

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 81346

AIRBNB, INC., a foreign corporation,

Appellant,

v.

ERIC RICE, individually; JEFFERSON TEMPLE,
as Special Administrator of the Estate of RAHEEM RICE,

Respondents.

Appeal from Order Denying Motion to Compel Arbitration
Eighth Judicial District Court, Case No. A-19-801549-C

APPELLANT'S APPENDIX - VOLUME II

Jeff Silvestri (NSBN 5779)
McDONALD CARANO LLP
2300 W. Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
Facsimile: (702) 873-9966
jsilvestri@mcdonaldcarano.com

David Hayek (*Pro Hac Vice*)
P.K. SCHRIEFFER LLP
100 North Barranca St., Suite 1100
West Covina, California 91791
Telephone: (626) 373-2444
Facsimile: (626) 974-8403
dth@pkslp.com

Attorneys for Appellant

Electronically Filed
Mar 01 2021 09:39 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Chronological Index to Appellant's Appendix

Date	Document Description	Volume	Labeled
9/9/2019	Plaintiffs' Complaint for Personal Injuries and Demand for Jury Trial	I	AA 001 – AA 016
12/10/2019	Defendant Airbnb, Inc.'s Motion to Compel Arbitration and Stay Litigation	I	AA 017 – AA 245
		II	AA 246 – AA 286
1/03/2020	Plaintiffs' Opposition to Defendant Airbnb, Inc.'s Motion to Compel Arbitration and Stay Litigation	II	AA 287 – AA 294
1/21/2020	Defendant Airbnb, Inc.'s Reply in Support of Motion to Compel Arbitration and Stay Litigation	II	AA 295 – AA 307
5/20/2020	Recorder's Transcript of Pending Motions	II	AA 308 – AA 333
5/28/2020	Order Denying Defendant, Airbnb, Inc.'s Motion to Compel Arbitration and Stay Litigation	II	AA 334 – AA 335
6/15/2020	Notice of Entry of Order Denying Airbnb, Inc.'s Motion to Compel Arbitration and Stay all Proceedings as to Claims of Eric Rice, Individually, and Jefferson Temple as Special Administrator of the Estate of Raheem Rice	II	AA 336 – AA 341
7/24/2020	Notice of Entry of Order Granting Stay of Entire Action Pending Appeal by Airbnb, Inc. of Denial of Its Motion to Compel Arbitration as to the Rice Plaintiffs and Request for Stay of All Proceedings Pursuant to 9 U.S.C. §3	II	AA 342 – AA 351

Alphabetical Index to Appellant's Appendix

Date	Document Description	Volume	Labeled
12/10/2019	Defendant Airbnb, Inc.'s Motion to Compel Arbitration and Stay Litigation	I	AA 017 – AA 245
		II	AA 246 – AA 286
1/21/2020	Defendant Airbnb, Inc.'s Reply in Support of Motion to Compel Arbitration and Stay Litigation	II	AA 295 – AA 307
6/15/2020	Notice of Entry of Order Denying Airbnb, Inc.'s Motion to Compel Arbitration and Stay all Proceedings as to Claims of Eric Rice, Individually, and Jefferson Temple as Special Administrator of the Estate of Raheem Rice	II	AA 336 – AA 341
7/24/2020	Notice of Entry of Order Granting Stay of Entire Action Pending Appeal by Airbnb, Inc. of Denial of Its Motion to Compel Arbitration as to the Rice Plaintiffs and Request for Stay of All Proceedings Pursuant to 9 U.S.C. §3	II	AA 342 – AA 351
5/28/2020	Order Denying Defendant, Airbnb, Inc.'s Motion to Compel Arbitration and Stay Litigation	II	AA 334 – AA 335
9/9/2019	Plaintiffs' Complaint for Personal Injuries and Demand for Jury Trial	I	AA 001 – AA 016
1/03/2020	Plaintiffs' Opposition to Defendant Airbnb, Inc.'s Motion to Compel Arbitration and Stay Litigation	II	AA 287 – AA 294
5/20/2020	Recorder's Transcript of Pending Motions	II	AA 308 – AA 333

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the succeeding document does not contain the social security number of any person.

Dated this 1st day of March, 2021.

McDONALD CARANO LLP

By: /s/ Jeff Silvestri
Jeff Silvestri (NSBN 5779)
2300 W. Sahara Ave., Suite 1200
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
Facsimile: (702) 873-9966
jsilvestri@mcdonaldcarano.com

Attorneys for Appellant Airbnb, Inc.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDONALD CARANO LLP and that on March 1, 2021, a true and correct copy of the foregoing **APPELLANT’S APPENDIX - VOLUME II** was e-filed and e-served on all registered parties to the Supreme Court’s electronic filing system and/or was emailed and served via U.S. Mail, postage prepaid, upon the following:

Michael C. Kane, Esq.
THE702FIRM
400 South Seventh Street, Floor 4
Las Vegas, Nevada 89101
mike@the702firm.com

Jordan P. Schnitzer, Esq.
Schnitzer Law Firm
9205 West Russel Road, Suite 240
Las Vegas, Nevada 89148
jordan@theschnitzerlawfirm.com

Dated: March 1, 2021

/s/ CaraMia Gerard
An Employee of McDonald Carano LLP

EXHIBIT “I”

2018 WL 583122

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.

FRANCESCO PLAZZA and SYLVIE
NAUDE, individually and on behalf of
all others similarly situated, Plaintiffs,

v.

AIRBNB, INC., Defendant.

16-CV-1085 (VSB)

Filed 01/26/2018

Attorneys and Law Firms

Appearances: Lucas A. Ferrara Jeffrey M. Norton
Newman Ferrara LLP New York, New York Kent L.
Gubrud Law Office of Kent Gubrud P.C. New York, New
York Counsel for Plaintiffs and the Proposed Class

Roberta A. Kaplan Kaplan & Company, LLP New York,
New York Counsel for Defendant

OPINION & ORDER

Vernon S. Broderick United States District Judge

*1 VERNON S. BRODERICK, United States District
Judge:

Plaintiffs Francesco Piazza and Sylvie Naude (collectively, "Plaintiffs") bring this putative class action against Defendant Airbnb, Inc. ("Defendant" or "Airbnb"). Before me is Airbnb's motion to compel arbitration and dismiss the action. Because Plaintiffs and Defendant entered into a valid and enforceable arbitration agreement, Airbnb's motion is granted in part and denied in part, and this action is stayed pending the outcome of arbitration.

I. Background

A. Plaintiffs' Claims

Plaintiff Naude originally created her account and registered as a user with Airbnb on July 29, 2009. (Naude Decl. ¶ 3; Miller Decl. ¶¶ 4–5.)¹ Plaintiff Piazza initially registered with Airbnb on August 21, 2011, and created a second account on October 2, 2014. (Piazza Decl. ¶ 2; Miller Decl. ¶¶ 6–9.)² Plaintiffs allege that by creating and maintaining a website that lists, advertises, and takes fees or commissions for property rentals posted by individual members on the site, Airbnb is acting as an unlicensed real estate broker in violation of New York Real Property Law § 440, *et seq.* (Compl. ¶¶ 2–4.)³ Plaintiffs assert that in this way Airbnb avoids being subject to the laws governing real estate brokers, and "place[s] itself in the position of sole arbiter and decision-maker in all member disputes and vests itself with complete discretion with regard to the fees and commissions its [sic] takes as well as the distribution of rental payments it processes." (*Id.* ¶ 7.) Plaintiffs allege that Airbnb's actions and behavior are "deceptive and fraudulent" and result in actual harm to Airbnb's members. (*Id.* ¶ 8.) Plaintiffs bring this putative class action on behalf of themselves and all similarly situated individuals who "[p]aid any fee, commission, or rent to Airbnb for the purpose of listing and/or renting real property, including apartments, co-ops, condominiums, and houses, within the State of New York within the six year period preceding the filing of the complaint in this action." (*Id.* ¶ 17.) Specifically, Plaintiffs claim violations under New York Real Property Law § 440, *et seq.*, deceptive trade practices under New York General Business Law § 349, fraud, and unjust enrichment. (*Id.* ¶¶ 47–73.)

B. Defendant's Terms of Service

*2 Since at least 2009, in order to use Airbnb's online platform, Hosts (third parties who offer their accommodations on Airbnb's website) and Guests (third parties who book such accommodations) have been required to create an account. (Miller Decl. ¶¶ 2, 4; *see also* Naude Decl. ¶ 3; Piazza Decl. ¶ 2.)⁴ It is implied, and I assume in connection with my consideration of this motion, that the 2009 Terms of Service ("TOS") did not contain an arbitration clause. (*See* Miller Decl. ¶¶ 11, 13; Def.'s Mem. 6; Pls.' Mem. 6.)⁵ However, since 2009 Airbnb has modified its TOS numerous times, and since August 15, 2011, the TOS includes a mandatory arbitration provision with a class action waiver. (Miller

Decl. ¶¶ 11, 13; Pls.' Mem. 6–11.)⁶ The TOS modifications have effective dates of August 15, 2011, May 22, 2012, April 7, 2014, June 30, 2014, and July 6, 2015. (Miller Decl. ¶ 11, Exs. 4–8.) During each of these years, the arbitration provision in the TOS reads as follows:

You and Airbnb agree that any dispute, claim or controversy arising out of or relating to these Terms or the breach, termination, enforcement, interpretation or validity thereof, or to the use of the Services or use of the Site or Application (collectively, “**Disputes**”) will be settled by binding arbitration, except that each party retains the right to seek injunctive or other equitable relief in a court of competent jurisdiction to prevent the actual or threatened infringement, misappropriation or violation of a party's copyrights, trademarks, trade secrets, patents, or other intellectual property rights. You acknowledge and agree that you and Airbnb are each waiving the right to a trial by jury or to participate as a plaintiff or class member in any purported class action or representative proceeding. Further, unless both you and Airbnb 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.

(*Id.* ¶ 13, Exs. 4–8.)⁷ The arbitration provision also includes paragraphs addressing the arbitration rules and governing law, arbitration process, arbitration location and procedure, arbitrator's decision, and the responsibility for paying any arbitration-related fees. (*Id.* Exs. 4–8.)⁸ Additionally, the initial paragraphs of the TOS state that “[b]y using the Site and Application, you agree to comply with and be legally bound by the terms and conditions of these Terms of Service.” (*Id.*)⁹ As of May 22, 2012, the TOS was also preceded by a capitalized admonition to users to

PLEASE READ THESE TERMS OF SERVICE CAREFULLY AS THEY CONTAIN IMPORTANT INFORMATION REGARDING YOUR LEGAL RIGHTS, REMEDIES AND OBLIGATIONS. THESE INCLUDE VARIOUS LIMITATIONS AND EXCLUSIONS, A CLAUSE THAT GOVERNS THE JURISDICTION AND VENUE OF DISPUTES

(*Id.* Exs. 5–8.)¹⁰

*3 According to Airbnb's archived computer code, as of 2009, the sign-up screen for potential users included a sentence, directly below the sign-up button, stating that “By clicking ‘Sign Up,’ you confirm that you accept the Terms of Service.” (*Id.* ¶ 5, Ex. 1.)¹¹ The TOS were hyperlinked, and there was one other hyperlink allowing existing members to sign in. (*Id.*) As of August 21, 2011, Airbnb presented users with one of two possible alternate sign-up screens. (*Id.* ¶¶ 6–7, Ex. 2.) The first allowed potential users to either “Connect with Facebook” or “Create an account with your email address.” (*Id.* Ex. 2.) The phrase “[c]reate an account with your email address” was hyperlinked. (*Id.*) Below those two options was a sentence stating that “By clicking ‘Connect with Facebook,’ you confirm that you accept the Terms of Service.” (*Id.*) The phrase “Terms of Service” was in blue text and underlined, indicating a hyperlink. (*Id.*) The second alternate screen similarly presented users with two options; however, users could now click a button stating “Connect with Facebook” or input their first name, last name, email address, password, and password confirmation prior to clicking on a button stating “Create Account.” (*Id.*) Above the button “Connect with Facebook” was text stating “Sign up using Facebook.” (*Id.*) Directly underneath the two options was text stating “By clicking ‘Sign Up’ or ‘Connect with Facebook,’ you confirm that you accept the Terms of Service.” (*Id.*) “Terms of Service” was in blue text, indicating a hyperlink. (*Id.*) There was one other hyperlink allowing existing members to sign in. (*Id.*) Finally, as of October 2, 2014, although the two alternate sign-up screens now allowed three methods of signing up, including “Sign up with Facebook,” “Sign up with Google” or “Sign up with Email,”¹² they still noted that “[b]y signing up,” the user “agree[s] to Airbnb's Terms of Service, Privacy Policy, Guest Refund Policy, and Host Guarantee Terms.” (*Id.* ¶¶ 8–9, Ex. 3.) The Terms of Service, Privacy Policy, Guest Refund Policy, and Host Guarantee Terms were all separately hyperlinked. (*Id.*)

Plaintiffs further referenced, and presented in advance of an April 28, 2016 conference in this matter, a “screenshot” of a 2016 sign-up screen. (Norton Decl. ¶¶ 2–4, Ex. A; Pls.' Pre-Mot. Letter.)¹³ This sign-up screen displayed three options for signing up—“Continue with Facebook,” “Continue with Google,” or “Sign up with Email”—

and included, underneath the third option, the sentence stating that “[b]y signing up, I agree to Airbnb’s Terms of Service, Privacy Policy, Guest Refund Policy, and Host Guarantee Terms.” (Norton Decl. Ex. A; Pls.’ Pre-Mot. Letter.) As with the other sign-up screens, the TOS and other documents were separately hyperlinked. (*Id.*)

Quite apart from the initial sign-up process, Airbnb presented its modified TOS to users the first time they attempted to log in to their Airbnb accounts after the particular modified TOS took effect. (Miller Decl. ¶ 16.) Users were required to accept the modified TOS prior to accessing any part of the Airbnb platform. (*Id.*; see Naude Decl. ¶ 7; Piazza Decl. ¶ 6.) Airbnb terms these acceptances “consent events.” (Miller Decl. ¶ 16.) The 2012, 2014, and 2015 modifications of the TOS each presented Airbnb users with a screen box titled either “Updated Terms of Service and Privacy Policy,” “Terms of Service,” or “Updated Terms of Service.” (*Id.* Exs. 9–11.) Below the title was a short paragraph notifying users that Airbnb recently updated its terms. (*Id.*) In that introductory paragraph, the 2014 and 2015 screen boxes further told users to read each term carefully and provided a hyperlink for users to “[l]earn more about what’s changed.” (*Id.* Exs. 10–11.) Below the introductory paragraph, each screen box provided a scrollable version of the TOS and tabs to the other relevant agreements that had been modified. (*Id.* Exs. 9–11.) Finally, each screen box required users, underneath the scrollable TOS, both to click a check box next to text stating “I agree to the terms and conditions of the updated Terms of Service” or other similar language, and to click a red button reading “I Agree” or “Agree.” (*Id.* ¶¶ 17–19, Exs. 9–11.)

*4 Airbnb’s records indicate that Plaintiff Naude “consented” to the TOS on July 29, 2009, May 23, 2012, May 7, 2014, and August 16, 2015. (*Id.* ¶¶ 21–23, Exs. 17–19.) Similarly, Airbnb’s records indicate that Plaintiff Piazza “consented” to the TOS on August 21, 2011, May 22, 2012, May 30, 2014, and November 22, 2015 under his first account, and on October 2, 2014 and August 6, 2015 under his second account. (*Id.* ¶¶ 21–22, 24, Exs. 17–19.) In addition to the modification screens, Airbnb’s records indicate that since 2014, Plaintiffs would have received emails after these modifications were enacted notifying Plaintiffs of the TOS modifications and providing links to explanations of those changes as well as the old and new versions of the TOS itself. (*Id.* ¶ 20, Exs. 12–16.) Plaintiffs provided copies of emails sent to Plaintiff Naude

on July 10, 2015 and March 30, 2016, and to Plaintiff Piazza on March 31, 2016, which informed Plaintiffs in the subject line that “We’re updating our Terms of Service and Privacy Policy,” informed Plaintiffs that they would be asked to agree to these terms upon using the site, and linked to information explaining the changes as well as old and new versions of the TOS. (Nadler Decl. ¶¶ 2–4, Exs. A–C.)¹⁴

Plaintiffs do not appear to dispute the accuracy of the modification and email records, (*see* Pls.’ Mem. 7–10),¹⁵ but rather indicate a lack of recollection as to certain facts related to the initial sign-up process. Specifically, Plaintiff Naude does not recall seeing, being provided with, or being required to agree to Airbnb’s TOS during the initial registration process or at any point between 2009 and 2012. (Naude Decl. ¶¶ 4–5.) Plaintiff Naude does, however, recall “visiting the Airbnb site and being required to click a button indicating that [she] accept[s] Airbnb’s updated Terms of Service and other policies” on “at least one occasion.” (*Id.* ¶ 7.) Plaintiff Naude did not read the TOS. (*Id.*) Finally, with respect to the emails, Plaintiff Naude acknowledges receipt of email “notices that Airbnb had updated its Terms of Service” and accurately notes that the emails did not explicitly inform users of the arbitration provision and class action waiver. (*Id.* ¶ 9; Miller Decl. Exs. 12, 14.)

Plaintiff Piazza similarly has “no specific recollection of either seeing the Terms of Service hyperlink or any statement” noting his agreement to the TOS before setting up his accounts. (Piazza Decl. ¶ 3.) Plaintiff Piazza further notes that while creating his accounts, he was not actually presented with the TOS, and was able to enter the site without clicking on an actual button reading “I Agree.” (*Id.* ¶ 4.) Plaintiff Piazza does recall being required to click such a button “[o]n several occasions” after he created his accounts, but also indicates that he did not read the TOS. (*Id.* ¶ 6.) Finally, like Plaintiff Naude, Plaintiff Piazza acknowledges receipt of email “notices that Airbnb had updated its Terms of Service,” but likewise reiterates that the emails did not explicitly inform him of the arbitration provision and class action waiver. (*Id.* ¶ 7; *see also* Miller Decl. Exs. 13, 15–16.)

II. Procedural History

Plaintiffs filed their putative class action complaint on February 11, 2016, claiming violations under New York

Real Property Law § 440, *et seq.*, deceptive trade practices under New York General Business Law § 349, fraud, and unjust enrichment. (Compl. ¶¶ 47–73.) In accordance with my Individual Rules, on March 28, 2016, Defendant filed a letter that requested a pre-motion conference on its anticipated motion to compel arbitration and outlined the basis for such a motion. (Doc. 8.) Defendant filed a letter with supplemental authority on March 29, 2016. (Doc. 9.) On March 31, 2016, Plaintiffs responded to this letter, (Doc. 10), and on April 28, 2016, I held a conference regarding Defendant's anticipated motion. (See Doc. 14.)

*5 On May 9, 2016, I granted the parties' joint letter proposing deadlines for discovery and motion practice. (Doc. 13.) On July 7, 2016, I granted the parties' stipulation requesting an extension of time in connection with the motion to compel arbitration. (Doc. 17.) Pursuant to that stipulation, Defendant filed its motion to compel arbitration on July 22, 2016, (Docs. 18–21), Plaintiffs filed their opposition on August 22, 2016, (Docs. 22–23), and Defendant filed its reply on September 12, 2016, (Doc. 26). Plaintiffs filed a notice of supplemental authority on October 5, 2016, (Doc. 27), to which Defendant responded on October 11, 2016, (Doc. 28). Defendant filed its own notice of supplemental authority on November 1, 2016, (Doc. 29), to which Plaintiffs responded on November 16, 2016, (Doc. 30). Defendant filed an additional notice of supplemental authority on August 17, 2017, (Doc. 37), to which Plaintiffs responded on August 18, 2017, (Doc. 38). Defendants filed a reply to Plaintiffs' letter that same day, (Doc. 39), and Plaintiffs filed a response on August 30, 2017, which provided an update noting that the Second Circuit had denied without prejudice a motion to amend its decision in *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66 (2d Cir. 2017), (Doc. 40), which was the subject of Defendant's notice of supplemental authority filed on August 17, (Doc. 37).

III. Legal Standard

The Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 *et seq.*, provides that an arbitration provision in a “contract evidencing a transaction involving commerce ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. In creating “a body of federal substantive law of arbitrability, applicable to any arbitration agreement with [its] coverage,” the FAA was “a congressional declaration of a liberal federal policy

favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.” *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see also AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011) (“[O]ur cases place beyond dispute that the FAA was designed to promote arbitration. They have repeatedly described the Act as ‘embod[ying] [a] national policy favoring arbitration,’”) (alteration in original) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)). The “ ‘principal purpose’ of the FAA is to ‘ensur[e] that private arbitration agreements are enforced according to their terms.’ ” *Concepcion*, 563 U.S. at 344 (citations omitted). Notwithstanding the strong policy in favor of arbitration agreements, “a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *In re Am. Express Fin. Advisors Sec. Litig.*, 672 F.3d 113, 127 (2d Cir. 2011) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)); *see also Concepcion*, 563 U.S. at 339 (“[C]ourts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms.”) (internal citations omitted).

In determining whether claims are subject to arbitration, courts in this Circuit consider “(1) whether the parties have entered into a valid agreement to arbitrate, and if so, (2) whether the dispute at issue comes within the scope of the arbitration agreement.” *In re Am. Express Fin. Advisors Sec. Litig.*, 672 F.3d at 128 (citations omitted). If these two conditions are met, the FAA “mandates that district courts *shall* direct the parties to proceed to arbitration.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis in original). When deciding motions to compel, courts apply a standard similar to that applied in considering a motion for summary judgment, necessitating a consideration of “all relevant, admissible evidence submitted by the parties and contained in pleadings, depositions, answers to interrogatories, and admissions on file, together with ... affidavits” and drawing all inferences in favor of the non-moving party. *Nicosia v. Amazon.com Inc.*, 834 F.3d 220, 229 (2d Cir. 2016) (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 155 (2d Cir. 2002) (internal quotation marks omitted)). If there exists a genuine issue of material fact as to whether the parties entered the agreement, a trial “is warranted.” *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 118 (2d Cir. 2012) (citation omitted).

*6 When determining whether the parties have entered into a valid agreement to arbitrate, “courts ‘should apply ordinary state-law principles that govern the formation of contract,’ ” and evaluate the allegations “to determine whether they raise a genuine issue of material fact.” *Sacchi v. Verizon Online LLC*, No. 14-CV-423, 2015 WL 765940, at *4 (S.D.N.Y. Feb. 23, 2015) (citations omitted). Defendant in this action submits that Airbnb’s TOS contains a choice of law provision that provides that its agreement will be governed by California law, and Plaintiffs do not appear to contest this position. (Def.’s Mem. 5; Def.’s Reply Mem. 6; *see generally* Pls.’ Mem.)¹⁶ In any event, both California and New York, the state in which Plaintiffs reside, apply substantively similar law with respect to contract formation. *See, e.g., Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014); *Be In, Inc. v. Google Inc.*, No. 12-CV-03373, 2013 WL 5568706, at *6 (N.D. Cal. Oct. 9, 2013).

IV. Discussion

A. The Agreement to Arbitrate

Although the Internet age has certainly introduced new twists with regard to entering into contracts, the fundamental elements of contract law, including mutual assent of the parties, have not changed. *Meyer*, 868 F.3d at 75. Assent may take the form of “words or silence, action or inaction, but “[t]he conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.” *Schnabel*, 697 F.3d at 120 (quoting Restatement (Second) of Contracts § 19(2)) (alteration in original). A person can manifest assent to contractual terms even without actual notice of those terms. *See id.*

Here, both Plaintiffs in this action claim that they did not read Airbnb’s TOS and, as such, actual notice of the arbitration provision at issue in this case is not present. However, Plaintiffs can still be bound by the contractual terms if there is inquiry notice of the terms and Plaintiffs “assent[ed] to [the terms] through the conduct that a reasonable person would understand to constitute assent.” *Id.*; *see also Nicosia*, 834 F.3d at 233. A person is on inquiry notice if a “reasonably prudent offeree would be on notice of the terms at issue.” *Schnabel*, 697 F.3d at 120 (“[I]nquiry notice” is ‘actual notice of circumstances

sufficient to put a prudent man upon inquiry.’ ” (quoting *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 27 n.14 (2d Cir. 2002))).

The scenario of notice given through terms of service drafted unilaterally and presented to an Internet user online is not unique, and has been the subject of an abundance of case law addressing what is required in these circumstances to find reasonable notice of and assent to those terms. Of notable, but not necessarily outcome determinative, importance is the distinction between what have been dubbed “clickwrap” and “browsewrap” agreements. Clickwrap agreements are generally defined by the requirement that users “click” some form of “I agree” after being presented with a list of terms and conditions. *See, e.g., Nicosia*, 834 F.3d at 233; *Whitt v. Prosper Funding LLC*, No. 15-CV-136, 2015 WL 4254062, at *1, *4 (S.D.N.Y. July 14, 2015) (finding a clickwrap agreement valid and enforceable where the website required applicants to click on a box adjacent to text noting that clicking on the box constituted acceptance of certain agreements); *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 837–38 (S.D.N.Y. 2012); *Long v. Provide Commerce, Inc.*, 200 Cal. Rptr. 3d 117, 122–23 (Ct. App. 2016). Browsewrap agreements, on the other hand, are usually found “where a website’s terms and conditions are ... posted on the website via a hyperlink at the bottom of the screen” and a user’s assent is given merely by his or her use of the website and nothing more. *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1176 (9th Cir. 2014). Although clickwraps present a far simpler determination for a court given the express and unambiguous manifestation of assent through the “click” of an “I accept” button, courts have also found browsewrap agreements valid and enforceable so long as there is some form of reasonably conspicuous notice. *See id.* at 1176–78 (listing cases). In other words, browsewrap agreements are not presumptively unenforceable.

