16-2750 (L)

(consolidated with 16-2752)

United States Court of Appeals for the Second Circuit

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

Plaintiff-Counter Defendant-Appellee,

v.

TRAVIS KALANICK,

Defendant-Appellant,

UBER TECHNOLOGIES, INC.,

Defendant-Counter Claimant-Appellant,

ERGO,

Third-Party Defendant.

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

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellant Uber Technologies, Inc. hereby files its corporate disclosure statement as follows. Uber Technologies, Inc. is a privately held corporation. No parent corporation or publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

Rules

Other Authorities

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. § 1331. On July 29, 2016, the district court issued an order denying Appellants' motion to compel arbitration. SPA1. Appellants filed timely notices of appeal on August 5, 2016. AA569, 572. This Court has jurisdiction pursuant to 9 U.S.C. § 16(a)(1)(C) to hear this appeal from an order denying an application to compel arbitration under 9 U.S.C. § 206.

STATEMENT OF ISSUES

1. Did the district court's refusal to compel arbitration violate the Federal Arbitration Act by discriminating against arbitration where the court: (a) expressed doubt that the federal policy favoring arbitration applies to agreements formed over the internet; (b) repeatedly characterized the arbitration agreement as a waiver of the right to a jury trial subject to special scrutiny; and (c) held that the placement of the arbitration clause within Uber's Terms of Service was not sufficiently "prominent" and constituted a "barrier to reasonable notice"?

2. Did the district court err in finding that Plaintiff never assented to the arbitration provision in Uber's Terms of Service where: (a) Uber's account registration screen clearly and conspicuously informed Plaintiff that he was required to agree to the Terms of Service in order to register for an Uber rider account; (b) the Terms of Service were easily accessible via a hyperlink located beneath the

"REGISTER" button on Uber's account registration page; (c) Plaintiff was required to enter his credit card information on the registration page, indicating that Plaintiff was entering into a contractual relationship with Uber; and (d) Plaintiff concedes that he entered his credit card information and clicked the "REGISTER" button on Uber's account registration screen, and acknowledged in his pleadings that Uber users must "agree" to Uber's Terms of Service to register?

3. Did the district court err in relying on a scaled-down, low-resolution, black-and-white image of Uber's account registration screen where: (a) the image did not resemble how text would have appeared on a color, high-resolution smartphone screen like the one Plaintiff used to register; (b) no party had authenticated the image; and (c) the image was not subject to judicial notice?

4. Should this Court direct the district court to compel Plaintiff to arbitrate his claims against Uber and Mr. Kalanick, where Plaintiff agreed that the arbitrator, not the courts, would decide threshold issues of arbitrability?

STATEMENT OF THE CASE

A. The Nature Of The Case, Course Of Proceedings, And Disposition Below

Uber is a technology company that enables riders to use their smartphones to request transportation services from third-party transportation providers. AA43–44 ¶ 2. Riders can request transportation services by using the Uber App on their

smartphones. These requests are then transmitted to available independent transportation providers. AA47 ¶ 24.

Plaintiff registered for an Uber rider account on October 18, 2014. AA314, 320. As a condition of registering to use Uber's services, Plaintiff was required to agree to Uber's Terms of Service. AA48 ¶ 29; AA316. At the time Plaintiff registered for an Uber rider account, Uber's Terms of Service contained an arbitration clause, requiring Uber and Uber users like Plaintiff to submit "any dispute, claim or controversy arising out of or relating to . . . the use of the [Uber] Service or Application" to "binding arbitration." AA111–12.

On December 16, 2015, notwithstanding this arbitration agreement, Plaintiff filed suit against Appellant Travis Kalanick, the co-founder and CEO of Uber, for alleged violations of the Sherman Act, 15 U.S.C. § 1, and the Donnelly Act, N.Y. Gen. Bus. Law § 340, claiming that the Uber App allows third-party transportation providers to fix prices amongst themselves, forcing riders like Plaintiff to pay a higher price than if the third-party transportation providers competed on price. AA25 ¶ 8, 23–24 ¶ 2, 27 ¶ 24. Plaintiff amended his Complaint on January 29, 2016. AA43. Plaintiff purports to bring these claims on behalf of a class composed of "all persons in the United States who, on one or more occasions, have used the Uber App to obtain rides from Uber driver-partners and paid fares for their rides set by the Uber pricing algorithm." AA62–63 ¶ 113. Although all of Plaintiff's claims

arise out of or relate to *Uber's* application and services, Plaintiff brought his claims solely against Mr. Kalanick individually, as co-founder and CEO of Uber.

On May 20, 2016, Mr. Kalanick filed a Motion for Joinder, requesting that Uber be joined as a necessary party in this action. Dist. Ct. Dkt. No. 47. On May 24, 2016, Uber filed a motion requesting that the Court permit it to intervene. Dist. Ct. Dkt. No. 58. The Court granted Mr. Kalanick's motion on June 19, 2016, and ordered that Uber be joined as a defendant. AA276. It denied Uber's motion as moot. AA272.

Mr. Kalanick moved to compel Plaintiff to arbitrate on June 7, 2016 (AA235), and Uber moved to compel Plaintiff to arbitrate on June 21, 2016. (AA278). Plaintiff opposed the motions, denying that he had ever assented to Uber's Terms of Service. AA320–21; Dist. Ct. Dkt. No. 102 at 21–25. Plaintiff acknowledged that he "entered [his] contact information and credit card information, and then clicked the REGISTER button." AA320. He also acknowledged in both his Complaint (AA28 ¶ 29) and Amended Complaint (AA48 ¶ 29) that in order "[t]o become an Uber account holder, an individual first must agree to Uber's terms and conditions." However, Plaintiff claimed he did not recall noticing the hyperlink to Uber's Terms of Service, and "did not read any terms and conditions" when registering. AA320.

The district court, Honorable Jed S. Rakoff presiding, denied the motions to compel, finding that Plaintiff had not assented to Uber's Terms of Service, including

the arbitration provision. The district court declared that courts must "indulg[e] every reasonable presumption against waiver" of the right to a jury trial. SPA1 (quoting *Aetna Ins. Co. v. Kennedy to Use of Bogash*, 301 U.S. 389, 393 (1937)). It expressed deep reservations about consumers waiving "[t]his most precious and fundamental right" by entering into an arbitration agreement over the internet, and characterized assent to such electronic agreements as a "legal fiction." SPA1–2. And it expressed doubt that the "liberal federal policy favoring arbitration" could apply to the internet, since the Congress that enacted the Federal Arbitration Act did not "contemplate[] the vicissitudes of the World Wide Web." SPA2. The court further lamented that "in this brave new world, consumers are routinely forced to waive their very access to courts, and to submit instead to arbitration, on the theory that they have voluntarily agreed to do so in response to endless, turgid, often impenetrable sets of terms and conditions, to which, by pressing a button, they have indicated their agreement." SPA1.

The district court found "no basis for a claim that plaintiff . . . had 'actual knowledge of the agreement.'" SPA14 (quoting *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014)). It therefore evaluated whether "'a reasonably prudent user' would have been put 'on inquiry notice of the terms of the contract.'" SPA15 (quoting *Nguyen*, 763 F.3d at 1177). In evaluating Uber's registration process, the district court relied on a small, low-quality image of Uber's registration

screen that the *court itself* generated (SPA31)—rather than the high-quality images that Uber submitted (AA319) and that Plaintiff did not contest (*see* AA320–21). Based on its own unauthenticated image, the district court found that the text in Uber's registration screen was "barely legible." SPA12. It placed great emphasis on the fact that users were not required to click a box stating "I agree" to proceed with registration. SPA22–23. And it singled out the "placement of the arbitration clause in Uber's User Agreement," finding that it constituted a "barrier to reasonable notice" because users had to scroll down to the "dispute resolution" section to read the arbitration clause. SPA27–28.

Uber and Mr. Kalanick filed notices of appeal on August 5, 2016. AA569, 572. On the same day, they filed a joint motion to stay the district court proceedings pending appeal. Dist. Ct. Dkt. Nos. 133, 134. The district court granted the motion on August 26, 2016. AA561. This Court subsequently consolidated Uber's and Mr. Kalanick's appeals. 16 Civ. 2750, Dkt. No. 12.

B. Statement Of The Facts

1. To Register For Uber's Services, Plaintiff Was Required To Agree To Uber's Terms Of Service

Plaintiff registered for an Uber rider account on October 18, 2014. AA314. According to Uber's records, Plaintiff registered for the account via the Uber App using a Samsung Galaxy S5 smartphone with an Android operating system. AA314.

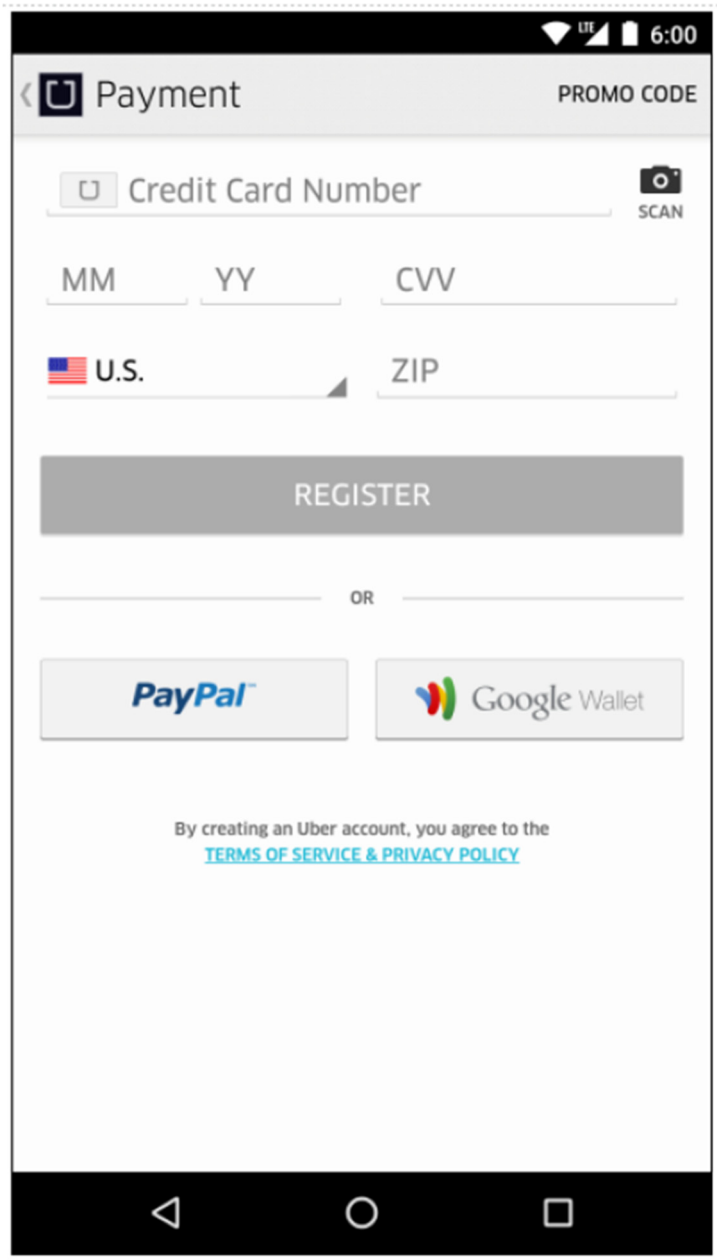
After downloading the Uber App, a user must register for an account in order to use the App. At the time Plaintiff registered, Uber's account registration process for users with Android-operated smartphones involved the following steps: A user began the registration process by clicking a button marked "Register." AA315. Doing so brought up a screen labeled "Register" with fields for the user to enter his or her name, email address, mobile phone number, and a password. AA318. After filling out these fields, the user advanced to the second screen by clicking a button labeled "NEXT." AA315.

