dispute resolution mechanism for employees *by direct comparison* to the advantages of a *procedural* device (a class action) that interferes with fundamental attributes of arbitration." *Id.* at 356-66 (first emphasis in original) (second emphasis added).

As the Ninth Circuit recognized in *Bauman*, and as this Court noted in *Hernandez*, PAGA imposes no *procedural* requirements on arbitrators (or courts for that matter) beyond those that apply in an individual labor law case. *See Baumann*, 747 F.3d at 1122; *Hernandez*, 2015 WL 458083, at *6. For instance, PAGA contains "no notice requirements for unnamed aggrieved employees, nor may such employees opt out of a PAGA action." *Baumann*, 747 F.3d at 1122. Nor does a PAGA action require inquiry into the "named plaintiff's and class counsel's ability to fairly and adequately represent unnamed employees." *Id.* "While the need for sufficient procedures to bind class members in class arbitration was cause for concern in *Concepcion*, PAGA's preclusive effect differs from that of class action judgments," and thus no such procedures are required under PAGA. *Hernandez*, 2015 WL 458083, at *6. Put simply, the "due-process-related procedural requirements of formal class actions do not obtain in PAGA representative actions." *Id*; *see also Zenalaj*, 2015 WL 971320, at *7-8 (concluding that *Iskanian* is not preempted because litigating representative PAGA claims is "not analogous to class action waivers, and therefore not contemplated by *Concepcion*"). Thus, there is no reason to conclude that *Concepcion* would preempt *Iskanian*'s requirement that representative PAGA actions be allowed to proceed either in court or in arbitration. The *Iskanian* rule is not preempted by the FAA.

iv. *Iskanian* Applies Here Because Drivers Had No Meaningful Opt-Out Right Under the 2013 Agreement

Alternatively, Uber argues that this case is materially distinguishable from *Iskanian* and *Hernandez* because in those cases the plaintiffs could not opt out of the PAGA waiver. *See Iskanian*, 59 Cal. 4th at 360 ("We conclude that where, as here, an employment agreement *compels* the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law.") (emphasis added); *Hernandez*, 2015 WL 458083, at *4 (applying *Iskanian* to plaintiff who had no right to opt-out of PAGA waiver). According to Uber,

the *Iskanian* rule only prohibits *mandatory* PAGA waivers. *See Iskanian*, 59 Cal. 4th at 383 (noting that it is contrary to public policy for an employment agreement to eliminate a worker's choice to bring a PAGA claim "altogether by *requiring* employees to waive the right to bring a PAGA action before any dispute arises"). But even assuming for the moment that Uber is correct that a PAGA waiver is enforceable under California law so long as the employee is given *any* opportunity to opt-out of that waiver – an assumption this Court rejects in its below discussion of the PAGA waiver in the 2014 agreements – Uber's argument is of no moment to the 2013 Agreement because, as discussed at length above, the opt-out in the 2013 Agreement is illusory. *See* Section III.C.1, *supra*. Thus, there is no basis for finding that the Uber drivers who are bound to PAGA waiver in the 2013 Agreement truly had the choice to maintain their representative PAGA rights.

v. Conclusion

In sum, the PAGA waiver in the 2013 Agreement is substantively unconscionable and void as a matter of California law. Uber has not shown that the FAA preempts the *Iskanian* anti-waiver rule. Thus, the representative PAGA waiver is unenforceable.

3. The PAGA Waiver is Not Severable

If a court finds as a matter of law that "'the contract or any clause of the contract [was] unconscionable at the time it was made[,] the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause so as to avoid any unconscionable result.'" *Armendariz*, 24 Cal. 4th at 121 (quoting Cal. Civ. Code § 1670.5(a)). The California Supreme Court has explained, however, that there are limits on a court's discretion to refuse to enforce the entirety of a contractual provision based on the existence of a substantively unconscionable clause.[39] As the Court noted, the law favors "severing or restricting illegal terms rather than voiding the entire contract" because severance "prevent[s] parties from gaining [an] undeserved benefit," and

[39] The U.S. Supreme Court has also held that "[a]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." *Rent-A-Center*, 561 U.S. at 70-71 (internal quotation marks and citation omitted). Thus, at most a court can invalidate the entirety of an arbitration provision if that specific provision is permeated with unconscionability. A Court may not, however, invalidate the entire contract based on unconscionable terms contained solely in an arbitration clause. *Id.*

"conserve[s] a contractual relationship if to do so would not be condoning an illegal scheme." *Id.* at 123 (citations omitted). Put simply, California law favors severance of unconscionable terms where "the interests of justice would be furthered by severance." *Id.* (internal modifications and quotation marks omitted) (citation omitted). Only where the agreement is "permeated by unconscionability" or where the "central purpose of the contract is tainted with illegality" should the court refuse to sever the offending terms. *Id.* (internal quotation marks omitted).

Where, however, a contract expressly states that an unconscionable provision is not to be severed from the remainder of the agreement, the Court must enforce the non-severability clause according to its terms. *See Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1098 (9th Cir. 2009) (recognizing that while "[i]n the usual case" the court must consider whether an unenforceable term "should be severed from the arbitration agreement as a whole," where the "arbitration agreement itself includes a provision prohibiting severance" the court must invalidate the entirety of the arbitration agreement "in accordance with [the] severability clause"); *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 986-87 (9th Cir. 2007) (holding an "entire arbitration clause is void and arbitration cannot be compelled" where contract contained unconscionable clause and "has a nonseverability clause"). This is because courts "must 'rigorously enforce' arbitration agreements according to their terms." *Italian Colors*, 133 S. Ct. at 2309 (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

Gillette argues that the PAGA waiver in the 2013 Agreement is not severable from the rest of the arbitration provision by the express terms of the arbitration clause. Thus, Gillette contends that all of the remaining clauses in the arbitration provision, such as the otherwise lawful class action waiver, must fail because the PAGA waiver failed. The Court agrees with Gillette.

The 2013 Agreement's PAGA waiver contains the following language: "The Private Attorney General Waiver *shall not be severable from this Arbitration Provision* in any case in which a civil court of competent jurisdiction finds the Private Attorney General Waiver is unenforceable. In such instances and where the claim is brought as a private attorney general, such private attorney general claim must be litigated in a civil court of competent jurisdiction." 2013 Agreement § 14.3(v)(c) (emphasis added).

Uber argues that the above non-severability language is not as clear as it seems. For instance, Uber points to a different provision in the 2013 Agreement, which appears two sections before the arbitration provision, which provides that: "If any provision of the Agreement is held to be invalid or unenforceable, such provision shall be struck and the remaining provisions shall be enforced to the fullest extent of the law." 2013 Agreement at § 14.1. The problem with this argument, however, is that this more general pro-severability language, which is not contained in the arbitration provision itself, is contradicted by the more specific non-severability language of the PAGA waiver. As Uber itself recognizes, "it is a well-settled canon of contract interpretation that when a general and particular provision are inconsistent, 'the particular and specific provision is paramount to the general provision." Reply Br. at 11 (quoting *Prouty v. Gores Tech. Group*, 121 Cal. App. 4th 1225, 1235 (2005) and citing Cal. Civ. Code § 3534)). While this argument was not well-taken in respect to construing the delegation clauses in Uber's contracts, because delegation language must pass the "clear and unmistakable" test, Uber's argument is entirely apt here where the "clear and unmistakable" test does not apply. Between the general severability language in section 14.1, and the specific non-severability language in section 14.3(v)(c), the non-severability clause "must govern." Reply Br. at 11.

Uber next points to non-severability language contained within the arbitration provision itself. In the subsection titled "Enforcement of This Agreement," the contract states that "[e]xcept as stated in subsection v above, in the event any portion of this Arbitration Provision is deemed unenforceable, the remainder of this Arbitration Provision will be enforceable." 2013 Agreement § 14.3(ix). Uber's argument fails, however, because it ignores the critical language "except as stated in subsection v above." As Gillette points out, the non-severability language in the PAGA waiver is contained in *subsection (v)*. That is, the severability provision in subsection (ix) expressly carves out any contrary language in subsection (v). And the language of subsection (v) states that "The Private Attorney General Waiver *shall not be severable from this Arbitration Provision* in any case in which a civil court of competent jurisdiction finds the Private Attorney General Waiver is unenforceable. 2013 Agreement § 14.3(v)(c) (emphasis added). Thus, the non-severability clause in subsection (v) obviously controls over the severability clause in subsection (ix).

Uber's final argument relies on the structure of subsection (v). Uber notes that subsection (v) contains three separate waivers, one each for class, collective and representative actions. *See* 2013 Agreement § 14.3(v)(a)-(c). For instance, the class action provision reads: "The Class Action Waiver shall not be severable from this Arbitration provision in any case in which (1) the dispute is filed as a class action and (2) a civil court of competent jurisdiction finds the Class Action Waiver is unenforceable." 2013 Agreement § 14.3(v)(a). According to Uber, "[t]here is no logical basis for dividing the waivers into three distinct subsections other than that the parties specifically contemplated the potential for different results as to the waivers." Reply Br. at 7. And Uber notes that, like the PAGA and collective action waivers, the class waiver provides what should occur if the waiver is invalidated – "the class action must be litigated in a civil court of competent jurisdiction." 2013 Agreement § 14.3(v)(a). Thus, Uber argues that the waivers "set forth the result *with respect to those claims* [(*i.e.*, class, collective, or representative)] in the event one or more waivers are found unenforceable. The benefit of setting forth three different waivers, and separately providing that they are not severable, is clear, particularly here: the unenforceable waiver does not fall out of the agreement entirely, but instead requires that the impacted claims proceed in court as the parties intended, *not the arbitral forum*." Reply Br. at 7 (emphases in original).

To the extent the Court understands Uber's argument, it is not persuasive: The plain language of the contract requires invalidation of the entire arbitration provision because the PAGA waiver expressly forbids severance. 2013 Agreement § 14.3(v)(c). In any event, even if Uber's structural argument offered a plausible construction of the Agreement (and the Court has considerable doubts on that point) it must ultimately be rejected. At best, Uber's argument suggests there is some ambiguity in the otherwise crystal clear language of the contract that provides that the PAGA waiver is not severable. Because the 2013 Agreement is a standardized contract written by Uber, however, to the extent the language is ambiguous any ambiguity must be "resolved against the drafter." *Badie v. Bank of Am.*, 67 Cal. App. 4th 779, 798 (1998); *see also Slottow v. Am. Cas. Co. of Reading, Pa.*, 10 F.3d 1355, 1361 (9th Cir. 1993) (recognizing California law rule that "ambiguities in a written instrument are resolved against the drafter") (citation omitted). Thus, the Court would resolve the ambiguity against Uber, and find that the PAGA waiver is expressly non-

severable from the remaining arbitration provisions. Hence, the court strikes the entire arbitration clause from the 2013 Agreement, consistent with the plain language of the contract. *See Chalk*, 560 F.3d at 1098; *Shroyer*, 498 F.3d at 986-87.

F. Alternatively, the Court Finds the Arbitration Provision of the 2013 Agreement is Permeated With Unconscionability

Even if the PAGA waiver in the 2013 Agreement was severable, the Court finds that the entire arbitration provision would fail in any event because the arbitration clause in the contract is permeated with a number of additional substantively unconscionable terms. *See Armendariz*, 24 Cal. 4th at 122 (citing Cal. Civ. Code § 1670.5(a)). The Court discusses the various additional substantively unconscionable terms below.

1. Arbitration Fee and Cost Splitting

As discussed at length in Section III.C.2, *supra*, California law provides that any clause in an employment agreement that would impose "substantial forum fees" on an employee in her attempt to vindicate her unwaivable statutory rights is contrary to public policy and therefore substantively unconscionable. *Armendariz*, 24 Cal. 4th at 110. "We conclude that when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court." *Id.* at 110-111 (emphasis in original).

Here, the 2013 Agreement purports to require drivers to split the full cost of arbitration with Uber. *See* 2013 Agreement § 14.3(vi). The Court has already made a finding that a number of these significant costs are of a type that drivers would not be required to bear if they litigated their statutory claims in court. *See, e.g.*, Maya Decl. Ex. A. Uber's in-litigation concession that it will not seek to enforce the terms of the contract (*i.e.*, it will pay for its drivers' arbitration costs) is irrelevant to determining substantive unconscionability. Such a concession "does not change the fact that the arbitration agreement as written is unconscionable and contrary to public policy. Such a willingness [to pay fees] can be seen, at most, as an offer to modify the contract; an offer that was never accepted. No existing rule of contract law permits a party to resuscitate a legally defective

contract merely by offering to change it." *Armendariz*, 24 Cal. 4th at 125 (internal quotation marks and citation omitted).

Because the 2013 Agreement, at the time it was drafted, purports to force Uber's presumptive employees to pay substantial arbitration costs of a type they would not be required to pay in court, this provision is substantively unconscionable. *See* Section III.C.2, *supra*.

2. Confidentiality Clause

Gillette next assails a confidentiality provision in the 2013 Agreement that provides "Except as may be permitted or required by law, as determined by the Arbitrator, neither a party nor an Arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of all the Parties." 2013 Agreement § 14.3(vii).

A panel of the Ninth Circuit has previously held that a broad confidentiality provision in an arbitration agreement is substantively unconscionable under California law.[40] *Ting v. AT&T*, 319 F.3d 1126, 1151-52 (9th Cir. 2003). As the panel explained, "[a]lthough facially neutral, confidentiality provisions usually favor companies over individuals." *Id.* at 1151 (citation omitted). This is because "if the company succeeds in imposing a gag order, plaintiffs are unable to mitigate the advantages inherent in [Uber] being a repeat player" in arbitration. *Id.* at 1152. Thus, by imposing arbitration confidentiality, the company places "itself in a far superior legal posture by ensuring that none of its potential opponents have access to precedent while, at the same time, [Uber] accumulates a wealth of knowledge" on how to arbitrate the claims most effectively. *Id.* Moreover, the panel expressed concern that "the unavailability of arbitral decisions may prevent potential plaintiffs from obtaining the information needed to build a case of intentional misconduct or unlawful discrimination" against the company.

Uber responds by citing *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1079 (9th Cir. 2007) for the proposition that "confidentiality provisions in an arbitration agreement are [not] per se unconscionable under California law." While true, the *Davis* court qualified that statement in the same paragraph, noting that certain narrow arbitration confidentiality provisions, such as those

[40] Uber has not argued that the *Ting* rule is preempted by the FAA. Any such argument is waived.

agreeing "to limit availability of sensitive employee information (*e.g.*, social security numbers or other person identifier information) or other issue-specific matter" might be acceptable. *Id.* As the panel explained, "[c]onfidentiality by itself is not substantively unconscionable." *Id.* What Uber does not mention, however, is that *Davis* then held that the particular confidentiality clause before it *was* substantively unconscionable under *Ting*, because, like the clause in Uber's 2013 Agreement, it precluded any disclosures about an arbitration whatsoever to non-parties. *Id.* at 1078.

Uber's only other case, *Velazquez v. Sears*, is unpersuasive. 2013 U.S. Dist. LEXIS 121400, at *13-15 (S.D. Cal. 2013). There, the district court found a confidentiality clause that was identical to Uber's in the 2013 Agreement was not substantively unconscionable. *See id.* The court reached this conclusion by purporting to follow the logic of a footnote from the Ninth Circuit's *en banc* decision in *Kilgore*. *Id.* Interestingly, that footnote specifically cites *Ting* and does not purport to overrule *Ting*'s interpretation of California law vis-a-vis the unconscionability of broad confidentiality clauses. *See Kilgore*, 718 F.3d at 1059 n.9. Indeed, the *en banc* court noted that where the number of putative class members is large (like it is here, and unlike in *Kilgore* itself), the concerns expressed in *Ting* about the repeat player effect are likely valid. *Id.* Then, and somewhat inexplicably, the court added the following dicta: "In any event, the enforceability of the confidentiality clause is a matter distinct from the enforceability of the arbitration clause in general. Plaintiffs are free to argue during arbitration that the confidentiality clause is not enforceable." *Id.* But this dicta, in a footnote, does not clearly overrule *Ting*. Moreover, this dicta appears to conflict with the United States Supreme Court's holding that a determination of arbitrability must be made by a court, and not an arbitrator, absent "clear and unmistakable" intent to delegate the adjudication of arbitrability to an arbitrator.[41] *See First Options of Chi.*, 514 U.S. at 945. Under *Ting* and *Davis*, the confidentiality clause is substantively unconscionable as a matter of California law.

[41] Neither the *Kilgore* majority nor dissent mention whether the contract in *Kilgore* contained a delegation clause. This Court has independently reviewed the arbitration provision at issue in *Kilgore*, which was appended to the dissenting opinion. *See id.* at 1065 (Pregerson, J. dissenting). It does not appear to have a delegation clause.

3. Intellectual Property Claim Carve Out

Gillette next attacks a provision in the 2013 Agreement that provides that "[o]ther than disputes regarding the Intellectual Property Rights of the parties, any disputes . . . may be subject to arbitration." 2013 Agreement § 14.2. This provision in the 2013 Agreement restricts intellectual property (IP) claims from the scope of the arbitration clause, while forcing nearly all other disputes, including employment disputes, into arbitration. *See id.*

Plaintiffs cite *Fitz v. NCR Corp.* for the proposition that a contract "may be unfairly one-sided if it compels arbitration of the claims more likely to be brought by the weaker party but exempts from arbitration the types of claims that are more likely to be brought by the stronger party."[42] 118 Cal. App. 4th 702, 724 (2004). *Fitz* is squarely on point, and its reasoning applies here.

In *Fitz*, the Court of Appeal expressly found that a provision that exempted IP claims from arbitration, to the exclusion of all other claims, was substantively unconscionable. *Fitz*, 118 Cal. App. 4th at 724. As the Court of Appeal explained, while employees "have filed actions against employers over . . . intellectual property claims, it is far more often the case that employers, not employees, will file such claims. Furthermore, the [list of arbitrable claims] only includes the types of complaints that are predominately, if not solely, of concern to employees." *Id.* at 725; *see also Mercuro v. Superior Court*, 96 Cal. App. 4th 167, 176-79 (2002) (finding an IP claim carve out provision substantively unconscionable because the "agreement exempts from arbitration the claims Countrywide is most likely to bring against its employees"). The *Fitz* court concluded that the IP carve out "is unfairly one-sided because it compels arbitration of the claims more likely to be brought by Fitz, the weaker party, but exempts from arbitration the types of claims that are more likely to be brought by NCR, the stronger party." 118 Cal. Ap. 4th at 725.

Uber responds to Plaintiffs' unconscionability argument by citing just one case, *Tompkins*. 2014 WL 2903752. Uber's response in insufficient, however, because *Tompkins* is plainly distinguishable. There, Judge Koh held that an IP carve out provision was not substantively

[42] Uber does not argue that the *Fitz* rule, or later cases applying it, are preempted by the FAA. Any such argument is waived.

unconscionable because consumers in that case were actually fairly likely to bring IP claims against the defendant. 2014 WL 2903752, at *17. This was because the defendant in *Tompkins* was in the business of collecting DNA samples from its customers, and the contracts allowed "consumers to retain certain intellectual property rights to their genetic and self-reported information. Therefore, consumers may avail themselves of the carve out for intellectual property disputes." *Id.* The holding of *Tompkins* makes perfect sense in the specific factual situation before Judge Koh: Given that lawsuits about the mishandling of a plaintiff's genetic information are at least somewhat foreseeable and valuable, a mutual carve out permitting such claims to be litigated in court was not harshly one-sided.

Uber suggests, without any evidentiary support, that like the plaintiffs in *Tompkins*, its "transportation company partners" (*i.e.*, drivers) "could have an interest in protecting their intellectual property rights and may very well benefit from the [IP] exemption." Reply Br. at 19. This speculation is not sufficient to bring the Plaintiffs within the reasoning of *Tompkins*. Rather, the opinions of the California Court of Appeal are persuasive – the IP carve out in the 2013 Agreement is substantively unconscionable because it is overly "one-sided." *See Armendariz*, 24 Cal. 4th at 114. Hence, the Court cannot enforce it.

4. Unilateral Modification Provision

Plaintiffs finally argue that a provision in the 2013 Agreement – although not one within the arbitration clause itself – that permits Uber to unilaterally modify the terms of the contract without notice to drivers is substantively unconscionable. *See* 2013 Agreement § 12.1 ("Uber reserves the right to modify the terms and conditions of this Agreement . . . at any time."). The Ninth Circuit has previously held, in a decision applying California law, that a provision affording the drafting party "the unilateral power to terminate or modify the contract is substantively unconscionable." *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1179 (9th Cir. 2003); *see also Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 926 (9th Cir. 2013) (affirming the substantive unconscionability rule in *Ingle*). Following *Ingle*, Judge Illston similarly ruled that a unilateral modification clause can be

substantively unconscionable under California law.[43] *See Macias v. Excel Bldg. Servs. LLC*, 767 F. Supp. 2d 1002, 1010-11 (N.D. Cal. 2011).

While Uber only fleetingly challenges Plaintiffs' assertion that the unilateral modification provision is *substantively* unconscionable,[44] Uber does cite a Northern District case that holds that a unilateral modification provision is not substantively unconscionable as a matter of California law. *See Slaughter v. Stewart Enters.*, No. 07-cv-1157 MHP, 2014 U.S. Dist. LEXIS 56732, at *30-31 (N.D. Cal. Aug. 3, 2007). *Slaughter* concluded that the "modification provision does not render the arbitration agreement [substantively] unconscionable" because "the modification provision was limited by the duty to exercise the right of modification fairly and in good faith." *See id.* at *31 (citing *24 Hour Fitness, Inc. v. Superior Court*, 66 Cal. App. 4th 1199, 1214 (1998)). Other California Court of Appeal panels have similarly held that unilateral modification clauses are not necessarily unconscionable because the implied duty of good faith and fair dealing prohibits the drafter from unilaterally modifying the contract in bad faith. *See, e.g.*, *24 Hour Fitness*, 66 Cal. App. 4th at 1214 (finding modification clause did not render contract "illusory" because the power to modify "indisputably carries with it the duty to exercise that right fairly and in good faith"); *Serpa v. Cal. Sur. Investigations, Inc.*, 215 Cal. App. 4th 695, 708 (2013) (finding the "implied covenant of good faith and fair dealing limits the employer's authority to unilaterally modify the arbitration agreement and saves that agreement from being illusory and thus unconscionable"). At least one other panel of the Court of Appeal, however, has reached the opposite conclusion. *See Sparks v. Vista Del Mar Child & Family Servs.*, 207 Cal. App. 4th 1511, 1523 (2012) (holding that "[a]n agreement to arbitrate is illusory if, as here, the employer can unilaterally modify the [contract]").

In the absence of controlling authority on this issue from the California Supreme Court, this Court must "attempt to 'predict how the highest state court would decide the issue using

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[43] Once again, Uber has not argued that *Ingle* or *Macias* are preempted by the FAA, and any such argument is now waived.

[44] Uber's citations and (limited) argument(s) regarding the unilateral modification provision appear in a section of its reply brief titled "The Arbitration Provisions Are Not *Procedurally* Unconscionable" and do not expressly mention substantive unconscionability except in a parenthetical quotation from the *Slaughter* case. *See* Reply Br. at 15-16 (emphasis added).

intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance.'" *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 745 F. Supp. 2d 1145, 1179 (C.D. Cal. 2010) (quoting *S.D. Myers, Inc. v. City & Cnty. of S.F.*, 253 F.3d 461, 473 (9th Cir. 2001)). Here, the intermediate appellate court decisions in California go both ways. However, the Ninth Circuit – which was likewise obligated to "predict" the California Supreme Court's ruling on this issue – has definitively held that a unilateral modification provision is substantively unconscionable under California law. *See Ingle*, 328 F.3d at 1179. The Ninth Circuit recently reaffirmed the validity of this determination. *Chavarria*, 733 F.3d at 926. Moreover, the Court is not entirely persuaded by the logic of *24 Hour Fitness* and *Serpa*, which conclude that the implied duty of good faith and fair dealing will prevent the drafting party from abusing its modification power to render a contract unfairly one-sided. But the duty of good faith will only prohibit Uber from imposing bad faith modifications, not all one-sided modifications. *See generally* Horton, *supra*, at 645-67 (explaining numerous reasons why unilateral modification provisions should be suspect, including that the power to alter procedural terms unilaterally "undermines the bedrock economic assumption that adherents can impose market discipline on procedural terms" because when drafters can freely alter terms, "they face little pressure to bow to adherents' preferences"). Put simply, the Court predicts that the California Supreme Court would follow *Ingle*, *Sparks*, *Chavarria*, and *Macias*, and hold that a unilateral modification provision is substantively unconscionable under these circumstances.

5. The 2013 Agreement is Permeated With Substantively Unconscionable Terms

The Court has identified four substantively unconscionable terms that affect the arbitration provision in the 2013 Agreement *in addition* to the unconscionable PAGA waiver. While standing alone, none of these four additionally unconscionable clauses would necessitate a conclusion that the 2013 arbitration provision is "permeated with unconscionability," taken together such a conclusion is required. As the California Supreme Court has held, multiple substantively unconscionable terms in or related to an arbitration agreement "indicate a systemic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." *Armendariz*, 24 Cal. 4th at 124. At bottom, a trial court does not "abuse its

discretion in concluding that [an] arbitration agreement is permeated by an unlawful purpose" where the arbitration agreement contains "multiple unlawful provisions." *Id.*; *see also Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1005-06 (9th Cir. 2010) (holding district court did not abuse its discretion by refusing to sever numerous substantively unconscionable terms from arbitration agreement). The Court finds that the presence of these four unconscionable terms, and in particular the arbitration fee-shifting and confidentiality provisions, render the 2013 Agreement's arbitration clause permeated with unconscionability. And the further presence of the unconscionable PAGA waiver bolsters this Court's conclusion that Uber's arbitration agreement was likely not simply designed to provide its drivers with an efficient alternate forum to litigation, but was instead designed to provide drivers "an inferior forum that works to [Uber's] advantage."[45] *Armendariz*, 24 Cal. 4th at 124.

6. Conclusion

The 2013 Agreement's arbitration provision is unenforceable. The contract is clearly procedurally unconscionable because it contained no meaningful opt-out right and was presented to drivers on an adhesive basis. Moreover, the arbitration provision itself was highly inconspicuous. The provision is also substantively unconscionable. First, the provision is substantively unconscionable because it contains a PAGA waiver in violation of public policy. And because the 2013 Agreement expressly provides that the PAGA waiver "shall not be severable from this Arbitration Provision," the entire arbitration provision fails. 2013 Agreement at § 14.3(v)(c).

Alternatively, the Court determines that the 2013 Agreement's arbitration provision is permeated with substantively unconscionable terms, in addition to the invalid PAGA waiver. Namely, the provision contains substantively unconscionable clauses regarding arbitration fees and arbitration confidentiality, an unconscionable term exempting Uber's most favored claims from arbitration while forcing drivers to arbitrate those claims that they are most likely to bring, and at least a moderately unconscionable clause permitting Uber to unilaterally modify the terms of the

[45] That the 2013 Agreement was interposed on drivers after Uber began facing class action lawsuits further suggests an improper motive to purposefully disable class members' rights. *See O'Connor*, 2013 WL 6407583.

arbitration agreement at any time. Even without the PAGA waiver, the Court would invalidate the arbitration provision in light of these four unconscionable clauses. The PAGA waiver bolsters the Court's conclusion that the 2013 Agreement's arbitration provision is unenforceable. Both procedural and substantive unconscionability are substantial. Uber's motion to compel Gillette's case to individual arbitration pursuant to the 2013 Agreement is **DENIED**.

G. The 2014 Agreements' Arbitration Provisions Are Unenforceable

Because the delegation clauses in the 2014 Agreement and 2014 Rasier Agreement are not enforceable, the Court must determine the validity of the arbitration provisions in each of those contracts as well. *See* Sections III.B, III.D, *supra*. Much of the discussion above applies. As the Court explains, the arbitration provisions in both 2014 agreements are unenforceable against Mohamed.

1. Procedural Unconscionability

As previously discussed, the 2014 agreements contain highly conspicuous and non-illusory opt-out provisions that permit drivers to obtain all of the benefits of the contracts, while avoiding any potential burdens of arbitration.[46] This would suggest there is little, if any, procedural unconscionability. Under California law as announced by the California Supreme Court, however, that is not the end of the procedural unconscionability analysis. According to *Gentry*, a putative employer must do more than simply provide a conspicuous opt-out right to render the contract without any procedural unconscionability. *See* Section III.D.1, *supra*. In order to avoid a finding of procedural unconscionability altogether, Uber needed to conspicuously disclose "the disadvantageous terms of the arbitration agreement" in connection with the opt-out provision. *See Gentry*, 42 Cal. 4th at 472. This is true because Mohamed and his fellow drivers likely "felt at least some pressure not to opt out of the arbitration agreement." *Id.*; *see also* Section III.D.1, *supra*.

The Court has already determined that the 2014 agreements did not conspicuously disclose one disadvantageous term of the arbitration agreement – the fee-splitting provision. *See* Section

[46] While this Court previously approved the opt-out language for the purpose of controlling class communications under Rule23(d), the Court expressly declined to consider the unconscionability of 2014 agreements. *O'Connor*, 2013 WL 6407583, at *2-3.

III.D, *supra*. It is quite obvious Uber did not disclose a number of other disadvantageous provisions of the arbitration provision either: the 2014 agreements contain the very same clauses the Court has found substantively unconscionable in the 2013 Agreement, namely a confidentiality provision, IP carve out provision, and unilateral modification term.[47] None of these unfavorable terms were called to drivers' attention when they were asked to assent to the 2014 agreements. Thus (though far less so than the 2013 Agreement) the Court concludes that the 2014 agreements present at least some degree of procedural unconscionability sufficient to permit the Court to at least consider the claimed substantive unconscionability of the contracts.[48]

2. Substantive Unconscionability

The 2014 agreements contain the same five substantively unconscionable terms this Court discussed in connection with the 2013 Agreement. *See* Sections III.E.2, III.F, *supra*. Just because the unconscionable clauses are nearly identical, however, does not compel the Court to reach the same result with respect to the 2014 contracts as it reached (in the alternative) with the 2013 Agreement (*i.e.*, that the arbitration provision is permeated with unconscionability and thus unenforceable). Unlike the 2013 Agreement's arbitration provision, which was procedurally unconscionable to a significant degree, the 2014 arbitration provisions display far less procedural unconscionability. Thus, under the California sliding scale test for unconscionability, it is uncertain whether the Court could find such overwhelming substantive unconscionability as to invalidate the 2014 arbitration provisions in their entirety, especially in light of the strong federal policy in favor of arbitration.[49] *See Concepcion*, 131 S. Ct. at 1745. In any event, the Court need not decide this

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[47] The 2014 contracts also contain an unconscionable PAGA waiver, but this term *was* conspicuously disclosed to drivers in connection with their right to opt-out. *See* 2014 Agreement at 14.3.

[48] The Court notes additional reasons support its procedural unconscionability finding. For instance, Mohamed did not receive a paper copy of the relevant contracts and had to review the contracts on the small screen of his phone. Moreover, the Court has made a finding based on the evidence in front of it that Mohamed likely could not easily or obviously review the relevant agreements in his driver portal while he was still employed by Uber.

[49] This observation is not in tension with the Court's earlier conclusion that the *delegation clauses* of the 2014 agreements are sufficiently procedurally unconscionable to be unenforceable in light of the significantly substantively unconscionable fee-shifting provision. Notably, the delegation clauses in the 2014 agreements are both oppressive under *Gentry* and *highly* surprising

question, because the 2014 agreements contain unenforceable PAGA waivers, and, like the 2013 Agreement, the 2014 contracts provide that the PAGA waivers cannot be severed from the remainder of the arbitration provision. Thus, the Court need not attempt to balance substantive unconscionability versus procedural unconscionability in order to determine whether the arbitration agreements should fail in their entirety.

The 2014 Agreement provides:

> You and Uber agree to resolve any dispute in arbitration on an individual basis only, and not on a class, collective, or private attorney general representative basis. The Arbitrator shall have no authority to consider or resolve any claim or issue any relief on any basis other than an individual basis. The Arbitrator shall have no authority to consider or resolve any claim or issue any relief on a class, collective, or representative basis . . . If at any point this provision is determined to be unenforceable, the parties agree that this provision shall not be severable, unless it is determined that the Arbitration may still proceed on an individual basis only.

2014 Agreement at § 14.3(v). The 2014 Rasier Agreement contains a similar PAGA waiver. *See* 2014 Rasier Agreement at 14. The Court will not repeat its discussion of the invalidity of representative PAGA waivers. Rather, it will only address Uber's additional arguments regarding the PAGA waivers in the 2014 agreements that do not apply to the PAGA waiver in the 2013 Agreement.

a. The Court Must Consider the PAGA Waiver Even Though Mohamed Does Not Bring Any PAGA Claims

Uber argues that the Court should not consider the potential substantive unconscionability of the PAGA waiver when analyzing the 2014 contracts because the only driver in this lawsuit bound

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because the delegation clauses themselves were not specifically called to drivers' attention in any way. By contrast, the 2014 arbitration provisions, as a whole, were hardly surprising to drivers. Thus, the 2014 arbitration provisions are much less procedurally unconscionable than the specific delegation clauses contained therein. Moreover, unlike agreements to arbitrate in general, which are presumed valid and enforceable under federal law, agreements to delegate arbitrability to an arbitrator are not so favored. Indeed, as previously discussed, delegation clauses must meet the "clear and unmistakable" test because determining arbitrability is typically a task reserved for courts, not arbitrators. Thus, a term that requires drivers to pay significant fees just to get a threshold determination on arbitrability renders the delegation clause far more substantively unconscionable, and thus unenforceable.

to the 2014 contracts, Mohamed, does not (and cannot)[50] raise any PAGA claims. Thus Uber argues that no matter how unconscionable the PAGA waivers may be, they simply do not affect Mohamed or, more importantly, Uber's ability to compel Mohamed's claims to arbitration. *See* Reply Br. at 1.

Uber cites only one case in support of its argument that the PAGA waiver's "enforceability is irrelevant" to the Court's substantive unconscionability analysis in Mohamed's lawsuit. Specifically, Uber claims that *West v. Henderson*, 227 Cal. App. 3d 1578 (1991), stands for the proposition that a "portion of [an] arbitration provision not being enforced against a party in a particular dispute is irrelevant to [a] claim of unconscionability." Reply Br. at 1-2 (citing *West*, 227 Cal. App. 3d at 1589). The Court does not believe that is what *West* holds.

The appellant in *West* signed a lease for a commercial property. *West*, 227 Cal. App. 3d at 1581. The lease contained a term that required the tenant-appellant to file any suit against the lessor-appellee within six-months of the occurrence of a legal wrong. *Id.* at 1588. The lease provided that the lessor, however, could file suit against its tenant anytime within an applicable statutory limitations period. *Id.* The lessor brought suit against the tenant for breach of the lease, and the tenant filed a cross-complaint. *Id.* at 1581. The trial court dismissed the tenant's cross-complaint, finding that the causes of action in the cross-complaint were barred by the six-month limitations provision contained in the lease. *Id.*

On appeal, the tenant claimed that the six-month limitations provision in the lease was unconscionable and should not be enforced. *West*, 227 Cal. App. 3d at 1585. After first determining that the tenant "has made a poor showing of procedural unconscionability," the panel went on to analyze whether the six-month limitations provision was substantively unconscionable. *Id.* at 1587-88. The Court of Appeal held that while the "lack of mutuality makes the provision suspect under our analysis" there were reasonable justifications for the provision. *Id.* at 1588. For instance, while pending "litigation initiated by the lessee could inhibit the lessor's ability to lease the property to another party . . . pending litigation by the lessor against the lessee would probably not have the same consequences." *Id.*

[50] Mohamed drove for Uber in Boston, not California.

In response to this justification, the tenant "present[ed] a hypothetical situation" to show that the one-sided six-month limitation period *could* have a substantively unconscionable effect in a particular situation that was not before the Court of Appeal. *West*, 227 Cal. App. 3d at 1588. Namely, if a lessor waited for the tenant's six-month window to file suit to expire, the lessor could then sue the tenant "and be immune to any defense raised by the lessee." *Id.* Because the Court of Appeal was unsure when, if ever, this peculiar hypothetical situation might obtain, the panel refused to consider this possibility in determining whether the six-month limitation clause was substantively unconscionable as applied to the appellant. As the panel explained, the "limitation of defenses is irrelevant to this case because it is not being asserted against West and could be subject to unconscionability review separately." *Id.*

The Court reads *West* more narrowly than Uber. The Court of Appeal did analyze the substantive unconscionability of the six-month limitation clause, which was the only contractual term the appellant asked the court to review. It refused, however, to analyze a potentially unconscionable *effect* that term might have where it was unclear whether the hypothetical situation postulated by the appellant could ever obtain. Put differently, the Court declined to analyze a certain aspect of the challenged term because it was speculative whether the term could ever have the putatively unconscionable effect appellant ascribed to it. *See West*, 227 Cal. App. 3d at 1588-89. By contrast here, the Court knows exactly what effect the PAGA waiver would have if it applied to Mohamed. It would be substantively unconscionable and void against public policy. Unlike the *West* panel, this Court does not need to speculate as to whether the challenged PAGA waiver *could* have unconscionable effects if it were ever invoked. Thus, *West* appears inapposite.

More fundamentally, even if *West* stands for the broader proposition Uber suggests, its holding would likely be inconsistent with California Supreme Court precedent that provides that when analyzing unconscionability, the court is to consider whether the clause or contract was "unconscionable at *the time it was made*." *Armendariz*, 24 Cal. 4th at 114 (emphasis added) (quoting Cal. Civ. Code § 1670.5(a)); *see also Sonic-Calabasas A*, 57 Cal. 4th at 1134. As the *Armendariz* court itself explained, the purpose of analyzing unconscionability at the time an agreement is drafted is to *deter* drafters from including such unconscionable terms in their

agreements in the first instance: "An employer will not be deterred from routinely inserting such . . . illegal clause[s] into the arbitration agreement it mandates for its employees if it knows that the worst penalty for such illegality is the severance of the clause after the employee has litigated the matter." *Armendariz*, 24 Cal. 4th at 124 n.13; *see also Fitz*, 118 Cal. App. 4th at 727 (explaining deterrence function of substantive unconscionability analysis); *Lou*, 2013 WL 2156316, at *6 (acknowledging that California unconscionability law is designed to encourage employers to "draft fair agreements initially") (citations omitted).[51] Indeed, even one of the dissenters in both *Sonic-Calabasas A* and *Iskanian* has recognized that the Legislature mandated that unconscionability be measured from the time an agreement was made in order to dissuade those drafting contracts from inserting unconscionable terms in the first instance. *See Sonic-Calabasas A*, 57 Cal. 4th at 1176 (Chin, J. concurring and dissenting) (explaining that the Legislature adopted the relevant rule because "[t]he principle is one of *prevention* of oppression and unfair surprise and not of [post-hoc] disturbance of allocation of risks because of superior bargaining power") (emphasis added) (citations to legislative history omitted).

When the 2014 agreements were drafted, Uber had no way of knowing whether a particular driver would or would not bring representative PAGA claims against it. The mere fact that the particular Uber driver suing here does not have any PAGA claims does not render the PAGA waiver any less substantively unconscionable at the time when Uber drafted the provision and inserted it into Mohamed's contract. To so hold would undermine the deterrence rationale of evaluating unconscionability at the time of contract formation. *See Armendariz*, 24 Cal 4th at 124 n. 13; *Lou*, 2013 WL 2156316, at *6. Thus the Court concludes that it should consider the substantive unconscionability of the 2014 contracts' PAGA waivers in determining whether to compel Mohamed's claims to arbitration pursuant to the 2014 agreements.

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[51] The same rationale likely undergirds *Armendariz*'s holding that a party cannot render a contract conscionable by agreeing to strike or otherwise limit the application of an unconscionable term after litigation has begun. *See Armendariz*, 24 Cal. 4th at 125 (holding that a later concession to strike an unconscionable term "does not change the fact that the arbitration agreement *as written* is unconscionable and contrary to public policy") (emphasis added). If the Supreme Court was not concerned with deterring parties from drafting unconscionable contracts in the first instance, there would be significantly less reason to adopt a rule that forbids a litigant from agreeing not to enforce unconscionable clauses after the fact.

b. *Iskanian* Applies Despite Mohamed's Opportunity to Opt Out of the PAGA Waiver

Uber argues that *Iskanian*'s anti-waiver rule does not apply here because *Iskanian* did not involve an agreement with an opt out provision. By contrast, Uber points out that Mohamed had a reasonable opportunity to opt-out of the PAGA waivers in its 2014 contracts.

To be sure, some portions of the *Iskanian* opinion that Uber cites can be read as suggesting that the Supreme Court was only concerned with forbidding compelled or mandatory PAGA waivers. *See Iskanian*, 59 Cal. 4th at 360 ("We conclude that where, as here, an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law."); *see also id.* at 383 (noting that it is contrary to public policy for an employment agreement to eliminate a worker's choice to bring a PAGA claim "altogether by requiring employees to waive the right to bring a PAGA action before any dispute arises"). Most notably, Uber cites the *Iskanian* majority's observation that "employees are free to choose whether or not to bring PAGA actions when they are aware of Labor Code violations"[52] but "it is contrary to public policy for an employment agreement to *eliminate this choice altogether* by *requiring* employees to waive the right to bring a PAGA action before any dispute arises." *Iskanian*, 59 Cal. 4th at 383 (emphases added). Uber thus contends that this Court should enforce the PAGA waivers in the 2014 contracts because those waivers were voluntarily accepted by Mohamed where he failed to opt-out. The Court disagrees. While *Iskanian* does not forbid the outright waiver of PAGA claims, only *post*-dispute waivers of PAGA claims are permitted under California law. *See Securitas Security Servs.*, 234 Cal. App. 4th at 1121; *see also Iskanian*, 59 Cal. 4th at 383.

The defendant in *Securitas* made the same argument that Uber makes here – that the *Iskanian* anti-waiver rule "only invalidates PAGA waivers within a mandatory agreement." *Securitas*, 234 Cal. App. 4th at 1121; *see also id.* ("Securitas maintains that because [plaintiff] has the express right to opt out of the agreements and did not do so, she voluntarily consented to the dispute resolution

[52] Even in this quote, the Court notes that the *Iskanian* majority tied the validity of a waiver of PAGA claims to an employee's "aware[ness] of Labor Code violations." *Iskanian*, 59 Cal. 4th at 383. Thus, even the passage Uber believes is most favorable to its position actually lends additional support to this Court's conclusion that pre-dispute PAGA waivers are not permitted under *Iskanian*.

agreement and its PAGA waiver."). The Court of Appeal rejected the argument, noting that "*Iskanian* compels us to conclude that the agreement's PAGA waiver violates public policy, notwithstanding the fact that [plaintiff] was not required or compelled to enter into it as a condition of employment." *Id.* As the *Securitas* court explained, "*Iskanian* repeatedly states that public policy would be contravened where an agreement required an employee to waive his or her PAGA rights *predispute* – 'before any dispute arises.'" *Id.* at 1122 (emphasis in original) (quoting *Iskanian*, 59 Cal. 4th at 383). And while *Iskanian* "does not preclude the possibility of a valid PAGA waiver" altogether, the *Securitas* court persuasively reasoned that the Supreme Court "suggests by its reference to footnote 8 in *Armendariz* that a valid PAGA waiver may occur where 'an employer and an employee knowingly and voluntarily enter into an arbitration agreement *after a dispute has arisen*.'" *Securitas*, 234 Cal. App. 4th 1122 (emphasis in original) (quoting *Iskanian*, 59 Cal. 4th at 383) (citing *Armendariz*, 24 Cal. 4th at 103 n.8). Indeed, the explanatory parenthetical the *Iskanian* court drafted to explain its citation to footnote 8 from the *Armendariz* opinion reads "waivers freely made *after* a dispute has arisen are not necessarily contrary to public policy." *Iskanian*, 59 Cal. 4th at 383 (citing *Armendariz*, 24 Cal. 4th at 103 n.8) (emphasis added). Thus, the court recognized employees may waive PAGA claims, but only *after* a dispute with the employer has already arisen. In assenting to the 2014 contracts, Mohamed purportedly forfeited his right to bring a PAGA representative claim *before* this litigation began. Hence, the rule of *Iskanian* applies, and the PAGA waivers contained in the 2014 agreements are unenforceable against Mohamed because they violate California public policy.

3. The 2014 PAGA Waivers Are Not Severable

Like the 2013 Agreement, the 2014 contracts expressly provide that if a court determines that the PAGA waiver is unenforceable, the PAGA waiver "shall not be severable." 2014 Agreement at § 14.3(v); 2014 Rasier Agreement at 14. Unlike the 2013 Agreement, Uber has never argued that the non-severability language in the 2014 contracts is ambiguous, and the Court concludes it is not.[53] The Court must enforce the express terms of the parties' agreements. Here, Uber specifically

[53] Indeed, the non-severability language in the 2014 contracts is even clearer than in the 2013 Agreement.

provided that the PAGA waiver "shall not be severable" if the Court determines it is unenforceable. *Id.* It is unenforceable. Thus, the arbitration provisions in the 2014 contracts cannot be enforced either.

4. Conclusion

The 2014 Agreement and 2014 Rasier Agreement contain arbitration provisions that are at least somewhat procedurally unconscionable under *Gentry*. And because the 2014 agreements contain non-severable PAGA waivers, the Court finds that the arbitration provisions in those contracts are unenforceable in their entirety. Hence, Uber's motion to compel Mohamed's claims to arbitration pursuant to the 2014 agreements is **DENIED**.

H. Hirease May Not Compel Arbitration of Mohamed's Claim Against It

Because none of Uber's arbitration agreements are enforceable against Mohamed, Hirease may not compel Mohamed's claim against it to individual arbitration pursuant to the arbitration agreements in Uber's contracts. Thus, Hirease's joinder in Uber's motion to compel is **DENIED.**

IV. CONCLUSION

The Court concludes that Gillette assented to be bound to the 2013 Agreement. The delegation clause in the 2013 Agreement is not enforceable because the parties' intent to delegate the determination of arbitrability to an arbitrator is not "clear and unmistakable." Alternatively, the Court finds that the delegation clause in the 2013 Agreement is unenforceable because it is both procedurally and substantively unconscionable. The Court further finds that the 2013 Agreement's arbitration provision is unenforceable because it is both procedurally and substantively unconscionable. Thus, Gillette's claims cannot be compelled to arbitration under the FAA.

The Court concludes that Mohamed assented to be bound to the 2013 Agreement, 2014 Agreement, and 2014 Rasier Agreement. Because the 2014 Agreement expressly superseded the 2013 Agreement, the Court determines that Mohamed is only currently bound to the two 2014 contracts.

The delegation clauses in the 2014 agreements are unenforceable because the intent of the parties to delegate arbitrability to an arbitrator is not "clear and unmistakable." Alternatively, the delegation clauses in the 2014 agreements are unenforceable because they are both procedurally and

substantively unconscionable. The arbitration provisions in the 2014 agreements are significantly less procedurally unconscionable than the 2014 delegation clauses, but nevertheless contain at least some procedural unconscionability, as well as substantively unconscionable PAGA waivers. The PAGA waivers in those contracts are expressly non-severable from the remainder of the arbitration provisions. Thus, Uber cannot compel Mohamed's claims to arbitration under the FAA. Neither can non-signatory Hirease.