*7 Plaintiffs acknowledge that Airbnb’s modified versions of its TOS were presented to them in what “appear to be” clickwrap form. (Pls.’ Mem. 16–17.) However, Plaintiffs maintain that the screens were insufficient notice because they did not directly refer to the arbitration provision, nor did the emails concurrently sent after the 2014 and 2015 modifications advise users of the arbitration provision. (*Id.* at 17–18.) These facts alone do not mandate a finding that there is no notice, and the other facts present do support the conclusion

that there was a valid agreement to arbitrate. Specifically, after modifying the TOS, Airbnb provided the modified TOS to users the first time that any user tried to access his or her account after the modified TOS took effect. (Miller Decl. ¶ 16.) During those times, Airbnb presented an actual scroll box with the modified TOS and would not allow users to access any part of Airbnb's website or continue using the platform until they indicated their assent to the TOS. (*Id.*; see also Naude Decl. ¶ 7; Piazza Decl. ¶ 6.) At the very top of the modified TOS was text warning users to “READ THE TERMS CAREFULLY” as they contained important legal information, including a clause governing “JURISDICTION AND VENUE OF DISPUTES.” (Miller Decl. Exs. 5–8, 10–11.)¹⁷ Moreover, the evidence establishes that directly underneath the scroll box, users had to click on two buttons manifesting assent: a check box with the text “I agree to the terms and conditions of the updated Terms of Service [and other terms],” and a red button right below it, with white text, reading “I Agree” or “Agree.” (*Id.* Exs. 9–11.) These facts combine to form the very circumstances under which courts *have* found notice and a manifestation of assent.¹⁸ See, e.g., *Specht v. Netscape Commc'ns Corp.*, 150 F. Supp. 2d 585, 594 (S.D.N.Y. 2001), *aff'd*, 306 F.3d 17 (2d Cir. 2002) (“The few courts that have had occasion to consider click-wrap contracts have held them to be valid and enforceable.”); *Whitt*, 2015 WL 4254062 at *1, *4 (finding, notwithstanding the need to click on a hyperlink to access the terms, that a website requiring applicants to click on a box adjacent to text noting that clicking on the box was an acceptance of the agreement was a clickwrap agreement, and “[i]n New York, clickwrap agreements are valid and enforceable contracts”).

Although both parties agree that the 2009 TOS, operative when Plaintiff Naude first created her account, did not include an arbitration provision, Airbnb has presented evidence that Plaintiff Naude accessed her account, and therefore was presented with the modified TOS containing the arbitration clause, on May 23, 2012.¹⁹ (Miller Decl. Exs. 17–18.) Following subsequent modifications, she was again presented with the TOS upon accessing her account in 2014 and 2015. (*Id.* ¶¶ 21–23, Exs. 17–18.) Indeed, Plaintiff Naude admits that she recalls “[o]n at least one occasion ... being required to click a button indicating [acceptance of] Airbnb's updated Terms of Service and other policies.” (Naude Decl. ¶ 7.) Similarly, Plaintiff Piazza recalls that on “several occasions” after he created

his accounts, he was “required to click a button indicating that [he accepted] Airbnb's updated Terms of Service and other policies.” (Piazza Decl. ¶ 6.) In addition, Airbnb presents evidence that Plaintiff Piazza accessed one of his two accounts and was required to accept the modified TOS on May 22, 2012, May 30, 2014, August 6, 2015, and November 22, 2015. (Miller Decl. ¶ 24, Exs. 17–18.)

*8 The emails sent by Airbnb to its users upon the modification of the TOS in 2014 and 2015 are yet another form of notice provided to Plaintiffs. While the subject lines of these emails are not apparent from the exhibits attached by Airbnb to the Miller declaration, (*id.* Exs. 12–16), the 2015 and 2016 emails actually sent to Plaintiffs and attached to the Nadler declaration clearly state in the subject line that Airbnb is “updating [its] Terms of Service and Privacy Policy,” (Nadler Decl. Exs. A–C). Moreover, the substance of the emails notified users that Airbnb had updated its Terms of Service, hyperlinked a page explaining the changes, and hyperlinked a page where the TOS could be found. (Miller Decl. Exs. 12–16; Nadler Decl. Exs. A–C.) Even without the evidence provided by Airbnb, Plaintiffs both acknowledge receiving emails with “notices that Airbnb had updated its Terms of Service.” (Naude Decl. ¶ 9; Piazza Decl. ¶ 7.) Certainly when combined with the clickwrap modified agreements, these emails gave inquiry notice of Airbnb's arbitration provision. See *Starkey v. G Adventures, Inc.*, 796 F.3d 193, 195–97 (2d Cir. 2015) (finding that emails containing a hyperlink and language advising plaintiff to click on the hyperlink sufficiently directed the plaintiff's notice to the terms and conditions); *Sacchi*, 2015 WL 765940, at *3 (finding that there was sufficient notice for an amended agreement newly inserting arbitration term when it was posted to Verizon's website and also referred to in an email sent to Plaintiff);²⁰ cf. *Schnabel*, 697 F.3d at 123 & n.14 (finding insufficient notice by email that was sent after enrollment in a service of an online consumer business, which presented an unclear subject line without mention of the terms and twelve paragraphs of membership and benefits information in the body of the email before reciting the terms of service). The fact that Plaintiffs failed to actually read the TOS on those occasions, or on any other occasion, does not help them. See, e.g., *Specht*, 306 F.3d at 30 (“It is true that ‘[a] party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing.’ ” (alteration in original) (quoting *Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc.*, 107 Cal. Rptr. 2d 645, 651 (Ct. App. 2001)));²¹

see also *Starkey*, 796 F.3d 193 (finding, notwithstanding plaintiff's claim that she never clicked on the hyperlinks or read the terms, that emails sufficiently directed her attention to the terms vis-à-vis the hyperlink and language advising her to click on the hyperlink).

Given that Airbnb's broad arbitration clause applies retroactively, the arbitration clauses in the modified versions of the TOS are sufficient to govern this dispute and refer the entire matter to arbitration, including any claims of Plaintiff Naude that arose when she first signed up for Airbnb in 2009 prior to the incorporation of any arbitration provision.²² See *Sacchi*, 2015 WL 765940, at *9 ("Courts generally 'give retroactive application to broad arbitration clauses ...' " (citation omitted)). Each version of the TOS between 2011 and 2015 contained a broadly worded arbitration clause stating that "*any dispute, claim or controversy arising out of or relating to these Terms or the breach, termination, enforcement, interpretation or validity thereof ... will be settled by binding arbitration.*" (Miller Decl. ¶ 13, Exs. 4–8 (emphasis added).) Courts have held that arbitration clauses with similarly broad language apply retroactively. See *Sacchi*, 2015 WL 765940, at *9 (holding that "[t]he Second Circuit has held that an arbitration clause that applied by its terms to 'any controversy' between members covered claims that accrued before the members entered into the agreement" (quoting *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1212 (2d Cir. 1972))); see also *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 99 (2d Cir. 1999).²³

*9 Even without the notice provided after the terms of service were modified, I find that Airbnb's original sign-up procedure was sufficient inquiry notice of the terms of service which—at least during the time that Plaintiff Piazza created his account—included an arbitration provision. As Plaintiff Naude signed up during a time when the TOS did not include the arbitration provision, I do not look to the circumstances surrounding her initial sign-up, but rather consider only the notice provided during Plaintiff Piazza's initial sign-up for his first account in 2011.²⁴ Although Plaintiffs and Defendant disagree about whether the initial sign-up procedure established a "clickwrap" or "browsewrap" agreement, I do not have to determine in which specific bucket the original presentation of the TOS falls in order to determine that Plaintiff Piazza had notice of the arbitration provision.

Nevertheless, I note that while Airbnb's initial sign-up procedure was not a classic clickwrap in the sense that the terms were presented by hyperlink instead of being shown to the user and there was no clear button affirmatively stating "I accept," it also was not a "true browsewrap" either. The resulting "hybrid agreement" weighs in favor of valid notice, as courts have generally been "more willing to find the requisite notice for constructive assent where the browsewrap agreement resembles a clickwrap agreement—that is, where the user is required to affirmatively acknowledge the agreement before proceeding with use of the website." *Nguyen*, 763 F.3d at 1176–77 (citing *Zaltz v. JDATE*, 952 F. Supp. 2d 439, 451–52 (E.D.N.Y. 2013)); see also *Fteja*, 841 F. Supp. 2d at 838–40 (explaining, using Judge Leval's oft-quoted analogy in *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 401 (2d Cir. 2004), that the situation was like one in which a website maintains a "roadside fruit stand displaying binds of apples," and there are signs saying that "[b]y picking up this apple, you consent to the terms of sale by this fruit stand. For those terms, turn over the sign," and noting that in those circumstances "courts have not hesitated in applying the terms against the purchaser"); *Swift*, 805 F. Supp. 2d at 911–12 ("Cases addressing modified clickwrap agreements more similar to the one at issue here, where a plaintiff was provided notice and an opportunity to review terms of service prior to acceptance, have held them sufficient to put a plaintiff on notice of the terms to which she was assenting.").

In making the ultimate determination that Airbnb provided inquiry notice during Plaintiff Piazza's initial sign-up, I look to "whether the design and content of [the] webpage rendered the existence of the terms reasonably conspicuous." *Nicosia*, 834 F.3d at 233. Here, the design and content of the website are such that Plaintiff Piazza was on reasonably conspicuous notice of the arbitration provision.

Plaintiff Piazza signed up for his first account on August 21, 2011. (Miller Decl. ¶ 7.) Depending on the algorithm assigned to the particular user, on the date that Plaintiff Piazza signed up for his account, one of two screens would have appeared. (*Id.* Ex. 2.) I find that both screens contained a limited amount of text in clear font size and color. (*Id.*) In one screen, directly underneath text directing users to "Connect with Facebook" or "Create an account with your email address," written

in similar, if not the same, font size was text warning users that “By clicking ‘Connect with Facebook,’ you confirm that you accept the Terms of Service.” (*Id.*) “Terms of Service” was highlighted with blue font and an underline, indicating a hyperlink that took users directly to the TOS. Although there were two other hyperlinks on the screen, one simply informed users that they could “Create an account with your email address” and the other, which appeared in a separate box below the box allowing persons to sign up, simply allowed existing Airbnb members to “Sign In Now.” (*Id.*) The second screen that Plaintiff Piazza may have seen upon signing up was substantially similar, except that instead of giving the option to “Create an account with your email address,” the screen provided text boxes for users to actually insert their first name, last name, email address, password, and password confirmation. (*Id.*) Below that text was a button allowing users to “Create Account.” (*Id.*) Again, underneath that text, was a sentence, in similar if not the same font size, telling users that “By clicking ‘Sign Up’ or ‘Connect with Facebook,’ you confirm that you accept the Terms of Service.” (*Id.*)²⁵ Here again, “Terms of Service” was highlighted with blue font, indicating a hyperlink that took users directly to the TOS. (*Id.*) No other hyperlinks appeared in the immediate vicinity, other than the hyperlink allowing current members to sign in. (*Id.*)²⁶

*10 These facts are easily distinguishable from those cases where browsewraps have been deemed invalid. *Cf. Nicosia*, 834 F.3d at 237–38 (finding that reasonable minds could disagree as to the reasonableness of notice where there were between fifteen and twenty-five links on the order page, various text was displayed in at least four font sizes and six colors alongside multiple buttons and promotional advertisements, and the customers’ personal address, credit card information, shipping option, and purchase summary sufficiently distracted the user from whatever effect the notification did have); *Nguyen*, 763 F.3d at 1174, 1178 & n.1 (refusing to enforce an arbitration agreement where the notice was predicated on a hyperlink located on the bottom left-hand corner of every page on the website, which appeared next to other hyperlinked terms); *Specht*, 306 F.3d at 20, 23, 29–30, 32 (finding a reasonably prudent Internet user would not have notice or manifest assent by downloading software when, to discover the existence of the TOS, the users would have to scroll down a webpage to a “submerged” screen located below the download button); *Long*, 200

Cal. Rptr. 3d at 120 (finding notice insufficient where the hyperlink was located at the bottom of each webpage, with light green typeface on lime green background, next to fourteen other capitalized and underlined hyperlinks of the same color, font, and size).²⁷

As a result of the foregoing, I find that Airbnb put Plaintiffs on reasonably conspicuous notice of the terms of the arbitration provision and that Plaintiff Piazza’s actions in signing up, as well as Plaintiffs’ explicit agreement to the modifications and continued use of Airbnb, manifested their assent. *See, e.g., Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 402–03 (2d Cir. 2004) (emphasizing that the defendant visited the computers daily, saw the terms daily, and acknowledged awareness of the terms, and further noting that the presence of an “I agree” icon is not essential in all circumstances to show assent); *Fteja*, 841 F. Supp. 2d at 835, 838–40 (enforcing forum selection clause when agreement was not a true browsewrap and the hyperlinked terms of service were next to the statement that “By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service”).

Plaintiffs argue in the alternative that the placement of the arbitration clause toward the end of a long agreement necessarily means that Airbnb did not provide notice. (Pls.’ Mem. 18–20.) This argument is equally unpersuasive. Regardless of the placement of the arbitration clause, Plaintiffs do not dispute that, beginning in May 2012, the TOS was preceded by a capitalized admonition warning users to read the terms carefully as they contained important legal information, including a clause governing “JURISDICTION AND VENUE OF DISPUTES.” (Miller Decl. Exs. 5–8.) It is also undisputed that Plaintiffs would have been confronted by that sentence when they attempted to access their respective accounts after the TOS had been modified. (*Id.* ¶¶ 16–19, Exs. 9–11; *see also* Naude Decl. ¶ 7; Piazza Decl. ¶ 6.) Moreover, in the emails sent by Airbnb and received by Plaintiffs in 2014 and 2015, Airbnb told users that they “should review the documents in full on [their] own.” (Miller Decl. Exs. 12–16.) Finally, the arbitration provision could at all times be found under a bolded heading, titled “Dispute Resolution.” (*Id.* Exs. 4–8.) The facts here are thus quite unlike those in the cases cited by Plaintiffs with respect to this issue. *See, e.g., Bruni v. Didion*, 73 Cal. Rptr. 3d 395 (Ct. App. 2008) (finding that an arbitration clause was an unconscionable surprise where the booklet containing the arbitration provision—

which in turn was indistinguishable and part of a thirty-page paper booklet—was in turn buried in a stack of purchase and sale documents, some plaintiffs did not even receive the booklet until after signing, and the court found “most important” that the plaintiffs were not required to sign or initial the booklet, but were only asked to sign a separate, one-page application); *see also Brookdale Inn & Spa v. Certain Underwriters at Lloyds, London*, No. 13-CV-2559, 2014 WL 116442, at *3–4 (N.D. Cal. Jan. 13, 2014) (distinguishing *Bruni* and finding an arbitration clause that was no more or less prominent than the other contractual terms and appeared on page twelve of thirty-four of a policy conscionable). Indeed, the *Meyer v. Kalanick* district court case cited frequently by Plaintiffs—while also distinguishable in terms of the facts leading the district court to conclude that notice was not given, *see* 200 F. Supp. 3d 408 (S.D.N.Y. 2016)—was recently overturned by the Second Circuit, *see Meyer*, 868 F.3d at 75. In its decision, the Second Circuit found that the arbitration clause—which was found on page seven of a nine-page document and was presented via a two-step process on the mobile application—still provided “reasonably conspicuous notice.” *Id.* at 77–79. In light of Plaintiffs’ heavy reliance on the district court’s opinion in *Meyer v. Kalanick*, its reversal considerably undermines their argument that they did not receive reasonably conspicuous notice.

B. The Enforceability of the Arbitration Clause

*11 Notwithstanding the liberal policy favoring arbitration, the FAA still permits the invalidation of an otherwise valid arbitration clause when certain “generally applicable contract defenses, such as fraud, duress, or unconscionability” apply. *See Concepcion*, 563 U.S. at 339 (citation omitted). Plaintiffs raise two issues they claim impact the enforceability of Airbnb’s arbitration clause: fraudulent inducement and unconscionability. These arguments are not supported by the facts and are, in any event, unpersuasive. I address each in turn below.

1. Fraudulent Inducement of the Arbitration Provision

Plaintiffs set forth their facts supporting a fraudulent inducement claim in a single, brief paragraph, arguing that Defendant surreptitiously inserted an arbitration provision into its TOS materially altering the rights of

users, and buried the arbitration provision deep within a voluminous document without drawing the users’ attention to that provision. (Pls.’ Mem. 21.) Putting aside the fact that Plaintiff Piazza initially signed up for his account after the date that the arbitration provision was added—a fact that makes Plaintiff Piazza’s assertion of this argument more flawed and unpersuasive—I find that these arguments fail with regard to both Plaintiffs.

If the claim involves fraudulent inducement of an arbitration provision as opposed to the contract itself, a court as opposed to the arbitrator may decide the claim. *See Buckeye*, 546 U.S. at 445. However, Plaintiffs do not provide any case law supporting that fraudulent inducement exists in this case. In fact, in the one case cited by Plaintiffs where fraudulent inducement of an arbitration provision was found sufficiently colorable to send the parties to trial, the case involved a standalone alternative dispute resolution document that was written in English and given to a non-English speaking plaintiff. *See Caseres v. Texas de Brazil (Orlando) Corp.*, No. 13-CV-1001, 2013 WL 5921539, at *1–2 (M.D. Fla. Nov. 4, 2013). Furthermore, the court in that case cited three cases where fraud was found, each involving improper or allegedly improper translation of agreements. *Id.* at *6. Similar facts do not exist here. The underlying facts supporting the holdings of these courts are not surprising since a fraudulent inducement claim must be premised on some form of actual reliance. Here, Plaintiffs Naude and Piazza, unlike the plaintiffs in these cases, are not relying on some faulty translation; rather, they argue that they did not even read the TOS, and do not cite to any evidence to show that Airbnb misleadingly communicated the terms of the TOS prior to Plaintiffs’ signing. *See Hinesley v. Oakshade Town Ctr.*, 37 Cal. Rptr. 3d 364, 367 (Ct. App. 2005) (explaining that fraudulent inducement is a “subset of the tort of fraud,” which requires a misrepresentation, scienter, intent to induce reliance, justifiable reliance, and resulting damage, and that fraudulent inducement occurs when the promisor knows what he is signing but his consent is induced by fraud). For these reasons and given that Plaintiffs’ fraudulent inducement claim here rests solely on the same faulty foundation upon which they base some of their arguments as to lack of notice, I find that the fraudulent inducement argument fails.

2. Unconscionability of the Arbitration Provision

Plaintiffs' final claim is that the arbitration provision contained in Airbnb's TOS is unconscionable. To find an arbitration clause unconscionable, I must find both procedural and substantive unconscionability. *See, e.g., Merkin v. Vonage Am., Inc.*, 639 F. App'x 481 (9th Cir. 2016) ("Under California law, a contract must be both procedurally and substantively unconscionable to be rendered invalid." (citations omitted)); *Mazzola v. Roomster Corp.*, 849 F. Supp. 2d 395, 406 (S.D.N.Y. 2012); *Baltazar v. Forever 21, Inc.*, 367 P.3d 6, 11 (Cal. 2016) ("[A] finding of procedural unconscionability does not mean that a contract will not be enforced, but rather that courts will scrutinize the substantive terms of the contract to ensure they are not manifestly unfair or one-sided." (alteration in original) (citation omitted)). Plaintiffs bear the burden of proving unconscionability. *See Smith v. VMware, Inc.*, No. 15-CV-03750, 2016 WL 54120, at *3 (N.D. Cal. Jan. 5, 2016).

*12 One common definition of unconscionability as it relates to contract formation is the "absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Sanchez v. Valencia Holding Co., LLC*, 353 P.3d 741, 748 (Cal. 2015) (internal quotation marks omitted) (citation omitted). This formulation divides unconscionability into a procedural and substantive element, with the first addressing "oppression or surprise due to unequal bargaining power," and the second addressing "overly harsh or one-sided results." *Id.*; *see also Baltazar*, 367 P.3d at 11. "Oppression" is defined as an "inequality of bargaining power resulting in no real negotiation and absence of meaningful choice", and "surprise" as to what occurs when "the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms." *Dean Witter Reynolds, Inc. v. Superior Court*, 259 Cal. Rptr. 789, 795 (Ct. App. 1989) (citations omitted). Procedural and substantive unconscionability do not need to be present to the same degree, and courts invoke a "sliding scale" to determine whether a contract or arbitration provision is, as a whole, unenforceable, taking into account the relevant factors supporting each type of unconscionability. *See Sanchez*, 353 P.3d at 748.

California law strongly supports the notion that substantive unconscionability is "concerned not with 'a simple old-fashioned bad bargain,' but rather terms that are 'unreasonably favorable to the more powerful

party,' " which includes "terms that impair the integrity of the bargaining process or otherwise contravene the public interest or public policy; terms (usually of an adhesion or boilerplate nature) that attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law, fine-print terms, or provisions that seek to negate the reasonable expectations of the nondrafting party, or unreasonably and unexpectedly harsh terms having to do with price or other central aspects of the transaction." *Id.* (citations omitted) (emphasis added). Specifically, and given that "[n]ot all one-sided contract provisions are unconscionable," when looking at substantive unconscionability, the unconscionability doctrine is concerned with contractual terms that are "overly harsh," "unduly oppressive," "unreasonably favorable," or "so one-sided as to shock the conscience." *Id.* (emphasis in original); *see also Peng v. First Republic Bank*, 162 Cal. Rptr. 3d 545, 550 (Ct. App. 2013) (noting that some courts have imposed a higher standard than "merely one-sided or overly harsh," that is, that the terms must be "so one-sided as to shock the conscience" (citation omitted) (emphasis in original)). The unconscionability of a contractual provision is a highly contextual inquiry, with the ultimate issue being "whether the terms of the contract are sufficiently unfair, in view of all of the relevant circumstances, that a court should withhold enforcement." *Sanchez*, 353 P.3d at 749.

Here, Plaintiffs claim that the arbitration provision is unconscionable for myriad reasons. With respect to procedural unconscionability, Plaintiffs first refer to the factual circumstances surrounding Airbnb's insertion of the arbitration provision into the TOS in 2011—namely, the insertion of the clause without notification to existing users, the lack of any bolding or capitalization to draw the attention of new users, and the alleged "hidden" nature of the clause. (Pls.' Mem. 22.) Presumably, Plaintiffs' argument focuses on the definition of surprise as occurring when "the terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms." *Dean Witter Reynolds*, 259 Cal. Rptr. at 795. In addressing these arguments, I note again that the arbitration provision was present when Plaintiff Piazza first signed up for his account and that the revised TOS containing the arbitration clause was presented to Plaintiff Naude when she attempted to access her account on May 22, 2012. In any event, beginning in 2011, the arbitration clause was set off by a bolded heading titled "Dispute Resolution," with various sections of information—

including “Arbitration Rules and Governing Law” and “Arbitration Process”—underlined. (Miller Decl. Exs. 4–8.) Furthermore, beginning in 2012, the TOS included a capitalized admonition at the very outset that referred to “A CLAUSE THAT GOVERNS THE JURISDICTION AND VENUE OF DISPUTES,” (*id.* Exs. 5–8), minimizing any impact that the location of the arbitration provision itself would have. Finally, although the 2011 modification did not present such a warning at the top of the agreement, California courts have found that parties are “under no obligation to highlight the arbitration clause of [a] contract, nor [are they] required to specifically call that clause to [the other party’s] attention.” *Sanchez*, 353 P.3d at 751 (noting that a state law to the contrary would be preempted by the FAA).

***13** Plaintiffs’ second argument of procedural unconscionability relates to the unavailability of the arbitration rules. (Pls.’ Mem. 22–23.) However, this fact alone does not necessitate a finding of procedural unconscionability. *See, e.g., Lane v. Francis Capital Mgmt. LLC*, 168 Cal. Rptr. 3d 800, 812 (Ct. App. 2014) (holding that the failure to attach a copy of the AAA rules did not render the agreement procedurally unconscionable, as those were easily available on the Internet and plaintiff did not lack the means or capacity to locate and retrieve a copy of the rules); *Peng*, 162 Cal. Rptr. 3d at 551–52 (finding case law cited by the plaintiffs on the failure to attach arbitration rules unpersuasive); *Smith*, 2016 WL 54120, at *3 (noting it was “difficult to believe” that the plaintiff, a software executive, would have trouble locating the AAA rules). In fact, the one case upon which Plaintiffs rely, *Harper v. Ultimo*, 7 Cal. Rptr. 3d 418 (Ct. App. 2003), was later distinguished by the California Court of Appeals, which emphasized that *Harper* involved the Better Business Bureau arbitration rules, which precluded the consumer from obtaining damages and substantively limited the defendant’s exposure. *See Peng*, 162 Cal. Rptr. 3d at 551–52; *see also Harper*, 7 Cal. Rptr. 3d at 423 (emphasizing that “there is not even the possibility of full relief”). Plaintiffs have not alleged that the AAA rules are similar in any way to the rules discussed in *Harper*.