On the second screen in the account registration process, which was labeled "Payment" in the top left corner, the user was prompted to enter his or her credit card information, or could elect to make payments using PayPal or Google Wallet. AA319. Plaintiff entered his credit card information. AA315; AA320. Near the center of the bottom half of this screen was a sentence informing users that

> By creating an Uber account, you agree to the
> TERMS OF SERVICE & PRIVACY POLICY

The phrase "TERMS OF SERVICE & PRIVACY POLICY" was in all caps, underlined, and in bright blue text, indicating that it was a hyperlink. The sentence was set off from the rest of the text on the page by ample negative space. It was also the only complete sentence on the screen, and contained nearly half of the 32 total words on the screen. AA319. In addition, the "TERMS OF SERVICE & PRIVACY

POLICY" was the only hyperlink on the screen. The image below depicts the second screen as it would have appeared when Plaintiff registered. AA319; AA588.



If the user chose to click the hyperlink, he or she was taken to a page with two buttons, labeled respectively "Terms and Conditions" and "Privacy Policy."

AA315–16. Clicking on the buttons displayed the version of Uber's "Terms and Conditions" or "Privacy Policy" in effect at that time. AA316.

To complete the registration process and be eligible to request rides, a user was required to click the button marked "REGISTER" on the "Payment" page. AA316. This button was located above the sentence reading "By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY." AA319. Plaintiff has confirmed that he clicked the "REGISTER" button after entering his credit card information. AA320.

2. Uber's Terms Of Service Contain An Arbitration Clause

Uber offers access to its services subject to certain terms and conditions specified in its Terms of Service. The version of Uber's Terms of Service in effect when Plaintiff registered contained a section labeled "**Dispute Resolution**" in boldface. AA111. This section contained an arbitration clause requiring that disputes between Uber and users be arbitrated on an individual basis. It stated

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

AA112 (boldface in original). The Terms of Service specified that the American Arbitration Association ("AAA") would oversee any dispute, and that the AAA Commercial Arbitration Rules would govern arbitration. AA112.

SUMMARY OF ARGUMENT

The district court's decision expresses precisely the type of hostility toward arbitration that the Federal Arbitration Act ("FAA") was enacted to prevent. *See DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 470 (2015). Indeed, from the very first paragraph, the district court characterized arbitration as a scheme designed to deny consumers "access to the courts" and to subvert the "most precious and fundamental" "right to a jury trial." SPA1. Viewing arbitration through this lens—as an unscrupulous "waiver" of the right to a jury trial—the district court endeavored to "indulg[e] every reasonable presumption *against*" arbitration (SPA1 (emphasis added)), in defiance of the Supreme Court's repeated admonition that federal law *favors* arbitration agreements. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *accord DIRECTV*, 136 S. Ct. at 468, 471; *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308–09 (2013).

For example, the district court singled out the arbitration clause in Uber's Terms of Service for special scrutiny and reasoned that the placement of the arbitration clause *within* Uber's Terms of Service was a "barrier to reasonable notice" (SPA28). But this singling out of arbitration runs contrary to the Supreme

Court's admonition that the FAA prohibits courts from subjecting arbitration clauses to unique placement and formatting requirements. *See, e.g.*, *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *see also Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899, 914–15 (2015). In fact, the district court even expressed doubt that the federal policy favoring arbitration applies *at all* to arbitration agreements formed over the internet (SPA2)—a conclusion that finds no textual or logical basis in the FAA or the precedents of the Supreme Court or this Court.

The district court's hostility to arbitration animated every aspect of its opinion, most notably its erroneous conclusion that Plaintiff did not assent to the arbitration provisions in his User Agreement. Under basic principles of contract formation, Plaintiff assented to those provisions when—after being presented with a conspicuous notice that registering for an Uber account would constitute agreement to Uber's Terms of Service—Plaintiff clicked the "REGISTER" button. The overwhelming consensus of federal courts throughout the country holds that simple, clear and unambiguous notifications like the one Uber provided to Plaintiff suffice to form an enforceable contract.

Plaintiff knew that he was entering into a contract with Uber; indeed, he was required to enter his credit card information on the very "Payment" screen that informed him of the existence of Uber's Terms of Service. He therefore had a duty—and ample opportunity—to read the extremely short text that accompanied

his registration, which stated that by registering he was agreeing to Uber's Terms of Service. As Plaintiff admitted in his complaint, "[t]o become an Uber account holder, an individual first must agree to Uber's terms and conditions." AA48 ¶ 29. He did exactly that.

The district court erred in indulging every presumption against Plaintiff's agreement to arbitrate. The natural consequence of that error was the district court's conclusion that Plaintiff did not contract with Uber when he admitted in his pleadings that he did just that. Appellants respectfully request that this Court enforce the parties' agreement and remand to the district court with instructions to compel Plaintiff to arbitrate with both Uber and Mr. Kalanick.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's denial of a motion to compel arbitration. *See, e.g.*, *Mediterranean Shipping Co. S.A. Geneva v. POL-Atl.*, 229 F.3d 397, 402 (2d Cir. 2000). "[I]n applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the [Federal Arbitration] Act . . . due regard must be given to the federal policy favoring arbitration . . . ." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 475–76 (1989). "In accordance with that policy, [this Court] resolve[s] doubts as to the arbitrability of a claim in favor of arbitrability." *State of N.Y. v. Oneida Indian Nation of N.Y.*, 90 F.3d 58, 61 (2d Cir.

1996) (citations and internal quotation marks omitted). The Court "will compel arbitration unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id*. (citation and internal quotation marks omitted).

ARGUMENT

I. The District Court Disfavored Arbitration In Violation Of The Federal Arbitration Act.

The district court's decision expresses a marked disregard for the "emphatic federal policy in favor of arbitral dispute resolution." *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (citation omitted). Indeed, its open antipathy for arbitration harkens back to the "dark chapter[] in legal history" when courts viewed arbitration agreements as "anathema," and "resorted to a great variety of devices and formulas to destroy" them. *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959). It was precisely this "longstanding judicial hostility to arbitration agreements" that Congress sought to reverse when it passed the FAA. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

The district court made no effort to conceal its deep misgivings about ceding jurisdiction to an arbitrator. The very first paragraph characterizes arbitration as a means of denying consumers "access to the courts." SPA1. The court lamented that "in this brave new world" of electronic contracting "consumers are routinely forced to waive their constitutional right to a jury and their very access to courts, and to

submit instead to arbitration." SPA1. This view of arbitration as an encroachment on the courts' domain closely aligns this decision with the long line of pre-FAA decisions that refused to enforce arbitration agreements for fear that arbitration would "oust" the courts of jurisdiction. *See Robert Lawrence*, 271 F.2d at 406 (describing courts' historical antipathy to arbitration); *Kulukundis Shipping Co., S/A v. Amtorg Trading Corp.*, 126 F.2d 978, 982–85 (2d Cir. 1942). In fact, the district court's reasoning is reminiscent of the very decisions Congress rejected when it enacted the FAA.[1] *See Kulukundis*, 126 F.3d at 982–85.

In particular, the district court's view of arbitration agreements as suspect waivers of the "the right to a jury trial" conflicts with the FAA and this Court's precedent. The district court observed that "[t]his most precious and fundamental right [to a jury trial] can be waived only if the waiver is knowing and voluntary, with the court 'indulg[ing] every reasonable presumption against waiver.'" SPA1 (citation omitted). That is not the law. Rather, it is "well-settled that waivers of jury trial are fully enforceable under the FAA." *Harrington v. Atl. Sounding Co.*, 602 F.3d 113, 126 (2d Cir. 2010); *see also, e.g.*, *Gilmer*, 500 U.S. at 26. Moreover, because an arbitration agreement "necessarily waives jury trial," viewing arbitration agreements with the same skepticism as jury waivers—merely because the parties

[1] *Compare* AA1–2, *with*, *e.g.*, *Meacham v. Jamestown, F. & C.R. Co.*, 211 N.Y. 346, 354 (1914), *and Holmes v. Richet*, 56 Cal. 307, 314 (1880).

have opted to resolve disputes outside of court—squarely violates the FAA by discriminating against arbitration. *Cf. Harrington*, 602 F.3d at 126 ("[C]ourts may not 'rely on the uniqueness of an agreement to arbitrate,' which necessarily waives jury trial, 'as a basis for a state-law holding that enforcement would be unconscionable.'") (quoting *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987)).

Remarkably, the district court also questioned whether the FAA applies *at all* to agreements formed over the internet. It expressed skepticism that the FAA's "liberal federal policy favoring arbitration" covers electronic transactions because "the Congress that enacted that Act in 1925" could not have "remotely contemplated the vicissitudes of the World Wide Web." SPA2.

Throughout its order, the court indulged in every presumption against arbitration—including on the question of whether the parties had contracted at all—due to what it viewed as the unique importance of the "right to sue in court." *See, e.g.*, SPA28 (reasoning that, because "contractual terms as significant as the relinquishment of one's right to a jury trial or even of the right to sue in court" were at issue, there was "a genuine risk that a fundamental principle of contract formation will be left in the dust"). The district court emphasized that Uber's account registration screen and the conspicuous Terms of Service hyperlink on that page did not draw special attention to the arbitration provision contained within Uber's Terms of Service. For example, the court observed that "[t]he reasonable user might be

forgiven for assuming that 'Terms of Service' refers to a description of the types of services that Uber intends to provide, not to the user's waiver of his constitutional right to a jury trial or his right to pursue legal redress in court." SPA26–27. And the court found that the placement of the arbitration clause "several pages" into the Terms of Service was not sufficiently "prominent" and constituted a "barrier to reasonable notice," even though the arbitration provision was separated from the rest of Uber's Terms of Service under the bolded heading, "**Dispute Resolution**." SPA26–27.

This was error. The district court's reasoning runs directly counter to the FAA's fundamental precept that courts must place arbitration agreements on "equal footing" with other types of contracts. *Concepcion*, 563 U.S. at 339; *accord DIRECTV*, 136 S. Ct. at 470–71; *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308–09 (2013); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *Aceros Prefabricados, S.A. v. TradeArbed, Inc.*, 282 F.3d 92, 100 (2d Cir. 2002). The FAA prohibits rules "that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339. This prohibition applies to any rule purporting to require *special placement* of an arbitration provision within a contract or *special formatting* to draw more attention to an arbitration provision than to other provisions of the contract. *See, e.g.*, *Casarotto*, 517 U.S. at 684, 687–88 (holding that the FAA preempted a

state statute requiring arbitration clauses to be prominently identified in underlined capital letters on the first page of a contract).

Indeed, although the district court purportedly applied California law,[2] the California Supreme Court, like the U.S. Supreme Court, has also explicitly rejected any rule—like the one proposed and applied by the district court below—purporting to impose an "obligation to highlight the arbitration clause of [a] contract . . . [or] to specifically call that clause to [another party's] attention," holding that such a rule "would be preempted by the FAA." *Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899, 914–15 (2015). In sum, because the district court's conclusion that Plaintiff did not assent to Uber's arbitration agreement explicitly "reflect[ed] the subject matter at issue here (arbitration),"—indeed, reflected outright hostility to arbitration—"rather than a general principle" applicable to all contracts, *DIRECTV*, 136 S. Ct. at 470, its order is fundamentally inconsistent with the FAA and cannot stand. Reversal is warranted on this ground alone.

[2] Appellants argued below that New York law governs the question of whether a valid contract was formed. The district court concluded that the choice of law was not "dispositive" (SPA7), and Appellants have cited both New York and California law in this brief. However, if this Court concludes that New York law differs from California law with respect to any determinative issues, it should apply New York law.

