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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

*MOISES OLIVAS, individually and
on behalf of others similarly situated,*

Plaintiff,

v.

THE HERTZ CORPORATION,

Defendant.

Case No. 17-cv-01083-BAS-NLS

**ORDER GRANTING MOTION
TO COMPEL ARBITRATION**

[ECF No. 14]

Plaintiff Moises Olivas brings this putative class action against Defendant The Hertz Corporation. He challenges the company’s practice of charging administrative fees to rental car customers in connection with their use of toll roads. Hertz moves to compel arbitration of Plaintiff’s claims or, in the alternative, to dismiss his claims as implausible. (ECF No. 14.) Plaintiff opposes. (ECF No. 19.)

The Court finds this motion suitable for determination on the papers submitted and without oral argument. *See* Fed. R. Civ. P. 78(b); Civ. L.R. 7.1(d)(1). For the following reasons, the Court grants Hertz’s motion to compel arbitration and terminates as moot its motion to dismiss Plaintiff’s claims.

//

1 **I. BACKGROUND**

2 **A. Plaintiff's Allegations**

3 Plaintiff Moises Olivas resides in New Jersey.¹ (Compl. ¶ 8.) Defendant The
4 Hertz Corporation “is the world’s largest airport general-use car-rental company with
5 more than 2,900 airport locations, including 1,600 in the United States.” (*Id.* ¶ 10.)
6 As detailed below, this action stems from Plaintiff renting a car from Hertz in
7 Southern California, which led to Hertz charging Plaintiff a \$30 administrative toll
8 fee after he incurred a toll violation during his rental.

9
10 **1. Rental Car Arrangements**

11 Plaintiff is one of Hertz’s “Gold Plus” members. (Compl. ¶ 28.) To attain this
12 status, Plaintiff “enrolled in Hertz’s Gold Plus program on Hertz’s website,
13 www.hertz.com,” by completing a form with personal information. (*Id.* ¶ 22.)
14 Plaintiff then “adopted an electronic signature and clicked an ‘I Agree’ button,
15 acknowledging that [he] had ‘received and agree[d] to Hertz’s Gold Plus Program
16 Terms and Conditions.’” (*Id.* ¶ 23.)

17 In November 2014, Plaintiff, “as an existing Gold Plus member who was not
18 making his initial Gold Plus rental, reserved a car for pick up at Hertz’s John Wayne
19 Airport location in Santa Ana, California.” (Compl. ¶ 28.) He reserved his car online.
20 (*Id.* ¶ 24.) To complete his reservation, Plaintiff “clicked on a ‘Submit’ prompt,
21 which Hertz’s website instructed would confirm that [he] understood and accepted
22 Hertz’s Rental Qualification and Requirements” and Gold Plus Program Terms and
23 Conditions. (*Id.* ¶ 27.)

24 Upon arriving at John Wayne Airport, Plaintiff alleges he proceeded directly
25 to the stall where his rental car waited with the keys inside. (Compl. ¶ 30.) He then

26
27 ¹ Initially, two individuals brought suit against Hertz—Moises Olivas and David Claassen.
28 (Compl. ¶¶ 3–4, ECF No. 1.) Claassen has since voluntarily dismissed his claims. (ECF No. 11.)
Further, although the Complaint identifies the remaining Plaintiff as “Moses Oliva,” (Compl. ¶ 3),
Hertz’s records and Plaintiff’s counsel indicate that Plaintiff’s actual name is Moises Olivas, (Ward
Decl. ¶ 2, ECF No. 14-4; Zenger Decl. Exs. 1–4, ECF Nos. 14-8 to 14-11).

1 drove to the exit gates, where he “joined a queue of cars waiting to leave.” (*Id.* ¶ 31.)
2 Plaintiff asserts that, upon reaching the front of the line, an agent handed him through
3 his “driver-side window, a multipage, folded document called a ‘Rental Record.’”
4 (*Id.*) Then, with drivers behind him and “rows of metal spikes before [him]
5 preventing [him] from driving anywhere but out,” Plaintiff alleges he “left the rental
6 car lot[.]” (*Id.*)

7 8 **2. Administrative Toll Fee**

9 During his rental, Plaintiff “drove through a fully automated toll plaza on
10 Highway 73 while driving to San Diego.” (Compl. ¶ 32.) Highway 73 uses an
11 electronic toll collection system called FasTrak. (*Id.* ¶ 19.) As a vehicle passes
12 through an electronic toll lane, a transponder in the vehicle identifies the vehicle to
13 the toll system and “records the toll payment and debits the corresponding account.”
14 (*Id.* ¶ 11.) This system, however, “recognizes only FasTrak transponders.” (*Id.* ¶ 32.)
15 “[Plaintiff] did not have a FasTrak transponder, and Hertz never told him to get one.
16 Therefore, he could not pay the toll as he passed through it.” (*Id.*)

17 Shortly after he returned his rental car to Hertz, Plaintiff received a “Notice of
18 Administrative Fee for Rental Car Toll Charge.” (Compl. ¶ 42.) In brief, this notice
19 explained that Hertz would charge Plaintiff a \$30 fee in connection with his toll
20 violation. (*Id.* ¶ 47.) This fee did not cover the toll violation itself. (*Id.*) Rather, the
21 fee was for Hertz to transfer liability for the toll violation to Plaintiff. (*Id.* ¶ 46.) The
22 transfer process involves Hertz: (1) receiving a notice for the unpaid toll violation;
23 (2) identifying the customer responsible for the violation; and (3) supplying the legal
24 documents necessary to transfer liability for the violation to the customer’s name.
25 (*Id.*) Soon after Plaintiff received this notice, Hertz charged his credit card the \$30
26 administrative toll fee. (*Id.* ¶ 92.)