Airbnb’s TOS is a standard adhesion contract, which does suggest some level of procedural unconscionability. *See Baltazar*, 367 P.3d at 11 (explaining that “[o]rdinary contracts of adhesion, although they are indispensable facts of modern life that are generally enforced, contain

a degree of procedural unconscionability even without any notable surprises, and ‘bear within them the clear danger of oppression and overreaching’ ” (citations omitted)). However, this is not sufficient to invalidate the arbitration provision. *See, e.g., Lane*, 168 Cal. Rptr. 3d at 810–11; *Marin*, 107 Cal. Rptr. 2d at 655 (stating that adhesive contracts are not “per se oppressive”). Although Airbnb’s arbitration provision could be viewed as somewhat procedurally unconscionable because it is adhesive, the factual circumstances present do not rise to the level of being an unfair surprise or unduly oppressive, such that they warrant invalidation of the arbitration provision. *See Concepcion*, 563 U.S. at 346–47 (“[T]he times in which consumer contracts were anything other than adhesive are long past.”).

In defense against procedural unconscionability, Defendant also cites case law determining that contracts that concern nonessential activities cannot be procedurally unconscionable. *See, e.g., Mazzola*, 849 F. Supp. 2d at 406–07; *Bassett v. Elec. Arts Inc.*, No. 13-CV-4208, 2015 WL 1298644, at *11 (E.D.N.Y. Feb. 9, 2015), *report and recommendation adopted*, 93 F. Supp. 3d 95 (E.D.N.Y. 2015); *Pokrass v. DirecTV Grp., Inc.*, No. 07-CV-423, 2008 WL 2897084, at *6 (C.D. Cal. July 14, 2008). I note that the majority of the case law cited involves recreational nonessential activities. *See, e.g., Pokrass*, 2008 WL 2897084, at *7; *Bassett*, 2015 WL 1298644, at *11. Defendant does, however, cite one case where the nonessential activity is not recreational. *See Mazzola*, 849 F. Supp. 2d at 406–07 (involving a website that helps match individuals with potential roommates). Although the instant case is somewhat different in that Airbnb’s hosts use the website as a source of business-related income, I still find *Mazzola* informative and note that Plaintiffs did have the option of “simply foregoing the activity.”²⁸ In fact, Plaintiff Naude had her own website renting out her apartment spaces prior to joining Airbnb. (Nadler Decl. Exs. E–F; Naude Decl. ¶ 2; Def.’s Mem. 14 n.3.) In addition, Plaintiffs could have opted to use other websites that offer similar apartment rental services, such as craigslist.com.

***14** With respect to substantive unconscionability, California courts have presented some examples of what is considered “overly harsh,” “unduly oppressive,” or “so one-sided so as to shock the conscience,” such that substantive unconscionability can be found. *See Mikhak v. Univ. of Phoenix*, No. C16-0090, 2016 WL

3401763, at *8 (N.D. Cal. June 21, 2016) (“Substantive unconscionability focuses on the ‘terms of the agreement and whether those terms are so one-sided as to shock the conscience.’ ” (citation omitted)). Circumstances that may merit a finding of substantive unconscionability include “terms that impair the integrity of the bargaining process or otherwise contravene the public interest or public policy; terms (usually of an adhesion or boilerplate nature) that attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law, fine-print terms, or provisions that seek to negate the reasonable expectations of the nondrafting party, or unreasonably and unexpectedly harsh terms having to do with price or other central aspects of the transaction.” *Baltazar*, 367 P.3d at 11–12.

With respect to substantive unconscionability, Plaintiffs argue only that the arbitration clause suffers from a lack of mutuality. (Pls.’ Mem. 23–25.) In support of this claim, Plaintiffs focus on two aspects of the clause: first, while the clause allows either party the ability to seek injunctive or equitable relief in court to prevent various intellectual property issues, these are in reality claims more likely to be brought by Airbnb; and second, the class action waiver only really targets customers, as Airbnb is not likely to bring a class action lawsuit.²⁹ To take on the second issue first, finding Airbnb’s arbitration clause substantively unconscionable essentially because it contains a class action waiver would contravene the intent of *Concepcion*, which found that the FAA prohibits conditioning the enforceability of certain arbitration agreements on the availability of class-wide arbitration procedures. *Concepcion*, 563 U.S. at 336. In fact, the drafter of the arbitration provision in *Concepcion* was, like in most consumer contracts, a major company. To thus find that Airbnb’s arbitration provision is unconscionable on this basis would be inconsistent with *Concepcion* and must be rejected.

Plaintiffs’ first argument—that the arbitration provision is substantively unconscionable because Airbnb is more likely to bring an action for injunctive or equitable relief with respect to intellectual property issues—is also unpersuasive, and certainly does not bring the provision to the level of “shocking the conscience.” *Cf. Peng*, 162 Cal. Rptr. 3d at 553 (noting that substantive unconscionability “typically is found in the employment context when the arbitration agreement is ‘one-sided’ in favor of the employer without sufficient justification, for example,

when ‘the employee’s claims against the employer, but not the employer’s claims against the employee, are subject to arbitration’ ” (citations omitted)); *Mikhak*, 2016 WL 3401763, at *13 (holding that the arbitration agreement had “only minor substantive unconscionability” given a unilateral modification clause). Particularly given the otherwise mutual application of the claims subject to arbitration to both Airbnb and its users, I do not find that the separate carve-out for these intellectual property claims to be substantively unconscionable. *See Saincome v. Truly Nolen of Am., Inc.*, No. 11-CV-825, 2011 WL 3420604, at *7–8 (S.D. Cal. Aug. 3, 2011) (holding that to find a neutrally worded employer-employee arbitration agreement substantively unconscionable because it is more likely for the employee to bring a particular type of claim would “be to render almost all such agreements automatically unenforceable, regardless of how they are drafted”).

***15** Since any argument that the arbitration clause at issue here is procedurally or substantively unconscionable is unpersuasive and not supported by the case law, I find that the arbitration clause in Airbnb’s TOS is not unconscionable.

C. To Stay or Dismiss

Although Defendant urges that I dismiss this action, I find that a stay, rather than dismissal, is appropriate given the Second Circuit’s holding in *Katz v. Celco Partnership*, 794 F.3d 341 (2d Cir. 2015), and subsequent case law addressing the same issue. In *Katz*, the Second Circuit, citing Section 3 of the FAA, found that “a stay of proceedings [is] necessary after all claims have been referred to arbitration *and a stay requested*.” *Id.* at 345 (emphasis added); *see also* 9 U.S.C. § 3 (a district court, upon being satisfied that an issue is arbitrable, “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”). Although the Second Circuit only decided the issue in the context of the moving party having requested the stay, the Second Circuit opted to stay rather than dismiss the proceedings for reasons applicable here, including that the dismissal of an arbitrable matter would convert the decision into an appealable order, thus controverting the FAA’s underlying policy “to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.” *Id.* at 346

(quoting *Moses H. Cone*, 460 U.S. at 22); *see, e.g., Virk v. Maple-Gate Anesthesiologists, P.C.*, No. 15-CV-513, 2016 WL 3583248, at *1 (2d Cir. July 1, 2016) (applying *Katz* in finding that the district court lacked discretion to dismiss the case where the defendant's motion to compel arbitration sought either a stay or dismissal); *Zambrano v. Strategic Delivery Sols., LLC*, No. 15-CV-8410, 2016 WL 5339552, at *10 (S.D.N.Y. Sept. 22, 2016) (finding that, where the defendants sought a dismissal rather than a stay, the court had discretion to decide whether to stay or dismiss but decided to stay the action based on the reasoning articulated in *Katz*). As a result, I exercise my discretion to impose a stay pending the outcome of arbitration.

V. Conclusion

For the foregoing reasons, Defendant's motion to compel arbitration and dismiss the action is GRANTED in part and DENIED in part, and this action is STAYED pending the outcome of arbitration. The Clerk of the Court is respectfully directed to close this motion on the docket.

SO ORDERED.

All Citations

Slip Copy, 2018 WL 583122

Footnotes

- 1 "NauDe Decl." refers to the August 20, 2016 Declaration of Sylvie Naude, Exhibit L to the August 22, 2016 Declaration of Jeffrey M. Norton, (Doc. 23), filed in support of Plaintiffs' Opposition to Defendant's Motion to Compel Arbitration. "Miller Decl." refers to the July 22, 2016 Declaration of Kyle Miller, (Doc. 21), filed in support of Defendant's Motion to Compel Arbitration.
- 2 "Plazza Decl." refers to the August 20, 2016 Declaration of Francesco Plazza, Exhibit M to the August 22, 2016 Declaration of Jeffrey M. Norton, (Doc. 23), filed in support of Plaintiffs' Opposition to Defendant's Motion to Compel Arbitration.
- 3 "Compl." refers to the Complaint filed in this action on February 11, 2016. (Doc. 1.)
- 4 Although Plaintiffs assert that Miller's declaration is "unreliable" and otherwise state that they do not concede that the screens presented by Miller "are accurate representations of the sign up screens presented to them," (Pls.' Mem. 12, 16 n.11), I do not agree that Miller's failure to include an alternative sign-up screen from 2016, a screen that itself was not tied to the date Plaintiffs accessed the site, is reason to disregard his entire declaration. In fact, even if I were to evaluate Plaintiffs' 2016 sign-up screen as the operative screen that appeared when Plaintiffs first registered for their accounts, this would not change my analysis of either the impact of the Terms of Service modifications—the content of which Plaintiffs do not dispute—or the notice provided to Plaintiff Plazza by the initial sign-up. "Pls.' Mem." refers to Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Compel Arbitration, filed on August 22, 2016. (Doc. 22.)
- 5 "Def.'s Mem." refers to Defendant's Memorandum of Law in Support of Defendant's Motion to Compel Arbitration, filed on July 22, 2016. (Doc. 19.)
- 6 Although Defendant did not provide a copy of the 2009 TOS, the August 15, 2011 version of the TOS contained a modification provision reserving to Airbnb the right to modify the TOS and informing users that "[i]f the modified Terms are not acceptable to you, your only recourse is to cease using the Site, Application and Services." (Miller Decl. Ex. 4.)
- 7 Although the May 22, 2012 version of the TOS inexplicably removed the clause "except that each party retains the right to seek injunctive or other equitable relief ... or other intellectual property rights," (Miller Decl. Ex. 5), this clause returned to the TOS with precisely the same wording in the April 7, 2014 version, (*id.* Ex. 6).
- 8 Plaintiffs note that the later versions of the TOS refer to the Supplementary Procedures for Consumer Related Disputes, notwithstanding that those procedures were no longer in effect as of September 1, 2014. (Norton Decl. ¶ 5.) Although this apparent error does not alter the legal analysis, I note that I find an agreement to arbitrate based on events occurring prior to September 1, 2014.
- 9 One difference exists between this wording, which was present in the August 15, 2011, May 22, 2012, April 7, 2014, and July 6, 2015 versions of the TOS, and the wording in the June 30, 2014 version of the TOS. This difference is not material to my consideration of the current motion.
- 10 Certain differences exist between this wording, which was present in the April 7, 2014, June 30, 2014, and July 6, 2015 versions of the TOS, and the wording in the May 22, 2012 version of the TOS. These differences are not material to my consideration of the current motion.
- 11 Although Plaintiffs submit that the wireframe images are "inaccurate or, at least, misleading," they do so based only on the fact that Plaintiffs' counsel was able to retrieve a screenshot of an alternate sign-up screen in 2016. (Pls.' Mem. 12.)

- Therefore, Plaintiffs conclude that there is no way to state with “any degree of certainty which sign-in screen Plaintiffs viewed.” (*Id.*) This argument is not compelling. The availability of an alternate sign-up screen does not mean that the archived sign-up screens attached to the Miller declaration are either made up or inaccurate.
- 12 The second alternate sign-up screen told users they could “Sign up with [Facebook](#) or [Google](#),” hyperlinking “[Facebook](#)” and “[Google](#),” or provide their first name, last name, email address, password, and password confirmation, and thereafter click a red button stating “Sign up.” (Miller Decl. Ex. 3.) Again, directly above the red “Sign up” button was the text “By signing up, I agree to Airbnb’s [Terms of Service](#), [Privacy Policy](#), [Guest Refund Policy](#), and [Host Guarantee Terms](#).” (*Id.*) The Terms of Service, Privacy Policy, Guest Refund Policy, and Host Guarantee Terms were all separately hyperlinked. (*Id.*)
- 13 “Pls.’ Pre-Mot. Letter” refers to the March 31, 2016 letter submitted to me in advance of the April 28, 2016 pre-motion conference. (Doc. 10.)
- 14 “Nadler Decl.” refers to the July 22, 2016 Declaration of Michael L. Nadler filed in support of Defendant’s Motion to Compel Arbitration. (Doc. 20.)
- 15 Plaintiffs point out that Plaintiff Naude’s August 16, 2015 “consent” purportedly occurred despite the fact that she claims to have been restricted from using her Airbnb account in March 2014, but do not otherwise dispute the validity of that record. (Pls.’ Mem. 11.) If Plaintiff Naude was restricted from using her Airbnb account in March 2014 and has not had any transactions through her Airbnb account since that time, (Naude Decl. ¶ 8), then it could be argued that she would not have standing to bring any claims after March 2014 and would not be an adequate class representative for any class members with claims accruing after March 2014.
- 16 “Def.’s Reply Mem.” refers to Defendant’s Corrected Reply Memorandum of Law in Support of its Motion to Compel Arbitration. (Doc. 26.)
- 17 Although the same warning does not appear in the screenshot of the May 22, 2012 scroll-through box attached as Exhibit 9 to the Miller declaration, the same sentence does appear in the actual May 22, 2012 TOS, attached as Exhibit 5 to the Miller declaration.
- 18 These facts further distinguish this case from the single case cited by Plaintiffs, a Maryland decision that is not binding on me. *See DirecTV v. Mattingly*, 829 A.2d 626, 628 (Md. 2003) (finding failure to provide sufficient notice when petitioner did not “discuss, mention, or even highlight any change in the customer agreement,” which was in turn required by the notice provisions of the initial customer agreement).
- 19 Although Plaintiffs do not recall certain facts related to seeing, being provided with, or being required to agree to Airbnb’s TOS during the initial registration process or at certain points thereafter, (Naude Decl. ¶¶ 4–5; Piazza Decl. ¶ 3), Plaintiffs’ lack of recollection does not create a meaningful dispute of fact. *Cf. Moule v. United Parcel Serv. Co.*, No. 16-CV-00102-JLT, 2016 WL 3648961, at *7 (E.D. Cal. July 7, 2016) (“Significantly, under California law, Plaintiff cannot avoid the terms of a contract by asserting a representative failed to read the UPS Terms when provided with an opportunity to do so, or that he does not recall receiving notice of the UPS Terms.”); *Gonder v. Dollar Tree Stores, Inc.*, 144 F. Supp. 3d 522, 528 (S.D.N.Y. 2015) (“A mere assertion that one does not recall signing a document does not, by itself, create an issue of fact as to whether a signature on a document is valid—especially in the absence of any evidence the document was fabricated.”).
- 20 I note that *Sacchi* involved an email where the body of the email referred to the arbitration provision, whereas Airbnb’s emails did not refer to the arbitration clause. However, like *Sacchi*, Airbnb’s subject line clearly indicated the content of the emails and, in any event, the Court in *Sacchi* mitigated the import of the above-mentioned distinction when finding that, with respect to the argument that the notices failed to mention the ban on class-wide arbitration, “[n]otice of the terms of the agreement is sufficient where the offeree is given ‘adequate notice of the existence of additional documents’ that contain those terms.” 2015 WL 765940, at *8 (citations omitted) (applying New Jersey law). Moreover, *Sacchi* involved a case where assent was based simply on continued acceptance of the services, and did *not* involve a plaintiff who expressly consented to the modified terms by clicking “I agree” after being presented with those terms.
- 21 Although the Court in *Specht* noted an exception when the writing does not appear to be a contract and the terms are not called to the attention of the recipient, the Court found that the contractual nature was not obvious specifically because the plaintiffs were responding to an offer that “did not carry an immediately visible notice of the existence of license terms or require unambiguous manifestation of assent to those terms,” 306 F.3d at 31, which are not the circumstances present here. To the contrary, Airbnb’s screens clearly presented the TOS and Airbnb even informed its users numerous times that the TOS affected their legal rights, most particularly in the scrollable screens presented after the TOS was modified. (*See, e.g.*, Miller Decl. Exs. 5–11.) Moreover, and contrary to the Plaintiffs’ arguments, (Pls.’ Mem. 20), courts have found the phrase “Terms of Service” sufficient to indicate notice of a contract. *See, e.g.*, *Meyer*, 868 F.3d at 79

(enforcing arbitration clause found in Terms of Service indicated by hyperlink); *Fteja*, 841 F. Supp. 2d 829 (same). The cases cited by Plaintiffs are not to the contrary, but rather indicate that the hyperlink is not enough in and of itself to notify a user of the terms. See, e.g., *Long*, 200 Cal. Rptr. 3d at 127 (noting that the hyperlink “may” not be enough to alert a reasonably prudent user to click on it). In any event, unlike the cases cited by Plaintiffs, the phrase “Terms of Service” was only hyperlinked next to other policies and terms in the sign-up page beginning in 2014, which is after the time period that Plaintiffs both signed up for their initial accounts and agreed to modifications. (Miller Decl. Exs. 1–3.)

- 22 I note that Defendant only briefly addresses whether the scope of the arbitration clause encompasses the claims alleged by Plaintiffs, (Def.’s Mem. 10), and Plaintiffs do not address the issue at all. In any event, I find that Defendant’s broadly worded arbitration provision does cover this dispute.
- 23 Although the *Smith/Enron* case was distinguished by the Second Circuit later on, the Court there merely noted that it would not read an arbitration clause to have an expansive temporal scope without looking first at whether the parties intended the arbitration clause to cover the dispute, and ultimately found in the negative because the parties’ contractual positions and relationship had changed over time in a way that impacted arbitrability. See *Holick v. Cellular Sales of N.Y., LLC*, 802 F.3d 391, 398 (2d Cir. 2015); see also *Lai Chan v. Chinese-Am. Planning Council Home Attendant Program, Inc.*, No. 15-CV-9605, 2016 WL 3004518, at *4–5 (S.D.N.Y. Apr. 8, 2016) (distinguishing *Holick*, including on the grounds that the agreement did not alter the plaintiffs’ employment status in a manner indicative of the parties’ intent such that a line should be drawn between the time periods).
- 24 However, the same reasoning applied here applies to any evaluation of the notice provided during the other sign-up periods identified by the parties in their papers.
- 25 Defendant’s description of the sign-up screens comport with Plaintiff Piazza’s recollection that he did not have to click on a button reading “I Agree” when registering his Airbnb accounts. (Piazza Decl. ¶ 4.)
- 26 Since I find that Plaintiff Piazza had notice of the arbitration provision when he signed up for his account on August 21, 2011, I need not examine the sign-up screen that popped up when he created his second account on October 2, 2014.
- 27 Plaintiffs’ citation to Judge Weinstein’s opinion in *Berkson v. Gogo, LLC*, 97 F. Supp. 3d 359 (E.D.N.Y. 2015), as support for their argument that notice in this case was deficient is unavailing. In *Berkson*, Judge Weinstein derived certain general principles which permit, rather than forbid, the validity of Airbnb’s TOS: first, a TOS will not be enforced when there is “no evidence” the website user had notice; second, the TOS will be enforced if the user is encouraged by the design and content of the website and webpage to examine the terms; and third, the TOS will not be enforced where the link to the terms is “buried at the bottom of a webpage or tucked away in obscure corners where users are unlikely to see it.” *Id.* at 401–02. Judge Weinstein further distinguished *Gogo* from another case on the grounds that *Gogo* did not have a practice of emailing or mailing the contents of the terms to its customers and did not make an effort to draw the plaintiff’s attention to the terms, *id.* at 403, two facts that are present in the current case.
- 28 Plaintiffs state that they felt forced into accepting the modified TOS because they otherwise would be unable to access their account information. Plaintiffs do not explain why this justifies failure to read the contract, nor do they state that they otherwise requested that Airbnb provide to them, and delete from its own servers, any personal, account-related information.
- 29 As an aside, Plaintiffs also cite to a clause in the section limiting liability, which is not part of the arbitration provision they argue is unconscionable. (Pls.’ Mem. 24–25.) To the extent that Plaintiffs are arguing that this portion of the agreement is also unconscionable, I leave that to the arbitrator to decide.

EXHIBIT “J”

1 Michele Floyd (SBN 163031)
mfloyd@srclaw.com
2 Elaisha Nandrajog (SBN 301798)
enandrajog@srclaw.com
3 SACKS, RICKETTS & CASE LLP
177 Post Street, Suite 650
4 San Francisco, CA 94108
Telephone: 415-549-0580
5 Fax: 415-549-0640

6 Attorneys for Defendant
AIRBNB, INC.

FILED
Superior Court of California
County of Los Angeles

SEP 21 2017

Sherri R. Carter, Executive Officer/Clerk
By [Signature] Deputy
M.V. Carino

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF LOS ANGELES
11 CENTRAL DISTRICT

RECEIVED
JUL 28 2017
FILING WINDOW

12 DR. MORTON MAZAHERI, an Individual,
13 KIUMARZ MAZAHERI, an Individual,

14 Plaintiffs,

15 vs.

16 BOB, an Individual, AIRBNB, Inc., a
California Corporation, and DOES 1 through
17 15, Inclusive,

18 Defendants.

Case No.: BC658417

**[PROPOSED] ORDER GRANTING
DEFENDANT AIRBNB, INC.'S MOTION
TO COMPEL ARBITRATION**

Date: September 21, 2017

Time: 8:30 a.m.

Dept.: 73

Judge: Hon. Rafael Ongkeko

Complaint Filed: April 19, 2017

RES. ID: 170726237725

24 The Motion of Defendant Airbnb, Inc. ("Airbnb") to Compel Arbitration as to Plaintiffs
25 Dr. Morton Mazaheri and Kiumarz Mazaheri's (collectively "Plaintiffs") claims against Airbnb
26 came on regularly for hearing on September 21, 2017 in Department 73 of the above-referenced
27 court, the Honorable Rafael Ongkeko presiding. Plaintiffs appeared pro se and Michele Floyd of
28 Sacks, Ricketts & Case, LLP appeared on behalf of Airbnb.

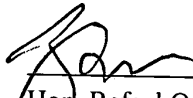
09/25/2017

1 Having read and considered the moving papers, opposition, reply, the evidence submitted
2 by the parties, and arguments presented by the parties and counsel, and all other information
3 bearing on the matter, and for good cause appearing:

4 IT IS HEREBY ORDERED that Airbnb's Motion to Compel Arbitration is granted. It is
5 further ordered that this litigation is stayed pending arbitration.

6 IT IS SO ORDERED.

7
8 Dated 9/21, 2017.

9 
10 Hon. Rafael Ongkeko
11 Judge of the Los Angeles County Superior Court
12
13
14
15
16
17
18
19
20
21
22
23
24

25
26
27
28
09/25/2017

EXHIBIT “K”

FILED
Superior Court of California
County of Los Angeles

AUG 29 2017

Sherri R. Carter, Executive Officer/Clerk
By Samantha Cuevas, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES -
CENTRAL DISTRICT

MARK ALAN FOGEL, ET AL.,)	Case No.: BC651607
)	
Plaintiff(s),)	[TENTATIVE] ORDER GRANTING MOTION
)	TO COMPEL ARBITRATION
vs.)	
)	Dept. 92
RON HACKER, ET AL.,)	1:30 p.m.
)	August 29, 2017
Defendant(s).)	
)	
)	

Background Facts

Plaintiffs, Mark and Kathy Fogel filed this action against Defendants, Ron Hacker, Airbnb, Inc., and Bag Fund, LLC for damages arising out of a trip and fall. Plaintiffs had contracted for a short-term rental at Hacker's property through the Airbnb platform at the time of the fall. Plaintiffs allege the stairs in Hacker's property were not up to code, and caused a fall that ultimately led to substantial injuries.

Motion to Compel Arbitration

At this time, Airbnb moves to compel all claims against it to be heard by way of binding arbitration. Airbnb provides evidence that Plaintiffs digitally signed an arbitration agreement when they became users of Airbnb, again when they rented Hacker's home, and on a third occasion when Airbnb's terms of service

1 were updated. Plaintiffs do not dispute the fact that they digitally signed the agreement, and do not
2 dispute that it governs their claims in this lawsuit. Airbnb therefore met its moving burden to show that
3 Plaintiffs' claims must be submitted to binding arbitration per CCP §1281.2. The burden shifts to Plaintiffs
4 to show a reason why the agreement should not be enforced.

5
6 Plaintiffs argue the agreement should not be enforced for two reasons. First and foremost, they argue it
7 should not be enforced because there is a danger of inconsistent rulings if the claims against Airbnb are
8 arbitrated but the claims against the remaining defendants are litigated. Second, they argue it would not
9 be equitable to enforce the agreement, as the agreement is unconscionable.

10
11 *CCP §1281.2(c)*

12 Plaintiffs' primary argument is that the Court should use CCP §1281.2(c) to preclude arbitration in this
13 case. §1281.2(c) permits the Court to refuse to enforce an arbitration agreement if the Court finds "A
14 party to the arbitration agreement is also a party to a pending court action or special proceeding with a
15 third party, arising out of the same transaction or series of related transactions and there is a possibility of
16 conflicting rulings on a common issue of law or fact."

17
18 Pursuant to *Gloster v. Sonic Automotive, Inc.* (2014) 2016 Cal.App.4th 438, 446-447, the Court can ONLY
19 apply §1281.2(c) if the Court finds either (a) the parties' agreement is governed by California state law
20 and not by the Federal Arbitration Act ("FAA"), or (b) the parties' agreement is governed by the FAA, but
21 the parties' agreement expressly provides for application of California state law.

