16-2750 (L)

(consolidated with 16-2752)

United States Court of Appeals
for the Second Circuit

SPENCER MEYER

Plaintiff-Counter Defendant-Appellee,

– v. –

UBER TECHNOLOGIES, INC.,

Defendant-Counter Claimant-Appellant,

TRAVIS KALANICK,

Defendant-Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK (NO. 15-cv-9796) (JSR)

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BRIEF OF *AMICI CURIAE* INTERNET ASSOCIATION AND CONSUMER TECHNOLOGY ASSOCIATION, URGING REVERSAL

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COBLENTZ PATCH DUFFY AND BASS LLP
Rees F. Morgan
Mark L. Hejinian
Skye D. Langs
One Montgomery Street, Suite 3000
San Francisco, CA 94104

Counsel for Amici Curiae Internet Association, and Consumer Technology Association

CORPORATE DISCLOSURE STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 26.1

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici Curiae* Internet Association and Consumer Technology Association submit the following corporate disclosure statements:

Neither the Internet Association nor the Consumer Technology Association has any parent corporations, and no publicly held corporation owns stock in either association.

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STATEMENT OF INTEREST OF *AMICI CURIAE* INTERNET ASSOCIATION AND CONSUMER TECHNOLOGY ASSOCIATION[1]

The Internet Association is a not-for-profit trade organization representing America's leading internet companies and their global community of users.[2] The Internet Association represents a broad cross-section of internet companies that benefits from an open internet. Its mission is to foster innovation, promote economic growth, and empower people through the free and open internet.

The Consumer Technology Association, formerly the Consumer Electronics Association, is a trade association representing the $287 billion U.S. consumer technology industry. Its 2200 members lead the consumer electronics industry in the development, manufacturing, and distribution of audio, video, mobile electronics, communications, information technology, multimedia, and accessory products, as well as related services, that are sold to consumers. The Consumer

[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure and Local Rule 29.1(b), *Amici* submit the following disclosure statement: No counsel for any party authored this brief in whole or in part; no such party or counsel made a monetary contribution intended to fund its preparation or submission; and no person other than *Amici* made such a contribution. All parties have consented to the filing of this brief.

[2] The Internet Association's members include Airbnb, Amazon, Auction.com, Coinbase, Dropbox, eBay, Etsy, Expedia, Facebook, FanDuel, Gilt, Google, Groupon, IAC, Intuit, LinkedIn, Lyft, Monster Worldwide, Netflix, Pandora, PayPal, Pinterest, Practice Fusion, Rackspace, reddit, Salesforce.com, Sidecar, Snapchat, SurveyMonkey, TripAdvisor, Twitter, Uber Technologies, Inc., Yahoo!, Yelp, Zenefits, and Zynga.

Technology Association also owns and produces CES – the world's gathering place for all those who thrive on the business of consumer technologies.

Amici have a strong interest in this proceeding because the district court's decision directly impacts the internet and consumer technology industries, particularly companies that use mobile contracting. *Amici* seek appropriate standards for internet- and mobile-based contracting that permit companies and consumers to efficiently contract in today's digital world. Several aspects of the district court's decision are inconsistent with the actual expectations and experiences of consumers' and companies' engaged in mobile contracting. *Amici* members also have an interest in a clear and predictable standard governing the enforceability of arbitration agreements, a settled issue that the district court's opinion also calls into question. For these reasons, *Amici* have an interest in this action and respectfully submit this brief for the Court's consideration.

SUMMARY OF ARGUMENT

The district court viewed the formation of a mobile contract between Appellant Uber Technologies, Inc. ("Uber") and Appellee Spencer Meyer ("Meyer") without acknowledging the experience and expectations of a prudent consumer engaged in mobile contracting, and without deference to the strong presumption in favor of the enforcement of arbitration agreements. Both of these approaches are of concern to *Amici Curiae* Internet Association and Consumer Technology Association (together the "*Association Amici*"). The district court's decision gave short shrift to the way in which consumers and internet- and mobile-based companies have been formulating contracts for years, particularly those formed on mobile devices. And the implications of the district court's order threaten the efficient and now-customary experience between consumers and companies on mobile devices and the resulting benefits that flow to all parties.

