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28UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

IN RE UBER TEXT MESSAGING

Case No. [18-cv-02931-HSG](#)**ORDER GRANTING LEAVE TO FILE  
SUR-REPLY; RESCHEDULING  
HEARINGS**

Re: Dkt. Nos. 56, 64

Pending before the Court are Defendant Uber Technologies, Inc.'s ("Uber") motion to stay the action pending a decision on the motion to compel, *see* Dkt. No. 56, and motion to compel arbitration, *see* Dkt. No. 64 ("Mot.").

**I. BACKGROUND**

In their putative class action complaint, Plaintiffs Wanda Rogers and Christopher Ziers allege that Uber used an automatic telephone dialing system to send text messages without the recipient's consent, in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* *See* Consolidated Class Action Complaint ("Compl."), Dkt. No. 46. Uber, however, maintains that Ziers registered for an Uber account in June 2016, thereby agreeing to arbitrate these claims and waiving his right to bring a class action complaint. *See* Mot. at 1. Uber relied on the declarations of two of its employees to support its motion to compel arbitration. *See* Dkt. Nos. 64-1, 64-2.<sup>1</sup> Beyond the declarations and generic screenshots documenting the registration process and agreement, Uber did not originally supply any other evidence to support its contention

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<sup>1</sup> When Ziers sought to depose one of those Uber employees, Uber moved for a protective order. *See* Dkt. No. 68. Magistrate Judge Corley denied that motion, finding that "Uber has failed to produce any evidence that shows Mr. Ziers agreed to arbitrate; instead, Uber is relying solely on the word of a witness whom Uber refuses to produce for deposition." *See* Dkt. No. 84 at 3. Judge Corley ordered Uber to make that witness available for deposition on or before February 21. *See id.* at 1.

1 that Ziers registered for the service and agreed to be bound by Uber’s Terms and Conditions.

2 In a sworn declaration attached to his opposition to the motion to compel, Ziers stated that  
3 he did “not recall ever completing the Uber registration process,” that he did not receive a  
4 welcome email from Uber, that he did not believe he provided his credit card information to Uber,  
5 and that the Android phone he owned in 2016 was incapable of downloading third-party  
6 applications. *See* Declaration of Christopher Ziers, Dkt. No. 71-3 ¶¶ 2, 8, 10, 11.

7 Then, in its reply brief, Uber “voluntarily produced information from its records that  
8 supports [its employee’s] declaration.” *See* Reply, Dkt. No. 82 at 7. Though Uber believed  
9 production of these records was “unnecessary,” it decided to provide them in its reply (but no  
10 earlier) in “an effort to efficiently resolve this issue.” *Id.* Unsurprisingly, in Uber’s view, these  
11 newly disclosed documents “confirm that Mr. Ziers entered into a binding arbitration agreement  
12 with Uber.” *Id.* at 8.

13 In response to these never-before-seen documents making their first appearance in Uber’s  
14 reply brief, Plaintiffs filed an objection under Civil Local Rule 7-3(d)(1). *See* Dkt. No. 85.

## 15 **II. LEGAL STANDARD**

16 Under Civil Local Rule 7-3(d)(1), “[i]f new evidence has been submitted in the reply, the  
17 opposing party may file within 7 days after the reply is filed, and serve an Objection to Reply  
18 Evidence, which may not exceed 5 pages of text, stating its objections to the new evidence, which  
19 may not include further argument on the motion.” The Local Rules thus “recognize the potential  
20 inequities that might flow from the injection of new matter at the last round of briefing.” *Dutta v.*  
21 *State Farm Mut. Auto. Ins. Co.*, 895 F.3d 1166, 1171–72 (9th Cir. 2018). However, the  
22 “unfairness inherent” in being unable to respond to new factual material may be mitigated by  
23 “granting the objecting party leave to file a sur-reply opposition to the new matter.” *Id.* at 1172.

## 24 **III. ANALYSIS**

25 Because Uber inexplicably produced these records only after Ziers filed his opposition,  
26 Ziers has not had an opportunity to explain how they may affect his argument that he is not subject  
27 to Uber’s Terms and Conditions, including mandatory arbitration and a class action waiver. To  
28 avoid the unfairness inherent in this eleventh-hour revelation of what appears to be consequential


1 new information, the Court will give Plaintiffs an opportunity to respond. *See Dutta*, 895 F.3d at  
2 1172. Accordingly, Plaintiffs may file a sur-reply, explaining their position on how the Court  
3 should assess the information Uber divulged in its reply and how it affects their assertion that  
4 Ziers did not complete the Uber registration process and thus never agreed to arbitrate his claims.

5 **IV. CONCLUSION**

6 Plaintiffs are **GRANTED LEAVE** to file a sur-reply of no more than 10 pages by  
7 February 27, 2019. The hearings scheduled for February 14 on Uber's motion to compel  
8 arbitration, Dkt. No. 64, and motion to stay, Dkt. No. 56, are **VACATED** and are  
9 **RESCHEDULED** for March 14, 2019 at 1:00 p.m.

10 **IT IS SO ORDERED.**

11 Dated: 2/13/2019

12   
13 HAYWOOD S. GILLIAM, JR.  
14 United States District Judge

United States District Court  
Northern District of California

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