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January 10, 2017

VIA ECF

Catherine O'Hagan Wolfe
Clerk of Court
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: *Meyer v. Uber Technologies, Inc.*, No. 16-2750; No. 16-2752

Dear Ms. Wolfe:

Pursuant to FRAP 28(j), Appellants Uber Technologies, Inc. (“Uber”) and Travis Kalanick submit as supplemental authority the January 5, 2017 decision of the U.S. District Court for the Northern District of California in *Cordas v. Uber Technologies, Inc.*, No. 3:16-cv-04065-RS, Dkt. 36 (N.D. Cal. Jan. 5, 2017).

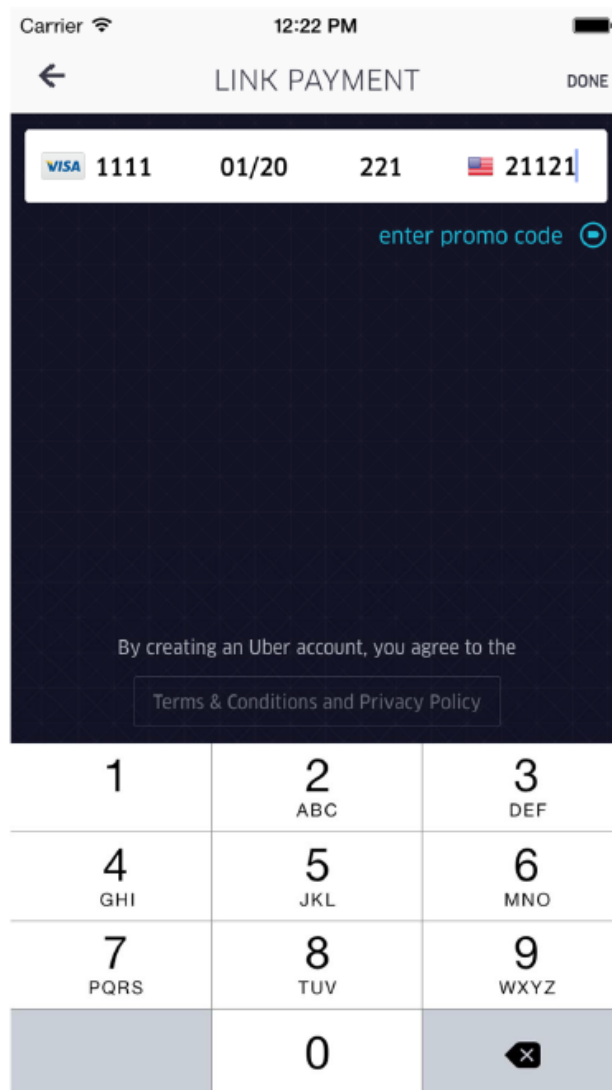
Joining other courts that have compelled Uber users to arbitrate under similar circumstances,¹ the court in *Cordas* held that the plaintiff agreed to arbitration when he registered to use the Uber application on his mobile device. Order at 3–7. In particular, the court rejected the notion that Uber’s registration process is a “browsewrap agreement,” because users “*affirmatively* acknowledge[] the agreement” “by creating an account.” Order at 5 (emphasis added) (citation omitted). The court emphasized that the registration screen contained an admonition—with placement and font size that are nearly identical to the admonition presented in this case—stating that “By creating an Uber account, you agree to the Terms & Conditions and Privacy Policy.” Order at 6. The court held that by clicking “Done” to complete the registration process—which, “although perhaps slightly less precise than ‘I accept,’ or ‘I agree,’” was nonetheless “clear”—it was reasonably obvious that “the user has consummated account registration, the very process that the notification warns users will bind them to the Agreement.” Order at 6–7 (citation omitted).

¹ See *Cullinane v. Uber Techs., Inc.*, 2016 WL 3751652, at *8 (D. Mass. July 11, 2016); *Lainer v. Uber Techs. Inc.*, No. 2:15-cv-09925-BRO-MRW, Dkt. No. 25 (C.D. Cal. May 11, 2016).