Uber's brief addresses the errors in the district court's decision. *Association Amici* limit themselves to two issues in that decision that could impact both companies and consumers engaged in mobile contracting beyond the scope of this case.

First, in light of the increasingly ubiquitous use of smartphones, reasonable consumers engaged in mobile transactions are accustomed to contracting through their mobile devices. The experience and expectations of such consumers must

inform the application of traditional principles of contract formation. Put another way, the district court should have analyzed the conspicuousness of contract terms for a mobile contract from the perspective of a consumer that actually engages in mobile contracting. Instead, the district court expressed concern over issues like the smaller screens that characterize virtually every consumer's interaction with a smartphone – a central feature that every mobile device user recognizes and manages to their satisfaction when they elect to execute a mobile transaction. The district court's decision did not appreciate the experience and expectations of consumers who are increasingly engaging in mobile commerce, thus ignoring the evolving experiences of consumers and companies and consumers entering into mobile contracting.

Second, in "indulging every reasonable presumption against waiver" of a jury trial, the district court disregarded the well-established legislative and judicial "liberal federal policy favoring arbitration." It thereby did not take into account the significant benefits and efficiencies arbitration provides to consumers and e-commerce companies alike.

Mobile contracting is convenient, efficient, and expanding rapidly. In assessing this emerging commercial medium, courts should take a practical approach that recognizes and considers the experience, realities and expectations

particular to mobile contracting, increasingly ubiquitous in today's digital economy.

The *Association Amici* respectfully request that the Court correct these errors, reverse the district court, and remand with instructions that the case be dismissed and the parties be ordered to arbitrate their dispute.

ARGUMENT

I. The District Court's Opinion Is Concerning For Companies Engaged In Mobile Contracting.

A. Mobile Devices And Contracting Are Increasingly Ubiquitous.

For many Americans, accessing the internet means pulling out their smartphone. Over two-thirds of American adults own a smartphone, a number that has nearly doubled since 2011. *See* Aaron Smith, *The Smartphone Difference*, Pew Research Center (April 2015), *available at* http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015. In 2016 alone, companies are expected to ship nearly 183 million smartphones to U.S. consumers. *See* CTA – U.S. Consumer Technology Sales and Forecasts (July 2016), *available at* https://www.cta.tech/Research-Standards/Reports-Studies/Studies/2016/U-S-Consumer-Technology-Sales-and-Forecasts-(July.aspx. 19% of Americans rely to some degree on their smartphones to access the internet because they have limited alternatives; 10% of Americans access the internet mostly through their smartphones. *See* Smith, *supra*.

The public uses their smartphones in myriad ways. 91% of smartphone owners ages 18-29 access social networking on their smartphones. Even among smartphone users over the age of 50, 55% access social networks on their smartphones. *See* Smith, *supra*. In total, 75% of smartphone users utilize social media on their device. *Id*. Smartphone owners also use their devices for other reasons: 62% access health information; 57% perform online banking; 30% take a class or access educational content; and even 18% have used smartphones to submit a job application. *Id*. For 18-29 year olds, the numbers are even higher, with 74%, 70%, 44%, and 34%, respectively, using their smartphones for those same services. *Id*.

Along with the increase in smartphone ownership, ownership of tablets, another mobile device, has increased significantly, from 4% of all Americans in 2010 to 45% in 2015. *See* Monica Anderson, *Technology Device Ownership: 2015*, Pew Research Center (October 2015), *available at* http://www.pewinternet.org/2015/10/29/technology-device-ownership-2015. Over 65 million tablets are expected to ship to American consumers in 2016. *See* CTA – U.S. Consumer Technology Sales and Forecasts (July 2016), *supra*. Like smartphones, consumers use these devices to access health information, engage in online banking, access educational content, submit job applications, and make mobile payments. By the end of 2015, there were nearly 378 million wireless

subscribers in the United States, far more than the total American population. *See* CTIA Wireless Industry Survey (2016) *available at* http://www.ctia.org/docs/default-source/default-document-library/ctia-survey-2015.pdf. At the same time, ownership of desktop computers or laptops is on the decline. Currently 73% of Americans own a desktop computer or laptop, down almost 10% in just the last four years. *Id*.

