UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

FORT LAUDERDALE DIVISION

Case No. 0:17-cv-61617-BB

JOSE MEJIA, individually and on
Behalf of all others similarly situated,

Plaintiff,

vs.

UBER TECHNOLOGIES, INC., a
Delaware corporation

Defendant.
_____/

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL ARBITRATION AND STAY ALL COURT PROCEEDINGS

Pursuant to the FAA, a court should stay a lawsuit and compel arbitration upon a showing that (a) the plaintiff entered into a written arbitration agreement that is enforceable "under ordinary state-law" contract principles, and (b) the claims before the court fall within the scope of the Agreement. *Lambert v. Austin Ind.*, 544 F.3d 1192, 1195 (11th Cir. 2008). When, as here, the parties have delegated the issue of arbitrability to the arbitrator, the only true issue for the Court is the threshold issue of whether the parties entered into an enforceable contract containing a mandatory arbitration clause. *Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1264 (11th Cir. 2017); *Lamour v. Uber Techs., Inc.*, No. 1:16-21449-CIV-MARTINEZ-GOODMAN, 2017 WL 878712, at *13 (S.D. Fla. Mar. 1, 2017); *Richemond v. Uber Techs., Inc.*, No. 1:16-cv-23267-DPG, 2017 WL 416123, at *3 (S.D. Fla. July 29, 2016); *Rimel v. Uber Techs., Inc. et al.*, No. 6:15-cv-2191, 2017 WL 1191384, at *3 (M.D. Fla. Aug. 4, 2016).

As more thoroughly explained in Uber's Motion to Compel Arbitration and Stay all Court Proceedings and Accompanying Memorandum of Law in Support (collectively, the "Motion"), the Arbitration Provision at issue falls squarely within this ambit. Plaintiff's Opposition to Defendant's Motion to Compel Arbitration and Incorporated Memorandum of Law ("Response") admits these elements have been met: specifically, Plaintiff (a) admits he entered into the Rasier Agreement, (b) does not contest the clause delegating arbitrability to the arbitrator, and (c) does not identify a carve-out to the Arbitration Provision, or a law (state or federal) specifically precluding application of the Arbitration Provision to Plaintiff's single state-law claim.[1] Plaintiff fails even to acknowledge, let alone distinguish, recent Southern District of

[1] Plaintiff cites to language Section 15.3(ii) of the Rasier Agreement, titled "Limitations On How This Agreement Applies, which provides that "Disputes that may not be subject to a predispute arbitration pursuant to applicable Federal law or Executive order are excluded from the coverage of the Arbitration Provision." Colman Decl., Exhibit 4. Plaintiff does not cite to any Federal law or Executive Order that would preclude arbitration here. Plaintiff brings his single-count

Florida cases enforcing nearly identical clauses with the same delegation language. *Lamour*, 2017 WL 87812 at *13; *Richemond*, 2017 WL 416123 at *3.

Plaintiff's Response focuses on the enforceability of the Arbitration Provision with respect to the Complaint allegations. Yet, he cannot identify a single case in support of his stance that this Court should ignore decades of binding Supreme Court and Eleventh Circuit precedent law upholding similar arbitration agreements. More importantly, Plaintiff's focus on an unsubstantiated notion of "unconscionability" wholly ignores the enforceability of the delegation clause requiring the arbitrator to make this determination. *Suarez v. Uber Techs., Inc.*, No. 16-cv-00166, 2016 WL 2348706, at *4 (M.D. Fla. May 4, 2016); *Rent-a-Center, W., Inc. v. Jackson*, 560 U.S. 63, 71 (2010); *Steingruber v. Family Dollar Stores of Fla., Inc.*, No. 3:15-CV-199-J-20JBT, 2015 WL 10818618, at *3 (M.D. Fla. Aug. 13, 2015) (when the delegation clause is not challenged, the arbitration decides threshold issues of enforceability). Because of the delegation clause, this Court lacks the authority to address any of Plaintiff's uncalled-for attacks on the conscionability of the Arbitration Provision.