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Cordas supports Appellants' argument that the lower court's reasoning is incorrect and inconsistent with prevailing precedent from this Court and other courts throughout the country. As the image of the registration screen in *Cordas* reproduced below demonstrates, the overall design of the registration screen in this case was at least as clear as the screen in *Cordas*. See *Cordas*, No. 3:16-cv-04065-RS, Dkt. 27-1 at 8 (N.D. Cal. Nov. 18, 2016). This Court should reverse the district court's order and hold that Uber's arbitration agreement is enforceable.



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Very truly yours,

s/ Theodore J. Boutrous Jr.

Theodore J. Boutrous Jr.
GIBSON, DUNN & CRUTCHER LLP
Counsel for Appellant Uber Technologies, Inc.

s/ Karen Dunn

Karen Dunn
BOIES, SCHILLER & FLEXNER LLP
Counsel for Appellant Travis Kalanick

cc: All counsel of record (via ECF)

CERTIFICATE OF SERVICE

I, Theodore J. Boutrous Jr., hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Theodore J. Boutrous Jr.
Theodore J. Boutrous Jr.

Dated: January 10, 2017

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL CORDAS,
Plaintiff,
v.
UBER TECHNOLOGIES, INC.,
Defendant.

Case No. [16-cv-04065-RS](#)

**ORDER GRANTING MOTION TO
COMPEL ARBITRATION**

I. INTRODUCTION

Uber Technologies, Inc. (“Uber”) moves to compel arbitration in this putative class action filed by Michael Cordas. For the reasons that follow, Uber’s motion is granted.

II. BACKGROUND

In July 2015, Cordas downloaded the Uber ride-sharing app and attempted to request a ride in New York City. His requested ride did not appear after the estimated 10-minute arrival time elapsed, and Cordas was unsuccessful in his attempts to contact the driver. Cordas received a notification from Uber that he would be charged \$10 for cancelling his ride, but he denies ever cancelling. Cordas later experienced similar incidents in Toronto and Irvine, California. Cordas now alleges Uber’s “deceptive, false, misleading and illusory business policies and practices . . . were designed and created . . . to generate millions of dollars based on their fraudulent, unearned and unconscionable ‘Cancellation Fees.’” Compl. ¶ 51. As a result, Cordas filed this putative class action against Uber, bringing ten different claims for relief. In response, Uber filed this motion to compel arbitration, claiming Cordas agreed to Uber’s terms of service and that the terms

United States District Court
Northern District of California

1 of service require arbitration of this dispute.¹

2 III. LEGAL STANDARD

3 Because Uber’s terms and conditions are “a contract evidencing a transaction involving
4 commerce,” they are subject to the Federal Arbitration Act (“FAA”). 9 U.S.C. § 2; *Chiron Corp.*
5 *v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). “The FAA provides that any
6 arbitration agreement within its scope ‘shall be valid, irrevocable, and enforceable,’ . . . and
7 permits a party ‘aggrieved by the alleged . . . refusal of another to arbitrate’ to petition any federal
8 district court for an order compelling arbitration in the manner provided for in the agreement.”
9 *Chiron*, 207 F.3d at 1130 (quoting 9 U.S.C. § 4) (second omission in original). The FAA “leaves
10 no place for the exercise of discretion by a district court, but instead mandates that district courts
11 shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has
12 been signed.” *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985). The role of a district
13 court under the FAA “is therefore limited to determining (1) whether a valid agreement to arbitrate
14 exists and, if it does, (2) whether the agreement encompasses the dispute at issue.” *Chiron*, 207
15 F.3d at 1130 (citations omitted). “If the response is affirmative on both counts, then the [FAA]
16 requires the court to enforce the arbitration agreement in accordance with its terms.” *Id.*

17 IV. DISCUSSION

18 Cordas raises a number of arguments for why Uber’s motion to compel arbitration should
19 be denied. They are all unavailing.

20
21 ¹ According to Uber, the terms of service Cordas agreed to contained the following arbitration
22 agreement: “ARBITRATION. You agree that any dispute, claim or controversy arising out of or
23 relating to these Terms or the breach, termination, enforcement, interpretation or validity thereof
24 or the use of the Services (collectively, “Disputes”) will be settled by binding arbitration between
25 you and Uber, except that each party retains the right to bring an individual action in small claims
26 court and the right to seek injunctive or other equitable relief in a court of competent jurisdiction
27 to prevent the actual or threatened infringement, misappropriation or violation of a party’s
28 copyrights, trademarks, trade secrets, patents or other intellectual property rights. You
acknowledge and agree that you and Uber are each waiving the right to a trial by jury or to
participate as a plaintiff or class in any purported class or representative proceeding. Further,
unless both you and Uber 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.” Mot. to Compel Arbitration 5.