27 //

28 //

1 **3. Claims Against Hertz**

2 Plaintiff now brings suit to challenge Hertz’s administrative toll fee. He
3 believes this fee over-represents Hertz’s costs in processing the unpaid toll. (Compl.
4 ¶ 58.) He relatedly alleges that Hertz failed to notify him before his rental commenced
5 that—among other things—he would incur a toll violation on certain toll roads unless
6 he used his own FasTrak responder or paid FasTrak directly. (*Id.* ¶ 61.)

7 Based on these allegations, Plaintiff asserts claims against Hertz for breach of
8 contract, breach of the implied covenant of good faith and fair dealing, conversion,
9 and violation of California’s Unfair Competition Law, California Business &
10 Professions Code § 17200. (Compl. ¶¶ 74–119.) He also seeks to certify a class action
11 of similarly-situated Hertz Gold Plus members who were charged at least one
12 administrative toll fee. (*Id.* ¶¶ 66–73.)

13
14 **B. Hertz’s Evidence**

15 **1. The Gold Agreement**

16 Hertz moves to compel arbitration of Plaintiff’s claims. In doing so, the
17 company introduces the following evidence. “Hertz operates a loyalty program called
18 the Hertz Gold Plus Rewards Program (the ‘Gold Program’).” (Schloss Decl. ¶ 2,
19 ECF No. 14-5.) Plaintiff electronically enrolled in the Gold Program on June 7, 2006.
20 (Zaenger Decl. ¶ 3, ECF No. 14-7.) At that time, the loyalty program was titled “Hertz
21 #1 Club Gold.” (*Id.*) Further, when Plaintiff enrolled, he agreed to the “Hertz #1 Club
22 Gold Program Rental Terms & Conditions” (“Gold Agreement”), which Hertz
23 submits “contains the terms and conditions in effect at the time of [Plaintiff]’s
24 November 25, 2014, rental from Hertz’s John Wayne Airport Location.” (Schloss
25 Decl. ¶ 3, Ex. 1.)

26 The Gold Agreement applies to all rentals that Plaintiff makes under the Gold
27 Program. (Gold Agreement 1, Schloss Decl. Ex. 1, ECF No. 14-6.) It advises that
28 Plaintiff—at the time of a rental—“will receive a written document (called a ‘Rental

1 Record’ or ‘Rental Agreement’) which contains specific terms of that rental.” (*Id.* 2.)
2 “[T]he Rental Record/Agreement may also contain other information pertaining to
3 Car rentals in the jurisdiction in which the rental commences.” (*Id.*)
4

5 2. **The Rental Record**

6 “Hertz provides a customized Rental Record to every Hertz customer at the
7 commencement of every rental.” (Schloss Decl. ¶ 5.) Consistent with the Gold
8 Agreement, Hertz describes the Rental Record as “a document that contains specific
9 terms of the rental to which it applies.” (Schloss Decl. ¶ 5; *see also* Pl.’s Rental
10 Records, Zaenger Decl. Exs. 1–4.)

11 Using one of Plaintiff’s Rental Records as an example, the document is five
12 pages long, but each page is half the width of a typical letter-size page. (*See* Rental
13 Record #589275985, 02 GN, ECF No. 14-10.) The top of the first page identifies the
14 document as a “Rental Record” and lists the customer, rental car, and various rates
15 and fees for the rental. (*Id.*) Next, the Rental Record’s second page states: “Further
16 information relating to Your rental charges, and other terms to which You agree,
17 appear below.” (*Id.* at 2.) At the time of Plaintiff’s rental, the terms in Hertz’s Rental
18 Record included the company’s “Arbitration Provision” on page four. (*Id.* at 4.) The
19 Arbitration Provision provides for mandatory, individual arbitration of certain claims
20 as follows:

21 Except for claims for property damage, personal injury or death, ANY
22 DISPUTES BETWEEN US MUST BE RESOLVED ONLY BY
23 ARBITRATION OR IN A SMALL CLAIMS COURT ON AN
24 INDIVIDUAL BASIS; CLASS ARBITRATIONS AND CLASS
25 ACTIONS ARE NOT ALLOWED.

26

27 This Arbitration Provision’s scope is broad and includes, without
28 limitation, any claims relating to any aspect of the relationship or
communications between us, whether based in contract, tort, statute,
fraud, misrepresentation or any other legal theory. It is governed by the
Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.

1 (Id.)

2 Further, the Arbitration Provision contains a delegation clause, which seeks to
3 allocate the responsibility for determining questions of arbitrability to the arbitrator:

4 In any arbitration under this Arbitration Provision, all issues are for the
5 arbitrator to decide, including his or her own jurisdiction, and any
6 objections with respect to the existence, scope or validity of this
7 Arbitration Provision.

8 (Rental Record #589275985, 02 GN, at 4.) Finally, after detailing other terms, the
9 provision allows a customer to opt-out of the agreement to arbitrate:

10 IF YOU DO NOT WISH TO AGREE TO THIS ARBITRATION
11 PROVISION, YOU MUST NOTIFY US IN WRITING WITHIN 30
12 DAYS OF YOUR RECEIPT OF THIS AGREEMENT BY EMAILING
13 US AT no.arbitration@hertz.com OR BY MAIL TO If you have
14 previously notified Hertz of Your decision to opt out of arbitration, You
do not need to do so again.