Plaintiff's Response is rife with proverbial "red herrings" intended to distract from the undeniable reality: the parties entered into an enforceable arbitration agreement under federal and Florida law, every other issue has been delegated to the Arbitrator, and Plaintiff's claims fall directly within the scope of that agreement to arbitrate (if this Court were to reach that issue).

For these reasons, and those discussed in Uber's Motion, this Court should compel the parties to proceed in arbitration.

A. Plaintiff's Agreement to the Arbitration Provision is Uncontested

As pled in the Complaint, and restated in the Response, Plaintiff admits that, in March

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Complaint under a specific Florida statute. There are no Federal laws or Executive Order at issue.

2016, he registered to utilize the Uber Driver App through his iPhone 5. Compl. ¶ 6; Response at 3, 9. By doing so, Plaintiff ***admits*** he entered into the Rasier Agreement with Uber, and that this Agreement contains an Arbitration Provision. Response at 9. Similarly, Plaintiff admits that, although the Rasier Agreement provides instructions for opting out of the arbitration provision, Plaintiff ***did not*** opt-out. *Id*. Plaintiff thus has consented to the Arbitration Provision.

In an effort to circumvent this clear-cut fact, Plaintiff alleges, because he had difficulty reading a document on the screen of his iPhone 5 in October 2017 and does not own a computer or laptop, this renders the Arbitration Provision unconscionable. *Id*. First, this argument is for the Arbitrator to decide, not the Court. *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013). Plaintiff is not arguing, nor can he, that the delegation clause itself is somehow unconscionable, and thus any attacks on the Arbitration Provision (or Rasier Agreement) as a whole is for the Arbitrator to adjudicate. *Jackson*, 560 U.S. 63, 68-69; *Jones*, 866 F.3d 1257, 1264.

In any event, Plaintiff quickly undercuts his own "unconscionability" argument by declaring under penalty of perjury that, after initiating this lawsuit, he was able to review the entire Rasier Agreement, including the Arbitration Provision, by viewing it on his mother's computer. Response at 9-12. Plaintiff makes no claim that he attempted to review the Rasier Agreement in March 2016 when he agreed to it, but was unable to read it. *See* Mejia Declaration, attached to Response. In fact, Plaintiff does not state in his Declaration or Response that he did not read the Rasier Agreement before he agreed to it. Indeed, as Uber outlined in its Motion, Plaintiff twice agreed he had reviewed the Agreement when he signed up to use the App. Colman Decl. ¶ 10. To successfully complete the registration process, Plaintiff was required to click "YES, I AGREE" in response to the prompt "By clicking below, you represent

that you have reviewed all the documents above and that you agree to all the contracts above." *Id*. at ¶¶ 9-15.[2] After clicking "YES, I AGREE," Plaintiff was prompted to confirm acceptance a second time. *Id.* at ¶ 11. On the second screen, Plaintiff was required to click "YES, I AGREE" in response to the prompt "PLEASE CONFIRM THAT YOU HAVE REVIEWED ALL THE DOCUMENTS AND AGREE TO ALL THE NEW CONTRACTS." *Id.* at ¶¶ 11-12. Notification of the ability to opt-out of the Arbitration Provision is located on the first page of the Agreement, in **bold capital letters**, set forth below. See Colman Decl. ¶ 16, Exhibit 4.

If Plaintiff decided to enter into the Rasier Agreement without having read it in his desired format or even if he chose not to read it at all, that does not render the Arbitration Provision unconscionable; to suggest otherwise is absurd. *Hansen v. Wheaton Van Lines, Inc.*, 486 F. Supp. 2d 1339, 1346 (S.D. Fla. 2006) ("An individual's failure to read or investigate the terms of the contract she signed is not a defense to enforcement of the contract"); *citing Manning v. Interfuture Trading, Inc.*, 578 So.2d 842, 845 (Fla. 4th DCA 1991) ("The rule is well established that a party's mere failure to read a contract and thus to know and understand its terms and implications is not grounds for rescission or revocation"); *Allied Van Lines, Inc. v. Bratton*, 351 So.2d 344, 347 (Fla.1977) (a contract is binding on a party who signs a contract whether or not he or she has read it). Plaintiff does not cite ***any*** case from ***any*** jurisdiction that an arbitration clause has been deemed unenforceable simply because a party utilized his smartphone to review the contract. In fact, this same Court has enforced Uber's arbitration provision where the plaintiff consented through the Uber App. *Lamour*, 2017 WL 87812, at *3-