1 **A. Whether Cordas Agreed to Uber’s Terms and Conditions**

2 Cordas’s first argument against arbitration is that he never agreed to Uber’s terms and
3 conditions, which are the source of the arbitration provision Uber invokes. “‘Before a party to a
4 lawsuit can be ordered to arbitrate and thus be deprived of a day in court, there should be an
5 express, unequivocal agreement to that effect. Only when there is no genuine issue of fact
6 concerning the formation of the agreement should the court decide as a matter of law that the
7 parties did or did not enter into such an agreement.’” *Three Valleys Mun. Water Dist. v. E.F.*
8 *Hutton & Co.*, 925 F.2d 1136, 1141 (9th Cir. 1991) (quoting *Par-Knit Mills, Inc. v. Stockbridge*
9 *Fabrics Co.*, 636 F.2d 51, 54 (3d Cir.1980)). The party opposing arbitration shall receive the
10 benefits of all reasonable doubts and inferences. *See id.* Questions of contract formation are
11 questions of state law. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)
12 (“When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . .
13 should apply ordinary state-law principles that govern the formation of contracts.”). The parties
14 agree California law applies in this case. Under California law, mutual assent is the key to
15 contract formation. *See Binder v. Aetna Life Ins. Co.*, 75 Cal. App. 4th 832, 850 (1999).

16 With its motion and reply brief, Uber submitted declarations of Engineer Manager
17 Christopher Brauchli. In the declarations, Brauchli explains how, when Cordas downloaded the
18 Uber app and created an account, he would have been presented with the notice: “By creating an
19 Uber account, you agree to the Terms & Conditions and Privacy Policy.” Brauchli Dec. ¶ 7.
20 According to Brauchli, no account could be created unless the user navigated through the screen
21 containing this notice; the same screen required the new registrant to click “DONE” in order to
22 create an account. The phrase “Terms & Conditions and Privacy Policy” was displayed in a
23 clickable box that linked a user to the pages containing the then-current terms and conditions and
24 privacy policies. Brauchli states Cordas created his account on an iPhone 6 around July 25, 2016,
25 and submits a screenshot of what Cordas would have seen at the time he created his account. He
26 also attests that the personal settings on a user’s phone will not alter the “sign up flow” that
27 requires, on the same page displaying the terms and conditions notice, the user to click “DONE”
28

1 in order to create an account. Thus, Brauchli declares:

2 [T]he user could not have created an Uber account and taken rides using the Uber
3 App without completing all of the steps in the registration process This is
4 based on technological constraints built into the Uber App. . . . If the user did not
5 input the requested information, move through each screen, and click “DONE” on
6 the screen stating that “By Creating an Uber account, you agree to the Terms &
7 Conditions and Privacy Policy,” the rider would not be able to request a ride using
8 the Uber app.

9 Brauchli Reply Dec. ¶ 7. According to Brauchli, his declaration is based on his personal
10 knowledge as an Uber engineer manager responsible for overseeing the rider sign-up and
11 registration process, and on records kept by Uber in the ordinary course of business that he has
12 access to and is familiar with.

13 Cordas lodges a litany of conclusory evidentiary objections against Brauchli’s declaration.
14 Specifically, he objects that some or all of the statements in Brauchli’s declaration are:
15 unsupported legal conclusions that violate Federal Rule of civil procedure 56(e); lacking
16 foundation; lacking personal knowledge; complete speculation; hearsay; improper lay witness
17 opinion; assuming facts not in evidence; prejudicial and confusing/misleading; lacking
18 authentication; and/or lacking an original copy. All of these objections are overruled.² At the
19 outset, Cordas elaborates on very few of them, and supports most of them with only cursory
20 citations to the Federal Rules of Evidence. *See Zoom Elec., Inc. v. Int’l Bhd. of Elec. Workers,*
21 *Local 595*, 989 F. Supp. 2d 912, 918 n.1 (N.D. Cal. 2013) (overruling conclusory objections).
22 More importantly, Brauchli’s declarations are admissible. They contain no legal conclusions or
23 arguments; are based on Brauchli’s personal knowledge; are based on records kept by Uber in the