22
23 Plaintiffs herein advance a number of arguments to support their position that California state law, as
24 opposed to the FAA, should be applied in this case. Plaintiffs fail, however, to address the fact that the
25 parties' agreement, at §34, expressly indicates that the FAA, and not California law, applies. Pursuant to

8/31/2017

1 Gloster, supra, an agreement that the FAA governs the parties' dispute is binding and enforceable. The
2 Court finds, therefore, that the parties' agreement is to be read and interpreted under the FAA, and not
3 under CA state law. Additionally, Plaintiffs do not reference, nor can the Court locate, any provision in the
4 parties' agreement referencing CA state law.

5
6 Because the agreement must be interpreted under the FAA, and not under CA state law, the Court finds
7 §1281.2(c) does not apply, and Plaintiffs' argument on this ground is not supported.

8
9 *Contract of Adhesion*

10 Plaintiffs' second argument is essentially that the parties' contract is a contract of adhesion, as it was
11 presented to Plaintiffs on a take it or leave it basis. They therefore argue it should not be enforced.

12
13 The same unconscionability analysis is applied to commercial, consumer and employment contracts.
14 Walnut Producers of Calif. v. Diamond Foods, Inc. (2010) 187 CA4th 634, 642-644.

15 Arbitration clauses are often found in adhesion contracts (standardized contracts drafted by a party of
16 superior bargaining power and presented to the weaker party on a take-it-or-leave-it basis).

17 "Unconscionable" provisions in such contracts may be unenforceable, at least under state law. See
18 Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 C4th 83, 113-115; Ontiveros v. DHL
19 Express (USA), Inc. (2008) 164 CA4th 494, 503-505. The mere fact an adhesion contract is involved
20 does not per se render the arbitration clauses unenforceable. Such contracts are "an inevitable fact of life
21 for all citizens—businessman and consumer alike." Graham v. Scissor-Tail, Inc. (1981) 28 C3d 807, 817.

22
23 "Procedural unconscionability" concerns the manner in which the contract was negotiated and the parties'
24 circumstances at that time. It focuses on the factors of oppression or surprise. Kinney v. United
25 HealthCare Services, Inc. (1999) 70 CA4th 1322, 1329. Substantive unconscionability focuses on the

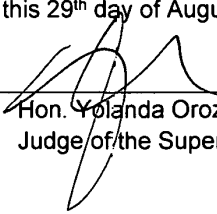
1 terms of the agreement and whether those terms are "overly harsh or one-sided." See Sonic-Calabasas
2 A, Inc. v. Moreno (2013) 57 C4th 1109, 1133, 1142-1145. **Both elements must be present in order for**
3 **a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of**
4 **unconscionability.** Armendariz v. Foundation Health Psychcare Services, Inc., supra, 24 C4th at 114.
5 Procedural and substantive unconscionability need not be present in the same degree: "(T)he more
6 substantively oppressive the contract term, the less evidence of procedural unconscionability is required
7 to come to the conclusion that the term is unenforceable, and vice versa." Id. at 114.

8
9 Even assuming the adhesive contract at issue in this case was procedurally unconscionable, Plaintiffs
10 failed to show that the contract is also substantively unconscionable. Absent such a showing, the mere
11 fact that the contract is one of adhesion does not render the agreement unenforceable.

12
13 *Conclusion*

14 Defendant met its burden to show that the claims against it are governed by the parties' binding
15 arbitration agreement. Plaintiffs failed to meet their burden to show that state law applies and/or that the
16 parties' agreement is unconscionable. The motion to compel arbitration is therefore granted. The civil
17 action against Airbnb is stayed pending the outcome of arbitration. CCP §1281.4. The Court sets an
18 OSC re: Status of Arbitration on February 27, 2018, at 8:30 a.m.

19
20 Dated this 29th day of August, 2017

21
22 
23 Hon. Yolanda Orozco
24 Judge of the Superior Court
25

24
25
08/29/2017
1102/17

EXHIBIT “L”

IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

CASE NO. CACE 17009259 Div. 09

SADIE FLYNN,

Plaintiff,

vs.

VALERIE J. SUTCLIFFE, SUTCLIFFE
REVOCABLE FAMILY TRUST and
AIRBNB, INC.

Defendants.

_____ /

**ORDER ON DEFENDANT AIRBNB, INC.'S MOTION TO COMPEL
ARBITRATION AND TO STAY PROCEEDINGS PENDING ARBITRATION**

THIS CAUSE OF ACTION, having come before the Court upon Defendant, AIRBNB, INC.'S ("Airbnb") Motion to Compel Arbitration and to Stay Proceedings Pending Arbitration (the "Motion"), and the Court having reviewed the Motion, and being otherwise fully advised in the premises, it is therefore:

ORDERED AND ADJUDGED:

1. Airbnb's Motion is hereby **GRANTED**.
2. Plaintiff's claims against Airbnb are hereby stayed pending completion of arbitration proceedings that the Plaintiff may commence against Airbnb.

DONE AND ORDERED in the Chambers at Fort Lauderdale, Florida this ____ day of August, 2017.

Jeffrey R. Levenson

AUG 15 2017

True Copy



JEFFREY R. LEVENSON
CIRCUIT COURT JUDGE

Copies furnished to:

Charles E. Stoecker, Esq.
McGlinchey Stafford
1 East Broward Boulevard, Suite 1400
Fort Lauderdale, FL 33301
Tel: (954) 356-2501
Fax: (954) 252-3808
Email: cstoecker@mcglinchey.com
Attorney for Defendant AIRBNB, Inc.

Bradford M. Cohen, Esq.
Jason A. Jovine, Esq.
Cohen & McMullen, P.A.
1132 SE 3rd Avenue,
Fort Lauderdale, FL 33316
Jason@floridajusticefirm.com
service@floridajusticefirm.com
Attorney for Plaintiff

Via U.S. Mail

Valerie J. Sutcliffe
1530 NW 17th Street
Fort Lauderdale, FL 33311

Sutcliffe Revocable Family Trust
C/O Mary Sutcliffe, Trustee
2100 S. Ocean Lane #803
Fort Lauderdale, FL 33316-3869

EXHIBIT “M”

1 MICHELE FLOYD (SBN 163031)
mfloyd@srclaw.com
2 WILL DUGONI (SBN 300241)
wdugoni@srclaw.com
3 SACKS, RICKETTS & CASE LLP
177 Post Street, Suite 650
4 San Francisco, CA 94108
5 Telephone: 415-549-0580
6 Facsimile: 415-549-0640

7 *Attorneys for Defendant*
AIRBNB, INC.

FILED
Superior Court of California
County of Los Angeles

APR 05 2017

Sherri B. Carter, Executive Officer/Clerk
By Raul Sanchez Deputy

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF LOS ANGELES
10 CENTRAL DISTRICT

11 MICHAEL STUTLAND, KATHRYN)
12 STUTLAND, JENNIFER STUTLAND,)

13 *Plaintiffs,*)

14 vs.)

15)
16 AIRBNB, INC., VINCENT CUMMINGS, DOE)
17 CRIMINAL PERPETRATORS 1 through 30; and)
18 DOES 31 through 100, Inclusive)

19 *Defendants.*)

Case No.: BC581681

NOTICE OF RULING ON
DEFENDANT AIRBNB, INC.'S
MOTION TO COMPEL
ARBITRATION

Hearing Date: March 22, 2017

Time: 01:30 p.m.

Dept: 98

Judge: Hon. Holly J. Fujie

RES. ID: 170215196075

BY FAX

20 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

21 PLEASE TAKE NOTICE that on March 22, 2017, after counsel were heard, the Court
22 entered its March 22, 2017 tentative ruling on Defendant Airbnb, Inc.'s Motion to Compel
23 Arbitration as the final order of the Court. A true and correct copy of the Court's March 22,
24 2017 Tentative Ruling is attached hereto as exhibit 1 and incorporated herein by this reference.

25 PLEASE TAKE FURTHER NOTICE that the Court further ordered as follows:

26 1. Arbitration is compelled only as to Plaintiffs and Defendant Airbnb, Inc.;

1 2. This matter is stayed as to the remaining defendants until May 11, 2017 or until
2 the arbitration proceedings between Plaintiffs and Airbnb, Inc. are complete;

3 3. A further status conference will be held on May 11, 2017, at 8:30 a.m. in
4 Department 98 of the above-encaptioned court.

5
6 Date: March 22, 2017

SACKS, RICKETTS & CASE LLP

7
8 Signed: 

Michele Floyd
Attorneys for Airbnb, Inc.

9
10
11 Approved as to form:

12 LAW OFFICES OF CHRIS BAKER

13
14 By: _____
15 Chris Baker

16 MASSERMAN & DUCEY, LLP

17
18
19 By:  _____
20 Mitchell F. Ducey

EXHIBIT 1

04/06/2017

DEPARTMENT 98 LAW AND MOTION RULINGS**IMPORTANT**

Communicating with the Court Staff re the Tentative Ruling

1. Please notify the courtroom staff by email not later than 9:30 a.m. on the day of the hearing if you wish to submit on the tentative ruling rather than argue the motion. The email address is SMCDEPT98@lacourt.org.
2. If you submit on the tentative, you must immediately notify the other side that you will not appear at the hearing. You must include the other parties on the email by "cc."
3. Include the word "SUBMISSION" in all caps in the Subject line and include your name, contact information, the case number, and the party you represent in the body of the email. If you submit on the tentative and elect not to appear at the hearing, the opposing party may nevertheless appear at the hearing and argue the motions. ON s
4. Include the words "SUBMISSION BUT WILL APPEAR" if you submit but one or both parties will nevertheless appear.
5. For other communications with Court Staff
 - a. OFF-CALENDAR should appear in all caps in the Subject line where all parties have agreed to have a matter placed off-calendar. All counsel should be cc'ed (and where appropriate parties not represented by counsel) and the body of the email should state: (a) name and case number; (b) date of proceeding.
 - b. CASE SETTLED should appear in all caps in the Subject line where all parties have agreed that the case has settled for all purposes. All counsel should be cc'ed (and where appropriate parties not represented by counsel) and the body of the email should state: (a) name and case number; (b) whether notice of settlement/dismissal documents have been filed; (c) if (b) has not been done, a date one year from the date of your email which will be a date set by the court for an OSC for dismissal of the case.
 - c. STIPULATION should appear in all caps in the Subject line where all parties have stipulated that a matter before the court can be postponed. All counsel should be cc'ed (and where appropriate parties not represented by counsel) and the body of the email should state: (a) name and case number; (b) what proceeding is agreed to be postponed e.g. Trial, FSC; (c) the agreed-upon future date; (d) whether all parties waive notice if the Court informs all counsel/parties that the agreed-upon date is satisfactory. This communication should be used only for matters that are agreed to be postponed and not for orders shortening time.
6. PLEASE MAKE SURE THAT ALL COMMUNICATIONS WITH COURT STAFF DEAL ONLY WITH SCHEDULING AND ADMINISTRATIVE MATTERS AND DO NOT DISCUSS THE MERITS OF ANY CASE.
7. With the exception of Orders transferring cases to an IC Court, if the department does not receive an email indicating the parties are submitting to the tentative ruling and there are no appearances at the hearing the MOTION WILL BE PLACED OFF CALENDAR.

Case Number: BC581681 **Hearing Date:** March 22, 2017 **Dept:** 98

MICHAEL STUTLAND, KATHRYN STUTLAND, JENNIFER STUTLAND,
Plaintiffs,
vs.

AIRBNB, INC., VINCENT CUMMINGS, DOES CRIMINAL PERPETRATORS 1 through 30; and DOES 31
through 100, inclusive,

Defendants.

Case No.: BC581681

[TENTATIVE] ORDER GRANTING DEFENDANT'S MOTION TO COMPEL ARBITRATION

Dept. 98

1:30 p.m.

March 22, 2017

I. BACKGROUND

In May 2013, Plaintiffs Michael Stutland, Kathryn Stutland, and Jennifer Stutland ("Plaintiffs") rented a home from non-moving Defendant Vincent Cummings, through the online platform owned and operated by moving Defendant Airbnb, Inc. On the morning of May 14, 2013, unknown robbers broke into the rented home, physically assaulted Plaintiff Michael Stutland, and stole Plaintiffs' property. On April 12, 2015, Plaintiffs filed this action, alleging, among other things, that Defendant Airbnb misrepresented, and failed to investigate, the safety of the home Plaintiffs had rented through its service. As to Defendants Airbnb and Vincent Cummings, Plaintiff Michael Stutland brought suit for (1) negligent misrepresentation; (2) negligence; and (3) premise liability. Plaintiff Kathryn Stutland brought suit for (4) loss of consortium. Plaintiff Jennifer Stutland brought suit for (5) negligent infliction of emotional distress.

Service of the summons and complaint was not completed until December 2016. Thereafter, on February 08, 2017, Defendant Airbnb ("Defendant") moved to compel arbitration, pursuant to its website's terms of service, to which all three Plaintiffs had assented. No opposition has been filed as of March 17, 2017. (Opposition was due March 9, 2017.)

II. LEGAL STANDARD

California law incorporates many of the basic policy objectives contained in the Federal Arbitration Act, including a presumption in favor of arbitrability. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 971-72.) The Court is empowered by CCP § 1281.2 to compel parties to arbitrate disputes pursuant to an agreement to do so. The petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence, and the party opposing the petition then bears the burden of proving by a preponderance of the evidence any fact necessary to demonstrate that there should be no enforcement of the agreement. (*Rosenthal v. Great Western Financial Securities Corp.* (1996) 14 Cal.4th 394, 413.) The trial court sits as a trier of fact to reach a final determination on the issue. (*Id.*)

III. DISCUSSION

1. Motion to Compel Arbitration

Defendant bears the burden of demonstrating a valid arbitration agreement exists. Here, Defendant argues all three Plaintiffs have accounts with Airbnb, and by design, such accounts could not be created without first agreeing to Defendant's terms of service, which includes an arbitration clause.

To make a rental through Defendant's website, a person is first directed to a webpage that allows them to either "Connect with Facebook" or "Create an account using my email." (Miller Decl. ¶ 5, Exh. A.) Beneath these two links is the following warning: "By clicking 'Create Account' or 'Connect with Facebook' you confirm that you accept the

Terms of Service and Privacy Policy.” (Id.) Both ‘Terms of Service’ and ‘Privacy Policy’ are hyperlinks, which take users to the relevant document. (Id.)

Plaintiff Kathryn Stutland created an Airbnb account on February 15, 2013. (Miller Decl. ¶ 10, Exh. F.) Plaintiff Michael Stutland created an Airbnb account on May 19, 2013. (Miller Decl. ¶ 9, Exh. E.) Plaintiff Jennifer Stutland created an Airbnb account on February 24, 2013. (Miller Decl. ¶ 11, Exh. G.) Defendant argues that by doing so, Plaintiffs entered a binding contract to arbitrate, pursuant to the arbitration clause contained in version two of Airbnb’s Terms of Service (the version in effect at the time the Plaintiffs created their accounts). Moreover, the Terms of Service have been updated four times since Plaintiffs first created their accounts, and each time they logged onto the account following the release of a new version, Plaintiffs received a notification regarding the new version, and were required to check a box and click an “accept” box in order to proceed to the site. (Miller Decl. ¶¶ 9-11, 14-15, Exhs. H-N.)

Terms of Service Version Two, which was in effect at the time Plaintiffs’ created their accounts, includes a lengthy dispute resolution section that begins by stating:

You and Airbnb agree that any dispute, claim or controversy arising out of or relating to these Terms or the breach, termination, enforcement, interpretation or validity thereof, or to the use of the Services or use of the Site or Application (collectively, “Disputes”) will be settled by binding arbitration, except that each party retains the right to seek injunctive or other equitable relief in a court of competent jurisdiction to prevent the actual or threatened infringement, misappropriation or violation of a party’s copyrights, trademarks, trade secrets, patents, or other intellectual property rights.

(Miller Decl. ¶ 18, Exh. O, p. 24.)

The arbitration clauses contained in versions three, four, five, and six of the Terms of Service are substantively the same. (Miller Decl. ¶¶ 19-22, Exhs. P (p. 13), Q (p. 30), R (p. 16), S (p. 52).)

Defendants argue that at least two courts have specifically held that the above procedures are sufficient to form a binding arbitration agreement between Airbnb and its users. (See *Hollywood v. Airbnb, Inc.*, LASC Case No. BC601165 (2016) [order granting petition to compel]; *Selden v. Airbnb, Inc.* (D.D.C. 2016) 2016 WL 6476934.) (Floyd Decl. ¶¶ 2-3, Exhs. A-B.)

The Selden opinion provides a useful summary of California law regarding “sign-in-wrap agreements,” as the online adhesive contract described above is sometimes called. (Selden, *supra*, 2016 WL 6476934 at *4 [citing *Nguyen v. Barnes & Noble, Inc.*, (9th Cir. 2014) 763 F.3d 1171; *Specht v. Netscape Commc’ns Corp.*, (2d Cir. 2002) 306 F.3d 17 [applying California law]; *Berkson v. Gogo LLC*, (E.D.N.Y. 2015) 97 F. Supp. 3d 359 [applying California law].) In Selden, the D.C. District Court concluded the placement, font, background, and page design of Defendant’s Terms of Service warning was sufficient to conclude a party creating an account with Defendant would know they were entering a contract. (Id. at *5.)

Although it does not include a detailed analysis like Selden, the Los Angeles Superior Court, Hon. Teresa Sanchez-Gordon presiding, likewise concluded that signing up with Defendant resulted in the creation of a valid contract pursuant to Defendant’s Terms of Service. (See *Hollywood v. Airbnb, Inc.*, LASC Case No. BC601165 (2016).)

This Court agrees. Defendant has carried its burden of demonstrating, by a preponderance of the evidence, that Plaintiffs are subject to a valid arbitration agreement that governs the instant dispute.

The burden thereafter shifts to Plaintiffs to demonstrate why the agreement should not be enforced. (See *Rosenthal v.*

3/20/2017

www.lacourt.org/tentativeRulingNet/ui/ResultPopup.aspx

Great Western Financial Securities Corp., supra, 14 Cal4th at 413.) Plaintiffs, having provided no opposition to the instant motion, have failed to do so.

Accordingly, Defendant's petition to compel arbitration is GRANTED.

2. Stay Proceedings

Pursuant to Section 3 of the FAA (which governs the instant arbitration agreement, see Miller Decl. ¶ 18, Exh. O p. 24):

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, 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, providing the applicant for the stay is not in default in proceeding with such arbitration

Accordingly, the instant civil action is stayed, pending the outcome of arbitration.

Dated this 22nd day of March, 2017

Hon. Holly J. Fujie
Judge of the Superior Court

Case Number: BC583252 **Hearing Date:** March 22, 2017 **Dept:** 98

BLANCA MEDINA,
Plaintiff,
vs.

7MARES, et al.,

Defendants.

CASE NO.: BC583252

[TENTATIVE] ORDER RE: PLAINTIFF'S REQUEST FOR DEFAULT JUDGMENT

Dept. 98
1:30 p.m.
March 22, 2017

On May 28, 2015, Plaintiff Blanca Medina ("Plaintiff") filed this action against Defendants 7Mares; El 7-Mares Seafood Restaurant, Inc.; Gems Seafoods, Inc.; Heriberto S. Diaz; and Carol J. Diaz ("Defendants") for alleged damages arising out of a June 4, 2013 trip and fall. On November 10, 2016, default was entered against Defendants.

<http://www.lacourt.org/tentativeRulingNet/ui/ResultPopup.aspx>

4/17

04/06/2017

1 **PROOF OF SERVICE**

2 I am employed in the County of San Francisco, State of California. I am over the age of
3 eighteen years and not a party to the within action. My business address is Sacks, Ricketts &
4 Case, LLP, 177 Post Street, Suite 650, San Francisco, CA 94108.

5 I served the below listed document(s) described as:

6 **NOTICE OF RULING ON DEFENDANT AIRBNB, INC.'S MOTION TO
7 COMPEL ARBITRATION**

8 on April 5, 2017, on the following interested parties to this cause as follows:

9 Carl D. Barnes, Esq. Andrew J. Fodo, Esq. Law Offices of Carl D. Barnes 3550 Wilshire Blvd., Suite 1640 10 Los Angeles, CA 90010	Christopher Baker, Esq. The Law Offices of Christopher R. Baker 329 S. McCarty Drive Beverly Hills, CA 90212
12 Mitchell F. Ducey, Esq. Masserman & Ducey, LLP 15260 Ventura Blvd., Suite 1000 13 Sherman Oaks, CA 91403	

14 **METHOD OF SERVICE**

15
16
17 ☒ MAIL: I deposited such envelope(s) in the mail at San Francisco. The envelope(s)
18 was/were mailed with postage thereon fully prepaid. I am readily familiar with the firm's
19 practice of collection and processing of mail, which would be deposited with the U.S.
20 Postal Service on that same day with postage thereon fully prepaid at San Francisco,
21 California, in the ordinary course of business. I am aware that on motion of the party
22 served, service is presumed invalid if postal cancellation or meter date is more than one
23 business day after date of deposit for mailing in affidavit.

24 ☐ PERSONAL SERVICE: I caused such envelope(s) to be delivered by hand to the
25 above addressee(s).

26 ☐ OVERNIGHT COURIER: I sent such document(s) on April 5, 2017 with postage
27 thereon fully prepaid at San Francisco, California.

28 I declare under penalty of perjury under the laws of the United States of America that the
foregoing is true and correct. Executed on April 5, 2017, at San Francisco, California.


Jessica Talavera-Rauh

EXHIBIT “N”

74

ORIGINAL

FILED
Superior Court of California
County of Los Angeles

APR 20 2016

Sherri R. Carter, Executive Officer/Clerk
By Stephen M. Smythe Deputy

1
2
3
4 RECEIVED
5 APR 15 2016
6 DEPT. 74
7
8

9 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
10 COUNTY OF LOS ANGELES

11 AROGANT HOLLYWOOD, an individual;
12 ALISON H. FAIRCHILD, an individual,

13 Plaintiffs,

14 vs.

15 AIRBNB, INC., a Delaware Corporation,
16 Defendant.

Case No.: BC601165

~~Related~~ Case Nos.: BC605023, BC601167
consolidated within

~~[PROPOSED]~~ ORDER GRANTING
DEFENDANT AIRBNB, INC.'S MOTION
TO COMPEL ARBITRATION

17 BY FAX

18
19 The Motion of Defendant Airbnb, Inc. ("Airbnb") to Compel Arbitration as to Plaintiff
20 Arogant Hollywood and Plaintiff Alison H. Fairchild's claims against Airbnb, came on regularly
21 for hearing on April 4, 2016, at 1:30 p.m., in Department 74 of the above-referenced court, the
22 Honorable Teresa Sanchez-Gordon, presiding. Sacks, Ricketts & Case, LLP appeared for
23 Defendant Airbnb and Plaintiff Alison H. Fairchild appeared on her own behalf; Plaintiff
24 Arogant Hollywood did not appear.

25 Having read and considered the moving papers, opposition, reply, the evidence submitted
26 by the Parties, and all other information bearing on the matter, this Court hereby GRANTS
27 Defendant Airbnb's Motion to Compel Arbitration.
28

04/23/2016
9:05:52 AM

1 **I. Legal Standard**

2 California law incorporates many of the basic policy objectives contained in the Federal
3 Arbitration Act ("FAA"), including a presumption in favor of arbitrability. This Court is
4 empowered by California Code of Civil Procedure section 1281.2 to compel parties to arbitrate
5 disputes pursuant to an agreement to do so. Section 1281.2 states:

6 [T]he court shall order the petitioner and the respondent to arbitrate
7 the controversy if it determines that an agreement to arbitrate the
8 controversy exists, unless it determines that:

9 (a) The right to compel arbitration has been waived by the
10 petitioner; or

11 (b) Grounds exist for the revocation of the agreement.

12 (c) A party to the arbitration agreement is also a party to a
13 pending court action or special proceeding with a third party,
14 arising out of the same transaction or series of related
15 transactions and there is a possibility of conflicting rulings on
16 a common issue of law or fact. For purposes of this section, a
17 pending court action or special proceeding includes an action
or proceeding initiated by the party refusing to arbitrate after
the petition to compel arbitration has been filed, but on or
before the date of the hearing on the petition. This subdivision
shall not be applicable to an agreement to arbitrate disputes as
to the professional negligence of a health care provider made
pursuant to Section 1295.

18 Cal. Civ. Proc. Code § 1281.2. The party petitioning to compel arbitration under a written
19 arbitration agreement bears the burden of proving the existence of a valid arbitration agreement
20 by a preponderance of the evidence, and the party opposing the petition must meet the same
21 evidentiary burden to prove any facts necessary to its defense that there should be no
22 enforcement of the agreement. The trial court sits as a trier of fact, weighing all the affidavits,
23 declarations and other documentary evidence, to reach a final determination on the issue. *Id.*;
24 *Provencio v. WMA Secs., Inc.*, 125 Cal. App. 4th 1028 (2005).