II. Plaintiff Assented To Uber's Terms And Conditions.

In addition to flouting Supreme Court precedent regarding arbitration, the district court's decision is out of step with the overwhelming weight of authority enforcing electronic agreements formed under circumstances that are virtually identical to those presented here. Under basic principles of contract, Plaintiff's contention that he did not read Uber's Terms of Service—after receiving clear notice that they were part of the registration agreement—does not negate his assent to the arbitration clause contained therein. A reasonably prudent user would have noticed the clear link to Uber's Terms of Service on the "payment" page and read those terms before entering his credit card information and clicking "REGISTER."

A. The Existence Of Uber's Terms Of Service Was Conspicuous.

Where, as here, the "design and content of [the] webpage rendered the existence of terms reasonably conspicuous," an offeree will be bound to those terms—even if he has not read them, and even if the terms are located elsewhere. *Nicosia*, 2016 WL 4473225, at *7.

Uber's "payment" page conspicuously disclosed that agreeing to Uber's Terms of Service was a condition of registering to receive Uber's services. Indeed, long before he denied assenting to the agreement, Plaintiff explicitly *conceded* in both his Complaint (AA28 ¶ 29) and Amended Complaint (AA48 ¶ 29) that "[t]o become an Uber account holder, an individual first must agree to Uber's terms

and conditions."[3] The screen on which Plaintiff entered his credit card information and consummated the agreement was labeled "payment" (AA319), and contained only 32 words. The admonition "[b]y creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY" was the only complete sentence on the page and comprised nearly half of all the words on the screen. The text was visible without scrolling, centered on the screen, set off from the rest of the text and buttons by ample negative space, and contrasted sharply with the white background. Moreover, the hyperlink "TERMS OF SERVICE & PRIVACY POLICY" was

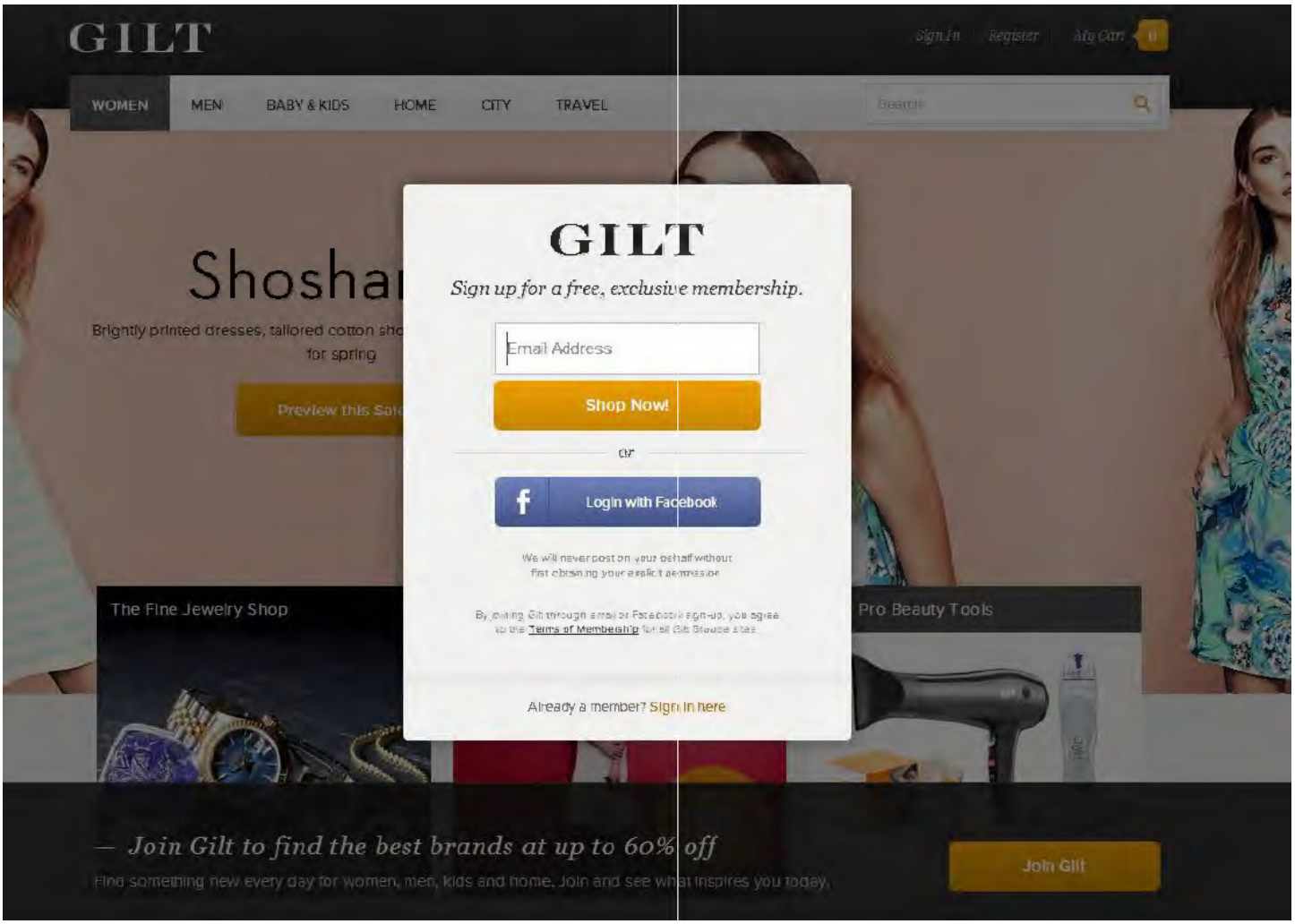
[3] The district court improperly refused to consider these allegations. Instead, it "deem[ed] the complaint . . . amended" to reflect Plaintiff's counsel's position at oral argument that this admission "was not intended as [an] implicit waiver." SPA9. This sua sponte amendment was procedurally improper. *See Miccosukee Tribe of Indians of Florida v. United States*, 716 F.3d 535, 559 (11th Cir. 2013) ("[I]t goes without saying that the court is barred from amending a plaintiff's claim."); *cf. id*. ("[I]n sua sponte amending a plaintiff's claim on summary judgment, the court may create the impression that it has become the plaintiff's advocate . . . ."). And even if it were proper, "[t]he amendment of a pleading does not make it any the less an admission of the party." *Andrews v. Metro N. Commuter R. Co.*, 882 F.2d 705, 707 (2d Cir. 1989); *see also United States v. McKeon*, 738 F.2d 26, 31 (2d Cir. 1984). "A party . . . cannot advance one version of the facts in [his] pleadings, conclude that [his] interests would be better served by a different version, and amend [his] pleadings to incorporate that version, safe in the belief that the trier of fact will never learn of the change in stories." *Andrews*, 882 F.2d at 707. Put simply, Plaintiff's admission that he contracted with Uber cannot be wished away through deletion. *See id*. In the face of his straightforward admission, Plaintiff's belated contention—alleged only when facing motions to compel arbitration—that he did *not* contract with Uber cannot be credited. *See id*. The district court's conclusion to the contrary—indeed, its decision to blot out Plaintiff's admission on his behalf—was itself reversible error. *See id.*; *Miccosukee*, 716 F.3d at 559.

underlined and capitalized, and was the only bright blue text on the screen, indicating a hyperlink. A user who wished to review the terms to which he would be subject after entering his credit card information on the "payment" page would have had no difficulty finding those terms. The district court's conclusion to the contrary is out of touch with the experience of modern consumers, who "are regularly and frequently confronted with non-negotiable contract terms, particularly when entering into transactions using the Internet." *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 127 (2d Cir. 2012).

The district court's finding that Plaintiff did not assent to Uber's Terms of Service is also out of sync with the overwhelming consensus of district courts that clear disclosures—like the one Uber provided—give rise to enforceable contracts where the user clicks a button to manifest assent. *See, e.g.*, *Cullinane v. Uber Techs., Inc.*, No. CV 14-14750-DPW, 2016 WL 3751652, at *1 (D. Mass. July 11, 2016); *In re Facebook Biometric Info. Privacy Litig.*, No. 15-CV-03747-JD, 2016 WL 2593853, at *1 (N.D. Cal. May 5, 2016); *Small Justice LLC v. Xcentric Ventures LLC*, 99 F. Supp. 3d 190, 193 (D. Mass. 2015); *Starke v. Gilt Groupe, Inc.*, No. 13 CIV. 5497 LLS, 2014 WL 1652225, at *1 (S.D.N.Y. Apr. 24, 2014); *Crawford v. Beachbody, LLC*, No. 14CV1583-GPC KSC, 2014 WL 6606563, at *1 (S.D. Cal. Nov. 5, 2014); *5381 Partners LLC v. Shareasale.com, Inc.*, 2013 WL 5328324, at *1 (E.D.N.Y. Sept. 23, 2013); *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 831

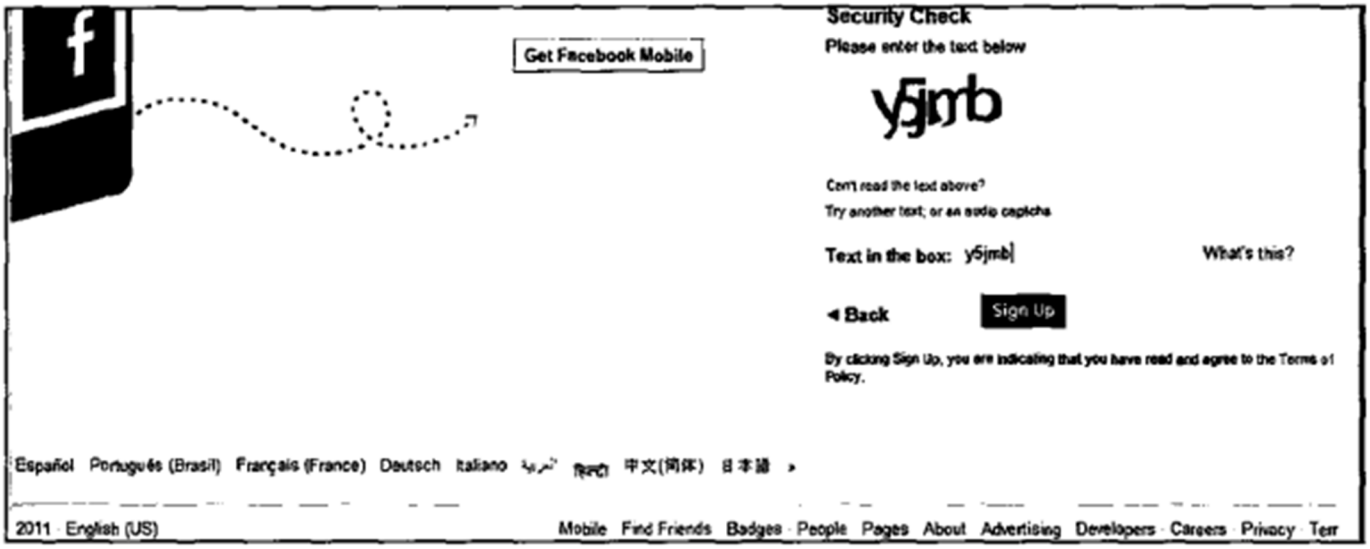
(S.D.N.Y. 2012); *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 906 (N.D. Cal. 2011); *Snap-on Bus. Sols. Inc. v. O'Neil & Assocs., Inc.*, 708 F. Supp. 2d 669, 673 (N.D. Ohio 2010); *Druyan v. Jagger*, 508 F. Supp. 2d 228, 232 (S.D.N.Y. 2007). Indeed, the design of Uber's "payment" page closely resembles—or is much clearer than—the registration screens in several of these cases.

For example, Uber's "payment" page closely resembles the registration screen in *Starke v. Gilt Groupe, Inc.*, 2014 WL 1652225, at *1, reproduced below. *See id.*, Dkt. No. 14-1, at 2.