[2] Plaintiff's assertion that the Colman Declaration does not state whether the disclaimer was in effect when Plaintiff entered into the Rasier Agreement is disingenuous. Colman verifies this language was included in the December 11, 2015 version of the Agreement, which Plaintiff accepted on March 5, 2016. Colman Decl. ¶¶ 9-15 and Exhibits 3, 4 and 5 thereto. The date and time (UTC) shown on the receipt indicates when Plaintiff clicked "YES, I AGREE," thus consenting to be bound by the Agreement and its Arbitration Provision. *Id*. at 15. Plaintiff does not dispute receiving the disclaimer, but states only that he has "no recollection" of it. *Mejia* Decl. ¶ 16.

5; *see also Richemond*, 2017 WL 416123 (same).

Further, Plaintiff mischaracterizes the notice provided regarding Plaintiff's ability to opt-out of the Arbitration Provision in the Rasier Agreement. The first page of the Rasier Agreement contains a stand-alone paragraph labeled "IMPORTANT," written in large, bold font in all capital letters, identifying the Arbitration Provision and the ability to opt out:

> **IMPORTANT: PLEASE NOTE THAT TO USE THE UBER SERVICES, YOU MUST AGREE TO THE TERMS AND CONDITIONS SET FORTH BELOW. PLEASE REVIEW THE ARBITRATION PROVISION SET FORTH BELOW CAREFULLY, AS IT WILL REQUIRE YOU TO RESOLVE DISPUTES WITH THE COMPANY ON AN INDIVIDUAL BASIS, EXCEPT AS PROVIDED IN SECTION 15.3, THROUGH FINAL AND BINDING ARBITRATION UNLESS YOU CHOOSE TO OPT OUT OF THE ARBITRATION PROVISION. BY VIRTUE OF YOUR ELECTRONIC EXECUTION OF THIS AGREEMENT, YOU WILL BE ACKNOWLEDGING THAT YOU HAVE READ AND UNDERSTOOD ALL OF THE TERMS OF THIS AGREEMENT (INCLUDING THE ARBITRATION PROVISION) AND HAVE TAKEN TIME TO CONSIDER THE CONSEQUENCES OF THIS IMPORTANT BUSINESS DECISION. IF YOU DO NOT WISH TO BE SUBJECT TO ARBITRATION, YOU MAY OPT OUT OF THE ARBITRATION PROVISION BY FOLLOWING THE INSTRUCTIONS PROVIDED IN THE ARBITRATION PROVISION BELOW.**

Colman Decl., Exhibit 4.

Accordingly, the first element required for enforcement of the Arbitration Provision -- that Plaintiff entered into a written arbitration agreement that is enforceable "under ordinary state-law" contract principles -- is met.

B. Plaintiff Does Not Contest the Validity of the Delegation Language

At this point, the Court's judicial labor is done; the parties agreed to a delegation clause

and thus any remaining issue is for the Arbitrator. As more thoroughly discussed in Uber's Motion, the Arbitration Provision explicitly states that "disputes arising out of or relations to the interpretation or application of this Arbitration Provision, ***including the enforceability, revocability or validity of the Arbitration Provision*** or any portion of the Arbitration Provision" shall be decided by an arbitrator, not a court. *See* Colman Decl., Exhibit 4 (emphasis added). Plaintiff's Response offers no rebuttal as to why the delegation language should not be enforced. Because the enforceability of the delegation clause is not at-issue, this Court should grant Uber's motion and compel the parties to proceed in arbitration. *Jones*, 866 F.3d 1257, 1264, *Lamour*, 2017 WL 87812 at *13; *Richemond*, 2017 WL 416123 at *3; *Rimel*, 2017 WL 1191384 at *3

C. The Matter At-Issue Falls Squarely within the Scope of the Arbitration Provision.

However, if this Court were to address arbitrability despite the delegation clause, the second element required of an enforceable arbitration agreement—that the claims before the Court fall within the scope of the Agreement—is also met. The Motion discusses the Arbitration Provision in great detail; in sum, the Provision requires Plaintiff to arbitrate "all disputes between You and the Company or Uber . . . including but not limited to any disputes arising out of or related to this Agreement and disputes arising out of or related to your relationship with the Company" and includes "state statutes, if any, addressing same or similar subject matters, and all other similar federal and state statutory and common law claims." Colman Decl., Exhibit 4.