25 ///

26 ///

27 ///

04/23/2016

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

II. Discussion

a. The Existence of a Valid Arbitration Agreement

Before hosts and guests can use Airbnb's online service to provide or book short or long term rentals, they must register for an Airbnb account and agree to the Terms of Service ("TOS"). Both Plaintiffs registered for Airbnb accounts. Plaintiff Hollywood accepted Version 3 of the TOS on March 21, 2015. Plaintiff Fairchild accepted Version 4 of the TOS on October 29, 2015. Plaintiff Hollywood also agreed to Version 4 of the TOS on October 25, 2015. Both versions of the TOS include the same arbitration agreement which broadly applies to: "any dispute, claim or controversy arising out of or relating to these Terms or the breach, termination, enforcement, interpretation or validity thereof, or to the use of the Services or use of the Site or Application." Here, Airbnb has demonstrated the existence of a valid arbitration agreement that applies to both Plaintiffs.

b. No Defense to Enforcement of the Valid Arbitration Agreement

The burden now shifts to Plaintiffs to demonstrate why the arbitration agreement should not be enforced. Plaintiffs argue that the arbitration agreement cannot be enforced against Plaintiff Fairchild because she did not agree to the TOS until October 2015 and the incidents giving rise to this action occurred in March 2015. The Complaint, however, is based on incidents that occurred both in March 2015 and November 2015. Plaintiff Fairchild, therefore, is subject to the arbitration agreement regardless of when she agreed to the TOS.

Plaintiffs also contend that Plaintiff Hollywood could not have agreed to Version 4 of the TOS in October 2015 because his account with Airbnb was closed on March 29, 2015. Plaintiffs' evidence does create some confusion as to if and when Plaintiff Hollywood's account with Airbnb was closed and how he could have logged back into a deactivated account after March 29, 2015. However, this does not change the fact that Plaintiff Hollywood agreed to Version 3 of the TOS on March 21, 2015, prior to any purported deactivation of his account. Version 3 of the TOS includes the same arbitration agreement as the latest TOS. The Plaintiffs

1 therefore have failed to overcome Airbnb's evidence demonstrating the existence of the
2 arbitration agreement that obligated them to submit their disputes to arbitration.

3 **III. Conclusion**

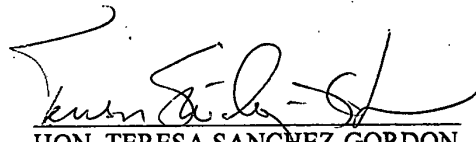
4 Accordingly, Defendant Airbnb's Motion to Compel Arbitration is GRANTED.

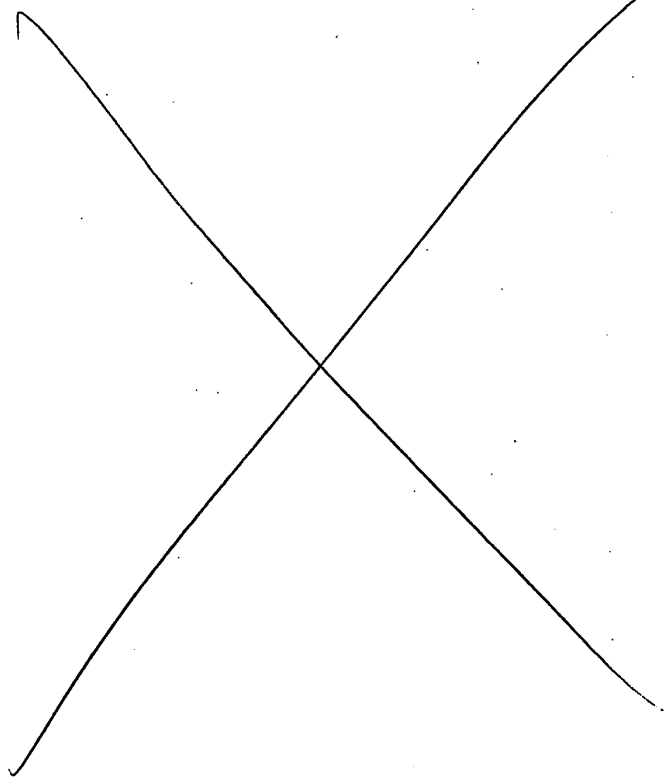
5 A status conference re arbitration is set for July 7, 2016, at 9:00 a.m., in Department 74 of
6 the above-referenced court.

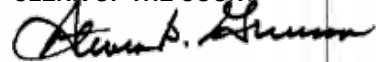
7 An O.S.C. re dismissal—failure to file proof of service on related cases BC605023 and
8 BC601167—is set for April 26, 2016, at 1:30 p.m., in Department 74 of the above-referenced
9 court.

10 **IT IS SO ORDERED.**

11 April 20, 2016

12 
13 HON. TERESA SANCHEZ-GORDON
14 Los Angeles County Superior Court Judge





OPP

MICHAEL C. KANE, ESQ.
Nevada Bar No.: 10096
BRADLEY J. MYERS, ESQ.
Nevada Bar No.: 8857
DAVID M. MOORE, ESQ.
Nevada Bar No.: 8580

THE702FIRM

400 S. 7th Street, Suite/Floor 4
Las Vegas, Nevada 89101
Telephone: (702) 776-3333
Facsimile: (702) 505-9787

E-Mail: mike@the702firm.com
brad@the702firm.com
david@the702firm.com

Attorneys for Eric Rice and JEFFERSON TEMPLE as
Special Administrator of the Estate of RAHEEM RICE

JORDAN P. SCHNITZER, ESQ.
Nevada Bar No. 10744

THE SCHNITZER LAW FIRM

9205 W. Russell Road, Suite 240
Las Vegas, Nevada 89148
Telephone: (702) 960-4050
Facsimile: (702) 960-4092

E-Mail: jordan@TheSchnitzerLawFirm.com

Attorney for Plaintiff BRYAN LOVETT

DISTRICT COURT

CLARK COUNTY, NEVADA

ERIC RICE, individually; JEFFERSON TEMPLE as
Special Administrator of the Estate of RAHEEM RICE;
and BRYAN LOVETT,

Plaintiff,

vs.

ZHENG TRUST c/o FENEX CONSULTING; LI JUN
ZHENG, individually; SHENANDOAH SOUTHWEST,
INC. a Nevada Corporation; JASPER HAN,
individually; AIRBNB, INC., a Foreign Corporation;
ROE HOA; ROE SECURITY COMPANY; DOE
PARTY HOST; ROE PROPERTY MANAGEMENT
COMPANY; DOES XI through XX, inclusive and ROE
CORPORATIONS XI through XX, inclusive.

Defendants.

Case No. : A-19-801549-C
Dept. No.: 26

Hearing Date: January 21, 2020
Hearing Time: 9:00 a.m.

PLAINTIFFS' OPPOSITION TO
DEFENDANT AIRBNB, INC.'S
MOTION TO COMPEL
ARBITRATION AND STAY
LITIGATION

1 **PLAINTIFFS' OPPOSITION TO DEFENDANT AIRBNB, INC.'S MOTION TO**
2 **COMPEL ARBITRATION AND STAY LITIGATION**

3 COMES NOW ERIC RICE, individually, JEFFERSON TEMPLE, as Special
4 Administrator of the Estate of RAHEEM RICE, by and through their attorneys of record
5 MICHAEL C. KANE, ESQ., BRADLEY J. MYERS, ESQ., and DAVID M. MOORE, ESQ., of
6 THE702FIRM, and BRYAN LOVETT, by and through his attorneys of record JORDAN P.
7 SCHNITZER, ESQ., of THE SCHNITZER LAW FIRM herein files *Plaintiffs' Opposition to*
8 *Defendant AIRBNB, Inc.'s Motion to Compel Arbitration and to Stay Litigation.*

9 This Opposition is based upon the following Memorandum of Points and Authorities, the
10 pleadings and papers on file herein, and any oral argument the Court may entertain on this matter.

11 DATED this 31 day of January, 2020.

12 **THE702FIRM**

13
14
15 
16 MICHAEL C. KANE, ESQ.
17 Nevada Bar No. 10096
18 BRADLEY J. MYERS, ESQ.
19 Nevada Bar No. 8857
20 DAVID M. MOORE, ESQ.
21 Nevada Bar No. 8580
22 400 South 7th Street #400
23 Las Vegas, Nevada 89101
24 Attorneys for Plaintiff

25 **MEMORANDUM OF POINTS AND AUTHORITIES**

26 **1. INTRODUCTION**

27 As preliminary matter, Plaintiffs do not dispute that this matter would be subject to
28 binding arbitration had the relevant facts regarding the incident occurred if Plaintiffs had booked
the house through Defendant AIRBNB, INC.'s website and platform. However, as discussed
more fully below, the relevant facts of this case do not arise or relate to a house rental by neither
Plaintiff ERIC RICE, The Estate of RAHEEM RICE, nor BRYAN LOVETT.

1 **2. STATEMENT OF RELEVANT FACTS**

2 **A. PROCEDURAL HISTORY**

3 Plaintiffs filed their Complaint on September 9, 2019 against Defendants ZHENG TRUST
4 c/o FENEX CONSULTING; LI JUN ZHENG, SHENANDOAH SOUTHWEST, INC., JASPER
5 HAN and AIRBNB, INC.

6 Plaintiffs served the Complaint on Defendants in Clark County, Nevada and Defendant
7 JASPER HAN filed an Answer on November 8, 2019.
8

9 **B. INCIDENT DESCRIPTION**

10 This incident occurred on or about June 3, 2018, Decedent RAHEEM RICE and Plaintiff
11 BRYAN LOVETT were on near the premises of 6145 Novelty Street, Las Vegas, Nevada and
12 were travelling to attend a party (See Complaint). While approaching the party, on or near the
13 premises, an unknown individual opened fire on the crowd, striking Decedent RAHEEM RICE
14 and Plaintiff BRYAN LOVETT.
15

16 As a result of his injuries, Decedent RAHEEM RICE was killed. Plaintiff BRYAN
17 LOVETT, continues to and shall continue to be limited in his activities and occupations in which
18 he is able to achieve. This has caused and shall continue to cause Plaintiff BYRAN LOVETT a
19 loss of earning and earning capacity to his damages.
20

21 Defendant AIRBNB admits in its Motion that an AIRBNB Host, non-party Ariyanna Jones,
22 booked the premises at issue in this case (See Declaration of Kyle Miller, DEF 000009, paragraph
23 24).

24 Plaintiffs concede that both RAHEEM and ERIC RICE opened accounts with Defendant
25 AIRBNB for services provided through its website wholly unrelated to this incident. Defendant
26 AIRBNB has not and cannot show that Plaintiff LOVETT ever utilized the AIRBNB platform for
27 any service and are not bound any of AIRBNB's "Terms of Service." It is also important to note
28

1 that the booking for the rental of this house did not occur between the RICES or LOVETT. The
2 booking occurred between Non-Party Ariyanna Jones and AIRBNB.

3 II.

4 LEGAL ARGUMENT

5 A. Arbitration Clause Interpretation

6 Contract interpretation is a question of law and, as long as no facts are in dispute, this
7 court reviews contract issues de novo, looking to the language of the agreement and the
8 surrounding circumstances.” *Redrock Valley Ranch, LLC v. Washoe Cnty.*, 127 Nev. 451, 460,
9 254 P.3d 641, 647–48 (2011). The objective of interpreting contracts “is to discern the intent of
10 the contracting parties. Traditional rules of contract interpretation are employed to accomplish
11 that result.” *Davis v. Beling*, 128 Nev. 301, 321, 278 P.3d 501, 515 (2012). Whether a dispute
12 arising under a contract is arbitrable is a matter of contract interpretation, which is a question of
13 law that we review de novo. *Clark Co. Public Employees v. Pearson*, 106 Nev. 587, 590, 798
14 P.2d 136, 137 (1990); *Phillips v. Parker*, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990).

15
16 In interpreting a contract, we construe a contract that is clear on its face from the written
17 language, and it should be enforced as written. *Canfora v. Coast Hotels & Casinos, Inc.*, 121
18 Nev. 771, 776, 121 P.3d 599, 603 (2005). This court initially determines whether the “language
19 of the contract is clear and unambiguous; if it is, the contract will be enforced as written.” *Id.*
20 The gateway question whether a binding arbitration agreement is enforceable depends on the
21 intent of the parties to arbitrate this particular type of controversy. *Principal Investments v.*
22 *Harrison*, 132 Nev. 9, 16, 366 P.3d 688, 694 (2016). An ambiguous contract is susceptible to
23 more than one reasonable interpretation, and “[a]ny ambiguity, moreover, should be construed
24 against the drafter.” *Anvui, LLC v. G.L. Dragon, LLC*, 123 Nev. 212, 215–16, 163 P.3d 405, 407
25 (2007).

26
27
28 ///

1 **B. The Binding Arbitration Agreement Only Applies To Plaintiffs' Use of the AIRBNB**
2 **Platform for a Specific Booking.**

3 The "Terms of Service" governing this dispute are contained in AIRBNB's Motion,
4 Exhibit "4" dated April 16, 2018. The Agreement to Arbitrate provides in pertinent part:

5 **You and Airbnb mutually agree that any dispute, claim, or controversy**
6 **arising out of or relating to these Terms or the breach, termination,**
7 **enforcement or interpretation thereof, or to the use of the Airbnb Platform,**
8 **the Host Services, the Group Payment Services, or the Collective Content**
9 **(collectively, "Disputes") will be settled by binding arbitration.**
(See AIRBNB Exhibit "4" DEC000031).

10 The Terms Plaintiffs RICE agreed to "govern[] [their] access to and use of the Airbnb
11 website" (emphasis added). Collectively, use of the site, application, and Airbnb service are
12 referred to as "Airbnb Services." (See AIRBNB Exhibit "4" DEF000018).

13 The scope of the Airbnb Services is to provide a "Platform" "that enables registered users
14 ("Members")" and certain third parties who offer services . . . to publish such Host Services on
15 the Airbnb Platform and communicate and transact directly with Members that are seeking to
16 book such Host Services (See Exhibit "4" p. DEF000019 para. 1.1).

17 Paragraph 1.2 provides that only "[w]hen Members make or accept a booking, they are
18 entering into a contract directly with each other (See Defendant's Exhibit "4" p. DEF000019).
19 "Airbnb is not and does not become a party to or other participant in any contractual relationship
20 between Member, nor is Airbnb a real estate broker or insurer" (Id.).

21 Construing the contract against the drafter, the binding arbitration agreement does not
22 apply because this Dispute does not relate to Plaintiffs' "use" of the Airbnb platform or arising
23 out of or relating to the Terms of the agreement. Furthermore, the parties clearly did not intend
24 to arbitrate this particular controversy as Plaintiffs did not book this house through the AIRBNB
25 platform. This matter involves someone else's use of the AIBNB platform for booking. In this
26 case, neither RICE nor LOVETT used the Airbnb platform for a booking for the house party
27
28

1 involved in this case. Plaintiffs were planning on attending a house party booked by non-party
2 Jones, who booked the house using Defendant AIRBNB's services. The binding arbitration
3 agreement would therefore only apply to the Terms of Service directly related to a booking made
4 by Plaintiff RICE between himself and another host. No contractual agreement was made by
5 RICE and non-party Jones through the site services provided by Defendant AIRBNB.

6 All of the cases cited by Defendant for the proposition that any matter of dispute with
7 AIRBNB requires arbitration ALL involve Plaintiffs booking with AIRBNB for the specific
8 listing involved in the litigation. Here, Plaintiffs merely attended a party in which it so happened
9 that the booker used AIRBNB. The contract is ambiguous as it relates to whether the dispute
10 involving third-parties' use of the site. Thus, the binding arbitration agreement simply does not
11 apply to Plaintiffs.
12

13 **C. Plaintiff BRIAN LOVETT is Not Bound by The Arbitration Agreement**

14 *Black's Law Dictionary* defines "agent" as "[s]omeone who is authorized to act for or in
15 place of another; a representative." *Agent, Black's Law Dictionary* (10th ed. 2014). Generally,
16 "[a]n agency relationship results when one person possesses the contractual right to control
17 another's manner of performing the duties for which he or she was hired." *Hamm v. Arrowcreek*
18 *Homeowners' Ass'n.* 124 Nev. 290, 183 895 (2008). Agency law typically creates liability for a
19 principal for the conduct of his agent that is within the scope of the agent's authority. *Nev. Nat'l*
20 *Bank v. Gold Star Meat Co.*, 89 Nev. 427, 429, 514 P.2d 651, 653 (1973). Nevada courts
21 resolve all doubts concerning the arbitrability of the subject matter of a dispute in favor of
22 arbitration, but if there is no enforceable agreement it may not order a party to arbitrate. *Truck*
23 *Ins. Exch. V. Palmer J. Swanson, Inc.*, 124 Nev. 629, 633, 189 P.3d 656, 659 (2008).
24

25
26 Plaintiff LOVETT did not open an account with Defendant AIRBNB. He never became
27 an agent and never knowingly exploited the benefits of the agreement between Ms. Jones and
28 AIRBNB. Defendant cannot say that LOVETT benefitted from the agreement even as a non-

1 signatory as he was just planning on attending a house party. The fact that Ms. JONES had
2 booked a rental with AIRBNB is irrelevant. There is no evidence that Plaintiffs even knew Ms.
3 Jones. Thus, there is no evidence anyone was agent for anyone.

4 **III.**

5 **CONCLUSION**

6 Defendant's Motion to Compel Arbitration and Stay Litigation should be denied in its
7 entirety. Plaintiffs causes of action do not arise out of THEIR use of the AIRBNB platform, but
8 rather arises out of non-party Jones' use of the AIRBNB platform. Therefore, there was no
9 contractual privity between Plaintiffs, non-party Jones, and AIRBNB for this specific rental or
10 booking.
11

12 DATED this 31 day of January, 2020.

13 **THE702FIRM**

14
15
16 

17 MICHAEL C. KANE, ESQ.
18 Nevada Bar No. 10096
19 BRADLEY J. MYERS, ESQ.
20 Nevada Bar No. 8857
21 DAVID M. MOORE, ESQ.
22 Nevada Bar No. 8580
23 400 South 7th Street #400
24 Las Vegas, Nevada 89101
25 *Attorneys for Plaintiff*
26
27
28


1 **CERTIFICATE OF SERVICE**

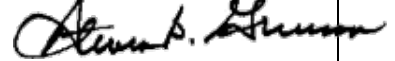
2 I hereby certify that on the 3 day of January, 2020, I caused service of a true and
3 correct copy of the foregoing **OPPOSITION TO MOTION TO COMPEL ARBITRATION**
4 to be made by the Eighth Judicial District Court's Wiznet eservice program, upon all parties
5 registered to use this service, in accordance with the Clark County District Court's Administrative
6 Order No. 14-2, issued 5/9/14:
7

8 Ryan L. Dennett, Esq.
9 Brent D. Quist, Esq.
10 **DENNETT WINSPEAR, LLP.**
11 3301 North Buffalo Drive, Suite 195
12 Las Vegas, Nevada 89129
13 Attorneys for Defendant AIRBNB, INC.

14 I further certify that any parties listed below are not registered to use Wiznet and service
15 was made by depositing the same in the United States Mail in Las Vegas, Nevada, postage
16 prepaid, addressed as follows:
17

18 Jasper Han
19 9660 Grouse Grove Avenue
20 Las Vegas, Nevada 89148
21 702-622-1111
22 Defendant IN PROPER PERSON

23 
24 _____
25 An Employee of THE702FIRM
26
27
28



1 RYAN L. DENNETT, ESQ.
2 Nevada Bar No. 005617
3 rdennett@dennettwinspear.com
4 BRENT D. QUIST, ESQ.
5 Nevada Bar No. 009157
6 bquist@dennettwinspear.com
7 **DENNETT WINSPEAR, LLP**
8 3301 N. Buffalo Drive, Suite 195
9 Las Vegas, Nevada 89129
10 Telephone: (702) 839-1100
11 Facsimile: (702) 839-1113
12 ***Attorneys for Defendant,***
13 ***AIRBNB, INC.***

DISTRICT COURT
CLARK COUNTY, NEVADA

14 ERIC RICE, Individually; JEFFERSON TEMPLE
15 as Special Administrator of the Estate of RAHEEM
16 RICE; BRYAN LOVETT

Plaintiffs,

vs.

17 ZHENG TRUST c/o FENEX CONSULTING; LI
18 JUN ZHENG, individually; SHENANDOAH
19 SOUTHWEST, INC. a Nevada Corporation;
20 JASPER HAN, individually; AIRBNB, INC., a
21 Foreign Corporation; ROA HOA; ROE SECURITY
22 COMPANY; DOE PARTY HOST; ROE
23 PROPERTY MANAGEMENT COMPANY; DOES
24 XI through XX, inclusive and ROE
25 CORPORATIONS XI through XX, inclusive,

Defendants.

Case No: A-19-801549-C
Dept. No: 26

**DEFENDANT AIRBNB, INC.'S REPLY IN SUPPORT OF MOTION TO COMPEL
ARBITRATION AND STAY LITIGATION**

22 Defendant AIRBNB, INC., by and through its counsel of record, DENNETT WINSPEAR,
23 LLP, hereby submits the following Reply in Support of its Motion to Compel Arbitration and Stay
24 Litigation, and renews its request for an order compelling Plaintiffs Eric Rice, Jefferson Temple
25 as special administrator of the estate of Raheem Rice, and Bryan Lovett ("Plaintiffs") to arbitrate
26 the claims asserted against Defendant AIRBNB, INC. in the Complaint pursuant to the Federal

///

Arbitration Act, 9 U.S.C. §1, *et seq.* ("FAA"), and to stay the litigation in this matter pursuant to 9 U.S.C. §3.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

FACTUAL STATEMENT

As noted in the Motion and Opposition, Plaintiffs allege on June 3, 2018, Plaintiffs Raheem Rice and Lovett were near the premises of 6145 Novelty Street, Las Vegas, Nevada ("Property"), to attend a party at that residence. While still walking to the Property they were fired upon by an unknown individual. Rice and Lovett were struck. Lovett was allegedly injured and Rice was killed.¹ Plaintiffs further allege that the Property, which was Plaintiffs intended destination, was rented through Airbnb's website by Airyanna Jones, who used his Airbnb account to make a reservation for the Property on June 1, 2018.²

A. RAHEEM RICE, ERIC RICE, AND ARIYANNA JONES AGREED TO THE TOS.

Key to the Court's determination in this case is the fact that Raheem Rice, Eric Rice and Ariyanna Jones all had Airbnb accounts and each assented to the Terms of Service ("TOS"). Specifically, as noted in the Motion, Jones created an Airbnb account on October 2, 2017 and consented to the TOS on that date.³ Likewise, Eric Rice consented to the TOS when he created his account on October 3, 2016 and subsequently assented to the TOS one additional time, on January 14, 2016.⁴ Raheem Rice created an account on May 22, 2018 and consented to the TOS on that date.⁵

The TOS in effect on the alleged incident date has been attached as Exhibit A(4) to the Motion. As noted in the Motion, Raheem Rice and Ariyanna Jones agreed to the TOS operative on the incident date, i.e., Version 8.⁶ While Eric Rice agreed to earlier versions of the TOS (i.e.,

¹ Motion, at pp. 3-4; and **Ex. B** thereto, Complaint, at ¶¶18-21.

² Motion, at p. 4; and **Ex. A** thereto, Miller Decl., at ¶4.

³ Motion, at p. 5; and **Ex. A** thereto, Miller Decl., at ¶18.

⁴ Motion, at pp. 5-6; and **Ex. A** thereto, Miller Decl., at ¶¶12 and 17.

⁵ Motion, at p. 6; and **Ex. A** thereto, Miller Decl., at ¶¶9-11.

⁶ **Ex. A** to Motion, Miller Decl., at ¶¶11 and 23.

Version 5 and 7), the terms to which he agreed were substantially the same as the operative TOS (i.e., Version 8).⁷ Additionally, Ariyanna Jones agreed to the TOS (Version 10) on August 22, 2019, as well as a prior version (Version 7) on October 2, 2017.⁸

Finally, as indicated in the Motion, in a wrongful death action brought by the representative of the decedent, Nevada law provides the claim derives from the rights belonging to the decedent.⁹

In sum, prior to the date of the alleged incident Raheem Rice, Eric Rice, and Ariyanna Jones either directly or by statutory effect agreed to the TOS.

B. THE TOS, WHEN READ AS A WHOLE, APPLY BROADLY TO PERSONS WHO ASSENT TO THE TOS, NOT TO ONLY THOSE PERSONS WHO ACTUALLY BOOK A PROPERTY THROUGH THE AIRBNB WEBSITE.

Plaintiffs contend the TOS, including the arbitration provision, only applies to the Plaintiffs' actual use of the Airbnb platform for a specific booking. However, the initial page of the TOS make clear that any person who accesses or uses the Airbnb website or **otherwise benefits from Airbnb services**, i.e., the Airbnb platform, agrees to comply with and be bound by the TOS, including the arbitration clause:

Terms of Service

Please read these Terms of service carefully as they contain important information about your legal rights, remedies and obligations. By accessing or using the Airbnb Platform, you agree to comply with and be bound by these Terms of Service.

Please note: Section 19 of these Terms of Service contains an arbitration clause and class action waiver that applies to all Airbnb Members. If your Country or Residence (as defined below) is the United States, this provision applies to all disputes with Airbnb . . . It affects how disputes with Airbnb are resolved. By accepting these Terms of Service, you agree to be bound by this arbitration clause and class action waiver. Please read it carefully.¹⁰

⁷ **Ex. A** to Motion, Miller Decl., at ¶¶12, 14, and 17; see also copies of the TOS agreed to by Raheem Rice, Eric Rice and Ariyanna Jones, attached to the Miller Declaration as Exhibits 4, 8, 9, 14 and 15.

⁸ **Ex. A** to Motion, Miller Decl., at ¶¶21 and 23.