The court in *Gilt Groupe* found that this registration screen "directed [the plaintiff] exactly where to click in order to review th[e] terms," and held that he assented by clicking the "Shop Now" button. *Id*. at *3.

Further, the text and hyperlink on Uber's registration screen are *much more* conspicuous than in *Fteja v. Facebook*, 841 F. Supp. 2d 829, a widely cited decision from the Southern District of New York. *See, e.g.*, *Nguyen v. Barnes & Noble Inc*., 763 F.3d 1171, 1176–77 (9th Cir. 2014) (citing *Fteja* with approval); *Cullinane*, 2016 WL 3751652, at *7 (same); *Gilt Grp.*, 2014 WL 1652225, at *2 (same); *5381 Partners*, 2013 WL 5328324, at *6–*7 (same). The registration screen at issue in *Fteja*, as it appeared in the record, is reproduced below:



No. 11-cv-918 (RJH), DE 12 at 17. Facebook's registration screen contained over 70 words and multiple complete sentences that did not pertain to the Terms of Service. The hyperlink was not set off from the rest of the text, and there is no

indication that it was displayed in a different color than the rest of the text. The district court nonetheless enforced a forum selection clause contained in Facebook's Terms of Use, noting that "[s]everal other courts have reached a similar conclusion on similar facts." *Fteja*, 841 F. Supp. 2d at 840 (citing cases).

Departing from the numerous courts that have enforced electronic agreements formed under closely analogous circumstances, the district court here found that a reasonably prudent user would not have been aware of the existence of Terms of Service because, according to the court, the text on the "payment" page was rendered in "no greater than 6-point font," and was "barely legible." AA 608 & n.5. But the district court's erroneous conclusion was based on a "scaled down" low-resolution, black-and-white image *the court itself* created. SPA11; *compare* SPA31, *with* AA319; *see infra* Part III. And it failed to account for the significant differences between how text appears on courtroom pleading paper and how it appears on a smartphone.

On its face, the court-created black-and-white image on which the district court relied is at odds with the high-resolution color image Uber provided in its briefing (AA319), and does not even resemble the way the text *actually* appears on a high-resolution, backlit, color screen, like the screen on the Samsung Galaxy S5 smartphone that Plaintiff used to register with Uber. *See* AA557–58. The text and hyperlink Plaintiff encountered would have been—and were—perfectly legible on

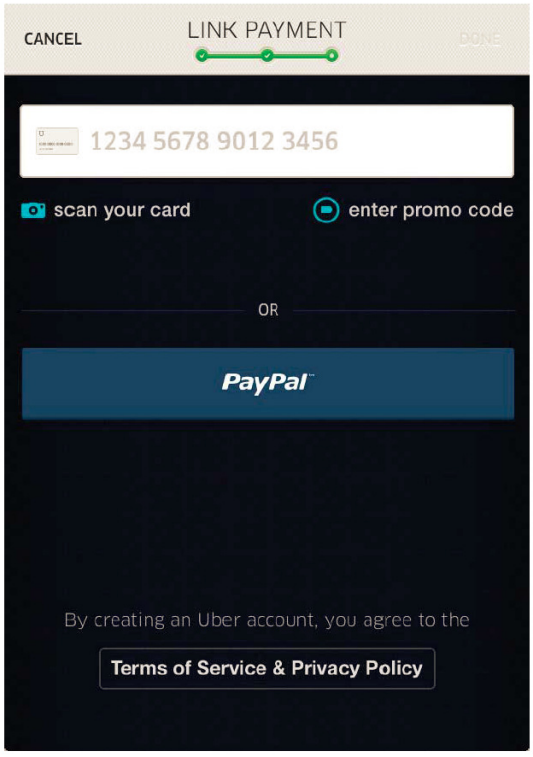
his smartphone (AA557), and Plaintiff never even argued that he was unable to read the text on Uber's registration screen. *See* AA320–21. Given the high resolution of modern smartphone screens and the way in which users routinely interact with such technology, text that might appear small on a printed paper form is perfectly legible on smartphones and well within the normal parameters of communication through such media. Plaintiff's successful use of the Uber application to request rides (*see* AA379–83)—which uses similar and even smaller-sized text—establishes as much.[4]

In addition, the district court repeatedly, and incorrectly, implied that Uber was required to disclose on the registration screen that its Terms of Service contained an arbitration clause, rather than simply notifying Plaintiff of the existence of the Terms of Service and providing an opportunity to review them. The district court found that the position of the arbitration clause within the Terms of Service was a "barrier to reasonable notice." SPA28. And it impermissibly faulted Uber for labeling its hyperlink "Terms of Service," reasoning that this accurate label could be construed to "refer[] to a description of the types of services that Uber intends to provide, not to the user's waiver of his constitutional right to a jury trial or his right

[4] Appellants intend to bring to oral argument Samsung Galaxy S5 smartphones loaded with the same "payment" screen image that appears in the record, so the panel can see how the image would have appeared on Plaintiff's smartphone (AA319). If the Court prefers, Appellants can lodge the smartphones with the Court in advance of oral argument.

to pursue legal redress in court . . . ." SPA26–27. But numerous courts addressing nearly identical circumstances have enforced agreements with identical hyperlinks, absent any indication of the content of the Terms of Service. *See, e.g.*, *Cullinane*, No. 14-14750, 2016 WL 3751652 at *2 (enforcing agreement with hyperlink labeled "Terms of Service"); *Fteja*, 841 F. Supp. 2d at 835 (same).

For example, in *Cullinane v. Uber Technologies, Inc.*, 2016 WL 3751652, the district court enforced an Uber arbitration agreement formed under circumstances that were virtually identical to the circumstances of this case. The hyperlink in *Cullinane* was labeled "Terms of Service & Privacy Policy," just as it was here. The registration screen in *Cullinane* is reproduced below. *Id.*, Dkt. No. 32-1, Ex. B-3.



Furthermore, the district court's unstated premise in this case—that a hyperlink must disclose the existence of an arbitration clause because arbitration implicates "significant" rights (SPA28)—finds no support in existing precedent. *See supra* Part I. To the contrary, the FAA preempts any such requirement, as requiring special, more stringent disclosure rules for arbitration agreements runs afoul of the FAA's command that "courts must place arbitration agreements on an equal footing with other contracts." *Concepcion*, 563 U.S. at 339. After receiving notice of the existence of the Terms of Service, it was incumbent on users to read the terms, whether or not the disclosure specifically mentioned arbitration.

The district court's holding also rested on the erroneous premise that courts have "repeatedly" "declin[ed] to find that an electronic contract was formed" where the agreement did not require a user to click a button or check a box labeled "I agree." SPA22–23. In fact, both this Court and other federal circuit courts, as well as the district court decisions discussed above, have *rejected* this requirement.

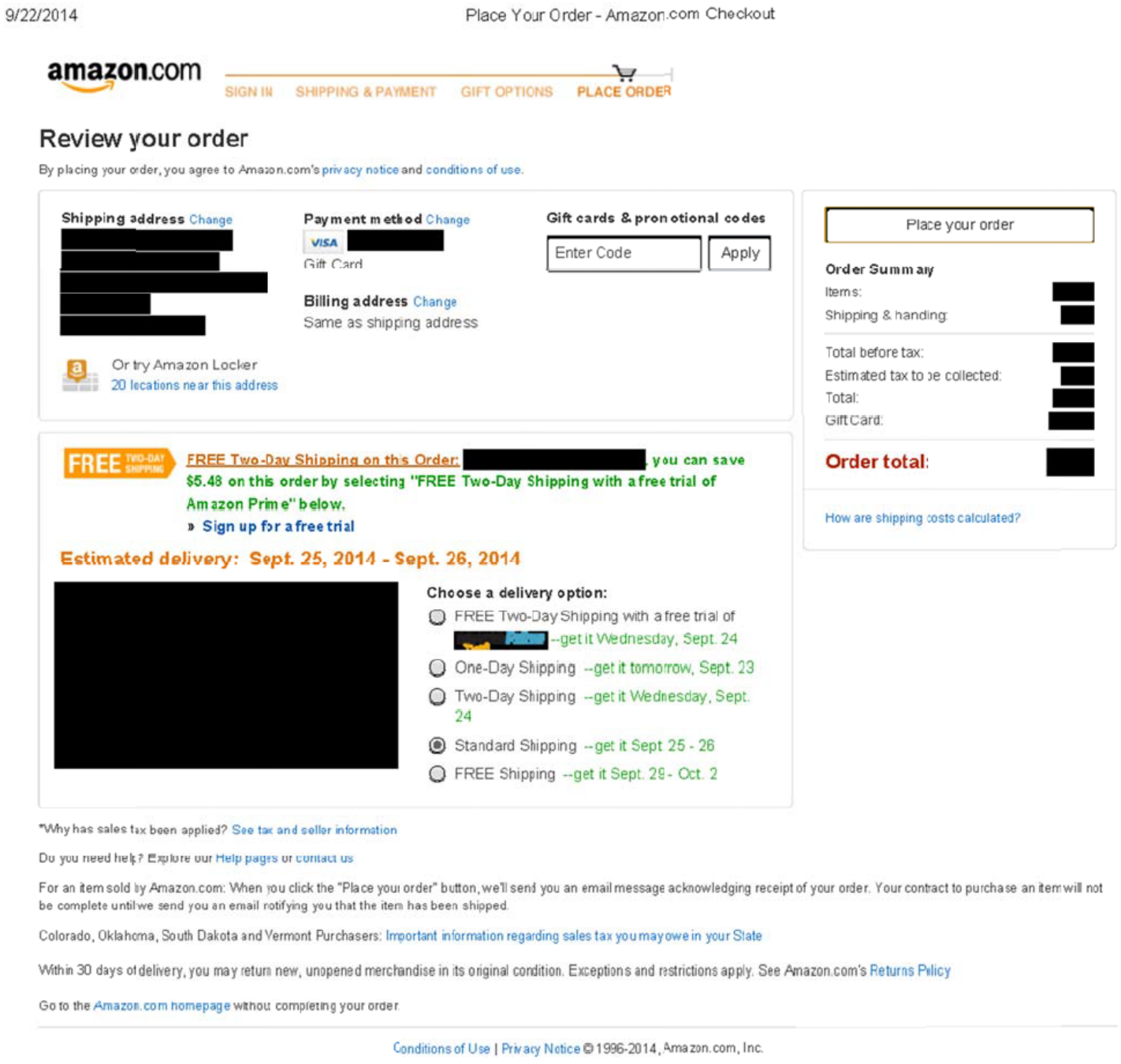
This Court held as much in *Register.com Inc. v. Verio*. *See* 356 F.3d at 403. As this Court recently explained, *Register.com* held that "an offeree need not specifically assent to certain terms by clicking an 'I agree' icon so long as the offeree 'makes a decision to take the benefit with knowledge of the terms of the offer.'" *Nicosia*, 2016 WL 4473225, at *11; *see also id.* ("[C]lickwrap agreements that

display terms in a scrollbox and require users to click an icon are *not necessarily required*." (emphasis added)).

The Ninth Circuit has also recognized that a user need not click "I agree" to assent to an agreement, permitting instead a "single-click 'Sign Up' and assent" approach like the one at issue here. *In re Facebook*, 2016 WL 2593853, at *8 (citing *Nguyen*, 763 F.3d at 1176–77). In *Nguyen v. Barnes & Noble Inc.*, 763 F.3d at 1176–77, the Ninth Circuit "cited with approval" *Fteja v. Facebook*, "a decision from the Southern District of New York finding that this approach was enough to create an enforceable contract." *In re Facebook*, 2016 WL 2593853, at *8. The Ninth Circuit observed that "[c]ourts have been more willing to find the requisite notice for constructive assent" in cases like *Fteja*, and here, where a notice below the button used to register informs the user that he is assenting to terms and conditions by clicking the button. *Nguyen*, 763 F.3d at 1176; *Fteja*, 841 F. Supp. 2d at 830–40.[5]

This Court's recent decision in *Nicosia* is not to the contrary. In fact, the clarity and conspicuousness of Uber's registration process stand in striking contrast to the muddled and confusing order page at issue in *Nicosia*. 2016 WL 4473225. The registration screen in *Nicosia* is reproduced on the next page. *Id.* at *13.