Plaintiff does not, and cannot, dispute the scope of the Arbitration Provision as written. Instead, he seeks to convince the Court that, despite having specifically agreed to arbitrate ***all state statutory claims***, this Court should make an exception for Plaintiff to pursue his single-count complaint for an alleged violation of Florid Statute section 790.251—a statute requiring businesses to allow statutorily defined persons holding a lawful weapons permit to keep a

weapon secured in their locked vehicle in the business's parking lot.

Plaintiff dedicates paragraphs upon paragraphs of his Response to the Second Amendment and "constitutional magnitude" of his claims. Yet, this is not a "Second Amendment" case, or one with ***any*** constitutional implications. The Complaint alleges violation of a very specific Florida statute. While it is true the Florida statute at issue and the Second Amendment both address the subject of firearms, the similarities end there. The Second Amendment only limits a government's infringement of the right to bear arms; not a private company's regulations. *Hoven v. Walgreen Co.*, 751 F.3d 778, 784 (6th Cir. 2014) (the Second Amendment does not prevent interference by private actors with the right of self-defense and right to bear arms).

Building on this straw-man argument, Plaintiff segues into a discussion of "as-applied" constitutional challenges. Defendant will not address this argument at length because it is not applicable to the instant case. Again, Plaintiff's Complaint alleges a single count—violation of the Florida Statute referenced above. This is not a matter of constitutional significance. The lone case cited by Plaintiff, *Berry v. Schmitt*, 688 F.3d 290 (6th Cir. 2012), is about the First Amendment rights of a Kansas attorney criticizing the local ethics commission; it has zero relevance to the enforceability of arbitration agreements.[3]

Plaintiff also briefly references the case of *Miele v. Prudential-Bache Securities, Inc.*, 656 So. 2d 470 (Fla. 1995), for the proposition that arbitration is not a "civil action," but is instead an "alternative to the court system." Response at 13. Plaintiff does not provide any framework for its citation of *Miele*—presumably because it has no bearing on the enforceability of the

[3] In any event, even if Uber were a state actor, which it is not, and constitutional claims were at issue, government entities can enforce a binding arbitration clause against a public employee who has sued claiming a violation of constitutional rights. Plaintiff has cited no "constitutional claim exception" to the Federal Arbitration Act.

Arbitration Provision at issue. In *Miele*, on certification from the Eleventh Circuit Court of Appeals, the Florida Supreme Court held that a particular Florida statute providing that 45% of a punitive damages award shall be made payable to claimant, with the balance being paid to the state, did not apply to arbitration awards. Notably, the Florida legislature subsequently passed a law overturning *Miele*. *See Martin Daytona Corp. v. Strickland Constr. Svcs.*, 941 So.2d 1220 (2006).

But, none of this has anything to do with enforcing an arbitration clause. What is more, an arbitration actually occurred in the *Miele* matter, and the *Miele* Court lauded arbitration as a "favored means of dispute resolution" and cautioned that only "limited review [of arbitration awards] is necessary to prevent arbitration from becoming merely an added preliminary step to judicial resolution rather than a true alternative." *Miele*, 656 So.2d 470, 473. The *Miele* holding, and its dialogue on the semantics of what is and is not a "civil action," has no impact on the instant case, in which the parties freely consented, through a binding contract, to arbitrate any and all claims arising from their relationship, including the threshold issue of arbitrability itself. *Miele* does not stand for the proposition that parties cannot be required to arbitrate statutory claims that use the words "civil action," as Plaintiff seemingly implies, because *Miele* does not address that issue at all, and parties are free to agree to arbitrate all types of claims including statutory claims. [4]

