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.
_____/

DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO ITS MOTION FOR PROTECTIVE ORDER AND TO STAY

In his response to Defendant Uber Technologies's ("Uber's") motion for protective order from Plaintiff's First Request for Production and to stay all discovery proceedings pending a ruling on Defendant's Motion to Compel Arbitration and Stay all Court Proceedings, Plaintiff readily admits that he "agreed with Defendant to stay this litigation for a limited time – up and until the Court ruled on Defendant's Motion to Compel Arbitration." (DE 32 at 1-2); *see also* (DE 15). Yet, despite this agreement, and despite that this Court has not ruled upon the fully briefed arbitration motion (and thus the agreed-upon stay should be in place), Plaintiff nevertheless reneged on the agreement and propounded discovery on matters that have nothing to do with the parties' arbitration agreement.

The result is a serious deprivation of Uber's federally protected rights to arbitration and completely at odds with numerous federal cases in Florida and throughout the country. Plaintiff seeks to litigate the case while the Court has the fully briefed arbitration motion under

advisement – despite Plaintiff's agreement ***not*** to do so.

Plaintiff does not distinguish any of the cases Uber cited in its motion holding that discovery should be stayed pending a motion to compel arbitration. *See* (D31 at 2-3) (citing *e.g.*, *Harrell's LLC v. Agrium Advanced (U.S.) Techs., Inc.*, No. 8:10-CV-1499-T-33AEP, 2011 WL 1596007, at *1 (M.D. Fla., Apr. 27, 2011)); *see also In re Managed Care Litig.*, 2001 WL 664391, at *3 (S.D. Fla. June 12, 2001) (Moreno, J) (staying discovery pending resolution of motion to compel arbitration); *O.N. Equity Sales Co. v. Merkel*, 2008 WL 380573 *1 (M.D. Fla. Feb. 11, 2008) (staying discovery pending motion to compel arbitration, following 16 cases from across the country following that procedure); *Morat v. Cingular Wireless LLC*, No. 3:07-CV-1057-J-20JRK, 2008 WL 11336388, at *2 (M.D. Fla. Feb. 14, 2008) ("[C]ourts have routinely stayed discovery into the underlying merits of the case when a motion to compel arbitration has been filed in good faith."). The only "exceptional circumstances" that warrant forcing the parties to engage in discovery while an arbitration motion is pending is when discovery is *needed* for the arbitration decision (*Harrell's*, 2011 WL 1596007, at *2), which, of course, is not true here because the arbitration motion is fully briefed and ripe for resolution. *See Gorelik v. Dillon*, 2010 WL 11553317 at *7-8 (S.D. Fla. Dec. 15, 2010) (Jordan, J) (granting stay of discovery pending ruling on arbitration motion because remaining arbitrability issue required no discovery, citing *O.N.*).

Plaintiffs fail to address the four mains reasons why courts stay discovery pending a decision on a motion to compel arbitration. Each reason applies here.

First, courts will stay discovery pending a motion to compel arbitration because such a motion, if granted, is dispositive of the litigation before the court as the case will go to the arbitrator. *Skytruck Co. LLC v. Sikorsky Aircraft Corp.*, 2010 WL 11475483 at *1-2 (M.D. Fla.

Oct. 29, 2010). Uber's motion is directed to the entire complaint and all claims sued upon.

Second, a defendant should not voluntarily participate in discovery or litigation to avoid an argument that it has waived arbitration. Thus, the courts will grant a motion to stay the litigation, including discovery, to avoid this issue. As *Harrell's* explains, "[a] number of courts have determined that participation in litigation, including discovery, can militate in favor of a finding that a party has waived their right to arbitrate. *Harrell's*, 2011 WL 1596007, at *2 (granting motion to stay discovery and citing *Citibank v. Stok & Assocs.*, 387 F. App'x 921, 924 (11th Cir. 2010) (participating in litigation can satisfy the first prong of the waiver test when a party seeking arbitration substantially participates in litigation to a point inconsistent with the intent to arbitrate) (internal citations omitted)); *Sundial Partners, Inc. v. Alt. St. Cap. Mgmt. LLC*, 2016 WL 4769748 at *1 (M.D. Fla. May 2, 2016) (same).

Here, of course, Uber has vigorously sought to protect is arbitration rights from the outset. Yet, Plaintiff wrongfully has put Uber in the position of appearing obstinate by pushing the case before the Court has had the opportunity to address the arbitration motion. Uber has had to object to all litigation in this Court – and now to this discovery – so as to not to allow Plaintiff to fashion an argument, however meritless, that Uber has waived its right to arbitrate.

A third reason courts grant stays in this situation is that "'[e]ngaging in discovery while the Motion to Compel Arbitration is pending would defeat the very purpose of that Motion and the arbitration clause itself - namely, to try to avoid the costs associated with this litigation and instead to create the opportunity for a relatively inexpensive and expedient process to resolve the disputes.'" *Harrell's*, 2011 WL 1596007, at *2 (quoting and adopting defendant's brief); *Sundial Partners*, 2016 WL 4769748 at *1 (M.D. Fla. May 2, 2016) ("permitting discovery to proceed in a case that may be subject to arbitration could 'frustrate one of the purposes

underlying arbitration, namely, the inexpensive and expedient resolution of disputes and the easing of court congestion"') (citation omitted). Plaintiff has no response to this point.