[5] The district court cited *Nguyen* in *support* of its assertion that Uber's contract with Plaintiff failed because Plaintiff was not required to click "I Agree." SPA22–23. In fact, as described above, *Nguyen* actually *endorsed* the kind of agreement at issue here.

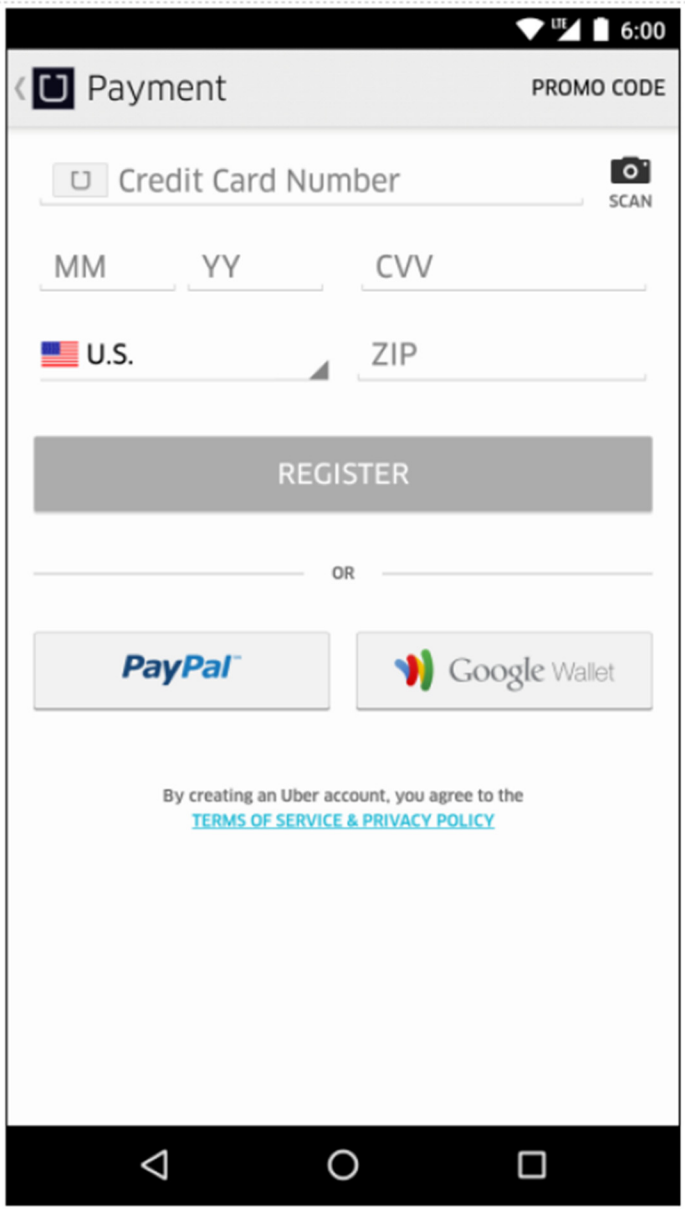


In *Nicosia*, Amazon contended that the plaintiff had assented to the terms of Amazon's arbitration agreement by placing an order. The critical sentence on Amazon's order page reading "[b]y placing your order, you agree to Amazon.com's privacy notice and conditions of use" did not appear near the button marked "[p]lace your order." Instead, Amazon's order page was cluttered with multiple promotional

offers, buttons, and hyperlinks—all competing for the user's attention. It contained fields completely unrelated to any terms or conditions, allowing the user to change the shipping address and payment method; choose a delivery option and shipping preference; and asked whether the user wanted to "try Amazon Locker," or sign up for "Amazon Prime." 2016 WL 4473225, at *13. In all, there were "between *fifteen and twenty-five* links on the Order Page" and "various text [wa]s displayed in at least four font sizes and six colors (blue, yellow, green, red, orange, and black), alongside multiple buttons and promotional advertisements." *Id*. at *10 (emphasis added). Further, "the presence of customers' personal address, credit card information, shipping options, and purchase summary [were] sufficiently distracting so as to temper any effect [of] the notification." *Id*. Under these circumstances, the Court held, "reasonable minds could disagree" about whether a contract was formed. *Id*. at *11.

Not so here. Uber's simple and straightforward registration screen (reproduced on the next page) was designed to permit users to read all of the information on the page. Unlike Amazon's order page, which contained copious text and as many as twenty-five hyperlinks, all of the information on Uber's "payment" page was directly relevant to the contract formation process. *See* AA319. It contained a single sentence—the critical admonition that registration was subject to Uber's Terms of Service. And it contained a single hyperlink—the critical

hyperlink allowing the offeree to access those Terms of Service. Thus, unlike the order page in *Nicosia*, the design of Uber's registration process gave Plaintiff clear notice that the services he sought were subject to Uber's Terms of Service.



B. Plaintiff Understood That He Was Forming A Contractual Relationship With Uber.

The context of Plaintiff's registration with Uber is also a critical consideration here, as that context put Plaintiff on notice that he was entering into a contract with Uber. Put simply, Plaintiff knew or should have known that he was forming a contractual relationship with Uber, whereby Uber would provide software services in exchange for money, when he registered for an account and entered his credit card information—even if he did not read the specific terms of the relationship. Therefore, it was not *only* the conspicuousness of the text disclosing the Terms of Service that put Plaintiff on notice of their existence; it was the context of the specific transaction. Specifically, because Plaintiff knew or should have known that the "payment" page requesting his credit card information was an offer regarding Uber's services, Plaintiff had a duty to read the single, extremely brief sentence of text disclosing the existence of the Terms of Service governing the relationship he sought to form with Uber. *See, e.g.*, *Taussig v. Baude & Haslett*, 134 Cal. 260 (1901); *Larrus v. First Nat'l Bank of San Mateo Cty.*, 122 Cal. App. 2d 884 (1954); *Dietrich v. Chem. Bank*, 115 Misc. 2d 713, 715 (N.Y. Sup. Ct. 1981); *David v. Manufacturers Hanover Trust Co.*, 59 Misc. 2d 248, 248-49 (N.Y. App. Term 1969); *Constantin v. Mercedes-Benz Co.*, 5 Cal. 2d 631 (1936).

This result flows from basic, well established contract doctrine. As this Court has emphasized, "commerce on the Internet . . . has not fundamentally changed the

principles of contract." *Register.com*, 356 F.3d at 403. Under those principles, a party who understands that he is entering into a contract may be bound by its terms even if he has not read them, as long as he is, or should be, aware that the transaction is subject to terms and conditions. *See, e.g.*, *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 992 (1972) ("[A]n offeree, knowing that an offer has been made to him but not knowing all of its terms, may be held to have accepted, by his conduct, whatever terms the offer contains."); Randy E. Barnett, *Consenting to Form Contracts*, 71 Fordham L. Rev. 627, 634–37 (Dec. 2002).[6] Such a party must avail himself of the opportunity to learn the terms of the offer he has received, even if those terms are contained in a separate document. *See, e.g.*, *Aceros Prefabricados*, 282 F.3d at 97; *King v. Larsen Realty, Inc.*, 121 Cal. App. 3d 349 (1981); *Dietrich*, 115 Misc. 2d at 715; *Larrus*, 122 Cal. App. 2d 884.

Here, Plaintiff knew that registering for an Uber account would likely involve contractual obligations, even if he never read Uber's notification that the registration was subject to terms and conditions. Plaintiff has admitted as much in his pleadings. AA28 ¶ 29; AA48 ¶ 29 ("To become an Uber account holder, an individual first must agree to Uber's terms and conditions."). Further, the entire purpose of

[6] *See also* Cal. Civ. Code § 1589 ("A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."); Cal. Civ. Code § 19.

registering was to form an economic relationship with Uber, whereby Uber would facilitate the provision of services *in exchange for money*. To that end, Uber required Plaintiff to enter his credit card information, on the very same screen on which Uber informed Plaintiff of how he could access the Terms of Service that would apply to his relationship with Uber. AA 319. Even if he did not read the only sentence on that screen—which would have informed him that "[b]y creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY"—he should have understood that by entering his credit card information and clicking "REGISTER" he was entering into a forward-looking contractual relationship with Uber.

Furthermore, a reasonable consumer would have understood the substantial probability that, by downloading and using Uber's mobile application, he would be required to agree to terms and conditions. Virtually all mobile applications are subject to terms and conditions, and the average consumer expects to be asked to agree to them before using software. *See Via Viente Taiwan, L.P. v. United Parcel Serv., Inc.*, No. 4:08-CV-301, 2009 WL 398729, at *2 (E.D. Tex. Feb. 17, 2009) ("That installation of the [software] required the completion of a click-through set up process that included terms of service would hardly be a surprise to anyone who has ever installed software on a computer . . . ."). Uber's terms were presented at

precisely the moment when a consumer would expect to receive them. As this Court has observed,

> inasmuch as consumers are regularly and frequently confronted with non-negotiable contract terms, particularly when entering into transactions using the Internet, the presentation of these terms *at a place and time that the consumer will associate with the initial purchase or enrollment* . . . indicates to the consumer that he or she is . . . employing such services subject to additional terms and conditions that may one day affect him or her.

Schnabel, 697 F.3d at 127 (emphasis added).

Because it would have been clear to Plaintiff that Uber's "payment" page contemplated some kind of contract, this case fits squarely within the body of law holding that an offeree cannot avoid his contractual obligations by failing to take reasonable steps to inform himself of the contract's terms. For example, in *Taussig v. Bode & Haslett*, 134 Cal. 260, the California Supreme Court held that receiving an "extremely brief" receipt with a notice of additional contractual terms "printed plainly on [its] face" was sufficient to bind the offeree, even if he did not read it. 134 Cal. at 265–66. "It was the duty of the [parties receiving the receipt] to take note of its contents," and no "evidence . . . would have been admissible to show that [they] had failed to do what their duty required them to do." *Id.* "The presumption, therefore, is, that they did read" the notice. *Id.*; *see also Larrus*, 122 Cal. App. 2d at 887–90 (providing a signature card to a bank in order to open an account binds a

party to the bank's rules, where the card discloses that the account will be governed by those rules); *accord David*, 59 Misc. 2d at 248–49.

Here, too, even in the unlikely event Plaintiff did not understand that terms would govern his relationship with Uber, and believed that his sole obligation was to provide his credit card information in order to receive the benefit he sought, he nonetheless had an obligation to read the brief text he was presented as part of the transaction. Had he done so, he would have known that he was required to agree to Uber's Terms of Service as a condition of registration.

This Court's seminal decision in *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d. Cir. 2002), is consistent with this limited duty to read documents provided during a transaction that appears to involve contractual obligations. The Court in *Specht* recognized that receiving a "document containing notice" of "contract terms . . . is frequently . . . a sufficient circumstance to place the offeree on inquiry notice of those terms," and that this principle applies equally to electronic documents. *See id*. at 31. But the Court correctly held that, under the specific "transactional circumstances" of *Specht*, where users had *no indication whatsoever* that a contract was contemplated, that principle did not apply. *See id*. at 32 ("When products are 'free' and users are invited to download them in the absence of reasonably conspicuous notice that they are about to bind themselves to contract

terms, the transactional circumstances cannot be fully analogized to those in the paper world of arm's length bargaining.").