This order disposes of Docket Nos. 28 and 32 in Case No. 14-5200, and disposes of Docket No. 16 in Case No. 14-5241.

IT IS SO ORDERED.

Dated: June 9, 2015

EDWARD M. CHEN
United States District Judge

Exhibit B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ABDUL KADIR MOHAMED, *et al.*,

Plaintiffs,

v.

UBER TECHNOLOGIES, *et al.*,

Defendants.

_____/

No. C-14-5200 EMC

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO STAY PENDING APPEAL

(Docket No. 76)

I. INTRODUCTION

On June 9, 2015, this Court denied a motion to compel arbitration filed by Defendants Uber Technologies and Rasier LLC (collectively, Uber). *See Mohamed v. Uber Techs., Inc.*, -- F. Supp. 3d. --, 2015 WL 3749716 (N.D. Cal. 2015).[1] Uber's co-defendant in this action, Hirease, filed a joinder in Uber's motion to compel arbitration which was also denied. *See id.* at *36. Both Uber and Hirease have appealed this Court's orders to the Ninth Circuit. *See* Ninth Circuit Case No. 15-16178. Currently pending before the Court is Uber's motion to stay these proceedings pending appeal.[2] Docket No. 76 (Motion). For the reasons explained below and further for the reasons articulated on the record at the hearing for this matter, Uber's motion for a stay is granted in part and

[1] The Court consolidated the briefing of Uber's motion to compel arbitration in this action with a motion to compel arbitration brought by Uber in *Gillette v. Uber Technologies*, Case No. 14-cv-5241. The Court issued an identical order in each case denying Uber's motions to compel arbitration, although as described in the main text below, the Court's reasoning in the two cases is materially different because the arbitration agreements at issue are different.

[2] Hirease filed a joinder in Uber's motion for a stay pending appeal. Docket No. 80.

denied in part. While reasonable discovery will *not* be stayed in this case, adjudication of all non-discovery issues (*i.e.*, dispositive motions) is hereby stayed pending the final resolution of Uber's appeal of this Court's order denying its motion to compel arbitration.

II. DISCUSSION

A. Procedural History

The Court assumes familiarity with the procedural history of this case, particularly as described it its Order Denying Defendants' Motions to Compel Arbitration. *Mohamed*, 2015 WL 3749716. For the purposes of this motion, however, it is important to keep in mind that there are essentially two separate versions of the arbitration clauses at issue; the arbitration clause contained in the 2013 Agreement between Uber and its drivers, and the arbitration clause in the 2014 Agreements between Uber and its drivers. *Id.* at *3. While the Court previously found that Plaintiff Mohamed could theoretically be bound to both the 2013 Agreement and 2014 Agreements, the Court held that "because the 2014 contracts expressly provide that they 'replace and supersede all prior agreements' between the parties regarding the same subject matter, the Court determines that only the 2014 contracts could actually apply to Mohamed's claims." *Id.* (internal modifications and citations omitted). Accordingly, Uber's appeal of this Court's order denying arbitration in *Mohamed* targets only this Court's rulings with respect to the unenforceability of the arbitration provisions in the 2014 Agreements – the 2013 Agreement is not implicated by Uber's appeal *in this case*.[3]

As the Court recognized in its earlier Order, "there are significant differences between the 2013 Agreement's arbitration provision and the ones contained in each of the 2014 contracts . . . ." *Mohamed*, 2015 WL 3749716, at *4. These differences are particularly relevant to the instant motion to stay because the Court finds that its holdings with respect to the 2014 Agreements raise two "serious" legal questions on appeal that are not material in *Gillette*: (1) whether the California

[3] Uber moved for a stay pending appeal in the *Gillette* action, where the 2013 Agreement applies. This Court denied Uber's motion in that case because Uber did not show a reasonable likelihood of success on the merits of its appeal, nor does its appeal in *Gillette* raise any serious legal questions. *See Gillette* Docket No. 66. That said, some of the Court's analysis denying a stay in *Gillette* would also apply to Uber's appeal in this case, for instance with respect to the unenforceability of the delegation clauses in the 2014 contracts.

Supreme Court's ruling in *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 348 (2014), that pre-dispute PAGA waivers are unenforceable as a matter of California law, is preempted by the Federal Arbitration Act (FAA); and (2) whether an arbitration provision that contains a conspicuous and meaningful opt-out provision may nevertheless be found at least somewhat procedurally unconscionable under California law, as articulated by the California Supreme Court in *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), leaving the door open to a general finding of unconscionability.

B. Legal Standard

Whether to issue a stay pending appeal is "an exercise of judicial discretion . . . to be guided by sound legal principles." *Nken v. Holder*, 556 U.S. 418, 433-34 (2009); *see also Guifu Li v. A Perfect Franchise, Inc.*, No. 10-cv-1189-LHK, 2011 WL 2293221, at *2 (N.D. Cal. Jun. 8, 2011). In determining whether a stay should issue, the Court should consider 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) whether the public interest favors a stay.

In re Carrier IQ Consumer Privacy Litig. (*In re Carrier IQ*), No. C-12-md-2330 EMC, 2014 WL 2922726, at *1 (N.D. Cal. Jun. 13, 2014) (citations omitted); *see also Leiva-Perez v. Holder*, 640 F.3d 962 (9th Cir. 2011).

In order to satisfy the first factor, although the moving party need not show that "success on appeal is more likely than not," *Guifu Li*, 2011 WL 2293221, at *3 (citation omitted), it must make a "strong showing" on the merits. *Morse v. Servicemaster Global Holdings, Inc.*, No. C10-628-SI, 2013 WL 123610, at *2 (N.D. Cal. Jan. 8, 2013) (citing *Leiva-Perez*, 640 F.3d at 964). Alternatively, the moving party can attempt to satisfy the first factor by showing that its appeal raises "serious legal questions," even if the moving party has only a minimal chance of prevailing on these questions. *See In re Carrier IQ*, 2014 WL 2922726, at *1 (recognizing that under Ninth Circuit law, the above factors "are considered on a continuum; thus, for example, a stay may be appropriate if the party moving for a stay demonstrates that serious legal questions are raised and the balance of hardships tips sharply in its favor") (citing *Golden Gate Rest. Ass'n v. City and Cnty. of*

S.F., 512 F.3d 1112, 1115-16 (9th Cir. 2008)). Where only such a lesser showing is made, the appellant must further demonstrate that the balance of the hardships absent a stay tips "sharply" in its favor. *See Morse*, 2013 WL 123610, at *1-2 (explaining that a party seeking a stay pending appeal must either: (1) make a strong showing it is likely to succeed on the merits and show it will be irreparably harmed absent a stay, or (2) demonstrate that its appeal presents a serious question on the merits and the balance of hardships tilts *sharply* in its favor). "The party requesting the stay . . . bears the burden of showing that the case's circumstances justify favorable exercise of [the Court's] discretion."[4] *Morse*, 2013 WL 123610, at *1 (citing *Nken*, 556 U.S. at 433-34).

C. Uber Has Not Made A Strong Showing it is Likely to Succeed on the Merits of its Appeal, But its Appeal Presents Two "Serious" Legal Issues

The first factor this Court must evaluate is whether the moving party has made a sufficient showing that it is likely to succeed on the merits of its appeal. Alternatively, the moving party may make a lesser showing that its appeal presents "serious legal issues" or "substantial questions" that warrant a stay. *Id.* While the Ninth Circuit has not exhaustively explained or defined what makes a question "serious," *see Morse*, 2013 WL 123610, at *3, a number of the judges on this district have shed light on the issue. For instance, Judge Koh has suggested that "[f]or a legal question to be 'serious,' it must be a 'question going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation." *Guifu Li*, 2011 WL 2293221, at *3 (quoting *Walmer v. United States DOD*, 52 F.3d 851, 854 (10th Cir. 1995)). Judge Koh further suggested that in "the Ninth Circuit, serious legal questions often concern constitutionality." *Id.* (citations omitted). Judge Illston has further noted that a serious legal issue or "substantial case" is "one that raises genuine matters of first impression within the Ninth Circuit," or

[4] Uber cites *Steiner v. Apple Computer, Inc.*, No. C-07-4486 SBA, 2008 WL 1925197, at *5 (N.D. Cal. Apr. 29, 2008), for the proposition that "almost every California district court to recently consider whether to stay a matter, pending appeal of an order denying a motion to compel arbitration has issued a stay." *Id.* While Judge Armstrong was correct at the time her decision issued in April 2008, the Court's own research demonstrates that it is no longer accurate to say that most courts grant stays in these circumstances. In fact, according to this Court's unofficial tally of decisions since *Steiner*, California district courts have denied stays pending appeal of an order denying a motion to compel arbitration twelve times, while California district courts have granted such motions eight times.

which may "otherwise address a pressing legal issue which urges that the Ninth Circuit hear the case." *Morse*, 2013 WL 123610, at *3. If the movant can only meet this lower standard, however, it must then show that the balance of hardships tilts *sharply* in its favor absent a stay. *See id.*; *see also In re Carrier IQ*, 2014 WL 2922726, at *1.

1. Uber's Delegation Clauses are Unenforceable

Uber's first argument is that it has a "fair probability of persuading the Ninth Circuit that the delegation provision[s] in the [2014] Agreements between Uber and Plaintiff[s] clearly and unmistakably delegate arbitrability issues to the arbitrator alone." Mot. at 3. Uber is mistaken. Uber claims that the Court erred by finding a conflict between the delegation language contained within the arbitration provisions themselves, and certain other conflicting language contained in separate sections of the Agreements. According to Uber, as long as the language of the arbitration provision itself "clearly and unmistakably" delegates arbitrability to an arbitrator, *see First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995), it is of no moment that another provision in the contract contradicts the delegation language in the arbitration provision.[5] The Court has previously rejected this argument in its Order, *Mohamed*, 2015 WL 3749716, at *11 n. 17, and the argument is no more convincing now. Notably, Uber has failed to cite a single case that stands for the proposition that it advocates.[6] And as this Court pointed out in its Order, at least two California Court of Appeal cases have found that it *is* appropriate to consider the language of the contract as a whole when determining whether a delegation clause meets the clear and unmistakable standard – a reviewing court need not artificially confine itself to the language of the arbitration provision alone. *See Mohamed*, 2015 WL 3749716, at *11 n.17 (noting that "in two of the Court of Appeal cases cited by this Court, the putatively conflicting language was contained in other provisions of the

[5] For instance, Uber apparently would argue that an otherwise clear delegation clause is enforceable as long as it appears in its own separate section of a contract, even if the very first sentence of the contract read "arbitrability can *never* be decided by an arbitrator." Uber's argument is short on legal authority and even shorter on common sense.

[6] As the Court noted in its Order, *Boghos v. Certain Underwrites at Llyod's of London*, 36 Cal. 4th 495 (2005), is of no assistance to Uber. In that case, the California Supreme Court was not called upon to evaluate the validity of a delegation clause. *Id.* Indeed, rather than being required to apply the heightened "clear and unmistakable" standard that applies to delegation clauses, the *Boghos* court applied the "presumption favoring arbitration." *Id.* at 502.

contract"). The Court believes the Ninth Circuit is unlikely to hold differently, as Uber's suggested rule finds no support in precedent.

For the reasons stated above, as well as for the reasons articulated in this Court's order denying Uber's motion for a stay pending appeal in *Gillette*, the Court finds that Uber has not demonstrated that it has a reasonable probability of persuading the Ninth Circuit that this Court erred in holding that the delegation clauses of the 2014 Agreements are unenforceable because they do not meet the U.S. Supreme Court's clear and unmistakable test. *See Gillette*, Docket No. 66. Indeed, Uber has not even raised a serious question on this issue.

2. The 2014 Agreements' Arbitration Provisions are Both Procedurally and Substantively Unconscionable

Uber also argues that it is reasonably likely to succeed in convincing the Ninth Circuit that this Court erred in determining that its arbitration provisions are unconscionable as a matter of California law. Again, the Court finds that Uber has overestimated its likelihood of success.

Uber first argues that this Court erred by holding that the 2014 Agreements present at least some amount of procedural unconscionability under California law despite the fact that this Court concluded that the opt-out provisions in the 2014 Agreements are "visually conspicuous" and the "actual opt-out procedures . . . give[] drivers a reasonable means of opting out." *Mohamed*, 2015 WL 3749716, at *17 (internal modifications and citation omitted). According to Uber, this finding "should have resulted in a ruling that the Arbitration Agreements are not unconscionable" as a matter of California law. Mot. at 5. Specifically, Uber argues that this Court went astray by declining to follow three Ninth Circuit decisions which each hold that an arbitration provision cannot be procedurally unconscionable under California law if the signatory to the agreement had a "meaningful opportunity to opt out of the arbitration program." *See Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1200 (9th Cir. 2002); *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104 (9th Cir. 2002) (same); *Kilgore v. KeyBank Nat'l Ass'n*, 718 F.3d 1052 (9th Cir. 2013) (en banc) (same). As this Court explained in its Order, however, the California Supreme Court "expressly rejected

Ahmed and *Najd*," when "faced with the exact same issue [as] the Ninth Circuit."[7] *Mohamed*, 2015 WL 3749716, at *18 (citing *Gentry*, 42 Cal 4th at 472 n.10). And the *Kilgore* court merely cited to *Ahmed* in its analysis of California law, apparently without recognizing that the *Ahmed* decision had been previously abrogated by the California Supreme Court in *Gentry*. *See id.* at *18 n. 31. Thus, *Ahmed*, *Najd*, and *Kilgore* are neither binding nor persuasive authority in this context.

Tellingly, Uber does not argue that this Court was mistaken in concluding that *Ahmed*, *Najd*, and *Kilgore* fail "to apply California law as announced by the California Supreme Court," nor does Uber quibble with this Court's conclusion that "the highest state court is the final authority on state law" and that *Gentry* is therefore binding on this Court. *See Mohamed*, 2015 WL 3749716, at *17. Indeed, Uber does not even mention *Gentry* in its motion to stay, despite its obvious importance to the issues in this case. Thus, Uber has presented no reason to seriously suspect that this Court's procedural unconscionability analysis will be reversed on appeal.

That being said, the Court believes that the propriety of its application of *Gentry*'s procedural unconscionability rule at least presents a "serious issue" on appeal. For whatever reason, very few district courts in the Ninth Circuit have seemingly recognized that *Gentry* abrogated *Ahmed* and *Najd*,[8] and the Ninth Circuit itself has not expressly addressed *Gentry*'s procedural unconscionability rule. Thus, the proper application of *Gentry* appears to remain an issue of first impression in the Ninth Circuit. Moreover, the application of *Gentry* is undoubtedly important to the ultimate resolution of the validity of the 2014 Agreements' arbitration provisions. If the Ninth Circuit expressly refuses to follow *Gentry*, and instead adheres to *Ahmed*, *Najd*, and *Kilgore*, then

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[7] This is not a case where the existence or amount of tension between Supreme Court and Ninth Circuit decisions is in any doubt. As noted in this Court's order, the California Supreme Court in *Gentry* passed on the validity of the *very same contract* that was before the Ninth Circuit in both *Ahmed* and *Najd*. *See Mohamed*, 2015 WL 3749716, at *18-19. And the Supreme Court expressly concluded that "neither case [is] persuasive." *Gentry*, 42 Cal. 4th at 472 n.10. While *Kilgore* post-dated *Gentry*, the Ninth Circuit did not discuss or distinguish *Gentry*.

[8] The Court has found only a smattering of decisions that even cite to *Gentry*'s procedural unconscionability rule. *See, e.g.*, *Jones-Mixon v. Bloomingdales's, Inc.*, No. 14-cv-1103-JCS, 2014 WL 2736020, at *7 (N.D. Cal. June 11, 2014) ("The California Supreme Court has since disagreed with the Ninth Circuit's approach in *Najd* and *Ahmed*."); *Duran v. Discover Bank*, 2009 WL 1709569, at *5 (Cal. Ct. App. 2009) (unpublished) (concluding that *Gentry* held generally that "even a contract with an opt-out provision can be a [procedurally unconscionable] contract of adhesion").

this Court's procedural unconscionability finding is unlikely to survive appellate review, and the 2014 arbitration provisions would likely be enforced under California law. Even though the Court finds this possibility to be somewhat remote given *Gentry*'s clear pronouncement of California law, the fact that one legal issue of first impression will have such a substantial impact on the outcome of Uber's appeal in this case militates in favor of staying this action.

Uber further argues that this "Court's ruling that the [2014] agreement is unconscionable conflicts with its *own* prior orders, in which the Court *drafted, approved, and compelled Uber to issue* the very agreement at issue." Mot. at 6 (emphases in original).[9] Uber is mistaken. This Court did *not* "draft" or "approve" the *substance* of the 2014 Agreements. Rather, it aided in drafting a corrective *notice* that was incorporated into those Agreements, which notice was designed to call new and existing Uber drivers' attention to the contracts' arbitration provisions and, particularly, their class action waivers, thereby providing drivers with a meaningful opportunity to decide whether to opt out of those provisions if they wanted to participate in various class action litigations that had already been filed against Uber on their behalf. *See O'Connor v. Uber Techs., Inc.*, No. C-13-3826-EMC, 2013 WL 6407583 (N.D. Cal. Dec. 6, 2013) (invoking the Court's power under Federal Rule of Civil Procedure 23(d) to control misleading communications to existing and potential class members). As this Court has previously explained in both *O'Connor* and *Mohamed*, in exercising its supervisory powers over communication to the class under Rule 23 this Court did not purport to rule on the ultimate question of the unconscionability or enforceability of Uber's arbitration provision(s); instead the focus was in ensuring the integrity of the class action process was not unduly tainted by unilateral communications from Uber. *See Mohamed*, 2015 WL 3749716, at *4 (explaining that the "Court expressly declined to rule on the alleged unconscionability of the arbitration provision" in the *O'Connor* matter, because the issue was "not properly before the Court at [that] juncture") (bracketed alteration in original). Consequently, the Court never reviewed

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[9] Uber goes even farther in its motion to expedite its appeal in the Ninth Circuit, arguing that the Court placed it in a "Catch-22" by ordering Uber to issue the 2014 Agreements that the Court "drafted," and then later holding that the arbitration provisions in those Agreements are unconscionable. Ninth Circuit No. 15-16181, Docket No. 7 at 14. This contention is not accurate. The Court did not address other aspects of the 2014 Agreements which raise unconscionability issues, including the broad analysis under *Gentry*.

Uber's arbitration clause to determine whether it contained a number of substantively unconscionable terms, most notably including a nonseverable and illegal PAGA waiver, which might still be cognizable notwithstanding the minimization of procedural unconscionability. Nor was the Court required to apply *Gentry*. In short, the ultimate issue of overall conscionability was not before the Court.

As for the Court's substantive unconscionability finding, Uber correctly argues that its appeal presents at least one additional serious legal issue – whether the California Supreme Court's ruling in *Iskanian*, that pre-dispute PAGA waivers are unenforceable as a matter of California law, is preempted by the FAA. *See Iskanian*, 59 Cal. 4th 348 (2014); *see also* Mot. at 7-8. As this Court recognized in its Order, there is currently no Ninth Circuit authority that resolves this issue, and the question is undoubtedly a "pressing legal issue" on which there has been significant disagreement at the district court level. *See Mohamed*, 2015 WL 3749716, at *23; *see also Hernandez v. DMSI Staffing, LLC*, -- F. Supp. 3d --, 2015 WL 458083, at *8 (N.D. Cal. 2015) (collecting cases). Until the Ninth Circuit issues a ruling one way or another,[10] the validity of both *Iskanian*, and pre-dispute PAGA waivers more generally, remains an issue of first impression that is sufficiently "serious" for the purposes of Uber's motion to stay.

In contrast to *Gillette*, the low level of procedural unconscionability with respect to the 2014 Agreements puts a premium on the degree of substantive unconscionability under the sliding scale test. Thus, the *Iskanian* preemption question is far more material to the ultimate unconscionability analysis here than in *Gillette*, where the 2013 Agreement is infected with a substantial degree of procedural unconscionability. Because Uber's appeal in this case presents two substantial legal questions material to the outcome of the appeal, the Court now considers the remaining three factors for obtaining a stay.

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[10] The Ninth Circuit currently has under submission a set of consolidated appeals that may well decide this question. *See Sakkab v. Luxottica Retail N. Am.*, lead Ninth Circuit Case No. 13-55184.

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D. Uber Will Suffer Significant Irreparable Harm if This Case Proceeds on the Merits Pending Appeal

Because Uber's appeal only demonstrates "serious questions," Uber must show that the balance of the hardships absent a stay tips sharply in its favor. *See In re Carrier IQ*, 2014 WL 2922726, at *1. Uber can meet this test, but only in part.

Uber identifies two types of irreparable harm it claims it will suffer if a stay is denied: (1) the loss of time and money associated with the ongoing litigation of this case pending appeal; and (2) the irrecoverable loss of the speed and efficiency of the arbitral forum. Mot. at 8. With respect to Uber's first claimed harm (*i.e.*, ongoing litigation and discovery expense), Uber correctly acknowledges that nearly all courts "have concluded that incurring litigation expenses does not amount to an irreparable harm." *Guifu Li*, 2011 WL 2293221, at *4 (citations omitted); *see also Morse*, 2013 WL 123610, at *3 (recognizing that "the money and time a party must expend [during the litigation] process, while burdensome, does not alone constitute irreparable injury") (citations omitted); *Bradberry v. T-Mobile USA, Inc.*, No. C-06-6567 CW, 2007 WL 2221076, at *4 (N.D. Cal. Aug. 2, 2007) ("The cost of some pretrial litigation does not constitute an irreparable harm to Defendant."). And as Judge Henderson recently explained, courts are especially unlikely to find "irreparable harm where the proposed arbitration included substantial discovery and motions practice such that continuing to litigate in federal court would have resulted in little to no loss of time and money." *Ward*, 2014 WL 7273911, at *3 (citations omitted).

Here, the 2014 Agreements both provide that "the Parties will have the right to conduct adequate civil discovery, bring dispositive motions, and present witnesses and evidence as needed to present their cases and defenses" in arbitration. *See* Docket No. 28-2, Ex. F (2014 Uber Agreement) at § 14.5; Ex. H (2014 Rasier Agreement) at 14. As Judge Koh has recognized under very similar circumstances, where the arbitration agreement "provides the parties 'adequate opportunity to conduct discovery'" then "even if Defendants' appeal is successful, it appears that the discovery costs arising during the appeal are inevitable." *Guifu Li*, 2011 WL 2293221, at *4. Indeed, Judge Koh went so far as to find no irreparable harm where the Defendants in the case before her

admittedly had "limited financial resources" to pay for litigation expenses and discovery. *Id.* By contrast here, Uber does not claim to have "limited financial resources," and Uber cannot seemingly deny that it will incur significant discovery costs "regardless of the outcome of this motion," because it will be required to respond to discovery requests *in either* arbitration or federal court litigation. *Id.*; *see also Morse*, 2013 WL 123610, at *4 (finding that defendants' litigation expenses pending appeal did not constitute irreparable harm because the "parties would have experienced lesser but still substantial burdens in the arbitration process defendants prefer"); *R&L Ltd. Invs. Inc. v. Cabot Inv. Props., LLC*, No. 09-1525, 2010 WL 3789401, at *2 (D. Ariz. Sept. 21, 2010) (finding no irreparable injury and denying motion to stay where "[c]ontrary to Defendants['] assertion, if their appeal was successful, the parties would still be able to use the discovery in arbitration"); *cf. Ward*, 2014 WL 7273911, at *4 (finding irreparable harm where "[t]he contrast, in time and expense, between the arbitration process as described by Defendants and the process of litigation in federal court is substantial" because "[u]nlike in the cases cited by Plaintiff, the arbitration procedure proposed by Defendants . . . is a streamlined process . . . [with] no formal discovery, law and motion practice, or other pre-trial hearings").

Uber argues that irreparable harm should be found under *Zaborowski v. MHN Gov't Servs., Inc.*, which held that "arbitration is unique" with respect to the irreparability of litigation costs because "[i]f a party must undergo the *expense of trial* before being able to appeal denial of a motion to compel arbitration, the anticipated advantages of arbitration – speed and economy – are lost." No. C-12-5109-SI, 2013 WL 1832638, at *2 (N.D. Cal. May 1, 2013) (emphasis added). This case is currently far from trial, however, and as noted above, the main cost Uber will likely face while this appeal is pending (*i.e.*, discovery costs) would presumably be borne by Uber in any forum. *See id.* (refusing to stay portions of the case that would proceed regardless of ultimate forum).

That said, *Zaborowski* and similar cases properly recognize that both the monetary and non-monetary harm to Uber from the actual *adjudication* of this case on the merits in federal court would likely constitute a significant irreparable injury were the arbitration forum wrongly denied. *See Zaborowski*, 2013 WL 1832638, at *2; *In re Carrier IQ*, 2014 WL 2922726, at *1-2 (denying without prejudice defendants' motion to stay pending appeal because "the Court is not convinced

that, *at this juncture*, the degree of hardship suffered would be substantial, and thus the balance of hardships does not tip decidedly in Defendants' favor") (emphasis added); *Bradberry*, 2007 WL 2221076, at *5 (denying motion to stay "without prejudice to refiling if discovery becomes burdensome or if the trial date approaches"); *Raymundo v. ACS State & Local Solutions*, No. 13-cv-442-WHA, ECF No. 51 (N.D. Cal. Aug. 6, 2013) (denying without prejudice motion to stay because there "will be no substantial harm to defendant in allowing reasonable discovery to go forward, inasmuch as discovery will be useful even if this action is ultimately arbitrated," but recognizing that defendant may "bring a further motion to stay as we approach the date for motions for summary judgment" or trial). If this case is allowed to proceed on the merits (*e.g.*, to summary judgment or class certification) without a ruling from the Ninth Circuit on the appeal herein, and the Ninth Circuit ultimately reverses this Court and compels Mohamed's claims to arbitration, this Court's substantive rulings may be for naught, and the parties will have expended significant resources to obtain what, in all likelihood, would constitute non-binding advisory opinions. Alternatively, were any ruling on the merits by the Court to have some binding effect on the arbitration, Uber would lose the benefit of arbitration. In any event, Uber risks losing the two main benefits of the arbitral forum it thought it had bargained for – speed and efficiency.

In light of the above, the Court finds that allowing anything more than reasonable discovery[11] (which would take place even in arbitration) while Uber's appeal is pending will result in significant irreparable harm to Uber; thus, the balance of hardships tips sharply in favor of staying all non-discovery-related activity in this case until the Ninth Circuit rules on the merits of Uber's appeal.

E. Plaintiffs' Will Not Suffer Irreparable Harm So Long As Reasonable Discovery is Permitted

Plaintiffs argue that even if Uber will suffer some irreparable harm if this case continues pending appeal, Plaintiffs themselves will suffer significant harms which outweigh Uber's interest in a stay. *See* Docket No. 84 (Opposition) at 15. The Court disagrees.

[11] The Court expects the parties to meet and confer in good faith regarding the appropriate limits of discovery. If the parties are unable to agree regarding the appropriate scope of discovery, they shall follow the procedures for discovery disputes outlined in this Court's standing orders.

First, Plaintiffs argue that any delay in the district court unfairly risks the loss of relevant evidence while the case remains stayed. Opp. at 15; *see also Bradberry*, 2007 WL 221076, at *4 (finding that "the risk of lost evidence . . . and the delay in litigation constitute a substantial injury to Plaintiff" and therefore "weighs against granting a stay"). Any such risk is minimized here, however, because Plaintiffs will be permitted to continue with reasonable discovery. Moreover, the parties are all aware of their obligations to preserve evidence, including electronically stored information (ESI), pursuant to the Federal Rules of Civil Procedure and this Court's guidelines regarding the discovery and preservation of ESI. *See* Docket No. 56 (joint case management statement recognizing evidence preservation obligations). Thus, the Court concludes that the risk of loss of evidence is minimal.

The Court is similarly not persuaded by Plaintiffs' alternative argument that they will suffer irreparable harm if the Court grants a stay because such a stay will prevent non-parties from joining this lawsuit and vindicating their statutory rights against Uber. Opp. at 15. Specifically, Plaintiffs have expressed an intention to file an amended complaint "that adds new plaintiffs . . . none of [whom] are subject to [either] the 2013 or 2014 Agreements on which the motion to compel was based." *Id.* To the extent that these individuals are not currently plaintiffs in this lawsuit, any irreparable harm they might suffer from the entry of a stay is largely speculative. More importantly, however, Plaintiffs have not explained why these new plaintiffs cannot file their own separate action, or even possibly join the related *Gillette* action, which lawsuit presents similar claims to those being litigated in this case, and which case is not being stayed pending appeal. *See* Hrg. Tr. at 22:3-20. The Court simply does not find that a limited stay in this case, while allowing reasonable discovery to continue, will unduly burden or harm Plaintiffs.

F. The Public Interest Factor is Neutral

Finally, the Court considers the public interest. Here, Plaintiffs argue that the public interest weighs against a stay because any delay will slow Plaintiffs' attempts to vindicate their important statutory rights. Opp. at 15-16. On the other hand, Uber argues the public interest favors a stay because a stay will vindicate the federal policy favoring arbitration. Mot. at 9-10. The Court

concludes that both are valid interests, and that they largely are in equipoise for purposes of this motion. The public interest factor is neutral.

III. CONCLUSION

Uber's motion for a stay of this action pending appeal is **GRANTED IN PART** and **DENIED IN PART**. While Uber has not shown a likelihood of success on the merits of its appeal, the appeal raises at least two serious legal issues. Moreover, the balance of hardships tilts sharply in Uber's favor were this Court to permit non-discovery motions practice or adjudication on the merits to occur in this forum pending appeal. By allowing reasonable discovery to continue in this forum, however, the Court reasonably protects the interests of the Plaintiffs and acknowledges that Uber would be required to engage in discovery irrespective of the outcome of its appeal. Thus, this case is hereby stayed for all purposes with the exception of reasonable discovery pending the issuance of the Ninth Circuit's mandate in Uber's appeal.

This order disposes of Docket No. 76.

IT IS SO ORDERED.

Dated: July 22, 2015

EDWARD M. CHEN
United States District Judge

Exhibit C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RONALD GILLETTE, *et al.*,

Plaintiffs,

v.

UBER TECHNOLOGIES,

Defendant.

_____/

No. C-14-5241 EMC

ORDER DENYING DEFENDANT'S MOTION TO STAY PENDING APPEAL

(Docket No. 54)

I. INTRODUCTION

On June 9, 2015, this Court denied a motion to compel arbitration filed by Defendant Uber Technologies in the instant action. *See Mohamed v. Uber Techs., Inc.*, -- F. Supp. 3d. --, 2015 WL 3749716 (N.D. Cal. 2015).[1] Uber has appealed this Court's order to the Ninth Circuit. *See* Ninth Circuit Case No. 15-16181. Currently pending before the Court is Uber's motion to stay these proceedings pending the resolution of its appeal. Docket No. 54 (Motion). Alternatively, Uber asks this Court for a temporary stay so that it can seek a stay of the action from the Ninth Circuit. For the reasons explained below and further for the reasons articulated on the record at the hearing for this matter, Uber's motion for a stay is **DENIED**.

[1] The Court consolidated the briefing of Uber's motion to compel arbitration in this action with a motion to compel arbitration brought by Uber and Uber's co-defendants in *Mohamed v. Uber Technologies*, Case No. 14-cv-5200. The Court issued an identical order in each case denying Uber's motions to compel arbitration, although as described in the main text below, the Court's reasoning in the two cases is materially different because the arbitration agreements at issue are different.

II. DISCUSSION

A. Procedural History

The Court assumes familiarity with the procedural history of this case, particularly as described it its Order Denying Defendants' Motions to Compel Arbitration. *Mohamed*, 2015 WL 3749716. For the purposes of this motion, however, it is important to keep in mind that there are essentially two separate versions of the arbitration clauses at issue; the arbitration clause contained in the 2013 Agreement between Uber and its drivers, and the arbitration clause in the 2014 Agreements between Uber and its drivers. *Id.* at *3. "It is undisputed that Gillette could only be bound to the 2013 Agreement. . . ." *Id.*

As the Court recognized in its earlier Order, "there are significant differences between the 2013 Agreement's arbitration provision and the ones contained in each of the 2014 contracts . . . ." *Mohamed*, 2015 WL 3749716, at *4. These differences are particularly relevant to the instant motion to stay, because the Court believes Uber is far less likely to succeed on the merits of its appeal of this Court's Order refusing to compel arbitration pursuant to the 2013 Agreement (*i.e.*, its Order in this case) than it is with respect to this Court's Order refusing to compel arbitration pursuant to the 2014 Agreements (*i.e.*, its Order in the *Mohamed* action).

B. Legal Standard

Whether to issue a stay pending appeal is "an exercise of judicial discretion . . . to be guided by sound legal principles." *Nken v. Holder*, 556 U.S. 418, 433-34 (2009); *see also Guifu Li v. A Perfect Franchise, Inc.*, No. 10-cv-1189-LHK, 2011 WL 2293221, at *2 (N.D. Cal. Jun. 8, 2011). In determining whether a stay should issue, the Court should consider 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) whether the public interest favors a stay.

In re Carrier IQ Consumer Privacy Litig. (*In re Carrier IQ*), No. C-12-md-2330 EMC, 2014 WL 2922726, at *1 (N.D. Cal. Jun. 13, 2014) (citations omitted); *see also Leiva-Perez v. Holder*, 640 F.3d 962 (9th Cir. 2011).

In order to satisfy the first factor, although the moving party need not show that "success on appeal is more likely than not," *Guifu Li*, 2011 WL 2293221, at *3 (citation omitted), it must make a "strong showing" on the merits. *Morse v. Servicemaster Global Holdings, Inc.*, No. C10-628-SI, 2013 WL 123610, at *2 (N.D. Cal. Jan. 8, 2013) (citing *Leiva-Perez*, 640 F.3d at 964). Alternatively, the moving party can attempt to satisfy the first factor by showing that its appeal raises "serious legal questions," even if the moving party has only a minimal chance of prevailing on these questions. *See In re Carrier IQ*, 2014 WL 2922726, at *1 (recognizing that under Ninth Circuit law, the above factors "are considered on a continuum; thus, for example, a stay may be appropriate if the party moving for a stay demonstrates that serious legal questions are raised and the balance of hardships tips sharply in its favor") (citing *Golden Gate Rest. Ass'n v. City and Cnty. of S.F.*, 512 F.3d 1112, 1115-16 (9th Cir. 2008)). Where only such a lesser showing is made, the appellant must further demonstrate that the balance of the hardships absent a stay tips "sharply" in its favor. *See Morse*, 2013 WL 123610, at *1-2 (explaining that a party seeking a stay pending appeal must either: (1) make a strong showing it is likely to succeed on the merits and show it will be irreparably harmed absent a stay, or (2) demonstrate that its appeal presents a serious question on the merits and the balance of hardships tilts *sharply* in its favor). "The party requesting the stay . . . bears the burden of showing that the case's circumstances justify favorable exercise of [the Court's] discretion."[2] *Morse*, 2013 WL 123610, at *1 (citing *Nken*, 556 U.S. at 433-34).

C. Uber is Unlikely to Succeed on the Merits Regarding the 2013 Agreement and its Appeal Raises No Serious Legal Issues

Uber argues that a number of this Court's determinations with respect to the 2013 Agreements are erroneous, and that Uber has a "fair prospect" of convincing the Ninth Circuit of

[2] Uber cites *Steiner v. Apple Computer, Inc.*, No. C-07-4486 SBA, 2008 WL 1925197, at *5 (N.D. Cal. Apr. 29, 2008), for the proposition that "almost every California district court to recently consider whether to stay a matter, pending appeal of an order denying a motion to compel arbitration has issued a stay." *Id.* While Judge Armstrong was correct at the time her decision issued in April 2008, the Court's own research demonstrates that it is no longer accurate to say that most courts grant stays in these circumstances. In fact, according to this Court's unofficial tally of decisions since *Steiner*, California district courts have denied stays pending appeal of an order denying a motion to compel arbitration twelve times, while California district courts have granted such motions eight times.

such. The Court disagrees, and finds that Uber has not established that it has a sufficient likelihood of success on the merits, nor does Uber's appeal of this Court's order vis-a-vis the 2013 Agreement present any serious legal issues. Because Uber cannot even satisfy the first factor of the Ninth Circuit test for a stay, the Court denies the stay without analyzing the remaining three factors. *See Newton v. Am. Debt Servs., Inc.*, No. 11-cv-3228-EMC, 2012 WL 3155719, at *8 (N.D. Cal. Aug. 2, 2012) ("Because the Court does not find there to be even a serious legal question, let alone a likelihood of success on the merits, it need not conduct any balancing of interests (*i.e.*, injury to Defendants if a stay were not granted and injury to Plaintiff if a stay were issued).").

1. Uber's Delegation Clause is Unenforceable

Uber first argues that it has a "fair probability of persuading the Ninth Circuit that the delegation provision in the Agreements between Uber and Plaintiff[s] clearly and unmistakably delegate[s] arbitrability issues to the arbitrator alone." Mot. at 3. Uber is mistaken. Uber claims that the Court erred by finding a conflict between the delegation language contained within the arbitration provision itself, and certain other conflicting language contained in separate sections of the 2013 Agreement. According to Uber, as long as the language of the arbitration provision itself "clearly and unmistakably" delegates arbitrability to an arbitrator, *see First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995), it is of no moment that another provision in the contract contradicts the delegation language in the arbitration provision.[3]

The Court has previously rejected Uber's argument in its Order, *Mohamed*, 2015 WL 3749716, at *11 n. 17, and the argument is no more convincing now. Notably, Uber has failed to cite a single case that stands for the proposition that it advocates.[4] And even more notably, Uber has again failed to recognize that with respect to the 2013 Agreement's delegation clause, the Court

[3] For instance, Uber apparently would argue that an otherwise clear delegation clause is enforceable as long as it appears in its own separate section of a contract, even if the very first sentence of the contract read "arbitrability can *never* be decided by an arbitrator." Uber's argument is short on both legal authority and common sense.

[4] As the Court noted in its Order, *Boghos v. Certain Underwrites at Llyod's of London*, 36 Cal. 4th 495 (2005), is of no assistance to Uber. In that case, the California Supreme Court was not called upon to evaluate the validity of a delegation clause. *Id.* Indeed, rather than being required to apply the heightened "clear and unmistakable" standard that applies to delegation clauses, the *Boghos* court applied the "presumption favoring arbitration." *Id.* at 502.

specifically found a significant conflict between provisions *within* the arbitration clause itself. *See Mohamed*, 2015 WL 3749716, at *9-10. Indeed, the Court found that two clauses within the arbitration clause of the 2013 Agreement "are facially inconsistent with each other and thus, *for this reason alone*, the heightened 'clear and unmistakable' test is not met with respect to the delegation clause contained in the 2013 Agreement." *Id.* at *10 (emphasis added). Thus, even if Uber were somehow able to convince the Ninth Circuit to ignore all of the conflicting language that appears outside the arbitration provision in the 2013 Agreement, that contract's delegation clause would nevertheless remain unenforceable under the "clear and unmistakable" test. *See id.*, at *11 n. 17 ("Uber overlooks the fact that with respect to the 2013 Agreement, there is tension within the arbitration provision itself."); *see also Newton*, 2012 WL 3155719, at *8 (denying a motion to stay where "there were other independent grounds supporting the Court's [unenforceability] determination" that the moving party did not challenge in its motion to stay).

Uber's alternative arguments with respect to this Court's holding regarding the delegation clause are similarly unavailing, and not likely to succeed on appeal. For instance, Uber argues that the Ninth Circuit is likely to follow *Hill v. Anheuser-Busch InBev Worldwide, Inc.*, which held that an express delegation provision was "clear and unmistakable" notwithstanding a broader contractual term that directly conflicted with the language of the delegation clause. No. 14-cv-6289 PSG, 2014 U.S. Dist. LEXIS 168947, at *11-13 (C.D. Cal. Nov. 26, 2014). As this Court already explained, *Hill* did not apply the correct legal standard to the question presented to it, and likely reached an erroneous result as a consequence. *See Mohamed*, 2015 WL 3749716, at *11 n. 19. The Court finds it unlikely that the Ninth Circuit will reverse this Court on the basis of one unpublished district court opinion that did not appear to apply the correct legal standard.

Nor is the Ninth Circuit likely to agree with Uber that this Court erred by "rel[ying] in part on the purported lack of sophistication of drivers who use the Uber app" in finding the delegation clauses insufficiently clear and unmistakable. Mot. at 4. This Court did *not* rely on this factor. As the Court made clear, "Uber's delegation clauses are not sufficiently clear and unmistakable to be enforced even against a legally sophisticated entity." *Mohamed*, 2015 WL 3749716, at *10 n. 16. Thus, regardless of whether the Court is ultimately deemed correct in its suggestion that the clear

and unmistakable test "*should* be viewed from the perspective of the particular parties to the specific contract at issue," that is of no moment here, because the Court expressly concluded that Uber's Agreements do not satisfy even the least demanding version of the applicable test. *Id.* (emphasis added).

Put simply, Uber has not shown even a likelihood of success on the merits of its appeal of this Court's determination that the delegation clause in the 2013 Agreement is not enforceable because it does not clearly and unmistakably delegate arbitrability to an arbitrator.

2. The 2013 Agreement's Arbitration Provision is Unconscionable

Uber also argues that it is reasonably likely to succeed in convincing the Ninth Circuit that this Court erred in determining that its arbitration provision is unconscionable as a matter of California law. Again, the Court finds that Uber has overestimated its likelihood of success.

a. Illusory Opt-Out Provision

Uber first argues that the Ninth Circuit will reverse this Court's determination that the 2013 Agreement is procedurally unconscionable, because that Agreement contains an opt-out provision that purports to allow drivers to avoid the arbitration provisions altogether. Mot. at 5-6. Uber's argument fails to acknowledge, however, that even under the Ninth Circuit cases it cites as binding precedent to this Court,[5] the 2013 Agreement is procedurally unconscionable because the opt-out provision in that contract was extremely onerous to comply with and ultimately illusory. *See Mohamed*, 2015 WL 3749716, at *12-13. Put differently, even if this Court was wrong to hold that *Ahmed*, *Najd*, and *Kilgore* cannot be followed because they "failed to apply California law as announced by the California Supreme Court," *id.* at *17, the 2013 Agreement would still be procedurally unconscionable under the Ninth Circuit's interpretation of California law because the opt-out right in that contract was not conspicuous or "meaningful." *Ahmed*, 283 F.3d at 1200; *see also Kilgore*, 718 F.3d at 1059.

[5] Uber cites to *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198 (9th Cir. 2002), *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104 (9th Cir. 2002), and *Kilgore v. KeyBank Nat'l Ass'n*, 718 F.3d 1052 (9th Cir. 2013) (en banc).

At the hearing, counsel for Uber suggested this Court erred in finding the 2013 Agreement's opt-out provision to be illusory as a matter of law, and specifically claims that the Court erred where it found that "Uber presented no evidence to this Court that even a single driver opted-out of the 2013 Agreement's arbitration clause." *Mohamed*, 2015 WL 3749716, at *13; *see also* Docket No. 64 (Hrg. Tr.) at 14:8-15:1. First, Uber admits that the Court's statement in its Order is accurate – Uber did *not* present the Court with any evidence regarding whether a single driver had successfully opted out of the 2013 Agreement. *See id.*; *see also* Mot. at 5 n.3. Under such circumstances, the Ninth Circuit is unlikely to find error. More fundamentally, however, the fact that Uber now claims that it is undisputed that roughly 270 drivers *did* successfully opt out of the 2013 Agreement's arbitration provision does not undercut this Court's legal conclusion that the opt-out right in that contract was largely illusory. *See* Hrg. Tr. at 14:13-17 (Uber's counsel arguing that it is undisputed roughly 269 drivers opted out of the 2013 arbitration agreement). In other filings with this Court, Uber claims there are roughly 160,000 Uber drivers in California alone. *See, e.g.*, *O'Connor v. Uber Techs.*, No. 13-cv-3826, Docket No. 298 at 1. The fact that only about 270 of Uber's phalanx of drivers successfully opted out of the 2013 Agreement arbitration clause thus supports, rather than undermines, this Court's conclusion that the opt-out right in the 2013 Agreement was essentially illusory and ineffective. In any event, "this Court has significant doubts that the California Supreme Court would vindicate an opt-out clause simply because a few signatories out of thousands were able to (and did) successfully opt-out." *Mohamed*, 2015 WL 3479716, at *13 (citations omitted).

b. Cost-Splitting

Uber next argues that it is likely to succeed on its appeal because this Court erred where it concluded that a provision requiring its drivers to pay substantial arbitration fees of a type they would not face in court is substantively unconscionable under California law. Mot. at 6-7. Uber contends that the U.S. Supreme Court has held that a court should not "tally the costs and burdens [of arbitration] to particular plaintiffs in light of their means" when determining whether to enforce an arbitration provision, and hence argues that the FAA preempts California law on this issue. Mot. at 6 (quoting *American Exp. Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2312 (2013)); *see also* Hrg. Tr. at 13:6-9 (Uber's counsel arguing that the relevant legal principle announced in

Armendariz v. Found. Health Psychcare Servs., 24 Cal. 4th 83 (2000) is pre-empted under the FAA).

The Court first notes that Uber did not adequately present this argument in its motion to compel arbitration in order to preserve it for appeal; the Ninth Circuit is therefore unlikely to address it. *See Mohamed*, 2015 WL 3479716, at *14 n.22; *see also Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed on below.").

Moreover, Uber takes the above-quotation from *Italian Colors* out of context[6] – there is nothing in the *Italian Colors* decision that suggests that the FAA preempts a state law rule, like California's, that prohibits the imposition of substantial forum fees on employees (or putative employees) who are attempting to vindicate their statutory rights. In fact, as this Court pointed out in its Order, the *Italian Colors* majority expressly recognized that an arbitration agreement may be invalidated if "filing and administrative fees attached to arbitration [] are so high as to make access to the forum impracticable." *Italian Colors*, 133 S.Ct. at 2310-11; *see also Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) ("It may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights.").

Uber's alternative contention fares no better. Uber argues that "numerous courts have rejected claims of substantive unconscionability *in this exact context* – where one party claims that a delegation clause is substantively unconscionable because of the arbitration fees and costs he would be required to incur." Mot. at 7 (emphasis added). Uber's claim that its cited cases arise "in this exact context" is false – none of the cases cited by Uber is on point. *Gilbert v. Bank of Am.*, No. C-13-01171-JSW, 2015 WL 1738017 (N.D. Cal. Apr. 8, 2015) is not an employment case, and thus Judge White had no occasion to apply or consider the substantive unconscionability rule this Court

[6] The language Uber cites held that a court cannot consider the costs and burdens of actually litigating a claim on an individual basis in deciding whether a class action waiver is enforceable under the FAA. *Italian Colors*, 133 S.Ct. at 2308 (reversing decision that had held that a class action waiver was unconscionable because "the costs of an expert analysis necessary to prove the antitrust claims would be at least several hundred thousand dollars . . . while the maximum recovery for an individual plaintiff would be $12,850, or $38,549 when trebled"). The Court was not addressing whether imposition of arbitration *forum fees* was unconscionable under state law.

applied from *Armendariz*.[7] *See Armendariz*, 24 Cal. 4th at 110 (holding that any clause in an *employment* agreement that would impose substantial forum fees on an employee in her attempt to vindicate her unwaivable statutory rights is contrary to pubic policy and therefore substantively unconscionable). Moreover, the clause at issue in *Gilbert* provided that the plaintiffs would *not* have to pay any arbitration filing fees, let alone the substantial fees Uber drivers would be required to pay to start arbitration here. *Gilbert*, 2015 WL 1738017, at *6 (finding fee-splitting provision conscionable, and noting that "the Arbitration Provisions provide that Cash Yes or a related third party will advance, *inter alia*, any filing fees"). Thus, *Gilbert* is inapposite.

