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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARTIN DULBERG, individually and on
behalf of all others similarly situated,

No. C 17-00850 WHA

Plaintiff,

v.

**ORDER DENYING MOTION
TO DISMISS**

UBER TECHNOLOGIES, INC., and
RASIER, LLC,

Defendants.

INTRODUCTION

In this putative class action for breach of contract, defendants move to dismiss the amended complaint. The motion is **DENIED**.

STATEMENT

Plaintiff Martin Dulberg initially brought this putative class action against defendants Uber Technologies, Inc., and its subsidiary Rasier LLC (“collectively, “Uber”), for breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel (in the alternative), and unjust enrichment (in the alternative). After Uber moved to dismiss the complaint, Dulberg filed an amended complaint, thereby mooted that motion (Dkt. No. 34). The amended complaint states only one claim for relief for breach of contract and is now challenged on another motion to dismiss. The following is taken from its well-pled allegations (Dkt. No. 30).

1 The essence of the amended complaint is that Uber found a way to charge higher rates to
2 its passengers but refuses to use those higher rates in calculating compensation for its drivers
3 pursuant to their percentage-based fee agreement with Uber. Dulberg is an Uber driver who
4 contends that his standardized agreement with Uber entitles him to higher compensation as a
5 result of Uber’s higher rates for passengers. On the other hand, Uber contends it can raise its
6 rates for passengers by instituting a more aggressive pricing regime while forcing drivers to
7 accept the same compensation they would have received under the old pricing regime, keeping
8 the difference for itself. Now follow the details.

9 Uber provides a mobile phone application that connects passengers seeking
10 transportation services with Uber drivers (*id.* ¶ 1). Dulberg, who resides in Raleigh, North
11 Carolina, is one of many such Uber drivers (*see id.* ¶ 5). The compensation scheme between
12 Dulberg and Uber is governed by a “Technology Services Agreement” dated December 11,
13 2015 (the “driver agreement”), which forms the basis for this lawsuit (*see id.* ¶ 2).

14 Section 4.1 of the driver agreement states (Dkt. No. 30-1):

15 **Fare Calculation and Your Payment.** You are entitled to charge
16 a fare for each instance of completed Transportation Services
17 provided to a User that are obtained via the Uber Services
18 (“Fare”), where such Fare is calculated based upon a base fare
19 amount plus distance (as determined by Company using location-
20 based services enabled through the Device) and/or time amounts,
21 as detailed at www.uber.com/cities for the applicable Territory
22 (“Fare Calculation”). You acknowledge and agree that the Fare
23 provided under the Fare Calculation is the only payment you will
24 receive in connection with the provision of Transportation
25 Services, and that neither the Fare nor the Fare Calculation
26 includes any gratuity. You are also entitled to charge User for any
27 Tolls, taxes or fees incurred during the provision of Transportation
28 Services, if applicable. You: (i) appoint Company as your limited
payment collection agent solely for the purpose of accepting the
Fare, applicable Tolls and, depending on the region and/or if
requested by you, applicable taxes and fees from the User on your
behalf via the payment processing functionality facilitated by the
Uber Services; and (ii) agree that payment made by User to
Company (or to an Affiliate of Company acting as an agent of
Company) shall be considered the same as payment made directly
by User to you. In addition, the parties acknowledge and agree
that as between you and Company, the Fare is a recommended
amount, and the primary purpose of the pre-arranged Fare is to act
as the default amount in the event you do not negotiate a different
amount. You shall always have the right to: (i) charge a fare that
is less than the pre-arranged Fare; or (ii) negotiate, at your request,
a Fare that is lower than the pre-arranged Fare (each of (i) and (ii))

herein, a “*Negotiated Fare*”). Company shall consider all such requests from you in good faith. Company agrees to remit, or cause to be remitted, to you on at least a weekly basis: (a) the Fare less the applicable Service Fee; (b) the Tolls; and (c) depending on the region, certain taxes and ancillary fees.

Section 4.4 of the driver agreement states (*ibid.*):

Service Fee. In consideration of Company’s provision of the Driver App and the Uber Services for your use and benefit hereunder, you agree to pay Company a service fee on a per Transportation Services transaction basis calculated as a percentage of the Fare determined by the Fare Calculation (regardless of any Negotiated Fare), as provided to you via email or otherwise made available electronically by Company from time to time for the applicable Territory (“*Service Fee*”). In the event regulations applicable to your Territory require taxes to be calculated on the Fare, Company shall calculate the Service Fee based on the Fare net of such taxes. Company reserves the right to change the Service Fee at any time in Company’s discretion based upon local market factors, and Company will provide you with notice in the event of such change. Continued use of Uber Services after any such change in the Service Fee calculation shall constitute your consent to such change.