⁹ Motion, at p. 6; see also, NRS 41.085; *Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 321 P.3d 912, 914-15 (Nev. 2014)(court holding that NRS 41.085 creates two separate wrongful death claims, "one belonging to the heirs of the decedent and the other belonging to the personal representative of the decedent . . .")(citing *Alsenz v. Clark Cnty. School Dist.*, 864 P.2d 285, 286 (Nev. 1993)).

¹⁰ **Ex. A** to Motion, Miller Decl., at Ex. 4 (TOS), DEF00018 (emphasis in the original).

As noted above the TOS apply to any person who makes use of the Airbnb platform. There are three components to the Airbnb platform, including the website through which Airbnb makes its services available, Airbnb's mobile, tablet and other smart device applications, and application program interfaces, and "all associated services", which would include use of properties rented through the Airbnb platform.¹¹ The foregoing plain language clearly sets forth that any individual who obtains an Airbnb account (i.e., an Airbnb Member), either through use of the Airbnb website or mobile applications, are subject to the TOS, including the applicable arbitration provision.¹²

Other provisions in the TOS also make clear they apply broadly to all Airbnb Members, with respect to their use of any aspect of the Airbnb platform or interactions with other Airbnb Members. For instance, Section 17 of the TOS (Liability) provides, in relevant part as follows:

Unless your Country of Residence is in the EU, you acknowledge and agree that, to the maximum extent permitted by law, the entire risk arising out of your access to and use of the Airbnb Platform . . . , your stay at any Accommodation, participation in any Experience or Event or use of any other Host Service . . . or any other interaction you have with other Members whether in person or online remains with you. Neither Airbnb nor any other party involved in creating, producing, or delivering the Airbnb Platform . . . will be liable for any incidental, special, exemplary or consequential damages . . . or for any damages for personal or bodily injury or emotional distress arising out of or in connection with (i) these Terms . . .¹³

Thus, persons who have used the Airbnb platform and have agreed to the TOS, and thus are considered Airbnb Members¹⁴, are subject to the TOS limitations on liability for any interaction with any other Members.

Moreover, Section 18 of the TOS (Indemnification) provides, in relevant part:

You agree to release, defend (at Airbnb's option), indemnify, and hold Airbnb and its affiliates . . . harmless from and against any claims . . . arising out of or in any way connected with . . . your interaction with any Member, stay at an Accommodation, participation in an Experience, Event or other Host Service . . . including without limitation any injuries, losses or damages . . . of any kind arising

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*, at DEF00030 (emphasis in the original).

¹⁴ *Id.*, at DEF 00019 (defining a "registered user", i.e, an individual who has assented to the TOS as a "Member").

in connection with or as a result of such interaction . . .¹⁵

Nothing in this provision limits an Airbnb Members' indemnification obligation to situations where the Member specifically books the subject property. Instead, the indemnification obligation arises out of a Member's interactions with another Airbnb Member.

Likewise, as applicable to this case, Section 19 (Dispute Resolution and Arbitration Agreement) applies to any dispute between an Airbnb Member and Airbnb that arises out of or relates to the TOS or use of the Airbnb platform, which includes the Airbnb website, mobile applications and "all associated services." Specifically:

19.4 Agreement to Arbitrate. You and Airbnb mutually agree that any dispute, claim or controversy arising out of or relating to these Terms or the breach, termination, enforcement or interpretation thereof, or to the use of the Airbnb Platform, the Host Services, the Group Payment Service, or the Collective Content (collectively, "Disputes") will be settled by binding arbitration (the "Arbitration Agreement"). If there is a dispute about whether this Arbitration Agreement can be enforced or applies to our Dispute, you and Airbnb agree that the arbitrator will decide that issue.¹⁶

As with the other TOS provisions, the arbitration provision does not limit its application to only those individuals who actually book a property through the Airbnb platform. The dispute need only arise out of or relate to the TOS or the use of the Airbnb platform. In other words, any Airbnb Member that has a claim against Airbnb arising out of or relating to Airbnb services must arbitrate that claim as set forth in Section 19 of the TOS.

II.

LEGAL ARGUMENT

A. THE TOS CANNOT BE REASONABLY CONSTRUED TO ONLY APPLY TO AIRBNB MEMBERS WHO ACTUALLY BOOK A PROPERTY THROUGH THE AIRBNB PLATFORM.

Plaintiffs wrongly argue the TOS applies solely to individuals who actually use the Airbnb platform to book a property. However, as noted above, by consenting to the TOS, Raheem Rice, Eric Rice and Ariyanna Jones agreed to arbitrate any dispute arising out of the TOS or related to the use of the Airbnb platform. This conclusion is supported under contract interpretation

¹⁵ Ex. A to Motion, Miller Decl., at Ex. 4 (TOS), DEF00030.

¹⁶ *Id.*, at DEF00031 (emphasis in the original).

principles employed by the Nevada Supreme Court.

"Contract interpretation is a question of law and, as long as no facts are in dispute, [the Nevada Supreme Court] reviews contract issues de novo, looking to the language of the agreement and the surrounding circumstances."¹⁷ "A basic rule of contract interpretation is that every word must be given effect if at all possible."¹⁸ "A court should not interpret a contract so as to make meaningless its provisions."¹⁹

In construing a contract, a court must initially determine whether the "language of the contract is clear and unambiguous; if it is, the contract will be enforced as written."²⁰ "An ambiguous contract" is one that is "susceptible to more than one reasonable interpretation[.]"²¹ Ambiguity in a contract's language is construed against the drafter.²²

In commenting on when a contract has more than one reasonable interpretation, the Utah Supreme Court recently noted a "reasonable interpretation is an interpretation that cannot be ruled out, after considering the natural meaning of the words in the contract provision in context of the contract as a whole, as one the parties could have reasonably intended." In other words, "if the court determines that either of the competing interpretations could reasonably have been what the parties intended when they entered into the contract, then the contract is ambiguous."²³

Based on the foregoing, this Court is required to look at the plain language of the TOS, in light of the surrounding circumstances and the TOS as a whole, and determine whether the arbitration provision could reasonably be read to apply only in those situations where an Airbnb Member books a property or, instead, if the arbitration provision applies more broadly to any dispute between a Member and Airbnb that arises out of the TOS or use of the Airbnb platform. If

¹⁷ *Solid v. Eighth Judicial District Court*, 393 P.3d 666, 672 (Nev. 2017)(quoting *Redrock Valley Ranch, LLC v. Washoe Cty*, 254 P.3d 641, 647-48 (Nev. 2011)).

¹⁸ *Id.* (quoting *Bielar v. Washoe Health Sys., Inc.*, 306 P.3d 360, 364 (Nev. 2013)).

¹⁹ *Id.*

²⁰ *America First Federal Credit Union v. Soro*, 359 P.3d 105, 106 (Nev. 2015)(*Davis v. Beling*, 278 P.3d 501, 515 (Nev. 2012)).

²¹ *Id.*

²² *Id.* (quoting *Anvui, LLC v. G.L. Dragon, LLC*, 163 P.3d 405, 407 (Nev. 2007)).

²³ *Brady v. Park*, 445 P.3d 395, 408-09 (Utah 2019).

1 the latter is true, which Airbnb contends is the case, then the Court must compel arbitration.

2 Section 19.4, quoted above, clearly states the requirement to arbitrate extends to all
3 disputes arising out of or relating to the TOS or the use of the Airbnb platform. When read in
4 connection with the first page of the TOS, it is clear the arbitration provision extends to all Airbnb
5 Members.²⁴ A person becomes an Airbnb Member once they assent to the TOS.²⁵ An individual
6 is not contractually considered a Member only when they book a property through the Airbnb
7 platform. In other words, an Airbnb Member does not lose their Airbnb membership status once
8 they are done booking or using a property. This ongoing membership status protects both the
9 Member and Airbnb.

10 Moreover, Section 19.4 clearly indicates the arbitration requirement applies to any
11 dispute involving Airbnb that relates "to these Terms," i.e., the TOS, **or** to the use of the Airbnb
12 platform, which would include use of the Airbnb website, mobile applications, or "related
13 services." There is nothing in Section 19.4 of the TOS that could reasonably be construed as
14 indicating that the TOS only applies to those Members actually booking a property through the
15 Airbnb platform. So long as the dispute arises out of the TOS or the use of the Airbnb platform,
16 then the arbitration provision applies to that dispute.

17 Here, the dispute obviously arises out of the TOS or, at a minimum, use of the Airbnb
18 platform because the Complaint alleges that the Property was rented from through "use of
19 Defendant AirBNB's service . . ."²⁶ The TOS specifically provides that Airbnb's services fall within
20 the scope of the Airbnb platform. Thus, because Plaintiffs' claims arise out of use of the Airbnb
21 platform, the claim is governed by the TOS's arbitration provision.

22 Further, when considering the TOS's other provisions, it is clear the TOS is meant to
23 apply to all Airbnb Members, not simply those actually booking a property involved in a dispute.
24 As noted above, TOS Section 17 (which places limits on Airbnb's liability) and Section 18 (which
25 addresses indemnification), applies to any interactions that an Airbnb Member has with other

26 ²⁴ See **Ex. A**, Miller Decl, at Ex. 4 (TOS), DEF 00018.

27 ²⁵ *Id.*, at DEF00019.

28 ²⁶ **Ex. B** to Motion, Complaint, at p. 4.

Airbnb Members.

Here, the factual allegations for Plaintiffs' claims are that Jones (a Member) threw a party at a Property rented through the Airbnb platform, and that because Airbnb allowed the party to be thrown at the Property Raheem Rice (another Member) with his traveling companion (Lovett) were injured. In other words, Plaintiffs are blaming Airbnb for their injuries because Airbnb permitted Jones to use the Airbnb platform to rent the Property and their allegations directly relate to the use of the Airbnb platform. Given the plain language of the TOS and the allegations in the Complaint, Plaintiffs' contention that Raheem Rice (and, by extension Raheem Rice's estate, Lovett, and Eric Rice) are not subject to the arbitration provision is not reasonable.

Plaintiffs contend that the Airbnb's cited cases only involve plaintiffs who actually used the Airbnb platform to book a property.²⁷ This is patently false. Indeed, multiple courts in those cases (set forth in footnote 45 of Airbnb's Motion) compelled non-booking plaintiffs to arbitrate their dispute against Airbnb.

For instance, in *Hatfield v. Bauer*, the court compelled a non-booking guest to arbitrate their dispute because "1) Plaintiff received the benefits conferred by the terms of service containing the agreement to arbitrate disputes 'arise out of or are related to' the use of Airbnb's platform [agreed to by the booking Guest]; 2) [the booking Guest] acted as Plaintiff's agent by booking the accommodation through his Airbnb account, and Plaintiff ratified [the booking Guest's] conduct; and 3) Plaintiff created an Airbnb account and consented to the terms and conditions containing the arbitration clause when he agreed to the Terms of Service himself after the incident and before the Complaint was filed."²⁸

In *Belinsky, et al. v. Duffy, et. al.*, the court compelled arbitration of a non-booking Plaintiff's negligence claims and the booking Guest spouse's loss of consortium claims.²⁹

²⁷ Opposition, at p. 6 ("All of the cases cited by Defendant for the proposition that any matter of dispute with AIRBNB requires arbitration ALL involve Plaintiffs booking with AIRBNB for the specific listing involved in the litigation.")

²⁸ **Ex. C** to Motion, *Hatfield v. Bauer*, Sonoma County California Superior Court Case No. SCV-263276 (Mar. 5, 2019).

²⁹ **Ex. D** to Motion, *Belinsky, et al. v. Duffy, et al.*, Bergen County New Jersey Superior Court Docket No. BER-L-000682-19 (May 10, 2019).

Finally, in *Benkert v. Pleas, et al.*, the court found Airbnb's "valid and enforceable" TOS "Clearly and unmistakably evidences the parties' intent to delegate threshold issues of arbitrability to the arbitrator" and compelled a non-booking Airbnb user to arbitration.³⁰

Plaintiffs argument that the TOS do not apply to non-booking Guests is without merit. The TOS clearly states otherwise. The Court should therefore hold that a valid, enforceable arbitration agreement exists and compel this case to arbitration.

B. RAHEEM RICE'S ESTATE IS BOUND BY RAHEEM RICE'S AGREEMENT TO ARBITRATE.

Controlling case law confirms Raheem Rice's estate is bound by his agreement to arbitrate. This case law is set forth in the Motion.³¹ Plaintiffs do not contend otherwise.

C. LOVETT, A NON-SIGNATORY TO THE ARBITRATION AGREEMENT, IS BOUND TO ARBITRATE PURSUANT TO AGENCY AND ESTOPPEL PRINCIPLES.

Ariyanna Jones acted as an implied agent of Raheem Rice and Lovett, when he arranged for the property (through use of the Airbnb platform) on their behalf as well as on behalf of all persons either in attendance at the party or, like Lovett and Rice, were in route to attend the party. While the Complaint does not allege an express agency relationship, the Complaint does allege sufficient facts from which the Court may reasonably determine an implied agency relationship existed between Jones and the Plaintiffs.

"An agency agreement can be either express or implied in fact."³² Here, the very fact that Raheem Rice and Lovett were on their way to the party hosted at the Property when the incident took place is evidence that Jones was an implied agent of Plaintiffs. In other words, acting on their behalf, as well as the behalf of all other persons who were at the party or on their way to the party when the incident took place, Jones used the Airbnb platform to rent the Property, and then hosted the party at the Property.

³⁰ **Ex. E** to Motion, *Benkert v. Pleas, et al.*, Missouri Circuit Court, 22nd Circuit Case No. 1822-CC11402 (June 18, 2019).

³¹ Motion, at pp. 11-12.

³² *Keystone Ralty v. Osterhus*, 807 P.2d 1385, 1388 (Nev. 1991)(citing *H.-H.-M. Safe Co. v. Balliet*, 145 P. 941 (Nev. 1914)). *See also, Myers v. Jones*, 657 P.2d 1163, 1164 (Nev. 1983)(recognizing that an agent can have either express or implied authority).

Plaintiffs argue Lovett cannot be bound by the arbitration provision because Lovett was not an agent, presumably of the Plaintiffs.³³ This argument misses the point. Airbnb is not arguing that Lovett is bound to the terms of the TOS, including the arbitration provision, because he was an agent. Admittedly, Lovett was not an agent in this situation. However, Jones was an agent. Jones had implied authority to arrange for the party on behalf of all those, including Lovett, who attended the party.

Plaintiffs further contend Lovett cannot be bound to the TOS by principles of estoppel because he did not "knowingly" exploit the benefits of the TOS as he was "just planning on attending a house party."³⁴ This argument is factually inaccurate and, once again, misses the point of Airbnb's argument.

The Complaint makes clear Lovett and Raheem Rice knew there was a party at the Property and that the friends intended to participate in the party. They travelled to the Property for the specific purpose of joining the party.³⁵ For Lovett to suggest he did not know he was attending a party, which was held at the Property, is simply not true. As noted in the Motion, either Lovett benefitted from the availability of the Property for his use and enjoyment (whether or not he took advantage of that availability) by virtue of that property's reservation through the use of the Airbnb platform, or he did not. If the former, he is estopped from avoiding the arbitration obligations of the TOS; if the latter, Lovett can state no claim against Airbnb due to the lack of such a connection because there could never be any duty owed to Lovett by Airbnb.³⁶

D. PLAINTIFFS FAIL TO ARGUE THE DELEGATION CLAUSE IN THE TOS IS NOT ENFORCEABLE; THEREFORE, THE COURT SHOULD COMPEL ARBITRATION OF PLAINTIFFS' CLAIMS AND STAY THIS ACTION.

Plaintiff fail to dispute the TOS's delegation clause is unenforceable. Indeed, the delegation clause, set forth in Section 19.4 of the TOS, is valid and enforceable. Thus, because

³³ Opposition, at p. 6.

³⁴ *Id.* at pp. 6-7.

³⁵ **Ex. B** to Motion, Complaint, at ¶18 ("On or about June 3, 2018, Decedent RICE and BRYAN LOVETT were on the premises of, on or near on the premises of 6145 Novelty Street, Las Vegas, Nevada **and were travelling to attend a party.**") (Emphasis added).

³⁶ See Motion, at pp. 14-15.

1 the Plaintiffs, directly or through operation of law, agreed to arbitrate their dispute with Airbnb,
2 the Court must grant the Motion and stay this matter. Additionally, to the extent there are any
3 questions as to the arbitrability of this dispute, the Court must allow an arbitrator to decide
4 whether the claims asserted by the Plaintiffs fall within the scope of the arbitration provision.³⁷

5 As noted in the Motion, in *Henry Schein, Inc. v. Archer and White Sales, Inc.*, the United
6 States Supreme Court addressed the question of, "Who decides whether [a] dispute is subject to
7 arbitration?"³⁸ In construing the FAA, which governs the Court's decision in the present matter³⁹,
8 the court explained that "parties may agree to have an arbitrator decide not only the merits of a
9 particular dispute but also 'gateway' questions of 'arbitrability,'" such as whether the parties have
10 agreed to arbitrate or whether their agreement covers a particular controversy."⁴⁰ A court may
11 not "rule on the potential merits of the underlying claim that is assigned by contract to an
12 arbitrator . . ."⁴¹

13 Delegation clauses are enforceable when, like here, they are "clear and unmistakable."⁴²
14 Section 19.4 of the TOS provides:

15 **19.4 Agreement to Arbitrate.** You and Airbnb mutually agree that any
16 dispute, claim or controversy arising out of or relating to these Terms or the
17 breach, termination, enforcement or interpretation thereof, or to the use of
18 the Airbnb Platform, the Host Services, the Group Payment Service, or the
19 Collective Content (collectively, "Disputes") will be settled by binding
20 arbitration (the "Arbitration Agreement"). If there is a dispute about whether
21 this Arbitration Agreement can be enforced or applies to our Dispute, you
22 and Airbnb agree that the arbitrator will decide that issue.⁴³

23 The above language clearly sets forth that the arbitrator is to decide any dispute as to
24 whether the claims asserted by the Plaintiffs are subject to arbitration. Plaintiffs fail to contend
25

26 ³⁷ See **Ex. A**, Miller Decl., at Ex. 4 (TOS), DEF00031.

27 ³⁸ 139 S.Ct. 524, 252 (2019).

28 ³⁹ Motion, at p. 7 (citing Miller Decl, at Ex. 4 (TOS), Section 19.6)

⁴⁰ *Henry Schein*, 139 S.Ct. at 529 (quoting *Rent-A-Center*, 561 U.S. 63, 68-69 (2010); and citing
First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995)).

⁴¹ *Id.* (quoting *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649-50
(1986)).

⁴² *Rent-A-Center*, 561 U.S. at 79-80; see also, Motion, at fn 69.

⁴³ *Id.*, at DEF00031 (emphasis in the original).

1 otherwise. Their argument is limited to contending they are not subject to the TOS. But, as
2 shown above, that is not the case. The Court should therefore compel arbitration. Any dispute
3 over the arbitrability of Plaintiffs' claims must be resolved by the arbitrator.

4 Finally, Section 3 of the FAA authorizes this Court to stay the litigation upon referring a
5 dispute to arbitration.⁴⁴

6 **III.**

7 **CONCLUSION**

8 For the foregoing reasons, and the reasons set forth in the Motion, the Court should issue
9 an order compelling Plaintiffs to arbitration and staying the litigation pursuant to section 3 of the
10 Federal Arbitration Act.

11 DATED this 21st day of January, 2020.

12 **DENNETT WINSPEAR, LLP**

13
14 By /s/ Ryan L. Dennett
15 RYAN L. DENNETT, ESQ.
16 Nevada Bar No. 005617
17 BRENT D. QUIST, ESQ.
18 Nevada Bar No. 009157
19 3301 N. Buffalo Drive, Suite 195
20 Las Vegas, Nevada 89129
21 Telephone: (702) 839-1100
22 Facsimile: (702) 839-1113
23 ***Attorneys for Defendant,***
24 ***AIRBNB, INC.***

25
26
27
28 ⁴⁴ See Motion, at p. 17, and cases set forth in Motion at fn 76.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), EDCR 7.26 and N.E.F.C.R. 9, I certify that on this date, I served the foregoing ***DEFENDANT AIRBNB, INC.'S REPLY IN SUPPORT OF MOTION TO COMPEL ARBITRATION AND STAY LITIGATION*** on all parties to this action by the following method:

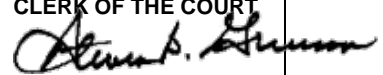
_____ Facsimile
_____ Mail
_____ XX Electronic Service

Michael C. Kane, Esq.
Nevada Bar No.10096
Bradley J. Myers, Esq.
Nevada Bar No. 8857
THE702FIRM
400 South Seventh Street, Floor 4
Las Vegas, Nevada 89101
Telephone: 702-776-3333
Facsimile: 702-505-9787
Attorneys for Eric Rice and Jefferson Temple,
as Special Administrator of the Estate of Raheem Rice

Jordan P. Schnitzer, Esq.
Nevada Bar No. 10744
THE SCHNITZER LAW FIRM
9205 W. Russell Road, Suite 240
Las Vegas, Nevada 89148
Telephone: 702-960-4050
Facsimile: 702-960-4092
Attorneys for Bryan Lovett

DATED this 21st day of January, 2020.

/s/ Theresa Amendola
An Employee of DENNETT WINSPEAR, LLP



1 RTRAN

2
3
4
5 DISTRICT COURT

6 CLARK COUNTY, NEVADA

7)
8 ERIC RICE, ET AL.,)

CASE#: A-19-801549-C

9 Plaintiffs,)

DEPT. XXVI

10 vs.)

11 ZHENG TRUST C/O FENEX
CONSULTING, ET AL.,)

12 Defendants.)
13

14 BEFORE THE HONORABLE GLORIA STURMAN
DISTRICT COURT JUDGE

15 WEDNESDAY, FEBRUARY 12, 2020

16 **RECORDER'S TRANSCRIPT OF PENDING MOTIONS**

17
18 APPEARANCES:

19
20 For the Plaintiffs:

MICHAEL C. KANE, ESQ.
JORDAN SCHNITZER, ESQ.

21
22 For the Defendant

DAVID M. MORE, ESQ.
RYAN L. DENNETT, ESQ.
DAVID HAYEK, ESQ.

23
24
25 RECORDED BY: KERRY ESPARZA, COURT RECORDER

1 Las Vegas, Nevada, Wednesday, February 12, 2020

2

3 [Case called at 9:04 a.m.]

4 THE COURT: So page 1, Rice versus Zheng Trust.

5 MR. MOORE: Good morning, Your Honor. David Moore and
6 Michael Kane, he's going to sit right there, Eric Raheem Rice.

7 MR. SCHNITZER: Good morning, Your Honor. Jordan
8 Schnitzer for Bryan Lovett. Sorry, Your Honor.

9 MR. HAYEK: Good morning, Your Honor. My name is David
10 Hayek. I'm from P.K. Schrieffer in Los Angeles. I have a pro hac vice
11 application pending. Mr. Dennett who is counsel of record is in another
12 department at this morning and asked to be put on second call.

13 THE COURT: Sorry. Is he coming?

14 MR. HAYEK: He's in another department of this courtroom
15 on a different matter.

16 THE COURT: Uh-huh.

17 MR. HAYEK: And asked to be first there and last here.

18 THE COURT: Okay. Well, you're kind of like the only thing
19 here.

20 MR. HAYEK: Well --

21 THE COURT: So --

22 MR. HAYEK: -- like I said, we submitted a motion --

23 THE COURT: -- it's a problem.

24 MR. HAYEK: -- for association, I believe it was done late last
25 night. I have a copy if you'd like.

1 THE COURT: Well, late last night's kind of late.
2 MR. HAYEK: Of course.
3 THE COURT: So I certainly haven't seen it. Counsel, have
4 you seen it?
5 MR. SCHNITZER: I mean, I don't think I've seen it, Your
6 Honor.
7 MR. HAYEK: It was --
8 MR. MOORE: I saw that it came in. I didn't have a chance to
9 read it.
10 THE COURT: Okay.
11 MR. MOORE: I did see that it came in late. I haven't had a
12 chance to read it. I'm you know, perfectly willing to trail for a few
13 minutes --
14 THE COURT: Sure.
15 MR. MOORE: -- so he could be here.
16 THE COURT: Okay. Yeah.
17 THE CLERK: Counselor, can I get you to spell your last name
18 for me please?
19 MR. HAYEK: Sure. It is H-A-Y-E-K. I have a card if that
20 helps?
21 THE CLERK: Yeah. That would be helpful too.
22 MR. HAYEK: May I approach, Your Honor?
23 THE COURT: Sure.
24 MR. HAYEK: So we already did our part with the state bar
25 and they submitted I assume electronically last night. There was a fellow

1 up at the California bar submitting --

2 THE COURT: Okay.

3 MR. HAYEK: -- outstanding certificates.

4 THE CLERK: Can I have your bar number?

5 MR. HAYEK: 144116.

6 [Pause]

7 MR. HAYEK: Your Honor, if you'd like, I do have a conformed
8 copy of the motion to associate.

9 THE COURT: I can print -- oh, no problem. I've got it print
10 right here.

11 [Pause]

12 THE COURT: Counsel, if you just want to have a seat.

13 [Recess taken from 9:09 a.m. to 9:14 a.m.]