Uber's next two cases similarly do not arise in the "exact context" of this case because neither apply California law, as this Court was required to apply here under the express terms of the contracts. In *Mercadante*, the district court applied North Carolina law. 2015 WL 186966, at *9. And the court in *Womack* appears to have been applying Missouri law. *See Womack v. Career Educ. Corp.*, No. 11-cv-1003 RWS, 2011 WL 6010912, at *2 (E.D. Mo. Dec. 2, 2011). Moreover, the plaintiffs in *Womack* "failed to specifically challenge the provision of the agreement which allows the arbitrator to decide enforceability of the arbitration clause," and thus the Court explicitly declined to rule on plaintiff's unconscionability challenge to the fee splitting provision, holding instead that "the arbitrator must decide the enforceability of the arbitration agreement." *Id.*

Finally, *Madrigal v. AT&T Wireless Servs.* is not on point because there the plaintiffs "provided no evidence that the cost of submitting threshold questions of arbitrability to the arbitrator is so high as to impeded [sic] Plaintiff's ability to challenge the arbitration agreement." No. 9-cv-33-OWW-MJS, 2010 WL 5343299, at *7 (E.D. Cal. Dec. 20, 2010). By contrast here, the Court found that the Plaintiffs "*have* made a sufficient showing that they would be subject to hefty fees of a type they would not face in court if they are forced to arbitrate arbitrability . . . ." *Mohamed*, 2015 WL 3749716, at *15 (emphasis in original). At bottom, none of Uber's arguments raised in its motion to stay are sufficiently strong to warrant a finding that Uber has even a fair likelihood of

[7] In fact only one of Uber's cited cases is an employment case: *Mercadante v. XE Servs., LLC*, No. CV-11-1044 (CKK), 2015 WL 186966, at *9 (D.D.C. Jan. 15, 2015).

success on the merits of its appeal regarding this Court's determination that the arbitration provision in the 2013 Agreement is unenforceable.

3. No "Serious Question"

For the reasons stated above, Uber has not identified any "serious legal questions" presented by its appeal on the issues previously discussed. But Uber further argues that whether the FAA preempts the California Supreme Court's ruling in *Iskanian v. CLS Transp. L.A., LLC*, that pre-dispute PAGA waivers are unenforceable as a matter of California law, presents a serious legal question. While the Court agrees that this *Iskanian* preemption issue raises a serious question, it is not a question materially presented *in this appeal*. This is because the Court found that the 2013 Agreement's arbitration provision would fail even if it did not contain an illegal PAGA waiver, as it is "permeated" by four other substantively unconscionable terms. *See Mohamed*, 2015 WL 3479716, at *31 ("The Court finds that the presence of these four unconscionable terms, and in particular the arbitration fee-shifting and confidentiality provisions, render the 2013 Agreement's arbitration clause permeated with unconscionability."); *see also id.* (finding that "the 2013 Agreement's arbitration provision is permeated with substantively unconscionable terms, *in addition* to the invalid PAGA waiver") (emphasis added). Moreover, and unlike the 2014 Agreements at issue in *Mohamed*,[8] the 2013 Agreement is significantly procedurally unconscionable, thereby requiring the Court to find less substantive unconscionability before determining that the arbitration provision as a whole is unconscionable and unenforceable. *See id.* at * 12 (noting that unconscionability "requires a showing of both procedural and substantive unconscionability, balanced on a sliding scale"). In view of the significant procedural unconscionability in the 2013 Agreement, the sliding scale test may be met with a less than robust showing of substantive unconscionability. Because this Court can be affirmed with respect to the 2013 Agreement's invalidity regardless of how the *Iskanian* issue is ultimately decided, the validity

[8] Because the amount of procedural unconscionability that inheres in the 2014 Agreements is significantly lower than in the 2013 Agreements, this Court's determination that the non-severable PAGA waivers in the 2014 Agreements are substantively unconscionable takes on considerably more importance to the overall outcome. Indeed, the Court will grant a partial stay pending appeal in *Mohamed* for largely this reason.

of *Iskanian* does not present a serious legal question *in this appeal*. *See Newton*, 2012 WL 3155719, at *8 ("As for the second issue, even if there were a serious legal question, Defendants run into a different problem, *i.e.*, there were other independent grounds supporting the Court's unconscionability determination."). Thus, Uber's motion for a stay pending appeal is denied.

Finally, because the Ninth Circuit would be obligated to perform the same analysis this Court just engaged in if Uber asks the Circuit for a stay pending appeal, the Court further denies Uber's request for a temporary stay of this action so it can request a stay from the Ninth Circuit.

III. CONCLUSION

Uber's motion for a stay of this action pending appeal is denied because Uber has not shown it has a sufficient probability of success on the merits of its appeal, nor has it shown that its appeal raises any serious questions that would bear on the impact of the appeal.

This order disposes of Docket No. 54.

IT IS SO ORDERED.

Dated: July 22, 2015

EDWARD M. CHEN
United States District Judge

Exhibit D

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Attorneys for Defendant
UBER TECHNOLOGIES, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RONALD GILLETTE, individually and on behalf of all others similarly-situated,

Plaintiff,

v.

UBER TECHNOLOGIES, INC., a California corporation, and DOES 1-20, inclusive,

Defendants.

Case No. 3:14-cv-05241-EMC

DECLARATION OF MICHAEL COLMAN IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL ARBITRATION

Date: March 12, 2015
Time: 1:30 p.m.
Ctrm.: 5, 17th Floor

I, Michael Colman, hereby declare and state:

1. The information set forth herein is true and correct of my own personal knowledge (unless otherwise stated) and if asked to testify thereto, I would do so competently.

2. I am currently employed as an Operations Specialist for Uber Technologies, Inc. ("Uber"), and I work out of Uber's San Francisco location. I have been employed by Uber since October 2011, and have worked as an Operations Specialist since February 2013. In that role, I consult with operations teams throughout the State of California regarding nearly every facet of Uber's operations and I have comprehensive personal knowledge of Uber's business model.

3. Uber is a technology company that connects individuals in need of a ride ("riders") with available, independent transportation providers looking for passengers. Uber provides the technology, through its smartphone application (the "app"), that allows riders and transportation providers to connect based on their location. Using the app, riders can connect with available transportation providers offering a variety of transportation options. The UberBLACK platform connects users to limousines or town cars operated by transportation companies.

4. Uber's app is available to riders and transportation providers in over 100 cities across the country.

5. As Operations Specialist, I am familiar with how the Uber app functions from the perspective of the transportation provider and/or driver. I am also familiar with the process transportation providers and drivers go through to sign up to use the app and the various documents to which transportation providers and drivers must agree to in order to use the app. As an Operations Specialist, I also have access to Uber's business records reflecting the identity of the transportation providers that use the app, as well as any drivers those transportation providers have engaged. These records are maintained in the regular course of Uber's business and updated with changes as new transportation providers and drivers join and leave the system.

6. Any transportation provider that wishes to access Uber's UberBLACK software platform to book passengers must first enter into a Software License & Online Services Agreement ("Licensing Agreement") with Uber. Transportation providers are free to engage drivers to provide transportation services on their behalf. Individual drivers who work for transportation providers may

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sign up to use the app to book passengers under a transportation provider's account, but must first enter into both the Licensing Agreement and the Driver Addendum Related to Uber Services ("Driver Addendum"). On occasion, Uber rolls out updated Licensing Agreements and Driver Addendums and transportation providers and drivers must agree to those updated documents in order to access the app.

7. I also have access to Uber's databases reflecting the dates and times the transportation providers and drivers agreed to the Licensing Agreement and, if applicable, any Driver Addendum, as well as any updates to those documents. These databases are maintained in the regular course of Uber's business and updated automatically as transportation providers and drivers agree to these documents. Specifically, an electronic receipt is generated at the time the transportation provider or driver agrees to the documents.

8. Based on my review of Uber's business records, on or about July 3, 2013, Plaintiff Ronald Gillette ("Plaintiff") signed up to use the Uber app to book passengers under the account for Abbey Lane Limousine, which operates in and around San Francisco.

9. On or about July 23, 2013, Uber notified transportation providers and drivers that it was planning on rolling out a Software License and Online Services Agreement ("Licensing Agreement") and Driver Addendum within the next couple of weeks. The email notifying transportation providers and drivers that these documents would be rolled out included links to the documents to provide transportation providers and drivers an opportunity to review them. A true and correct copy of the email and an electronic record reflecting that Mr. Gillette was sent this email on July 23, 2013 are attached as **Exhibit A**. I have personal knowledge that this email was sent to transportation providers in or around mid-July, 2013, and the records reflected in **Exhibit A** are maintained by Uber in the regular course of Uber's business as they are created, and I have access to them.

10. After Uber rolled out the Licensing Agreement and Driver Addendum, when transportation providers and drivers logged on to the app they saw the screenshot attached as **Exhibit B**. Within the app, this screen contained links to the Licensing Agreement and Driver Addendum (as well as the City Addendum) which the transportation provider or driver could have clicked in order to

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review prior to hitting "Yes, I agree." By clicking on the link, the transportation provider or driver could review the document referenced. After hitting "Yes, I agree," the app prompted the transportation provider or driver to confirm that he or she agreed to the updated documents. This confirmation screen appeared similar in form to the confirmation screen currently in place today, a screenshot of which is attached as **Exhibit C**. I am familiar with this process based on my experience as an Operations Specialist.

11. According to Uber's records, Mr. Gillette accepted the updated Licensing Agreement and Driver Addendum on July 29, 2013. The process described in paragraph 10 is the same process Mr. Gillette would have gone through when he logged into the app prior to accepting the updated Licensing Agreement and Driver Addendum. Attached hereto as **Exhibits D** and **E** respectively are true and correct copies of the Software License & Online Services Agreement and the Driver Addendum Related to Uber Services agreed to by Plaintiff on July 29, 2013.

12. Uber received an electronic receipt when Plaintiff accepted the Licensing Agreement and Driver Addendum. A true and correct copy of the receipt that Uber received following Plaintiff's acceptance of the agreements is embedded below. The receipt includes a date and time stamp indicating Plaintiff's acceptance:

Driver ID	First Name	Last Name	Date Accepted Agreements	Doc ID Shown
1901111	Ron	Gillette SV	2013-07-29 22:51:42.494244	https://s3.amazonaws.com/uber-regulatory-documents/country/united_states/licensed/Software+License+and+Online+Services+Agreement.pdf?

13. As Operations Specialist, I also have access to Uber's business records reflecting the names of those individuals who have decided to opt out of the Arbitration Provision contained in Uber's Licensing Agreement. There is no record that Ronald Gillette opted out.

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I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed at San Francisco, California, this 23 day of January, 2015.

MICHAEL COLMAN

Firmwide:131295027.2 073208.1047

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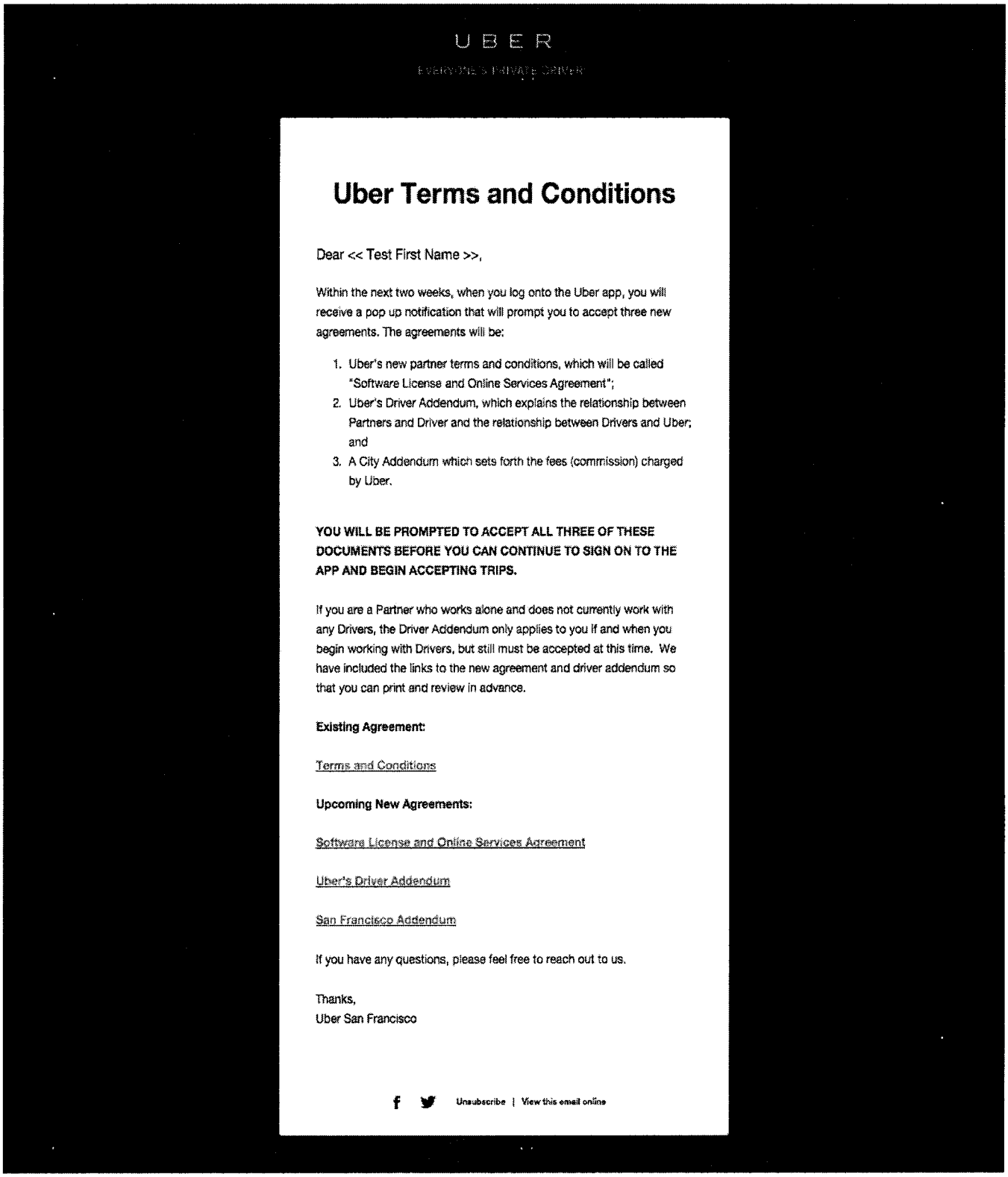
Exhibit A



Uber Terms and Conditions

Dear << Test First Name >>,

Within the next two weeks, when you log onto the Uber app, you will receive a pop up notification that will prompt you to accept three new agreements. The agreements will be:

1. Uber's new partner terms and conditions, which will be called "Software License and Online Services Agreement";
2. Uber's Driver Addendum, which explains the relationship between Partners and Driver and the relationship between Drivers and Uber; and
3. A City Addendum which sets forth the fees (commission) charged by Uber.

YOU WILL BE PROMPTED TO ACCEPT ALL THREE OF THESE DOCUMENTS BEFORE YOU CAN CONTINUE TO SIGN ON TO THE APP AND BEGIN ACCEPTING TRIPS.

If you are a Partner who works alone and does not currently work with any Drivers, the Driver Addendum only applies to you if and when you begin working with Drivers, but still must be accepted at this time. We have included the links to the new agreement and driver addendum so that you can print and review in advance.

Existing Agreement:

Terms and Conditions

Upcoming New Agreements:

Software License and Online Services Agreement

Uber's Driver Addendum

San Francisco Addendum

If you have any questions, please feel free to reach out to us.

Thanks,
Uber San Francisco

[redacted]

[redacted]

Uber Partners And Drivers [redacted]

[redacted]

[redacted]

Ron Gillette SV

★★ Subscribed: Jun 03, 2013 10:46 pm

[redacted]

Want To Track VIPs?

[redacted]

Jul 23 [redacted]

Finished sending

Uber Terms and Conditions - San Francisco - View Results

Exhibit B

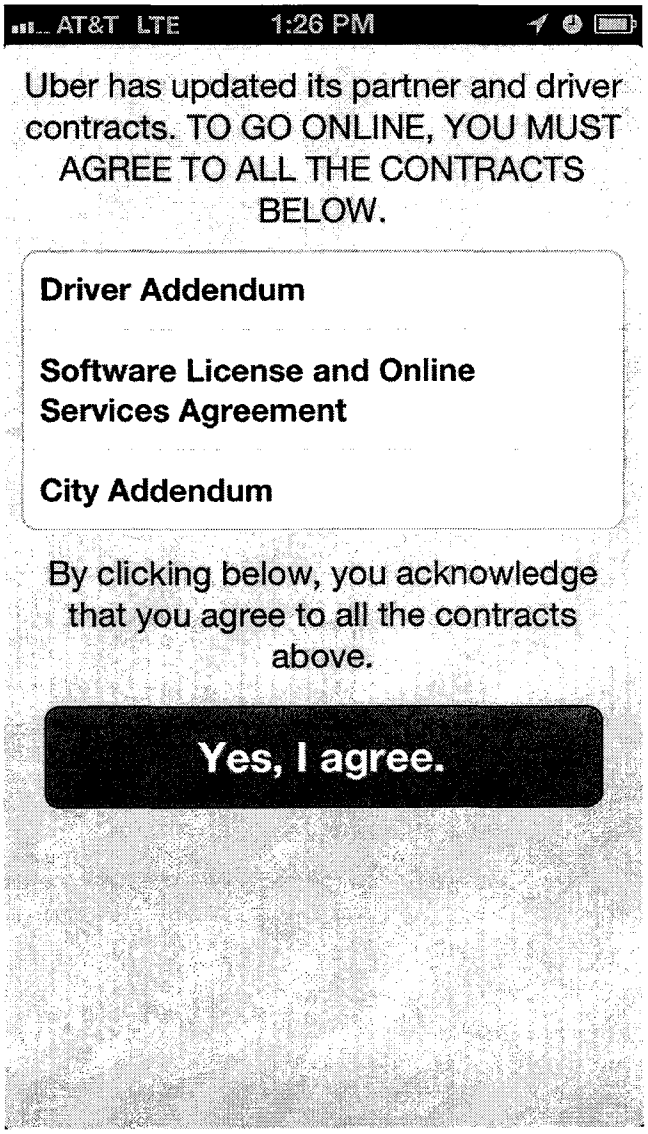

AT&T LTE
1:26 PM
Uber has updated its partner and driver contracts. TO GO ONLINE, YOU MUST AGREE TO ALL THE CONTRACTS BELOW.
Driver Addendum
Software License and Online Services Agreement
City Addendum
By clicking below, you acknowledge that you agree to all the contracts above.
Yes, I agree.

Exhibit C

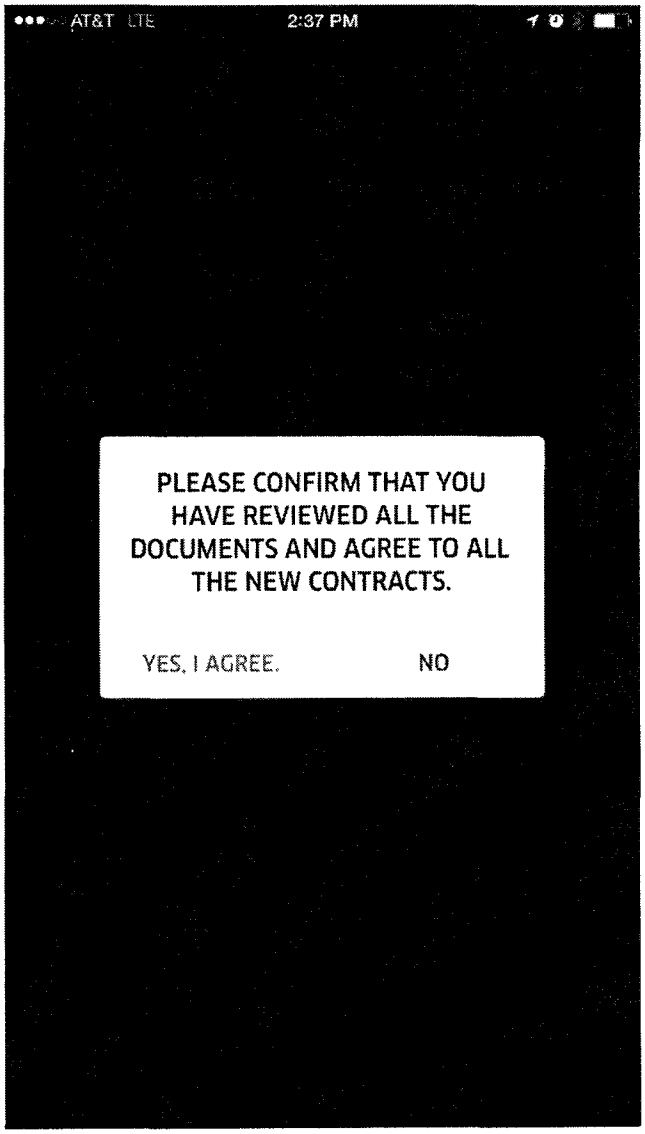

AT&T LTE
2:37 PM
PLEASE CONFIRM THAT YOU HAVE REVIEWED ALL THE DOCUMENTS AND AGREE TO ALL THE NEW CONTRACTS.
YES, I AGREE.
NO

Exhibit D

UBER

SOFTWARE LICENSE AND ONLINE SERVICES AGREEMENT

This Agreement constitutes a legal agreement between you ("Transportation Company" or "You") and Uber Technologies, Inc., a Delaware corporation ("Uber" or "Vendor").

Uber is the developer of a mobile application and associated software (the "Software" as defined below) and the Uber Services (as defined below). The mobile application and Software enables a person who has downloaded a copy of the Uber App (as defined below) and signed up as a user to request transportation services from transportation companies who have executed this Agreement and have downloaded and are using the Driver App (as defined below).

Uber does not provide transportation services and is not a transportation carrier.

You are an independent company in the business of providing transportation services, which business you are authorized to conduct in the state(s) and jurisdiction(s) in which you operate. As used herein, "You" and "Transportation Company" shall include your employees, subcontractors, agents and representatives, all of which shall be bound by the terms of this Agreement. You desire to enter into this Agreement for the purpose of accessing and using the Uber Services and Software to increase your transportation business.

In order to use the Uber Services and the associated Software, You must agree to the terms and conditions that are set out below. Upon Your electronic execution of this Agreement, You and Uber shall be bound by the terms and conditions set forth herein.

1. DEFINITIONS

In addition to the terms defined elsewhere in this Agreement, the following definitions apply:

1.1 '"**Affiliated Company**" means a company that directly or indirectly is under control of or controls that relevant party, by having more than fifty percent (50%) of the voting stock or other ownership interest or the majority of the voting rights.

1.2 "**App**" means the software application developed, owned, controlled, managed, maintained, hosted, licensed and/or designed by Uber (or its Affiliated Companies) to run on smartphones, tablet computers and/or other devices, through which the Uber Service is made available.

1.3 "**Change Notice**" has the meaning as set out in Section 5.4 (Invoice Terms).

1.4 "**City**" means the state, city, municipality, place, region or territory in which the Driving Service shall be made available by the Transportation Company.

1.5 "**Data**" means all data with regard to or transmitted using the Device, the App, the Driver App, the Uber Service or the Driver ID, or data relating to the User and/or the Ride.

1.6 "**Device**" means the relevant smartphone or such other device as made available by Uber (in its sole discretion) to the Driver in order for the Driver to use and have (limited) access to the Uber Service and to enable the Driver in providing the Driving Service to the Users.

1.7 "**Driver**" means the person who is a member, employee, contractor or business affiliate of, or otherwise retained by the Transportation Company and who shall render the Driving Service of whom the relevant contact details (including copy of the driver's license) are provided to Uber.

1.8 "**Driver Addendum**" means the applicable terms and conditions that Transportation Company is required to enter into with all Drivers prior to allowing access to the Software and Uber Services. The Driver Addendum is available at www.uber.com, and is specific to certain Uber products and Driver's location. Uber may update the Driver Addendum from time to time at its sole discretion. By consenting to this agreement, You are consenting to the Driver Addendum.

1.9 "**Driver App**" means the software application developed, owned, controlled, managed, maintained, hosted, licensed and/or designed by Uber (or its Affiliated Companies) to run on the Device.

1.10 "**Driver ID**" means the identification and password key allotted by Uber to a Driver by which the Driver can access and use the Driver App and Device.

UBER

1.11 "**Driving Service**" means the transportation service as provided, made available or rendered by the Transportation Company (through the Driver (as applicable) with the Vehicle) upon request of the User through the App.

1.12 "**Fare**" means the amount (including applicable taxes and fees) that the Transportation Company is entitled to charge the User for the Ride, based on the recommended fares for the City as set out on http://www.uber.com or on the App.

1.13 "**Fee**" means the commission paid by the Transportation Company to Uber for the Service.

1.14 "**Intellectual Property Right**" means any patent, copyright, invention, database right, design right, registered design, trademark, trade name, brand, logo, slogan, service mark, know-how, utility model, unregistered design or, where relevant, any application for any such right, know-how, trade or business name, domain name (under whatever extension, e.g. .com, .nl, .fr, .eu, etc.) or other similar right or obligation whether registered or unregistered or other industrial or intellectual property right subsisting in any territory or jurisdiction anywhere in the world.

1.15 "**Ride**" means the transportation of the User by the Driver from the point of pick-up of the User until the point of drop-off of the User.

1.16 "**Software**" means Uber's mobile application and associated software, including but not limited to the App and Driver App.

1.17 "**Toll Charges**" means any and all road, bridge, ferry, tunnel and airport toll charges, including inner-city congestion, environmental or similar charges.

1.18 "**Uber Service**" means the on-demand, lead-generation service through the App, SMS (text messaging), web based requests or such other platforms, communication media or channels as are from time to time operated and made available by or on behalf of Uber that allow a User to request Driving Service from a Driver (who shall render the Driving Service on behalf of the Transportation Company) as available to and accepted by the User. "Uber Service" also includes Uber's arrangement for a third party payment processor or mobile payment platform to process the Fare for a Ride requested via the App and distribution of the Fare (minus the Fee) to the Transportation Company.

1.19 "**User**" means a person who has signed up and is registered with Uber for the use of the App and/or the Uber Service.

1.20 "**User Information**" Information provided by Uber to the Driver via the Driver App indicating the User's name, the User's pick-up location and photo of the User, if the User has elected to include a photo in the User's profile with Uber.

1.21 "**Vehicle**" means any motorized vehicle (whether powered by an internal combustion, hybrid or an electrical engine) that is in safe and clean condition and fit for passenger transportation as required by applicable laws and regulations and that has been accepted by Uber and identified as the vehicle to be used by the Driver in the provision of the Driving Service.

1.22 "**Website**" means the Uber website www.uber.com.

2. LICENSE GRANT

2.1 Use of and access to the Driver App

Uber hereby grants Transportation Company a non-exclusive, non-transferable, right to use the Software and Uber Service, subject to the terms and conditions of this Agreement for the sole purpose of providing and rendering the Driving Service in and/or from within the City to and for the benefit of the Users. All rights not expressly granted to you are reserved by Uber and its licensors.

2.2 Restrictions.

Transportation Company shall not and will ensure that Driver does not (i) license, sublicense, sell, resell, transfer, assign, distribute or otherwise commercially exploit or make available to any third party the Uber Service, the Software, or the Device in any way; (ii) modify or make derivative works based upon the Uber Service or the Software; (iii) create Internet "links" to the Uber Service or Software or "frame" or "mirror" any Software on any other server or wireless or Internet-based device; (iv) reverse engineer, decompile,

UBER

modify, or disassemble, except as allowed under the applicable law; (v) access the Software in order to (a) build a competitive product or service, (b) build a product using similar ideas, features, functions or graphics of the Uber Service or Software, or (c) copy any ideas, features, functions or graphics of the Uber Service or Software; or (vi) launch an automated program or script, including, but not limited to, web spiders, web crawlers, web robots, web ants, web indexers, bots, viruses or worms, or any program which may make multiple server requests per second, or unduly burdens or hinders the operation and/or performance of the Uber Service or Software.

Transportation Company may not use the Software and Uber Service to: (i) send spam or otherwise duplicative or unsolicited messages in violation of applicable laws; (ii) send or store infringing, obscene, threatening, libelous, or otherwise unlawful or tortious material, including material harmful to children or violative of third party privacy rights; (iii) send or store material containing software viruses, worms, Trojan horses or other harmful computer code, files, scripts, agents or programs; (iv) interfere with or disrupt the integrity or performance of the Software or Service or the data contained therein; or (v) attempt to gain unauthorized access to the Software or Service or its related systems or networks.

2.3 Unavailability. The Transportation Company acknowledges and agrees that the Software or the Uber Service may, from time to time, be unavailable (e.g. due to scheduled maintenance or system upgrades) and that Uber cannot, and does not, guarantee an specific or minimum availability of the Software or the Uber Service.

2.4 Ownership. Uber (and its Affiliated Companies and licensors, where applicable) shall own and have all rights (including Intellectual Property Rights) in and to the Device, the Software, the Uber Service, the Driver ID and the Data. Insofar the Transportation Company and/or Driver may, by operation of applicable law or otherwise, obtain any rights (including Intellectual Property Rights) in relation thereto, these rights shall be and are hereby transferred (insofar permitted under the applicable law, in advance) to Uber (rights obtained by any Driver should be transferred via the Transportation Company). Where a transfer may not be permissible under the applicable mandatory law, the Transportation Company hereby undertakes to grant and to procure from the Driver a grant to Uber of a perpetual, exclusive (exclusive also with regard to Transportation Company and/or Driver), world-wide and transferable right and license under any such non-transferable rights.

3. OBLIGATIONS OF THE TRANSPORTATION COMPANY

3.1 Transportation Company shall have the sole responsibility for any obligations or liabilities to Drivers, Users or third parties that arise from its provision of the Driving Service.

3.2 By using the Uber Services to receive and accept requests for transportation and by providing the Driving Service to the User, the Transportation Company accepts, agrees and acknowledges that a direct legal relationship is created and assumed solely between the Transportation Company and the User. Uber shall not be responsible or liable for the actions, omissions and behavior of the User in or in relation to the activities of the Transportation Company, the Driver and the Vehicle.

3.3 Transportation Company acknowledges and agrees that it and the Driver are solely responsible for taking such precautions as may be reasonable and proper (including taking out adequate insurance in conformity with standard market practice and in conformance with any applicable regulations or other licensing requirements) regarding any acts or omissions of the User.

3.4 The Transportation Company represents and undertakes to procure that the Driver shall comply with, adhere to and observe the terms and conditions set forth in this Agreement, the Driver Addendum, and all applicable laws, regulations, rules, statutes or ordinances governing or otherwise relating to the Driving Service. To the extent required, the

Transportation Company hereby agrees and ensures that the rights, covenants, undertakings, representations and obligations of the Driver as set out in this Agreement shall apply to, and be assumed, accepted and taken over by the Driver. The Transportation Company shall provide copies of all executed Driver Addendums to Uber upon Uber's request.

3.5 The Transportation Company acknowledges and agrees that it exercises sole control over the Driver and will comply with all applicable laws and regulations (including tax, social security and employment laws) governing or otherwise applicable to its relationship with the Driver. Uber does not and does not intend to exercise any control over the Driver's (or the Transportation Company's) actions or the operation or physical condition of the Vehicle (except as provided under the Agreement).

3.6 Transportation Company undertakes that it will, and that it will ensure that its Driver(s) will, safeguard, protect and keep the Driver ID at all times confidential and safely stored and shall not disclose it to any person other than those who need to have access to the Driver ID in order to render and/or provide the Driving Service.

3.7 Transportation Company undertakes that it will, and that it will ensure that its Driver(s) will, safeguard, protect and keep the User Information received from Uber and the details of any Ride, at all times confidential and shall not disclose it to any person or store the information in any manner, except as required by law.

3.8 Transportation Company will immediately notify Uber of any actual or suspected security breach or improper use of the Device, the Driver App, the Driver ID, the Data or of the User Information.

4. USE OF UBER SERVICE AND SOFTWARE BY DRIVERS

4.1 Driver ID

4.1.1 Uber will issue the Transportation Company a Driver ID for each Driver retained by the Transportation Company to enable Transportation Company and/or the Driver (as applicable) to access and use the Driver App and the Device in accordance with the Driver Addendum. Uber will have the right, at all times and at Uber's sole discretion, to reclaim, prohibit, suspend, limit or otherwise restrict the Transportation Company and/or the Driver from accessing or using the Driver App or the Device. Uber may charge a fee for the use of the Device or request a retainer fee and/or a security deposit per Device.

4.2 Information provided to Users

4.2.1 Once the Driver has accepted a User's request for transportation, Uber will provide the User Information to the Driver via the Driver App, including the User's location. The User shall inform the Driver of the destination. Transportation Company acknowledges and agrees that once the Driver has accepted a User's request for transportation, Uber may provide specific information to the User regarding the Transportation Company and Driver in relation to the Driving Service, including but not limited to the Transportation Company's name, Driver's name, Driver's photo, license number, geo-location and contact information.

4.2.2 The Transportation Company and its Drivers retain the sole right to determine when and for how long each of them will utilize the Software and Services to receive lead generation service. The Transportation Company and its Drivers also retain the option to accept or reject each request for transportation received via the Driver App. However, Transportation Company and Driver agree to utilize the App at least once a month to accept a request for transportation.

4.3 Driver and User Review.

4.3.1 Users who have used the Driving Service will be asked by Uber to comment on the Driving Service and to provide a score for the Driving Service and the Driver. Uber reserves the right to post these comments and scores on the App or the Website (or such other

platforms as owned, managed, controlled or managed by Uber) without reference to the Customer, Transportation Company or Driver. Uber shall also request the Transportation Company and/or the Driver to comment on and to provide a score for the User on the Driver App. Transportation Company will and will require that its Drivers will provide accurate and objective feedback that does not violate any applicable laws and regulations.

4.3.2 The Transportation Company acknowledges that Uber is a distributor (without any obligation to verify) and not a publisher of these comments and scores. Uber reserves the right to refuse, edit or remove unfavorable reviews in the event that such reviews include obscenities or mention an individual's name or violate any privacy laws or any other applicable laws and regulations. Beyond the legal and regulatory requirements, Uber shall not have and hereby disclaims any liability and responsibility for the content and consequences of (the publication or distribution of) any comments, scores or reviews howsoever or whatsoever.

4.3.3 The Transportation Company acknowledges that Uber desires to provide users of its Software with the opportunity to connect with Transportation Companies that maintain the highest standards of professionalism. Transportation Company agrees that its Drivers will maintain high standards of professionalism and service, including but not limited to professional attire and maintaining an average Customer score set by Uber based on feedback from users of its Software. Uber utilizes a five-star rating system designed to allow the Users of its Software to provide feedback on the level of service provided by those transportation providers who accept requests for transportation received via the Service. Transportation Company understands that there is a minimum star-rating Drivers must maintain to continue receiving access to the Service and Software. In the event a Driver's star-rating falls below the applicable minimum star-rating, Uber will notify Transportation Company by email or other written means. In the event the star-rating (based on User feedback) has not increased above the minimum, Uber may deactivate the Driver's access to the Software and Service. Uber reserves the right, at all times and at Uber's sole discretion, to reclaim, prohibit, suspend, limit or otherwise restrict the Transportation Company and/or the Driver from accessing or using the Driver App or the Device if the Transportation Company or its Drivers fail to maintain the standards of appearance and service required by the users of the Uber Software.

4.4 Disclosure of Information. In case of a complaint, dispute or conflict between the Transportation Company or the Driver on the one hand and the User on the other hand or in other appropriate instances where a legitimate reason for such disclosure exists (for example, receipt by Uber of a subpoena or warrant requesting information), Uber may, but shall not be required to – to the extent permitted by applicable laws and regulations – provide the User, Transportation Company, the Driver and/or the relevant authorities the relevant data (including personal data) of the Transportation Company or the Driver. Uber may also disclose certain information of the Transportation Company or the Driver as set forth in this Agreement.

5. CALCULATION OF FARES AND FEES

5.1 Fares

5.1.1 The recommended pricing structure used in calculating the Fare for the Driving Service can be found at www.uber.com, or on the App or can at any time be communicated to the Transportation Company by Uber.

5.1.2 As part of its Services provided to Transportation Company, Uber will arrange for a third party payment processor or mobile payment platform to process the Fare for a Ride requested via the App to the User designated credit card or mobile payment platform.

5.2 Fee

5.2.1 Transportation Company shall pay Uber a Fee per Ride, which shall be set by Uber at Uber's sole discretion based upon local market factors and may be subject to change. The Fee is calculated as a percentage of each Fare. The Fare will be collected by Uber for and

on behalf of the Transportation Company. Transportation Company agrees and requests that Uber deduct its Fee payable on all Fares earned by the Transportation Company and remit the remainder of the Fare to Transportation Company. The Fee is set forth in the City Addendum. The City Addendum may change from time to time. Transportation Company and Drivers can always view the most current City Addendum at http://www.uber.com and also will receive written notice in the event of a change in Fee percentage.

5.3 Invoicing and payment terms

5.3.1 Payment of the Fares to Transportation Company shall be made in accordance with the payment method as set forth in the Driver Addendum.

5.3.2 Uber operates, and the Transportation Company accepts, a system for receipts being issued by Uber for and on behalf of the Transportation Company to the User. The receipts, which are issued by Uber for and on behalf of the Transportation Company to the User shall be sent in copy by email or made available online to the Transportation Company. The receipts may include specific information regarding the Transportation Company and Driver in relation to the Driving Service, including but not limited to the Transportation Company's name, Driver's name, Driver's photo, license number, geo-location and contact information.

The Transportation Company represents that it will ensure that the Driver will notify Uber of any corrections necessary to the receipt for a Ride within three (3) business days after each Ride. Unless Uber receives timely notification (three (3) business days) of any correction needed, Uber shall not be liable for any mistakes in the receipt or in any calculation of the Fares that are remitted to the Transportation Company pursuant to the terms of section 5.2.1.

6. REPRESENTATIONS

6.1 Transportation Company/Driver representations

6.1.1 The Transportation Company represents to Uber and shall ensure that the Driver shall represent to Transportation Company, that for the term of this Agreement:

(i) it holds, complies and shall continue to hold and comply with all permits, licenses and other governmental authorisations necessary for conducting, carrying out and continuing their activities, operations and business in general and the Driving Service in particular;

(ii) shall comply with all local laws and regulations, including the laws related to the operation of a taxi/passenger delivery, driving service or transportation service and will be solely responsible for any violations of such local laws and regulations;

(iii) the Driver has a valid driver's license and is authorized to operate the Vehicle as set out in the Driver Addendum and has all the appropriate licenses, approvals and authority to provide transportation for hire to third parties in the City where the Driving Service is rendered or performed;

(iv) it has appropriate and up-to-date level of expertise and experience to enable and provide the Driving Service and the Driving Service will be supplied, provided and supported by appropriately qualified and trained Drivers acting with due skill, care and diligence;

(v) the Transportation Company and the Driver have and maintain a valid policy for the appropriate (transportation, personal injury, third party or general) liability insurance and such other insurances as are considered market practice (all in industry-standard coverage amounts) for the operation of the Vehicle and/or business insurance to cover any anticipated risks, damages and losses related to the operation of a taxi/passenger delivery, driving service or transportation services (including the Driving Service), and not less than the minimum coverage amounts required by applicable law. The Transportation Company shall add Uber to its liability insurance policy as an additional insured, and shall upon first request of Uber provide Uber with a copy of the insurance certificate.

(vi) the Transportation Company's employees are covered by workers' compensation insurance, as required by law. If permitted by law, Transportation Company may choose to insure itself against industrial injuries by maintaining occupational accident insurance in place of workers' compensation insurance. Transportation Company's subcontractors may also, to the extent permitted by law, maintain occupational accident insurance in place of workers' compensation insurance.

(vii) the Vehicle is kept in a clean condition at all times, such Vehicle is in good operating condition and meets the industry safety standards for a Vehicle of its kind;

(viii) the Driver and the Vehicle maintain at all times the star rating quality described in Section 4.3.3 above.

(ix) Transportation Company is the owner or lessee, or are otherwise in lawful possession of a Vehicle or Vehicles, and said Vehicle or Vehicles are suitable for performing the commercial carriage services contemplated by this Agreement, which equipment complies with all applicable federal, state and local laws.

6.2 Disclaimer

6.2.1 Uber provides, and the Transportation Company accepts, the Service, the Device and Driver App on an "as is" and "as available" basis. Uber does not warrant or guarantee that the Transportation Company, the Driver or the User's access to or use of the Service, the Website, the Device, the App or the Driver App will be uninterrupted or error free.

6.2.2 **Internet Delays**. THE UBER SERVICE AND SOFTWARE MAY BE SUBJECT TO LIMITATIONS, DELAYS, AND OTHER PROBLEMS INHERENT IN THE USE OF THE INTERNET AND ELECTRONIC COMMUNICATIONS. THE COMPANY IS NOT RESPONSIBLE FOR ANY DELAYS, DELIVERY FAILURES, OR OTHER DAMAGE RESULTING FROM SUCH PROBLEMS.

6.3 Transportation Company/ Driver indemnifications

6.3.1 Subject to the exceptions set forth in this Agreement, the Transportation Company agrees and undertakes and ensures that the Transportation Company will indemnify, defend and hold Uber (and its Affiliated Companies and employees and, at the request of Uber, Uber's licensors, suppliers, officers, directors and subcontractors) harmless from and against any and all claims, demands, expenses (including legal fees), damages, penalties, fines, social contributions and taxes by a third party (including Users, regulators and governmental authorities) directly or indirectly related to this Agreement.

6.3.2 The Transportation Company is solely responsible for ensuring that Drivers take reasonable and appropriate precautions in relation to any third party with which they interact in connection with the Driving Service. Where this allocation of the parties' mutual responsibilities may be ineffective under applicable law, the Transportation Company undertakes to indemnify, defend and hold Uber harmless from and against any claims that may be brought against Uber in relation to the Transportation Company's or Driver's provision of the Driving Service under such applicable law as further set forth in Section 6.3 (Indemnification).

7.0 RELATIONSHIP BETWEEN THE PARTIES

7.1 The relationship between the Parties is solely that of independent contracting parties.

7.2 The Parties expressly agree that this Agreement is not an employment agreement or employment relationship. The parties further agree that no employment contract is created between Uber and the Drivers.

7.3 The Parties expressly agree that no joint venture, partnership, employment, or agency relationship exists between you, Uber or any third party provider as a result of this Agreement or use of the Uber Service or Software.

7.4 The Transportation Company acknowledges and agrees that it has no authority to bind Uber and undertakes not to hold itself out and to ensure that the Driver does not hold himself or herself out, as an employee, agent or authorized representative of Uber. Where, by implication of mandatory law or otherwise, the Driver and/or the Transportation Company may be deemed an agent or representative of Uber, the Transportation Company undertakes and agrees to indemnify, defend and hold Uber harmless from and against any claims by any person or entity based on such implied agency relationship.

8. LIABILITY

8.1 IN NO EVENT SHALL UBER'S AGGREGATE LIABILITY EXCEED THE FEES ACTUALLY PAID BY AND/OR DUE FROM TRANSPORTATION COMPANY IN THE SIX (6) MONTH PERIOD IMMEDIATELY PRECEDING THE EVENT GIVING RISE TO SUCH CLAIM. IN NO EVENT SHALL UBER AND/OR ITS LICENSORS BE LIABLE TO ANYONE FOR ANY INDIRECT, PUNITIVE, SPECIAL, EXEMPLARY, INCIDENTAL, CONSEQUENTIAL OR OTHER DAMAGES OF ANY TYPE OR KIND (INCLUDING PERSONAL INJURY, LOSS OF DATA, REVENUE, PROFITS, USE OR OTHER ECONOMIC ADVANTAGE). UBER AND/OR ITS LICENSORS SHALL NOT BE LIABLE FOR ANY LOSS, DAMAGE OR INJURY WHICH MAY BE INCURRED BY TRANSPORTATION COMPANY, INCLUDING BUT NOT LIMITED TO LOSS, DAMAGE OR INJURY ARISING OUT OF, OR IN ANY WAY CONNECTED WITH THE UBER SERVICE OR SOFTWARE, INCLUDING BUT NOT LIMITED TO THE USE OR INABILITY TO USE THE UBER SERVICE OR SOFTWARE.

8.2 If the disclaimer of liability by Uber as set out in Clause 7.1 shall, for some reason, not have any effect, the maximum aggregate liability of Uber vis-a-vis the Transportation Company and its Drivers collectively, is limited to 50% of the total amount of the Fee paid to Uber by the Transportation Company in the year (12 months) preceding the event that led to the liability.

8.3 All defenses (including limitations and exclusions of liability) in favor of Uber apply (i) regardless of the ground upon which a liability is based (whether default, tort or otherwise), (ii) irrespective of the type of breach of obligations (guarantees, contractual obligations or otherwise), (iii) for all events and all agreements together, (iv) insofar no event of wilful misconduct or gross negligence of Uber or its management has occurred, and (v) also for the benefit of its Affiliated Companies and employees and, at the request of Uber, Uber's licensors, suppliers and subcontractors.

8.4 Uber makes no guarantees, warranties, or representations as to the actions or conduct of any Users who may request transportation service from Transportation Company or the Driver. Responsibility for the decisions Transportation Company makes regarding transportation services offered via the Software or Uber Service (with all its implications) rests solely with Transportation Company. Transportation Company agrees that it is Your responsibility to take reasonable precautions in all actions and interactions with any third party You interact with through the Uber Service.

8.5 The transportation services that You provide pursuant this Agreement are fully and entirely Your responsibility. Uber does not screen or otherwise evaluate potential riders/Users of Your transportation services. You understand, therefore, that by using the Software and the Uber Service, You may be introduced to third parties that may be potentially dangerous, and that You use the Software and the Uber Service at Your own risk.

8.6 Notwithstanding the Transportation Company's right, if applicable, to take recourse against the Driver, the Transportation Company acknowledges and agrees that it is at all times responsible and liable for the acts and omissions of the Driver(s) vis-à-vis the User and Uber, even where such vicarious liability may not be mandated under applicable law.

8.7 UBER WILL NOT ASSESS THE SUITABILITY, LEGALITY OR ABILITY OF ANY SUCH THIRD PARTIES AND YOU EXPRESSLY WAIVE AND RELEASE UBER FROM ANY AND ALL LIABILITY, CLAIMS, CAUSES OF ACTION, OR DAMAGES ARISING FROM YOUR USE OF THE SOFTWARE OR UBER SERVICE, OR IN ANY WAY RELATED TO THE THIRD PARTIES INTRODUCED TO YOU BY THE SOFTWARE OR SERVICE. YOU EXPRESSLY WAIVE AND RELEASE ANY AND ALL RIGHTS AND BENEFITS UNDER SECTION 1542 OF THE CIVIL CODE OF THE STATE OF CALIFORNIA (OR ANY ANALOGOUS LAW OF ANY OTHER STATE), WHICH READS AS FOLLOWS: "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH, IF KNOWN BY HIM, MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR."