The driver agreement’s “Service Fee Addendum” for Raleigh adds (Dkt. No. 30-2):

2. **Service Fee.** In exchange for your access to and use of the Uber app, including the right to receive requests for transportation, you agree to pay to the Company a fee for each accepted trip request as set forth below.

Raleigh partners first activated **before** November 23, 2015:

	uberX	uberXL	UberSELECT
SERVICE FEE	20%	28%	28%

Raleigh partners first activated **on or after** November 23, 2015:

	uberX	uberXL	UberSELECT
SERVICE FEE	25%	28%	28%

3. **Booking Fee.** You will be charged a Booking Fee for every trip (amount posted and updated on City Page), and Company will collect this fee from riders on your behalf.

Dulberg signed up as a driver for UberX in May 2014 and as a driver for UberSelect in February 2015 (Dkt. No. 30 ¶ 13). Accordingly, under the driver agreement, he could charge to passengers (1) the Fare, (2) Uber’s Booking Fee, and (3) any applicable tolls, taxes, or fees for each ride. Uber collected these amounts from passengers on Dulberg’s behalf. Additionally,

1 Dulberg owed to Uber (1) a Service Fee equal to 20 percent of each UberX ride and 28 percent
2 of each UberSelect ride, and (2) Uber’s Booking Fee. Uber withheld these before remitting
3 anything to Dulberg.

4 According to the amended complaint, sometime in the autumn of 2016, Uber’s policy
5 changed from calculating the price for each ride *after* the ride to calculating the price upfront
6 *before* the ride. This new “upfront pricing” policy appeared on Uber’s website. According to
7 the amended complaint, Uber’s website *prior* to the shift allegedly stated (in a section directed
8 to *drivers*) (*id.* ¶¶ 19, 27):

9 When a rider takes a trip with you, they are charged a fare at the
10 end of the ride. Each fare is calculated based on how far and how
11 long the trip took to complete. Fares are calculated by adding a
12 base fare (if applicable) + time and distance rates. Riders are also
13 charged a booking fee (approx \$1-2) Let’s say, for example,
14 that you’re in Los Angeles and your rider wants to go from
Downtown LA to West Hollywood, which is approximately 9
miles and 35 minutes away. The fare that the rider pays is
calculated like this: **(9 miles x \$0.90) + (35 minutes x \$0.15) +
\$1.65 booking fee = \$15.00[.]** Drivers using the partner app are
charged an Uber Fee as a percentage of each trip fare.

15 In contrast, Uber’s website *currently* states (in a section directed to *passengers*) (*see id.* ¶ 18):

16 **UPFRONT FARES**

17 With upfront pricing, you know the exact cost of your trip before
requesting. This fare includes (but is not limited to):

- 18 - A base rate
- 19 - Rates for estimated time and distance of the route
- 20 - The current demand for rides in the area

21 A booking fee and any applicable surcharges, fees, and tolls are
22 also calculated and included.

23 When you request a ride, you agree to be charged the upfront fare
when the trip ends. Your fare may increase if you travel to a
24 different destination or make extra stops along the route, or the trip
25 takes much longer than expected.

26 If an upfront fare is not honored, you will either be charged the
minimum fare or a fare based on the measured time and distance
for your trip, including any base fare, booking fee, surcharges,
27 tolls, and other relevant factors such as a dynamic pricing charge.

28 You’ll always get a receipt for any trip fare. If your fare is
different than the upfront fare you agreed to, your receipt will
explain why.

1 *See How are fares calculated?*, UBER HELP, <https://help.uber.com/> (follow “A Guide to Uber”
2 hyperlink, then “How are fares calculated?” hyperlink under “After my ride”) (last visited July
3 28, 2017); *see also Northstar Fin. Advisors Inc. v. Schwab Invs.*, 779 F.3d 1036, 1043 (9th Cir.
4 2015) (courts may consider documents not physically attached to the plaintiff’s pleading if they
5 are incorporated by reference, *i.e.*, their contents are alleged in the complaint and no party
6 questions their authenticity).