Mobile payments (such as purchases, bill payments, or payments to other people) are increasingly common. 46% of American consumers report making mobile payments for transactions over their smartphones, which translates to roughly 114 million adult Americans. Pew Issue Brief, *Who Uses Mobile Payments?*, The Pew Charitable Trusts, *available at* http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/05/who-uses-mobile-payments. The federal government similarly found that 47% of smartphone owners completed at least one mobile payment task in 2014. *See* Board of Governors of the Federal Reserve System, *Consumers and Mobile Financial Services 2015* (March 2015), *available at* http://www.federalreserve.gov/econresdata/consumers-and-mobile-financial-services-report-201503.pdf. According to one industry study, by the end of 2015, mobile commerce likely accounted for 33% of all online commerce in the United States and 40% worldwide. *See* Criteo, *State of Mobile Commerce: Growing like a*

weed Q1 2015, *available at* http://www.criteo.com/media/1894/criteo-state-of-mobile-commerce-q1-2015-ppt.pdf.

Reflecting these new consumer preferences, the size and impact of the internet sector of the economy and e-commerce is expanding exponentially. A December 2015 study by *Amici* Internet Association estimated that the internet sector contributed nearly $1 trillion, or six percent, of real GDP in the United States in 2014. Stephen A. Siwek, *Measuring The U.S. Internet Sector*, *available at* http://internetassociation.org/wp-content/uploads/2015/12/Internet-Association-Measuring-the-US-Internet-Sector-12-10-15.pdf. That is twice the value of the internet sector just seven years earlier. *Id.* 92% of the 299 million Americans use the internet. *Id.* at 4. From 2007 to 2012, retail e-commerce – sales from e-commerce merchants to consumers over the internet – grew by nearly $100 billion, from $136 billion to $228 billion in total sales. *Id*. at 20. eBay now has 155 million active buyers, and the world's leading retailer in terms of market value is Amazon, which has only three physical stores but a valuation of $247 billion – $14 billion more than Wal-Mart. *Id.* at 4.

In short, mobile device usage is changing the way consumers are accessing the internet, researching products and services, providing information to others, and contracting with companies. Consumers are able to do so on the go, untethered from their desktop computers or laptops, much less the brick and mortar

locations of traditional consumer-facing companies. As consumers increasingly use their smartphones, all parties desire predictable and fair guidelines to direct their relationships, particularly in forming contracts.

B. Mobile Contracting Should Be Analyzed From The Perspective Of A Reasonably Prudent User Of Mobile Devices.

As the district court properly stated, whether a consumer was provided with sufficient inquiry notice of a contract's terms is determined by an objective standard. *See* AA606; AA610-11; *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 30 (2d Cir. 2002) (applying California law) (measuring assent by an objective standard). But the objective standard used to evaluate whether a mobile- or internet-based contract has been formed should recognize that the proper perspective is that of a reasonable consumer *who engages in mobile-contracting*. *See Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 839 (S.D.N.Y. 2012) (recognizing that a consumer with knowledge of the internet knows how to find terms of use by hyperlink).

As this Court recognized in *Specht*, the context of the transaction at issue is critical to understanding whether the consumer received adequate notice and therefore assented to the terms of a contract. *Specht*, 306 F.3d at 30 (assent inquiry standard includes considering "the transactional context in which the offeree verbalized or acted"); *see also Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 124 (2d Cir. 2012) ("What constitutes sufficient inquiry notice of a term not actually read

by the offeree depends on various factors including, but not limited to, the conspicuousness of the term, the course of dealing between the parties, and industry practices.") (emphasis added). This principle is not specific to e-commerce – in assessing the enforceability of an agreement, the context of the commercial transaction is important whether the resulting contract is made of paper or pixels. *See, e.g., ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451-52 (7th Cir. 1996) (evaluating application of traditional contract principles in the context of various commercial transactions).