15 (Id.) “Every Rental Record since September 2013 has contained the Arbitration
16 Provision.” (Schloss Decl. ¶ 11.) Aside from minor grammatical changes and a
17 change in the name of the American Arbitration Association’s Rules, the Arbitration
18 Provision’s text “has not changed from September 2013 to the present.” (Id.)

20 3. Plaintiff’s Rental History

21 Between 2010 and 2016, Plaintiff “engaged in 47 rental transactions with
22 Hertz in the United States.” (Zaenger Decl. ¶ 4.) One rental transaction occurred at
23 Hertz’s Fort Lauderdale International Airport location on November 8, 2014, which
24 generated two Rental Records. (Rental Record #589613312, 01 RT, ECF No. 14-8;
25 Rental Record #589613312, 02 UP, ECF No. 14-9.²) Both of these Rental Records
26 contain the Arbitration Provision, and Plaintiff signed each of them. (Rental Record

27 ² There appears to be two Rental Records for this transaction because Plaintiff accepted the
28 “Fuel Purchase Option,” which increased his estimated charge and generated a new Rental Record.
(See Rental Record #589613312, 01 RT; Rental Record #589613312, 02 UP.)

1 #589613312, 01 RT at 4–5; Rental Record #589613312, 02 UP, at 4–5.) Above his
2 signature, the Rental Records note: “By signing below, You acknowledge that You
3 have read, understand, accept and agree to the above and the Rental Terms, and You
4 accept or decline the Optional Services as shown on [Page] 1 and [Page] 2.” (Rental
5 Record #589613312, 01 RT, at 5; Rental Record #589613312, 02 UP, at 5.)

6 Two and a half weeks later, on November 25, 2014, Plaintiff engaged in the
7 rental transaction at issue at Hertz’s John Wayne Airport location in Santa Ana,
8 California. (Rental Record #589275985, 02 GN, ECF No. 14-10; Rental Record
9 #589275985, 01 GS, ECF No. 14-11.) There are, again, two Rental Records for this
10 transaction.³ Plaintiff, however, did not sign the Rental Record he received when
11 leaving Hertz’s premises. (Rental Record #589275985, 02 GN, at 5.) Instead, the
12 Rental Record provides on the signature line: “GOLD – SIGNATURE ON FILE.”
13 (*Id.*; accord Rental Record #589275985, 01 GS, at 5.) Hertz explains that for
14 customers like Plaintiff “who are making Gold Program rentals, Hertz typically prints
15 the phrase ‘GOLD – SIGNATURE ON FILE’ on the Rental Record’s signature line,
16 indicating that the customer has already provided a signature in connection with
17 executing the Gold Agreement,” and—in Hertz’s view—has “therefore has agreed to
18 be bound by the Rental Record for that particular rental.”⁴ (Schloss Decl. ¶ 8.)

19 Further, the Rental Record for November 25, 2014, contains different
20 acceptance language than that found in the Rental Records signed by Plaintiff a few
21 weeks prior. Instead of providing that Plaintiff agrees to the Rental Record’s terms
22 by “signing below,” this Rental Record states: “By accepting the Car, You
23

24 ³ Plaintiff’s Complaint only mentions him receiving a single Rental Record as he left Hertz’s
25 facility. (Compl. ¶ 31.) It appears a second Rental Record was generated when he upgraded his car.
26 (*Compare* Rental Record #589275985, 01 GS, at 1–2 (listing a “2015 IMPALA” and including a
27 print time of 8:07 p.m.), *with* Rental Record #589275985, 02 GN, at 1–2 (listing a “2013
28 CHALLENGER RT” at an additional expense of \$50.00 per day and including a print time of 8:41
p.m.).)

⁴ Hertz does not explain why it deviated from this convention for Plaintiff’s prior rental at
its Fort Lauderdale International Airport location and obtained his signature on those Rental
Records.

1 Acknowledge that You have read, understand, accept and agree to the above and the
2 Rental Terms” (Rental Record #589275985, 02 GN, at 5; *accord* Rental Record
3 #589275985, 01 GS, at 5.) Consequently, Hertz submits that Plaintiff agreed to the
4 Rental Record’s terms when he accepted the Rental Record and departed the
5 company’s facility in its vehicle. Hertz accordingly now asks this Court to enforce
6 the Rental Record’s Arbitration Provision by compelling arbitration of the parties’
7 dispute.

8
9 **II. LEGAL STANDARD**

10 The Federal Arbitration Act (“FAA”) applies to contracts involving interstate
11 commerce. 9 U.S.C. §§ 1, 2. The FAA provides that contractual arbitration
12 agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as
13 exist at law or in equity for the revocation of any contract.” *Id.* § 2. The primary
14 purpose of the FAA is to ensure that “private agreements to arbitrate are enforced
15 according to their terms.” *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford*
16 *Junior Univ.*, 489 U.S. 468, 479 (1989). Therefore, “as a matter of federal law, any
17 doubts concerning the scope of arbitrable issues should be resolved in favor of
18 arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–
19 25 (1983).

20 Given this strong federal preference for arbitration and the contractual nature
21 of arbitration agreements, “a district court has little discretion to deny an arbitration
22 motion” once it determines that a claim is covered by a written and enforceable
23 arbitration agreement. *Republic of Nicar. v. Standard Fruit Co.*, 937 F.2d 469, 475
24 (9th Cir. 1991). “In determining whether to compel a party to arbitration, a district
25 court may not review the merits of the dispute[.]” *Esquer v. Educ. Mgmt. Corp.*, —
26 F. Supp. 3d —, 2017 WL 5194635, at *2 (S.D. Cal. Nov. 9, 2017). Instead, a district
27 court’s determinations are limited to (1) whether a valid arbitration agreement exists
28

1 and, if so, (2) whether the agreement covers the relevant dispute. *See* 9 U.S.C. § 4;
2 *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000).