The plaintiffs in *Specht* had no indication that they might be entering into a contractual relationship with the defendant. They simply navigated to a webpage prompting them to "Download With Confidence Using SmartDownload!" *Specht*, 306 F.3d at 22. The only reference to the license terms on the webpage "was located in text that would have become visible to plaintiffs only if they had scrolled down to the next screen." *Id*. at 23. That transaction—which appeared to be a free download involving no reciprocal obligations, and which did not require the use of a credit card—did not raise a "red flag" (*Schnabel*, 697 F.3d at 127) that any contract was contemplated. *See Specht*, 306 F.3d at 32. Under those circumstances, the Court held, "a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms." *Id*.

Specht thus applied the well-established rule that there is no duty to read a document if it is not clear that a contract is contemplated, particularly where the offeree has never been exposed to *any* notice of the existence of terms. *See id*. at 31; *see also Register.com*, 356 F.3d at 402 ("[In *Specht*,] [w]e ruled against Netscape and in favor of the users of its software because the users would not have seen the terms Netscape exacted without scrolling down their computer screens, *and there was no reason for them to do so*.") (emphasis added). *Specht* did not hold that an

offeree who knows or should know that he is engaged in a contractual transaction—where he is entering his credit card number to receive services—has no duty to read a *clearly visible* 15-word sentence presented to him prior to completing the transaction.

Subsequent "browsewrap" cases that have applied *Specht* and concluded that no contract was formed have similarly involved circumstances where the offeree had no reason to expect that his transaction was subject to additional terms and conditions. *See, e.g.*, *Nguyen*, 763 F.3d at 1179; *Schnabel*, 697 F.3d at 127. In those cases, unlike here, the offerees did not seek out a forward-looking consumer relationship and had no reason to believe that any contract was contemplated by their actions.

This Court's recent decision in *Nicosia* is a good example. In *Nicosia*, the Court considered whether the plaintiff assented to Amazon's *new* terms and conditions at the time he purchased a product online. 2016 WL 4473225 at *9. It did not, however, consider whether the plaintiff assented to Amazon's terms and conditions at the time he *originally* registered for an account (*id.*)—as Plaintiff did here—which would have indicated that he was "employing [Amazon's] services subject to additional terms and conditions." *See Schnabel*, 697 F.3d at 127. Merely using Amazon's service to purchase a product—*years after* registering for an Amazon account—would not "have 'raised a red flag vivid enough to cause a

reasonable [person] to anticipate the imposition of a legally significant alteration to the terms and conditions' of the relationship" with Amazon. *Schnabel*, 697 F.3d at 127.

In sum, *Specht* and its progeny are consistent with the longstanding rule that an offeree who understands, or should understand, that a contract is contemplated has a duty to read brief disclosures in the documents the offeror has provided. Here, however, a reasonably prudent offeree in Plaintiff's position would have understood that a contract was contemplated, would have read the brief, clear text on Uber's "payment" page asking for his credit card information, and therefore would have known that Uber's Terms of Service formed part of his agreement to receive Uber's services.

Under these circumstances, Plaintiff's inability to recall whether he accessed the Terms of Service is insufficient to negate his assent. Both the design of Uber's registration screen and the context of this transaction informed Plaintiff that he was required to, and did, agree to the Terms of Service by registering to receive Uber's services.

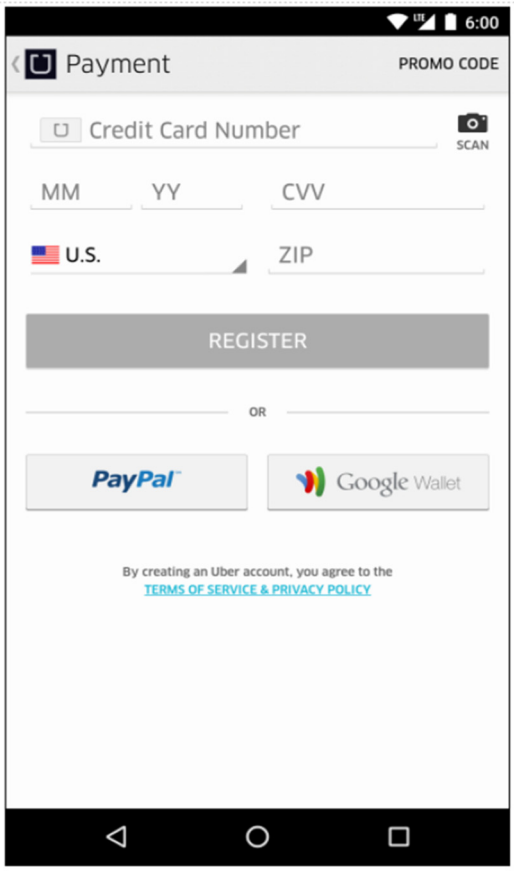
III. The Court Improperly Relied On An Unauthenticated Exhibit That Was Not Subject To Judicial Notice.

In evaluating Uber's registration process, the district court improperly relied on a low-resolution, black-and-white image of Uber's registration screen that *the court generated itself*. SPA31. No party authenticated this inaccurate image, and it

was not a proper subject of judicial notice. The court's reliance on this image is, by itself, an error requiring reversal. *See Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir. 1998); *Alvary v. United States*, 302 F.2d 790 (2d Cir. 1962).

In support of its motion to compel arbitration, Uber filed a high-resolution color screenshot of its registration screen as it appeared at the time Plaintiff registered. AA319. An employee of Uber authenticated the screenshot (AA315), and Plaintiff did not dispute its accuracy. In fact, after reviewing it, Plaintiff agreed that it "depicted" "the second screen of the registration process," and affirmed that the image caused him to "recall that [he] entered [his] contact information and credit card information, and then clicked the REGISTER button." AA320.

Rather than relying on the authenticated image of Uber's registration screen in the record, the district court relied on a black-and-white, "scaled down" image of its own making. SPA11, SPA31. Uber's exhibit (AA319) and the exhibit the district court relied on (SPA31) are reproduced at the same scale below.



The court-created image was not evidence on which the court could rely because it had not been authenticated. *See* Fed. R. Evid. 901(a). On its face, this low-resolution image—which appears to have been generated using a black-and-white photocopier—does not resemble the authenticated exhibit in the record, and does not accurately reproduce Uber's registration screen (AA557–58). *See* Fed. R. Evid. 1001(e) (a "duplicate" must "accurately reproduce[] the original").

Because the image was not evidence, the only way the court could rely on it was by taking judicial notice of it. But the image was not subject to judicial notice. Only facts that are "not subject to reasonable dispute" may be noticed, Fed. R. Evid.

201, and "caution must be used in determining that a fact is beyond controversy." *Int'l Star Class Yacht Racing*, 146 F.3d at 70; *see also Brown v. Piper*, 91 U.S. 37, 43 (1875) ("Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative.").

This case illustrates the wisdom of that rule. By taking notice of a facially inaccurate image of Uber's registration screen, the court deprived Appellants of any opportunity to contest the erroneous factual basis for the court's decision.[7] *See Int'l Star Class*, 146 F.3d at 70 ("Because the effect of judicial notice is to deprive a party of the opportunity to use . . . argument to attack contrary evidence, caution must be used in determining that a fact is beyond controversy under Rule 201(b).").

The court's improper use of this image played a central role in its incorrect conclusion that Plaintiff did not receive notice of Uber's Terms of Service. Based on the image, the court concluded that the phrase "By creating an Uber account, you agree to the Terms of Service & Privacy Policy" was "barely legible." SPA12. But those words were clearly legible in Uber's properly authenticated exhibit and would have been even more clear on a high-resolution smartphone like the Samsung Galaxy S5 Plaintiff used to register. *See* AA557–58. Indeed, Plaintiff *never* argued that the words were illegible or difficult to read.

[7] Uber vigorously disputed the accuracy of the court's image at the first opportunity, in its motion to stay pending appeal. AA538.

Where a judge's decision rests, even in part, on facts outside the record that are not subject to judicial notice, reversal is warranted. *See Int'l Star Class*, 146 F.3d at 71.

IV. This Court Should Remand With Instructions To Compel Arbitration Of Any Outstanding Arbitrability Questions

If the Court concludes—as it should—that Plaintiff assented to the Terms of Service, it should direct the district court to compel arbitration of Plaintiff's claims, including Plaintiff's other objections to arbitration. Plaintiff argued below that: (1) Uber cannot compel arbitration because Plaintiff has not asserted any formal claims against it (*see infra* Part IV.B.2); (2) Mr. Kalanick is not entitled to compel Plaintiff to arbitrate under the Arbitration Agreement (*see infra* Part IV.B.3); (3) Uber impliedly waived its right to compel arbitration (*see infra* Part IV.B.4.a); and (4) Mr. Kalanick expressly or impliedly waived his right to compel arbitration (*see infra* Part IV.B.4.a–b).

The Court need not, and should not, reach any of these issues because the parties expressly agreed that an arbitrator would decide them. *See Contec Corp. v. Remote Solution, Co., Ltd.*, 398 F.3d 205, 208 (2d Cir. 2005). However, if the Court concludes that the parties have not agreed to submit these issues to the arbitrator, it should decide them in this appeal. All of Plaintiff's arguments lack merit, and addressing any issues the district court left unresolved now would conserve judicial resources, prevent further delay by avoiding additional interlocutory appeals on

these closely related issues, and facilitate the FAA's "intent . . . to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone*, 460 U.S. at 22. Ruling on these issues now is particularly appropriate because Plaintiff's remaining arguments were fully briefed below and raise issues of law requiring no further fact finding. *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals"); *Ford v. Bernard Fineson Dev. Ctr.*, 81 F.3d 304, 307 (2d Cir. 1996) (this Court "reserve[s] considerable discretion to review purely legal questions").

A. Plaintiff Agreed To Arbitrate "Gateway" Arbitrability Issues

Once a court determines that the parties have a binding contract to arbitrate, most ancillary issues "are to be decided by the arbitrators, not the courts." *Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, 776 F.3d 126, 129–30 (2d Cir. 2015). While a narrow class of so-called "arbitrability questions" may be resolved by courts, the parties here have agreed that the arbitrator must decide all threshold questions of arbitrability. *See Rent-A-Center West v. Jackson*, 561 U.S. 63, 68–69 (2010) (because "arbitration is a matter of contract," "parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy"); *see also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–84 (2002) (questions of

arbitrability are *not* for the courts if "the parties clearly and unmistakably provide otherwise").

As Uber and Mr. Kalanick argued below (AA249–51)—and as Plaintiff has never disputed—the Arbitration Agreement in this case delegates gateway questions of arbitrability to the arbitrator by incorporating the AAA Commercial Arbitration Rules. AA111. Specifically, Rule 7(a) of the AAA Rules provides: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." AAA Commercial Arbitration Rules and Mediation Procedures at R-7(a), *available at* http://bit.ly/1KQnH1j (effective October 1, 2013; last accessed October 24, 2016). As this Court has squarely held, incorporation of the AAA Rules "serves as clear and unmistakable evidence of the parties' intent to delegate [issues of arbitrability] to an arbitrator." *Contec*, 398 F.3d at 208; *accord Shaw Grp. v. Triplefine Int'l Corp.*, 322 F.3d 115, 122 (2d Cir. 2003).

The Arbitration Agreement delegates *all* of Plaintiff's remaining arguments to the arbitrator because all of these arguments pertain to "the existence, scope or validity of the arbitration agreement or to the arbitrability of [the] claim[s]." *See infra* Part IV.B; *see also Rent-A-Center*, 561 U.S. at 68–69 ("arbitrability" questions include "whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy"); *Mulvaney Mech., Inc. v. Sheet Metal*

Workers Int'l Ass'n, Local 38, 351 F.3d 43, 46 (2d Cir. 2003) ("[D]efenses to arbitrability such as waiver, estoppel, or delay" are "questions properly decided by arbitrators."); *Contec*, 398 F.3d at 209 (whether a signatory to an arbitration agreement is estopped from avoiding arbitration with a non-signatory may be delegated to the arbitrator). Because Plaintiff and Uber are both signatories to the Arbitration Agreement, there is no question that the arbitrator must decide Plaintiff's remaining arguments regarding *Uber's* right to compel arbitration. *See, e.g.*, *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1202 (2d Cir. 1996). And there can be no serious dispute that Mr. Kalanick, *as Uber's CEO*, has a "sufficient relationship" to Uber, the Rider Agreement, "and the issues that ha[ve] arisen" in this litigation to permit Mr. Kalanick "to compel arbitration even if, in the end, an arbitrator were to determine that the dispute itself is not arbitrable" as to Mr. Kalanick. *See Contec*, 398 F.3d at 209; *see also infra* Part IV.B.3.