The typical mobile-contracting consumer is sophisticated enough to have a reasonable understanding of basic mobile device functions, and likely has engaged in various transactions on their mobile device. *See supra* at Section I.A (citing statistics). These consumers further understand that mobile transactions involve the formation and execution of contracts that place terms, obligations, and restrictions on their use of the product or service. *See* Woodrow Hartzog, *The New Price to Play: Are Passive Online Media Users Bound by Terms of Use?*, 15 Comm. L. & Pol'y 405, 409 (2010). This is particularly true when consumers engaged in mobile contracting are presented with a registration page that requires them to enter their credit card information. *See Schnabel*, 697 F.3d at 127 (presenting the contractual terms "at a place and time that the consumer will associate with the initial purchase or enrollment … at least indicates to the

consumer that he or she is … employing such services subject to additional terms and conditions," including when requiring the consumer to re-enter credit-card information); *Specht*, 306 F.3d at 32 ("Internet users" could not be expected to search for additional contractual terms because, in part, the transaction was free).

Reasonably prudent consumers elect to engage in mobile contracting because they benefit from the convenience – performing an online transaction while commuting, for instance, saves more time for work, family or other interests. They do so fully aware that the screens of their mobile devices are, by their very nature, typically smaller than a desktop or standard-size paper, and knowing that they still can review the terms and conditions that apply to online transactions.

C. The District Court's Opinion Does Not Reflect The Experience And Expectations Of Companies And Consumers Engaged In Mobile Contracting.

The district court's refusal to compel arbitration hinged on whether the parties had formed an enforceable agreement. Part of this inquiry turned on whether "a reasonably prudent user would have been put on inquiry notice of the terms of the contract." AA611 (internal quotations and citations omitted). After analyzing a variety of factors, the district court concluded that the plaintiff here "did not have '[r]easonably conspicuous notice' of Uber's User Agreement, including its arbitration clause, or evince 'unambiguous manifestation of assent to those terms.'" AA621. Several aspects of the district court's conclusion do not

give proper consideration to the evolving expectations and experience of mobile device users engaged in mobile-contracting, a result that could have implications far broader than this case.

First, the district court expressed concern with the size of the screen of plaintiff's mobile device. *See* AA607 (rejecting image "that is considerably larger than the screen that would be faced by the user of a Samsung Galaxy S5 phone," and including instead a to-scale rendering of plaintiff's Samsung Galaxy S5 smartphone screen). But screen size *per se* cannot be cause for concern since such a finding would imperil mobile contracting as a whole. Mobile devices come in screens of various sizes,[3] and the consumer has the choice to select a screen that best fits his or her needs. And consumers using mobile devices know, of course, that a smaller screen necessarily has a smaller area to display text than a device with a larger screen, or a desktop with a full-size monitor.[4] These consumers elect

[3] For example, an iPad Air has a 9.7-inch screen. *See* iPad Air – Technical Specifications, *available at* https://support.apple.com/kb/sp692?locale=en_US. Meyer's Samsung Galaxy S5 had a 5.1-inch screen. AA607.

[4] Modern smartphones also offer a number of features to mitigate the screen size issue. Most smartphones feature high-resolution and backlit screens, text size manipulation and "pinch-to-zoom" capabilities, and other features that address the device's small screen, which can enhance the readability of text on mobile devices. *See, e.g.*, iPhone 7 – Technical Specifications – Apple, *available at* http://www.apple.com/iphone-7/specs/ (iPhone 7 Plus has "1920-by-1080-pixel resolution at 401 ppi" and "LED-backlit" "Retina HD display"). Modern smartphone users also typically have the option to alter the text presentation on (footnote continued)

to engage in transactions over their smartphones and tablets anyway, utilizing the devices' smaller screens and navigating through various mobile interfaces, including for commercial transactions.