9. TERM, TERMINATION AND SUSPENSION

9.1 This Transportation Company Agreement shall commence on the date this Agreement is accepted, for an indefinite period of time, unless terminated by either party by written notice with due observance of a notice period of seven (7) calendar days. Uber may terminate this Agreement automatically, without any notice requirement, at such moment when the Transportation Company and/or its Drivers no longer qualifies, under the applicable law or the quality standards of Uber, to provide the Driving Service or to operate the Vehicle.

9.2.1 Each party may terminate this Agreement or suspend the Agreement in respect of the other party, with immediate effect and without a notice of default being required in case of:

(a) a material breach by the other party of any term of the Agreement (including but not limited to breach of representations or receipt of a significant number of User complaints); or

(b) insolvency or bankruptcy of the other party, or upon the other party's filing or submission of request for suspension of payment (or similar action or event) against the terminating party.

9.3 Upon termination of the Agreement, the Transportation Company and/ or the Driver shall promptly return all Devices and all Data provided to either of them by Uber without withholding a copy thereof.

10. CONFIDENTIALITY

10.1 Parties understand and agree that in the performance of this Agreement, each party may have access to or may be exposed to, directly or indirectly, confidential information of the other party (the **"Confidential Information"**). Confidential Information includes Data, transaction volume, marketing and business plans, business, financial, technical, operational and such other non-public information that either a disclosing party designates as being private or confidential or of which a receiving party should reasonably know that it should be treated as private and confidential.

10.2 Each party agrees that: (a) all Confidential Information shall remain the exclusive property of the disclosing party and receiving party shall not use any Confidential Information for any purpose except in furtherance of this Agreement; (b) it shall maintain, and shall use prudent methods to cause its employees, officers, representatives, contracting parties and agents (the **"Permitted Persons"**) to maintain, the confidentiality and secrecy of the Confidential Information; (c) it shall disclose Confidential Information only to those Permitted Persons who need to know such information in furtherance of this Agreement; (d) it shall not, and shall use prudent methods to ensure that the Permitted Persons do not, copy, publish,

disclose to others or use (other than pursuant to the terms hereof) the Confidential Information; and (e) it shall return or destroy all ((hard and soft) copies of) Confidential Information upon written request of the other party.

10.3 Notwithstanding the foregoing, (a) Confidential Information shall not include any information to the extent it (i) is or becomes part of the public domain through no act or omission on the part of the receiving Party, (ii) was possessed by the receiving Party prior to the date of this Agreement, (iii) is disclosed to the receiving Party by a third party having no obligation of confidentiality with respect thereto, or (iv) is required to be disclosed pursuant to law, court order, subpoena or governmental authority, and (b) nothing in this Agreement shall prevent, limit or restrict a Party from disclosing this Agreement (including any technical, operational, performance and financial data (but excluding any User Data)) in confidence to an Affiliated Company.

11. LOCATION-BASED SERVICES

11.1. For the purpose of rendering the Service, the Transportation Company explicitly agrees and acknowledges, and procures that the Driver agrees and acknowledges, that geo-location information regarding the Driver who is available for the Driving Service or performing the Driving Service shall be monitored and traced through the Driver App via GPS tracking. The Device and the relevant details of the Driver and the Ride and the position of the Driver shall also be disclosed to the User on the App.

11.2 To provide location-based services on the Uber App and for analytical, marketing and commercial purposes of Uber, Uber may collect, use, and share precise geo-location data, including the real-time geographic location of You and the Drivers. This location data is used by Uber to provide and improve location-based products and services. Information You provide may be transferred or accessed by entities around the world. Uber abides by the "safe harbor" frameworks set forth by the U.S. Department of Commerce regarding the collection, use, and retention of personal information collected by organizations in the European Economic Area and Switzerland. You expressly consent to Uber's use of locations-based services and You expressly waive and release Uber from any and all liability, claims, causes of action or damages arising from Your use of the software or Uber service, or in any way relating to the use of the geo-location and other location-based services.

12 MODIFICATIONS

12.1 Uber reserves the right to modify the terms and conditions of this Agreement or at any time, effective upon publishing an updated version of this Agreement at http://www.uber.com or on the Software.

12.2 Transportation Company hereby expressly acknowledges and agrees that, by using or receiving the Uber Service, and downloading, installing or using the Software, Transportation Company and Uber are bound by any future amendments and additions to this Agreement or documents incorporated herein, including the Fee schedule. Continued use of the Uber Service or Software after any such changes shall constitute your consent to such changes. Transportation Company is responsible for regularly reviewing this Agreement.

13. MISCELLANEOUS

13.1 If any provision of this Agreement is or becomes invalid or non-binding, the parties shall remain bound by all other provisions hereof. In that event, the parties shall replace the

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invalid or non-binding provision by provisions that are valid and binding and that have, to the greatest extent possible, a similar effect as the invalid or non-binding provision, given the contents and purpose of this Agreement.

13.2 Neither party shall be entitled to assign, transfer, encumber any of its rights and/or the obligations under this Agreement without the prior written consent of the other party, provided that Uber may assign, transfer, encumber any of its rights and/or the obligations under this Agreement (in whole or in part or from time to time) to (a) an Affiliated Company or (b) in the event of a merger or sale of assets without the prior written consent of the Transportation Company.

13.3 This Agreement (including the schedules, annexes and appendixes, which form an integral part of this Agreement) constitutes the entire agreement and understanding of the parties with respect to its subject matter and replaces and supersedes all prior agreements, arrangements, offers, undertakings or statements regarding such subject matter.

14. GOVERNING LAW AND JURISDICTION

14.1 This Agreement shall be governed by California law, without regard to the choice or conflicts of law provisions of any jurisdiction, and any disputes, actions, claims or causes of action arising out of or in connection with this Agreement or the Uber Service or Software shall be subject to the exclusive jurisdiction of the state and federal courts located in the City and County of San Francisco, California. If any provision of the Agreement is held to be invalid or unenforceable, such provision shall be struck and the remaining provisions shall be enforced to the fullest extent under law. The failure of Uber to enforce any right or provision in this Agreement shall not constitute a waiver of such right or provision unless acknowledged and agreed to by Uber in writing. This Agreement and the documents incorporated by reference therein comprise the entire agreement between you and Uber and supersedes all prior or contemporaneous negotiations, discussions or agreements, whether written or oral, between the parties regarding the subject matter contained herein.

14.2 Other than disputes regarding the Intellectual Property Rights of the parties, any disputes, actions, claims or causes of action arising out of or in connection with this Agreement or the Uber Service or Software may be subject to arbitration pursuant to Section 14.3.

14.3 Arbitration.

i. How This Arbitration Provision Applies.

This Arbitration Provision is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. and evidences a transaction involving commerce. This Arbitration Provision applies to any dispute arising out of or related to this Agreement or termination of the Agreement and survives after the Agreement terminates. Nothing contained in this Arbitration Provision shall be construed to prevent or excuse You from utilizing any procedure for resolution of complaints established in this Agreement (if any), and this Arbitration Provision is not intended to be a substitute for the utilization of such procedures.

Except as it otherwise provides, this Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration. This Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial.

Such disputes include without limitation disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision.

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Except as it otherwise provides, this Arbitration Provision also applies, without limitation, to disputes arising out of or related to this Agreement and disputes arising out of or related to Your relationship with Uber, including termination of the relationship. This Arbitration Provision also applies, without limitation, to disputes regarding any city, county, state or federal wage-hour law, trade secrets, unfair competition, compensation, breaks and rest periods, expense reimbursement, termination, harassment and claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act (except for claims for employee benefits under any benefit plan sponsored by Uber and covered by the Employee Retirement Income Security Act of 1974 or funded by insurance), Genetic Information Non-Discrimination Act, and state statutes, if any, addressing the same or similar subject matters, and all other similar federal and state statutory and common law claims.

ii. Limitations On How This Agreement Applies.

This Arbitration Provision does not apply to claims for workers compensation, state disability insurance and unemployment insurance benefits.

Regardless of any other terms of this Arbitration Provision, claims may be brought before and remedies awarded by an administrative agency if applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include without limitation claims or charges brought before the Equal Employment Opportunity Commission (www.eeoc.gov), the U.S. Department of Labor (www.dol.gov), the National Labor Relations Board (www.nlrb.gov), or the Office of Federal Contract Compliance Programs (www.dol.gov/esa/ofccp). Nothing in this Arbitration Provision shall be deemed to preclude or excuse a party from bringing an administrative claim before any agency in order to fulfill the party's obligation to exhaust administrative remedies before making a claim in arbitration.

Disputes that may not be subject to predispute arbitration agreement as provided by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203) are excluded from the coverage of this Arbitration Provision.

This Arbitration Provision shall not be construed to require the arbitration of any claims against a contractor that may not be the subject of a mandatory arbitration agreement as provided by section 8116 of the Department of Defense ("DoD") Appropriations Act for Fiscal Year 2010 (Pub. L. 111-118), section 8102 of the Department of Defense ("DoD") Appropriations Act for Fiscal Year 2011 (Pub. L. 112-10, Division A), and their implementing regulations, or any successor DoD appropriations act addressing the arbitrability of claims.

iii. Selecting The Arbitrator and Location of the Arbitration.

The Arbitrator shall be selected by mutual agreement of Uber and You. Unless You and Uber mutually agree otherwise, the Arbitrator shall be an attorney licensed to practice in the location where the arbitration proceeding will be conducted or a retired federal or state judicial officer who presided in the jurisdiction where the arbitration will be conducted. If the Parties cannot agree on an Arbitrator, then an arbitrator will be selected using the alternate strike method from a list of five (5) neutral arbitrators provided by JAMS (Judicial Arbitration & Mediation Services). You will have the option of making the first strike. If a JAMS arbitrator is used, then the applicable JAMS rules will apply. The location of the arbitration proceeding shall be no more than 45 miles from the place where You last provided transportation services under this Agreement, unless each party to the arbitration agrees in writing otherwise.

iv. Starting The Arbitration.

All claims in arbitration are subject to the same statutes of limitation that would apply in court. The party bringing the claim must demand arbitration in writing and deliver the written demand by hand or first class mail to the other party within the applicable statute of limitations period. The demand for arbitration shall include identification of the Parties, a statement of the legal and factual basis of the claim(s), and a specification of the remedy sought. Any demand for arbitration made to Uber shall be provided to General Counsel, Uber Technologies, Inc., 182 Howard Street, # 8, San Francisco CA 94105. The arbitrator shall resolve all disputes regarding the timeliness or propriety of the demand for arbitration. A party may apply to a court of competent jurisdiction for temporary or preliminary injunctive relief in connection with an arbitrable controversy, but only upon the ground that the award to which that party may be entitled may be rendered ineffectual without such provisional relief.

v. How Arbitration Proceedings Are Conducted.

In arbitration, the Parties will have the right to conduct adequate civil discovery, bring dispositive motions, and present witnesses and evidence as needed to present their cases and defenses, and any disputes in this regard shall be resolved by the Arbitrator.

You and Uber agree to bring any dispute in arbitration on an individual basis only, and not on a class, collective, or private attorney general representative action basis. Accordingly,

(a) There will be no right or authority for any dispute to be brought, heard or arbitrated as a class action ("Class Action Waiver"). The Class Action Waiver shall not be severable from this Arbitration Provision in any case in which (1) the dispute is filed as a class action and (2) a civil court of competent jurisdiction finds the Class Action Waiver is unenforceable. In such instances, the class action must be litigated in a civil court of competent jurisdiction.

(b) There will be no right or authority for any dispute to be brought, heard or arbitrated as a collective action ("Collective Action Waiver"). The Collective Action Waiver shall not be severable from this Arbitration Provision in any case in which (1) the dispute is filed as a collective action and (2) a civil court of competent jurisdiction finds the Collective Action Waiver is unenforceable. In such instances, the collective action must be litigated in a civil court of competent jurisdiction.

(c) There will be no right or authority for any dispute to be brought, heard or arbitrated as a private attorney general representative action ("Private Attorney General Waiver"). The Private Attorney General Waiver shall not be severable from this Arbitration Provision in any case in which a civil court of competent jurisdiction finds the Private Attorney General Waiver is unenforceable. In such instances and where the claim is brought as a private attorney general, such private attorney general claim must be litigated in a civil court of competent jurisdiction.

Although you will not be retaliated against, disciplined or threatened with discipline as a result of you exercising your rights under Section 7 of the National Labor Relations Act by the filing of or participation in a class, collective or representative action in any forum, Uber may lawfully seek enforcement of this Arbitration Provision and the Class Action Waiver, Collective Action Waiver and Private Attorney General Waiver under the Federal Arbitration Act and seek dismissal of such class, collective or representative actions or claims. Notwithstanding any other clause contained in this Agreement, any claim that all or part of the Class Action Waiver, Collective Action Waiver or Private Attorney General Waiver is invalid, unenforceable, unconscionable, void or voidable may be determined only by a court of competent jurisdiction and not by an arbitrator.

The Class Action Waiver, Collective Action Waiver and Private Attorney General Waiver shall be severable in any case in which the dispute is filed as an individual action and severance is necessary to ensure that the individual action proceeds in arbitration.

vi. Paying For The Arbitration.

Each party will pay the fees for his, her or its own attorneys, subject to any remedies to which that party may later be entitled under applicable law. However, in all cases where required by law, Uber will pay the Arbitrator's and arbitration fees. If under applicable law Uber is not required to pay all of the Arbitrator's and/or arbitration fees, such fee(s) will be apportioned between the Parties in accordance with said applicable law, and any disputes in that regard will be resolved by the Arbitrator.

vii. The Arbitration Hearing And Award.

The Parties will arbitrate their dispute before the Arbitrator, who shall confer with the Parties regarding the conduct of the hearing and resolve any disputes the Parties may have in that regard. Within 30 days of the close of the arbitration hearing, or within a longer period of time as agreed to by the Parties or as ordered by the Arbitrator, any party will have the right to prepare, serve on the other party and file with the Arbitrator a brief. The Arbitrator may award any party any remedy to which that party is entitled under applicable law, but such remedies shall be limited to those that would be available to a party in his or her individual capacity in a court of law for the claims presented to and decided by the Arbitrator, and no remedies that otherwise would be available to an individual in a court of law will be forfeited by virtue of this Arbitration Provision. The Arbitrator will issue a decision or award in writing, stating the essential findings of fact and conclusions of law. Except as may be permitted or required by law, as determined by the Arbitrator, neither a party nor an Arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of all Parties. A court of competent jurisdiction shall have the authority to enter a judgment upon the award made pursuant to the arbitration. The Arbitrator shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error.

viii. Your Right To Opt Out Of Arbitration.

Arbitration is not a mandatory condition of your contractual relationship with Uber. If you do not want to be subject to this Arbitration Provision, you may opt out of this Arbitration Provision by notifying Uber in writing of your desire to opt out of this Arbitration Provision, which writing must be dated, signed and delivered by a nationally recognized overnight delivery service or by hand delivery to Uber Technologies, Inc., 182 Howard Street, #8 San Francisco, CA 94105 addressed to the attention of the General Counsel. In order to be effective, the writing must clearly indicate your intent to opt out of this Arbitration Provision and the envelope containing the signed writing **must be post-marked within 30 days** of the date this Agreement is executed by you. Your writing opting out of this Arbitration Provision will be filed with a copy of this Agreement and maintained by Uber. Should You not opt out of this Arbitration Provision within the 30-day period, You and Uber shall be bound by the terms of this Arbitration Provision. You have the right to consult with counsel of Your choice concerning this Arbitration Provision. You understand that You will not be subject to retaliation if You exercise Your right to assert claims or opt-out of coverage under this Arbitration Provision.

ix. Enforcement Of This Agreement.

This Arbitration Provision is the full and complete agreement relating to the formal resolution of disputes arising out of this Agreement. Except as stated in subsection v,

above, in the event any portion of this Arbitration Provision is deemed unenforceable, the remainder of this Arbitration Provision will be enforceable.

By clicking "I accept", You expressly acknowledge and agree to be bound by the terms and conditions of the Agreement, and further acknowledge that You are legally competent to enter into this Agreement with Uber.

Exhibit E

Driver Addendum Related To Uber Services

This Addendum Related to Uber Services (hereafter "Addendum") is hereby entered into by a Driver using ("Subcontractor") and a Transportation Company with which Uber Technologies, Inc. has executed a Software License and Online Services Agreement ("Transportation Company").

Subcontractor is an independent, for-hire transportation provider and currently maintains a contractual arrangement with Transportation Company to perform passenger carriage services for Transportation Company's customers.

Transportation Company has a separate contractual relationship with Uber Technologies, Inc. ("Uber") to access Uber's Software, through which customers in need of on-demand transportation services ("Users") may connect with Transportation Companies in the business of providing on-demand, professional passenger carriage services (the "Service").

In addition to the transportation services it regularly performs pursuant to its contractual arrangement with Transportation Company, Subcontractor is interested in receiving trip requests through the Service.

Transportation Company and Subcontractor desire to enter into this Addendum to define the terms and conditions under which Subcontractor may receive trip requests through the Service.

Therefore, in consideration of the foregoing, and for other good and valuable consideration, Subcontractor and Transportation Company agree as follows:

1. AGREEMENT TO SOFTWARE LICENSE AND ONLINE SERVICES AGREEMENT BETWEEN TRANSPORTATION COMPANY AND UBER: As a condition of receiving trip requests through the Service, Subcontractor hereby acknowledges and agrees to be bound by the Software License and Online Services Agreement between Transportation Company and Uber, a copy of which has been provided in connection herewith and can be found at www.uber.com and is incorporated by reference as though set forth fully herein.

1.1 Subcontractor understands that the terms "you" and "Transportation Company" as used in the Software License and Online Services Agreement are defined to include Subcontractor, and that the Software License and Online Services Agreement was intended by the parties to bind Subcontractor to the fullest extent permitted by law.

1.2 Subcontractor expressly acknowledges and agrees that, by using or receiving the Service and/or Software, Subcontractor is bound by any future amendments and additions to the Software License and Online Services Agreement or documents incorporated therein.

1.3 Subcontractor acknowledges that he/she currently possesses a valid driver's license and all licenses, permits, and other legal prerequisites necessary to perform the transportation for hire services contemplated by this Addendum, as required by states and/or localities in which he/she operates.

1.4 Subcontractor further agrees that, in order to obtain access to the Service and Software, Subcontractor may be required to submit to a criminal background check, drug test and/or motor vehicle report background search, the result(s) of which must be provided to Uber prior to Subcontractor's access to the Service pursuant to this Addendum, and/or provide proof of authority to operate a motor vehicle to provide commercial transportation services under this Addendum.

2. UBER'S STAR-RATING FRAMEWORK: As set forth in the Software License and Online Services Agreement, Uber only contracts with Transportation Companies whose personnel offer high quality service and professionalism. Therefore, Uber utilizes a five-star rating system designed to allow the Users of its Software to provide feedback on the level of service provided by those transportation providers who accept requests for transportation received via the Service. Subcontractor understands that there is a minimum star-rating Subcontractor must maintain to continue receiving access to the Service and Software.

2.1 Uber reserves the right, at all times and at Uber's sole discretion, to reclaim, prohibit, suspend, limit or otherwise restrict the Subcontractor from accessing or using the Driver App or the Device if the Transportation Company or its Drivers fail to maintain the standards of appearance and service required by the users of the Uber Software. In the event Subcontractor's star-rating falls below the applicable minimum star-rating, Uber will notify Transportation Company by email or other written means and, in turn, Transportation Company will notify Subcontractor. In the event his/her star-rating (based on User feedback) has not increased above the minimum, Uber may deactivate Subcontractor's access to the Software and Service.

3. INDEMNITY: Except as otherwise required by law, Subcontractor agrees to indemnify and hold harmless Uber and its Users against any and all liability, including attorneys' fees and other legal expenses, asserted against Uber or its Users arising directly or indirectly from Subcontractor's failure to comply with the provisions of the Software License and Online Services Agreement and this Addendum, exercise legally required due care in the performance of the services contemplated by this Addendum, or comply with all applicable laws, rules, ordinances and other legal requirements (including those relating to the Subcontractor's ownership, maintenance, operation and/or preparation of the equipment used to perform services under this Addendum).

4. INSURANCE: Subcontractor represents and agrees that he/she has or is otherwise covered by a valid policy of liability insurance (in industry-standard coverage amounts) with respect to Subcontractor's operation of a motor vehicle related to the performance of services contemplated by the Software License and Online Services Agreement and this Addendum.

5. DEACTIVATION FROM ACCESS TO THE SOFTWARE AND SERVICE: Subcontractor understands and agrees that Uber reserves the right to immediately deactivate Subcontractor's access to the Software and Service in the event of any act or omission by Subcontractor which constitutes a material breach of the Software License and Online Services Agreement between Transportation Company and Uber, including but not limited to, the following:

5.1 Subcontractor's refusal to fully complete a trip after acceptance of a trip request, as described in the Software License and Online Services Agreement, without waiver by the User or Uber.

5.2 Subcontractor's failure to maintain all license, permits, and insurance coverage required by law and/or this Addendum and/or the Software License and Online Services Agreement.

5.3 Subcontractor's refusal to reimburse a User or Uber for any damage or injury caused by Subcontractor.

5.4 A major driving violation, such as a citation for reckless driving, while transporting a User.

5.5 Intentional misrepresentations by You to a User or Uber, including intentionally taking an indirect route to the User's specified destination.

5.6 Violation of the Intellectual Property Ownership provision of the Software License and Online Services Agreement.

5.7 Documented complaint by a User that Subcontractor engaged in conduct that a reasonable person would find physically threatening, highly offensive or harassing.

Subcontractor's deactivation from access to the Software and Service shall not be deemed to alter, modify or waive any separate contractual provision between Transportation Company and Subcontractor, including with respect to termination of their separate contractual arrangement.

6. RELATIONSHIP BETWEEN UBER AND SUBCONTRACTOR: Subcontractor understands that his/her access to the Software and Service are in no way intended to create an employer-employee relationship between Uber and Subcontractor for any purpose. Subcontractor represents that he/she specifically desires to operate as an independent contractor with respect to the transportation services performed under this Addendum.

7. DISPUTE RESOLUTION: Subcontractor agrees that any dispute, claim or controversy and arising out of relating to this Addendum, or the breach, termination, enforcement, interpretation or validity thereof, or performance of transportation services pursuant to the Software License and Online Services Agreement, including, but not limited to the use of the Service or Software, will be settled by binding arbitration in accordance with the terms set forth in the Software License and Online Services Agreement. Upon any change to the Software License and Online Services Agreement, Uber shall provide written notice of such change(s) to Transportation Company, whose obligation it will be to inform Subcontractor.

BY CLICKING "I ACCEPT", THE PARTIES HERETO EXPRESSLY ACKNOWLEDGE AND AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THE AGREEMENT, AND FURTHER ACKNOWLEDGE THAT THEY ARE LEGALLY COMPETENT TO ENTER INTO THIS AGREEMENT.

Exhibit E

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Attorneys for Defendants
UBER TECHNOLOGIES, INC. AND RASIER, LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ABDUL KADIR MOHAMED, individually and on behalf of all others similarly-situated,

Plaintiff,

v.

UBER TECHNOLOGIES, INC., RASIER, LLC, and DOES 1-50, inclusive,

Defendants.

Case No. 3:14-cv-05200-EMC

DECLARATION OF MICHAEL COLMAN IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL ARBITRATION

Date: April 9, 2015
Time: 1:30 p.m.
Ctrm.: 5, 17th Floor

I, Michael Colman, hereby declare and state:

1. The information set forth herein is true and correct of my own personal knowledge (unless otherwise stated) and if asked to testify thereto, I would do so competently.

2. I am currently employed as an Operations Specialist for Uber Technologies, Inc. ("Uber"), and I work out of Uber's San Francisco location. I have been employed by Uber since October 7, 2011, and have worked as an Operations Specialist since February 2013. In that role, I consult with operations teams throughout the State of California regarding nearly every facet of Uber's operations and I have comprehensive personal knowledge of Uber's business model, as well as the operations of Uber's wholly-owned subsidiary, Rasier, LLC.

3. Uber is a technology company that connects individuals in need of a ride ("riders") with available, independent transportation providers looking for passengers. Uber provides the technology, through its smartphone application (the "app"), that allows riders and transportation providers to connect based on their location. Using the app, riders can connect with available transportation providers offering a variety of transportation options. The UberBLACK platform connects users to limousines or town cars operated by transportation companies. The UberX platform connects users to cars operated by private individuals. Rasier, LLC ("Rasier") is engaged in the business of providing lead generation to independent transportation providers comprised of requests for transportation service made by individuals using Uber's app. Through its license of the Uber app, Rasier provides a platform for individuals to connect with independent transportation providers. Rasier contracts with independent transportation providers who wish to be part of the UberX platform.

4. Uber's app is available to riders and transportation providers in over 100 cities across the country.

5. As Operations Specialist, I am familiar with how the Uber app functions from the perspective of the transportation provider and/or driver. I am also familiar with the process transportation providers and drivers go through to sign up to use the app and the various documents to which transportation providers and drivers must agree to in order to use the app. As an Operations Specialist, I also have access to Uber's business records reflecting the identity of the

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transportation providers that use the app, as well as any drivers those transportation providers have engaged. These records are maintained in the regular course of Uber's business and updated with changes as new transportation providers and drivers join and leave the system.

6. Any transportation provider that wishes to access Uber's UberBLACK software platform to book passengers must first enter into a Software License & Online Services Agreement ("Licensing Agreement") with Uber. Transportation providers are free to engage drivers to provide transportation services on their behalf. Individual drivers who work for transportation providers may sign up to use the app to book passengers under a transportation provider's account, but must first enter into both the Licensing Agreement and the Driver Addendum Related to Uber Services ("Driver Addendum"). On occasion, Uber rolls out updated Licensing Agreements and Driver Addendums and transportation providers and drivers must agree to those updated documents in order to access the app. Any transportation provider that wishes to access Uber's UberX software platform to book passengers must first enter into a separate agreement with Rasier ("Rasier Agreement").

7. I also have access to Uber's databases reflecting the dates and times the transportation providers and drivers agreed to the Licensing Agreement and, if applicable, any Driver Addendum, or Rasier Agreement, as well as any updates to those documents. These databases are maintained in the regular course of Uber's business and updated automatically as transportation providers and drivers agree to these documents. Specifically, an electronic receipt is generated at the time the transportation provider or driver agrees to the documents.

8. Based on my review of Uber's business records, on or about November 2, 2012, Plaintiff Abdul Kadir Mohamed ("Plaintiff") signed up to use the Uber app to book passengers under the account for Gedi Limo, Inc. which operates in and around Boston, Massachusetts.

9. On or about July 22, 2013, Uber notified Boston-area transportation providers and drivers that it was planning on rolling out a new Licensing Agreement and Driver Addendum within the next couple of weeks. The email notifying Boston-area transportation providers and drivers that these documents would be rolled out included links to the documents to provide transportation providers and drivers an opportunity to review them. A true and correct copy of the email is attached

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as Exhibit A. I have personal knowledge that this email was sent to the email address of every active Boston-area transportation provider on July 22, 2013, and the records reflected in Exhibit A are maintained by Uber in the regular course of Uber's business as they are created, and I have access to them.

10. After Uber rolled out the Licensing Agreement and Driver Addendum, when transportation providers and drivers logged on to the app they saw the screenshot attached as Exhibit B. Within the app, this screen contained links to the Licensing Agreement and Driver Addendum (as well as the City Addendum) which the transportation provider or driver could have clicked in order to review prior to hitting "Yes, I agree." By clicking on the link, the transportation provider or driver could review the document referenced. After hitting "Yes, I agree," the app prompted the transportation provider or driver to confirm that he or she agreed to the updated documents. This confirmation screen appeared similar in form to the confirmation screen currently in place today, a screenshot of which is attached as Exhibit C. I am familiar with this process based on my experience as an Operations Specialist.

11. According to Uber' s records, Plaintiff accepted the updated Licensing Agreement and Driver Addendum on July 31, 2013. The process described in paragraph 10 is the same process Plaintiff would have gone through when he logged into the app prior to accepting the updated Licensing Agreement and Driver Addendum. Attached hereto as Exhibits D and E respectively are true and correct copies of the Licensing Agreement and Driver Addendum agreed to by Plaintiff on July 29, 2013.

12. According to Uber' s records, Plaintiff accepted another updated Licensing Agreement and Driver Addendum on July 31, 2014, though the same process described in paragraph 10, and the same process Plaintiff would have gone through when he logged into the app prior to accepting the updated Licensing Agreement and Driver Addendum. Attached hereto as Exhibits F and G respectively are true and correct copies of the Licensing Agreement and Driver Addendum agreed to by Plaintiff on July 31, 2014.

13. Uber received an electronic receipt when Plaintiff accepted the Licensing Agreement and Driver Addendum on July 31, 2013 and July 31, 2014. A true and correct copy of the receipts

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that Uber received following Plaintiff's acceptance of the agreements is embedded below. The receipts include a date and time stamp indicating Plaintiff's acceptance:

Driver ID	First Name	Last Name	Date Accepted Agreements	Doc ID Shown
773477	Abdulkadir	Mohamed	2013-07-31 11:38:25.845170	https://s3.amazonaws.com/uber-regulatory-documents/country/united_states/licensed/Software+License+and+Online+Services+Agreement.pdf? and https://s3.amazonaws.com/uber-regulatory-documents/country/united_states/licensed/Driver+Addendum.pdf?
773477	Abdulkadir	Mohamed	2014-07-31 08:42:43.436774	https://uber-regulatory-documents.s3.amazonaws.com/country/united_states/licensed/Software%20License%20Agreement%20June%2021%202014.pdf and https://uber-regulatory-documents.s3.amazonaws.com/country/united_states/licensed/Driver%20Addenda%20June%2021%202014.pdf

14. As Operations Specialist, I also have access to Uber's business records reflecting the names of those individuals who have decided to opt out of the Arbitration Provision contained in Uber's Licensing Agreement. There is no record that Plaintiff ever opted out under either agreement.

15. According to Uber's records, Plaintiff accepted the Rasier Agreement on October 3, 2014, to use the Uber app to book passengers under the UberX platform, though the same process described in paragraph 10, and the same process Plaintiff would have gone through when he logged into the app prior to accepting the Rasier Agreement. Attached hereto as Exhibit H is a true and correct copy of the Rasier Agreement agreed to by Plaintiff on October 3, 2014.

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16. Uber received an electronic receipt when Plaintiff accepted the Rasier Agreement on October 3, 2014. A true and correct copy of the receipt that Uber received following Plaintiff's acceptance of the Rasier Agreement is embedded below. The receipt includes a date and time stamp indicating Plaintiff's acceptance:

Driver ID	First Name	Last Name	Date Accepted Agreements	Doc ID Shown
18655447	Abdulkadir	Mohamed	2014-10-03 18:45:56.359139	https://uber-regulatory-documents.s3.amazonaws.com/country/united_states/p2p/Rasier%20Software%20Sublicense%20Agreement%20June%2021%202014.pdf

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

Executed at San Francisco, California, this 6th day of February, 2015.

MICHAEL COLMAN

LITTLER MENDELSON, P.C.
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EXHIBIT F

SOFTWARE LICENSE AND ONLINE SERVICES AGREEMENT

This Agreement constitutes a legal agreement between you ("Transportation Company" or "You") and Uber Technologies, Inc., a Delaware corporation ("Uber" or "Vendor").

Uber is the developer of a mobile application and associated software (the "Software" as defined below) and the Uber Services (as defined below). The mobile application and Software enables a person who has downloaded a copy of the Uber App (as defined below) and signed up as a user to request transportation services from transportation companies who have executed this Agreement and have downloaded and are using the Driver App (as defined below).

Uber does not provide transportation services and is not a transportation carrier.

You are an independent company in the business of providing transportation services, which business you are authorized to conduct in the state(s) and jurisdiction(s) in which you operate. As used herein, "You" and "Transportation Company" shall include your employees, subcontractors, agents and representatives, all of which shall be bound by the terms of this Agreement. You desire to enter into this Agreement for the purpose of accessing and using the Uber Services and Software to increase your transportation business.

In order to use the Uber Services and the associated Software, You must agree to the terms and conditions that are set out below. Upon Your electronic execution of this Agreement, You and Uber shall be bound by the terms and conditions set forth herein.

IMPORTANT: PLEASE NOTE THAT TO USE THE UBER SERVICES AND THE ASSOCIATED SOFTWARE, YOU MUST AGREE TO THE TERMS AND CONDITIONS SET FORTH BELOW. PLEASE REVIEW THE ARBITRATION PROVISION SET FORTH BELOW IN SECTION 14.3 CAREFULLY, AS IT WILL REQUIRE YOU TO RESOLVE DISPUTES WITH UBER ON AN INDIVIDUAL BASIS THROUGH FINAL AND BINDING ARBITRATION UNLESS YOU CHOOSE TO OPT OUT OF THE ARBITRATION PROVISION. BY VIRTUE OF YOUR ELECTRONIC EXECUTION OF THIS AGREEMENT, YOU WILL BE ACKNOWLEDGING THAT YOU HAVE READ AND UNDERSTOOD ALL OF THE TERMS OF THIS AGREEMENT (INCLUDING SECTION 14.3) AND HAVE TAKEN TIME TO CONSIDER THE CONSEQUENCES OF THIS IMPORTANT BUSINESS DECISION. IF YOU DO NOT WISH TO BE SUBJECT TO ARBITRATION, YOU MAY OPT OUT OF THE ARBITRATION PROVISION BY FOLLOWING THE INSTRUCTIONS PROVIDED IN SECTION 14.3 BELOW.

1. DEFINITIONS

In addition to the terms defined elsewhere in this Agreement, the following definitions apply:

1.1 "**Affiliated Company**" means a company that directly or indirectly is under control of or controls that relevant party, by having more than fifty percent (50%) of the voting stock or other ownership interest or the majority of the voting rights.

1.2 "**App**" means the software application developed, owned, controlled, managed, maintained, hosted, licensed and/or designed by Uber (or its Affiliated Companies) to run on smartphones, tablet computers and/or other devices, through which the Uber Service is made available.

1.3 "**Change Notice**" has the meaning as set out in Section 5.4 (Invoice Terms).

1.4 "**City**" means the state, city, municipality, place, region or territory in which the Driving Service shall be made available by the Transportation Company.

1.5 "**Data**" means all data with regard to or transmitted using the Device, the App, the Driver App, the Uber Service or the Driver ID, or data relating to the User and/or the Ride.

1.6 "**Device**" means the relevant smartphone or such other device as made available by Uber (in its sole discretion) to the Driver in order for the Driver to use and have (limited) access to the Uber Service and to enable the Driver in providing the Driving Service to the Users.

1.7 "**Driver**" means the person who is a member, employee, contractor or business affiliate of, or otherwise retained by the Transportation Company and who shall render the Driving Service of whom the relevant contact details (including copy of the driver's license) are provided to Uber.

1.8 "**Driver Addendum**" means the applicable terms and conditions that Transportation Company is required to enter into with all Drivers prior to allowing access to the Software and Uber Services. The Driver Addendum is available at www.uber.com, and is specific to certain Uber products and Driver's location. Uber may update the Driver Addendum from time to time at its sole discretion. By consenting to this agreement, You are consenting to the Driver Addendum.

1.9 "**Driver App**" means the software application developed, owned, controlled, managed, maintained, hosted, licensed and/or designed by Uber (or its Affiliated Companies) to run on the Device.

1.10 "**Driver ID**" means the identification and password key allotted by Uber to a Driver by which the Driver can access and use the Driver App and Device.

1.11 "**Driving Service**" means the transportation service as provided, made available or rendered by the Transportation Company (through the Driver (as applicable) with the Vehicle) upon request of the User through the App.

1.12 "**Fare**" means the amount (including applicable taxes and fees) that the Transportation Company is entitled to charge the User for the Ride, based on the recommended fares for the City as set out on http://www.uber.com or on the App.

1.13 "**Fee**" means the commission paid by the Transportation Company to Uber for the Service.

1.14 "**Intellectual Property Right**" means any patent, copyright, invention, database right, design right, registered design, trademark, trade name, brand, logo, slogan, service mark, know-how, utility model, unregistered design or, where relevant, any application for any such right, know-how, trade or business name, domain name (under whatever extension, e.g. .com, .nl, .fr, .eu, etc.) or other similar right or obligation whether registered or unregistered or other industrial or intellectual property right subsisting in any territory or jurisdiction anywhere in the world.

1.15 "**Ride**" means the transportation of the User by the Driver from the point of pick-up of the User until the point of drop-off of the User.

1.16 "**Software**" means Uber's mobile application and associated software, including but not limited to the App and Driver App.

1.17 "**Toll Charges**" means any and all road, bridge, ferry, tunnel and airport toll charges, including inner-city congestion, environmental or similar charges.

1.18 "**Uber Service**" means the on-demand, lead-generation service through the App, SMS (text messaging), web based requests or such other platforms, communication media or channels as are from time to time operated and made available by or on behalf of Uber that allow a User to request Driving Service from a Driver (who shall render the Driving Service on behalf of the Transportation Company) as available to and accepted by the User. "Uber Service" also includes Uber's arrangement for a third party payment processor or mobile payment platform to process the Fare for a Ride requested via the App and distribution of the Fare (minus the Fee) to the Transportation Company.

1.19 "**User**" means a person who has signed up and is registered with Uber for the use of the App and/or the Uber Service.

1.20 "**User Information**" Information provided by Uber to the Driver via the Driver App indicating the User's name, the User's pick-up location and photo of the User, if the User has elected to include a photo in the User's profile with Uber.

1.21 "**Vehicle**" means any motorized vehicle (whether powered by an internal combustion, hybrid or an electrical engine) that is in safe and clean condition and fit for passenger transportation as required by applicable laws and regulations and that has been accepted by Uber and identified as the vehicle to be used by the Driver in the provision of the Driving Service.

1.22 "**Website**" means the Uber website www.uber.com.

2. LICENSE GRANT

2.1 Use of and access to the Driver App
Uber hereby grants Transportation Company a non-exclusive, non-transferable, right to use the Software and Uber Service, subject to the terms and conditions of this Agreement for the sole purpose of providing and rendering the Driving Service in and/or from within the City to and for the benefit of the Users. All rights not expressly granted to you are reserved by Uber and its licensors.

2.2 Restrictions.

Transportation Company shall not and will ensure that Driver does not (i) license, sublicense, sell, resell, transfer, assign, distribute or otherwise commercially exploit or make available to any third party the Uber Service, the Software, or the Device in any way; (ii) modify or make derivative works based upon the Uber Service or the Software; (iii) create Internet "links" to the Uber Service or Software or "frame" or "mirror" any Software on any other server or wireless or Internet-based device; (iv) reverse engineer, decompile, modify, or disassemble, except as allowed under the applicable law; (v) access the Software in order to (a) build a competitive product or service, (b) build a product using similar ideas, features, functions or graphics of the Uber Service or Software, or (c) copy any ideas, features, functions or graphics of the Uber Service or Software; or (vi) launch an automated program or script, including, but not limited to, web spiders, web crawlers, web robots, web ants, web indexers, bots, viruses or worms, or any program which may make multiple server requests per second, or unduly burdens or hinders the operation and/or performance of the Uber Service or Software.

Transportation Company may not use the Software and Uber Service to: (i) send spam or otherwise duplicative or unsolicited messages in violation of applicable laws; (ii) send or store infringing, obscene, threatening, libelous, or otherwise unlawful or tortious material, including material harmful to children or violative of third party privacy rights; (iii) send or store material containing software viruses, worms, Trojan horses or other harmful computer code, files, scripts, agents or programs; (iv) interfere with or disrupt the integrity or performance of the Software or Service or the data contained therein; or (v) attempt to gain unauthorized access to the Software or Service or its related systems or networks.

2.3 Unavailability. The Transportation Company acknowledges and agrees that the Software or the Uber Service may, from time to time, be unavailable (e.g. due to scheduled maintenance or system upgrades) and that Uber cannot, and does not, guarantee an specific or minimum availability of the Software or the Uber Service.

2.4 Ownership. Uber (and its Affiliated Companies and licensors, where applicable) shall own and have all rights (including Intellectual Property Rights) in and to the Device, the Software, the Uber Service, the Driver ID and the Data. Insofar the Transportation Company and/or Driver may, by operation of applicable law or otherwise, obtain any rights (including Intellectual Property Rights) in relation thereto, these rights shall be and are hereby transferred (insofar permitted under the applicable law, in advance) to Uber (rights obtained by any Driver should be transferred via the Transportation Company). Where a

transfer may not be permissible under the applicable mandatory law, the Transportation Company hereby undertakes to grant and to procure from the Driver a grant to Uber of a perpetual, exclusive (exclusive also with regard to Transportation Company and/or Driver), world-wide and transferable right and license under any such non-transferable rights.

3. OBLIGATIONS OF THE TRANSPORTATION COMPANY

3.1 Transportation Company shall have the sole responsibility for any obligations or liabilities to Drivers, Users or third parties that arise from its provision of the Driving Service.

3.2 By using the Uber Services to receive and accept requests for transportation and by providing the Driving Service to the User, the Transportation Company accepts, agrees and acknowledges that a direct legal relationship is created and assumed solely between the Transportation Company and the User. Uber shall not be responsible or liable for the actions, omissions and behavior of the User in or in relation to the activities of the Transportation Company, the Driver and the Vehicle.

3.3 Transportation Company acknowledges and agrees that it and the Driver are solely responsible for taking such precautions as may be reasonable and proper (including taking out adequate insurance in conformity with standard market practice and in conformance with any applicable regulations or other licensing requirements) regarding any acts or omissions of the User. Transportation Company acknowledges and agrees that Uber may release the contact or insurance information of Transportation Company to a User upon User request.

3.4 The Transportation Company represents and undertakes to procure that the Driver shall comply with, adhere to and observe the terms and conditions set forth in this Agreement, the Driver Addendum, and all applicable laws, regulations, rules, statutes or ordinances governing or otherwise relating to the Driving Service. To the extent required, the Transportation Company hereby agrees and ensures that the rights, covenants, undertakings, representations and obligations of the Driver as set out in this Agreement shall apply to, and be assumed, accepted and taken over by the Driver. The Transportation Company shall provide copies of all executed Driver Addendums to Uber upon Uber's request.

3.5 The Transportation Company acknowledges and agrees that it exercises sole control over the Driver and will comply with all applicable laws and regulations (including tax, social security and employment laws) governing or otherwise applicable to its relationship with the Driver. Uber does not and does not intend to exercise any control over the Driver's (or the Transportation Company's) actions or the operation or physical condition of the Vehicle (except as provided under the Agreement).

3.6 Transportation Company undertakes that it will, and that it will ensure that its Driver(s) will, safeguard, protect and keep the Driver ID at all times confidential and safely stored and shall not disclose it to any person other than those who need to have access to the Driver ID in order to render and/or provide the Driving Service.

3.7 Transportation Company undertakes that it will, and that it will ensure that its Driver(s) will, safeguard, protect and keep the User Information received from Uber and the details of any Ride, at all times confidential and shall not disclose it to any person or store the information in any manner, except as required by law.

3.8 Transportation Company will immediately notify Uber of any actual or suspected security breach or improper use of the Device, the Driver App, the Driver ID, the Data or of the User Information.

3.9 Transportation Company and Drivers have complete discretion to operate their independent businesses in good faith including providing transportation services separate

from those obtained using the Driver App. Access to the Driver App may be suspended or revoked, however, if Transportation Company or Drivers unlawfully, unfairly or in bad faith disparage Uber.

4. USE OF UBER SERVICE AND SOFTWARE BY DRIVERS

4.1 Driver ID

4.1.1 Uber will issue the Transportation Company a Driver ID for each Driver retained by the Transportation Company to enable Transportation Company and/or the Driver (as applicable) to access and use the Driver App and the Device in accordance with the Driver Addendum. Uber will have the right, at all times and at Uber's sole discretion, to reclaim, prohibit, suspend, limit or otherwise restrict the Transportation Company and/or the Driver from accessing or using the Driver App or the Device. Uber may charge a fee for the use of the Device or request a retainer fee and/or a security deposit per Device.

4.2 Information provided to Users

4.2.1 Once the Driver has accepted a User's request for transportation, Uber will provide the User Information to the Driver via the Driver App, including the User's location. The User shall inform the Driver of the destination. Transportation Company acknowledges and agrees that once the Driver has accepted a User's request for transportation, Uber may provide specific information to the User regarding the Transportation Company and Driver in relation to the Driving Service, including but not limited to the Transportation Company's name, Driver's name, Driver's photo, license number, geo-location and contact information.

4.2.2 The Transportation Company and its Drivers retain the sole right to determine when and for how long each of them will utilize the Software and Services to receive lead generation service. The Transportation Company and its Drivers also retain the option to accept or reject each request for transportation received via the Driver App. However, Transportation Company and Driver agree to utilize the App at least once a month to accept a request for transportation.

4.3 Driver and User Review.

4.3.1 Users who have used the Driving Service will be asked by Uber to comment on the Driving Service and to provide a score for the Driving Service and the Driver. Uber reserves the right to post these comments and scores on the App or the Website (or such other platforms as owned, managed, controlled or managed by Uber) without reference to the Customer, Transportation Company or Driver. Uber shall also request the Transportation Company and/or the Driver to comment on and to provide a score for the User on the Driver App. Transportation Company will and will require that its Drivers will provide accurate and objective feedback that does not violate any applicable laws and regulations.

4.3.2 The Transportation Company acknowledges that Uber is a distributor (without any obligation to verify) and not a publisher of these comments and scores. Uber reserves the right to refuse, edit or remove unfavorable reviews in the event that such reviews include obscenities or mention an individual's name or violate any privacy laws or any other applicable laws and regulations. Beyond the legal and regulatory requirements, Uber shall not have and hereby disclaims any liability and responsibility for the content and consequences of (the publication or distribution of) any comments, scores or reviews howsoever or whatsoever.

4.3.3 The Transportation Company acknowledges that Uber desires to provide users of its Software with the opportunity to connect with Transportation Companies that maintain the highest standards of professionalism. Transportation Company agrees that its Drivers will maintain high standards of professionalism and service, including but not limited to professional attire and maintaining an average Customer score set by Uber based on feedback from users of its Software. Uber utilizes a five-star rating system designed to allow the Users of its Software to provide feedback on the level of service provided by those transportation providers who accept requests for transportation received via the

Service. Transportation Company understands that there is a minimum star-rating Drivers must maintain to continue receiving access to the Service and Software. In the event a Driver's star-rating falls below the applicable minimum star-rating, Uber will notify Transportation Company by email or other written means. In the event the star-rating (based on User feedback) has not increased above the minimum, Uber may deactivate the Driver's access to the Software and Service. Uber reserves the right, at all times and at Uber's sole discretion, to reclaim, prohibit, suspend, limit or otherwise restrict the Transportation Company and/or the Driver from accessing or using the Driver App or the Device if the Transportation Company or its Drivers fail to maintain the standards of appearance and service required by the users of the Uber Software.

4.4 Disclosure of Information. In case of a complaint, dispute or conflict between the Transportation Company or the Driver on the one hand and the User on the other hand or in other appropriate instances where a legitimate reason for such disclosure exists (for example, receipt by Uber of a subpoena or warrant requesting information), Uber may, but shall not be required to – to the extent permitted by applicable laws and regulations – provide the User, Transportation Company, the Driver and/or the relevant authorities the relevant data (including personal data) of the Transportation Company or the Driver. Uber may also disclose certain information of the Transportation Company or the Driver as set forth in this Agreement.