3 4 **III. ANALYSIS**

5 Plaintiff raises a series of arguments to resist arbitration of his claims. (Opp’n
6 9:5–18:17, ECF No. 19.) They can be distilled into a single point: Plaintiff believes
7 Hertz does not meet its burden to demonstrate he agreed to arbitrate this dispute.
8 Ultimately, the Court disagrees. But before reaching this issue, the Court will resolve
9 Hertz’s threshold argument that the arbitrator—not this Court—should determine
10 whether an agreement to arbitrate exists.

11 12 **A. Responsibility for Determining Formation of the Agreement**

13 The Rental Record’s Arbitration Provision contains language delegating
14 questions of arbitrability to the arbitrator. It provides that “all issues are for the
15 arbitrator to decide, including his or her own jurisdiction, and any objections with
16 respect to the existence, scope or validity of this Arbitration Provision.” (Rental
17 Record #589275985, 01 GS, at 4.) Based on this language, Hertz argues the parties
18 clearly and unmistakably intended for an arbitrator to decide threshold issues of
19 arbitrability. (Mot. 12:2–3.) In the company’s view, this clause means the
20 arbitrator—as opposed to the Court—should even decide whether an agreement to
21 arbitrate exists.

22 The Court is not convinced. The issue of arbitrability “is left to the court unless
23 the parties clearly and unmistakably provide otherwise.” *Momot v. Mastro*, 652 F.3d
24 982, 988 (9th Cir. 2011); *see also Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d
25 1069, 1072 (9th Cir. 2013). “Clear and unmistakable evidence of an agreement to
26 arbitrate arbitrability ‘might include . . . an express agreement to do so.’” *Mohamed*
27 *v. Uber Techs., Inc.*, 848 F.3d 1201, 1208 (9th Cir. 2016) (quoting *Momot*, 652 F.3d
28 at 988). If the parties unmistakably agree to arbitrate the “gateway issue” of

1 arbitrability, then this agreement is “simply an additional, antecedent agreement” that
2 is subject to the FAA. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70. (2010)

3 The problem with Hertz’s position is it presupposes that an “agreement to
4 arbitrate arbitrability” exists. *See Momot*, 652 F.3d at 988. Yet, Plaintiff challenges
5 whether he agreed to the Arbitration Provision, including its delegation clause. This
6 Court cannot enforce the delegation clause—let alone the remainder of the
7 Arbitration Provision—without first concluding Plaintiff entered into an agreement.
8 *See, e.g., Quevedo v. Macy’s, Inc.*, 798 F. Supp. 2d 1122, 1133 (C.D. Cal. 2011)
9 (quoting *Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 756 (9th Cir.
10 1988)) (“The threshold issue in deciding a motion to compel arbitration is ‘whether
11 the parties agreed to arbitrate.’ ”). After all, “arbitration is a matter of contract.” *Rent-*
12 *A-Ctr.*, 561 U.S. at 69. Plaintiff “cannot be required to submit to arbitration any
13 dispute which he has not agreed so to submit.” *See Granite Rock Co. v. Int’l Bhd. of*
14 *Teamsters*, 561 U.S. 287, 314 (2010) (alteration omitted) (quoting *United*
15 *Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)); *see also*
16 9 U.S.C. § 4 (authorizing the court to compel arbitration once it is “satisfied that the
17 making of the agreement . . . is not at issue”). Thus, despite that the parties may
18 validly commit some threshold issues to the arbitrator, this Court must resolve
19 “whether the clause was agreed to.” *See Granite Rock Co.*, 561 U.S. at 297.

20 Accordingly, the Court—not the arbitrator—will determine whether Plaintiff
21 agreed to the Arbitration Provision and its delegation clause.

22 23 **B. Formation Framework**

24 The FAA authorizes enforcement of a “written provision” to arbitrate a
25 dispute. 9 U.S.C. § 2. Courts generally “apply ordinary state-law principles that
26 govern the formation of contracts” to decide “whether the parties agreed to arbitrate
27 a certain matter (including arbitrability).” *First Options of Chicago, Inc. v. Kaplan*,
28 514 U.S. 938, 944 (1995). The party seeking arbitration has “the burden of proving

1 the existence of an agreement to arbitrate by a preponderance of the evidence.”
2 *Norcia v. Samsung Telecommunications Am., LLC*, 845 F.3d 1279, 1283 (9th Cir.
3 2017).

4 To determine whether Plaintiff and Hertz agreed to arbitrate, the Court turns
5 to California’s principles governing the formation of contracts. *See, e.g., Norcia*, 845
6 F.3d at 1289; *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014).
7 “A contract is . . . an exchange of promises.” *Orcilla v. Big Sur, Inc.*, 244 Cal. App.
8 4th 982, 1005 (2016) (quoting *In re Marriage of Feldner*, 40 Cal. App. 4th 617, 623
9 (1995)). Under California law, the essential elements of a contract are: “(1) parties
10 capable of contracting; (2) their consent; (3) a lawful object; and (4) a sufficient cause
11 or consideration.” *Marshall & Co. v. Weisel*, 242 Cal. App. 2d 191, 196 (1966) (citing
12 Cal. Civ. Code § 1550).

