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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION – LOS ANGELES

IN RE: UBER TECHNOLOGIES, INC., DATA SECURITY BREACH LITIGATION

This Document Relates To:

BRADLEY WEST, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

UBER USA, LLC, UBER TECHNOLOGIES, INC., RASIER, LLC

Defendants.

MDL No. 2:18-ml-02826-PSG(GJSx)

Case No. 2:18-cv-3001-PSG(GJSx)

The Honorable Philip S. Gutierrez

DEFENDANTS' RESPONSE TO PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF PLAINTIFF BRADLEY WEST'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STAY ACTION

Defendants Uber USA, LLC, Uber Technologies, Inc., and Rasier, LLC (collectively, "Uber") hereby submit this Response to Plaintiff's Notice of Supplemental Authority in Support of Plaintiff Bradley West's Opposition to Defendants' Motion to Compel Arbitration, addressing the First Circuit's recent decision in *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53 (1st Cir. 2018).

The First Circuit's decision in *Cullinane* was wrongly decided and conflicts with the current legal landscape regarding assent to online agreements. It also inexplicably departs from the reasoning applied by other courts that have reviewed the registration processes for Uber riders. *See Meyer v. Uber Techs., Inc*. 868 F. 3d 66 (2d Cir. 2017) (applying California law); *Cordas v. Uber Techs., Inc.*, 228 F. Supp. 3d 985 (N.D. Cal. 2017) (applying California law); *Cubria v. Uber Techs., Inc.*, 242 F. Supp. 3d 541 (W.D. Tex. 2017).

Applying Massachusetts law, the *Cullinane* court concluded that the riders did not receive reasonable notice of Uber's Terms sufficient to show assent to those Terms and the arbitration agreement therein. *See Cullinane*, 893 F.3d at 64. Ignoring the modern realities of website and mobile application design, the court opined that the notice presented on plaintiffs' iPhones during registration that said "By creating an Uber account, you agree to the Terms of Service & Privacy Policy" with "The Terms of Service & Privacy Policy" in a clickable button indicated by bold white text enclosed in a rectangle was not sufficiently conspicuous, because it was not blue and underlined and thus "did not have the common appearance of a hyperlink." *Id.* at 63. But this disregards that clickable buttons are both common practice and a recognized format for hyperlinks, *see* HTML Style Sheet, https://www.w3schools.com/css/css_link.asp (last visited August 6, 2018) ("Links can be styled with any CSS property (e.g. color, font-family, background, etc.)."). Indeed, the First Circuit's own website demonstrates that hyperlinks come in a variety of colors, fonts, icons, and shapes. *See* U.S. Court of Appeals for the First Circuit, http://www.ca1.uscourts.gov (last visited August 6, 2018) (displaying a link

to the privacy policy in plain gray text at the bottom of the webpage). The court also made the unprecedented finding that the handful of other items on the screen—amounting to just ten additional words—diminished the ability of consumers to identify a notice and hyperlink that otherwise has "characteristics that make a term conspicuous." *Id.* at 64.

The *Cullinane* analysis is further flawed in failing to evaluate Uber's registration process from the perspective of a "reasonably prudent smartphone user," who recognizes that a button labeled "Terms of Service & Privacy Policy" leads to another page displaying the terms to which they will be bound. *Meyer*, 868 F.3d at 79. This is why courts that have properly applied the perspective of a reasonably prudent smartphone user to identical or nearly identical Uber registration processes for riders have uniformly concluded that the notice of Uber's Terms is sufficiently conspicuous to conclude that riders assented to them. *See, e.g.*, *id.* at 78 ("[A] reasonably prudent smartphone user would understand that the terms were connected to the creation of a user account."); *Cordas*, 228 F. Supp. 3d at 990 (Uber "clearly display[ed] the notice" and the plaintiff "was on notice of Uber's terms and conditions" under California law); *Cubria*, 242 F. Supp. 3d at 548 (Uber's notice was "prominent enough to put a reasonable user on notice of the terms of the Agreement"). *Cullinane* provides no grounds for departing from the well-reasoned analyses in those cases.

Finally, *Cullinane* is at odds with the reasoning of the Ninth Circuit Court of Appeals, which has noted that courts find the requisite notice for assent to terms of service where, as here "the user is required to affirmatively acknowledge the agreement before proceeding with use of the website" or app. *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1176 (9th Cir. 2014) (citing *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 835–40 (S.D.N.Y. 2012) (finding assent where the user clicked a button labeled "Sign Up" in response to a notice stating: "By Clicking Sign Up, you

are indicating that you have read and agreed to the Terms of Service")). That is the case with Plaintiff West.

The *Cullinane* opinion is not binding here, and is not persuasive. Uber's Motion to Compel Arbitration should be granted.

Dated: August 6, 2018

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By: */s/ Michelle A. Kisloff*

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