5. CALCULATION OF FARES AND FEES

5.1 Fares

5.1.1 The recommended pricing structure used in calculating the Fare for the Driving Service can be found at www.uber.com, or on the App or can at any time be communicated to the Transportation Company by Uber.

5.1.2 As part of its Services provided to Transportation Company, Uber will arrange for a third party payment processor or mobile payment platform to process the Fare for a Ride requested via the App to the User designated credit card or mobile payment platform.

5.1.3 Transportation Company understands and agrees that, for the mutual benefit of the Parties, Uber may endeavor to attract new Users to the Service and Software, and to increase existing Users' use of the Service and Software, through advertising and marketing to the effect that tipping the Transportation Company and/or its Drivers is "voluntary," "not required," and/or "included" in the Fare paid by the User. Transportation Company understands that the aim of advertising and marketing to the effect that there is no need to leave a tip is ultimately to increase the number of trip requests the Transportation Company and/or its Drivers receive through the Service and Software. Transportation Company agrees that the existence of any such advertising or marketing does not entitle Transportation Company to any payment beyond the payment of Fares to Transportation Company as provided in this Agreement.

5.1.4 Transportation Company acknowledges and agrees that, in Uber's sole discretion, a User's cancellation fee may be waived.

5.2 Fee

5.2.1 Transportation Company shall pay Uber a Fee per Ride, which shall be set by Uber at Uber's sole discretion based upon local market factors and may be subject to change. The Fee is calculated as a percentage of each Fare. The Fare will be collected by Uber for and on behalf of the Transportation Company. Transportation Company agrees and requests that Uber deduct its Fee payable on all Fares earned by the Transportation Company and remit the remainder of the Fare to Transportation Company. The Fee is set forth in the City Addendum. The City Addendum may change from time to time. Transportation Company and Drivers can always view the most current City Addendum at http://www.uber.com and also will receive written notice in the event of a change in Fee percentage.

UBER

5.3 Invoicing and payment terms

5.3.1 Payment of the Fares to Transportation Company shall be made in accordance with the payment method as set forth in the Driver Addendum.

5.3.2 Uber operates, and the Transportation Company accepts, a system for receipts being issued by Uber for and on behalf of the Transportation Company to the User. The receipts, which are issued by Uber for and on behalf of the Transportation Company to the User shall be sent in copy by email or made available online to the Transportation Company. The receipts may include specific information regarding the Transportation Company and Driver in relation to the Driving Service, including but not limited to the Transportation Company's name, Driver's name, Driver's photo, license number, geo-location and contact information.

The Transportation Company represents that it will ensure that the Driver will notify Uber of any corrections necessary to the receipt for a Ride within three (3) business days after each Ride. Unless Uber receives timely notification (three (3) business days) of any correction needed, Uber shall not be liable for any mistakes in the receipt or in any calculation of the Fares that are remitted to the Transportation Company pursuant to the terms of section 5.2.1.

6. REPRESENTATIONS

6.1 Transportation Company/Driver representations

6.1.1 The Transportation Company represents to Uber and shall ensure that the Driver shall represent to Transportation Company, that for the term of this Agreement:

(i) it holds, complies and shall continue to hold and comply with all permits, licenses and other governmental authorisations necessary for conducting, carrying out and continuing their activities, operations and business in general and the Driving Service in particular;

(ii) shall comply with all local laws and regulations, including the laws related to the operation of a taxi/passenger delivery, driving service or transportation service and will be solely responsible for any violations of such local laws and regulations;

(iii) the Driver has a valid driver's license and is authorized to operate the Vehicle as set out in the Driver Addendum and has all the appropriate licenses, approvals and authority to provide transportation for hire to third parties in the City where the Driving Service is rendered or performed;

(iv) it has appropriate and up-to-date level of expertise and experience to enable and provide the Driving Service and the Driving Service will be supplied, provided and supported by appropriately qualified and trained Drivers acting with due skill, care and diligence;

(v) the Transportation Company and the Driver have and maintain a valid policy for the appropriate (transportation, personal injury, third party or general) liability insurance and such other insurances as are considered market practice (all in industry-standard coverage amounts) for the operation of the Vehicle and/or business insurance to cover any anticipated risks, damages and losses related to the operation of a taxi/passenger delivery, driving service or transportation services (including the Driving Service), and not less than the minimum coverage amounts required by applicable law. The Transportation Company shall add Uber to its liability insurance policy as an additional insured, and shall upon first request of Uber provide Uber with a copy of the insurance certificate.

(vi) the Transportation Company's employees are covered by workers' compensation insurance, as required by law. If permitted by law, Transportation Company may choose to insure itself against industrial injuries by maintaining occupational accident insurance in place of workers' compensation insurance. Transportation Company's subcontractors may also, to the extent permitted by law, maintain occupational accident insurance in place of workers' compensation insurance.

(vii) the Vehicle is kept in a clean condition at all times, such Vehicle is in good operating condition and meets the industry safety standards for a Vehicle of its kind;

(viii) the Driver and the Vehicle maintain at all times the star rating quality described in Section 4.3.3 above.

(ix) Transportation Company is the owner or lessee, or are otherwise in lawful possession of a Vehicle or Vehicles, and said Vehicle or Vehicles are suitable for performing the commercial carriage services contemplated by this Agreement, which equipment complies with all applicable federal, state and local laws.

6.2 Disclaimer

6.2.1 Uber provides, and the Transportation Company accepts, the Service, the Device and Driver App on an "as is" and "as available" basis. Uber does not warrant or guarantee that the Transportation Company, the Driver or the User's access to or use of the Service, the Website, the Device, the App or the Driver App will be uninterrupted or error free.

6.2.2 **Internet Delays**. THE UBER SERVICE AND SOFTWARE MAY BE SUBJECT TO LIMITATIONS, DELAYS, AND OTHER PROBLEMS INHERENT IN THE USE OF THE INTERNET AND ELECTRONIC COMMUNICATIONS. THE COMPANY IS NOT RESPONSIBLE FOR ANY DELAYS, DELIVERY FAILURES, OR OTHER DAMAGE RESULTING FROM SUCH PROBLEMS.

6.3 Transportation Company/ Driver indemnifications

6.3.1 Subject to the exceptions set forth in this Agreement, the Transportation Company agrees and undertakes and ensures that the Transportation Company will indemnify, defend and hold Uber (and its Affiliated Companies and employees and, at the request of Uber, Uber's licensors, suppliers, officers, directors and subcontractors) harmless from and against any and all claims, demands, expenses (including legal fees), damages, penalties, fines, social contributions and taxes by a third party (including Users, regulators and governmental authorities) directly or indirectly related to this Agreement.

6.3.2 The Transportation Company is solely responsible for ensuring that Drivers take reasonable and appropriate precautions in relation to any third party with which they interact in connection with the Driving Service. Where this allocation of the parties' mutual responsibilities may be ineffective under applicable law, the Transportation Company undertakes to indemnify, defend and hold Uber harmless from and against any claims that may be brought against Uber in relation to the Transportation Company's or Driver's provision of the Driving Service under such applicable law as further set forth in Section 6.3 (Indemnification).

7.0 RELATIONSHIP BETWEEN THE PARTIES

7.1 The relationship between the Parties is solely that of independent contracting parties.

7.2 The Parties expressly agree that this Agreement is not an employment agreement or employment relationship. The parties further agree that no employment contract is created between Uber and the Drivers.

7.3 The Parties expressly agree that no joint venture, partnership, employment, or agency relationship exists between you, Uber or any third party provider as a result of this Agreement or use of the Uber Service or Software.

7.4 The Transportation Company acknowledges and agrees that it has no authority to bind Uber and undertakes not to hold itself out and to ensure that the Driver does not hold himself or herself out, as an employee, agent or authorized representative of Uber. Where, by implication of mandatory law or otherwise, the Driver and/or the Transportation Company may be deemed an agent or representative of Uber, the Transportation Company

undertakes and agrees to indemnify, defend and hold Uber harmless from and against any claims by any person or entity based on such implied agency relationship.

8. LIABILITY

8.1 IN NO EVENT SHALL UBER'S AGGREGATE LIABILITY EXCEED THE FEES ACTUALLY PAID BY AND/OR DUE FROM TRANSPORTATION COMPANY IN THE SIX (6) MONTH PERIOD IMMEDIATELY PRECEDING THE EVENT GIVING RISE TO SUCH CLAIM. IN NO EVENT SHALL UBER AND/OR ITS LICENSORS BE LIABLE TO ANYONE FOR ANY INDIRECT, PUNITIVE, SPECIAL, EXEMPLARY, INCIDENTAL, CONSEQUENTIAL OR OTHER DAMAGES OF ANY TYPE OR KIND (INCLUDING PERSONAL INJURY, LOSS OF DATA, REVENUE, PROFITS, USE OR OTHER ECONOMIC ADVANTAGE). UBER AND/OR ITS LICENSORS SHALL NOT BE LIABLE FOR ANY LOSS, DAMAGE OR INJURY WHICH MAY BE INCURRED BY TRANSPORTATION COMPANY, INCLUDING BUT NOT LIMITED TO LOSS, DAMAGE OR INJURY ARISING OUT OF, OR IN ANY WAY CONNECTED WITH THE UBER SERVICE OR SOFTWARE, INCLUDING BUT NOT LIMITED TO THE USE OR INABILITY TO USE THE UBER SERVICE OR SOFTWARE.

8.2 If the disclaimer of liability by Uber as set out in Clause 8.1 shall, for some reason, not have any effect, the maximum aggregate liability of Uber vis-a-vis the Transportation Company and its Drivers collectively, is limited to 50% of the total amount of the Fee paid to Uber by the Transportation Company in the year (12 months) preceding the event that led to the liability.

8.3 All defenses (including limitations and exclusions of liability) in favor of Uber apply (i) regardless of the ground upon which a liability is based (whether default, tort or otherwise), (ii) irrespective of the type of breach of obligations (guarantees, contractual obligations or otherwise), (iii) for all events and all agreements together, (iv) insofar no event of wilful misconduct or gross negligence of Uber or its management has occurred, and (v) also for the benefit of its Affiliated Companies and employees and, at the request of Uber, Uber's licensors, suppliers and subcontractors.

8.4 Uber makes no guarantees, warranties, or representations as to the actions or conduct of any Users who may request transportation service from Transportation Company or the Driver. Responsibility for the decisions Transportation Company makes regarding transportation services offered via the Software or Uber Service (with all its implications) rests solely with Transportation Company. Transportation Company agrees that it is Your responsibility to take reasonable precautions in all actions and interactions with any third party You interact with through the Uber Service.

8.5 The transportation services that You provide pursuant this Agreement are fully and entirely Your responsibility. Uber does not screen or otherwise evaluate potential riders/Users of Your transportation services. You understand, therefore, that by using the Software and the Uber Service, You may be introduced to third parties that may be potentially dangerous, and that You use the Software and the Uber Service at Your own risk.

8.6 Notwithstanding the Transportation Company's right, if applicable, to take recourse against the Driver, the Transportation Company acknowledges and agrees that it is at all times responsible and liable for the acts and omissions of the Driver(s) vis-à-vis the User and Uber, even where such vicarious liability may not be mandated under applicable law.

8.7 UBER WILL NOT ASSESS THE SUITABILITY, LEGALITY OR ABILITY OF ANY SUCH THIRD PARTIES AND YOU EXPRESSLY WAIVE AND RELEASE UBER FROM ANY AND ALL LIABILITY, CLAIMS, CAUSES OF ACTION, OR DAMAGES ARISING FROM YOUR USE OF THE SOFTWARE OR UBER SERVICE, OR IN ANY WAY RELATED TO THE THIRD PARTIES INTRODUCED TO YOU BY THE SOFTWARE OR SERVICE. YOU EXPRESSLY WAIVE AND RELEASE ANY AND ALL RIGHTS AND BENEFITS UNDER

UBER

SECTION 1542 OF THE CIVIL CODE OF THE STATE OF CALIFORNIA (OR ANY ANALOGOUS LAW OF ANY OTHER STATE), WHICH READS AS FOLLOWS: "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH, IF KNOWN BY HIM, MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR."

9. TERM, TERMINATION AND SUSPENSION

9.1 This Transportation Company Agreement shall commence on the date this Agreement is accepted, for an indefinite period of time, unless terminated by either party by written notice with due observance of a notice period of seven (7) calendar days. Uber may terminate this Agreement automatically, without any notice requirement, at such moment when the Transportation Company and/or its Drivers no longer qualifies, under the applicable law or the quality standards of Uber, to provide the Driving Service or to operate the Vehicle.

9.2.1 Each party may terminate this Agreement or suspend the Agreement in respect of the other party, with immediate effect and without a notice of default being required in case of:

(a) a material breach by the other party of any term of the Agreement (including but not limited to breach of representations or receipt of a significant number of User complaints); or

(b) insolvency or bankruptcy of the other party, or upon the other party's filing or submission of request for suspension of payment (or similar action or event) against the terminating party.

9.3 Upon termination of the Agreement, the Transportation Company and/ or the Driver shall promptly return all Devices and all Data provided to either of them by Uber without withholding a copy thereof.

10. CONFIDENTIALITY

10.1 Parties understand and agree that in the performance of this Agreement, each party may have access to or may be exposed to, directly or indirectly, confidential information of the other party (the "**Confidential Information**"). Confidential Information includes Data, transaction volume, marketing and business plans, business, financial, technical, operational and such other non-public information that either a disclosing party designates as being private or confidential or of which a receiving party should reasonably know that it should be treated as private and confidential.

10.2 Each party agrees that: (a) all Confidential Information shall remain the exclusive property of the disclosing party and receiving party shall not use any Confidential Information for any purpose except in furtherance of this Agreement; (b) it shall maintain, and shall use prudent methods to cause its employees, officers, representatives, contracting parties and agents (the "**Permitted Persons**") to maintain, the confidentiality and secrecy of the Confidential Information; (c) it shall disclose Confidential Information only to those Permitted Persons who need to know such information in furtherance of this Agreement; (d) it shall not, and shall use prudent methods to ensure that the Permitted Persons do not, copy, publish, disclose to others or use (other than pursuant to the terms hereof) the Confidential Information; and (e) it shall return or destroy all ((hard and soft) copies of) Confidential Information upon written request of the other party.

10.3 Notwithstanding the foregoing, (a) Confidential Information shall not include any information to the extent it (i) is or becomes part of the public domain through no act or omission on the part of the receiving Party, (ii) was possessed by the receiving Party prior to the date of this Agreement, (iii) is disclosed to the receiving Party by a third party having no obligation of confidentiality with respect thereto, or (iv) is required to be disclosed pursuant to law, court order, subpoena or governmental authority, and (b) nothing in this Agreement shall prevent,

limit or restrict a Party from disclosing this Agreement (including any technical, operational, performance and financial data (but excluding any User Data)) in confidence to an Affiliated Company.

11. LOCATION-BASED SERVICES

11.1. For the purpose of rendering the Service, the Transportation Company explicitly agrees and acknowledges, and procures that the Driver agrees and acknowledges, that geo-location information regarding the Driver who is available for the Driving Service or performing the Driving Service shall be monitored and traced through the Driver App via GPS tracking. The Device and the relevant details of the Driver and the Ride and the position of the Driver shall also be disclosed to the User on the App.

11.2 To provide location-based services on the Uber App and for analytical, marketing and commercial purposes of Uber, Uber may collect, use, and share precise geo-location data, including the real-time geographic location of You and the Drivers. This location data is used by Uber to provide and improve location-based products and services. Information You provide may be transferred or accessed by entities around the world. Uber abides by the "safe harbor" frameworks set forth by the U.S. Department of Commerce regarding the collection, use, and retention of personal information collected by organizations in the European Economic Area and Switzerland. You expressly consent to Uber's use of locations-based services and You expressly waive and release Uber from any and all liability, claims, causes of action or damages arising from Your use of the software or Uber service, or in any way relating to the use of the geo-location and other location-based services.

12 MODIFICATIONS

12.1 Uber reserves the right to modify or supplement the terms and conditions of this Agreement at any time, effective upon publishing a modified version of this Agreement, or upon publishing the supplemental terms to this Agreement, on the Software or via email or on your online Partner Dashboard.

12.2 Transportation Company hereby expressly acknowledges and agrees that, by using or receiving the Uber Service, and downloading, installing or using the Software, Transportation Company and Uber are bound by the then-current version of this Agreement, including any modifications and supplements to this Agreement or documents incorporated herein, including the Fee schedule. Continued use of the Uber Service or Software after any modifications or supplements to the Agreement shall constitute your consent to such modifications and supplements. Transportation Company is responsible for regularly reviewing this Agreement.

13. MISCELLANEOUS

13.1 If any provision of this Agreement is or becomes invalid or non-binding, the parties shall remain bound by all other provisions hereof. In that event, the parties shall replace the invalid or non-binding provision with provisions that are valid and binding and that have, to the greatest extent possible, a similar effect as the invalid or non-binding provision, given the contents and purpose of this Agreement.

13.2 Neither party shall be entitled to assign, transfer, encumber any of its rights and/or the obligations under this Agreement without the prior written consent of the other party, provided that Uber may assign, transfer, encumber any of its rights and/or the obligations under this Agreement (in whole or in part or from time to time) to (a) an Affiliated Company or (b) in the event of a merger or sale of assets without the prior written consent of the Transportation Company.

13.3 This Agreement (including the schedules, annexes and appendixes, which form an integral part of this Agreement) constitutes the entire agreement and understanding of the parties with respect to its subject matter and replaces and supersedes all prior or contemporaneous negotiations, discussions, agreements, arrangements, offers, undertakings or statements, whether verbal, electronic, or in writing, regarding such subject matter. This Agreement may be modified only in a writing accepted by the parties; this Agreement may not be amended, by implication or otherwise, by any marketing material contained on the Uber website or the Uber App. Nothing contained in this provision or this Agreement is intended to or shall be interpreted to create any third-party beneficiary claims.

14. GOVERNING LAW AND JURISDICTION

14.1 The interpretation of this Agreement shall be governed by California law, without regard to the choice or conflicts of law provisions of any jurisdiction, and any disputes, actions, claims or causes of action arising out of or in connection with this Agreement or the Uber Service or Software shall be subject to the exclusive jurisdiction of the state and federal courts located in the City and County of San Francisco, California. However, neither the choice of law provision regarding the interpretation of this Agreement nor the forum selection provision is intended to create any other substantive right to non-Californians to assert claims under California law whether that be by statute, common law, or otherwise. These provisions are only intended to specify the use of California law to interpret this Agreement and the forum for disputes asserting a breach of this Agreement, and these provisions shall not be interpreted as generally extending California law to You if You do not otherwise operate Your business in California. If any provision of this Agreement is held to be invalid or unenforceable, such provision shall be struck and the remaining provisions shall be enforced to the fullest extent under law. The failure of Uber to enforce any right or provision in this Agreement shall not constitute a waiver of such right or provision unless acknowledged and agreed to by Uber in writing.

14.2 Other than disputes regarding the Intellectual Property Rights of the parties, any disputes, actions, claims or causes of action arising out of or in connection with this Agreement or the Uber Service or Software may be subject to arbitration pursuant to Section 14.3.

14.3 Arbitration.

Important Note Regarding this Section 14.3:

- Arbitration does not limit or affect the legal claims you may bring against Uber. Agreeing to arbitration only affects where any such claims may be brought and how they will be resolved.
- Arbitration is a process of private dispute resolution that does not involve the civil courts, a civil judge, or a jury. Instead, the parties' dispute is decided by a private arbitrator selected by the parties using the process set forth herein. Other arbitration rules and procedures are also set forth herein.
- Unless the law requires otherwise, as determined by the Arbitrator based upon the circumstances presented, you will be required to split the cost of any arbitration with Uber.
- IMPORTANT: This arbitration provision will require you to resolve any claim that you may have against Uber on an

individual basis pursuant to the terms of the Agreement unless you choose to opt out of the arbitration provision. This provision will preclude you from bringing any class, collective, or representative action against Uber. It also precludes you from participating in or recovering relief under any current or future class, collective, or representative action brought against Uber by someone else.

- ***Cases have been filed against Uber and may be filed in the future involving claims by users of Uber Services and Software, including by drivers. You should assume that there are now, and may be in the future, lawsuits against Uber alleging class, collective, and/or representative claims on your behalf, including but not limited to claims for tips, reimbursement of expenses, and employment status. Such claims, if successful, could result in some monetary recovery to you. (THESE CASES NOW INCLUDE, FOR EXAMPLE, LAVITMAN V. UBER TECHNOLOGIES, INC., ET AL., CASE NO. 1:13-cv-10172-DJC (DISTRICT OF MASSACHUSETTS) AND O'CONNOR V. UBER TECHNOLOGIES, INC., ET AL., CASE NO. CV 13-03826-EMC (NORTHERN DISTRICT OF CALIFORNIA).***

- **The mere existence of such class, collective, and/or representative lawsuits, however, does not mean that such lawsuits will ultimately succeed. But if you do agree to arbitration with Uber, you are agreeing in advance that you will not participate in and therefore, will not seek to recover monetary or other relief under any such class, collective, and/or representative lawsuit.**

- **However, as discussed above, if you agree to arbitration, you will not be precluded from bringing your claims against Uber in an individual arbitration proceeding. If successful on such claims, you could be awarded money or other relief by an arbitrator (subject to splitting the cost of arbitration as mentioned above).**

WHETHER TO AGREE TO ARBITRATION IS AN IMPORTANT BUSINESS DECISION. IT IS YOUR DECISION TO MAKE, AND YOU SHOULD NOT RELY SOLELY UPON THE INFORMATION PROVIDED IN THIS AGREEMENT AS IT IS NOT INTENDED TO CONTAIN A COMPLETE EXPLANATION OF THE CONSEQUENCES OF ABRITRATION. YOU SHOULD TAKE REASONABLE STEPS TO CONDUCT FURTHER RESEARCH AND TO CONSULT WITH OTHERS — INCLUDING BUT NOT LIMITED TO AN ATTORNEY — REGARDING THE CONSEQUENCES OF

YOUR DECISION, JUST AS YOU WOULD WHEN MAKING ANY OTHER IMPORTANT BUSINESS OR LIFE DECISION.

i. How This Arbitration Provision Applies.

This Arbitration Provision is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (the "FAA") and evidences a transaction involving commerce. This Arbitration Provision applies to any dispute arising out of or related to this Agreement or termination of the Agreement and survives after the Agreement terminates. Nothing contained in this Arbitration Provision shall be construed to prevent or excuse You from utilizing any procedure for resolution of complaints established in this Agreement (if any), and this Arbitration Provision is not intended to be a substitute for the utilization of such procedures.

Except as it otherwise provides, this Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration. This Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative action.

Such disputes include without limitation disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision. All such matters shall be decided by an Arbitrator and not by a court or judge.

Except as it otherwise provides, this Arbitration Provision also applies, without limitation, to disputes arising out of or related to this Agreement and disputes arising out of or related to Your relationship with Uber, including termination of the relationship. This Arbitration Provision also applies, without limitation, to disputes regarding any city, county, state or federal wage-hour law, trade secrets, unfair competition, compensation, breaks and rest periods, expense reimbursement, termination, harassment and claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act (except for claims for employee benefits under any benefit plan sponsored by Uber and covered by the Employee Retirement Income Security Act of 1974 or funded by insurance), Genetic Information Non-Discrimination Act, and state statutes, if any, addressing the same or similar subject matters, and all other similar federal and state statutory and common law claims.

This Agreement is intended to require arbitration of every claim or dispute that lawfully can be arbitrated, except for those claims and disputes which by the terms of this Agreement are expressly excluded from the Arbitration Provision.

ii. Limitations On How This Agreement Applies.

The disputes and claims set forth below shall not be subject to arbitration and the requirement to arbitrate set forth in Section 14.3 of this Agreement shall not apply:

Claims for workers compensation, state disability insurance and unemployment insurance benefits;

Regardless of any other terms of this Arbitration Provision, claims may be brought before and remedies awarded by an administrative agency if applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include without limitation claims or charges brought before the Equal Employment Opportunity Commission (www.eeoc.gov), the U.S. Department of Labor

(www.dol.gov), the National Labor Relations Board (www.nlrb.gov), or the Office of Federal Contract Compliance Programs (www.dol.gov/esa/ofccp). Nothing in this Arbitration Provision shall be deemed to preclude or excuse a party from bringing an administrative claim before any agency in order to fulfill the party's obligation to exhaust administrative remedies before making a claim in arbitration;

Disputes that may not be subject to predispute arbitration agreement as provided by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203) are excluded from the coverage of this Arbitration Provision;

Disputes regarding the Intellectual Property Rights of the parties;

This Arbitration Provision shall not be construed to require the arbitration of any claims against a contractor that may not be the subject of a mandatory arbitration agreement as provided by section 8116 of the Department of Defense ("DoD") Appropriations Act for Fiscal Year 2010 (Pub. L. 111-118), section 8102 of the Department of Defense ("DoD") Appropriations Act for Fiscal Year 2011 (Pub. L. 112-10, Division A), and their implementing regulations, or any successor DoD appropriations act addressing the arbitrability of claims.

iii. Selecting The Arbitrator and Location of the Arbitration.

The Arbitrator shall be selected by mutual agreement of Uber and You. Unless You and Uber mutually agree otherwise, the Arbitrator shall be an attorney licensed to practice in the location where the arbitration proceeding will be conducted or a retired federal or state judicial officer who presided in the jurisdiction where the arbitration will be conducted. If the Parties cannot agree on an Arbitrator, then an arbitrator will be selected using the alternate strike method from a list of five (5) neutral arbitrators provided by JAMS (Judicial Arbitration & Mediation Services). You will have the option of making the first strike. If a JAMS arbitrator is used, then the JAMS Streamlined Arbitration Rules & Procedures rules will apply. Those rules are available here:

http://www.jamsadr.com/rules-streamlined-arbitration/

The location of the arbitration proceeding shall be no more than 45 miles from the place where You last provided transportation services under this Agreement, unless each party to the arbitration agrees in writing otherwise.

iv. Starting The Arbitration.

All claims in arbitration are subject to the same statutes of limitation that would apply in court. The party bringing the claim must demand arbitration in writing and deliver the written demand by hand or first class mail to the other party within the applicable statute of limitations period. The demand for arbitration shall include identification of the Parties, a statement of the legal and factual basis of the claim(s), and a specification of the remedy sought. Any demand for arbitration made to Uber shall be provided to General Counsel, Uber Technologies, Inc., 1455 Market St., Ste. 400, San Francisco CA 94103. The arbitrator shall resolve all disputes regarding the timeliness or propriety of the demand for arbitration. A party may apply to a court of competent jurisdiction for temporary or preliminary injunctive relief in connection with an arbitrable controversy, but only upon the ground that the award to which that party may be entitled may be rendered ineffectual without such provisional relief.

v. How Arbitration Proceedings Are Conducted.

In arbitration, the Parties will have the right to conduct adequate civil discovery, bring dispositive motions, and present witnesses and evidence as needed to present their cases and defenses, and any disputes in this regard shall be resolved by the Arbitrator.

You and Uber agree to resolve any dispute in arbitration on an individual basis only, and not on a class, collective, or private attorney general representative action basis. The Arbitrator shall have no authority to consider or resolve any claim or issue any relief on any basis other than an individual basis. The Arbitrator shall have no authority to consider or resolve any claim or issue any relief on a class, collective, or representative basis. If at any point this provision is determined to be unenforceable, the parties agree that this provision shall not be severable, unless it is determined that the Arbitration may still proceed on an individual basis only.

While Uber will not take any retaliatory action in response to any exercise of rights You may have under Section 7 of the National Labor Relations Act, if any, Uber shall not be precluded from moving to enforce its rights under the FAA to compel arbitration on the terms and conditions set forth in this Agreement.

vi. Paying For The Arbitration.

Each party will pay the fees for his, her or its own attorneys, subject to any remedies to which that party may later be entitled under applicable law (i.e., a party prevails on a claim that provides for the award of reasonable attorney fees to the prevailing party). In all cases where required by law, Uber will pay the Arbitrator's and arbitration fees. If under applicable law Uber is not required to pay all of the Arbitrator's and/or arbitration fees, such fee(s) will be apportioned equally between the Parties or as otherwise required by applicable law. Any disputes in that regard will be resolved by the Arbitrator.

vii. The Arbitration Hearing And Award.

The Parties will arbitrate their dispute before the Arbitrator, who shall confer with the Parties regarding the conduct of the hearing and resolve any disputes the Parties may have in that regard. Within 30 days of the close of the arbitration hearing, or within a longer period of time as agreed to by the Parties or as ordered by the Arbitrator, any party will have the right to prepare, serve on the other party and file with the Arbitrator a brief. The Arbitrator may award any party any remedy to which that party is entitled under applicable law, but such remedies shall be limited to those that would be available to a party in his or her individual capacity in a court of law for the claims presented to and decided by the Arbitrator, and no remedies that otherwise would be available to an individual in a court of law will be forfeited by virtue of this Arbitration Provision. The Arbitrator will issue a decision or award in writing, stating the essential findings of fact and conclusions of law. Except as may be permitted or required by law, as determined by the Arbitrator, neither a party nor an Arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of all Parties. A court of competent jurisdiction shall have the authority to enter a judgment upon the award made pursuant to the arbitration. The Arbitrator shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error.

viii. **Your Right To Opt Out Of Arbitration.**

Arbitration is not a mandatory condition of your contractual relationship with Uber. If You do not want to be subject to this Arbitration Provision, You may opt out of this Arbitration Provision by notifying Uber in writing of Your desire to opt out of this Arbitration Provision, either by (1) sending, within 30 days of the date this

Agreement is executed by You, electronic mail to optout@uber.com, stating Your name and intent to opt out of this Arbitration Provision or (2) by sending a letter by U.S. Mail, or by any nationally recognized delivery service (e.g, UPS, Federal Express, etc.), or by hand delivery to:

General Counsel
Uber Technologies, Inc.
1455 Market St., Ste. 400
San Francisco CA 94103

In order to be effective, the letter under option (2) must clearly indicate Your intent to opt out of this Arbitration Provision, and must be dated and signed. The envelope containing the letter must be received (if delivered by hand) or post-marked within 30 days of the date this Agreement is executed by You. Your writing opting out of this Arbitration Provision, whether sent by (1) or (2), will be filed with a copy of this Agreement and maintained by Uber.

Should You not opt out of this Arbitration Provision within the 30-day period, You and Uber shall be bound by the terms of this Arbitration Provision. You have the right to consult with counsel of Your choice concerning this Arbitration Provision. You understand that You will not be subject to retaliation if You exercise Your right to assert claims or opt-out of coverage under this Arbitration Provision.

ix. Enforcement Of This Agreement.

This Arbitration Provision is the full and complete agreement relating to the formal resolution of disputes arising out of this Agreement. Except as stated in subsection v, above, in the event any portion of this Arbitration Provision is deemed unenforceable, the remainder of this Arbitration Provision will be enforceable.

By clicking "I accept", You expressly acknowledge that You have read, understood, and taken steps to thoughtfully consider the consequences of this Agreement, that You agree to be bound by the terms and conditions of the Agreement, and that You are legally competent to enter into this Agreement with Uber.

EXHIBIT H

Rasier Software Sublicense & Online Services Agreement

The terms and conditions stated herein ("Agreement") constitute a legal agreement between you, an independent provider of rideshare or P2P transportation services ("Transportation Provider" or "You"), and one of the following entities ("Rasier" or Company"):

- If you will be operating in California, this Agreement is between You and Rasier-CA LLC, a Delaware Limited Liability Company;

- Otherwise, this Agreement is between You and Rasier, LLC, a Delaware Limited Liability Company.

Upon your execution of this Agreement, you and the Company shall be bound by the terms and conditions set forth herein.

RECITALS

Rasier is engaged in the business of providing lead generation to the Transportation Provider comprised of requests for transportation service made by individuals using Uber Technologies, Inc.'s mobile application ("Users"). Through its license of the mobile application ("Software"), Rasier provides a platform for Users to connect with independent Transportation Providers.

Rasier does not provide transportation services, and is not a transportation carrier. In fact, the Company neither owns, leases nor operates any vehicles. The Company's business is solely limited to providing Transportation Providers with access, through its license with Uber Technologies, Inc. ("Uber"), to the lead generation service provided by the Software, for which the Company charges a fee ("Service").

You are an independent transportation provider who offers rideshare or P2P transportation services, which business you are authorized to conduct in the state(s) in which you operate.

You are the owner or lessee, or are otherwise in lawful possession of motor vehicle equipment suitable for performing the transportation services contemplated by this Agreement, which equipment complies with all applicable federal, state and local laws.

You desire to enter into this Agreement as a Transportation Provider for the purpose of receiving the Service from the Company.

In consideration of the above representations and the mutual covenants set forth below, and for other good and valuable consideration, the Company and you (collectively "Parties") agree as follows:

IMPORTANT: PLEASE NOTE THAT TO USE THE SERVICE, YOU MUST AGREE TO THE TERMS AND CONDITIONS SET FORTH BELOW. PLEASE REVIEW THE ARBITRATION PROVISION SET FORTH BELOW CAREFULLY, AS IT WILL REQUIRE YOU TO RESOLVE DISPUTES WITH THE COMPANY ON AN INDIVIDUAL BASIS THROUGH FINAL AND BINDING ARBITRATION UNLESS YOU CHOOSE TO OPT OUT OF THE ARBITRATION PROVISION. BY VIRTUE OF YOUR ELECTRONIC EXECUTION OF THIS AGREEMENT, YOU WILL BE ACKNOWLEDGING THAT YOU HAVE READ AND UNDERSTOOD ALL OF THE TERMS OF THIS AGREEMENT (INCLUDING THE ARBITRATION PROVISION) AND HAVE TAKEN TIME TO CONSIDER THE CONSEQUENCES OF THIS IMPORTANT BUSINESS DECISION. IF YOU DO NOT WISH TO BE SUBJECT TO ARBITRATION, YOU MAY OPT OUT OF THE ARBITRATION PROVISION BY FOLLOWING THE INSTRUCTIONS PROVIDED IN THE ARBITRATION PROVISION BELOW.

TERMS

Service Arrangement

Subject to the terms and conditions contain herein, this Agreement shall give you the right to accept requests to perform on-demand transportation services ("Requests") received by you via the Software, for which you shall be paid a Service Fee (as described more fully below). Each Request that you accept shall constitute a separate contractual engagement.

The Company will offer the Service to you during those times you choose to be available to receive the Requests. You shall have no obligation to use the Service at any specific time or for any specific duration. You shall have complete discretion to determine when you will be available to receive the Requests. If, however, you agree to be available to receive the Requests, you shall be obligated to abide by the terms of this Agreement.

You shall be entitled to accept, reject, and select among the Requests received via the Service. You shall have no obligation to the Company to accept any Request. Following acceptance of a Request, however, you must perform the Request in accordance with the User's specifications. Failure to provide promised services on an accepted Request shall constitute a material breach of this Agreement, and may subject you to damages.

Nothing in this Agreement shall be construed as a guarantee that you shall be offered any particular number of Requests during any particular time period.

Performance of Transportation Services

You agree to fully perform all accepted Requests in accordance with the job parameters and other specifications established by the User. Full performance of a Request shall typically include, but is not limited to:

i. notification to the User of arrival using Uber's mobile application;

ii. waiting at least 10 minutes for a User to show up at the requested pick-up location;

iii. safe, direct and uninterrupted transport of the User directly to the specified destination, as directed by User; and

iv. timely submission of all necessary documentation required by the Company.

Failure to comply with this paragraph shall constitute a material breach of this Agreement.

You understand that for liability reasons, Users may prohibit the transport of individuals other than themselves during the performance of a Request. If you accept a Request subject to such a prohibition, you agree to allow only the User, and any individuals authorized by User, inside your vehicle during performance of a Request. A passenger restriction imposed by a User shall be limited to that Request and shall only apply during performance of the Request. This provision shall in no way limit your right to perform transportation services for other customers or to carry passengers in your vehicle(s) at any other time.

You understand that for liability reasons, all Users should be transported directly to their specified destination, as directed by User, without unauthorized interruption or unauthorized stops.

The Company shall have no right to require you to display Rasier's name, logo or colors on your vehicle(s) or to require that your driver(s) wear a uniform or any other clothing displaying Rasier's name, logo or colors.

The Company shall have no right to, and shall not, control the manner or prescribe the method you use to perform accepted Requests, subject to the terms of this Agreement. You shall be solely responsible for determining the most effective, efficient and safe manner to perform the services relating to each Request, subject to the terms of this Agreement and the applicable User specifications. The Parties acknowledge that any provisions of this Agreement reserving certain authority in the Company have been inserted solely to achieve compliance with federal, state, or local laws, rules, and interpretations thereof.

You represent that you are an independent contractor engaged in the independent business of providing the transportation services described in this Agreement and further represent that, as of the date of execution of this Agreement, you currently possess a valid driver's license and all licenses, permits and other legal prerequisites necessary to perform rideshare or P2P transportation services, as required by the states and/or localities in which you operate. To ensure your compliance with all legal requirements, you must provide written copies of all such licenses, permits and other legal prerequisites prior to the date of execution of this Agreement. Thereafter, you must submit to the Company current copies of such licenses, permits, etc., as they are renewed. To ensure all such permits and licenses remain current, the Company shall, upon request, be entitled to review such licenses and permits from time to time. Failure to maintain current licenses, permits or other legal prerequisites, or failure to comply with any other provision of this paragraph, shall constitute a material breach of this Agreement.

In signing this Agreement, you certify that the equipment you use in performing services pursuant to this Agreement meet all industry and regulatory standards and qualifications. You acknowledge and agree that the Company may release your contact or insurance information to a User upon User request.

The Parties recognize that both you and the Company are, or may be, engaged in similar agreements with others. Nothing in this Agreement shall preclude the Company from doing business with other independent transportation service providers, nor preclude you from entering into contracts similar to this Agreement with other lead generation providers. The Company neither has nor reserves the right to restrict you from performing other transportation services for any company, business or individual, or from being engaged in any other occupation or business. However, during the time you are actively signed into the Software, you shall perform transportation services only for Requests received by you via the Software. Additionally, during the time you are actively signed into the Software, you shall not display on your vehicle any removable insignia provided by third-party transportation service providers, other lead generation providers, or similar. You understand that you shall not during the term of this Agreement use your relationship with the Company (or the information gained therefrom) to

divert or attempt to divert any business from the Company to a company that provides lead generation services in competition with the Company or Uber.

You agree to faithfully and diligently devote your best efforts, skills and abilities to comply with the job parameters and User specifications relating to any Request accepted by you.

You have complete discretion to operate your independent business in good faith including providing transportation services separate from those obtained using the Service. Access to the Service may be suspended or revoked, however, if you unlawfully, unfairly or in bad faith disparage the Company or Uber.

Transportation Provider's Equipment

You agree that you shall maintain a vehicle that is a model approved by the Company. Any such vehicle shall be no more than ten (10) model years old, and shall be in good operating condition. Prior to execution of this Agreement, you shall provide to the Company a description of each vehicle and a copy of the vehicle registration for each vehicle(s) you intend to use to provide service under this Agreement. You agree to notify the Company of any change in your fleet by submitting to the Company an updated description and vehicle registration for any previously unidentified vehicle to perform services under this Agreement. The purpose of this provision is to enable the Company to determine whether your equipment meets industry standards. Any intentional misrepresentation regarding the nature or condition of your equipment shall be deemed a material breach of this Agreement.

Subject only to requirements imposed by law, Request parameters, User specifications, and/or as otherwise set forth in this Agreement, you shall direct in all aspects the operation of the equipment used in the performance of this Agreement and shall exercise full discretion and judgment as an independent business in determining the means and methods of performance under this Agreement.

Except as specifically set forth in this Agreement, you are solely responsible for all costs and expenses incident to your personnel and equipment in performing services under this Agreement, including, but not limited to, costs of fuel, fuel taxes, wages, employment taxes, excise taxes, permits of all types, gross revenue taxes, road taxes, equipment use fees and taxes, licensing, insurance coverage and any other tax, fine or fee imposed or assessed against the equipment or you by any state, local, or federal authority as a result of an action by you or your employees, agents, or subcontractors in the performance of this Agreement.

Service Fees

In exchange for accepting and fully performing on a Request, you shall be paid an agreed upon Service Fee for your completion of that Request. Unless otherwise negotiated at the time the Request is received by you, the Parties agree that you shall be paid a Service Fee at the pre-arranged rates for each Request performed, which shall be forth in a Service Fee Schedule. You acknowledge that the applicable Service Fee Schedule was provided to you in advance of your execution of this Agreement. The Service Fee Schedule shall be made available upon request. Before any change to the rates set forth in the Service Fee Schedule may become effective, the Company shall provide notice of such change(s) to you via email, your mobile application or other written means.

Regardless of the pre-arranged Service Fee, you shall always have the right to refuse any Request without penalty.

Similarly, you and the Company shall always have the right to negotiate a Service Fee different from the pre-arranged fee. The purpose of the pre-arranged Service Fee is only to act as the default fee in the event neither party negotiates a different amount.

You acknowledge that there is no tipping for any transportation services that you provide pursuant to the receipt of a Request. You understand and agree that, for the mutual benefit of the Parties, Company may endeavor to attract new Users to the Service and Software, and to increase existing Users' use of the Service and Software, through advertising and marketing to the effect that tipping is "voluntary," "not required," and/or "included" in the Service Fee paid by the User. You understand that the aim of advertising and marketing to the effect that there is no need to leave a tip is ultimately to increase the number of Requests you receive through the Service and Software. You agree that the existence of any such advertising or marketing does not entitle you to any payment beyond the payment of Service Fees as provided in this Agreement.

The Company shall electronically remit payment of Service Fees to you consistent with Company's practices, as set forth in the Service Fee Schedule.

In the event the User cancels a Request after you arrive at the designated pick-up location or does not show after you have waited at least 10 minutes, the User is subject to a cancellation fee. The amount of the cancellation fee will be as specified in the Service Fee Schedule. Notwithstanding the foregoing, you acknowledge and agree that, in the Company's sole discretion, a User's cancellation fee may be waived, in which case you will have no entitlement to any such fee.

Rasier's Fee

In exchange for your access to and use of the Software and Service, including the right to receive the Requests, you agree to pay to the Company a fee for each Request accepted as indicated in the Service Fee Schedule.

Transportation Provider Quality Framework

You acknowledge that the Company desires to provide Users with the opportunity to connect with Transportation Providers who maintain the highest standards of professionalism. For quality assurance purposes, the Company has access to Uber's star rating system designed to determine the level of service provided by the Transportation Providers contracting with the Company through User feedback. In a sense, the star rating is similar to a Yelp® or Zagat® rating, as it is based on a continuously growing collection of star reviews submitted by Users. The Company uses the rating system to determine the quality of Transportation Providers to whom to forward Requests. Transportation Providers with low ratings may be limited in their right to accept Requests.

Insurance

Vehicle Insurance. As an express condition of doing business with the Company, and at your sole expense, you agree to maintain current during the life of this Agreement, third-party automobile insurance of the types and amounts specified herein for every vehicle used to perform services under this Agreement. You acknowledge that failure to secure or maintain the third-party automobile insurance of the types or amounts specified herein shall be deemed a material breach of this Agreement and shall result in the immediate suspension of the Agreement and the loss of your right to receive Requests under this Agreement.

i. Coverage Specifications. To perform services under this Agreement, you must maintain automobile insurance with coverage of at least the minimum coverage required by state or local law to operate a private passenger vehicle on public roads. You understand and acknowledge that your personal automobile insurance policy may not afford liability, comprehensive, collision, medical payments, personal injury protection, uninsured motorist, underinsured motorist, or other coverage for the P2P transportation service you provide pursuant to this Agreement. If you have any questions or concerns about the scope or applicability of your own insurance coverage, it is your responsibility, not the Company's, to resolve them with your insurer(s).

ii. Notification of Coverage. You agree to provide proof of such insurance coverage by delivering to the Company, before using the Service to accept transportation requests, current certificates of insurance. To ensure public safety, you further agree to provide updated certificates each time you purchase, renew or alter your insurance coverage. Furthermore, you must provide the Company with written notice of cancellation of any insurance policy required by the Company. The Company shall have no right to control your selection or maintenance of your policy.

iii. Additional Excess Coverage. The Company holds a commercial automobile insurance policy with $1 million of liability coverage per accident, as defined in the relevant policy. Subject to its specific terms and conditions, this policy is intended to cover your liability to third parties, on an excess basis, from the time you accept a Request via the Software until the completion of the requested trip. You understand and acknowledge that your own automobile insurance policy is primary and that the Company's policy is excess to your policy. Additional terms, limitations, and exclusions may apply. THIS IS A SUMMARY OF THE COMPANY'S COMMERCIAL AUTOMOBILE LIABILITY INSURANCE COVERAGE, THE ACTUAL TERMS OF WHICH ARE SET FORTH IN THE POLICY, WHICH CONTROLS IN THE EVENT OF ANY CONFLICT.

Occupational Accident Insurance. If permitted by law, you may choose to insurance yourself against industrial injuries by maintaining occupational accident insurance in place of workers' compensation insurance. Your subcontractors may also, to the extent permitted by law, maintain occupational accident insurance in place of workers' compensation insurance. All of your employees must be covered by workers' compensation insurance, as required by law.

Colorado Disclosure. If you operate in Colorado, you understand and acknowledge that, under Colorado law: IF THE VEHICLE THAT YOU PLAN TO USE TO PROVIDE TRANSPORTATION NETWORK COMPANY SERVICES FOR THE COMPANY HAS A LIEN AGAINST IT, YOU MUST NOTIFY THE LIENHOLDER THAT YOU WILL BE USING THE VEHICLE FOR TRANSPORTATION SERVICES THAT MAY VIOLATE THE TERMS OF YOUR CONTRACT WITH THE LIENHOLDER. When operating on the Transportation Network Company's digital network, your personal automobile insurance policy might not afford liability coverage, depending on the policy's terms.

Transportation Provider Personnel

You shall furnish at your own discretion, selection, and expense any personnel required or incidental to the performance of the Services contemplated by the performance of this

Agreement. You shall be solely responsible for the direction and control of your employees, agents and subcontractors, if any, including their selection, hiring, firing, supervision, assignment, and direction, the setting of wages, hours and working conditions, and addressing their grievances. You shall determine the method, means and manner of the performance of the work of your employees, agents and subcontractors.

You assume full and sole responsibility for the payment of all wages, benefits and expenses of your employees, agents, or subcontractors, if any, and for all state and federal income tax withholdings, unemployment insurance, and social security taxes as to you and all persons employed by you in the performance of services under this Agreement, and you shall be responsible for meeting and fulfilling the requirements of all regulations now or hereafter prescribed by law. The Company shall not be responsible for the wages, benefits or expenses due your employees, agents, or subcontractors nor for income tax withholding, social security, unemployment, or other payroll taxes of your employees, agents, or subcontractors.

The Company shall neither have nor exercise disciplinary authority or control over you, your employees, agents, or subcontractors, shall have no authority to supervise or direct your employees, agents, or subcontractors, and shall have no authority or right to select, approve, hire, fire or discipline any of your employees, agents, or subcontractors.

You shall not allow any other person, including any employee, agent, or subcontractor, to access the Service to accept transportation requests using the Device or the Driver ID. You acknowledge and agree that this Agreement only enables you, not any other person, to access the Services and Software, and to use the Device and the Driver ID to receive requests for transportation services.