7 The amended complaint presents inconsistent allegations — discussed below in the
8 context of the parties’ arguments — about how exactly Uber breached the driver agreement, but
9 its basic theory seems to be that the driver agreement set forth a fixed compensation scheme, as
10 between Uber and its drivers, that comprehensively regulates distribution of all payments
11 collected from Uber’s passengers. Uber then found a way to charge higher rates to its
12 passengers by switching to an “upfront pricing” policy that uses aggressively *estimated* time
13 and distance amounts to calculate the cost for each ride. But, unfortunately for drivers, Uber
14 did not use the same aggressively *estimated* time and distance amounts to calculate Fares under
15 the driver agreement. Instead, Uber continued to use *actual* time and distance amounts (*i.e.*, the
16 cheaper system) for purposes of compensating its drivers, keeping the difference for itself.
17 This, according to the amended complaint, breaches the driver agreement by effectively altering
18 the percentage-based breakdown of Fares between drivers’ remittances and Uber’s Service Fees
19 (*see* Dkt. No. 30 ¶¶ 27–28).

20 Uber now moves to dismiss the amended complaint for failure to state a claim (Dkt. No.
21 38). This order follows full briefing and oral argument.

22 ANALYSIS

23 1. LEGAL STANDARD.

24 To survive a motion to dismiss, a complaint must plead “enough facts to state a claim to
25 relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A
26 claim has facial plausibility when it pleads factual content that allows the court to draw the
27 reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*,
28 556 U.S. 662, 678 (2009). “When ruling on a motion to dismiss, [courts] may generally

1 consider only allegations contained in the pleadings, exhibits attached to the complaint, and
2 matters properly subject to judicial notice.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519
3 F.3d 1025, 1030–31 (9th Cir. 2008) (quotation and citations omitted). Courts accept factual
4 allegations in the complaint as true and construe the pleadings in the light most favorable to the
5 nonmoving party. *Ibid.* Conclusory allegations or “formulaic recitation of the elements” of a
6 claim, however, are not entitled to the presumption of truth. *Iqbal*, 556 U.S. at 681.

7 2. THE PARTIES’ ARGUMENTS.

8 As a preliminary matter, the parties’ briefs struggle to clearly and precisely articulate
9 what Dulberg’s theory of the case is supposed to be, thereby generating a considerable amount
10 of unresponsive arguments. This difficulty traces back to the amended complaint itself, which
11 misleadingly asserts in multiple places that the Fare defined in the driver agreement is the *total*
12 amount of *everything* that Uber charges to its passengers. As just one example, the amended
13 complaint alleges (Dkt. No. 30 ¶ 29):

14 [O]n February 2, 2017, Plaintiff drove an UberX passenger . . . in
15 Raleigh, North Carolina. The passenger was charged \$15.38. This
16 is the Fare, which Uber collected on Plaintiff’s behalf as Plaintiff’s
17 agent. The Booking Fee in Raleigh at the time was \$1.80. So,
18 Dulberg should have made 80% of $(\$15.38 - \$1.80) = \$10.86$. But
19 Dulberg was paid \$9.91 (80% of Uber’s backend hypothetical
20 calculation of \$12.39, which had nothing to [*sic*] with the Fare that
21 was actually charged for the ride — the amount that the passenger
22 paid to Plaintiff and that Uber collected on Plaintiff’s behalf). This
23 is 95 cents less than Dulberg should have made under the
24 Agreement. Indeed, instead of receiving the promised 80% of the
25 Fare, Dulberg received approximately 73%. Instead of receiving
26 20% of the Fare, Uber received approximately 27%.

21 On its face, this narrative is self-contradicting. It claims the Fare was the *total* amount of
22 \$15.38 charged to the passenger, but also claims Dulberg should have received only 80 percent
23 of \$13.58 $(\$15.38 - \$1.80)$, inconsistently indicating that the Fare was actually *less* than the
24 total amount charged to the passenger. As another example, the amended complaint alleges that
25 “[t]he money that passengers pay for a ride, minus Uber’s service fee, belongs to Plaintiff and
26 other drivers” (*id.* ¶ 47). Based on these and other similar allegations, the amended complaint
27 seems to assert — contrary to the driver agreement — that the Fare includes *everything* charged
28 to a passenger, including Uber’s Booking Fee and any applicable tolls, taxes, or fees.

1 Seizing on this problem, Uber dedicates its motion to arguing — correctly — that the
2 Fare defined in the driver agreement is *not* the total amount charged to passengers for rides (*see*
3 Dkt. No. 38 at 7–12). In response, Dulberg’s opposition brief expressly withdraws the amended
4 complaint’s allegation that “the entire amount of the upfront charge [is] the Fare” and admits
5 that Uber’s upfront pricing (*i.e.*, the total amount collected from passengers) “includes more
6 than just the Fare” (Dkt. No. 40 at 11–12 n.2).