14 THE COURT: So we'll recall the case and get appearances of
15 counsel. We'll start over here.

16 MR. SCHNITZER: Good morning, Your Honor. Jordan
17 Schnitzer for Brian Lovett.

18 MR. MOORE: David Moore and Michael Kane on behalf of
19 the Rice Plaintiffs.

20 MR. DENNETT: Ryan Dennett and David Hayek on behalf of
21 Defendant, Airbnb.

22 THE COURT: Okay.

23 MR. DENNETT: Your Honor, as a preliminary matter we
24 submitted a pro hac vice application --

25 THE COURT: Uh-huh.

1 MR. DENNETT: -- last night.

2 THE COURT: Yeah. We discussed that briefly with your
3 colleague before your arrival. So I have printed it. And I believe
4 Counsel, you indicate -- Mr. Schnitzer, I think you said you were not
5 aware of it, but I do believe that your co-counsel --

6 MR. KANE: Yeah. When I was sitting back there, I saw it. I
7 just didn't open the email yet.

8 THE COURT: Okay, all right. Great. So according to -- it's
9 not been noticed for hearing yet, but according to the application, other
10 than the certificate of good standing from California there appears to be
11 no other appearances of counsel in this jurisdiction. So he would fall
12 under Rule 42.

13 MR. MOORE: Yes, Your Honor.

14 THE COURT: Any questions or concerns about the --

15 MR. MOORE: Well, as I said, I haven't even opened it. I just
16 saw that it came in. So I can't talk about the substance of the motion to
17 associate counsel. So I have no position right now. I haven't had a
18 chance to read it; it just came in last night.

19 THE COURT: Okay. Well, then with the understanding that
20 it's here, it's on the record, but none of us have really had a chance to
21 digest it, I'm assuming that Mr. Hayek intended to argue today. So
22 counsel, what's your --

23 MR. DENNETT: Your Honor, we have no objection to --

24 MR. MOORE: Right.

25 MR. DENNETT: -- pro hac vice.

1 THE COURT: You agree with that, okay.

2 MR. DENNETT: There's no question --

3 THE COURT: So you'll waive that and we'll -- pending the
4 approval, because it is on file.

5 MR. MOORE: All right.

6 THE COURT: So pending the approval of the actual petition
7 or motion to associate counsel, we'll waive that. I'll just tell you guys
8 that for my purposes when I grant pro hac vice applications, no problem
9 with what you do in your own case in your own -- outside of court, but I
10 always do require the appearance of counsel pursuant to local rules at
11 trials and court appearances.

12 MR. DENNETT: Okay.

13 THE COURT: Thank you, Mr. Dennett.

14 MR. DENNETT: And I have an order granting that, Your
15 Honor. I could --

16 THE COURT: Okay, thanks. We're going to give them an
17 opportunity to have an opportunity to review it.

18 MR. DENNETT: Okay.

19 THE COURT: And if they wish to raise any issues they
20 certainly can. But other than that if you're ready then to proceed --

21 MR. MOORE: We're ready. Yes, Your Honor.

22 THE COURT: We are, okay. Okay. So what we have on
23 today is Airbnb's motion to compel arbitration and stay the litigation.
24 We have responses and joinders and then the -- a notice of withdrawal
25 which, you know, it's not a thing, but they have conceded I believe the

1 point on the -- I think it's Mr. Schnitzer's client who's under 18?

2 MR. SCHNITZER: Yes, Your Honor.

3 THE COURT: And wouldn't have been competent to enter
4 into any kind of a contract assuming he did.

5 MR. SCHNITZER: Correct, Your Honor.

6 THE COURT: So, yeah. Okay, great. Okay, all right. So
7 that's what we've got on. We're ready to go then. It's your motion.

8 MR. HAYEK: Sure. Your Honor, I think as just an
9 introductory matter, looking at the opposition, the first sentence in the
10 P's and A's concedes that there is a contract between Airbnb and Mr.
11 Rice to arbitrate claims. The argument in opposition is this claim doesn't
12 fall within the scope of that agreement.

13 Under the most recent U.S. Supreme Court case involving
14 arbitration, *Henry Schein v. Archer and Wright* that was decided -- and
15 White, excuse me, that was decided on January 8th last year, that
16 precise issue was before the court. And the principal holding of that
17 unanimous U.S. Supreme Court decision was, where the arbitration
18 agreement delegates to the arbitrator, the issue of arbitrability of a
19 particular claim as being within the scope of an admitted arbitration
20 agreement. The court's obligation is to compel arbitration at least on
21 that matter.

22 We believe that it's clear from the agreement and from the
23 facts that the terms of service obligate Mr. Rice to arbitrate any claim
24 against Airbnb that is brought within the United States. In fact the first
25 sentence of the dispute resolution provision, it's Exhibit -- let's see here.

1 Actually it's number paginated, DEF000153, section 19.1. And it reads, "If
2 you bring" -- or excuse me, "This dispute resolution and arbitration
3 agreement shall apply if you bring any claim against Airbnb in the
4 United States to the extent not in conflict with section 21", which doesn't
5 apply here. At the next page, DEF154 at section 19.4 it says, "If there is a
6 dispute about whether this arbitration agreement can be enforced or
7 applies to our dispute you and Airbnb agree that the arbitrator will
8 decide that issue."

9 And again, that was precisely the issue in *Henry Schein*.
10 Whether or not, even where a court in that case believed the claim that
11 the dispute was arbitrable under the arbitration agreement was wholly
12 groundless under the federal arbitration agreement to which -- under
13 which this contract sits says, you can delegate that to the arbitrator and
14 the court has no option but to send it to the arbitrator if it believes that's
15 an issue.

16 Now we don't believe that's an issue because the arbitration
17 agreement applies to any dispute claim or controversy arising out of or
18 relating to the terms of services to hosting services, which is what's
19 alleged in this case, or anything arising or relating thereto. We believe
20 that expansive statement certainly encompasses this claim where the
21 only claim against Airbnb is that the property two doors down was
22 having a party through an accommodation reserved on the Airbnb
23 platform. And because of that reservation somehow Airbnb is
24 responsible.

25 So it certainly arises out of hosting services, which is the

1 interaction of a property accommodation and the claimant. But even if
2 the Court were at this point not inclined to agree that the dispute fell
3 within that, the result is the Court sends it to arbitration to have that
4 issue resolved, as the parties agreed to do in their terms of service.

5 THE COURT: That's it?

6 MR. HAYEK: Lastly, once it is compelled to arbitration under
7 the Federal Arbitration Act 9 section 3, upon request of a party the court
8 shall stay the action. We have requested that stay and again, that would
9 -- how long that stay lasts depends on whether this is referred to
10 arbitration to determine arbitrability, or whether it's referred to
11 arbitration to arbitrate. But either way, however it's sent to arbitration,
12 the matter -- the rest of the matter must be stayed under 9 section 3.

13 THE COURT: Okay.

14 MR. HAYEK: Reserve for rebuttal.

15 THE COURT: Okay.

16 MR. MOORE: Thank you, Your Honor. We talked a lot about
17 delegation. It was more brought up in their reply here, but we just need
18 to talk about that there's a prima facie case. We have no doubt that there
19 is -- that an account was opened up, but we have no proof that Rice ever
20 used a booking ever. Just got on the site and you know, agreed to the
21 terms of service. Well, we're not talking about agree -- we concede that
22 that's his email and he agreed to terms of service.

23 The point is, is the prima facie case, for whether the
24 arbitration provision will apply is is that if the claim encompasses the -- if
25 the claim encompasses that the claims that you are asserting. And the

1 arbitration agreement is absolutely here that it only regards any dispute,
2 claim or controversy arising out of, relating to the terms of the breach,
3 termination, enforcement or interpretation thereof.

4 Now we have a non-party Ms. Jones who uses an Airbnb
5 booking. And my client and Lovett you know, are going to this party.
6 There's no relationship.

7 THE COURT: And the party is at the home she booked.

8 MR. MOORE: Right.

9 THE COURT: It's not at a -- because there was a reference
10 that it's two houses down. It's -- they were on their way to that event --

11 MR. MOORE: Right.

12 THE COURT: -- that was being held at this party house.

13 MR. MOORE: Well, what I'm trying to say is that the
14 connection, there's no connection. Let's say Mr. Schnitzer and I, Mr.
15 Schnitzer uses an Airbnb booking and invites me to stay with him at this
16 Airbnb booking.

17 THE COURT: Uh-huh.

18 MR. MOORE: Underwriting a benefit because I'm going to be
19 staying with him. There is no connection between Rice and Lovett to
20 Jones. They're not deriving a benefit because they're not -- there's no
21 knowledge of the Airbnb booking until you know, after the fact.

22 THE COURT: They didn't know how she had --

23 MR. MOORE: Right.

24 THE COURT: -- retained occupancy of these premises?

25 MR. MOORE: Yeah. Just to come to a party.

1 THE COURT: Uh-huh.

2 MR. MOORE: That's all it is. There's no, I'm going to stay
3 with the person who's booking an Airbnb. There's just no connection.
4 So this terms of service does not relate. If Rice had -- the terms of
5 service apply only in the sense that if Rice were to use an Airbnb booking
6 to rent a booking, then if there is a dispute concerning that booking then
7 that's when the arbitration provision would apply. It would not apply to
8 something so far connected that it's not related to the claims that are
9 being asserted by Rice and Lovett.

10 The analogy I best can draw is it's a -- I buy a laptop
11 computer at Best Buy. And part of the purchase agreement includes an
12 arbitration provision. Clearly if I have a dispute regarding the purchase
13 of the laptop, then an arbitration provision could, you know, potentially
14 apply. But let's say a year later I'm on a Best Buy property and I trip and
15 fall. Well, then Best Buy says, no. You agree to arbitrate any and all
16 disputes regarding, you know, regarding the slip and fall. It's
17 unconscionable to apply that type of arbitration provision in this case.

18 The clause has to be clear and unmistakable. This is not
19 clear and unmistakable because this is so far afield from the connection
20 between Rice and Lovett to the rental of the Airbnb book.

21 THE COURT: Well, look at the --

22 MR. MOORE: It's overbroad.

23 THE COURT: 19.4 says the agreement to arbitrate is you and
24 Airbnb mutually agree that any dispute, claim or controversy arising out
25 of or relating to these terms, in other words the terms of service for

1 using their platform, or the breach, termination enforcement or
2 interpretation thereof. It's not complaining about renting the property.
3 Or to the use of the Airbnb platform. He didn't use it. I mean, it's not like
4 Airbnb sends out invitations to the parties. I mean, you don't use Airbnb
5 to notify people that I'm renting a party house; come to the party. It's
6 not -- so I mean, it's not related to their platform.

7 The host services, I -- host services are not here. Group
8 payment service. Again, he wasn't paying. Collected content. Those are
9 what the agreement seems to say it's related to. It's related to use of the
10 platform.

11 MR. MOORE: And you're exactly correct, Your Honor. And
12 that's our position. It just does not apply to the Rices. It is too far afield
13 from the actual use of the Airbnb platform. Didn't -- he didn't use the
14 Airbnb platform in this case. It was someone else; a separate third party.
15 And that is the absolute distinction that needs to be made as to why it
16 does not apply in this case.

17 THE COURT: Uh-huh. So the argument that counsel makes
18 that you have to -- because he signed -- because he accepted the terms
19 of service, he has to go first to the arbitrator and have the arbitrator
20 make that decision.

21 MR. MOORE: Well, I mean, it's an overbroad interpretation
22 of this. We have to say -- you have to look at what the intent of the
23 parties were at the time. And the intent of Mr. Rice when he setup an
24 account, whether he ever used it or not --

25 THE COURT: Uh-huh.

1 MR. MOORE: -- the intent of the parties was not to waive his
2 right to a jury trial in the event that Airbnb was somehow negligent
3 involved in a separate tort action not arising out of the use of the Airbnb
4 platform. The intent --

5 THE COURT: His own use.

6 MR. MOORE: Excuse me?

7 THE COURT: His own use.

8 MR. MOORE: Yes. His own -- it only applies to his own use.
9 And we talked about on their motion about regarding whether Lovett
10 was like an agent or -- of this. You know, we already discussed that, and
11 it's been withdrawn, but it's -- as I said, the agency would only involve if
12 you derive a benefit because you're going to be with someone who's
13 going to be using it and there's some kind of connection there. But I
14 mean, that's a whole separate --

15 THE COURT: Oh, because I wasn't sure if the allegation was
16 that they had arranged for her to be the one to rent the property for
17 them.

18 MR. MOORE: Right, yeah. There's no allegation of that --

19 THE COURT: Okay.

20 MR. MOORE: -- that there's any connection other than --

21 THE COURT: Because that's confusing.

22 MR. MOORE: -- you know, hey we're having a party. That is
23 -- you know, he's not -- Rice is not staying there to use the booking to
24 stay there and then there would be some kind of connection there. But
25 other than just going to a party there's no connection between Rice and

1 Jones that would make them subject to an overbroad arbitration
2 agreement.

3 And you can't just, you know, have any -- make up any
4 dispute about a provision to go to arbitration to interpret the policy. And
5 it must be a reasonable dispute and that clearly does not apply here
6 because it only applies to the terms of service of an Airbnb booking.
7 And that clearly just does not apply here. And I'll reserve answering any
8 question.

9 THE COURT: Mr. Schnitzer, I believe with respect to your
10 client who I think at the time was underage --

11 MR. SCHNITZER: Correct, Your Honor.

12 THE COURT: -- if I'm correct about your client? Do we --

13 MR. SCHNITZER: It seems like they --

14 THE COURT: What's the status of that?

15 MR. SCHNITZER: Well, it seems like they've withdrawn their
16 motion I guess conceding my opposition. I just want to make sure their
17 notice of withdrawal said they're withdrawing the motion to arbitrate,
18 but not the motion to stay.

19 THE COURT: Uh-huh.

20 MR. SCHNITZER: There are lines upon the Federal
21 Arbitration Act. There's no arbitration agreement. There's no basis to
22 stay as to my client. So regardless of this Court's decision as to my
23 client, the case should move forward based upon their withdrawal of the
24 motion to arbitrate.

25 THE COURT: Okay.

1 MR. SCHNITZER: Thank you.

2 THE COURT: Thanks very much.

3 MR. MOORE: Thank you.

4 THE COURT: So Mr. Dennett with respect to withdrawing the
5 opposition, we have this problem all the time with people saying they're
6 going to be withdrawing motions. Once -- but once you filed it and
7 there's been a response technically, they can't be withdrawn.

8 MR. DENNETT: I understand.

9 THE COURT: So understanding that it's more in the nature
10 of, we acknowledge what -- that Mr. Schnitzer's client as being under the
11 age of 18. So am I interpreting --

12 MR. DENNETT: Yeah. The acknowledgement that we're
13 making is that --

14 THE COURT: The acknowledgment?

15 MR. DENNETT: -- Mr. Schnitzer's client did not have an
16 Airbnb account. So he wasn't -- he hadn't clicked on. In addition, that
17 was more significant to us than his age but --

18 THE COURT: Okay.

19 MR. DENNETT: -- he did not have an Airbnb account.

20 THE COURT: Okay.

21 MR. DENNETT: So he didn't have the same issue that the
22 Rices had.

23 THE COURT: Got it, okay. All right. Thanks. Okay, so
24 counsel.

25 MR. HAYEK: So again, there's no dispute that Mr. Rice had

1 agreed to the terms of service. This -- as I said before, this case is
2 precisely what the Supreme Court dealt with. The exact same argument
3 that's being made by Mr. Rice's counsel here is wait a minute, wait a
4 minute. Yeah, we had an agreement, but it doesn't apply to this case.
5 And in fact, it would be ridiculous to apply it to this case. That's wholly
6 unsupported. That's exactly what happened in the U.S. Supreme Court
7 case *Henry Schein v. Archer and White*.

8 At the trial court and appellate court level of that case, the
9 court looked at the dispute -- courts looked at the dispute and said wait a
10 minute, wait a minute. Yes, you have an arbitration agreement. Nobody
11 argues that you have an arbitration agreement. The argument is, this
12 claim, which is of a completely different nature than what was intended
13 by this arbitration agreement is at issue in this case.

14 The argument that the -- that dispute requires arbitration
15 under this agreement is wholly groundless. And under the Federal
16 Arbitration Act, we don't have to send it to the arbitrator to decide. We
17 can see it for ourselves. It's wholly groundless. And the Supreme Court
18 said, there is no such exception where they delegate it to the arbitrator to
19 decide. If there is a valid arbitration agreement, which the party --
20 Plaintiffs concede, the Court's only decision is to compel arbitration on
21 the issue of arbitrability. Because that's all we're arguing about here, is
22 whether this particular claim falls within the scope of this arbitration
23 agreement between the parties. That's delegated to the arbitrator.
24 There's no discretion of the Court to decide, I don't buy that argument
25 that it's within the four corners of that arbitration agreement. That's for

1 the arbitrator to decide; the parties agreed to that.

2 And just to make absolutely plain -- by the way, I miss
3 referenced the page numbers earlier of the arbitration clause. It's
4 actually defense 84 -- 83 and 84. The other one happens to deal with the
5 rest of the arbitration which is Irish Airbnb. But again, it says if you bring
6 any claim against Airbnb in the United States, that claim is subject to
7 arbitration. There's no ambiguity at all in that clause. It doesn't say, if it
8 relates to you signing an agreement. But it's -- I'm struck with the idea,
9 the argument here is, Airbnb has nothing to do with my guys going to
10 the party. They have no relationship to this incident, nothing. Well --

11 THE COURT: Can I just ask something? If hypothetically
12 speaking Mr. Rice was actually that rare individual who read the terms of
13 service and got to this arbitration clause and said I don't like that, I'm not
14 going to agree to that, would Airbnb have accepted him on their
15 platform?

16 MR. HAYEK: No.

17 THE COURT: Okay.

18 MR. HAYEK: However, if he had originally signed up, then
19 later they sent a revision and said we're changing our arbitration
20 agreement, he can say no. I am not going to be part of the new
21 language of the arbitration agreement. So they have opportunities, but
22 in the initial signup, no. That's why this is not a public platform, but one
23 which you have to agree to terms to, to participate like most of these
24 platforms.

25 And just as an aside, Your Honor, I'm now on case 200, I

1 think this is 209 of these. And in every case the court has compelled
2 arbitration and/or enforced the terms of service. But that aside again,
3 once we're talking about applicability of the arbitration clause to this
4 dispute, that's within the province of the arbitrator as the parties agreed.

5 MR. KANE: Judge, may I real quick?

6 THE COURT: Sure. And then they can have last word; it's
7 their motion.

8 MR. KANE: Yeah, absolutely. In response to that, number
9 one, the *Henry* case says one, you have to have mutual assent and two,
10 you have to have the scope, it has to be well-defined. In order for the
11 court to make a determination of one, the binding arbitration clause can
12 apply or two, if it's even going to go to arbitration to find the arbitrability
13 of the case. Number one, and I think we have a little bit of a misnomer
14 or maybe a clerical error in the original opposition. Raheem Rice who is
15 deceased, we don't know if he actually clicked on the platform or not.
16 We will say that we did a thorough investigation. We know that's his
17 email however, we cannot, and they cannot meet that burden that
18 there's any mutual assent from Raheem, the decedent in this case
19 because no one's ever going to be able to ask him if he actually signed
20 up.

21 Number two, Mr. Rice, the father, we know that that's his
22 email as well. So yes. I guess the emails that they cited are correct.
23 They brought no other evidence to this court to make a determination on
24 one of the most important parts of the arbitrability of the case, which is
25 mutual assent. There's absolutely nothing in their moving papers other

1 than emails.

2 THE COURT: Uh-huh.

3 MR. KANE: And so I multiple times, and not just for the
4 Court's edification, my wife for instance, I may use her email to sign up
5 with something. Does that then automatically bind her after a divorce to
6 the agreement with Airbnb for the rest of her life? No. And that's the
7 purpose of having mutual assent as well as scope.

8 Your Honor, they just don't meet those two qualification of
9 this case.

10 THE COURT: Well, I'm going to save Mr. Hayek the burden
11 of standing up and saying well, wouldn't that be something the arbitrator
12 has to decide?

13 MR. KANE: Why would we --

14 THE COURT: According --

15 MR. KANE: -- waste the time and effort and split a case for
16 Lovett, Raheem and Mr. Rice to go and to make a determination of
17 whether -- yes. I mean, isn't it fruitless to go to an arbitration and make a
18 determination if somebody --

19 THE COURT: Well, and the other thing --

20 MR. KANE: -- has actually signed up?

21 THE COURT: -- you raise an interesting point which is the
22 nature of a wrongful death case. Raheem's dead. So the damages of a
23 deceased person I don't know, did he die immediately?

24 MR. KANE: He died shortly thereafter.

25 THE COURT: So I mean, he's got --

1 MR. KANE: So you're looking at --

2 THE COURT: -- his estate has some damages, but really the
3 damages are the survivors.

4 MR. KANE: That's correct.

5 THE COURT: And so how do we know which of these
6 persons has this app? I mean, do we know? Was it the younger Raheem
7 or his father who had the app?

8 MR. KANE: We don't know, or if they even had the app or if
9 they just went online to the inter -- I mean, I don't know. I certainly don't
10 know for Raheem.

11 THE COURT: Right. I mean, because that's -- that is the --
12 kind of the difficulty I'm having with this is, as we -- you know, for me I
13 appreciate the fact that they're not conceding on the under 18 being an
14 issue. But that was what for me was the problem when I first read it,
15 even before they withdrew their position with respect to Mr. Lovett is
16 that he's under 18; you can't hold him to anything. You can't. I'm sorry,
17 you can't.

18 But my other problem was he's dead. And a wrongful death
19 claim is different. It's not -- I think the analogy was, what if I went and
20 tripped and fell at Lowes? Well -- or Best Buy. No. That's not what it is.
21 Somebody died and it's the claim of the estate for those damages but it's
22 the claim of the survivors. And what's -- how would they be bound to
23 the terms of service, assuming he did, assuming the decedent did agree,
24 so then aren't we further splitting this? I mean, I just think this is bizarre.

25 MR. KANE: I think you're absolutely right.

1 THE COURT: I mean, it's an unusual kind of a case. I mean,
2 it's a wrongful death, which are different. Okay.

3 MR. KANE: I agree 100 percent, Your Honor.

4 THE COURT: Right. Okay, right. Thanks. So finally we got
5 to my problem with this thing. With all due respect, I want to talk Mr.
6 Dennett, about the withdrawal with respect to Mr. Lovett. Now I
7 understand your position that it wasn't so much the issue that there's
8 just no proof he had an account. For me when I first looked at this, I'm
9 like, how on earth can you hold somebody who's under the age of 18 to
10 terms of service. You couldn't hold them to a contract to purchase a car.
11 How can you hold them to the terms of service?

12 Then I got to my second problem with this thing which is,
13 isn't the guy dead? And the claims of his parents for wrongful death,
14 how can you bind somebody else to the fact that he clicked on an app
15 when it's their claim for wrongful death. And their damages are their
16 loss of loving support of their child. I mean, how -- are you -- seriously?
17 Seriously? I mean, seriously.

18 MR. HAYEK: Well, there's two points, Your Honor. First the
19 parent, Eric Rice, also agreed, separately agreed to the terms of service.

20 THE COURT: Okay.

21 MR. HAYEK: So he's bound to arbitrate claims he has
22 separately, but even more importantly --

23 THE COURT: Do we know that? I mean --

24 MR. HAYEK: Yeah. That's in the moving papers; that's Eric
25 Rice.

1 THE COURT: Okay.

2 MR. HAYEK: So he separately agreed to arbitrate his claim.

3 THE COURT: Okay.

4 MR. HAYEK: But let me point this out. The who clicked that
5 -- I'm hearing this for the very first time. It wasn't in any of their
6 papers --

7 THE COURT: Right.

8 MR. HAYEK: -- it wasn't argued, it wasn't briefed until just
9 this moment. So that's improper argument. But it doesn't matter
10 because --

11 THE COURT: Well, yeah. I appreciate the fact that you've
12 already made --

13 MR. HAYEK: -- the --

14 THE COURT: -- created challenges to something they filed.

15 MR. HAYEK: -- again we put forth evidence that he did in fact
16 agree to the terms of service. And --

17 THE COURT: He --

18 MR. HAYEK: He, Raheem as well as Eric.

19 THE COURT: Uh-huh.

20 MR. HAYEK: So both the estate and the parent claimant are
21 bound by the terms of service. And put that information in the
22 declaration that was submitted, bought from the Airbnb person who --

23 THE COURT: Okay.

24 MR. HAYEK: -- reviewed their accounts.

25 THE COURT: So now we're one step further beyond. I'm

1 sitting at home and I get a phone call from a police officer. Are you the
2 father of Raheem? He was just shot outside an Airbnb. And all of a
3 sudden, I now have a deceased child and a claim for wrongful death.
4 And I'm nowhere near this site.

5 MR. HAYEK: Right.

6 THE COURT: My only claim is because my child died.

7 MR. HAYEK: Uh-huh.

8 THE COURT: It's not arising from anything other than this
9 legal operation of statute that if your child dies, you as a surviving parent
10 have a cause of action. Okay, all right. So even though --

11 MR. HAYEK: And but again --

12 THE COURT: -- even though I --

13 MR. HAYEK: -- we've moved -- excuse me, Your Honor.

14 That's rude of me.

15 THE COURT: Yeah.

16 MR. HAYEK: Again, we're back into the field of, we have an
17 agreement and we've said as part of our agreement, if we're not sure
18 this claim belongs in arbitration, the arbitrator decides it. And again, the
19 same arguments that were made by counsel a moment ago were made
20 in *Henry Schein*. Wait a minute. Why -- in fact, that was the court's -- the
21 appellate court's reasoning. We don't need to send this to the arbitrator.
22 We can see it for ourselves. This doesn't belong there. And the
23 Supreme Court in a nine to zero decision mind you, and Justice
24 Cavanaugh's first opinion said, no. You must send it to the arbitrator to
25 determine arbitrability if that's the question and if the parties in making

1 an arbitration agreement have delegated that issue to the arbitrator.