13 This case hinges on the second element: the parties’ consent. “There is no
14 contract until there is mutual consent of the parties.” *Deleon v. Verizon Wireless,*
15 *LLC*, 207 Cal. App. 4th 800, 813 (2012) (citing Cal. Civ. Code §§ 1550, 1565)).
16 “Mutual assent is determined under an objective standard applied to the outward
17 manifestations or expressions of the parties, i.e., the reasonable meaning of their
18 words and acts, and not their unexpressed intentions or understandings.” *Alexander*
19 *v. Codemasters Grp. Ltd.*, 104 Cal. App. 4th 129, 141 (2002). Mutual consent is
20 typically “manifested by an offer communicated to the offeree and an acceptance
21 communicated to the offeror.” *Donovan v. RRL Corp.*, 26 Cal. 4th 261, 271 (2001).

22 “An offer is the manifestation of willingness to enter into a bargain, so made
23 as to justify another person in understanding that his [or her] assent to that bargain is
24 invited and will conclude it.” *City of Moorpark v. Moorpark Unified Sch. Dist.*, 54
25 Cal. 3d 921, 930 (1991). “The objective manifestation of the party’s assent ordinarily
26 controls, and the pertinent inquiry is whether the individual to whom the
27 communication was made had reason to believe that it was intended as an offer.”
28 *Donovan*, 26 Cal. 4th at 271. However, when the recipient “does not know” that an

1 offer has been made, “this objective standard does not apply.” *Windsor Mills, Inc. v.*
2 *Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 993 (1972). Thus, regardless of an
3 offeree’s “apparent manifestation of . . . consent,” the offeree is not “bound by
4 inconspicuous contractual provisions of which [the offeree] was unaware, contained
5 in a document whose contractual nature is not obvious.” *Id.*; *see also Marin Storage*
6 *& Trucking, Inc. v. Benco Contracting & Eng’g, Inc.*, 89 Cal. App. 4th 1042, 1049
7 (2001) (noting that a party is not bound by a document where it “does not appear to
8 be a contract and the terms are not called to the attention of the recipient”).

9 The second part of contract formation is acceptance. One form of acceptance
10 is a signature to an agreement. *See Marin Storage*, 89 Cal. App. 4th at 1049
11 (“[O]rdinarily one who signs an instrument which on its face is a contract is deemed
12 to assent to all its terms.”). But a signature is not the only form of assent under
13 California contract law. *E.g., DeLeon*, 207 Cal. App. 4th at 812. Nor does the FAA
14 require that the written arbitration provision be signed by the parties. *Nghiem v. NEC*
15 *Elec., Inc.*, 25 F.3d 1437, 1439 (9th Cir. 1994).

16 Another form of assent is acceptance by actions or conduct. *Esparza v. KS*
17 *Indus., L.P.*, 13 Cal. App. 5th 1228, 1238 (2017). “One party may use the words and
18 the other party may accept by words, actions or conduct.” *Lane v. Superior Court*,
19 104 Cal. App. 340, 347 (1930). “Performance of the conditions of a proposal, or the
20 acceptance of the consideration offered with a proposal, is an acceptance of the
21 proposal.” (Cal. Civ. Code § 1854.) Relatedly, “[a] voluntary acceptance of the
22 benefit of a transaction is equivalent to a consent to all the obligations arising from
23 it, so far as the facts are known, or ought to be known, to the person accepting.” *Id.*
24 § 1589; *see also Craig v. Brown & Root, Inc.*, 84 Cal. App. 4th 416, 420 (2000)
25 (noting acceptance may be “implied-in-fact”).

26 For instance, an agreement to arbitrate existed where an employee continued
27 her employment after she received a memorandum providing for arbitration. *Craig*,
28 84 Cal. App. 4th at 416. The plaintiff’s former employer in *Craig* established a

1 dispute resolution program that included mandatory arbitration. *Id.* at 418–19. In a
2 memorandum sent to all employees, including the plaintiff at her home address, the
3 employer explained the program and stressed that “everyone would be bound by it.”
4 *Id.* at 419–20. Plaintiff did not sign the memorandum or an acknowledgement of
5 receipt of the document. *See id.* at 420. After being terminated several years later, the
6 plaintiff brought suit, and the company moved to compel arbitration. *Id.* at 419–20.
7 The trial court granted the petition, and the California Court of Appeal affirmed. *Id.*
8 at 420, 423. The court reasoned that a party’s acceptance of an arbitration agreement
9 may be not only express, but also implied-in-fact. *Id.* at 420. Accordingly, because
10 the plaintiff continued to work for the company after she received the dispute
11 resolution memorandum, the court held she “thereby agreed to be bound by the terms
12 of the Dispute Resolution Program, including its provision for binding arbitration.”
13 *Id.* at 422; *see also Harris v. Superior Court*, 188 Cal. App. 3d 475, 479–80 (1986)
14 (stating that a physician’s acceptance of the benefits of a health plan agreement to
15 which he was not a party “necessarily entailed acceptance of the agreement that
16 members’ claims would be subject to binding arbitration”).

17 In contrast, an agreement to arbitrate did not exist where a vehicle purchaser
18 received a document providing for arbitration in connection with a bundled satellite
19 radio service over a month after the service commenced. *Knutson*, 771 F.3d at 569.
20 The plaintiff in *Knutson* purchased a Toyota vehicle that came with “a 90–day trial
21 subscription to Sirius XM satellite radio.” *Id.* at 562. More than a month after the
22 satellite radio service was activated, the plaintiff received a “Welcome Kit” in the
23 mail from Sirius XM containing its Customer Agreement. *Id.* The agreement
24 provided that by using the service, the user agrees to the agreement’s terms, including
25 a mandatory arbitration clause. *Id.* at 563–64. The plaintiff later brought a consumer
26 class action against Sirius XM, and the company successfully moved to compel
27 arbitration. *Id.* at 564.