Uber's motion incorporates ***26 different cases*** upholding arbitration agreements between private parties that are similar or identical to the Arbitration Provision at-issue; in 23 pages of

[4] To the extent *Meile* could so be read, this Court is not bound by the Florida Supreme Court on an issue of federal law. *See Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012). The Court should not read this, or any other state statute, in a manner found to be pre-empted by the Federal Arbitration Act but if, in fact, section 790.251 could be read as prohibiting arbitration of a claim brought under it, it would be pre-empted. *Id*. at 533 ("when state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: the conflicting rule is replaced by the FAA"). This Court need not go so far because Plaintiff completely misinterprets *Miele*.

briefing, Plaintiff ***does not identify a single case*** in support of his opposition, nor does it address any of Uber's cases.[5]

Plaintiff's "public policy" argument, again void of any supporting case law, also misses the mark. Neither Plaintiff nor the Florida statute at-issue articulates any plausible reason why public policy would prevent the parties from following through on their contractual agreement to bring their claims in arbitration. Plaintiff cites no case in which public policy is an exception to the Federal Arbitration Act; indeed, case law sides the opposite way – strongly favoring arbitration. *Caley v. Gulfstream Aerospace Corp.*, 428 F. 3d 1359, 1368 (11th Cir. 2005) ("federal policy *favoring* arbitration is taken into consideration even in applying ordinary state law); *KFC Nat'l Mgmt. Co. v. Beauregard*, 739 So. 2d 630, 631 (Fla. 5th DCA 1999) (Florida favors arbitration as a matter of public policy).

D. Plaintiff Admits Enforceability of the Class Action Waiver

In its motion, Uber requests this Court strike Plaintiff's class allegations. By consenting to the Arbitration Provision, Plaintiff expressly agreed he would not bring a class or collective claim, such as the instant case. Uber's Motion references a litany of case law, including opinions rendered by the U.S. Supreme Court, upholding the validity of class and collective action waivers. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748-1751 (2011) ("the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution" and that class arbitration would sacrifice the principal advantage of arbitration and make the process "slower, more costly, and more likely to generate procedural

[5] The Response includes a handful of case law cited for general legal propositions and random dissimilar examples of unconscionability, which, for the sake of brevity, Defendant will not address. For example, Plaintiff references *U.S. v. Feaster*, 394 Fed. Appx. 561 (11th Circ. 2010), as a general example of "an as-applied constitutional challenge based on the Second Amendment brought by a criminal possession of a firearm." As Plaintiff points out, the plaintiff did not prevail there. Moreover, this case does not include an arbitration provision, nor does it discuss the enforceability of arbitration agreements.

morass"); *Stolt-Nielsen S.A. v. Anima/Feeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010) ("a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so."); *see also McKenzie Check Advance of Fla., LLC v. Betts*, 112 So. 3d 1176 (Fla. 2013) (citing *Concepcion* and holding that, to the extent Florida state decisions have found class action waivers void against public policy, such holdings are preempted by the Federal Arbitration Act); and *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1207 (11th Cir. 2011).

Plaintiff does not raise a single counter-argument as to why the waiver should not be enforced. To the contrary, Plaintiff admits his purported class action is barred by the Rasier Agreement. Response at 7. Accordingly, this Court should strike Plaintiff's class allegations and compel Plaintiff to arbitrate his claims on an individual basis only.

E. This Court Should Stay All Proceedings While the Parties Proceed in Arbitration

Despite their differences, the parties concur that all court proceedings should be stayed (a) until a determination is made on this motion; and (b) should this Court grant Uber's Motion, during the pendency of the arbitration. *See* Stipulation of Stay Pending Arbitration Briefing at Docket, 15; Motion at 16-17; Response at 3. Accordingly, Uber respectfully requests this Court enter an Order staying all further proceedings until a determination is made with respect to the Motion to Compel Arbitration, and should the Motion be granted, while the parties proceed in arbitration.

Dated: November 14, 2017

Respectfully Submitted:

UBER TECHNOLOGIES, INC.

By: */s/ Edward M. Mullins*

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2017 I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel or parties of record.

/s/ Edward M. Mullins
Edward M. Mullins (FBN 863920)