The Company is not authorized to withhold state or federal income taxes, social security taxes, unemployment insurance taxes, or any other local, state or federal tax on behalf of you or your employees, agents, or subcontractors. If mandated by a court of law with proper authority and jurisdiction, the Company shall comply with the terms of a garnishment order, as required by law. The Company will comply with any and all applicable requirements of local, state, or federal law to report payments the Company makes to independent contractors. You will be notified of any such reports made by the Company regarding your services to the extent required by applicable law.

Legally Mandated Drug and Alcohol Testing

You agree to comply with all federal, state and local laws regulating drug and alcohol use and testing. Failure to satisfy all such requirements shall constitute a material breach of this Agreement. You acknowledge that if you test positive for drugs and/or alcohol, you may not thereafter operate equipment under this Agreement until first satisfying all requirements of federal, state and local law.

Company Equipment/Driver ID

Contemporaneously with the execution and delivery of this Agreement, and subject to the terms and conditions herein, the Company will offer you the right to use a mobile telephone "smartphone" provided by the Company, which is and will remain the property of the Company (the "Device").

The Company shall deliver the Device in good working order to the Transportation Provider. The Device will have the Software loaded on it. The Company will provide normal maintenance of the Device; however, such maintenance will not include repairs and servicing required as a result of damage

(including, without limitation, water damage) to the Device, whether caused by accident, negligence, misuse, or breach of this Agreement. All repairs and servicing required as a result of any accident, negligence, misuse, or breach of this Agreement will be at the Transportation Provider's sole cost and expense, and will be performed at a service center designated in writing by the Company as a duly authorized service center. You also assume all risks for any and all loss or damage to the Device, including, without limitation, loss or damage caused by fire, theft, collision or water, whether or not such loss or damage is caused by the Transportation Provider's negligence. The Company may charge a fee for the use of the Device or request a retainer fee and/or a security deposit per Device.

Company will also issue identification and password keys (each, a "Driver ID") to the Transportation Provider to enable you to access the Service. You will ensure the security and confidentiality of each Driver ID. ONLY YOU may use the Driver ID. Sharing your Driver ID with someone else constitutes a material breach of this Agreement. ONLY YOU may use the Device to accept requests for transportation services. Allowing someone else to use the Device to accept requests for transportation services constitutes a material breach of this Agreement. The Company will have the right, at all times and in the Company's sole discretion, to prohibit or otherwise restrict you or anyone else from accessing the Service for any reason.

The Company's approval and authorization of a Driver may be conditioned upon terms and conditions including, without limitation, a requirement that such Driver, at his own cost and expense, undergo the Company's screening process and attend the Company's informational session regarding the use of Uber's mobile application. The Company reserves the right to withhold or revoke its approval and authorization of any Driver at any time, in its sole and unreviewable discretion. Upon termination of this Agreement, whether by default or otherwise, the Device, which you acknowledge is and at all times will remain the property of the Company, must be returned to the Company.

Intellectual Property Ownership

The Parties understand that to perform the services contemplated by this Agreement, it may be necessary for the Parties to exchange certain confidential and proprietary information regarding their operations, Users and other sensitive details that the Parties consider confidential. This confidential and proprietary information ("Confidential Information") includes, but is not limited to, the following:

i. Company's Information. (1) the Service, and related methods, processes and technology; (2) pricing, pricing methods and billing practices; (3) marketing and financial plans; (4) letters, memoranda, agreements, and other internal documents; and (5) financial or other information regarding the Company or Users that has not been disclosed to the public.

ii. Transportation Provider Information. (1) your billing practices; (2) your business proposals and bids and any related letters, memoranda, agreements, and other internal documents maintained in confidence; and (3) financial information regarding you that has not been disclosed to the public.

Except upon order of government authority having jurisdiction or upon written consent by the other party, the Company and you covenant and agree that they will not disclose to third parties or use for their own benefit or the benefit of any third party, any Confidential Information entrusted by the other party or Users in the performance of services pursuant to this Agreement.

This Agreement is not a sale and does not convey to you any rights of ownership in or related to the Service or Software, or any intellectual property rights owned or licensed by the Company. The Company name, the Company logo, and the product names associated with the Service and Software are trademarks of the Company or third parties, and no right or license is granted to use them.

Indemnification

By entering into this Agreement, you agree to defend, indemnify, protect and hold harmless the Company, its licensors and each such party's parent organizations, subsidiaries, affiliates, officers, directors, members, employees, attorneys and agents, from any and all claims, demands, damages, suits, losses, liabilities, expenses (including attorneys' fees and costs), and causes of action arising directly or indirectly from out of or in connection with (a) your actions (or omissions) arising from the performance of services under this Agreement, including personal injury or death to any person (including you and/or your employees); (b) liability for civil and/or criminal conduct (e.g., assault, battery, fraud); (c) any liability arising from your failure to comply with the terms of this Agreement, including with respect to payment of wages, benefits or expenses due your employees, agents, or subcontractors; and (d) your use (or misuse) of the Software or Service.

Damage or Injury Claims

You shall be liable to the User for all claims of damage and/or injury to any User sustained while being transported by you. You agree to notify the Company of any damage or injury as soon as practicable after the damage or injury occurs. You understand that insurance may or may not provide coverage for damage or injury, or it may provide coverage for some, but not all, damage or injury.

You agree to fully cooperate with the User and/or the Company to resolve injury or damage claims as quickly as possible. You further acknowledge that, in the event of damage or an insurance claim, the Company may inform your insurance provider, or the insurance provider of any other party involved, of the claim and provide information about your acceptance or performance of a Request at the time of the damage or incident underlying a claim.

You agree that, in the event the Company is held liable for any injury or damage to any person caused by you, the Company shall have the right to recover such amount from you. Similarly, should the Company voluntarily elect to pay any amount owed to any person for damage or injury to that person caused by you or for which you are responsible and/or liable, the Company shall have the same right as the injured party to recover from you (i.e., the Company stands in the shoes of the injured party).

Relationship of Parties

This Agreement is between two co-equal, independent business enterprises that are separately owned and operated. The Parties intend this Agreement to create the relationship of principal and independent contractor and not that of employer and employee. The Parties are not employees, agents, joint venturers or partners of each other for any purpose.

As an independent contractor, you recognize that you are not entitled to unemployment benefits following termination of the Parties' relationship.

Termination of Agreement

This Agreement shall remain in effect until terminated as follows:

i. At any time upon mutual written consent of the Parties hereto.

ii. If one party has materially breached the Agreement, upon seven (7) days' written notice to the breaching party, with such notice specifying the breach relied upon.

iii. By either party without cause upon thirty (30) days' prior written notice to the other party, with the date of mailing commencing the thirty (30) day period.

iv. The Agreement shall be automatically terminated for inactivity of more than 180 days, with the date of termination being the 180th day following the date of the last Request accepted and performed by you.

The following acts or occurrences shall constitute a material breach of this Agreement:

i. Your failure to maintain current insurance coverage in the amounts and types required herein.

ii. Failure by the Company to remit to you all Service Fees due and owing within 30 days of the date the amount became due.

iii. Your refusal to reimburse a User or the Company for any damage or injury caused by you.

iv. Refusal by the Company to provide documentation requested by you reasonably relating to a damage or injury claim arising under this Agreement.

v. Your refusal to fully complete Request after acceptance without waiver by the User or the Company.

vi. Failure by either party to maintain all licenses and permits required by law and/or this Agreement.

vii. Your allowing any other person to access the Software, Service, or Device to receive requests for transportation services, or allowing anyone to log into the Software using your Driver ID.

viii. A major driving violation, such as a citation for reckless driving, while transporting a User.

ix. Your loss of license and/or full driving privileges, or your use of a driver who is not fully and properly licensed and approved by the Company to perform the job offered through the Service.

x. Intentional misrepresentations by you, your employees, agents or subcontractors to a User or the Company, including intentionally taking an indirect route to the User's specified destination.

xi. Violation by either party of the Intellectual Property Ownership provision of the Agreement.

xii. Documented complaint by a User that you and/or your employee or subcontractor engaged in conduct that a reasonable person would find physically threatening, highly offensive or harassing.

Arbitration Provision

Important Note Regarding this Arbitration provision:

- Arbitration does not limit or affect the legal claims you may bring against the Company. Agreeing to arbitration only affects where any such claims may be brought and how they will be resolved.

- Arbitration is a process of private dispute resolution that does not involve the civil courts, a civil judge, or a jury. Instead, the parties' dispute is decided by a private arbitrator selected by the parties using the process set forth herein. Other arbitration rules and procedures are also set forth herein.

- Unless the law requires otherwise, as determined by the Arbitrator based upon the circumstances presented, you will be required to split the cost of any arbitration with the Company.

- IMPORTANT: This arbitration provision will require you to resolve any claim that you may have against the Company or Uber on an individual basis pursuant to the terms of the Agreement unless you choose to opt out of the arbitration provision. This provision will preclude you from bringing any class, collective, or representative action against the Company or Uber. It also precludes you from participating in or recovering relief under any current or future class, collective, or representative action brought against the Company or Uber by someone else.

    - ***Cases have been filed against Uber and may be filed in the future involving claims by users of the Service, including by drivers. You should assume that there are now, and may be in the future, lawsuits against the Company or Uber alleging class, collective, and/or representative claims on your behalf, including but not limited to claims for tips, reimbursement of expenses, and employment status. Such claims, if successful, could result in some monetary recovery to you. (THESE CASES NOW INCLUDE, FOR EXAMPLE, LAVITMAN V. UBER TECHNOLOGIES, INC., ET AL., CASE NO. 1:13-cv-10172-DJC (DISTRICT OF MASSACHUSETTS) AND O'CONNOR V. UBER TECHNOLOGIES, INC., ET AL., CASE NO. CV 13-03826-EMC (NORTHERN DISTRICT OF CALIFORNIA).***

    - **The mere existence of such class, collective, and/or representative lawsuits, however, does not mean that such lawsuits will ultimately succeed. But if you do agree to arbitration with the Company, you are agreeing in advance that you will not participate in and therefore, will not seek to recover monetary or other relief under any such class, collective, and/or representative lawsuit.**

    - **However, as discussed above, if you agree to arbitration, you will not be precluded from bringing your claims against the Company or Uber in an**

individual arbitration proceeding. If successful on such claims, you could be awarded money or other relief by an arbitrator (subject to splitting the cost of arbitration as mentioned above).

WHETHER TO AGREE TO ARBITRATION IS AN IMPORTANT BUSINESS DECISION. IT IS YOUR DECISION TO MAKE, AND YOU SHOULD NOT RELY SOLELY UPON THE INFORMATION PROVIDED IN THIS AGREEMENT AS IT IS NOT INTENDED TO CONTAIN A COMPLETE EXPLANATION OF THE CONSEQUENCES OF ABRITRATION. YOU SHOULD TAKE REASONABLE STEPS TO CONDUCT FURTHER RESEARCH AND TO CONSULT WITH OTHERS — INCLUDING BUT NOT LIMITED TO AN ATTORNEY — REGARDING THE CONSEQUENCES OF YOUR DECISION, JUST AS YOU WOULD WHEN MAKING ANY OTHER IMPORTANT BUSINESS OR LIFE DECISION.

i. How This Arbitration Provision Applies.

This Arbitration Provision is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (the "FAA") and evidences a transaction involving commerce. This Arbitration Provision applies to any dispute arising out of or related to this Agreement or termination of the Agreement and survives after the Agreement terminates. Nothing contained in this Arbitration Provision shall be construed to prevent or excuse you from utilizing any procedure for resolution of complaints established in this Agreement (if any), and this Arbitration Provision is not intended to be a substitute for the utilization of such procedures.

Except as it otherwise provides, this Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration. This Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative action.

Such disputes include without limitation disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision. All such matters shall be decided by an Arbitrator and not by a court or judge.

Except as it otherwise provides, this Arbitration Provision also applies, without limitation, to disputes arising out of or related to this Agreement and disputes arising out of or related to your relationship with the Company, including termination of the relationship. This Arbitration Provision also applies, without limitation, to disputes regarding any city, county, state or federal wage-hour law, trade secrets, unfair competition, compensation, breaks and rest periods, expense reimbursement, termination, harassment and claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act (except for claims for employee benefits under any benefit plan sponsored by the Company and covered by the Employee Retirement Income Security Act of 1974 or funded by insurance), Genetic Information Non-Discrimination Act, and state statutes, if any, addressing the same or similar subject matters, and all other similar federal and state statutory and common law claims.

This Agreement is intended to require arbitration of every claim or dispute that lawfully can be arbitrated, except for those claims and disputes which by the terms of this Agreement are expressly excluded from the Arbitration Provision.

The parties expressly agree that Uber is an intended third-party beneficiary of this Arbitration Provision.

ii. Limitations On How This Agreement Applies.

The disputes and claims set forth below shall not be subject to arbitration and the requirement to arbitrate set forth in this Arbitration Provision shall not apply:

Claims for workers compensation, state disability insurance and unemployment insurance benefits;

Regardless of any other terms of this Arbitration Provision, claims may be brought before and remedies awarded by an administrative agency if applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include without limitation claims or charges brought before the Equal Employment Opportunity Commission (www.eeoc.gov), the U.S. Department of Labor (www.dol.gov), the National Labor Relations Board (www.nlrb.gov), or the Office of Federal Contract Compliance Programs (www.dol.gov/esa/ofccp). Nothing in this Arbitration Provision shall be deemed to preclude or excuse a party from bringing an administrative claim before any agency in order to fulfill the party's obligation to exhaust administrative remedies before making a claim in arbitration;

Disputes that may not be subject to predispute arbitration agreement as provided by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203) are excluded from the coverage of this Arbitration Provision;

Disputes regarding your, the Company's, or Uber's intellectual property rights;

This Arbitration Provision shall not be construed to require the arbitration of any claims against a contractor that may not be the subject of a mandatory arbitration agreement as provided by section 8116 of the Department of Defense ("DoD") Appropriations Act for Fiscal Year 2010 (Pub. L. 111-118), section 8102 of the Department of Defense ("DoD") Appropriations Act for Fiscal Year 2011 (Pub. L. 112-10, Division A), and their implementing regulations, or any successor DoD appropriations act addressing the arbitrability of claims.

iii. Selecting The Arbitrator and Location of the Arbitration.

The Arbitrator shall be selected by mutual agreement of the Company and you. Unless you and the Company mutually agree otherwise, the Arbitrator shall be an attorney licensed to practice in the location where the arbitration proceeding will be conducted or a retired federal or state judicial officer who presided in the jurisdiction where the arbitration will be conducted. If the Parties cannot agree on an Arbitrator, then an arbitrator will be selected using the alternate strike method from a list of five (5) neutral arbitrators provided by JAMS (Judicial Arbitration & Mediation Services). You will have the option of making the first strike. If a JAMS arbitrator is used, then the JAMS Streamlined Arbitration Rules & Procedures rules will apply. Those rules are available here:

http://www.jamsadr.com/rules-streamlined-arbitration/

The location of the arbitration proceeding shall be no more than 45 miles from the place where you last provided transportation services under this Agreement, unless each party to the arbitration agrees in writing otherwise.

iv. Starting The Arbitration.

All claims in arbitration are subject to the same statutes of limitation that would apply in court. The party bringing the claim must demand arbitration in writing and deliver the written demand by hand or first class mail to the other party within the applicable statute of limitations period. The demand for arbitration shall include identification of the Parties, a statement of the legal and factual basis of the claim(s), and a specification of the remedy sought. Any demand for arbitration made to the Company or Uber shall be provided to Legal, Rasier, LLC, 1455 Market St., Ste. 400, San Francisco CA 94103. The arbitrator shall resolve all disputes regarding the timeliness or propriety of the demand for arbitration. A party may apply to a court of competent jurisdiction for temporary or preliminary injunctive relief in connection with an arbitrable controversy, but only upon the ground that the award to which that party may be entitled may be rendered ineffectual without such provisional relief.

v. How Arbitration Proceedings Are Conducted.

In arbitration, the Parties will have the right to conduct adequate civil discovery, bring dispositive motions, and present witnesses and evidence as needed to present their cases and defenses, and any disputes in this regard shall be resolved by the Arbitrator.

You and the Company agree to resolve any dispute in arbitration on an individual basis only, and not on a class, collective, or private attorney general representative action basis. The Arbitrator shall have no authority to consider or resolve any claim or issue any relief on any basis other than an individual basis. If at any point this provision is determined to be unenforceable, the parties agree that this provision shall not be severable, unless it is determined that the Arbitration may still proceed on an individual basis only.

While the Company will not take any retaliatory action in response to any exercise of rights you may have under Section 7 of the National Labor Relations Act, if any, the Company shall not be precluded from moving to enforce its rights under the FAA to compel arbitration on the terms and conditions set forth in this Agreement.

vi. Paying For The Arbitration.

Each party will pay the fees for his, her or its own attorneys, subject to any remedies to which that party may later be entitled under applicable law (i.e., a party prevails on a claim that provides for the award of reasonable attorney fees to the prevailing party). In all cases where required by law, the Company will pay the Arbitrator's and arbitration fees. If under applicable law the Company is not required to pay all of the Arbitrator's and/or arbitration fees, such fee(s) will be apportioned equally between the Parties or as otherwise required by applicable law. Any disputes in that regard will be resolved by the Arbitrator.

vii. The Arbitration Hearing And Award.

The Parties will arbitrate their dispute before the Arbitrator, who shall confer with the Parties regarding the conduct of the hearing and resolve any disputes the Parties may have in that regard. Within 30 days of the close of the arbitration hearing, or within a longer period of time as agreed to by the Parties or as ordered by the Arbitrator, any party will have the right to prepare, serve on the other party and file with the Arbitrator a brief. The Arbitrator may award any party any remedy to which that party is entitled under applicable law, but such remedies shall be limited to those that would be available to a party in his or her individual capacity in a court of law for the claims presented to and decided by the Arbitrator, and no remedies that otherwise would be available to an individual in a court of law will be forfeited by

virtue of this Arbitration Provision. The Arbitrator will issue a decision or award in writing, stating the essential findings of fact and conclusions of law. Except as may be permitted or required by law, as determined by the Arbitrator, neither a party nor an Arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of all Parties. A court of competent jurisdiction shall have the authority to enter a judgment upon the award made pursuant to the arbitration. The Arbitrator shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error.

viii. Your Right To Opt Out Of Arbitration.

Arbitration is not a mandatory condition of your contractual relationship with the Company. If you do not want to be subject to this Arbitration Provision, you may opt out of this Arbitration Provision by notifying the Company in writing of your desire to opt out of this Arbitration Provision, either by (1) sending, within 30 days of the date this Agreement is executed by you, electronic mail to optout@uber.com, stating your name and intent to opt out of the Arbitration Provision or (2) by sending a letter by U.S. Mail, or by any nationally recognized delivery service (*e.g*, UPS, Federal Express, etc.), or by hand delivery to:

Legal
Rasier, LLC
1455 Market St., Ste. 400
San Francisco CA 94103

In order to be effective, the letter under option (2) must clearly indicate your intent to opt out of this Arbitration Provision, and must be dated and signed. The envelope containing the signed letter must be received (if delivered by hand) or post-marked within 30 days of the date this Agreement is executed by you. Your writing opting out of this Arbitration Provision, whether sent by (1) or (2), will be filed with a copy of this Agreement and maintained by the Company. Should you not opt out of this Arbitration Provision within the 30-day period, you and the Company shall be bound by the terms of this Arbitration Provision. You have the right to consult with counsel of your choice concerning this Arbitration Provision. You understand that you will not be subject to retaliation if you exercise your right to assert claims or opt-out of coverage under this Arbitration Provision.

ix. Enforcement Of This Agreement.

This Arbitration Provision is the full and complete agreement relating to the formal resolution of disputes arising out of this Agreement. Except as stated in subsection v, above, in the event any portion of this Arbitration Provision is deemed unenforceable, the remainder of this Arbitration Provision will be enforceable.

Notice

The Company may give notice by means of a general notice to you through the Software, electronic mail to your email address on record in the Company's account information, or by written communication sent by first class mail or pre-paid post to your principal place of business on record in the Company's account information. Such notice shall be deemed to have been given upon the expiration of 48 hours

after mailing or posting (if sent by first class mail or pre-paid post) or 12 hours after sending (if sent by email or through the Software).

You may give notice to the Company (such notice shall be deemed given when received by the Company) at any time by any of the following: (a) letter sent by email to support@uber.com; or (b) letter delivered by nationally recognized overnight delivery service or first class postage prepaid mail to the Company at the following address: Rasier, LLC, 1455 Market St., Ste. 400, San Francisco CA 94103 addressed to the attention of: Legal.

Assignment

You may not assign this Agreement without the prior written approval of the Company. Any purported assignment in violation of this section shall be void. The Company shall have the right, without your consent and in its sole discretion, to assign the Agreement or all or any of its obligations and rights hereunder provided that the assignee of the Company's obligations under such assignment is, in the Company's reasonable judgment, able to perform the Company's obligations under this Agreement. Upon such assignment, the Company shall have no further liability to the Transportation Provider for the obligations assigned.

Confidentiality Of Agreement

You represent you have not disclosed and agree to maintain in confidence the contents and terms of this Agreement, unless any such information is otherwise publicly available or its disclosure is mandated by law. You agree to take every reasonable precaution to prevent disclosure of the contents and terms of this Agreement, including by your personnel, to third parties, and agree that there will be no publicity, directly or indirectly, concerning any terms and conditions contained herein. You agree to disclose the terms and conditions of the Agreement only to those attorneys, accountants, governmental entities, and family members who have a need to know of such information and then only to the extent absolutely necessary. In the event you must disclose certain terms and conditions of the Agreement to the necessary third parties identified, you agree to inform Rasier of the nature and extent of the disclosure and further agree to inform the necessary third parties of this confidentiality provision and take every precaution to ensure those parties do not disclose the terms and conditions of the Agreement themselves.

Modifications

The Company reserves the right to modify or supplement the terms and conditions of this Agreement at any time, effective upon publishing a modified version of this Agreement, or upon publishing the supplemental terms to this Agreement, on the Software or via email or on your online Partner Dashboard.

You hereby expressly acknowledge and agree that, by using or receiving the Service, and downloading, installing or using the Software, you and Company are bound by the then-current version of this Agreement, including any modifications and supplements to this Agreement or documents incorporated herein. Continued use of the Service or Software after any modifications or supplements to the Agreement shall constitute your consent to such modifications and supplements. You are responsible for regularly reviewing this Agreement.

General

Except as otherwise explicitly set forth in this agreement, if any provision of the Agreement is held to be invalid or unenforceable, such provision shall be stricken and the remaining provisions shall be enforced to the fullest extent under law. The failure of the Company to enforce any right or provision in this Agreement shall not constitute a waiver of such right or provision unless acknowledged and agreed to by the Company in writing. This Agreement, including any modifications and supplements to this Agreement or documents incorporated herein, constitutes the entire agreement and understanding of the parties with respect to its subject matter and replaces and supersedes all prior or contemporaneous negotiations, discussions, agreements, arrangements, offers, undertakings or statements, whether verbal, electronic, or in writing, regarding such subject matter. Except as explicitly set forth in this Agreement, nothing contained in this provision or this Agreement is intended to or shall be interpreted to create any third-party beneficiary claims.

The interpretation of this Agreement shall be governed by California law, without regard to the choice or conflicts of law provisions of any jurisdiction, and any disputes, actions, claims or causes of action arising out of or in connection with this Agreement or the Uber Service or Software shall be subject to the exclusive jurisdiction of the state and federal courts located in the City and County of San Francisco, California. However, neither the choice of law provision regarding the interpretation of this Agreement nor the forum selection provision is intended to create any other substantive right to non-Californians to assert claims under California law whether that be by statute, common law, or otherwise. These provisions are only intended to specify the use of California law to interpret this Agreement and the forum for disputes asserting a breach of this Agreement, and these provisions shall not be interpreted as generally extending California law to you if you do not otherwise operate your business in California. If any provision of this Agreement is held to be invalid or unenforceable, such provision shall be struck and the remaining provisions shall be enforced to the fullest extent under law. The failure of the Company to enforce any right or provision in this Agreement shall not constitute a waiver of such right or provision unless acknowledged and agreed to by the Company in writing.

By clicking "I agree", you expressly acknowledge that you have read, understood, and taken steps to thoughtfully consider the consequences of this Agreement, that you agree to be bound by the terms and conditions of the Agreement, and that you are legally competent to enter into this Agreement with the Company.

Exhibit F

Pages 1 - 42

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE EDWARD M. CHEN

DOUGLAS O'CONNOR, et al, Plaintiffs, VS. UBER TECHNOLOGIES, et al, Defendants.	)	NO. C 13-3826 EMC San Francisco, California Thursday November 14, 2013 1:30 p.m.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiffs:

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(APPEARANCES CONTINUED ON FOLLOWING PAGE)

Reported By: *Debra L. Pas, CSR 11916, CRR, RMR, RPR*
Official Reporter - US District Court
Computerized Transcription By Eclipse

APPEARANCES (CONTINUED)
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ROBERT HENDRICKS, ESQ.

— — —

P R O C E E D I N G S

NOVEMBER 14, 2013 **1:40 p.m.**

THE CLERK: Calling Case C13-3826, O'Connor versus Uber.

Counsel, please come to the podium and state your name for the record.

MR. HENDRICKS: Good afternoon, your Honor. R.J. Hendricks with Morgan Lewis and Bockius on behalf of defendants.

THE COURT: All right. Thank you, Mr. Hendricks.

MR. TAEUSCH: Good afternoon, your Honor. Stephen Taeusch of Morgan Lewis and Bockus on behalf of defendants.

THE COURT: Good afternoon, Mr. Taeusch.

MS. LISS-RIORDAN: Good afternoon, your Honor. Shannon Liss-Riordan for the plaintiffs. Along with me is...

MS. OLIVIER: Monique Olivier, your Honor.

THE COURT: Good afternoon, Ms. Riordan, Ms. Olivier.

Let me address the motion regarding -- to strike the arbitration clause first.

Explain to me, one who has to opt out of his arbitration clause has to do it within 30 days, is that right, and has to do that with a notice providing for hand delivery or overnight mail to general counsel? Is that correct?

MS. LISS-RIORDAN: Yes, your Honor.

THE COURT: Do I have that wrong?

MS. LISS-RIORDAN: Yes, your Honor. That is correct. And I actually have a decision that was just issued two days ago by the Federal Court in Chicago addressing this very situation, which I could hand up for your Honor if you would like to take it.

It was a case in which there was an arbitration agreement and there was a similar opt-out provision in which there was a 30-day opt-out period, but although the arbitration agreement was emailed out to the potential class members and it was buried in attachments, the class members had to print it out, sign it and mail it in to the company. The Court found that it was unenforceable and struck the --

THE COURT: Unenforceable on unconscionability grounds?

MS. LISS-RIORDAN: Yes.

THE COURT: All right. Is that procedural or substantively unconscionable?

MS. LISS-RIORDAN: Well, the focus was on that procedural nature of it. I just got this case this morning, so I'm looking at it quickly to see if it addresses both procedural and substantive, but it addresses many of the same cases that we have cited in our briefing.

I believe, like in this case, there was no notice about what the potential rights would be that the class members would be waiving if they did not go through the steps to opt out of

the agreement.

And, also, the Court seems to be focusing on the cases, many of which we've cited, involving the Court's power to regulate communications with class members under Rule 23.

THE COURT: I'm going to get there, all right?

MS. LISS-RIORDAN: Okay.

THE COURT: The first question -- that was my factual question. And I take it from defendants you don't -- I stated it correctly, right?

MR. HENDRICKS: You state correctly that there is a 30-day opt-out period, that's right, your Honor.

THE COURT: That requires either hand delivery to either the general counsel in San Francisco or overnight delivery?

MR. HENDRICKS: That's correct, per the terms --

THE COURT: Regular first class mail, registered mail, email, fax won't do it?

MR. HENDRICKS: Per the terms, that would be the process by which you would opt out.

THE COURT: So I don't know if you had a hand in drafting this or not, but other than trying to make it extremely difficult, what is the purpose of such a requirement?

MR. HENDRICKS: Well, overnight delivery does give you a means of tracking --

THE COURT: So does email. We have ECF here, right?

MR. HENDRICKS: That's true.

THE COURT: So if you're worried about verification, there is nothing better than email.

MR. HENDRICKS: And -- but, your Honor, one thing to put in perspective. We're not dealing with a situation where either of these two plaintiffs were claiming that somehow because they emailed it, as opposed to submitting it, that the opt-out wasn't accepted or was deemed --

THE COURT: Yeah. I'm not talking about them necessarily. I'm talking about the overall conscionability of this. I'm just trying to ascertain why this was done.

MR. HENDRICKS: It's a legitimate means of communication. And the fact that that -- you know, before email existed, folks used mail or overnight mail. And it's a legitimate means of communication and that does not -- that process does not make it unconscionable.

THE COURT: All right. Let me ask the plaintiff. It seems to me this is classic procedural unconscionability. You may take issue with that, but I've looked at the record.

The problem is under California law, you need both: Procedural and substantive unconscionability. That is not necessarily the law in every state. And I don't see much in your brief and I don't see much discussion from your end about what is substantively unconscionable here.

MS. LISS-RIORDAN: Well, there are two things that I

would say are substantively unconscionable.

One is -- well, I'm not sure which order to put these in, but one is that there isn't any mention of potential claims that would be given up. And I understand that we filed this case just after this was distributed to a number of the Uber drivers, but the reason that I was rushing in trying to get expedited relief several times so quickly is because we were still within the time period that the class members could opt out.

So once the case was on file, we were attempting to get a ruling that at that point usually should have notified people that if they didn't opt out, these were the rights they were going to be giving up.

And just another thing I want to say on this --

THE COURT: That is a surprise factor, which is a procedure under procedural conscionability. I'm asking about substantive.

Like the case you just submitted. There was a substantive thing that you had to pay half the fee as an employee, in the Ninth Circuit decision that just came down, and you had to pay 5,000 bucks to even be heard and the Court said: No, that ain't going to cut it.

MS. LISS-RIORDAN: Exactly. That was the second point I was going to make.

Here the agreement is arguably similar to what the Ninth

Circuit said wouldn't cut it in the *Ralph's Grocery* case, because it's -- like the *Ralph's Grocery* case, the agreement is a little ambiguous about who is going to pay the arbitration fees. It says that Uber will pay them if the law requires, which says to me, and I think most importantly says --

THE COURT: Can you tell me what paragraph that is?

MS. LISS-RIORDAN: Yes. That is -- it's on Page 11 -- no, I'm sorry. Okay. Fee provision is on Page 14. It says in paragraph small number six:

"In all cases where required by law Uber will pay the arbitrators and arbitration fees."

But if you're an Uber driver who somehow got to Page 14 and read that sentence, that tells you you're not so sure whether you might get stuck with arbitration fees, which are going to be -- is going to be deterring because that's going to being expensive and you're going to have to pay a lot of money to pursue a potential claim.

I think that similar to the *Ralph's* case where in that case the Ninth Circuit said that the -- the agreement was a little ambiguous about fees, but said that the arbitrator was going to allocate the fees at the beginning; meaning, someone looking at that -- looking at that clause deciding whether or not they wanted to or could make a claim is facing this risk that they may get stuck with arbitration fees, and that's really the same thing that you're seeing in this provision of

the Uber agreement.

THE COURT: Your response to that?

MR. HENDRICKS: Our response is this particular provision is nothing like the case that was cited. It does not bring any substantive burden on behalf of someone that would be party to it from the driver perspective. It merely is a statement that we will do what we're obligated to do and that's not substantively unconscionable.

To the extent that counsel is suggesting that it may be ambiguous or confusing or what-have-you, that, again, would fall into the bucket of, at best, procedural issues, but it's -- it doesn't represent any substantive unconscionability. And this was not something that was argued in the moving papers or in the supplemental papers. This is --

THE COURT: How does it work? If one wants to implement arbitration, start arbitration, who -- do you have to pay something upfront? How would you know this is a case required by law?

And I guess that means that the default -- if it's not required by law, fees will be apportioned between the parties in accordance with said applicable law, whatever that is. I don't even know if there's a law that allocates expressly in arbitration who pays? It's usually a matter of contract.

MR. HENDRICKS: You would apply the rules of the procedure. They would send a notice requesting arbitration

and --

THE COURT: And who pays?

MR. HENDRICKS: In a situation where the company is obligated to pay, the company would pay.

THE COURT: Okay. In California who pays?

MR. HENDRICKS: Well, it would depend -- in this context, given we're dealing with independent contractors, I believe absent a showing of employee status, each party would probably bear their own expenses.

THE COURT: All right. So your position if somebody were to invoke arbitration now, is that -- and the issue they want to arbitrate, for instance, is employee versus independent contractor since they start in a -- and the contract does nominally state they are independent contractors, they would have to pony up the first half, or whatever it is --

MR. HENDRICKS: My position would be that the -- pursuant to the arbitration agreement, to the extent that was a question, that would be something that the arbitrator would ultimately decide pursuant to the terms of the agreement.

You know, the agreement provides for, in it's terms, that all disputes, including issues of enforcement, revocation, compliance, et cetera, are resolved by the arbitrator. And so in the first instance the -- it would be -- if there was a question regarding this, that's an issue that the arbitrator would ultimately have to decide.

THE COURT: So this is one of those *Rent-a-Center* cases where the agreement provides for even questions of arbitrability go to the arbitrator.

MR. HENDRICKS: That's correct, your Honor, which go to one of our threshold arguments that we've made regarding this entire motion, and it's sort of, you know, three-fold.

One, that these particular plaintiffs who have opted out of the arbitration program don't have standing to be challenging it and seeking it to be rewritten.

Two, since we have not yet moved to compel arbitration, all of these questions are premature and not ripe for the Court.

And, three, pursuant to *Rent-a-Center*, by the express terms of the arbitration agreement, all of these issues are issues that must be decided by the arbitrator.

THE COURT: Let me get your response, Ms. Riordan, on the fact that the arbitration clause is broadly worded and arguably encompasses even the question, the threshold question of arbitrability and unconscionability.

MS. LISS-RIORDAN: Well, for the very reason that you were just pointing out, I would say it's unconscionable because no one -- someone is not going to get his foot even in the door because he's going to be deterred even from going to an arbitrator to find out whether he has to pay arbitration fees to pursue the claims.

What happens when you go to these arbitration services and you start an arbitration process, is that the first thing that happens is they ask you to put down big deposits to pay these arbitrators. And given what I suspected, and now has been confirmed by Uber's counsel, that Uber will take the position that it does not have to bear the whole fees and that the Uber driver would have to pay half of the fees, then that -- the driver is not even going to be able to get his foot in the door to get that preliminary arbitration ruling as to who has to pay.

THE COURT: Which is an issue not addressed by *Rent-a-Center*.

MS. LISS-RIORDAN: Right.

THE COURT: All right.

MR. HENDRICKS: If I may be heard about that, your Honor?

THE COURT: Yeah.

MR. HENDRICKS: Again, I think the Supreme Court has been pretty clear that issues of enforceability, to the extent that the arbitration agreement provides for that, that those are issues that must be decided by an arbitrator and that to the extent a motion to compel arbitration was brought, which would be the proper context in which all of these issues would get joined, that the arbitration agreement should be enforced in accordance with its terms.

THE COURT: Has the Supreme Court addressed the situation where even the threshold question of arbitrability where that would otherwise presumptively belong to the arbitrator under the *Rent-a-Center* case, the party invoking arbitration can't even afford it, what happens then?

MR. HENDRICKS: Well, I think that -- this becomes circular. There has been no showing whatsoever that any particular person can or cannot afford any particular fee. You asked me a question in a broad context about who would pay and I said: Well, it would depend upon the circumstances. And that's true.

One thing that you're not entitled to do is have a presumption that these are, quote/unquote, employees and, therefore, apply some sort of standard that you may have seen under *Armendariz* or other state law standards dealing with employees and how fees need to be split amongst employees.

In true commercial settings commercial entities split costs and there is nothing unconscionable about that. The only way you reach some sort of assumption on unconscionability is to presuppose we're dealing with employees and a whole host of other --

THE COURT: There are other situations. Consumer, consumer contracts. If you had a consumer contract that required a consumer to put down $10,000 in order to arbitrate a $60 claim, my guess is that some Courts would find that

somewhat problematic.

MR. HENDRICKS: There is nothing here -- I think that a part of *Concepcion* and those cases did speak in terms of that; you know, the cost of proving up the claim, the cost of litigating the claim may be such that for certain individuals, they may choose to pursue it, others they may choose not to pursue it.

THE COURT: I'm familiar with that. I'm familiar with the *Italian Colors* decision that says, essentially, if the cost -- the fact that the adjudication costs may make it uneconomical in order to vindicate a claim is not necessarily a reason to avoid FAA preemption.

But the ability to even get in the door is a different question; that is, if you can't even pay to get in arbitration. Let's say there was a rule you have to deposit $100,000 just to get in arbitration. That's a little different than saying: Well, it costs attorneys and, therefore, you know, you have to make your own judgment whether it's worth it or not.

MR. HENDRICKS: If you have -- if you have commercial entities, commercial entities -- and that's through our perspective what we're dealing with here. These are people who have entered into bona fide agreements and they have entered into them as commercial entities, respective commercial entities. No one was obligated to enter into these agreements. They made choices to do so.

First, I reject the premise that this agreement specifically provides for that amount. The case that counsel cited, it was very clear that the party moving for arbitration would have a significant upfront cost.

Our agreement here is not that specific. It simply says that each party is obligated to bear those expenses unless the law requires a different result. And that, quite frankly, makes this where it's not unconscionable.

And the notion that economically sophisticated parties -- and there is no evidence to suggest these individuals are not that, and there is no basis to presume that -- that would create a certain, quite frankly, class action specific sort of standard of unconscionability that I think under *Concepcion* would not be appropriate. That's the only way that you get to that conclusion.

Right now we have a bona fide agreement. On a substantive basis the parties are treated very comparably. On a procedural basis, especially given the fact of the opt-out provision, we don't believe there is really procedural unconscionability. Even with respect to the Court's notion regarding the notice.

You know, there has been no factual showing that there's any material difficulty in people walking in -- where is the declaration from someone saying: You know something? I would have liked to opt out, but the difficulty of walking in and delivering my notice was such that it created a burden. I

would have liked to opt out, but, you know, the difficulty of getting overnight mail delivered to this location was such a burden for me that I -- that I couldn't exercise those rights.

The mechanism for opting out was made clear. We know that it can be followed because the two plaintiffs that you're dealing with here, in fact, followed the appropriate mechanism. And, therefore, even the suggestion that that is procedurally --

THE COURT: They had counsel, didn't they?

MR. HENDRICKS: What's that?

THE COURT: They had counsel?

MR. HENDRICKS: I don't know that they had counsel at the time that they did that, you know. And I don't know when they got the counsel.

THE COURT: How many people have actually opted out?

MR. HENDRICKS: I don't have those numbers, your Honor, you know, but the point is this: Within 30 days anyone who wanted to look for counsel could have, you know. When you have --

THE COURT: So they can eat cake. Go ahead and find counsel in 30 days and pay counsel whatever it takes to go through a 15-page single-spaced document to find -- to find on page four Roman numeral VIII your right to opt out, which the only bold is "Must be postmarked within 30 days."

So, yeah, I'm sure that's very easy for most people to do.

MR. HENDRICKS: It begs the question. There is a pre-assumption that they may not already have counsel.

What I am challenging right now is the assumption here that underlies that conclusion of unconscionability; that we're dealing with unsophisticated individuals.

The individuals that we are contracting with are transportation companies. They have employees, many of them do. They may have their own legal staff. They may have already legal relationships. They choose to have, you know, a fleet of cars or other operations. You know, they vary.

And so the notion, the presumption that somehow we're dealing with unsophisticated individuals, there's nothing in this record to support that inference.

THE COURT: All right. Is that true, counsel? That a lot of the drivers are actually companies, independent contractor, traditional -- one might be deemed a classic independent contractor?

MS. LISS-RIORDAN: Well, there are some. There are some relationships that are -- that look more like bigger companies.

What we're talking about here, the class here are drivers, who are individuals, who are -- who are driving for Uber, who are getting their direction from Uber. They are getting their business from Uber. They are getting rated by Uber and they get fired if they don't meet a certain rating standard and --

THE COURT: I don't understand --

MS. LISS-RIORDAN: (Continuing) -- they are largely immigrant drivers, many of whom are not English speaking as their first language.

THE COURT: What percentage of the driver population in Uber is comprised of that profile that you just mentioned, individuals that are not tied to a company?

MS. LISS-RIORDAN: Well, I don't know specifics. We haven't done discovery yet, but from talking to many Uber drivers, my understanding is that the majority of them are what I just described.

There may also be some of these companies that look more like classic independent contractor relationships, but that the majority are what I've described and that's the class that we're seeking to have covered by this case.

THE COURT: All right. Let me ask this question about the timing of the arbitration policy. Now, this was -- post-dated the Massachusetts lawsuit.

MS. LISS-RIORDAN: Yes.

THE COURT: Right?

MS. LISS-RIORDAN: Yes.

THE COURT: Was there any attempt -- I don't know if Massachusetts -- that's in state court, correct?

MS. LISS-RIORDAN: Yes.

THE COURT: Does Massachusetts have an equivalent of

Rule 23?

MS. LISS-RIORDAN: Yes.

THE COURT: Was there an effort -- I'm getting now to the notice question, the communication with the class.

Was there any order or any effort in Massachusetts to get out some kind of regulatory order with respect to communications?

MS. LISS-RIORDAN: No, no, because the case had not gotten to that point yet.

Just one thing I would like to add is something that I have learned even since the briefing was done in this case, is that it's come to my attention that it appears that Uber has been rolling out this arbitration clause over the course of this year. When I filed these papers, I was aware of the one that they sent to many drivers in July.

I was contacted by an Uber driver just yesterday who got sent this agreement last week. So, again, part of the reason we were seeking expedited relief here is that we were concerned that Uber would continue to engage in these discussions with class members and that appears to be what they have done.

So I don't know all of the dates upon which these agreements were sent out, but I am now aware that there were at least several dates over the course of this year, one as recently as in the last couple weeks, in which they have been sent out.

THE COURT: Was this lawsuit in this Court preceded by any demand notice or any prelitigation communication?

MS. LISS-RIORDAN: This particular case, no. There was simply the fact that similar claims had been raised in Massachusetts. There was also similar types of claims raised in a case in Illinois.

So what we have on that basis is that it seems evident that Uber saw these claims coming toward it and it started rolling out this clause in order to ward off the risk of a more broad case being brought against it raising these types of claims.

THE COURT: What's the Illinois case and what's the status of that?

MS. LISS-RIORDAN: I have it cited in our papers. I don't know the current status because I think it was filed sometime around or maybe after the Massachusetts case. I don't know -- I don't know the current status of it. I think it's in early stages as well.

THE COURT: That's a class action?

MS. LISS-RIORDAN: Yes.

THE COURT: And you don't know what the stage of that is?

MS. LISS-RIORDAN: Well, when I last checked awhile back, it didn't look like anything much of substance had occurred yet.

I think that's a case that was actually brought by consumers raising these claims about tips; that they thought they were paying tips to drivers --

THE COURT: So it's a consumer, not a labor case.

MS. LISS-RIORDAN: Exactly. It's a similar kind of allegation, but brought on behalf of the consumers rather than the drivers.

THE COURT: Well, let me ask: The cases that you cite and the cases that I found in which there has been either some kind of coercive conduct or some kind of misleading communication on the part of a class action defendant are such that the action is filed and then there is the offending communication. Here the policy preceded this case.

So, first of all, I would like to know: Are there any cases in which -- I understand it has ongoing effects and I understand your position that there is continuing communications, as evidenced by recent roll-outs and other things, but the policy itself was instituted before the suit was filed. So the idea this was done not necessarily to thwart the class interests in this case is a little harder to make, isn't it?

MS. LISS-RIORDAN: Well, I do agree it's a little more of an extension of what those other cases have been about. That's why -- again, that's why I was trying so hard to jump in there and do something as soon as I got wind of it and got

retained.

THE COURT: Even then it was well over a month after the policy had been implemented --

MS. LISS-RIORDAN: No, no. Actually, it wasn't. As we spelled out in our papers, I believe it's in our reply brief and motion for protective order, when we filed the case and when we filed the emergency motion, it was still within the 30 days. It looks like the 30 days didn't expire for that -- for the July roll-out until September 4th.

THE COURT: We're talking about two different things.

MS. LISS-RIORDAN: Yes.

THE COURT: The 30 days won't help you because with respect to the relief of requiring clarifying communication and issuances of warnings and things, that wouldn't have helped.

What you're talking about is the substantive relief from 30 days, getting relieved from the opt-out period, invalidated, which could be done now, which is one reason I think no relief was granted. To the extent that that is awardable relief, assuming you get past *Concepcion*, *Italian Colors*, the substantive law and everything else, the timing there -- I guess I should make myself clear.

I'm now talking about your request for some kind of clarifying notice or warning notice or know-your-rights kind of notice.

MS. LISS-RIORDAN: Right.

THE COURT: And those usually occur when there has been tainted or offending communication after the class action was filed.

MS. LISS-RIORDAN: Right. I agree that's what the prior cases addressed.

The point that I was trying to make was this was an unusual situation in which we jumped in there, filed the case, filed for emergency relief while there was still ongoing communications going on. And once the case was filed, they were asking that Uber be required to go forward at least, let the drivers know about the pendency of the action.

And then as further background, we have this backdrop that there were similar claims filed in Massachusetts and somewhat similar claims also already filed in Illinois. So it -- it appears evident that this was rolled out in order to contain such claims and prevent such broader claims from going forward.

But I agree, that does go beyond what prior cases were about.

THE COURT: Well, let me ask defense counsel. Are there notices that -- I mean, how was this being disseminated, this policy and people signing onto the arbitration policy?

MR. HENDRICKS: Well, there was the initial roll-out. And to the extent you have a new driver sign up, when they initially -- before they have -- you know, take their first ride, they are then presented with the licensing agreement and

the driver addendum and the other paperwork that comprises the licensing agreement, which includes the arbitration provision.

THE COURT: So everybody who has been working for Uber, let's say more than a month or two, has already received this agreement?

MR. HENDRICKS: I believe that would be correct, yes.

THE COURT: So it's the new drivers that come on that might or might not be affected by any --

MR. HENDRICKS: Again, I don't want to limit it to this notion of drivers. It is the -- the entities that are contracting with Uber. That may include individual drivers, but it also includes transportation companies and the people that they work for.

THE COURT: All right.

MR. HENDRICKS: And the people that work for them.

THE COURT: We'll call them transportation companies. That's what this contract calls them.

MR. HENDRICKS: That's right.

THE COURT: So the issue of what the plaintiff is seeking, sort of notice or warning or know your rights, whatever it is, at this point would only affect prospectively new transportation companies as they sign on. The people who have already been there have now already gotten this and has either opted out or not opted out.

MR. HENDRICKS: That would be correct.

Again, let me address, again, a fundamental sort of premise that is underlying the plaintiff's argument here. That premise is is that the fact that individuals, either transportation companies or drivers, would agree to an arbitration process is somehow representing misconduct or conduct that needs to be addressed by the Court. And we just fundamentally reject that notion.