28

1 On appeal, the Ninth Circuit considered whether Sirius XM met its burden to
2 demonstrate the plaintiff assented to its Customer Agreement under California law.
3 *Knutson*, 771 F.3d at 565. The court concluded the company did not. *Id.* at 569. It
4 highlighted that when the plaintiff purchased the vehicle, “he did not receive any
5 documents from Sirius XM, and he did not know that he was entering into a
6 contractual relationship with Sirius XM by using the service.” *Id.* at 566. Thus, the
7 plaintiff, “as far as he knew,” was “only in a contractual relationship with Toyota.”
8 *Id.* Therefore, a reasonable person in the plaintiff’s position “could not be expected
9 to understand that purchasing a vehicle from Toyota would simultaneously bind him
10 or her to any contract with Sirius XM, let alone one that contained an arbitration
11 provision without any notice of such terms.” *Id.* In addition, the court concluded the
12 plaintiff’s continued use of the satellite radio service after receiving the Welcome Kit
13 in the mail did not constitute assent to the agreement. *Id.* The Ninth Circuit
14 rationalized that, in view of the plaintiff’s “lack of awareness of any contractual
15 relationship with Sirius,” he lacked a reason to even open the Welcome Kit from
16 Sirius XM and read the documents therein. *Id.* at 567. Thus, no agreement was
17 formed. *Id.*; *see also Norcia*, 845 F.3d at 1282, 1291 (concluding cellphone
18 manufacturer did not meet its burden of demonstrating an agreement to arbitrate
19 existed where the consumer purchased the cellphone from a cellphone service
20 provider and an arbitration clause was included in a 101-page “Product Safety &
21 Warranty Information” brochure inside the product box).

22
23 **C. Formation of the Rental Record and Its Arbitration Provision**

24 “While the Court may not review the merits of the underlying case ‘[i]n
25 deciding a motion to compel arbitration, [it] may consider the pleadings, documents
26 of uncontested validity, and affidavits submitted by either party.’ ” *Macias v. Excel*
27 *Bldg. Servs. LLC*, 767 F. Supp. 2d 1002, 1007 (N.D. Cal. 2011) (quoting *Ostroff v.*
28 *Alterra Healthcare Corp.*, 433 F. Supp. 2d 538, 540 (E.D. Pa. 2006)). Hertz, as the

1 party seeking to compel arbitration, bears the burden of demonstrating an agreement
2 to arbitrate was formed. *See Norcia*, 845 F.3d at 1283. The company meets its burden.

3 Initially, there is no dispute that Plaintiff received the Rental Record
4 containing the Arbitration Provision. “Hertz provides a customized Rental Record to
5 every Hertz customer at the commencement of every rental,” and each “Rental
6 Record since September 2013 has contained the Arbitration Provision.” (Schloss
7 Decl. ¶¶ 5, 11.) Consistent with this policy, the company provides the customized
8 Rental Record for Plaintiff’s transaction. Further, Plaintiff admits in his Complaint
9 that he accepted “a multipage, folded document called a ‘Rental Record’” before
10 driving off with his rental car. (Compl. ¶ 31.)

11 Hertz also demonstrates Plaintiff had ample reason to believe its Rental
12 Record, including the Arbitration Provision within the document, was intended as an
13 offer. The Rental Record is a document that appears to be a contract. It is filled with
14 terms for Plaintiff’s ensuing rental. And, after listing Plaintiff’s estimated charges,
15 the Rental Record states: “Further information relating to Your rental charges, and
16 other terms to which You agree, appear below.” (Rental Record #589275985, 02 GN,
17 at 2.) In addition, the term Hertz seeks to enforce—the Arbitration Provision—is not
18 an “inconspicuous contractual provision[.]” *See Windsor Mills*, 25 Cal. App. 3d at
19 993. The agreement to arbitrate consumes a full page of the Rental Record and is
20 preceded by the conspicuous warning to Plaintiff that:

21 **THIS AGREEMENT REQUIRES ARBITRATION OR A SMALL**
22 **CLAIMS COURT CASE ON AN INDIVIDUAL BASIS, RATHER**
23 **THAN JURY TRIALS OR CLASS ACTIONS.**

24 (*Id.* at 4.)

25 Aside from the Rental Record’s appearance and contents, Plaintiff’s multi-year
26 relationship with Hertz supports that he had reason to believe the company was
27 making him an offer. Plaintiff agreed to the Gold Agreement to become a Gold Status
28 member and obtain the benefits associated with this status. At minimum, the Gold

1 Agreement put Plaintiff on notice that he would be receiving additional terms with
2 each rental. (*See* Gold Agreement 3.) He also engaged in numerous rental
3 transactions with Hertz. (Zaenger Decl. ¶ 4). Plaintiff previously signed Rental
4 Records he received containing the Arbitration Provision. (*Id.* ¶ 5, Exs. 1, 2.) In short,
5 Plaintiff “had reason to believe that” the Rental Record he received from Hertz “was
6 intended as an offer.” *See Donovan*, 26 Cal. 4th at 271. Further, these circumstances
7 demonstrate that the arbitrability provisions were not “inconspicuous contractual
8 provisions of which [the offeree] was unaware, contained in a document whose
9 contractual nature is not obvious.” *See Windsor Mills*, 25 Cal. App. 3d at 993.