24 ² Cordas filed a lengthy list of perfunctory evidentiary objections to Brauchli’s first declaration, in
25 violation of the local rules. *See* Civ. Local R. 7-3(a) (“Any evidentiary and procedural objections
26 to the motion must be contained within the brief or memorandum.”). Those objections will not be
27 considered. Cordas also filed objections to Brauchli’s reply declaration. These objections are
28 mostly proper. *See* Civ. Local R. 7-3(d)(1). To the extent they are proper, they will be
considered. To the extent, however, these “objections” are really an attempt to point out
shortcomings in Uber’s briefs, *see, e.g.*, *Objs. to Brauchli Reply Dec. 2-3* (“Uber never considers
or addresses Mr. Cordas’ use of the phone in a horizontal orientation”), they are improper
argument and will not be considered. *See* Civ. Local R. 7-3(d)(1).

1 ordinary course of business (and are therefore not hearsay); assume no facts not in evidence; are
 2 not misleading, confusing, or prejudicial; are not speculative; and are not improper opinion
 3 evidence. Likewise, to the extent the screenshots Brauchli submitted required authentication, he
 4 has authenticated them with his testimony from personal knowledge. *See* Fed. R. Evid. 901(b)(1).
 5 Similarly, no original of the screenshots is required because they are not a writing, recording, or
 6 photograph. *See* Fed. R. Evid. 1002. It is difficult, if not impossible, to conceive of how an
 7 “original” screenshot would be presented.

8 Cordas also submits his own declaration, claiming he was not given notice of the terms and
 9 conditions when he signed up for Uber, that when he signed up his “phone settings were not in
 10 ‘default’ mode, and [his] phone screen did not display anything even remotely similar to the
 11 generic depictions attached to the Brauchli declaration,” and that the “font, the screen size,
 12 display, personal settings, and the orientation of the screen shots and keyboard shots [in the
 13 Brauchli declaration] do not remotely represent” what he saw when signing up for the app.
 14 Cordas Dec. ¶¶ 3, 8, 9. Likewise, he argues in opposition to Uber’s motion that Brauchli fails to
 15 account for a phone’s potential orientation and personal settings. None of these arguments,
 16 however, are relevant. Cordas does not claim to have had his phone in a horizontal orientation,
 17 does not say what his settings were at the time he signed up, offers no testimony or evidence
 18 regarding what he *did* see on his screen, and offers no evidence to rebut Brauchli’s reasoned
 19 declaration other than his own conclusory allegations that he never received notice of the terms
 20 and conditions and that Brauchli’s declaration is false and inadequate. In short, Cordas raises no
 21 *genuine* dispute of any *material* fact, and it is proper to conclude, as a matter of law, that he was
 22 on notice of Uber’s terms and conditions, and assented to them in signing up for Uber. *See Three*
 23 *Valleys*, 925 F.2d at 1141. Thus, he is bound by them. *See Binder*, 75 Cal. App. 4th at 850.

24 **B. Whether Uber’s Terms and Conditions Are an Unenforceable ‘Browsewrap’ Agreement**

25 Cordas next argues Uber’s terms and conditions amount to an unenforceable
 26 “browsewrap” agreement. “[A] browsewrap agreement does not require the user to manifest
 27 assent to the terms and conditions expressly . . . [a] party instead gives his assent simply by using

1 the website.” *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1176 (9th Cir. 2014) (citation and
 2 internal quotation marks omitted) (second alteration in original). “Thus, by visiting the website —
 3 something that the user has already done — the user agrees to the Terms of Use” *Id.* (citation
 4 and internal quotation marks omitted). “Because no affirmative action is required by the website
 5 user to agree to the terms of a contract other than his or her use of the website, the determination
 6 of the validity of the browsewrap contract depends on whether the user has actual or constructive
 7 knowledge of a website’s terms and conditions.” *Id.* (citation and internal quotation marks
 8 omitted). “Courts have . . . been more willing to find the requisite notice for constructive assent
 9 where the browsewrap agreement resembles a clickwrap agreement — that is, where the user is
 10 required to affirmatively acknowledge the agreement before proceeding with use of the website.”
 11 *Id.* (citing *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 838 (S.D.N.Y. 2012) (finding user
 12 assented by clicking “Sign Up” after being presented with notice stating: “By clicking Sign Up,
 13 you are indicating that you have read and agree to the Terms of Service.”)).