The Federal Arbitration Act represents a policy that favors arbitration agreements. The Supreme Court has made clear that class action waivers are not some sort of bad, you know, thing. In fact, they restore litigation to its normal state, which is one claimant bringing a claim against another claimant.

And so the suggestion that that conduct, that business conduct represents some misconduct that requires court intervention, we reject that.

THE COURT: Well, what if you had a situation where a putative class action is filed and in response to that is a broad-based class action waiver provision, which would be upheld and preempted against an unconscionability claim under *Concepcion*.

Are you saying that even if this was done with the purpose of trying to decimate the class and reduce its number and size and perhaps undermine the class action before one could get to class certification, that a Court under Rule 23(d) would have

no power to do anything about it?

MR. HENDRICKS: Let me say two things. One, that was not the purpose here, but going with your hypothetical --

THE COURT: Yeah.

MR. HENDRICKS: (Continuing) -- I would say that the intentionality makes no difference. Because what's going on, your Honor, is a validation and a vindication of a federal right manifest in the FAA.

Regardless of what my intent is, I have a right to attempt to enter into arbitration agreements. I have a right to do that under federal law. The Congress has said that. The United States Supreme Court has validated that, repeatedly now, saying: You know something? Even if there is a class action waiver -- in fact, it's such an important right that we don't even have to have agreements specifically address the issue of whether there is an affirmative class action waiver or not. Unless there is something specifically saying you intend to include class action within arbitration, we're going to presume that they are excluded, okay? That's the right we're dealing with here.

Most of the cases what we're talking about where the Court takes some sort of corrective action, you're dealing with eliminating substantive rights. You're dealing with releases, people trying to get releases in the context, trying to settle claims.

Nothing that Uber has done affects a substantive right. As the Supreme Court in *Gilmer* said way back in 1991, the fact that you agree to arbitrate a claim does not affect substantive rights. It only changes the form in which those rights are being addressed.

So the suggestion that a defendant, a business, looking at, you know, litigation, looking at its interest, the very nature of arbitration is to avoid litigation and court. That's its very nature.

THE COURT: It seems to me it's one thing to have an arbitration clause and have it apply prospectively as a means of reducing costs, et cetera, et cetera, and all things we were talking about in *Concepcion*. It seems to me something different -- and I understand this is arguably not the facts here.

If you had a pending case in the middle of a prior -- in order to preempt in a different direction, effectively preempt class certification, Rule 23(d) does give the district judge certain powers over that process. So Rule 23(d) wasn't involved in *Concepcion*.

MR. HENDRICKS: But the issue is, as the Court pointed out in its own preliminary order when it denied the emergency motion, the showing that the Supreme Court has required is a specific factual showing demonstrating the harm and attempting to balance the communication interest.

Let me tell you why this is also different, why this entire notion of regulating communication under Rule 23 is very problematic in the context of arbitration.

You're not dealing simply with communications. What the Court -- what counsel is seeking is the attempt to rewrite these agreements. I mean, that's really what the request has been. Modify the opt-out period. Invalidate them in some sort of way.

Again, our position is, is that under the FAA the Court's ability to rewrite or to modify or change in any respect the arbitration provision is -- does not exist. The Court's obligation is to enforce them in accordance with their terms.

And you can't allow the Court's authority under Rule 23 -- and there is authority under Rule 23, but you cannot allow that to attempt to circumvent the restrictions that have been placed on Courts with respect to arbitration agreements. So you can't use --

THE COURT: Well, it depends how that notice is framed. If it is simply a notice: Dear Prospective Putative Class Member. Please look carefully at Paragraph VIII because if you don't exercise your rights thereunder, among other things, you will not be able to participate in this class.

You're not touching the class. It still goes, you're giving people warning.

MR. HENDRICKS: Very good. So let's look at what

that's doing.

The rhetorical question is: Why is the Court being asked to place its thumb on the scale? The entire purpose of that is to encourage individuals not to participate in the arbitration process. It's to encourage them --

THE COURT: No. Arguably one purpose is to make sure they know what the consequences are that they are alerted to this very material term that is now proven material in light of legal developments, i.e., the pendency of a class action.

MR. HENDRICKS: But this is the point. By its very nature, an arbitration agreement always means that. It's fully disclosed to them already.

You know, whether or not there is an action pending or not pending, whether one might develop later down the road --

THE COURT: We're ships passing through the night. You're ignoring the context of Rule 23(d). It's very different.

Now, your best argument is that it doesn't come into play here because this preceded it. I, frankly, would have a very clear view if this happened in response to this action and, therefore, the power of this Court to act under Rule 23 is to give notice so that people know what they are doing, just as I would supervise a class notice to make sure that the opt-out and opt-in provisions are clearly stated. They are bolded, et cetera, et cetera, et cetera. This is not much different

than that. Making people know their rights, okay?

But, so the issue is not *Concepcion* versus Rule 23 versus something else. I don't see it that way and you've argued that now about six different ways.

The issue is in light of that, I'm not sure what power this Court has to order notices when there is a preexisting policy before the suit. I mean, I haven't found a case where the Court has done that.

MS. LISS-RIORDAN: Well, I would just emphasize again, your Honor, the fact here that the -- the agreement had not been consummated when this case was filed.

So, in other words, you're saying that it preceded it because the agreement was emailed out to the drivers a couple weeks before we filed the case. But because it wasn't going to be consummated, that arbitration agreement wasn't binding on them until 30 days went by and they didn't opt out. The case was pending before that agreement was consummated and that's why we believe there is the power of this Court under Rule 23 to at that point step in and regulate communications with class members.

THE COURT: Well, but I think the bigger point is that -- I do think intentionality counts in a Rule 23 analysis, and it's hard to say that there was an intentional effort undermining this case when -- and that's why I asked you whether there has been pre-litigation.

If there had been a threat to sue back in April or something and negotiations -- it's almost like an anticipatory lawsuit. Then Uber were to issue this. Then one could say: Yeah, this was sort of done in anticipation to specifically thwart this lawsuit or thwart the class action and kind of exterminate any possible class certification.

But that didn't happen here. Apparently, there was no pre-litigation communication. This lawsuit came and was filed without any particular notice that, it appears to me, pre-litigation notice.

And so when the time that they enacted this, maybe it was in response to the Massachusetts case or something, which is why I asked whether the Massachusetts -- it seemed like that would be the court where one would try to seek some Rule 23-type notice, but this preceded it. And there is not a case so far that I've seen that applies, that gives the Court authority to do something about that.

MS. LISS-RIORDAN: Well, again, I would just rest on the fact that this particular fact pattern has not emerged in the cases, but the backdrop of this is the same in that it just -- it appears evident that they started -- they saw these claims starting to pop up in the country and they wanted to ward off the possibility that drivers might collectively try to bring such claims in a broader -- of a broader scope.

THE COURT: Do you have a response to the -- let me

go back, then, to the unconscionability question, to the argument that given the breadth of this arbitration clause, that under *Rent-a-Center* this has -- this is an issue for the arbitrator to decide?

MS. LISS-RIORDAN: Well, I think my argument there is what we were already discussing that the drivers here wouldn't be able to get their foot in the door. They would be deterred from even getting their foot in the door to bring the issue to an arbitrator as to whether or not they have to abide by this arbitration agreement.

THE COURT: What showing has there been of that, you know, given the vagueness of the fee splitting provision?

MS. LISS-RIORDAN: Well, I mean, looking at it closely the vagueness of the fee splitting provision is really similar to what the Ninth Circuit just said wouldn't work in the *Ralph's* grocery case because there it was going to be based on what the Supreme Court had said. I mean --

THE COURT: If there been any cases that found an exception to *Rent-a-Center* on this basis, that is, one of the parties couldn't even get to arbitration to determine arbitrability because they -- because it was cost prohibitive or the way it was structured, there was just too many barriers even to get to that arbitration.

MS. LISS-RIORDAN: There is a case that I have been litigating for a long time where I believe -- it's very

complicated procedurally, but I believe the Court agreed with us that even after *Rent-a-Center*, it was still the Court's duty to address these preliminary issues. It's a case pending in Massachusetts against Coverall North America.

I would have to go back and check the docket on that particular issue, but I do believe the Court agreed that even after *Rent-a-Center*, the preliminary issue as to whether or not the class members would be deterred from -- could even get to an arbitrator to get started with a question of whether they could challenge the arbitration agreement was going to be decided by the Court.

THE COURT: All right. Well, that gives me a hint if there is one out there.

MS. LISS-RIORDAN: I can --

MR. HENDRICKS: And, your Honor, we've not found any such authority. We think that the *Rent-a-Center* authority is controlling here and would require threshold questions of enforceability, the very issues that are being raised here to be addressed by the arbitrator.

And we still, again, reaffirm, at least when it gets to an issue of substantively challenging the arbitration provisions, moving aside now from perhaps any Rule 23 analysis, that these individuals who have opted out did not have standing to challenge arbitration agreements to which they're not a party. We've cited for you authority to that effect, that they need to

be a party to the agreement.

The *Britain Company versus Coop Banking Group* case, no standing to enforce arbitration agreement because it's not a party to it.

We cited a number of cases on Page 9 --

THE COURT: Have any of those cases addressed the situation where the plaintiffs are named representatives of a putative class, to be able to have standing on behalf of the putative class?

MR. HENDRICKS: You know, I -- I believe they do. I believe in our discussion of them, we point out that they were not parties to the arbitration agreements they were attempting to address. And if memory serves me *Britain* might even implicate that fact pattern as well.

You know, they need to be parties to it. And they are not. And they are not legal agents of any of these folks. There has been no class certified here. No one has given them authority to stand on their behalf, to challenge agreements --

THE COURT: So who could ever -- under that construct who could ever have standing? If you opted out, you're no longer within the regime. You have no standing to challenge it. If you stayed in, you're now stuck and you're now bound by arbitration, you'll never get a chance to go to court to challenge it.

MR. HENDRICKS: Sure. Someone could come back and

say that I had wanted to -- all of the issues of unconscionability that are being raised, someone could try to raise that to an arbitrator. They have could say: I'm challenging the validity of this agreement. I want to be in court. And they could challenge it in front of the arbitrator. And they would have standing to do so in front of the arbitrator and the arbitrator could say: You know, looking at circumstances I don't think that the method of opting out was appropriate, or I don't think this was right or that was right, and I agree with you, and I conclude that it's not enforceable as to you and you can go file your lawsuit. Absolutely. That's exactly how that process would play out.

Again, nothing that is done by this agreement avoids substantive rights. You know, these -- any party who would be subject to the arbitration agreement has a forum through arbitration to address not only their substantive claims, but also any sort of procedural attacks or challenges to the arbitration agreement.

THE COURT: All right. Let me ask a couple questions about the substantive issues, if we were to get there. I have some factual questions.

How does it work in terms of how drivers are assigned customers? Is it at the driver's option to take up an assignment or how does that work?

MR. HENDRICKS: The driver is not assigned anything.

What happens is is that you have a transportation company that are -- that may have access to the software. You have potential passengers that have access to the software. And a potential passenger, using their mobile device, indicates that they would be interested in a fare. That information is distributed and it's made available to the transportation providers or the users of the software and then they decide whether or not they are going to select that particular ride or not.

THE COURT: So the request for a ride goes out to everyone?

MR. HENDRICKS: I believe it's geographically.

THE COURT: Whoever is in the geographic area?

MR. HENDRICKS: Sure, sure. And various people can either choose to accept it or not.

THE COURT: The software is set up so that if one -- the first bidder gets it?

MR. HENDRICKS: Yes. Whoever locks it in, that's the -- they can choose to -- they can choose to decline it at some point in time as well.

THE COURT: So if a driver declines, obviously, the driver doesn't pick up the fare or revenue from that. There's no consequence.

MR. HENDRICKS: Absolutely none.

And let me add something further to it. You know, Uber

has no control over which drivers are on at which particular time in terms of whose looking for these leads. This is all determined by the end users. Uber has no involvement in that.

THE COURT: Okay. Let me ask another question. It's stated in Paragraph 17 of the complaint that there are some situations where there is an actual amount stated by Uber in terms of the amount of the alleged gratuity. I'm not sure what to make of that allegation. It's number 17.

It says:

"In some instances Uber has advertised that the gratuity is a set amount, such as 20 percent of the fair that it charges."

I take it at other times it just says "gratuity included" with no designation?

MS. LISS-RIORDAN: That's correct.

THE COURT: So there is a mixed practice? That's the allegation here.

MS. LISS-RIORDAN: That's paragraphs 17 and 18, yes.

THE COURT: All right. The last question I have is with respect to potential liability of individual defendants.

It seems to me that that is something that would turn on which particular cause of action we're talking about. It may vary from a statutory claim, who may be liable under a particular statute versus a contract claim, and generally you can't be liable unless you're a party to a contract, to a tort

claim. There is not much briefing on that frankly.

And, frankly, I'm debating whether I should order more briefing or wait until this develops a little further and see what's left before ordering that briefing, but there is not a lot of discussion here about that.

And you're not asserting an alter-ego theory, right?

MS. LISS-RIORDAN: We've asserted in the complaint that these individuals are responsible for the pay practices that we're challenging. At this point before discovery there is not much more detail we have to say about it other than that, but we contend that under the statutes, they may be statutorily liable. Under the common law, as we have alleged, they were, in, fact responsible for these policies. They are the ones who committed the common law violations as well.

So at this stage I don't really know what more we can say about that until we've done some discovery.

THE COURT: Do you have any comments on that?

MR. HENDRICKS: At this stage the individual defendants should be dismissed. There are not specific allegations to them, as to any of the specific causes of action. There is no allegation specific that either of the individual defendants ever met either of these named plaintiffs or specifically what their conduct was.

All they are alleged to have been are employees. And, you know, merely being an employee does not mean somehow that

you've engaged in tortious interference of contractual relations or that you have some implied contract. There are no specific factual allegations as to the conduct, the specific conduct of either of these individual defendants that under *Iqbal* and *Twombley* would make these claims plausible as to them.

And, again, your Honor -- and we can address the specific claims as it relates to Uber as well, but take, for example, the fourth cause of action. There is no private right of action for 351 in California. Our Supreme Court, the state Supreme Court in *Lou versus Hawaiian Gardens* made that clear.

You go to the issue of the third causes of action --

THE COURT: What about the sixth cause of action? I understand that there is a -- at least as -- with respect to whether there is an unfair or unlawful business practice, that may turn on the substantive counts, but there also appears to be a claim of unfair business practice. But whatever it is, can an individual who directs the company's activities, the corporation's activities, be held liable under 17200?

MR. HENDRICKS: I don't believe so. I don't believe there is any authority for that proposition.

The act -- you know, when you're dealing with employees acting within the scope of their employment, they are the agents of the employer, which is the principle. And it's the principle that ultimately is responsible.

In fact, if you were to analogize to basic discrimination law, under the FEHA it's very clear. Acts, managerial acts don't create individual liability unless a statute very clearly articulates that. That's why an individual supervisor would not be liable for discrimination even if he is the individual or she is the individual that made the termination decision.

Okay. I mean, that's a classic example as how the State of California and why, again, we should be really focused on the case law, the statutes, the requirements of California law. Why under the State of California an individual supervisor or manager is not liable under *Reno v Baird*, for acts of discrimination. That's another statutory framework.

THE COURT: There are common law cause of actions, too.

And let me ask Ms. Riordan: Are there cases that say that the president of a corporation can be held liable absent -- absent some alter-ego theory for a common law claim?

MS. LISS-RIORDAN: Well, if the president of the corporation was responsible for a practice in which the drivers are not reimbursed for their expenses and for which the company is going to charge an gratuity to customers that's not paid in full, if that is the person who put that into place, then I don't see any particular reason why that could only be liability that a company could bear rather than an individual.

THE COURT: That's why there is a corporate

structure. Because when you say who made the decision, presumably there was a Board of Directors that may have been involved. There are other corporate officers.

The corporate entity is a legally recognized entity and that's normally who you look to because that's the company that implemented the -- that's the entity that implemented the policy, whether people behind it influenced it.

I have a very specific question. Do you have a case cite where somebody was held liable for, let's say, tortious interference --

MS. LISS-RIORDAN: Yeah. Well, we have two sites on Page 22 of our opposition. One is a case from this year which the Federal Court held that an individual defendant could be personally liable under 17200. That's a statutory claim, another cite for the proposition that an individual can be personally liable for tortious interference.

THE COURT: That's *Steiner* and *Klein*, the Oakland Raiders cases?

MS. LISS-RIORDAN: Yes, yes.

THE COURT: Where they -- were the individuals who were held prospectively liable acting only in their capacity as president of some corporation?

MS. LISS-RIORDAN: I don't know that as I stand here today. And, again, because we haven't done discovery in the case, I don't know what corporate approvals these individual

defendants had in enacting these policies. Not having done discovery, we just don't know very much yet.

I think that could be fleshed out further when we have discovery and that could be through briefing as to whether they have met a standard to attain liability against them personally.

THE COURT: Okay. I'm going to take the matter under submission.

MR. HENDRICKS: Your Honor, if we could, there is an additional issue here, and that relates to this issue of the non-California putative class members.

We believe that there is this attempt to apply extra territorially --

THE COURT: I understand the issues, the dormant commercial clause and the extra territorial clause. I have read the briefs. I will take it under submission.

Thank you.

MR. HENDRICKS: Thank you, your Honor.

MS. LISS-RIORDAN: Thank you, your Honor.

(Proceedings adjourned.)

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Monday, December 2, 2013

.

Exhibit G

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Attorneys for Defendant
UBER TECHNOLOGIES, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RONALD GILLETTE, individually and on behalf of all others similarly-situated,

Plaintiff,

v.

UBER TECHNOLOGIES, INC., a California corporation, and DOES 1-20, inclusive,

Defendants.

Case No. 3:14-cv-05241-EMC

DEFENDANT'S NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: March 12, 2015
Time: 1:30 p.m.
Ctrm.: 5, 17th Floor

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on March 12, 2015, in Courtroom 5, 17th Floor of the U.S. District Court, Northern District of California, 450 Golden Gate Avenue, San Francisco, California, at 1:30 p.m., or as soon thereafter as counsel may be heard, Defendant UBER TECHNOLOGIES, INC. ("Uber") will and hereby does move the Court for an order compelling to arbitration on an individual basis the claims of Plaintiff RONALD GILLETTE ("Plaintiff") pursuant to his agreement to arbitrate with Defendant, and dismissing all class or representative claims alleged in Plaintiff's First Amended Complaint ("Complaint"). This motion is made pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq*. This motion is brought on the grounds that all of Plaintiff's claims against Uber are subject to a valid and enforceable arbitration agreement that requires Plaintiff to arbitrate his claims on an individual basis only, and not in a court of law.

If the Court concludes that Plaintiff is entitled to pursue his Eighth Cause of Action under the Private Attorneys General Act of 2004, California Labor Code §§ 2698, *et seq.* ("PAGA"), on a representative basis, Uber requests that the Court stay litigation of the representative claim pending arbitration of Plaintiff's First through Seventh Causes of Action pursuant to 9 U.S.C. § 3.

The motion will be based upon this notice of motion and motion and upon Uber's memorandum of points and authorities, the declarations of Michael Colman and Emily E. O'Connor filed herewith, the pleadings and papers filed herein, and any other matters considered by the Court.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On July 29, 2013, Plaintiff Ronald Gillette ("Plaintiff") entered into an arbitration agreement with Uber. The arbitration agreement provides that: "this Arbitration Provision [ ] applies, without limitation, to disputes arising out of or related to this Agreement and disputes arising out of or related to Your relationship with Uber, including termination of the relationship." The agreement further states that: "You and Uber agree to bring any dispute in arbitration on an individual basis only, and not on a class, collective, or private attorney general representative action basis."

Despite being bound by a valid arbitration agreement covering any claims arising out of his relationship with Uber, Plaintiff proceeded to file the instant lawsuit, alleging violations of the Fair Credit Reporting Act ("FCRA") on a class basis, PAGA on a representative basis, and the California Investigative Consumer Reporting Agencies Act ("ICRAA") on an individual basis.

Uber brings this motion to compel Plaintiff's compliance with his agreement to arbitrate and requests that the Court dismiss Plaintiff's class and representative claims and order him to submit his individual claims to arbitration. Alternatively, Uber requests that this Court stay litigation of Plaintiff's PAGA claim pending arbitration of his other claims pursuant to 9 U.S.C. § 3.

II. RELEVANT FACTS

A. Defendant Uber Technologies, Inc.

Uber is a technology company that offers a smartphone application connecting riders looking for transportation to independent transportation providers looking for riders. (Declaration of Michael Colman ("Colman Decl.") ¶ 3.) Uber offers the app as a tool to facilitate transportation services, and it licenses the use of the app to independent transportation providers. (*Id.*, at ¶¶ 4, 6.) Any independent transportation provider who wishes to access Uber's software platform to book passengers must first enter into a Software License & Online Services Agreement ("Licensing Agreement") with Uber. (*Id.*, at ¶ 6.) Independent transportation providers are free to engage drivers to provide transportation services booked using the Uber app. (*Id.*) Any such drivers are required to accept both the Licensing Agreement and Driver Addendum Related to Uber Services ("Driver Addendum") before receiving access to the app. (*Id.*) On occasion, Uber implements

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updated Licensing Agreements and Driver Addendums and transportation providers and drivers must agree to those updated documents in order to access the app. (*Id.*)

B. Plaintiff Agreed To Be Bound By An Arbitration Agreement Covering The Instant Dispute.

Plaintiff first signed up to use the Uber app to book passengers on or about June 3, 2013. (Colman Decl., ¶ 8.) At the time, Plaintiff was engaged as a driver by Abbey Lane Limousine, an independent transportation provider authorized to use the Uber app as a lead generation tool. (*Id.*) Plaintiff signed up to use the app under Abbey Lane Limousine's account. (FAC, ¶¶ 11-12.) On or about July 23, 2013, Plaintiff was given notice and an opportunity to review the new Licensing Agreement and Driver Addendum that Uber intended to implement. (Colman Decl., ¶ 9, Exs. A, B, C.) On July 29, 2013, Plaintiff accepted Uber's new Licensing Agreement and Driver Addendum. (Colman Decl., ¶¶ 10-12, Exs. D, E.)[1]

The Licensing Agreement contains an arbitration agreement (the "Arbitration Provision"). The Arbitration Provision broadly requires Plaintiff to individually arbitrate ***all*** disputes arising out of the Licensing Agreement and/or his relationship with Uber, including termination of that relationship. Plaintiff also expressly agreed to arbitrate any challenges to the validity or enforceability of the Arbitration Provision. The Arbitration Provision reads in relevant part as follows:

> This Arbitration Provision is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. and evidences a transaction involving commerce. This Arbitration Provision applies to any dispute arising out of or related to this Agreement or termination of the Agreement and survives after the Agreement terminates…
>
> **Except as it otherwise provides, this Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration. This Arbitration Provision requires all such disputes be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of court or jury trial.**
>
> Such disputes include without limitation disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of

[1] The Licensing Agreement and Driver Addendum are attached as Exhibits D and E, respectively, to Mr. Colman's Declaration.

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> the Arbitration Provision. All such matters shall be decided by an Arbitrator and not by a court or judge.
>
> Except as it otherwise provides, this Arbitration Provision also applies, without limitation, to disputes arising out of or related to this Agreement and disputes arising out of or related to Your relationship with Uber, including termination of the relationship.

(Colman Decl., Ex. D at Section 14.3.i.) The Driver Addendum, to which Plaintiff also agreed to be bound, states Plaintiff "may be required to submit to a criminal background check." (*Id.*, Ex. E at Section 1.4.) The Driver Addendum also contains an acknowledgement that Plaintiff agreed to arbitrate any disputes related to the Driver Addendum consistent with the terms of the dispute resolution provision contained in the Licensing Agreement:

> **DISPUTE RESOLUTION**: Subcontractor agrees that any dispute, claim or controversy and arising out of relating to this Addendum, or the breach, termination, enforcement, interpretation or validity thereof, or performance of transportation services pursuant to the Software License and Online Services Agreement, including, but not limited to the use of the Service or Software, will be settled by binding arbitration in accordance with the terms set forth in the Software License and Online Services Agreement.

(*Id*., Ex. E at Section 7.)

The Arbitration Provision in the Licensing Agreement further provides that Plaintiff must pursue any claims in arbitration solely on an ***individual basis***, and not on a class, collective, or private attorney general representative action basis. (*Id*., Ex. D at Section 14.3.v ["You and Uber agree to bring any dispute in arbitration on an individual basis only, and not on a class, collective, or private attorney general representative action basis."]). Plaintiff was provided 30 days to opt-out of the dispute resolution provision of the Licensing Agreement, and was also notified of his right to consult with an attorney regarding the dispute resolution provision:

> Your Right To Opt Out Of Arbitration.
> Arbitration is not a mandatory condition of your contractual relationship with Uber. If you do not want to be subject to this Arbitration Provision, you may opt out of this Arbitration Provision by notifying Uber in writing of your desire to opt out of this Arbitration Provision… In order to be effective, the writing must clearly indicate your intent to opt out of this Arbitration Provision and the envelope containing the signed writing **must be post-marked within 30 days** of the date this Agreement is executed by you. Your writing opting out of this Arbitration Provision will be filed with a copy of this Agreement and maintained by Uber. Should You not opt out of

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> this Arbitration Provision within the 30-day period, You and Uber shall be bound by the terms of this Arbitration Provision. You have the right to consult with counsel of Your choice concerning this Arbitration Provision. You understand that You will not be subject to retaliation if You exercise Your right to assert claims or opt-out of coverage under this Arbitration Provision.

(*Id*., Ex. D at Section 14.3.viii.)[2] Plaintiff did not opt out of the Arbitration Provision and accordingly, he is contractually bound to individually arbitrate his claims against Uber. (*Id*., ¶ 13.)

C. Plaintiff Has Refused To Arbitrate His Claims.

On November 26, 2014, Plaintiff filed a class action complaint in the United States District Court, Northern District of California. On December 15, 2014 Plaintiff filed a First Amended Complaint, the operative complaint in this action ("Complaint"). Plaintiff's First through Fourth Causes of Action assert violations of the FCRA on a class-wide basis as follows: (1) Failure to Provide Notice of Obtaining Consumer Report, (2) Failure to Obtain Authorization for Consumer Report, (3) Failure to Provide Consumer Report Prior to Taking Adverse Action, and (4) Failure to Provide a Summary of Rights Prior to Taking Adverse Action.

Plaintiff's Fifth, Sixth and Seventh Causes of Action assert violations of the California ICRAA on an individual basis as follows: (1) Failure to Provide Notice of Obtaining Consumer Report, (2) Failure to Obtain Authorization for Consumer Report, and (3) Failure to Provide Opportunity to Request and Receive Copy of Consume Report.

Lastly, Plaintiff's Eighth Cause of Action seeks penalties under PAGA on a representative basis for alleged violations of the California Labor Code. Plaintiff asserts that Uber failed to comply with various provisions of the California Labor Code due to the allegedly erroneous classification of drivers as independent contractors (*see* FAC, ¶ 79).[3]

---

[2] Uber notes that Plaintiff assented to the Licensing Agreement and Arbitration Provision ***prior to*** the filing of *O'Connor v. Uber Technologies, Inc.*, Case No. C-13-3826 EMC ("*O'Connor*"), which is currently pending before this Court. Accordingly, the Court's order in the *O'Connor* litigation granting, in part, Plaintiffs' "Renewed Emergency Motion for Protective Order to Strike Arbitration Clauses" does not apply to Plaintiff. (*O'Connor*, ECF No. 60.) As stated by the Court in the *O'Connor* litigation, it "will not regulate communications issued prior to the filing of this suit[.]" (*Id.* at 10.)

[3] Specifically, Plaintiff seeks civil penalties pursuant to PAGA for the following Labor Code violations: failure to provide wages upon termination, failure to provide accurate wage statements, failure to provide meal and rest breaks, failure to provide gratuities, failure to keep payroll records, failure to pay minimum wage and overtime and failure to reimburse for reasonably necessary business expenses. (FAC, ¶ 79.)

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Each of the foregoing claims is encompassed by the terms of the Arbitration Provision. Despite the existence of a valid and enforceable arbitration agreement, Plaintiff refused to abide by its terms by filing the instant action. He subsequently declined to stipulate to arbitration prior to the filing of this motion. (*See* Declaration of Emily O'Connor ("O'Connor Decl.") ¶¶ 2, 3.)

III. THE COURT SHOULD ORDER PLAINTIFF TO ARBITRATE HIS CLAIMS ON AN INDIVIDUAL BASIS AND DISMISS OR STAY THE INSTANT SUIT

A. The Federal Arbitration Act Applies To The Arbitration Provision.

As affirmed by the United States Supreme Court in *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) ("*Concepcion*"), the Federal Arbitration Act ("FAA") declares a liberal policy favoring the enforcement of arbitration policies, stating: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In enacting the FAA, Congress sought to overcome widespread judicial hostility to the enforcement of arbitration agreements. *See Hall St. Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008); *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (explaining that FAA was enacted "[t]o overcome judicial resistance to arbitration"). The Court explained that the FAA permits private parties to "trade[] the procedures . . . of the courtroom for the simplicity, informality, and expedition of arbitration." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

The FAA is designed "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 (1983). To this end, the FAA not only placed arbitration agreements on equal footing with other contracts, but amounts to a "congressional declaration of a liberal federal policy favoring arbitration agreements." *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (quoting *Moses H. Cone*, 460 U.S. at 24). As the Ninth Circuit has declared: "In our view, *Concepcion* crystalized the directive that ***the FAA's purpose is to give preference (instead of mere equality) to arbitration***

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provisions." *Mortensen v. Bresnan Comm., LLC*, 722 F. 3d 1151, 1160 (9th Cir. 2013) (emphasis supplied). In this regard, the FAA "eliminates district court discretion and requires the court to compel arbitration of issues covered by the arbitration agreement." *Dittenhafer v. Citigroup*, 2010 U.S. Dist. LEXIS 77673 *5 (N.D. Cal. 2010) (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985)) (upheld on appeal).

The Arbitration Provision at issue here is indisputably governed by the FAA. First, the Arbitration Provision so states, which is sufficient to bring it within the purview of the FAA. *See Buckeye Check Cashing*, 546 U.S. at 442-443 (Where arbitration agreement expressly provided that FAA was to govern, the FAA preempted application of state law and thus under the FAA, the question of the contract's validity was left to the arbitrator); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63-64 (1995) (For state law to apply exclusively to an arbitration agreement, the agreement must opt out of the FAA and express that state law applies); *Cronus Investments, Inc. v. Concierge Services*, 35 Cal. 4th 376, 394 (2005) (recognizing parties to an arbitration agreement may expressly designate that the FAA's procedural provisions apply); *Rodriguez v. American Technologies, Inc.*, 136 Cal. App. 4th 1110, 1115 (2006) (reversing lower court's order denying defendant's motion to compel arbitration because the parties expressly agreed that any arbitration proceeding would move forward under the FAA's procedural provisions and the trial court therefore lacked discretion under state arbitration law to deny the motion).

Second, the Licensing Agreement within which the Arbitration Provision is contained affects commerce. The FAA's term "involving commerce" is interpreted broadly. *See, e.g., Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (finding the requisite commerce for FAA coverage even when the individual transaction did not have a substantial effect on commerce). Uber's app is available to riders and transportation providers in over 100 cities across the country. (Colman Decl., ¶ 4.) As a user of Uber's app, Plaintiff utilized its interstate reach and popularity as a tool to book passengers in exchange for payment by the passenger. Plaintiff's use of Uber's software application therefore involved commerce sufficient for the FAA to apply. The FAA controls here.

B. The Arbitration Provision Is Valid And Must Be Enforced.

The FAA requires courts to compel arbitration "in accordance with the terms of the

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agreement" upon the motion of either party to the agreement, consistent with the principle that arbitration is a matter of contract. 9 U.S.C. § 4. In determining whether to compel arbitration under the FAA, only two "gateway" issues need to be evaluated: (1) whether there exists a valid agreement to arbitrate between the parties; and (2) whether the agreement covers the dispute. *Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401, 407 n.2 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002);

"Any doubt concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Simula, Inc. v. Autoliv, Inc.*, 175 F. 3d 716, 719 (9th Cir. 1999) (citing *Moses H. Cone*, 460 U.S. at 24-25). "[T]he district court ***must*** order arbitration if it is satisfied that the making of the agreement for arbitration is not in issue." *Id.* at 719-720. (Emphasis added.)

1. The Arbitration Provision Delegates The Gateway Issues To The Arbitrator.

Before reaching these gateway issues, however, the Court must examine the underlying contract to determine whether the parties have agreed to commit the threshold question of arbitrability to the arbitrator. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010) ("An agreement to arbitrate a gateway issue is simply an additional antecedent agreement the party seeking arbitration asks the court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other."). Here, the Arbitration Provision clearly and unmistakably provides that the following matters must be decided by the arbitrator: "disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision."[4] (Colman Decl., Ex. D at Section 14.3.i.)

Therefore, any question as to the validity of the Arbitration Provision and whether it applies to this dispute has been delegated to, and must be decided by, the arbitrator. Regardless, the two gateway issues are plainly satisfied in this case.

[4] The Arbitration Provision does leave to the Court the limited question of whether the class and representative action waivers are enforceable. (Colman Decl., Ex. D at Section 14.3(v)(c).)

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2. A Valid Agreement To Arbitrate Exists.

General contract law principles apply to the interpretation and enforcement of arbitration agreements. *First Options of Chicago v. Kaplan*, 514 U.S. 938, 944 (1995). Arbitration can be denied only where a party proves a defense to enforcement of the agreement, such as unconscionability. *Hoffman v. Citibank, N.A.*, 546 F. 3d 1078, 1082 (9th Cir. 2008) ("party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration"); *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC*, 55 Cal. 4th 223, 235 (2012) ("*Pinnacle Museum*").

To establish a defense to enforcement of the parties' arbitration agreement based on unconscionability, Plaintiff bears the burden of proving that the agreement is ***both*** procedurally and substantively unconscionable. *Pinnacle Museum*, 55 Cal. 4th at 236, 247; *Armendariz v. Foundation Health Psychare Servs.*, 24 Cal. 4th 83, 89 (2000) ("No matter how heavily one side of the scale tips, both procedural and substantive unconscionabilty are required for a court to hold an arbitration agreement unenforceable."). Procedural unconscionability "addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise." *Pinnacle Museum*, 55 Cal. 4th at 246. Substantive unconscionability relates to "the fairness of the agreement's actual terms and to assessments of whether they are overly harsh or one-sided." *Id.*

a. The Arbitration Provision is not procedurally unconscionable.

In order to book passengers using the Uber app, Plaintiff had to affirmatively accept, by electronic acknowledgment, the Licensing Agreement and Driver Addendum. Uber provided ample notice and opportunity to review the Licensing Agreement or Driver Addendum – and thus the Arbitration Provision – before Plaintiff accepted. Plaintiff was also expressly advised of his right to consult an attorney regarding the terms of the Arbitration Provision. (Colman Decl., Ex. D at Section 14.3.viii.)

Plaintiff was even provided the opportunity to opt out of the Arbitration Provision set forth in the Licensing Agreement, even though there was no legal obligation to do so. (*Id.*) Plaintiff's right to opt out of the Arbitration Provision is described in a standalone section of the Arbitration Provision with the underlined title "Your Right To Opt Out Of Arbitration." (*Id.*)

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Neither the Arbitration Provision itself nor the section describing Plaintiff's right to opt out were ambiguous, confusing or disguised. *See McManus v. CIBC World Markets Corp.*, 109 Cal. App. 4th 76, 87 (2003) (procedural unconscionability focuses on whether there is "oppression" arising from an inequality of bargaining power or "surprise" arising from buried terms in a complex printed form). The Arbitration Provision explained that arbitration was not a mandatory condition of Plaintiff's contractual relationship with Uber and that there would be no retaliation if Plaintiff elected to opt out. (Colman Decl., Ex. D at Section 14.3.viii.) After accepting the terms of the Licensing Agreement and Driver Addendum, Plaintiff had 30 days to inform Uber of his desire to opt out.[5] (*Id.*)

Plaintiff had a choice – to opt out of the Arbitration Provision or not, and whatever he chose, he could continue to have access to Uber's app to book passengers. He declined to do so, and having elected to arbitrate his individual claims, he must now be compelled to abide by that agreement. *See Johnmohammadi v. Bloomingdale's, Inc*., 755 F. 3d 1072, 1074 (9th Cir. 2014) (by not opting out within the 30-days, plaintiff is bound by the terms of the arbitration agreement); *see also Circuit City Stores, Inc. v. Ahmed*, 283 F. 3d 1198, 1199-1200 (9th Cir. 2002) ("*Ahmed*") (same); *Rosas v. Macy's Inc.*, 2012 WL 3656274, *6 (C.D. Cal. 2012) (same).

There is no procedural unconscionability where the agreement is not presented in a contract of adhesion and the contracting party is provided a meaningful opportunity to opt out. *See Johnmohammadi*, 755 F. 3d at 1077; *Ahmed*, 283 F. 3d at 1199 (employee provided a meaningful opportunity to opt out by mailing form within 30 days); *Circuit City Stores, Inc. v. Najd*, 294 F. 3d 1104, 1108 (9th Cir. 2002) (same). The Arbitration Provision was not presented as a condition of contracting or on a take-it-or-leave-it basis. Rather, Plaintiff was afforded the opportunity to opt out

[5] The Court previously noted, albeit in the context of communications to putative class members after the filing of the *O'Connor* lawsuit, that the "opt out" method set forth in the Arbitration Provision—by hand or overnight delivery—was "extremely onerous." (*O'Connor*, ECF No. 60 at 10.) The method of opting out is largely irrelevant here, however, for a number of reasons. First, there was no obligation on Uber's part to include an opt-out provision at all in order for the Arbitration Provision to be enforceable as to Plaintiff. Second, in the City of San Francisco (where Plaintiff drove), delivery by "nationally recognized overnight delivery service" is as convenient as delivery by "first class mail with return receipt requested." (*O'Connor*, ECF No. 60 at 10.) According to FedEx's website, it has 47 office locations and 75 drop boxes within a 20 mile radius of San Francisco. (O'Connor Decl., ¶ 4, http://local.fedex.com/ca/san-francisco/.) FedEx is just one provider of national overnight delivery services. Third, given that Plaintiff lived and provided car services in the City of San Francisco (*see* FAC, ¶¶ 7, 11), hand delivery is also not a particularly burdensome method of delivery.

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of the Arbitration Provision by notifying Uber of his decision to opt out within 30 days. There is therefore no procedural unconscionability and the parties' agreement must be enforced.

b. The Arbitration Provision is not substantively unconscionable.

Even if there was some modicum of procedural unconscionability (and here Plaintiff cannot even meet that threshold), Plaintiff must prove a high level of substantive unconscionability to avoid arbitration. *Pinnacle Museum*, 55 Cal. 4th at 247. He cannot do so here.

In *Armendariz*, 24 Cal. 4th at 102, the California Supreme Court found that mandatory arbitration agreements for ***employees*** must meet various requirements in order to be valid and enforceable. The question of the nature of the relationship between Plaintiff and Uber is an issue central to this case and one explicitly covered by the Arbitration Provision as it is a dispute "related to [Plaintiff's] relationship with Uber." (Colman Decl., Ex. D at Section 14.3.i.) Given that the *Armendariz* decision addressed employee arbitration agreements, the judicially imposed factors necessarily do not apply here unless and until Plaintiff can demonstrate he was an employee, rather than an independent contractor as set forth in the Licensing Agreement and Driver Addendum. Accordingly, should Plaintiff argue that the Arbitration Provision is unenforceable under *Armendariz*, that question of enforceability ***is for the arbitrator to decide***, particularly in light of the Arbitration Provision's delegation clause. (Colman Decl., Ex. D at Section 14.3.i); *see also Rent-A-Center, W., Inc.*, 561 U.S. at 70 (upholding arbitration agreement's provision delegating to the arbitrator the gateway issue of enforceability); *Buckeye Check Cashing*, 546 U.S. at 446 ("the issue of the contract's validity is considered by the arbitrator in the first instance.").

Regardless, it is questionable whether *Armendariz* survived the United States Supreme Court's decision in *Concepcion*, which limits a state's ability to impose conditions on the enforceability of arbitration agreements that effectively discourage arbitration, such as applying more stringent unconscionability standards than those applicable to contracts in general.[6]

[6] The Court in *Concepcion* explained that even rules applying general principles of unconscionability undermine the FAA if they "have a disproportionate impact on arbitration agreements." *Concepcion*, 131 S. Ct. at 1747. In this regard, as noted by the California Court of Appeal in *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115, 1136 (2012), "*Concepcion* adopts a sweeping rule of FAA preemption. Under *Concepcion*, the FAA preempts any rule or policy rooted in state law that subjects agreements to arbitrate particular kinds of claims to more stringent standards of enforceability than contracts generally." The restrictions established by *Armendariz* fall within this category of restrictions precluded by the FAA. In this same vein, recently the United States Supreme Court confirmed that a state

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Even if *Armendariz* applies here, which Defendant maintains that it does not, the Arbitration Provision complies with *Armendariz* and Plaintiff cannot demonstrate substantive unconscionability. *Armendariz* holds that an agreement to arbitrate non-waivable statutory claims is enforceable if both parties are equally bound by all terms of the agreement and if it: (1) provides for a neutral arbitrator; (2) provides for adequate discovery; (3) provides for all types of relief otherwise available in court; (4) provides for a written arbitration award; and (5) provides that Plaintiff would not be required to pay either unreasonable costs of any arbitrator's fees or expenses as a condition of access to the arbitration forum. 24 Cal. 4th at 102, 117. The Arbitration Provision meets all of the *Armendariz* factors:

- It provides for a neutral arbitrator: "The Arbitrator shall be selected by mutual agreement of Uber and You. Unless You and Uber mutually agree otherwise, the Arbitrator will be an attorney licensed to practice in the location where the arbitration proceeding will be conducted or a retired federal or state judicial officer who presided in the jurisdiction where the arbitration will be conducted." (Colman Decl., Ex. D at Section 14.3.iii.)
- It provides for adequate discovery: "In arbitration, the Parties will have the right to conduct adequate civil discovery, bring dispositive motions, and present witnesses and evidence as needed to present their cases and defenses." (*Id.*, Ex. A at Section 14.3.v.)
- It provides for a written decision: "The Arbitrator will issue a decision or award in writing, stating the essential findings of fact and conclusion of law." (*Id.*, Ex. A at Section 14.3.vii.)
- It does not limit statutorily available remedies: "The Arbitrator may award any party any remedy to which that party is entitled under applicable law…no remedies that

may not frustrate the FAA on public policy grounds. *See Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (state public policy cannot defeat the FAA's pro-arbitration policy or its preemptive effect). *Armendariz*'s fairness factors were born from public policy concerns – namely whether arbitration could properly vindicate nonwaivable statutory rights. In this regard, the California Supreme Court in *Armendariz* established minimum criteria to be forced on the parties in determining the validity of an arbitration agreement related to non-waivable statutory claims in the employment context. However, *Concepcion* and *Marmet* make clear, that such imposed limitations run afoul of the FAA.

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otherwise would be available to an individual in a court of law will be forfeited by virtue of this Arbitration Provision." (*Id*., Ex. A at Section 14.3.vii.)

- It requires Uber to pay for arbitration: "[I]n all cases where required by law, Uber will pay the Arbitrator's and arbitration fees." (*Id*., Ex. A at Section 14.3.vi.)

Armendariz also states that arbitration agreements must have a "modicum of bilaterality" to avoid a finding of substantive unconscionability. *Armendariz*, 24 Cal. 4th at 116-117. Here, the Arbitration Provision is fully bilateral and a mutual waiver of rights. Under the circumstances, Plaintiff cannot show the requisite substantive unconscionability needed to avoid his contractual obligation.

3. Plaintiff's Claims Are Covered By The Arbitration Agreement.

The second gateway issue is whether the arbitration agreement covers the dispute between the parties. *EEOC. v. Waffle House, Inc.*, 534 U.S. 279, 280 (2002); *Moses H. Cone*, 460 U.S. at 24-25 ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"). Here, Plaintiff unequivocally agreed to arbitrate each of his claims against Uber.

In his First through Seventh Causes of Action, Plaintiff claims Uber unlawfully procured his background report and thereafter terminated his relationship with Uber in violation of the FCRA and ICRAA. Plaintiff agreed to arbitrate these claims because the Arbitration Provision covers ***any dispute*** arising out of or related to the Licensing Agreement as well as ***any dispute*** arising out of or related to Plaintiff's relationship with Uber, including termination of the relationship. (Colman Decl., Ex. A at Section 14.3.i.)

Plaintiff's Eighth Cause of Action for PAGA penalties is based on the assertion that Plaintiff suffered various California Labor Code violations as a result of his alleged misclassification as an independent contractor. This claim is also unambiguously covered by the Arbitration Provision. The Licensing Agreement states that the Arbitration Provision applies "without limitation, to disputes regarding any city, county, ***state or federal wage-hour law***, trade secrets, unfair competition, ***compensation, breaks and rest periods, expense reimbursement***, termination, harassment…" (Colman Decl., Ex. D, Section 14.3.i.)

Based on the foregoing language, there is no dispute that the Arbitration Provision covers

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Plaintiff's FCRA and ICRAA claims as well as his wage and hour claims under the California Labor Code. *See Cronin v. Citifinancial Servs.*, 352 Fed. Appx. 630, 636-637 (3rd Cir. 2009) (appellate court confirmed district court's granting of defendant's motion to compel individual arbitration following conclusion that arbitration agreement was valid and enforceable and applied to plaintiff's FCRA claims); *Yaqub v. Experian Info. Solutions, Inc.*, 2011 U.S. Dist. LEXIS 156427, *7, 16 (C.D. Cal. 2011) (Court enforced arbitration agreement and compelled individual arbitration of Plaintiff's FCRA claims). Thus, a valid agreement to arbitrate exists between Plaintiff and Uber that covers each and every claim asserted by Plaintiff in the FAC. Where there is a valid agreement to arbitrate and the dispute falls within the scope of the agreement, the FAA requires that the Court order the parties to arbitrate in accordance with the terms of the agreement. *See* 9 U.S.C. § 4; *Bencharsky v. Cottman Transmission Sys., LLC*, 625 F. Supp. 2d 872, 876 (N.D. Cal. 2008). Here, the Arbitration Provision requires that Plaintiff pursue his claims in individual arbitration only.

C. Plaintiff's Class Claims Cannot Proceed.

The Court must dismiss Plaintiff's class claims and order the parties to arbitrate Plaintiff's First through Fourth Causes of Action solely on an individual basis. It is now well settled in California that class action waivers are enforceable. *Johnmohammadi*, 755 F. 3d at 1074 ("Johnmohammadi can't argue that the class-action waiver is unenforceable under California law."); *accord Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 359-60 (2014) (enforcing class waiver and finding California law to the contrary is preempted by the FAA).

As the Supreme Court confirmed in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 664 (2010), it is improper to force a party into a class proceeding to which it did not agree, because arbitration "is a matter of consent." Parties "may specify *with whom* they choose to arbitrate their disputes." *Id.* at 683. (Emphasis in original.) As such, "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." *Id.* at 684. *Accord*, *Murphy v. DirectTV, Inc.*, 724 F. 3d 1218, 1226 (9th Cir. 2013) ("Section 2 of the FAA, which under *Concepcion* requires the enforcement of arbitration agreements that ban class procedures, is the law of California and of every other state."); *accord Kairy v. Supershuttle, Int'l*, 2012 U.S. Dist. LEXIS 134945, *16-19 (N.D. Cal. 2012) ("…courts

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must compel arbitration even in the absence of the opportunity for plaintiffs to bring their claims as a class action"); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 846 (N.D. Cal. 2012) (finding *Concepcion* overruled *Gentry* and no longer precludes enforcement of class action waivers in arbitration agreements).