10 Moreover, Plaintiff manifested his assent to the Rental Record. The Rental
11 Record invited Plaintiff’s acceptance by conduct—accepting and taking the
12 company’s rental car. (Rental Record #589275985, 02 GN, at 5 (“By accepting the
13 Car, You Acknowledge that You have read, understand, accept and agree to the above
14 and the Rental Terms”); *accord* Rental Record #589275985, 01 GS, at 5.)
15 Plaintiff did so. He accepted the rental car and the customized Rental Record for his
16 transaction. He then drove off of Hertz’s lot.

17 Thus, this case is unlike *Knutson* discussed above—where the vehicle
18 purchaser had no reason to believe he was entering into a contractual relationship
19 with the satellite radio provider. *See* 771 F.3d at 555–56. In contrast to that purchaser,
20 a reasonable person in Plaintiff’s position would believe that renting a vehicle from
21 Hertz—as a Hertz Gold Member at a Hertz location—would bind him to a contract
22 he received from Hertz before leaving the company’s lot with its vehicle.
23 Accordingly, Hertz satisfies its burden of demonstrating Plaintiff agreed to the Rental
24 Record and its Arbitration Provision.

25 Turning to Plaintiff’s Opposition, he does not submit any evidence disputing
26 that he agreed to the Rental Record. Where the making of the agreement is at issue,
27 “[c]ourts have employed a summary judgment approach” and ruled “as a matter of
28 law where there are no genuine issues of material fact.” *Geoffroy v. Wash. Mut. Bank*,

1 484 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007); *see also Three Valleys Mun. Water*
2 *Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1141 (9th Cir. 1991) (indicating
3 agreement with the Third Circuit that, where there is a doubt as to whether an
4 agreement to arbitrate exists, the matter should be submitted to a jury and “[o]nly
5 when there is no genuine issue of fact concerning the formation of the agreement
6 should the court decide as a matter of law that the parties did or did not enter into
7 such an agreement”). Confronted with Hertz’s evidence in support of its motion to
8 compel, Plaintiff provides no substantiation for his unsworn allegations or the
9 inferences he suggests this Court draw from his pleading—including that he possibly
10 lacked a reasonable opportunity to review the Rental Record or that the Rental
11 Record’s terms were not known to him before he accepted the rental car and left
12 Hertz’s premises.

13 For example, Plaintiff does not submit a declaration stating he did not receive
14 the Rental Record at the time of the transaction or that he was not given an
15 opportunity to review it. *See Knutson*, 771 F.3d at 563 (quoting the plaintiff’s
16 declaration submitted in opposition to the defendant’s motion to compel arbitration);
17 *see also, e.g., Anderson v. Credit One Bank, Nat’l Ass’n*, No. 16-cv-3125-MMA
18 (AGS), 2017 WL 2258064, at *3 (S.D. Cal. May 23, 2017) (finding the defendant
19 failed to meet its burden of demonstrating mutual assent where the plaintiff declared
20 he did not receive the relevant contract and was never notified that he was bound to
21 arbitrate disputes in connection with his use of the defendant’s service); *Ferguson v.*
22 *Countrywide Credit Indus., Inc.*, No. CV00-13096AHM(CTX), 2001 WL 867103, at
23 *1 (C.D. Cal. Apr. 23, 2001) (concluding the plaintiff created a genuine dispute
24 where she asserted in her declaration “that the signature on the purported agreement
25 is not hers and that she had never seen the purported agreement until her attorney
26 showed it to her”). Thus, resolving this issue based on the evidence before the Court
27 is appropriate.

1 Finally, the Court is unpersuaded by Plaintiff’s ancillary arguments seeking to
2 undercut the formation of the Rental Record and its Arbitration Provision. For
3 instance, Plaintiff highlights that since his rental, Hertz chose to “move its Rental
4 Records’ arbitration language to its standardized Gold Terms.” (Opp’n 16:16–17.)
5 Plaintiff argues that “[h]ad this change been unnecessary to achieve the enforceability
6 of Hertz’s arbitration clause, Hertz—still, a rational, profit-maximizing company,
7 would neither have spent time nor money doing so.” (*Id.* 16:17–19.) This point misses
8 the mark. The Court need not speculate why Hertz opted to modify its approach to
9 obtaining Gold Members’ consent to arbitration. The focus here is whether Plaintiff
10 agreed to the terms he received for his November 25, 2014, rental—not whether
11 Hertz has since improved on its approach.⁵

12 Plaintiff also attempts to draw a dispositive distinction based on when he
13 admits to receiving the Rental Record. Plaintiff alleges he received the Rental Record
14 from an agent as he was exiting Hertz’s premises in a queue of rental cars—as
15 opposed to before he got into his vehicle. (Compl. ¶ 31.) Plaintiff believes this
16 distinction should mean the Rental Record is not part of his agreement with Hertz—
17 despite that he accepted the document from an agent before taking Hertz’s car from
18 its facility. (*See id.* ¶¶ 36, 39–40.)

19 This point is unconvincing. The arrangement Plaintiff attacks is the one he
20 agreed to by becoming a Gold Member. The Gold Agreement put Plaintiff on notice

21
22 ⁵ The Court is unpersuaded by Plaintiff’s arguments concerning California’s incorporation
23 by reference doctrine. In Plaintiff’s view, whether he agreed to arbitration should hinge on whether
24 the 2006 Gold Agreement incorporated by reference the November 25, 2014, Rental Record
25 containing the Arbitration Provision. (Opp’n 11:14–16:26.) Hertz responds that Plaintiff’s “effort
26 is misguided from the start because Hertz does not contend that the 2014 John Wayne Airport
27 Rental Record was incorporated by reference at the time plaintiff signed the Gold Agreement in
28 2006.” (Reply 3:21–23.) Instead, Hertz states its position is that “the parties expressly agreed in the
Gold Agreement that their contractual relationship would be supplemented for each future rental
by the terms contained in each future Rental Record.” (*Id.* 3:23–25.) In substance, the Court agrees.
The lynchpin here is not whether Plaintiff bound himself to the Arbitration Provision when he
clicked the “I Agree” button for the Gold Agreement back in 2006, but rather whether he later
agreed to the specific terms he received in the November 25, 2014, Rental Record, including its
Arbitration Provision, when he received the document and accepted the rental car.