Fourth, pursuant to 9 U.S.C. § 7, "if a dispute is arbitrable, 'responsibility for discovery lies with the arbitrators.'" *Morat*, 2008 WL 11336388, at *2 (quoting *CIGNA Healthcare of St. Louis, Inc. v. Kaiser*, 294 F.3d 849, 855 (7th Cir. 2002)); *see also Niven v. Dean Witter Reynolds, Inc.*, 1985 WL 5802 at *1 (M.D. Fla. June 27, 1985) (rejecting request by plaintiff to have court address discovery issues for matter compelled to arbitration). Thus, even if some merits discovery sought might have some use in the arbitration itself, it is for the arbitrator, not this Court, to so order and oversee that discovery. *See Suarez-Valez v. Shearson Lehman/Am. Exp., Inc.*, 858 F.2d 648, 649 (11th Cir. 1988) (granting writ of mandamus against Miami district court judge who allowed discovery in the case after compelling case to arbitration, "[a]n agreement to arbitrate is an agreement to proceed under arbitration and not under court rules"); *see also id.* (Tjoflat, J., concurring) (agreement to arbitrate "indicates the parties' preference for more informal, less expensive procedures," and allowing continued discovery in court "would subject the parties to the very complexities, inconveniences and expenses of litigation that they determined to avoid").

Plaintiff ignores all of this case law and these compelling points and instead makes three meritless arguments. First, he contends that the Court, in requiring the parties to do a scheduling order and to set mediation, has somehow ruled on and denied the stipulation to stay. (DE 32 at 3). The argument is meritless. The arbitration motion is pending before the Court. And, the court has not denied the motion to stay pending the motion to compel arbitration. Indeed, if anything, by permitting Uber to file this reply over Plaintiff's objection, the Court recognizes that this is a significant issue requiring this full briefing. With this complete briefing it is now

evident that what Plaintiff is requesting this Court to do – allow discovery pending a motion to compel arbitration – would put this Court at odds with numerous district court decisions in this District and district courts throughout the country and the Eleventh Circuit. At the same time, Plaintiff has not cited a ***single*** decision from any court supporting its position.

Plaintiff next reiterates his reasons why he believes the motion to compel arbitration itself should be denied. (DE 37 at 2). Uber will not reiterate here why arbitration must be compelled but will note that the very arbitration clause at issue has been enforced many times in this and other courts[1] and Plaintiff has not made any effort to distinguish these cases, either in the briefing on the arbitration motion or even in response to the instant motion. The only thing Plaintiff contends here is that the Court should deny the motion to compel because there are supposed "Constitutional rights" at issue. (DE 32 at 2). As explained in the arbitration briefing, Uber is a private actor, not subject to the Second Amendment. (DE 30 at 8). The only issue here is whether a claim pursuant to a Florida statute is subject to arbitration. That is not a reason to deny the motion to compel arbitration as arbitrability must be decided by the arbitrator pursuant to the delegation clause. Plaintiff *still* has no answer to this point.

In any event, if somehow the arbitration motion were to be denied in the face of this authority (which Uber respectfully suggests would be completely contrary to the law), all discovery would be stayed pending Uber's appeal. *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1251 (11th Cir. 2004); *Espinoza v. Galardi S. Enters., Inc.*, No. 14-21244-CIV, 2016 WL 482090, at *1-2 (S.D. Fla. Feb. 5, 2016); *Baron v. Best Buy Co.*, 79 F. Supp. 2d 1350 (S.D. Fla. 1999). Thus, under no circumstance can discovery be conducted here – either before the

[1] This Court has enforced nearly identical, arbitration provisions in favor of Uber. *See 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.*, 263 F.Supp.3d 1312, at *3 (2017); see also *Rimel v. Uber Techs., Inc. et al.*, 246 F.Supp.3d (2017).

arbitration motion is decided or after.

Finally, Plaintiff cites numerous cases holding that courts have the discretion to manage their docket. (DE 32 at 4-5). That is in fact the very basis that courts use to stay discovery pending a motion to compel arbitration. *Geopolymer Sinkhole Specialist, Inc. v. Urtek Worldwide Oy*, 2016 WL. 4769747 *1 (M.D. Fla. Feb. 3, 2016) (using Rule 26(c) and docket control case law to stay discovery pending the motion to compel arbitration, citing *Harrell's*); *Gorelik*, 2010 WL 11553317 at *7 (same). None of the cases Plaintiff cites remotely suggest that a court should require the parties to engage in merits discovery while a motion to compel arbitration is pending and in fact the cases support that a court has the ability to stay when, as here, compelling reasons exist to do so.

For the reasons set forth above and in the original motion, this Court should enter an Order staying discovery pending a ruling on Defendant's Motion to Compel Arbitration.

Dated: January 8, 2018

Respectfully Submitted:

UBER TECHNOLOGIES, INC.

By:/s/ *Edward M. Mullins*

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2018 I electronically filed the foregoing document with the Clerk of the Court for the Southern District of Florida 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)