Here, the Arbitration Provision contains a valid class action waiver: "[t]here will be no right or authority for any dispute to be brought, heard or arbitrated as a class . . . action." (Colman Decl., Ex. D at Section 14.3.v(a).) Accordingly, Plaintiff cannot proceed with his class claims before this Court or in arbitration.

D. Plaintiff's PAGA Claim Should Be Ordered To Arbitration On An Individual Basis Or, In The Alternative, Stayed.

Plaintiff's PAGA claim must also be compelled to arbitration on an individual basis. The Arbitration Provision expressly precludes arbitration of Plaintiff's representative PAGA claims, stating: "[t]here will be no right or authority for any dispute to be brought, heard or arbitrated as a . . . private attorney general representative action," Plaintiff's representative claim cannot stand. (Colman Decl., Ex. D at Section 14.3.v(c).) "Because arbitration of representative PAGA claims would fundamentally change the nature of arbitration, it cannot be presumed that the parties consented to arbitration of representative PAGA claims simply because they agreed to submit their dispute to an arbitrator." *Chico v. Hilton Worldwide, Inc.*, 2014 U.S. Dist. LEXIS 147752, *32 (C.D. Cal. 2014) (citing *Stolt-Nielsen, supra*, 559 U.S. at 685). Such claims can only proceed in binding arbitration if the parties consented to arbitrate them, and the parties have not done so here.

Whether Plaintiff has a colorable claim under PAGA as an "aggrieved employee" is subject to a central issue in this case to be decided by the arbitrator, namely, whether Plaintiff is an employee or independent contractor. (Colman Decl., Ex. D at Section 14.3.i. ["this Arbitration Provision also applies, without limitation, to…disputes arising out of or related to Your relationship with Uber."])

1. The FAA Preempts *Iskanian*'s Holding Prohibiting The Waiver Of Representative PAGA Claims.

Plaintiff will argue that any limitation on his ability to pursue his PAGA claim in a judicial forum is untenable under the California Supreme Court's recent decision in *Iskanian v. CLS*

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Transportation Los Angeles, LLC., *supra*, 59 Cal. 4th 348. In *Iskanian*, the California Supreme Court held that an employee's right to bring a representative PAGA claim is not waivable and that any purported waiver in an arbitration agreement is unenforceable as a matter of state law. *Id.* at 383.

Uber submits that *Iskanian* is incorrect on the PAGA issue and is not binding on this Court.

First, the Arbitration Provision is governed by federal law, and this Court is not bound in this context by California decisions. *See Local Union 598, Plumbers & Pipefitters Indus. Journeymen & Apprentices Training Fund v. J.A. Jones Constr. Co.*, 846 F. 2d 1213, 1218 (9th Cir. 1988) ("Preemption is a question of federal law ...."); *United States v. Nev. Tax Comm'n*, 439 F. 2d 435, 439 (9th Cir. 1971) (noting that "decisions of the states are not binding" on "question[s] of federal law").

Indeed, the Supreme Court's decision in *Concepcion* is controlling on this point. As the Court explained: "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straight forward: The conflicting rule is displaced by the FAA." 131 S. Ct. at 1747; *see also Marmet Health Care Ctr., Inc.*, 132 S. Ct. at 1203. The *Concepcion* Court specifically noted that "the judicial hostility towards arbitration that prompted the FAA has manifested itself in a 'great variety' of 'devices and formulas' declaring arbitration against public policy." *Concepcion*, 131 S. Ct. at 1747-1748. Over a dissent that argued the *Discover Bank* rule concerning class waivers in arbitration agreements could be necessary to "prosecute small-dollar claims that might otherwise slip through the legal system," the Court held that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 1753.

This holding reaffirmed the U.S. Supreme Court's consistent position that the FAA preempts all otherwise applicable or conflicting state laws, pursuant to the Supremacy Clause. U.S. CONST. art. VI, cl. 2. *See Preston v. Ferrer*, 552 U.S. 346, 356-357 (2008); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *see also Mastrobuono*, 514 U.S. at 62 ("[W]hen a court interprets such provisions in an agreement covered by the FAA, due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.").

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Both before and after *Iskanian*, many district courts within the Ninth Circuit have determined that the FAA preempts California's rule prohibiting the waiver of representative PAGA claims.[7] For example, in *Fardig v. Hobby Lobby Stores, Inc.*, the court maintained that "Even in light of *Iskanian*, ***the Court continues to hold that the rule making PAGA claim waivers unenforceable is preempted by the FAA***." 2014 U.S. Dist. LEXIS 139359, *10-11 (C.D. Cal. Aug. 11, 2014) (emphasis supplied); *see also Ortiz v. Hobby Lobby Stores, Inc.*, 2014 U.S. Dist. LEXIS 140552, *25 (E.D. Cal. Oct. 1, 2014) ("Despite the holding of the California Supreme Court, federal law is clear that a state is without the right to interpret the appropriate application of the FAA. District courts within the Ninth Circuit have generally held that PAGA claims are subject to Arbitration Agreements and any waiver clauses within those agreements."); *Chico*, 2014 U.S. Dist. LEXIS 147752, *32-34 (rejecting the holding of *Iskanian* and concluding "that the FAA preempts California's rule against PAGA waivers"); *Langston v. 20/20 Cos.*, 2014 U.S. Dist. LEXIS 151477, *20 (C.D. Cal. Oct. 17, 2014) (rejecting the holding of *Iskanian* and holding that the "FAA preempts California's rule against arbitration agreements that waive an employee's right to bring representative PAGA claims"). These cases faithfully adhere to controlling Supreme Court and Ninth Circuit precedent, and *Iskanian*, a state decision, is not controlling on matters of federal preemption, as these cases also hold.

2. Because Plaintiff Was Provided The Opportunity To Opt Out Of The Arbitration Provision, *Iskanian* Does Not Apply.

Regardless, *Iskanian* is distinguishable because there the arbitration agreement was mandatory, whereas here Plaintiff had the right to opt out. The California Supreme Court repeatedly emphasized in *Iskanian* that its ruling is limited to employment arbitration agreements ***that are a mandatory condition of employment***. In other words, a PAGA representative waiver violates public

[7] *See, e.g., Asfaw v. Lowe's HIW, Inc.*, 2014 U.S. Dist. LEXIS 68657, *23-28 (C.D. Cal. May 13, 2014); *Appelbaum v. AutoNation Inc.*, 2014 U.S. Dist. LEXIS 50588, *30-33 (C.D. Cal. Apr. 8, 2014); *Parvateneni v. E*Trade Financial Corp.*, 967 F. Supp. 2d 1298, 1305 (N.D. Cal. 2013); *Velazquez v. Sears, Roebuck and Co.*, 2013 U.S. Dist. LEXIS 121400, *15-16 (S.D. Cal. Aug. 23, 2013); *Andrade v. P.F. Chang's China Bistro, Inc.*, 2013 U.S. Dist. LEXIS 112759, *27-32 (S.D. Cal. Aug. 9, 2013); *Miguel v. JP Morgan Chase Bank, N.A.*, 2013 U.S. Dist. LEXIS 16865, *25-28 (C.D. Cal. Feb. 5, 2013); *Quevedo v. Macy's Inc.*, 798 F. Supp. 2d 1122, 1140-42 (C.D. Cal. 2011).

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policy only when it is forced upon an employee in exchange for employment:

- "As explained below, we conclude that an arbitration agreement ***requiring an employee as a condition of employment*** to give up the right to bring representative PAGA actions in any forum is contrary to public policy." *Iskanian*, 59 Cal. 4th at 360 (emphasis added).
- "Of course, employees are free to choose whether or not to bring PAGA actions when they are aware of Labor Code violations. But it is contrary to public policy for an employment agreement to ***eliminate this choice*** altogether by ***requiring*** employees to waive the right to bring a PAGA action before any dispute arises." *Id.* at 383 (emphasis added).
- "We conclude that where, as here, an employment agreement ***compels*** the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law." *Id.* at 384 (emphasis added).
- "Of course, any employee is free to forgo the option of pursuing a PAGA action. But it is against public policy for an employment agreement to ***deprive employees of this option altogether***, before any dispute arises." *Id.* at 387 (emphasis added).

Thus, the California Supreme Court did not address whether a PAGA representative waiver violates public policy where it is not a mandatory condition of "employment." Here, Plaintiff could continue to access Uber's app to book passengers, regardless of whether he chose to opt-out of the Arbitration Provision or not. Once it is, as it must be, concluded that Plaintiff had a choice, *Iskanian* simply does not apply. *See People v. Johnson*, 53 Cal. 4th 519, 528 (2012); *People v. Harris*, 47 Cal. 3d 1047, 1071 (1989) ("It is axiomatic, of course, that a decision does not stand for a proposition not considered by the court"); *People v. Myers*, 43 Cal. 3d 250, 265, fn. 5 (1987) ("It is well established, of course, that a decision is not authority for propositions that were not considered in the court's opinion").

Indeed, on the same day *Iskanian* was decided, the Ninth Circuit in *Johnmohammadi* held that an employee is not coerced to waive a right to file a class action where the employee had a choice to accept the arbitration agreement. *Johnmohammadi*, 755 F. 3d at 1076. *Johnmohammadi's*

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holding, distinguishing mandatory from non-mandatory agreements, shows that Plaintiff's agreement to arbitrate is wholly distinguishable from the type of agreement *Iskanian* addressed in its holding.

Because the *Iskanian* Court did not address the enforceability of non-mandatory arbitration agreements, this Court is free to address the issue in light of United States Supreme Court precedent. This was explained by the California Supreme Court in *Johnson*. In that case, the appellant argued that the trial court failed to apply the rule in *Auto Equity Sales* that decisions of the California Supreme Court are binding on all California courts. *Johnson*, 53 Cal. 4th at 527-528. The California Supreme Court rejected appellant's argument because its prior decisions did not address the specific issue in dispute. *Id.* The California Supreme Court explained that in such a situation, "a lower court does not violate *Auto Equity Sales* [citation omitted] merely by deciding questions of first impression." *Id.* Controlling U.S. Supreme Court precedent requires enforcement of the parties' agreement, as written, and therefore the class and PAGA waivers must be enforced.

Because Plaintiff's arbitration agreement with Uber does not allow arbitration on a representative basis, Plaintiff's PAGA claim should be ordered to arbitration on an individual basis only. Should the Court conclude that Plaintiff is entitled to pursue his PAGA claim on a representative basis, Uber requests that this Court stay litigation of that claim pending arbitration of Plaintiff's other claims. 9 U.S.C. § 3 (when the court finds that any action "is referable to arbitration under [an arbitration agreement], [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.").

IV. CONCLUSION

Plaintiff agreed to arbitrate on an individual basis any and all claims arising from his contractual relationship with Uber pursuant to the Arbitration Provision. The Arbitration Provision is valid and enforceable. Accordingly, Uber respectfully requests that the Court compel Plaintiff to arbitrate his claims on an individual basis and dismiss his class and representative claims. Alternatively, should the Court conclude that Plaintiff is entitled to pursue his PAGA claim on a representative basis, Uber requests that the Court stay litigation of the representative claim pending arbitration of Plaintiff's other claims.

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Dated: January 23, 2015

/s/ Andrew M. Spurchise
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Exhibit H

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Attorneys for Defendants
UBER TECHNOLOGIES, INC. AND RASIER, LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ABDUL KADIR MOHAMED, individually and on behalf of all others similarly-situated,

Plaintiff,

v.

UBER TECHNOLOGIES, INC., RASIER, LLC, HIREASE, LLC and DOES 1-50,

Defendants.

Case No. 3:14-cv-05200-EMC

DEFENDANTS' NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: April 9, 2015
Time: 1:30 p.m.
Ctrm.: 5, 17th Floor

Complaint Filed: November 24, 2014

Trial Date: None set.

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STATUTES

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on April 9, 2015, in Courtroom 5, 17th Floor of the U.S. District Court, Northern District of California, 450 Golden Gate Avenue, San Francisco, California, at 1:30 p.m., or as soon thereafter as counsel may be heard, Defendants UBER TECHNOLOGIES, INC. ("Uber") and Rasier, LLC ("Rasier") (collectively "Defendants") will and hereby do move the Court for an order compelling to arbitration on an individual basis the claims of Plaintiff Abdul Kadir Mohamed ("Plaintiff") pursuant to his agreement to arbitrate with Defendants, and dismissing all class claims alleged in Plaintiff's Complaint ("Complaint"). This motion is made pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* This motion is brought on the grounds that all of Plaintiff's claims against Defendants are subject to a valid and enforceable arbitration agreement that requires Plaintiff to arbitrate his claims on an individual basis only, and not in a court of law.

The motion will be based upon this notice of motion and motion and upon Uber's memorandum of points and authorities, the declarations of Michael Colman and Rod M. Fliegel filed herewith, the pleadings and papers filed herein, and any other matters considered by the Court.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

As early as July 2013, and most recently in July 2014 Plaintiff Abdul Kadir Mohamed ("Plaintiff") entered into an arbitration agreement with Uber. On October 3, 2014, Plaintiff entered into a separate arbitration agreement with Rasier, Uber's wholly owned subsidiary. All of the arbitration agreements provide that: "this Arbitration Provision [ ] applies, without limitation, to disputes arising out of or related to this Agreement and disputes arising out of or related to Your relationship with" Uber and Rasier, "including termination of the relationship." The agreements further provide that all disputes between Plaintiff and Defendants will be brought "in arbitration on an individual basis only," and not on a "class . . . action basis."

Despite being bound by valid arbitration agreements with Defendants covering any claims arising out of his relationship with them, and in which he specifically agreed not to bring class action claims, Plaintiff proceeded to file the instant lawsuit, alleging violations of the Fair Credit Reporting Act ("FCRA") on a nationwide class basis, the California Consumer Reporting Agencies Act ("CCRAA") on a nationwide class basis, and the Massachusetts Credit Reporting Act ("MCRA") and Massachusetts Criminal Offender Record Information Act ("CORI Statute") on a Massachusetts class basis.

Defendants bring this motion to compel Plaintiff's compliance with his agreement to arbitrate and requests that the Court dismiss Plaintiff's class claims and order him to submit his individual claims to arbitration, or in the alternative stay Plaintiff's claims pending arbitration.

II. RELEVANT FACTS

A. Defendants Uber Technologies, Inc. and Rasier, LLC

Uber is a technology company that offers lead generation services for transportation requests to independent transportation providers looking for riders. (Declaration of Michael Colman ("Colman Decl.") ¶ 3.) Uber offers the app as a tool to facilitate transportation services, and it licenses the use of the app to independent transportation providers. (*Id.*, at ¶ 3.) Rasier, LLC is a wholly-owned subsidiary of Uber engaged in the business of providing lead generation to independent transportation providers through Uber's mobile app. (*Id.*, at ¶ 2-3.) Any independent

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transportation provider who wishes to access Uber's software platform to book passengers must first enter into a Software License & Online Services Agreement ("Licensing Agreement") with Uber. (*Id.*, at ¶ 6.) Independent transportation providers are free to engage drivers to provide transportation services booked using the Uber app. (*Id.*) Any such drivers are required to accept both the Licensing Agreement and Driver Addendum Related to Uber Services ("Driver Addendum") before receiving access to the app. (*Id.*) On occasion, Uber implements updated Licensing Agreements and Driver Addendums and transportation providers and drivers must agree to those updated documents in order to access the app. (*Id.*)

B. Plaintiff Agreed To Be Bound By Arbitration Agreements Covering The Instant Dispute.

Plaintiff first signed up to use the Uber app as a lead generation resource on or about November 2, 2012. (Colman Decl., ¶ 8.) At the time, Plaintiff was engaged by Gedi Limo to provide transportation services. Plaintiff signed up to use the app as a lead generation tool under Ahmed Gehdi's account. (*Id.*) On or about July 22, 2013, Plaintiff was given notice and an opportunity to review the new Licensing Agreement and Driver Addendum that Uber intended to implement. (Colman Decl., ¶¶ 9-10, Exs. A, B, C.) On July 31, 2013, Plaintiff accepted, through the app, Uber's new Licensing Agreement and Driver Addendum ("July 2013 Licensing Agreement and Driver Addendum"). (*Id.*, ¶¶ 10-11, 13 Exs. D, E.) On July 31, 2014, as Plaintiff was presented and accepted, through the app, Uber's revised Licensing Agreement and Driver Addendum ("June 21, 2014 Licensing Agreement and Driver Addendum"). (*Id.*, ¶¶ 12-13, Exs. F, G.)

Plaintiff then signed up to use Uber's "uberX" platform to book passengers and on October 3, 2014, Plaintiff accepted a separate agreement with Rasier ("Rasier Agreement"), which also contained a dispute resolution provision. (*Id.*, ¶¶ 15-16 ; Ex. H.)

The June 21, 2014 Licensing Agreement contains an arbitration agreement (the "Arbitration Provision")[1] which broadly requires Plaintiff to individually arbitrate ***all*** disputes arising out of the June 21, 2014 Licensing Agreement and/or his relationship with Uber, including termination of that

[1] Defendants will discuss the provisions in the July 2014 Licensing Agreement and Driver Addendum and Rasier Agreement as those are the operative agreements.

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relationship. Plaintiff also expressly agreed to arbitrate any challenges to the validity or enforceability of the Arbitration Provision. The Arbitration Provision reads in relevant part as follows:

> This Arbitration Provision is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. and evidences a transaction involving commerce. This Arbitration Provision applies to any dispute arising out of or related to this Agreement or termination of the Agreement and survives after the Agreement terminates…
>
> **Except as it otherwise provides, this Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration. This Arbitration Provision requires all such disputes be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of court or jury trial.**
>
> Such disputes include without limitation disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision. All such matters shall be decided by an Arbitrator and not by a court or judge.
>
> Except as it otherwise provides, this Arbitration Provision also applies, without limitation, to disputes arising out of or related to this Agreement and disputes arising out of or related to Your relationship with Uber, including termination of the relationship.

(Colman Decl., Ex. F at Section 14.3.i.) The Driver Addendum, to which Plaintiff also agreed to be bound, states Plaintiff "may be required to submit to a criminal background check." (*Id.*, Ex. G at Section 1.4.) The Driver Addendum also contains an acknowledgement that Plaintiff agreed to arbitrate any disputes related to the Driver Addendum consistent with the terms of the dispute resolution provision contained in the Licensing Agreement:

> **DISPUTE RESOLUTION**: Subcontractor agrees that any dispute, claim or controversy and arising out of relating to this Addendum, or the breach, termination, enforcement, interpretation or validity thereof, or performance of transportation services pursuant to the Software License and Online Services Agreement, including, but not limited to the use of the Service or Software, including claims against Uber, will be settled by binding arbitration in accordance with the terms set forth in Section 14.3 of the Software License and Online Services Agreement.

(*Id.*, Ex. G at Section 7.)

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The Arbitration Provision in the Licensing Agreement further provides that Plaintiff must pursue any claims in arbitration solely on an ***individual basis***, and not on a class action basis. (*Id.*, Ex. F at Section 14.3.v ["You and Uber agree to bring any dispute in arbitration on an individual basis only, and not on a class, collective, or private attorney general representative action basis."]). Agreeing to arbitration, however, was not mandatory. Plaintiff was provided 30 days to opt-out of the dispute resolution provision of the July 2014 Licensing Agreement, and was also notified of his right to consult with an attorney regarding the dispute resolution provision:

> Your Right To Opt Out Of Arbitration.
> Arbitration is not a mandatory condition of your contractual relationship with Uber. If You do not want to be subject to this Arbitration Provision, You may opt out of this Arbitration Provision by notifying Uber in writing of Your desire to opt out of this Arbitration Provision, either by (1) sending, within 30 days of the date of this Agreement is executed by You, electronic mail to optout@uber.com, stating Your name and intent to opt out of this Arbitration Provision or (2) by sending a letter by U.S. Mail, or by any nationally recognized delivery service (e.g., UPS, Federal Express, etc.), or by hand-delivery . . .
> Should You not opt out of this Arbitration Provision within the 30-day period, You and Uber shall be bound by the terms of this Arbitration Provision. You have the right to consult with counsel of Your choice concerning this Arbitration Provision. You understand that You will not be subject to retaliation if You exercise Your right to assert claims or opt-out of coverage under this Arbitration Provision.

(*Id.*, Ex. G at Section 14.3.viii.) Plaintiff did not opt out of the Arbitration Provision and accordingly, he is contractually bound to individually arbitrate his claims against Uber. (*Id.*, ¶ 14.)

The Rasier Agreement Plaintiff executed contains equally broad arbitration and class action waiver provisions. (*See* Colman Decl., Ex. H at pp. 11-15 ("Rasier Arbitration Provision").) It provides that the FAA governs the agreement. (*Id.*, p. 14.) It similarly advises that "this Arbitration Provision also applies, without limitation, to disputes arising out of or related to this Agreement and disputes arising out of or related to your relationship with the Company, including termination of the relationship." (*Id.*, p. 14.) It further provides that "This Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative action." (*Id.*) It likewise provides for opt-out within 30 days by U.S. Mail, nationally recognized delivery service, or electronic mail. (*Id.*, p. 15.)

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Both the June 21, 2014 Licensing Agreement and the Rasier Agreement contained, on the first page, extensive cautionary notices to Plaintiff that advised him of the consequences of continuing his prior agreement to arbitration and continuing to choose not to opt-out, as well as of the pending litigation against Uber, including the *O'Connor* litigation:

> **PLEASE REVIEW THE ARBITRATION AGREEMENT CAREFULLY, AS IT WILL REQUIRE YOU TO RESOLVE DISPUTES WITH UBER ON AN INDIVIDUAL BASIS THROUGH FINAL AND BINDING ARBITRATION UNLESS YOU CHOOSE TO OPT OUT OF THE ARBITRATION PROVISION**

(Coleman Decl., Ex. F, pp. 1; *see also id.* Ex. H, pp. 1 (similar notice, referencing "the Company.")

> ***Cases have been filed against Uber and may be filed in the future involving claims by users of Uber Services and Software, including by drivers. You should assume that there are now, and may be in the future, lawsuits against Uber alleging, class, collective, and/or representative claims on your behalf. . . Such claims, if successful, could result in some monetary recovery to you. (THESE CASES NOW INCLUDE, FOR EXAMPLE, . . . O'CONNOR V. UBER TECHNOLOGIES, INC., ET AL., CASE NO. CV 13-03826-EM (NORTHERN DISTRICT OF CALIFORNIA).***

(*Id.*, Ex. F at Section 14.3 ("Important Note Regarding this Section 14.3."; *see also id.* Ex. H, pp. 11 (adding references to "the Company").) Despite being given the opportunity to opt-out of the arbitration agreement on at least three occasions, Plaintiff never did so.

C. Plaintiff Has Refused To Arbitrate His Claims.

On November 24, 2014, Plaintiff filed a class action complaint against Defendants in the United States District Court, Northern District of California ("Complaint"). Plaintiff's First Cause of Action asserts a violation of the FCRA on a nationwide class basis for allegedly failing to provide so-called "pre-adverse action" notices before taking adverse action against the putative class. (Complaint ¶ 72) Plaintiff's Second Cause of Action asserts a violation of the CCRAA for alleged failures to provide a compliant written notice before obtaining consumer credit reports on the putative class members. (*Id.* ¶ 77.) Plaintiff's Third Cause of Action asserts a violation of the MCRA by allegedly failing to provide certain documents in its so-called "adverse action notices" to the putative class. (*Id.* ¶¶ 82-83.) Plaintiff's Fourth Cause of Action asserts violations of the CORI Statute for allegedly failing to provide a CORI policy, information concerning the process for

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correcting a criminal record, and copies of Massachusetts criminal records relied upon in taking adverse actions against the putative class. (*Id.* ¶¶ 87-90.)

Each of the foregoing claims is encompassed by the broad terms of the arbitration provisions in the agreements that Plaintiff executed with Defendants. Plaintiff refused to abide by their terms by filing the instant action. He subsequently declined to stipulate to arbitration prior to the filing of this motion. (*See* Declaration of Rod M. Fliegel ("Fliegel Decl.") ¶¶ 2, 3.)

III. THE COURT SHOULD ORDER PLAINTIFF TO ARBITRATE HIS CLAIMS ON AN INDIVIDUAL BASIS AND DISMISS THE INSTANT SUIT

A. The Federal Arbitration Act Applies To The Arbitration Provisions.

As affirmed by the United States Supreme Court in *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) ("*Concepcion*"), the Federal Arbitration Act ("FAA") declares a liberal policy favoring the enforcement of arbitration policies, stating: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In enacting the FAA, Congress sought to overcome widespread judicial hostility to the enforcement of arbitration agreements. *See Hall St. Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008); *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (explaining that FAA was enacted "[t]o overcome judicial resistance to arbitration"). The Court explained that the FAA permits private parties to "trade[] the procedures . . . of the courtroom for the simplicity, informality, and expedition of arbitration." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

The FAA is designed "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 (1983). To this end, the FAA not only placed arbitration agreements on equal footing with other contracts, but amounts to a "congressional declaration of a liberal federal policy favoring arbitration agreements." *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (quoting *Moses H.*

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Cone, 460 U.S. at 24). As the Ninth Circuit has declared: "In our view, *Concepcion* crystalized the directive that ***the FAA's purpose is to give preference (instead of mere equality) to arbitration provisions***." *Mortensen v. Bresnan Comm., LLC*, 722 F. 3d 1151, 1160 (9th Cir. 2013) (emphasis supplied). In this regard, the FAA "eliminates district court discretion and requires the court to compel arbitration of issues covered by the arbitration agreement." *Dittenhafer v. Citigroup*, 2010 U.S. Dist. LEXIS 77673 *5 (N.D. Cal. 2010) (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985)) (upheld on appeal).

The Arbitration Provision and the Rasier Arbitration Provision at issue here are indisputably governed by the FAA. First, both arbitration provisions so state, which is sufficient to bring them within the purview of the FAA. *See Buckeye Check Cashing*, 546 U.S. at 442-443 (Where arbitration agreement expressly provided that FAA was to govern, the FAA preempted application of state law and thus under the FAA, the question of the contract's validity was left to the arbitrator); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63-64 (1995) (For state law to apply exclusively to an arbitration agreement, the agreement must opt out of the FAA and express that state law applies); *Cronus Investments, Inc. v. Concierge Services,* 35 Cal. 4th 376, 394 (2005) (recognizing parties to an arbitration agreement may expressly designate that the FAA's procedural provisions apply); *Rodriguez v. American Technologies, Inc.*, 136 Cal. App. 4th 1110, 1115 (2006) (reversing lower court's order denying defendant's motion to compel arbitration because the parties expressly agreed that any arbitration proceeding would move forward under the FAA's procedural provisions and the trial court therefore lacked discretion under state arbitration law to deny the motion).

Second, the July 2014 Licensing Agreement and Rasier Agreement within which the Arbitration Provisions are contained affect commerce. The FAA's term "involving commerce" is interpreted broadly. *See, e.g.*, *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (finding the requisite commerce for FAA coverage even when the individual transaction did not have a substantial effect on commerce). Uber's app is available to riders and transportation providers in over 100 cities across the country. (Colman Decl., ¶ 4.) As a user of Uber's app, Plaintiff utilized its interstate reach and popularity as a tool to book passengers in exchange for payment by the

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passenger. Plaintiff's use of Uber's software application therefore involved commerce sufficient for the FAA to apply. The FAA controls here.

B. The Arbitration Provision Is Valid And Must Be Enforced.

The FAA requires courts to compel arbitration "in accordance with the terms of the agreement" upon the motion of either party to the agreement, consistent with the principle that arbitration is a matter of contract. 9 U.S.C. § 4. In determining whether to compel arbitration under the FAA, only two "gateway" issues need to be evaluated: (1) whether there exists a valid agreement to arbitrate between the parties; and (2) whether the agreement covers the dispute. *Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401, 407 n.2 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002);

"Any doubt concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Simula, Inc. v. Autoliv, Inc.*, 175 F. 3d 716, 719 (9th Cir. 1999) (citing *Moses H. Cone*, 460 U.S. at 24-25). "[T]he district court ***must*** order arbitration if it is satisfied that the making of the agreement for arbitration is not in issue." *Id.* at 719-720. (Emphasis added.)

1. The Arbitration Provision Delegates The Gateway Issues To The Arbitrator.

Before reaching this gateway issues, however, the Court must examine the underlying contract to determine whether the parties have agreed to commit the threshold question of arbitrability to the arbitrator. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010) ("An agreement to arbitrate a gateway issue is simply an additional antecedent agreement the party seeking arbitration asks the court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other."). Here, the Arbitration Provision and Rasier Arbitration Provision clearly and unmistakably provide that the following matters must be decided by the arbitrator: "disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision." (Colman Decl., Ex. F at Section 14.3.i; Ex. H at pp. 14.)

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Therefore, any question as to the validity of the Arbitration Provision and whether it applies to this dispute has been delegated to, and must be decided by, the arbitrator. Regardless, the two gateway issues are plainly satisfied in this case.

2. A Valid Agreement To Arbitrate Exists.

General contract law principles apply to the interpretation and enforcement of arbitration agreements. *First Options of Chicago v. Kaplan*, 514 U.S. 938, 944 (1995). Arbitration can be denied only where a party proves a defense to enforcement of the agreement, such as unconscionability. *Hoffman v. Citibank, N.A.*, 546 F. 3d 1078, 1082 (9th Cir. 2008) ("party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration"); *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC*, 55 Cal. 4th 223, 235 (2012) ("*Pinnacle Museum*").

To establish a defense to enforcement of the parties' arbitration agreement based on unconscionability, Plaintiff bears the burden of proving that the agreement is ***both*** procedurally and substantively unconscionable. *Pinnacle Museum*, 55 Cal. 4th at 236, 247; *Armendariz v. Foundation Health Psychare Servs.*, 24 Cal. 4th 83, 89 (2000) ("No matter how heavily one side of the scale tips, both procedural and substantive unconscionabilty are required for a court to hold an arbitration agreement unenforceable."). Procedural unconscionability "addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise." *Pinnacle Museum*, 55 Cal. 4th at 246. Substantive unconscionability relates to "the fairness of the agreement's actual terms and to assessments of whether they are overly harsh or one-sided." *Id.*

a. The Arbitration Provision is not procedurally unconscionable.

In order to book passengers using the Uber app and to contract with Rasier for lead generation, Plaintiff had to affirmatively accept, by electronic acknowledgment, the June 21, 2014 Licensing Agreement, Driver Addendum, and Rasier Agreement. Defendants provided ample notice and opportunity to review the documents – and thus the arbitration provision– before Plaintiff accepted. Plaintiff was also expressly advised of his right to consult an attorney regarding the terms of the Arbitration Provision and Rasier Arbitration Provision. (Colman Decl., Ex. F at Section 14.3.viii; Ex. H at p. 17.)

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Plaintiff was even provided the opportunity to opt out of the Arbitration Provision set forth in the 2014 Licensing Agreement and Rasier Agreement. (*Id.*) Plaintiff's right to opt out of the Arbitration Provision and Rasier Arbitration Provision is described in a standalone section of both documents with the bolded and underlined title "Your Right To Opt Out Of Arbitration." (*Id.*) Neither the arbitration provisions themselves nor the sections describing Plaintiff's right to opt out were ambiguous, confusing or disguised. *See McManus v. CIBC World Markets Corp.*, 109 Cal. App. 4th 76, 87 (2003) (procedural unconscionability focuses on whether there is "oppression" arising from an inequality of bargaining power or "surprise" arising from buried terms in a complex printed form). The Arbitration Provision and Rasier Arbitration Provision explained that arbitration was not a mandatory condition of Plaintiff's contractual relationship with Uber or Rasier and that there would be no retaliation if Plaintiff elected to opt out. (Colman Decl., Ex. F at Section 14.3.viii; Ex. H at p. 17.) After accepting the terms of the 2014 Licensing Agreement and Driver Addendum and Rasier Agreements, Plaintiff had 30 days to inform Uber of his desire to opt out. (*Id.*) Plaintiff had the opportunity to use his choice of email, U.S. Mail, or other recognized carrier to opt out if he so desired. (*Id.*)

Plaintiff thus had a choice – to opt out of the Arbitration Provision and Rasier Arbitration Provision or not – and whatever he chose, he could continue to have access to Uber's app to book passengers and to Rasier for lead generation. He declined to do so, and having elected to arbitrate his individual claims, he must now be compelled to abide by that agreement. *See Johnmohammadi v. Bloomingdale's, Inc.*, 755 F. 3d 1072, 1074 (9th Cir. 2014) (by not opting out within the 30-days, plaintiff is bound by the terms of the arbitration agreement); *see also Circuit City Stores, Inc. v. Ahmed*, 283 F. 3d 1198, 1199-1200 (9th Cir. 2002) ("*Ahmed*") (same); *Rosas v. Macy's Inc.*, 2012 WL 3656274, *6 (C.D. Cal. 2012) (same).

There is no procedural unconscionability where the agreement is not presented in a contract of adhesion and the contracting party is provided a meaningful opportunity to opt out. *See Johnmohammadi*, 755 F. 3d at 1077; *Ahmed*, 283 F. 3d at 1199 (employee provided a meaningful opportunity to opt out by mailing form within 30 days); *Circuit City Stores, Inc. v. Najd*, 294 F. 3d 1104, 1108 (9th Cir. 2002) (same). The Arbitration Provision was not presented as a condition of

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contracting or on a take-it-or-leave-it basis. Indeed, in stark contrast to any hint of procedural unconscionability, Plaintiff is in the unique position of having over ***two*** opportunities to review, execute, ***and choose not to opt out*** of the relevant arbitration provisions. Plaintiff was already bound to the 2013 Licensing Agreement and Arbitration Provision prior to the filing of *O'Connor v. Uber Technologies, Inc.*, Case No. C-13-3826 EMC ("O'Connor"), which is currently pending before this Court. Plaintiff was never included in the *O'Connor* class because he was a Massachusetts resident. (Complaint ¶ 7 (Plaintiff's residency); *O'Connor*, ECF No. 107 ¶¶ 1-2 (class definition, excluding Massachusetts residents). Nevertheless, in this Court's order in the *O'Connor* litigation granting, in part, Plaintiffs' "Renewed Emergency Motion for Protective Order to Strike Arbitration Clauses" this Court ruled that it would "not regulate communications issued prior to the filing of" *O'Connor*. (*O'Connor*, ECF No. 60 at 10.) Instead, the Court ordered that for only those drivers covered by *O'Connor* who executed an arbitration agreement with Uber after August 16, 2013, Uber "must seek approval of the arbitration provision for these drivers anew, giving them 30 days to accept or opt out from the date of the revised notice." (*Id.* at 11.) Plaintiff had never opted out of the 2013 Licensing Agreement and Arbitration Provision which he had executed before August 16, 2013, and thus even if he had been a putative class member in *O'Connor*, Uber would not have been required to provide him yet another opportunity to opt out via the June 21, 2014 Licensing Agreement. Yet Uber voluntarily gave Plaintiff this same second opportunity, despite that he had executed the 2013 Licensing Agreement on July 31, 2013, before *O'Connor*, and was never included in the *O'Connor* class in any event. Uber thereby ensured the utmost procedural fairness to Plaintiff. And, the June 21, 2014 Licensing Agreement and Arbitration Provision and Rasier Agreement that Plaintiff executed comply with all aspects of the Court's later orders, including extensive notices and warnings, allowing Plaintiff to easily opt-out via electronic mail or U.S. Mail, and notifying him of the pending *O'Connor* litigation, among others. (*See* Colman Decl., Ex. F at Section 14.3; O'Connor, ECF No. 106, 111).

There is therefore no procedural unconscionability and the parties' agreement must be enforced.

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b. The Arbitration Provision is not substantively unconscionable.

Even if there was some modicum of procedural unconscionability (and here Plaintiff cannot even meet that threshold), Plaintiff must prove a high level of substantive unconscionability to avoid arbitration. *Pinnacle Museum*, 55 Cal. 4th at 247. He cannot do so here.

In *Armendariz*, 24 Cal. 4th at 102, the California Supreme Court found that mandatory arbitration agreements for ***employees*** must meet various requirements in order to be valid and enforceable. The question of the nature of the relationship between Plaintiff and Uber is an issue central to this case and one explicitly covered by the Arbitration Provision and Rasier Arbitration Provision as it is a dispute "related to [Plaintiff's] relationship with Uber" and/or a dispute arising out of or related to [his] relationship with [Rasier]." (Colman Decl., Ex. F at Section 14.3.i; Ex. H at p. 14.) Given that the *Armendariz* decision addressed employee arbitration agreements, the judicially imposed factors necessarily do not apply here unless and until Plaintiff can demonstrate he was an employee, rather than an independent contractor as set forth in the Licensing Agreement and Driver Addendum. Accordingly, should Plaintiff argue that the Arbitration Provision is unenforceable under *Armendariz*, that question of enforceability ***is for the arbitrator to decide***, particularly in light of the Arbitration Provision's delegation clause. (Colman Decl., Ex. D at Section 14.3.i); *see also Rent-A-Center, W., Inc.*, 561 U.S. at 70 (upholding arbitration agreement's provision delegating to the arbitrator the gateway issue of enforceability); *Buckeye Check Cashing*, 546 U.S. at 446 ("the issue of the contract's validity is considered by the arbitrator in the first instance.").

Regardless, it is questionable whether *Armendariz* survived the United States Supreme Court's decision in *Concepcion*, which limits a state's ability to impose conditions on the enforceability of arbitration agreements that effectively discourage arbitration, such as applying more stringent unconscionability standards than those applicable to contracts in general.[2]

[2] The Court in *Concepcion* explained that even rules applying general principles of unconscionability undermine the FAA if they "have a disproportionate impact on arbitration agreements." *Concepcion*, 131 S. Ct. at 1747. In this regard, as noted by the California Court of Appeal in *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115, 1136 (2012), "*Concepcion* adopts a sweeping rule of FAA preemption. Under *Concepcion*, the FAA preempts any rule or policy rooted in state law that subjects agreements to arbitrate particular kinds of claims to more stringent standards of enforceability than contracts generally." The restrictions established by *Armendariz* fall within this category of restrictions precluded by the FAA. In this same vein, recently the United States Supreme Court confirmed that a state

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Even if *Armendariz* applies here, which Defendants maintain that it does not, the Arbitration Provision complies with *Armendariz* and Plaintiff cannot demonstrate substantive unconscionability. *Armendariz* holds that an agreement to arbitrate non-waivable statutory claims is enforceable if both parties are equally bound by all terms of the agreement and if it: (1) provides for a neutral arbitrator; (2) provides for adequate discovery; (3) provides for all types of relief otherwise available in court; (4) provides for a written arbitration award; and (5) provides that Plaintiff would not be required to pay either unreasonable costs of any arbitrator's fees or expenses as a condition of access to the arbitration forum. 24 Cal. 4th at 102, 117. The Arbitration Provision and Rasier Arbitration Provision meet all of the *Armendariz* factors:

- They provide for a neutral arbitrator: "The Arbitrator shall be selected by mutual agreement of Uber and You. Unless You and Uber mutually agree otherwise, the Arbitrator will be an attorney licensed to practice in the location where the arbitration proceeding will be conducted or a retired federal or state judicial officer who presided in the jurisdiction where the arbitration will be conducted." (Colman Decl., Ex. F at Section 14.3.iii; *see also id.* Ex. H at p. 15.)
- They provide for adequate discovery: "In arbitration, the Parties will have the right to conduct adequate civil discovery, bring dispositive motions, and present witnesses and evidence as needed to present their cases and defenses." (*Id.*, Ex. F at Section 14.3.v; *see also id.* Ex. H at p. 16.)
- They provide for a written decision: "The Arbitrator will issue a decision or award in writing, stating the essential findings of fact and conclusion of law." (*Id.*, Ex. F at Section 14.3.vii; *see also id.* Ex. H at 17.)
- They do not limit statutorily available remedies: "The Arbitrator may award any party any remedy to which that party is entitled under applicable law…no remedies

may not frustrate the FAA on public policy grounds. *See Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (state public policy cannot defeat the FAA's pro-arbitration policy or its preemptive effect). *Armendariz*'s fairness factors were born from public policy concerns – namely whether arbitration could properly vindicate nonwaivable statutory rights. In this regard, the California Supreme Court in *Armendariz* established minimum criteria to be forced on the parties in determining the validity of an arbitration agreement related to non-waivable statutory claims in the employment context. However, *Concepcion* and *Marmet* make clear, that such imposed limitations run afoul of the FAA.

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that otherwise would be available to an individual in a court of law will be forfeited by virtue of this Arbitration Provision." (*Id.*, Ex. F at Section 14.3.vii; *see also id.* Ex. H at 16.)

- They require Defendants to pay for arbitration: "[I]n all cases where required by law, Uber will pay the Arbitrator's and arbitration fees." (*Id.*, Ex. F at Section 14.3.vi; *see also id.* Ex. H at 16.)

Armendariz also states that arbitration agreements must have a "modicum of bilaterality" to avoid a finding of substantive unconscionability. *Armendariz*, 24 Cal. 4th at 116-117. Here, the Arbitration Provision is fully bilateral and a mutual waiver of rights. Under the circumstances, Plaintiff cannot show the requisite substantive unconscionability needed to avoid his contractual obligation.

3. Plaintiff's Claims Are Covered By The Arbitration Agreement.

The second gateway issue is whether the arbitration agreement covers the dispute between the parties. *EEOC. v. Waffle House, Inc.*, 534 U.S. 279, 280 (2002); *Moses H. Cone*, 460 U.S. at 24-25 ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"). Here, Plaintiff unequivocally agreed to arbitrate each of his claims against Uber and Rasier.

All of Plaintiff's Four Causes of Action relate to Plaintiff's claims that Defendants failed to provide certain documents and notices to him in connection with their criminal background check on him in alleged violation of the FCRA, CCRAA, MCRA and the CORI Statute. Plaintiff agreed to arbitrate these claims because the Arbitration Provision and Rasier Arbitration Provision broadly covers ***any dispute*** arising out of or related to the Licensing Agreement as well as ***any dispute*** arising out of or related to Plaintiff's relationship with Uber or Rasier, including termination of the relationship. (Colman Decl., Ex. F at Section 14.3.i; Ex. H p. 14.)

Based on the foregoing language, there is no dispute that the Arbitration Provision and Rasier Arbitration Provision covers Plaintiff's FCRA, CCRAA, MCRA and CORI Statute claims. *See Cronin v. Citifinancial Servs.*, 352 Fed. Appx. 630, 636-637 (3rd Cir. 2009) (appellate court confirmed district court's granting of defendant's motion to compel individual arbitration following

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conclusion that arbitration agreement was valid and enforceable and applied to plaintiff's FCRA claims); *Yaqub v. Experian Info. Solutions, Inc.*, 2011 U.S. Dist. LEXIS 156427, *7, 16 (C.D. Cal. 2011) (Court enforced arbitration agreement and compelled individual arbitration of Plaintiff's FCRA claims). There thus exists a valid agreement to arbitrate between Plaintiff and Uber that covers each and every claim asserted by Plaintiff in the FAC. Where there exists a valid agreement to arbitrate and the dispute falls within the scope of the agreement, the FAA requires that the Court order the parties to arbitrate in accordance with the terms of the agreement. *See* 9 U.S.C. § 4; *Bencharsky v. Cottman Transmission Sys., LLC*, 625 F. Supp. 2d 872, 876 (N.D. Cal. 2008). Here, the Arbitration Provision requires that Plaintiff pursue his claims in individual arbitration only.

C. Plaintiff's Class Claims Cannot Proceed.

The Court must dismiss Plaintiff's class claims and order the parties to arbitrate Plaintiff's First through Fourth Causes of Action solely on an individual basis. It is now well settled in California that class action waivers are enforceable. *Johnmohammadi*, 755 F. 3d at 1074 ("Johnmohammadi can't argue that the class-action waiver is unenforceable under California law."); *accord Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 359-60 (2014) (enforcing class waiver and finding California law to the contrary is preempted by the FAA).

As the Supreme Court confirmed in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 664 (2010), it is improper to force a party into a class proceeding to which it did not agree, because arbitration "is a matter of consent." Parties "may specify *with whom* they choose to arbitrate their disputes." *Id.* at 683. (Emphasis in original.) As such, "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." *Id.* at 684. *Accord*, *Murphy v. DirectTV, Inc.*, 724 F. 3d 1218, 1226 (9th Cir. 2013) ("Section 2 of the FAA, which under *Concepcion* requires the enforcement of arbitration agreements that ban class procedures, is the law of California and of every other state."); *accord Kairy v. Supershuttle, Int'l*, 2012 U.S. Dist. LEXIS 134945, *16-19 (N.D. Cal. 2012) ("…courts must compel arbitration even in the absence of the opportunity for plaintiffs to bring their claims as a class action"); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 846 (N.D. Cal.

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2012) (finding *Concepcion* overruled *Gentry* and no longer precludes enforcement of class action waivers in arbitration agreements).

Here, the Arbitration Provision contains a valid class action waiver: "You and Uber agree to resolve any dispute in arbitration on an individual basis only, and not on a class, collective, or private attorney general representative action basis." (Colman Decl., Ex. F at Section 14.3.v.) So does the Rasier Arbitration Provision: "You and the Company agree to resolve any dispute in arbitration on an individual basis only, and not on a class, collective, or private attorney general representative action basis." (*Id.*, Ex. H p. 16.) Indeed, both the 2014 Licensing Agreement and Rasier Agreement contain repeated, bolded and/or capitalized notices to Plaintiff that the parties were waiving any right to proceed on a class-wide basis:

- "This provision will preclude you from bringing any class, collective or representative action against Uber. It also precludes you from participating in or recovering relief under any current or future class, collective or representative action brought against Uber by someone else." (*Id.* Ex. F at Section 14.3 (larger font in original).)
- "**This Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative action.**" (*Id.* Ex. F at Section 14.3.i (bold in original).)
- "**PLEASE REVIEW THE DISPUTE RESOLUTION PROVISION SET FORTH BELOW IN SECTION 7 CAREFULLY, AS IT WILL REQUIRE YOU TO RESOLVE DISPUTES WITH UBER ON AN INDIVIDUAL BASIS THROUGH FINAL AND BINDING ARBITRATION UNLESS YOU CHOOSE TO OPT OUT.**" (*Id.* Ex. G at p. 1 (bold and caps in original).)
- "IMPORTANT: This arbitration provision will require you to resolve any claim that you may have against the Company or Uber on an individual basis pursuant to the terms of the Agreement unless you chose to opt out of the arbitration provision." (*Id.* Ex. H at p. 13 (larger font in original).)

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Accordingly, Plaintiff cannot proceed with his class claims before this Court or in arbitration.

IV. CONCLUSION

Plaintiff agreed to arbitrate on an individual basis any and all claims arising from his contractual relationship with Defendants pursuant to the Arbitration Provision and Rasier Arbitration Provision. The arbitration provisions are valid and enforceable. Accordingly, Defendants Uber and Rasier respectfully request that the Court compel Plaintiff to arbitrate his claims on an individual basis and dismiss his class claims.

Dated: February 6, 2015

/s/Andrew W. Spurchise
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 5, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 5, 2015 /s/ Theodore J. Boutrous, Jr.