14 The agreement at issue is not a browsewrap agreement; an Uber user is not told he has
 15 assented to Uber’s terms and conditions simply by passively viewing one screen of the Uber app.
 16 Instead, he must affirmatively assent to Uber’s terms and conditions by clicking “DONE” to
 17 complete his sign-up process on a page clearly displaying the notice: “By creating an Uber
 18 account, you agree to the Terms & Conditions and Privacy Policy.” Only by clicking “DONE”
 19 does the user assent. If he does not create an account, he does not agree to Uber’s terms and
 20 conditions. By creating an account on the Uber app, Cordas “affirmatively acknowledge[d] the
 21 agreement” and is bound by its terms. *See Nguyen*, 763 F.3d at 1176; *Fteja*, 841 F. Supp. 2d at
 22 838; *Binder*, 75 Cal. App. 4th at 850 (“To form a contract, a manifestation of mutual assent is
 23 necessary.”); *see also Cullinane v. Uber Techs., Inc.*, No. CV 14-14750-DPW, 2016 WL 3751652,
 24 at *8 (D. Mass. July 11, 2016) (“The language surrounding the button leading to the Agreement is
 25 unambiguous in alerting the user that creating an account will bind her to the Agreement. And the
 26 word “Done,” although perhaps slightly less precise than “I accept,” or “I agree,” makes clear that
 27 by clicking the button the user has consummated account registration, the very process that the

1 notification warns users will bind them to the Agreement.”). Thus, the parties agreed to arbitrate;
 2 the only questions remaining are whether that agreement is valid and whether it encompasses this
 3 dispute. *See Chiron*, 207 F.3d at 1130 (citations omitted).

4 **C. Who Should Decide Whether the Dispute Is Arbitrable**

5 In its motion, Uber argues the threshold issue of whether Cordas’s case can and should be
 6 submitted to arbitration is itself a question for an arbitrator. Cordas disagrees. “Unless the parties
 7 clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate
 8 is to be decided by the court, not the arbitrator.” *AT & T Techs., Inc. v. Commc’ns Workers of*
 9 *Am.*, 475 U.S. 643, 649 (1986); *see also Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069,
 10 1072 (9th Cir. 2013) (“[T]here is a presumption that courts will decide which issues are arbitrable;
 11 the federal policy in favor of arbitration does not extend to deciding questions of arbitrability.”).
 12 Conversely, “a court must enforce an agreement that . . . clearly and unmistakably delegates
 13 arbitrability questions to the arbitrator.” *Brennan v. Opus Bank*, 796 F.3d 1125, 1132 (9th Cir.
 14 2015). The parties have clearly agreed to arbitrate, *see supra* Parts IV.A-B, so the question
 15 becomes whether that agreement “clearly and unmistakably delegates arbitrability questions to the
 16 arbitrator.” *Brennan*, 796 F.3d at 1132.

17 According to Uber, its arbitration agreement’s incorporation of the AAA Commercial
 18 Arbitration Rules shows the parties’ clear and unmistakable intent to delegate arbitrability
 19 questions to an arbitrator because the AAA rule provides: “The arbitrator shall have the power to
 20 rule on his or her own jurisdiction, including any objections with respect to the existence, scope,
 21 or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.” AAA
 22 Commercial Arbitration Rule 7-6(a).³ In *Brennan*, the Ninth Circuit held “incorporation of the
 23 AAA rules constitutes ‘clear and unmistakable’ evidence that the parties intended to delegate the
 24

25 ³ The arbitration agreement in Uber’s terms and conditions provides: “ARBITRATION RULES
 26 AND GOVERNING LAW. The arbitration will be administered by the American Arbitration
 27 Association (“AAA”) in accordance with the Commercial Arbitration Rules and the
 28 Supplementary Procedures for Consumer Related Disputes (the “AAA Rules”) then in effect”
 Mot. to Compel Arbitration 5-6.