Second, the district court questioned whether mobile contracting consumers would understand the phrase "terms of service" as denoting the terms and conditions applicable to Uber's ride-sharing service. AA622. The district court was concerned that a "reasonable user" might assume that "terms of service" referred to "the types of services that Uber intends to provide[.]" *Id*. But a reasonably prudent consumer engaged in mobile contracting would not view this phrase – employed frequently on the internet – as offering a menu of Uber's services. Such a consumer would instead understand that the phrase relates to the terms applicable to the service to be provided. *See Specht*, 306 F.3d at 30 (courts should consider context of transaction); *Schnabel* (courts should consider industry practice).

Numerous courts have concluded that hyperlinks to a company's online contract that use the phrase "terms of service" provide sufficient inquiry notice to consumers. In *Cullinane*, for instance – a case cited frequently in the district

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their phone generally, making it smaller or larger, through their smartphone's display settings. *See, e.g.*, Change the font size on your iPhone, iPad, and iPod touch – Apple Support, *available at* https://support.apple.com/en-us/HT202828.

court's opinion – the court considered a similar Uber registration page and reached the opposite conclusion of the district court. *Cullinane v. Uber Techs., Inc.*, No. CV 14-14750-DPW, 2016 WL 3751652, at *2 (D. Mass. July 11, 2016). The interface in *Cullinane* used language in the hyperlink identical to the phrase the interface at issue here – "Terms of Service & Privacy Policy." *Id.* Yet *Cullinane* found that "[t]he language surrounding the button leading to the Agreement is unambiguous in alerting the user that creating an account will bind her to the Agreement." *Id.* at *8; *see also Leong v. Myspace, Inc.*, No. CV 10-8366 AHM EX, 2011 WL 7808208, at *5 (C.D. Cal. Mar. 11, 2011) (hyperlink to "Terms Of Service" provided constructive notice to plaintiff of contract terms); *Zaltz v. JDATE*, 952 F. Supp. 2d 439, 451 (E.D.N.Y. 2013); *Fteja*, 841 F. Supp. 2d at 835 (same); *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 912 (N.D. Cal. 2011) (same).

Finally, the district court seemed concerned that the hyperlinked "Terms of Service & Privacy Policy" took the user to an interim page where the user would then be required to click another hyperlink in order to view the "terms and conditions" or "Privacy Policy" then in effect, instead of linking to the "Terms and Conditions" directly from the registration page. *See* AA609. Yet the use of hyperlinks to connect online consumers to contract terms is commonplace, and routinely blessed by courts. *See, e.g., Whitt v. Prosper Funding LLC*, No. 1:15-

CV-136-GHW, 2015 WL 4254062, at *5 (S.D.N.Y. July 14, 2015) (collecting cases finding that hyperlinks are often used to provide access to the contractual terms and conditions of service and have been approved by the courts); *5381 Partners LLC v. Shareasale.com, Inc.*, No. 12-CV-4263 JFB AKT, 2013 WL 5328324, at *7 (E.D.N.Y. Sept. 23, 2013) (hyperlink to contractual terms on the same page as button to complete registration); *Fteja*, 841 F. Supp. 2d at 834-35 (same); *Swift*, 805 F. Supp. 2d at 911 (same); *Major v. McCallister*, 302 S.W.3d 227, 230 (Mo. Ct. App. 2009) (same); *see also Snap-on Bus. Sols. Inc. v. O'Neil & Associates, Inc.*, 708 F. Supp. 2d 669, 683 (N.D. Ohio 2010) (same).

* * *

Changed (and changing) technological and marketplace factors shape the experience and expectations of a mobile device user engaged in mobile contracting. Such a consumer understands the limitations – such as, most basically, screen size – involved in transacting over their smartphones and tablets, but engages in those transactions anyway because he or she can address or manage the limitations. It is from such a consumer's perspective – one actually executing mobile transactions and regularly using their smartphones – that the reasonable conspicuousness of a company's terms and conditions should be measured. The district court's concern with several characteristics of mobile contracting that exist

in virtually every mobile transaction concerns the *Association Amici*, and supports reversal.