1 that he would receive—at the time of a rental—“a written document (called a ‘Rental
2 Record’ or ‘Rental Agreement’) which contains specific terms of that rental” and
3 “may also contain other information pertaining to Car rentals in the jurisdiction in
4 which the rental commences.” (Gold Agreement 2.) Hence, although Plaintiff was
5 able to proceed directly to the stall where his rental car “awaited with the keys
6 inside,” he had not yet received the anticipated Rental Record for his Gold Program
7 rental. The Court therefore rejects Plaintiff’s argument that his contractual
8 relationship was complete before he received the Rental Record. Moreover, the
9 circumstances here are distinguishable from other cases where a significant delay in
10 receipt of an arbitration provision indicated the parties did not form an agreement to
11 arbitrate. *See, e.g., Knutson*, 771 F.3d at 564 (noting the plaintiff received the
12 agreement containing the arbitration clause “over one month after the service was
13 activated”); *Perez v. DirecTV Grp. Holdings, LLC*, 251 F. Supp. 3d 1328, 1338 (C.D.
14 Cal. 2017) (reasoning no agreement was formed where the relevant document was
15 only mailed to the plaintiff after the equipment was already installed and the
16 accompanying service was activated).

17 In sum, because Plaintiff had ample reason to believe the Rental Record
18 containing the Arbitration Provision was an offer, and because Plaintiff accepted the
19 Rental Record in taking the rental car, the Court concludes Hertz meets its burden of
20 proving the existence of an agreement to arbitrate.

21
22 **D. Delegation of Arbitrability Determination**

23 Given that Plaintiff agreed to the Arbitration Provision, he also agreed to its
24 delegation clause, which provides that “all issues are for the arbitrator to decide,
25 including his or her own jurisdiction, and any objections with respect to the existence,
26 scope or validity of this Arbitration Provision.” (Rental Record #589275985, 02 GN,
27 at 4.) Plaintiff contends the delegation clause is inapplicable because it includes the
28 antecedent language “In any arbitration under this Arbitration Provision” before

1 providing that “all issues are for the arbitrator to decide” (Rental Record
2 #589275985, 02 GN, at 4.) He argues this language “assumes the existence of an
3 arbitration, which by the Rental Record’s language triggers only in—not preceding—
4 an arbitration.” (Opp’n 11:5–7.) The Court is unmoved. The issue here is whether the
5 parties have clearly and unmistakably delegated to the arbitrator the authority to
6 decide arbitrability. The clause plainly provides they have done so.⁶ Consequently,
7 the Court finds the parties have clearly and unmistakably delegated arbitrability
8 issues to the arbitrator.⁷ *See Brennan*, 796 F.3d at 1131; *Mohamed*, 848 F.3d 1201 at
9 1208.

10 Accordingly, the Court will grant Hertz’s motion to compel arbitration and
11 require the parties to submit to the arbitrator whether their dispute is arbitrable.

12 13 **IV. CONCLUSION & ORDER**

14 In light of the foregoing:

- 15 1. The Court **GRANTS** Hertz’s motion to compel arbitration
16 (ECF No. 14).
- 17 2. The Court **TERMINATES AS MOOT** Hertz’s motion to dismiss
18 Plaintiff’s claims (ECF No. 14).
- 19 3. The Court **STAYS** this action as to all parties and all claims. *See*
20 9 U.S.C. § 3.
- 21 4. The Court further **ORDERS** the parties to proceed to arbitration for a
22 determination of arbitrability and possible arbitration of Plaintiff’s
23

24 ⁶ Further, regardless of the delegation clause, the Arbitration Provision incorporates the
25 American Arbitration Association’s rules. (Rental Record #589275985, 02 GN, at 4.) The parties’
26 incorporation of these rules also serves as clear and unmistakable evidence of an agreement to
arbitrate arbitrability. *See, e.g., Brennan v. Opus Bank*, 796 F.3d 1125, 1131 (9th Cir. 2015).

27 ⁷ The Court also notes Plaintiff does not challenge the delegation clause on any other
28 ground, such as unconscionability. *See Rent-A-Ctr.*, 561 U.S. at 70 (providing a delegation
provision “is simply an additional, antecedent agreement the party seeking arbitration asks the
federal court to enforce” and “is valid under § 2 ‘save upon such grounds as exist at law or in equity
for the revocation of any contract’”).


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claims in the manner provided for in the Rental Record’s Arbitration Provision. *See* 9 U.S.C. § 4.

5. The Court directs the Clerk of the Court to **ADMINISTRATIVELY CLOSE** this action. The decision to administratively close this action pending the resolution of the arbitration does not have any jurisdictional effect. *See Dees v. Billy*, 394 F.3d 1290, 1294 (9th Cir. 2005) (“[A] district court order staying judicial proceedings and compelling arbitration is not appealable even if accompanied by an administrative closing. An order administratively closing a case is a docket management tool that has no jurisdictional effect.”).

IT IS SO ORDERED.

DATED: March 12, 2018


Hon. Cynthia Bashant
United States District Judge