1 arbitrability question to an arbitrator.” 796 F.3d at 1130. Importantly, *Brennan* reserved the
 2 question of whether its holding extended to consumer contracts because it dealt with a commercial
 3 contract, but noted:

4 Our holding today should not be interpreted to require that the contracting parties
 5 be sophisticated or that the contract be “commercial” before a court may conclude
 6 that incorporation of the AAA rules constitutes “clear and unmistakable” evidence
 7 of the parties’ intent. Thus, our holding does not foreclose the possibility that this
 8 rule could also apply to unsophisticated parties or to consumer contracts. Indeed,
 9 the vast majority of the circuits that hold that incorporation of the AAA rules
 constitutes clear and unmistakable evidence of the parties’ intent do so without
 explicitly limiting that holding to sophisticated parties or to commercial contracts.

10 796 F.3d at 1130-31 (9th Cir. 2015) (collecting cases). This statement strongly indicates approval
 11 of other decisions enforcing arbitrability delegation via incorporation of the AAA rules. Likewise,
 12 “nearly every . . . decision in the Northern District of California . . . has consistently found
 13 effective delegation of arbitrability regardless of the sophistication of the parties.” *Zenelaj v.*
 14 *Handybook Inc.*, 82 F. Supp. 3d 968, 973 (N.D. Cal. 2015) (collecting cases). Although one
 15 notable decision in this District has held incorporation by reference of the AAA rules in a
 16 consumer contract did not amount to clear and unmistakable evidence of the parties’ intent to
 17 delegate arbitrability, *Tompkins v. 23andMe, Inc.*, No. 5:13-CV-05682-LHK, 2014 WL 2903752,
 18 at *11 (N.D. Cal. June 25, 2014), *aff’d on other grounds*, 840 F.3d 1016 (9th Cir. 2016), it was
 19 decided before *Brennan*.

20 Altogether, the clear weight of authority supports the conclusion Uber’s terms and
 21 conditions provide clear and unmistakable evidence of the parties’ intent to delegate questions of
 22 arbitrability to an arbitrator, and Cordas has advanced no persuasive argument to the contrary.
 23 Because the parties agreed to arbitrate, *see supra* Parts IV.A-B., and agreed to delegate questions
 24 of arbitrability to an arbitrator, the remaining questions of whether the arbitration agreement is
 25 valid and whether it encompasses this dispute are delegated to an arbitrator.⁴ *See Brennan*, 796

26 _____
 27 ⁴ It may have been possible for Cordas specifically to challenge the delegation clause as
 28 unconscionable, thereby raising a question for the Court rather than the arbitrator. *See Brennan*,

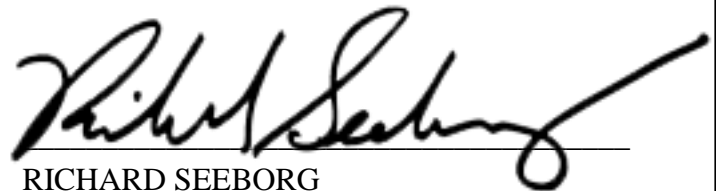
1 F.3d at 1133 (citing *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 72 (2010)). Accordingly,
2 Uber’s motion to compel arbitration is granted.⁵

3 **V. CONCLUSION**

4 Uber’s motion to compel arbitration is granted, and the case is hereby stayed, pending
5 completion of the arbitration. The Clerk is directed to close the file for administrative purposes. It
6 may be reopened for such additional proceedings as may be appropriate and necessary upon
7 conclusion of the arbitration.

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10 **IT IS SO ORDERED.**

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12 Dated: January 5, 2017



13
14 RICHARD SEEBORG
15 United States District Judge
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24 796 F.3d at 1132-34 (citations omitted). Cordas, however, did not make such a challenge. Insofar
25 as he challenges the enforceability of the entire arbitration agreement, he raises a question for the
26 arbitrator. *See id.* (citations omitted).

27 ⁵ Because the arbitrability of this dispute is itself a question for an arbitrator, it is neither necessary
28 nor appropriate to consider the parties’ positions regarding the scope and validity of the arbitration
agreement.

United States District Court
Northern District of California