II. The District Court Erred In Applying Every Presumption Against Arbitration.

For nearly 100 years, federal policy has favored agreements to arbitrate. In 1925, Congress passed the Federal Arbitration Act ("FAA") in an effort to put an end to persistent efforts by courts and state governments to invalidate arbitration agreements. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). The FAA announced a clear policy favoring arbitration, and federal courts have enforced a presumption favoring arbitration agreements for decades. *See* 9 U.S.C. § 2; *see also, e.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."). The Supreme Court has further held that agreements to arbitrate are not subject to heightened standards for enforceability, but rather must be "place[d] . . . on equal footing with other contracts." *See, e.g., Concepcion*, 563 U.S. at 339, 341; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006); *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1204 (2012); *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311 (2013).

The district court's decision seemingly flips this long-standing policy on its head. Rather than presuming that the arbitration agreement in Uber's contract was valid and enforceable, the district court – focusing on the bolded jury waiver in the

arbitration clause and lamenting the "vicissitudes of the World Wide Web" – suggested that it "indulge[d] every reasonable presumption against waiver." AA597-98. To the extent that application of this standard impacted the district court's order, it was error.

A. An Enforceable Arbitration Agreement Requires Objective Evidence Of Assent.

Arbitration agreements are simply contracts, subject to all the basic principles of contract. Courts "must place agreements to arbitrate on equal footing with other contracts and enforce them according to their terms;" they may not invalidate agreements based on "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue;" and they must not apply "generally applicable" contract defenses "in a fashion that disfavors arbitration[.]" *Concepcion*, 563 U.S. at 339, 341, 351.

Like any other contract, arbitration agreements are enforceable where there is an objective manifestation of assent to the agreement. 9 U.S.C. § 2; *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Sufficient manifestation of assent to a contract term can take the form of a party's signature to the contract as a whole or, more recently, the party's electronic agreement to be bound by the terms of a contract through clicking a button on a website. *See, e.g.*, *Starkey v. G Adventures, Inc.*, 796 F.3d 193, 195 (2d Cir. 2015) (forum selection clause accessible via hyperlink enforceable); *Fteja*, 841 F.Supp.2d at 834 (users

agreed to forum selection clause by clicking acknowledgement to site's terms and conditions, even if they did not review the terms); *Swift*, 805 F.Supp.2d at 912 (user agreed to terms and conditions, despite not viewing them, by clicking assent); *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela*, 991 F.2d 42, 46 (2d Cir. 1993) (party who signs written contract to arbitrate "is conclusively presumed to know its contents and to assent to them"). This is as true for arbitration agreements as for any other contract. *See IFC Credit Corp.v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 993-94 (7th Cir. 2008) (enforcing arbitration agreement); *Chelsea Square Textiles, Inc. v. Bombay Dyeing & Mfg. Co., Ltd.* 189 F.3d 289, 296 (2d Cir. 1999) (same); *Desert Outdoor Advert. v. Superior Court*, 196 Cal. App. 4th 866, 872 (2011) (same).

Noting the presumption in favor of arbitration, the district court nonetheless suggested that the waiver of the right to a jury trial – subsumed by its very nature in every agreement to arbitrate – required it to indulge every presumption against jury waiver as well as, presumably, any and all arbitration agreements. *See* AA597. But the application of such a heightened standard is foreclosed by numerous Supreme Court decisions holding that agreements to arbitrate should not be treated differently from other contracts. *See, e.g., Concepcion*, 563 U.S. at 339, 341; *Buckeye Check Cashing*, 546 U.S. at 449; *Marmet Health Care Ctr.*, 132 S. Ct. at 1204; *Am. Exp. Co.*, 133 S. Ct. at 2311.

To the extent that the district court disfavored arbitration and used a standard other than the objective manifestation of assent necessary for standard contract formation, that was error. *See, e.g., Concepcion*, 563 U.S. at 339 (arbitration agreement may not be invalidated by applying "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue").

B. The District Court's Standard For Enforceable Arbitration Agreements Erodes The Certainty and Predictability Of Consumer Contracts.