Because the Arbitration Agreement delegates issues of arbitrability to an arbitrator, not a court (*Contec*, 398 F.3d. at 208), the Court should leave all of Plaintiff's arbitrability questions for the arbitrator to decide in the first instance, and direct the district court to do the same.

B. Alternatively, This Court Should Resolve Plaintiff's Arbitrability Issues Itself And Remand With Instructions To Compel Arbitration.

Even if the Court were to decline to enforce the parties' agreement to arbitrate gateway questions of arbitrability, the Court should nonetheless remand with instructions to compel arbitration. Where parties have not contracted for arbitrability questions to be determined by the arbitrator, the Court's role under the FAA is limited to determining "(1) whether there exists a valid agreement to arbitrate at all under the contract in question," and "if so, (2) whether the particular dispute sought to be arbitrated falls within the scope of the arbitration agreement." *Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219, 226 (2d Cir. 2001) (citation omitted). In conducting these inquiries, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24–25.

Plaintiff has never disputed that the Arbitration Clause covers antitrust claims against Uber and, as set forth below, his remaining objections to arbitration lack merit. The Court accordingly should remand to the district court with instructions to compel arbitration of Plaintiff's claims.

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

Under the FAA, a court must compel arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation

that covers the asserted dispute." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986).

There is no serious question that this dispute falls within the scope of the Arbitration Agreement, which broadly covers "any dispute, claim or controversy arising out of or relating to this Agreement . . . or the use of the Service or Application." AA112. The Court need look no further than Plaintiff's own Complaint to see that this case arises out of and relates to Uber's services and application, both of which are at the heart of the Terms of Service. AA43–45. Plaintiff challenges the very lawfulness of Uber's service and application, alleging that Uber is built on a "simple but illegal business plan" (AA43) designed to "fix prices among competing drivers" (AA43–44). Indeed, Plaintiff claims that his injuries flow from overpaying for car service by virtue of the allegedly "price-fixed fares" "set by the Uber algorithm," and that the Uber algorithm is a core function of the Uber App. *See* AA43–45, 52.

This Court has characterized arbitration clauses that closely resemble the clause here as "broad" in scope, *see Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys.*, 369 F.3d 645, 649, 654 (2d Cir. 2004); *Vera v. Saks & Co.*, 335 F.3d 109, 117 (2d Cir. 2003), and has held that such "broad" clauses cover price-fixing claims even where the plaintiff alleges "a conspiracy which was formed

independently of the specific contractual relations between the parties." *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 175 (2d Cir. 2004) (emphasis omitted).

2. Uber Has the Right to Compel Arbitration.

In the district court, Plaintiff argued that Uber cannot compel arbitration because his Complaint "asserts no claims against Uber." Dist. Ct. Dkt. No. 102 at 37. But this is both factually incorrect and premised on a misunderstanding of the Federal Rules of Civil Procedure.

Plaintiff's formalistic argument that Uber cannot enforce its arbitration agreement because Plaintiff has asserted claims "only against Kalanick, not against Uber" (*id.*), is belied by the allegations in Plaintiff's own complaint and the district court's findings to the contrary. As the district court observed, Plaintiff "named only Mr. Kalanick in the suit, and not Uber itself, possibly in order to avoid an arbitration clause in the User Agreement between plaintiff and Uber." AA270. The district court correctly rejected Plaintiff's attempts to mischaracterize his claims as being *exclusively* against Mr. Kalanick as "hyper-technical" and "awfully artificial" (Dist. Ct. Dkt. No. 94 at 23, 25–26), and granted Mr. Kalanick's motion to join Uber as an indispensable party under Federal Rule of Civil Procedure 19. *See* AA276; *see also* AA274 (Plaintiff's assertion that he "seeks no relief whatsoever against Uber" is "at odds with any fair reading of plaintiff's claim"). Now that Uber is a "party" to the case under Rule 19, there is no procedural barrier preventing Uber from

enforcing the Arbitration Agreement. *See* Fed. R. Civ. P. 19(a) (an indispensable party must be "joined as a party"); *see McCowan v. Sears, Roebuck & Co.*, 908 F.2d 1099, 1101, 1106–07 (2d Cir. 1990) (reversing order that "indispensable party" joined under Rule 19 could not invoke arbitration agreement).

The absence of formal claims against Uber does not strip Uber of its right to compel arbitration as an "aggrieved" party under 9 U.S.C. § 4. *See, e.g.*, *Doctor's Assocs., Inc. v. Hollingsworth*, 949 F. Supp. 77, 83 (D. Conn. 1996) ("[T]he fact that the franchisees sued the owners and agents of DAI and did not name DAI as a party does not prevent DAI from being an aggrieved party" entitled to compel arbitration); AA275–76. A contrary rule would permit a plaintiff to evade his arbitration agreement through artful pleading by suing the employees of an entity with which he has agreed to arbitrate disputes. As described *infra* Part IV.B.3, that is not the law.

In any event, Uber has asserted a counterclaim for declaratory relief against Plaintiff (AA515–22), and clearly is entitled to arbitrate that claim.

3. Mr. Kalanick Is Entitled to Enforce the Arbitration Agreement.

As the district court recognized, Plaintiff attempted to skirt his agreement to arbitrate disputes with Uber by filing suit against Mr. Kalanick individually, rather than filing suit against Uber. AA270. But well-established law in this Circuit precludes Plaintiff from evading his contractual obligations so easily. *See Roby v.*

Corp. of Lloyd's, 996 F.2d 1353, 1360 (2d Cir. 1993); *Marcus v. Frome*, 275 F. Supp. 2d 496, 505 (S.D.N.Y. 2003). Plaintiff's ploy fails for two independent reasons: (1) Mr. Kalanick, an employee sued in his capacity as an Uber employee, is entitled to enforce Uber's Arbitration Agreement; and (2) Plaintiff should be equitably estopped from avoiding his Arbitration Agreement, because his claims against Mr. Kalanick and Uber are "intertwined," and Plaintiff treats the two parties as interchangeable. These doctrines apply to employees and officers who "are neither signatories to nor third-party beneficiaries of any agreement" containing an arbitration clause. *Roby*, 996 F.2d at 1360.

a. Mr. Kalanick Is Entitled to Enforce the Arbitration Agreement in His Capacity as Uber's Employee.

As *CEO of Uber*, Mr. Kalanick is covered by the protections of the Arbitration Agreement in Plaintiff's agreement *with Uber*. Indeed, this Court has squarely held that "employees . . . of an entity that is a party to an arbitration agreement are protected by that agreement" and thereby "entitled to rely on the contract clauses incorporated into their employers' agreements." *Roby*, 996 F.2d at 1360. This rule makes considerable sense: Because an entity "can only act through its employees, an arbitration agreement would be of little value if it did not extend" to them. *Amisil Holdings Ltd. v. Clarium Capital Mgmt.*, 622 F. Supp. 2d 825, 833 (N.D. Cal. 2007); *e.g.*, *Mosca v. Doctors Assocs.*, 852 F. Supp. 152, 155 (E.D.N.Y. 1993) ("This court will not permit Plaintiffs to avoid arbitration simply by naming individual agents of

the party to the arbitration clause and suing them in their individual capacity."); *Scher v. Bear Stearns & Co.*, 723 F. Supp. 211, 216 (S.D.N.Y. 1989).

Plaintiff alleges that Mr. Kalanick is the co-founder, CEO, board member, and manager of operations of Uber, and, *in those capacities*, was personally involved in the alleged antitrust violations. AA43, 45, 57; *see Roby*, 996 F.2d at 1360 (corporate directors, though non-signatories, were entitled to rely on arbitration provisions incorporated into their employers' agreements).[8] Plaintiff also alleges that Mr. Kalanick's liability "aris[es] out of the same misconduct charged against" the entity that is party to the arbitration agreement. AA43, 45, 57. As the district court found, any "fair[] reading" of the Complaint includes allegations that Mr. Kalanick participated in "*Uber's* scheme for setting prices." AA274. Indeed, Plaintiff alleges that Mr. Kalanick and Uber have engaged in the same misconduct—namely, designing and deploying the Uber App to unlawfully fix prices. *See* AA43. Mr. Kalanick therefore has the right to compel arbitration in his capacity as an officer and employee of Uber.

[8] *Accord Arrigo v. Blue Fish Commodities*, 704 F. Supp. 2d 299, 303, 305 (S.D.N.Y. 2010) (even if the CEO "is not a party to the [arbitration agreement], it nevertheless protects him from the instant suit"); *Dryer v. L.A. Rams*, 40 Cal. 3d 406, 418 (1985) (same).

b. Mr. Kalanick Is Entitled to Enforce the Arbitration Agreement Under Principles of Equitable Estoppel.

Equitable estoppel provides a second, independent basis for requiring Plaintiff to arbitrate his claims against Mr. Kalanick. The doctrine applies here because Plaintiff's claims against Mr. Kalanick are "intertwined" with the Terms of Service, and Plaintiff consistently treats Mr. Kalanick and Uber as interchangeable. *See JLM Indus.*, 387 F.3d at 177–78 (equitable estoppel applies where "the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed"); *In re Currency Conversion Fee Antitrust Litig.*, 265 F. Supp. 2d 385, 402 (S.D.N.Y. 2003); *JSM Tuscany, LLC v. Super. Ct.*, 193 Cal. App. 4th 1222, 1238 (2011).

In evaluating whether the claims are sufficiently "intertwined," the court must determine: (1) whether the signatory's claims arise under the subject matter of the underlying agreement; and (2) whether there is a close relationship between the signatory and the non-signatory. *JLM Indus.*, 387 F.3d at 17778; *Currency Conversion*, 265 F. Supp. 2d at 402. Both factors are satisfied here.

First, Plaintiff's claims unquestionably "arise under the subject matter of the underlying agreement." Plaintiff alleges in his Complaint that "[r]iders using the Uber App have suffered by paying artificially increased fares resulting from this price-fixing conspiracy." AA57. According to Plaintiff, Mr. Kalanick and Uber conspired to require Uber drivers to charge fares set by the pricing algorithm in the

Uber App. AA48–49 ¶¶ 30–36, AA54 ¶ 68–69. In other words, Plaintiff's Complaint singles out the Uber App as the mechanism for the allegedly supracompetitive prices that are the basis for all of Plaintiff's claims. The Uber App is similarly the primary subject matter of the Terms of Service. *See* AA105 ("In order to use the . . . Application . . . you must agree to the terms and conditions"). The Terms contain a wide array of provisions governing use of the Uber App (AA105–113), including—in a section entitled "Payment Terms"—specific provisions governing *prices*. AA107 (granting Uber "the right to determine final prevailing pricing").