2 Here that is clearly the case.

3 So scope issues are within the province of the arbitrator. We
4 have conceded that Eric Rice, the father and we have no evidence that
5 Raheem -- we have evidence that Raheem did click to agree, and they've
6 not rebutted it with a declaration from the father saying no, no. That was
7 me that day, I did that. I signed up separately for myself and for my son
8 at the same time, although they're different dates and times and different
9 devices.

10 So again, with all due respect to the Court, the options are
11 limited. You send it to arbitration and stay the case pending an
12 arbitrator termination on arbitrability of the issue in dispute, or you send
13 it to arbitration for all purposes, because there's no argument that
14 everybody agreed to arbitration.

15 THE COURT: Okay. Okay. And I'm going to deny this. I just
16 -- I don't -- I just do not see this. I mean --

17 MR. HAYEK: I guess there's always a first.

18 THE COURT: I'm happy to be told I'm wrong. So I just --
19 okay.

20 MR. KANE: Thank you, Your Honor.

21 MR. MOORE: Thank you.

22 MR. DENNETT: Your Honor, could I --

23 MR. KANE: You know what --

24 MR. DENNETT: -- leave the order.

25 MR. KANE: -- I'll just look at this real quick.

1 THE COURT: They wanted to see it.
2 MR. DENNETT: This is just the order.
3 MR. KANE: Yeah, I know.
4 MR. HAYEK: That's the pro hac vice order, not the --
5 THE COURT: And did you guys even -- I've got the motion to
6 associate. So who's going to do an order for me? Because they've got
7 the right to appeal it. So --
8 MR. MOORE: We can do it.
9 MR. KANE: We'll draft the order, Your Honor.
10 THE COURT: Okay. All right. Did you want to see --
11 MR. KANE: And, Your Honor, we have no objection to this.
12 THE COURT: Okay, okay. I just didn't know if you wanted to
13 see the motion to associate. Then do we need the --
14 MR. DENNETT: Well, this is an order admitting to practice.
15 THE COURT: Do we need to notice it for a hearing? Because
16 the clerk's office is probably going to send out a notice for the hearing.
17 MR. DENNETT: Okay. Well, I can wait and submit this.
18 MR. SCHNITZER: I mean, from --
19 THE COURT: So my question is --
20 MR. SCHNITZER: It sounds like we'll both waive the hearing
21 and you can grant the order.
22 MR. MOORE: Okay.
23 THE COURT: Okay. You'll just sign it, so they don't --
24 MR. SCHNITZER: Yeah. That's fine, Your Honor.
25 THE COURT: -- they don't need to --

1 MR. MOORE: That's correct.

2 THE COURT: Clerk's office doesn't need to -- great, okay.
3 Terrific. We'll get it back to you, Mr. Dennett, thank you.

4 MR. KANE: Thank you, gentlemen. Appreciate your
5 professional courtesy.

6 THE COURT: Okay. We'll return it.

7 MR. DENNETT: All right. Thank you.

8 THE COURT: Thanks.

9 [Proceedings adjourned at 9:46 a.m.]

10

11

12

13

14

15

16

17

18

19

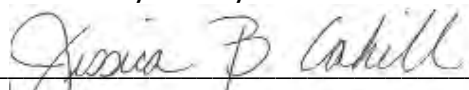
20

21 ATTEST: I do hereby certify that I have truly and correctly transcribed the
22 audio-visual recording of the proceeding in the above entitled case to the
best of my ability.

23

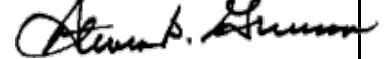
24

25


Maukele Transcribers, LLC
Jessica B. Cahill, Transcriber, CER/CET-708

ORDR

Electronically Filed
5/28/2020 11:35 AM
Steven D. Grierson
CLERK OF THE COURT



DISTRICT COURT
CLARK COUNTY, NEVADA

ERIC RICE, Individually; JEFFERSON
TEMPLE as Special Administrator of the
Estate of RAHEEM RICE; BRYAN
LOVETT,

Plaintiffs,

vs.

ZHENG TRUST c/o FENEX CONSULTING;
LI JUN ZHENG, individually;

Case No.: A-19-801549-C

Dept No.: 26

ORDER DENYING DEFENDANT,
AIRBNB, INC.'S MOTION TO
COMPEL ARBITRATION AND
STAY LITIGATION

Defendant, AIRBNB, Inc.'s Motion to Compel Arbitration and Stay Litigation was heard on February 12, 2020 with Jordan P. Schnitzer, Esq. appearing for Plaintiff, Bryan Lovett, Michael C. Kane, Esq., appearing for Plaintiffs' Eric Rice and Jefferson Temple, Special Administrator of the Estate of Raheem Rice, and Ryan L. Dennett, Esq. and David Hayek, Esq. appearing for Defendant, AIRBNB, Inc.

The Court having considered the papers and pleading on file herein, the Court being fully advised in the premises and good cause appearing therefore, finds and Orders as follow:

Counsel for AIRBNB, Inc. filed a "Notice of Withdrawal" of the Motion as to Bryan Lovett only, as the matter had been fully briefed, the Court left the Motion on calendar pursuant to EDCR 2.22. The Court finds that Mr. Lovett did not have a contract with AIRBNB, Inc, as there is no proof that he accepted the terms of service, further even if he had done so, no contract would have been formed as Mr. Lovett was under 18 at the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28


time of the incident.

Therefore, Defendant, AIRBNB, Inc.'s Motion to Compel Arbitration and Stay
Litigation regarding Bryan Lovett is **DENIED**.

IT IS SO ORDERED.

DATED this 27th day of May 2020.

Counsel for Plaintiff Lovett to file Notice of Entry of Order.

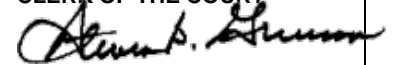


District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on or about the date signed, a copy of this Order was electronically
served to all registered parties in the Eighth Judicial District Court's electronic filing program per
the attached Service Contacts list and/or placed in the attorney's folder maintained by the Clerk of
the Court and/or transmitted via facsimile and/or mailed, postage prepaid, by United States mail to
the proper parties.

/s/ Linda Denman
Linda Denman
Judicial Executive Assistant
To Judge Gloria Sturman
Department 26



1 **NEOJ**
2 Jeff Silvestri, Esq. (NSBN 5779)
3 Jason B. Sifers, Esq. (NSBN 14273)
4 McDONALD CARANO LLP
5 2300 West Sahara Avenue, Suite 1200
6 Las Vegas, Nevada 89102
7 Telephone: (702) 873-4100
8 Facsimile: (702) 873-9966
9 jsilvestri@mcdonaldcarano.com
10 jsifers@mcdonaldcarano.com
11

12 *Attorneys for Defendant, AIRBNB, INC.*

13
14 **DISTRICT COURT**
15
16 **CLARK COUNTY, NEVADA**

17 ERIC RICE, individually; JEFFERSON
18 TEMPLE as Special Administrator of the Estate
19 of RAHEEM RICE; BRYAN LOVETT,

20 Plaintiffs,

21 v.

22 ZHENG TRUST c/o FENEX CONSULTING;
23 LI JUN ZHENG, individually; SHENANDOAH
24 SOUTHWEST, INC., a Nevada Corporation;
25 JASPER HAN, individually; AIRBNB, INC.,
26 a Foreign Corporation; ROE HOA; ROE
27 SECURITY COMPANY; DOE PARTY HOST;
28 ROE PROPERTY MANAGEMENT
COMPANY; DOES XI through XX, inclusive
and ROE CORPORATIONS XI through XX,
inclusive,

Defendants.

CASE NO.: A-19-801549-C
DEPT. NO.: XXVI

**NOTICE OF ENTRY OF ORDER
DENYING AIRBNB, INC.'S
MOTION TO COMPEL
ARBITRATION AND STAY ALL
PROCEEDINGS AS TO CLAIMS OF
ERIC RICE, INDIVIDUALLY, AND
JEFFERSON TEMPLE AS SPECIAL
ADMINISTRATOR OF THE ESTATE
OF RAHEEM RICE**

PLEASE TAKE NOTICE an **ORDER DENYING AIRBNB, INC.'S MOTION TO
COMPEL ARBITRATION AND STAY ALL PROCEEDINGS AS TO CLAIMS OF ERIC
RICE, INDIVIDUALLY, AND JEFFERSON TEMPLE AS SPECIAL ADMINISTRATOR
OF THE ESTATE OF RAHEEM RICE** was entered in the above-captioned case on the
28th day of May, 2020, a copy of which is attached hereto.

...

1 DATED this 15th day of June, 2020.

2 MCDONALD CARANO LLP

3 By: /s/ Jeff Silvestri

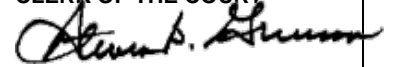
4 Jeff Silvestri, Esq. (NSBN 5779)
5 Jason B. Sifers, Esq. (NSBN 14273)
6 2300 West Sahara Avenue, Suite 1200
7 Las Vegas, Nevada 89102

8 *Attorneys for Defendant, AIRBNB, INC.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on or about the 15th day of June, 2020, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER DENYING AIRBNB, INC.'S MOTION TO COMPEL ARBITRATION AND STAY ALL PROCEEDINGS AS TO CLAIMS OF ERIC RICE, INDIVIDUALLY, AND JEFFERSON TEMPLE AS SPECIAL ADMINISTRATOR OF THE ESTATE OF RAHEEM RICE** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

/s/ CaraMia Gerard
An employee of McDonald Carano LLP



1 **ORDR**

2
3
4
5
6
7
8
9
10 **DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

12 ERIC RICE, Individually; JEFFERSON TEMPLE
13 as Special Administrator of the Estate of
14 RAHEEM RICE; BRYAN LOVETT.

15 Plaintiffs,

16 vs.

17 ZHENG TRUST c/o FENEX CONSULTING; LI
18 JUN ZHENG, individually; SHENANDOAH
19 SOUTHWEST, INC. a Nevada Corporation;
20 JASPER HAN, individually; AIRBNB, INC., a
Foreign Corporation; ROA HOA; ROE
SECURITY COMPANY; DOE PARTY HOST;
ROE PROPERTY MANAGEMENT COMPANY;
DOES XI through XX, inclusive and ROE
CORPORATIONS XI through XX, inclusive,

21 Defendants.

Case No: A-19-801549-C
Dept. No: 26

**ORDER DENYING AIRBNB, INC.'S
MOTION TO COMPEL
ARBITRATION AND STAY ALL
PROCEEDINGS**

22
23 This matter came before the above-captioned Court on February 12, 2020 on Defendant
24 AIRBNB INC's Motion to Compel Arbitration and Stay All Proceedings Pursuant to the Federal
25 Arbitration Act, 9 U.S.C. §§3 and 4 against Plaintiff Eric Rice and Jefferson Temple as Special
26 Administrator of the Estate of Raheem Rice, and Motion to Stay All Proceedings against Bryan
27 Lovett.
28

1 The Court, having considered the moving papers and arguments of counsel, finds and
2 orders as follows:

3 1. The motion to compel arbitration as to Jefferson Temple as Special Administrator
4 of the Estate of Raheem Rice is denied. The Court finds the there is no enforceable
5 arbitration agreement under the Airbnb Terms of Service (which included an agreement
6 to arbitrate claims against Airbnb) as the cause of action arises under the wrongful
7 death statute;

8 2. The motion to compel arbitration as to Eric Rice, individually, is denied. The
9 Court finds the there is no enforceable arbitration agreement under the Airbnb Terms of
10 Service (which included an agreement to arbitrate claims against Airbnb) as his cause of
11 action arises under the wrongful death statute, and is derivative of the death of Raheem
12 Rice;

13 3. Because the Court denies Airbnb, Inc.'s motion to compel arbitration as to Eric
14 Rice and Jefferson Temple as Special Administrator of the Estate of Raheem Rice, the
15 Court also denies Airbnb, Inc.'s motion pursuant to 9 U.S.C. §3 to stay all proceedings
16 as to all parties.

17 IT IS SO ORDERED.

18 DATED this 27th day of May 2020.

19 Counsel for Plaintiff to prepare the Notice of Entry of Order.

20
21 

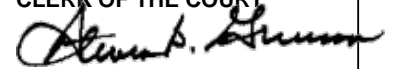
22 _____
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on or about the date signed, a copy of this Order was electronically served to all registered parties in the Eighth Judicial District Court's electronic filing program per the attached Service Contacts list and/or placed in the attorney's folder maintained by the Clerk of the Court and/or transmitted via facsimile and/or mailed, postage prepaid, by United States mail to the proper parties.

/s/ Linda Denman

Linda Denman
Judicial Executive Assistant
To Judge Gloria Sturman
Department 26



NEOJ

Jeff Silvestri, Esq. (NSBN 5779)
Jason B. Sifers, Esq. (NSBN 14273)
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
Facsimile: (702) 873-9966
jsilvestri@mcdonaldcarano.com
jsifers@mcdonaldcarano.com

David T. Hayek, Esq. (*admitted pro hac vice*)
P. K. SCHRIEFFER LLP
100 N. Barranca Street, Suite 1100
West Covina, California 91791
Phone: (626) 373-2444
Facsimile: (626) 974-8403
dth@pksllp.com

Attorneys for Defendant Airbnb, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

ERIC RICE, individually; JEFFERSON
TEMPLE as Special Administrator of the Estate
of RAHEEM RICE; BRYAN LOVETT,

Plaintiffs,

v.

ZHENG TRUST c/o FENEX CONSULTING;
LI JUN ZHENG, individually; SHENANDOAH
SOUTHWEST, INC., a Nevada Corporation;
JASPER HAN, individually; AIRBNB, INC.,
a Foreign Corporation; ROE HOA; ROE
SECURITY COMPANY; DOE PARTY HOST;
ROE PROPERTY MANAGEMENT
COMPANY; DOES XI through XX, inclusive
and ROE CORPORATIONS XI through XX,
inclusive,

Defendants.

CASE NO.: A-19-801549-C
DEPT. NO.: XXVI

**NOTICE OF ENTRY OF ORDER
GRANTING STAY OF ENTIRE ACTION
PENDING APPEAL BY AIRBNB, INC.
OF DENIAL OF ITS MOTION TO
COMPEL ARBITRATION AS TO THE
RICE PLAINTIFFS AND REQUEST
FOR STAY OF ALL PROCEEDINGS
PURSUANT TO 9 U.S.C. §3**

PLEASE TAKE NOTICE that an **ORDER GRANTING STAY OF ENTIRE ACTION
PENDING APPEAL BY AIRBNB, INC. OF DENIAL OF ITS MOTION TO COMPEL
ARBITRATION AS TO THE RICE PLAINTIFFS AND REQUEST FOR STAY OF ALL
PROCEEDINGS PURSUANT TO 9 U.S.C. §3** was filed in the above-captioned case on the

24th day of July, 2020, a copy of which is attached hereto.

DATED this 24th day of July, 2020.

MCDONALD CARANO LLP

By: /s/ Jeff Silvestri

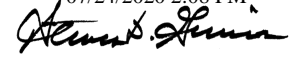
Jeff Silvestri, Esq. (NSBN 5779)
Jason B. Sifers, Esq. (NSBN 14273)
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102

Attorneys for Defendant, AIRBNB, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on or about the 24th day of July, 2020, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING STAY OF ENTIRE ACTION PENDING APPEAL BY AIRBNB, INC. OF DENIAL OF ITS MOTION TO COMPEL ARBITRATION AS TO THE RICE PLAINTIFFS AND REQUEST FOR STAY OF ALL PROCEEDINGS PURSUANT TO 9 U.S.C. §3** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

/s/ Leah Jennings
An employee of McDonald Carano LLP


CLERK OF THE COURT

ORDR

Jeff Silvestri, Esq. (NSBN 5779)
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
jsilvestri@mcdonaldcarano.com

David T. Hayek, Esq. (*admitted pro hac vice*)
P. K. SCHRIEFFER LLP
100 N. Barranca Street, Suite 1100
West Covina, California 91791
Telephone: (626) 373-2444

Attorneys for Defendant, AIRBNB, INC.

DISTRICT COURT

CLARK COUNTY, NEVADA

ERIC RICE, Individually; JEFFERSON TEMPLE
as Special Administrator of the Estate of
RAHEEM RICE; BRYAN LOVETT.

Plaintiffs,

vs.

ZHENG TRUST c/o FENEX CONSULTING; LI
JUN ZHENG, individually; SHENANDOAH
SOUTHWEST, INC. a Nevada Corporation;
JASPER HAN, individually; AIRBNB, INC., a
Foreign Corporation; ROA HOA; ROE
SECURITY COMPANY; DOE PARTY HOST;
ROE PROPERTY MANAGEMENT COMPANY;
DOES XI through XX, inclusive and ROE
CORPORATIONS XI through XX, inclusive,

Defendants.

Case No: A-19-801549-C
Dept. No: 26

**ORDER GRANTING STAY OF
ENTIRE ACTION PENDING APPEAL
BY AIRBNB, INC. OF DENIAL OF ITS
MOTION TO COMPEL
ARBITRATION AS TO THE RICE
PLAINTIFFS AND REQUEST FOR
STAY OF ALL PROCEEDINGS
PURSUANT TO 9 U.S.C. §3**

This matter came before the above-captioned Court on July 14, 2020 on Defendant AIRBNB INC.'s ("Airbnb") Motion to Stay All Proceedings as to Claims Brought by Bryan Lovett on Order Shortening Time.

This Court, having considered the moving, opposing and reply briefs, and the arguments of Counsel at the hearing on July 14, 2020, finds and orders as follows:

The Motion to Stay All Proceedings as to Claims Brought by Bryan Lovett on Order Shortening Time is **GRANTED**. The Court finds that the Notice of Appeal filed by Airbnb, Inc.

1 with respect to this Court's denial of Airbnb's Motion to Compel Arbitration as to Eric Rice and
2 Jefferson Temple as Special Administrator of the Estate of Raheem Rice, and of Airbnb's request
3 for stay of the entire action pursuant to 9 U.S.C. Section 3, raises issues for determination by the
4 Nevada Supreme Court which requires a stay of the entire action pending the Nevada Supreme
5 Court's determination of those issues. Accordingly, the entire action is hereby stayed as to all
6 parties pending the Supreme Court's determination.

7 IT IS SO ORDERED.

8 DATED this _____ day of _____ 2020.

Dated this 24th day of July, 2020



DISTRICT COURT JUDGE
909 115 6252 FCD7
Gloria Sturman
District Court Judge

12 Respectfully submitted by:

13 McDONALD CARANO LLP

Approved as to form and content:

THE SCHNITZER LAW FIRM

14 By: /s/ Jeff Silvestri
15 Jeff Silvestri, Esq. (NSBN 5779)
16 McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102

By: /s/ Jordan P. Schnitzer
Jordan P. Schnitzer, Esq. (NSBN 10744)
9205 W. Russell Road, Suite 240
Las Vegas, Nevada 89148

Attorney for Plaintiff, Bryan Lovett

17 David T. Hayek, Esq.
18 (admitted pro hac vice)
19 P. K. SCHRIEFFER LLP
100 N. Barranca Street, Suite 1100
West Covina, California 91791

THE702FIRM

20 *Attorneys for Defendant, AIRBNB, INC.*

By: /s/ Michael C. Kane
Michael C. Kane, Esq. (NSBN 10096)
400 South Seventh Street, Floor 4
Las Vegas, Nevada 89101

*Attorneys for Eric Rice and Jefferson
Temple, as Special Administrator of the
Estate of Raheem Rice*

Kimberly Kirn

From: Jeff Silvestri
Sent: Friday, July 24, 2020 9:40 AM
To: Kimberly Kirn
Subject: FW: Order on Motion to Stay

Jeff Silvestri | Partner

McDONALD CARANO

D: 702.257.4521 | E: jsilvestri@mcdonaldcarano.com

From: Jordan Schnitzer <Jordan@TheSchnitzerLawFirm.com>
Sent: Thursday, July 23, 2020 4:55 PM
To: Jeff Silvestri <jsilvestri@mcdonaldcarano.com>; Mike Kane <mike@the702firm.com>
Cc: Amber Casteel <amber@the702firm.com>; David T. Hayek <dth@pksllp.com>; Jason Sifers <jsifers@mcdonaldcarano.com>; Karen Surowiec <ksurowiec@mcdonaldcarano.com>; CaraMia Gerard <cgerard@mcdonaldcarano.com>; Melisa Gabhart <Melisa@TheSchnitzerLawFirm.com>
Subject: RE: Order on Motion to Stay

You can add my e-signature.

Jordan P. Schnitzer, Esq.



TheSchnitzerLawFirm.com
Tel 702.960.4050 | Fax 702.960.4092
Email Jordan@TheSchnitzerLawFirm.com
9205 West Russell Road | Suite 240 | Las Vegas, Nevada 89148

This electronic message and any attachments come from a law firm and may contain information that is or may be legally privileged, confidential, proprietary in nature, or otherwise protected by law from disclosure. The message and attachments are intended only for the use of the addressee. If you are not the intended recipient, please contact me so that any mistake in transmission can be corrected and then delete the message and any attachments from your system. Thank you.

From: Jeff Silvestri <jsilvestri@mcdonaldcarano.com>
Sent: Thursday, July 23, 2020 4:11 PM
To: Jordan Schnitzer <Jordan@TheSchnitzerLawFirm.com>; Mike Kane <mike@the702firm.com>
Cc: Amber Casteel <amber@the702firm.com>; David T. Hayek <dth@pksllp.com>; Jason Sifers <jsifers@mcdonaldcarano.com>; Karen Surowiec <ksurowiec@mcdonaldcarano.com>; CaraMia Gerard <cgerard@mcdonaldcarano.com>; Melisa Gabhart <Melisa@TheSchnitzerLawFirm.com>; Jeff Silvestri <jsilvestri@mcdonaldcarano.com>
Subject: Order on Motion to Stay

Good Afternoon Everyone –

Attached is a draft order on Airbnb's Motion to Stay. Please advise if I can attach your e-signature to this draft.

Thanks

Jeff Silvestri | Partner

McDONALD CARANO

D: 702.257.4521 | E: jsilvestri@mcdonaldcarano.com

Kimberly Kirn

From: Jeff Silvestri
Sent: Friday, July 24, 2020 9:40 AM
To: Kimberly Kirn
Subject: FW: Order on Motion to Stay

Jeff Silvestri | Partner

McDONALD CARANO

D: 702.257.4521 | E: jsilvestri@mcdonaldcarano.com

From: Mike Kane <Mike@the702firm.com>
Sent: Friday, July 24, 2020 8:09 AM
To: Jeff Silvestri <jsilvestri@mcdonaldcarano.com>
Cc: Jordan Schnitzer <Jordan@theschnitzerlawfirm.com>; Amber Casteel <Amber@the702firm.com>; David T. Hayek <dth@pksllp.com>; Jason Sifers <jsifers@mcdonaldcarano.com>; Karen Surowiec <ksurowiec@mcdonaldcarano.com>; CaraMia Gerard <cgerard@mcdonaldcarano.com>; Melisa Gabhart <Melisa@theschnitzerlawfirm.com>
Subject: Re: Order on Motion to Stay

You can e sign for me

Michael C. Kane, Esq.
The702Firm
Sent from my iPhone

On Jul 23, 2020, at 4:12 PM, Jeff Silvestri <jsilvestri@mcdonaldcarano.com> wrote:

Good Afternoon Everyone –

Attached is a draft order on Airbnb's Motion to Stay. Please advise if I can attach your e-signature to this draft.

Thanks

Jeff Silvestri | Partner

McDONALD CARANO

D: 702.257.4521 | E: jsilvestri@mcdonaldcarano.com

<Order on Motion to Stay Lovett Claims pending appeal - version 2.docx>

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Eric Rice, Plaintiff(s)

CASE NO: A-19-801549-C

7 vs.

DEPT. NO. Department 26

8 Zheng Trust c/o Fenex
9 Consulting, Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Order Granting was served via the court's electronic eFile system to all
recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 7/24/2020

15 Rena McDonald

Rena@mcdonaldlawgroup.com

16 Jordan Schnitzer

jordan@theschnitzerlawfirm.com

17 Theresa Amendola

tamendola@dennettwinspear.com

18 Bradley Myers

Brad@the702firm.com

19 Jennifer Edwards

jennifer@the702firm.com

20 CaraMia Gerard

cgerard@mcdonaldcarano.com

21 Jeff Silvestri

jsilvestri@mcdonaldcarano.com

22 Tina Crisp

tcrisp@dennettwinspear.com

23 Jason Sifers

jsifers@mcdonaldcarano.com

24 Marianne Carter

mcarter@mcdonaldcarano.com

25 Michael Kane

mike@the702firm.com

1	Karen Surowiec	ksurowiec@mcdonaldcarano.com
2		
3	Brittany Eichorn	brittany@mcdonaldlawgroup.com
4	Brandon Born	brandon@the702firm.com
5	Ashley Marchant	amarchant@dennettwinspear.com
6	Melisa Gabhart	melisa@theschnitzerlawfirm.com
7	Gloria Pacheco	gloria@the702firm.com
8	Cindy Halas	chalas@dennettwinspear.com
9	Service 702	service@the702firm.com
10		
11	Richard Reed	rrreedlaw@gmail.com
12	Tania Dawood	tania@mcdonaldlawgroup.com
13	Patrick Harrington	patrick@mcdonaldlawgroup.com