Businesses rely on the consistent federal policy favoring arbitration in contracting with consumers throughout the nation. Treating arbitration agreements differently from other contracts could harm both businesses and consumers, particularly those that utilize standardized consumer contracts for transactions with millions of customers. *See, e.g.*, Siwek, *Measuring The U.S. Internet Sector*, at 4, *available at* http://internetassociation.org/wp-content/uploads/2015/12/Internet-Association-Measuring-the-US-Internet-Sector-12-10-15.pdf (noting that eBay has 155 million users and that Expedia has engaged in over 200 million hotel room transactions).

Businesses make conscious decisions about how to allocate and budget for the cost of doing business, and they need enforceable consumer agreements in order to effectively manage their risk and set accurate pricing. Consumer-facing

companies often employ standardized contracts, which may contain arbitration agreements in order to resolve consumer claims quickly, conveniently, and efficiently. They expect that contracts containing such arbitration provisions will be treated the same as those that do not. The district court's presumption against arbitration therefore threatens the predictability of many companies' interactions with potentially millions of consumers.

In exchange for goods and services, consumers accept certain conditions, including agreements to arbitrate. This is a rational choice by consumers, given that alternative forms of dispute resolution generally are *more* beneficial to them than to businesses. Alan S. Kaplinsky & Mark J. Levin, *Consumer Financial Services Arbitration: What Does the Future Hold After Concepcion?*, 8 J. Bus. Tech. L. 345, 360-61 (2013). Studies show that compared to consumers who litigate their claims, consumers who complete arbitration have more favorable outcomes, recover more, spend less, resolve their disputes more quickly, and are happier with the outcomes. *Id.*; *see also Concepcion*, 563 U.S. at 337-38 (noting that under AT&T's arbitration provisions, a consumer was likely to recover more through individual arbitration than they would as members of a class).

In sum, arbitration agreements are favored under the law, do not constitute a constitutionally-questionable hardship on consumers, and cannot be subject to a

standard higher than those applicable to any contract. In appearing to employ a presumption against arbitration, the district court erred.

CONCLUSION

For the foregoing reasons, *Association Amici* respectfully submit that the district court's denial of Defendants' motion to compel should be reversed and the case remanded with instructions that the parties be ordered to arbitrate their dispute.

Dated: October 31, 2016

COBLENTZ PATCH DUFFY AND BASS LLP

By: */s/ Rees F. Morgan*

Rees F. Morgan
Mark L. Hejinian
Skye D. Langs
One Montgomery Street, Suite 3000
San Francisco, CA 94104
ef-rfm@cpdb.com
ef-mlh@cpdb.com
ef-sdl@cpdb.com

Counsel for Amici Curiae
Internet Association and Consumer Technology Association

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP, Rule 32(a)

I hereby certify that this brief has been prepared using proportionately spaced Times New Roman font, with lines double spaced, in 14 point typeface. The brief was prepared using Microsoft Word software, and according to the Word Count feature therein, the brief contains 4,436 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on October 31, 2016.

/s/ Rees F. Morgan
Rees F. Morgan

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of October 2016, a true and correct copy of the foregoing Brief Of *Amici Curiae* Internet Association And Consumer Technology Association, Urging Reversal was served on the following counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1 (h)(1) & (2).

Theodore J. Boutrous, Jr., Esq.
Gibson Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, CA 90071

Brian Marc Feldman, Esq.
Edwin Michael Larkin, III, Esq.
Jeffrey A. Wadsworth, Esq.
Harter Secrest & Emery LLP
1600 Bausch & Lomb Place
Rochester, NY 14604

Matthew L. Cantor, Esq.
Ankur Kapoor, Esq.
Constantine Cannon LLP
335 Madison Avenue, 9th Floor,
New York, NY 10017

Bryan L. Clobes, Esq.
Ellen Meriwether, Esq.
Cafferty Clobes Meriwether & Sprengel, LLP
1101 Market Street, Suite 2650
Philadelphia, PA 19107

/s/ Rees F. Morgan
Rees F. Morgan