Because Plaintiff's claims concern the fares charged by the Uber App—which are "at the heart of the underlying contract containing the arbitration agreement"—Plaintiff's claims arise under the "subject matter" of the underlying agreement. *Currency Conversion I*, 265 F. Supp. 2d at 403 (holding that plaintiffs' price-fixing claims arose under the "subject matter" of their cardholder agreement); *see In re A2p SMS Antitrust Litig.*, 972 F. Supp. 2d 465, 478 (S.D.N.Y. 2013) (applying estoppel in an antitrust suit where "the scheme, the harm, and the damages alleged . . . directly relate to and arise from the subject matter" of the user agreement); *accord Turtle Ridge Media Grp. v. Pac. Bell Directory*, 140 Cal. App. 4th 828, 833 (2006). Even if there were any doubt on this score, that doubt must be resolved in favor of

arbitration. *See United Steelworkers v. Warrior & Gulf Navigation Co*., 363 U.S. 574, 582–83 (1960).

Second, Plaintiff's Complaint makes numerous allegations of a "close relationship" between, and collusion and interdependent conduct by, Mr. Kalanick and Uber. Plaintiff alleges, for instance, that "Kalanick, Uber, and Uber's driver-partners have entered into an unlawful agreement, combination or conspiracy in restraint of trade." AA65; *see Crewe v. Rich Dad Educ., LLC*, 884 F. Supp. 2d 60, 75 n.6 (S.D.N.Y. 2012) (holding that estoppel would apply, in the alternative, "given the Amended Complaint's pervasive allegations of interdependent and coordinated misconduct between the nonsignatories and signatory").

Further, Plaintiff consistently treats Mr. Kalanick and Uber as a single unit, alleging that Mr. Kalanick is the "primary facilitator" of Uber's "illegal business plan," and "ultimately controlled" the prices charged through the Uber App. AA 43–44. He further alleges that "Kalanick and Uber are authorized by drivers to control the fares charged to riders," and "Kalanick and Uber artificially set the fares for its driver-partners to charge to riders." AA52. Although Mr. Kalanick denies that he and Uber are interchangeable or that any basis exists to disregard Uber's corporate form (AA207), it is *Plaintiff's treatment* of Mr. Kalanick and Uber that determines whether it may be estopped from avoiding arbitration. *See Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 97-98 (2d

Cir. 1999); *accord Metalclad Corp. v. Ventana Envtl. Organizational P'ship*, 109 Cal. App. 4th 1705, 1718 (Cal. Ct. App. 2003).

4. No Party Has Waived The Right To Compel Arbitration.

The waiver claims that Plaintiff pressed below lack merit and, in any event, should be decided in the first instance by the arbitrator. Regardless of whether the parties delegated *all* arbitrability questions to the arbitrator—they did, *see supra* Part IV.A—waiver issues "are presumptively *not* for the judge, but for an arbitrator, to decide." *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 393–94 (2d Cir. 2011); *accord Mulvaney*, 351 F.3d at 46. Even if the Court elects to address Plaintiff's waiver claims, these arguments are without merit, and Plaintiff cannot demonstrate prejudice, which is the touchstone of the waiver analysis.

a. Uber Has Not Impliedly Waived Its Right to Compel Arbitration.

Although Uber filed a proposed motion to compel arbitration *simultaneously* with its motion to intervene and Mr. Kalanick's motion for joinder, and later moved to compel immediately upon being joined in the case, Plaintiff has argued that Uber waived its right to arbitration. *See* Dist. Ct. Dkt. No. 102. That is wrong.

"In determining whether a party has waived its right to arbitration by expressing its intent to litigate the dispute in question," this Court considers three factors: "(1) the time elapsed from when litigation was commenced until the request for arbitration; (2) the amount of litigation to date, including motion practice and

discovery; and (3) proof of prejudice." *La. Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 626 F.3d 156, 159 (2d Cir. 2010).

With respect to Uber's conduct, *every factor* weighs against implied waiver, which "is not to be lightly inferred." *Sweater Bee by Banff, Ltd. v. Manhattan Indus., Inc.*, 754 F.2d 457, 461 (2d Cir. 1985). *First*, Uber moved to compel arbitration *immediately* when joined as a party. Delay is no basis for inferring waiver here, particularly where—as the district court acknowledged—the parties were "still relatively in the preliminary stages of this case" when Uber moved to compel arbitration. Dist. Ct. Dkt. No. 94 at 42.

Second, the minimal litigation activity in which Uber participated is an insufficient basis to find waiver. *See Rush v. Oppenheimer & Co.*, 779 F.2d 885, 888 (2d Cir. 1985); *Scott v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 1992 WL 245506, at *3 (S.D.N.Y. Sept. 14, 1992) (no waiver despite motion to dismiss, document productions, interrogatory responses, document demands, and answer to complaint). Finally, Plaintiff has not been prejudiced by any financial expenditures since Uber was joined as a party; indeed, any financial burden to Plaintiff would be the result of *Plaintiff's own choice* to bring his dispute in a judicial, rather than arbitral, forum. *See Doctor's Associates, Inc. v. Distajo*, 107 F.3d 126, 134 (2d Cir. 1997) ("[L]egal expenses inherent in litigation, without more, do not constitute prejudice requiring a finding of waiver.").

b. Mr. Kalanick Has Not Impliedly Waived His Right to Compel Arbitration.

Plaintiff's argument that Mr. Kalanick waived his right to arbitration through litigation conduct is equally unfounded. Mr. Kalanick's conduct does not indicate an intent to waive his right to arbitrate, but more importantly, Plaintiff cannot prove prejudice, which is the "key to a waiver analysis." *See Thyssen, Inc. v. Calypso Shipping Corp.*, 310 F.3d 102, 105 (2d Cir. 2002). In fact, "[g]iven [the] dominant federal policy favoring arbitration, waiver of the right to compel arbitration due to participation in litigation may be found *only* when prejudice to the other party is demonstrated." *Rush*, 779 F.2d at 887 (emphasis added). Prejudice can come in two forms: (1) "substantive prejudice," which may occur where a party loses an issue on the merits and attempts to relitigate it through arbitration; or (2) "*excessive* cost and time delay." *Thyssen*, 310 F.3d at 105 (emphasis added). Neither form is present here.

First, Plaintiff has not been substantively prejudiced because courts have consistently declined to find prejudice where parties have done little more than litigate a pleadings challenge. *See Rush*, 779 F.2d at 888 ("[A] motion [to dismiss] . . . does not waive the right to arbitrate.").[9] Thus, Mr. Kalanick's motion to dismiss

[9] *Accord Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1269–71 (9th Cir. 2002); *Groom v. Health Net*, 82 Cal. App. 4th 1189, 1198 (2000) ("filing [] a series of demurrers" does not result in waiver).

on the basis of a class waiver does not constitute "litigation of substantial issues" such that arbitration assumes the form of relitigation. *Sweater Bee*, 754 F.2d at 461–66 (collecting cases).

Second, the short duration of the litigation thus far—with the motion to compel being filed just two months after the district court denied Mr. Kalanick's motion to dismiss and five months after the case was filed—has not created unduly prejudicial cost or delay. *See Rush*, 779 F.2d at 887 (no prejudice where party waited eight months before invoking arbitration, during which time it participated in "extensive discovery"); *Kulukundis Shipping Co.*, 126 F.2d at 980 (no prejudice despite waiting nine months to invoke arbitration, two months before trial). Indeed, mere "pretrial expense and delay . . . without more do not constitute prejudice sufficient to support a finding of waiver." *Leadertex*, 67 F.3d at 26; *Distajo*, 107 F.3d at 134.

Viewed as a whole, this litigation is nowhere near the stage at which this Court has previously found prejudice, and, in light of the strong presumption against waiver, the Court should reject Plaintiff's implied waiver claim.

c. Mr. Kalanick Has Not Expressly Waived His Right to Compel Arbitration.

Plaintiff has also claimed that Mr. Kalanick expressly waived arbitration in a footnote to his motion to dismiss confirming that Mr. Kalanick did not seek to compel arbitration *in that motion*. *See* Dist. Ct. Dkt. No. 102 at 26. This Court has

never found express waiver on such equivocal evidence, and it should not do so here. Instead, the Court should apply the longstanding presumption against the express waiver of arbitration rights except by *unambiguous* language. *See Gilmore v. Shearson/American Exp. Inc*, 811 F.2d 108, 112–13 (2d Cir. 1987).

"In view of the 'overriding federal policy favoring arbitration,'" this Court applies a strong presumption *against* waiver of a party's right to arbitration, such that "any doubts concerning whether there has been a waiver are resolved in favor of arbitration." *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading, Inc.*, 252 F.3d 218, 229 (2d Cir. 2001); *accord Moses H. Cone*, 460 U.S. at 24–25. "The party seeking to establish a waiver of arbitration carries a heavy burden," which Plaintiff has not met here. *Application of ABN Int'l Capital Markets Corp.*, 812 F. Supp. 418, 420 (S.D.N.Y.) *aff'd* 996 F.2d 1478 (2d Cir. 1993).

Plaintiff's express waiver argument rested on a few stray words in a footnote in Mr. Kalanick's motion to dismiss, stating that Mr. Kalanick did not intend to compel arbitration *prior to resolution of that motion*. Mr. Kalanick moved to dismiss on the ground that the arbitration clause's class action waiver was independently enforceable, regardless of whether Mr. Kalanick moved to compel arbitration. AA97. The footnote underscored that Mr. Kalanick did not (and was not required to) move to compel arbitration "here"—*i.e.*, in the motion to dismiss:

> Although Mr. Kalanick does not seek to compel arbitration *here*, arbitration would be mandated for the reasons explained below if Mr. Kalanick sought to enforce the arbitration provision of the User Agreement. Mr. Kalanick does not waive and expressly reserves his right to move to compel arbitration in other cases arising out of the User Agreement.

AA97 n.10 (emphasis added). This statement does not clearly and unambiguously convey Mr. Kalanick's intent to relinquish his right to arbitration, as required for a finding of express waiver. Mr. Kalanick underscored that although he did not seek to enforce the arbitration agreement in the motion to dismiss, "arbitration would be mandated if [he] sought to enforce the arbitration provision of the User Agreement." AA97 n.10. Nor can Mr. Kalanick's statement that he "reserves his right to move to compel arbitration in other cases" constitute an express waiver of his right to enforce arbitration *in this case*. AA97 n.10. To hold otherwise would be to lightly infer an express waiver of Mr. Kalanick's arbitration rights based on mere negative implication—in direct contravention of the well-established rule that any ambiguity is to be resolved *against* a finding of waiver. *Louis Dreyfus*, 252 F.3d at 229.

Further evincing his intent to preserve his arbitration rights, on the *same day* that he filed his motion to reconsider denial of the motion to dismiss, Mr. Kalanick filed his Answer to Plaintiff's Complaint that expressly asserted affirmative defenses based on the Arbitration Agreement. *See* AA230 ¶¶ 143, 147. Such assertions make clear that Mr. Kalanick did not intend statements in a footnote to convey a voluntary

waiver of his arbitration rights. *See PPG v. Webster Auto Parts, Inc.*, 128 F.3d 103 (2d Cir. 1997).[10]

CONCLUSION

For the foregoing reasons, the Court should reverse and remand with instructions to compel arbitration of Plaintiff's claims.

[10] If this Court decides to compel arbitration with Uber, but not Mr. Kalanick, it should order the claims against Mr. Kalanick stayed pending arbitration. *See* 9 U.S.C. § 3 (where an "issue involved in [a] suit or proceeding 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"); *McMahan Sec. Co. L.P. v. Forum Capital Markets L.P.*, 35 F.3d 82, 85–86 (2d Cir. 1994) ("[A] district court must stay proceedings if satisfied that the parties have agreed in writing to arbitrate . . . .").

October 24, 2016

Respectfully Submitted,

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1. This brief complies with Fed. R. App. P. 32(a)(7)(B)(i) because it contains 13,986 words, as determined by the word-count function of Microsoft Word 2016, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

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October 24, 2016	/s/ Theodore J. Boutrous Jr.
Date	Theodore J. Boutrous Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of October 2016, a true and correct copy of the foregoing Appellant's Opening Brief (Page Proof) was served on the following counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1 (h)(1) & (2).

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