7 The best argument discernible from Dulberg’s opposition brief is that the driver
8 agreement comprehensively regulates distribution of all payments collected from Uber’s
9 passengers (*see, e.g.*, Dkt. No. 40 at 19). Since the driver agreement contemplated only one
10 “Fare” consisting of a base amount plus applicable time and distance amounts, it must follow
11 that the “Fare” defined in the driver agreement corresponds exactly to the base amount plus
12 applicable time and distance amounts included in Uber’s “upfront pricing” policy. Thus,
13 however Uber calculates the latter, it should likewise calculate the former.

14 This reading finds support in both the driver agreement and Uber’s “upfront pricing”
15 policy, both of which cover essentially identical charges to passengers, *i.e.*, (1) a rate calculated
16 using a base amount plus applicable time and distance amounts for the area; (2) any tolls, taxes,
17 or fees; and (3) a booking fee. Significantly, and as Dulberg points out in his opposition brief
18 (Dkt. No. 40 at 10), the driver agreement itself did not specify whether the Fare Calculation
19 uses *actual* or *estimated* time and distance amounts. Uber contends in its motion that the Fare is
20 calculated based on *actual* amounts determined after each “completed trip” but points to no
21 such provision in the driver agreement (*see* Dkt. No. 38 at 10–11).

22 On the contrary, the driver agreement simply stated the “Fare is calculated based upon a
23 base fare amount plus distance . . . and/or time amounts, as detailed at www.uber.com/cities for
24 the applicable Territory (“*Fare Calculation*”)” (Dkt. No. 30-1; *see also* Dkt. No. 38 at 9).
25 Nothing in the driver agreement purported to dictate how that website determines time or
26 distance amounts, or precluded the possibility that the website’s — and, by extension, the driver
27 agreement’s — method of determining such amounts might change over time.
28

1 Currently, the website prompts passengers to “find a city” from among a list of cities
2 serviced by Uber. Upon selecting a city, the passenger is then prompted to “get a fare estimate”
3 by inputting a pickup location and destination. Thus, the website referenced in the driver
4 agreement currently appears to facilitate a fare calculation process that closely tracks Uber’s
5 current “upfront pricing” policy. This further supports the plausible inference that Uber’s
6 “upfront pricing” policy simply explains to passengers the enumerated charges covered by the
7 driver agreement and Uber must use the same time and distance amounts — whether estimated
8 or actual — for both.

9 Despite the foregoing, according to the amended complaint, Uber separately calculates a
10 post-ride “Fare” based on the *actual* time and distance amounts for each ride, and remits to
11 drivers their percentage of that “Fare.” Since Uber’s aggressive upfront estimates consistently
12 exceed the actual time and distance amounts, this results in drivers receiving less than what they
13 would be entitled to under the driver agreement. The difference remains with Uber, effectively
14 allowing Uber to retain a higher Service Fee than it is actually entitled to under the driver
15 agreement. Dulberg describes this process as essentially calculating the “Fare” twice — once
16 upfront, using higher *estimated* time and distance amounts, to determine Uber’s own Service
17 Fee, and again after each ride, using lower *actual* time and distance amounts, to determine the
18 amount remitted to drivers — even though the driver agreement tied both Uber’s Service Fee
19 and the driver’s remittance to the same calculated Fare for each ride. These allegations, taken
20 as true, suffice to state a claim for breach of contract.

21 In its reply brief, Uber points out that Dulberg admits (1) the driver agreement has not
22 changed since December 2015 despite Uber’s shift to upfront pricing in the interim, and (2)
23 Uber’s conduct prior to the shift — *i.e.*, calculating Dulberg’s remittance based on the *actual*
24 time and distance amounts determined after each ride — did not violate the driver agreement.
25 Thus, Uber reasons, Dulberg has admitted away his case because the same conduct that
26 comported with the driver agreement before the shift cannot now violate the same driver
27 agreement after the shift (Dkt. No. 45 at 9–11). This is counterfeit logic. As stated, the driver
28 agreement left it up to Uber to determine the applicable time and distance amounts by reference

1 to Uber’s website. Nothing in the driver agreement precluded Uber from using actual *or*
2 estimated amounts, or from unilaterally changing its method of calculation by changing the
3 referenced website. The bottom line is that, whatever method Uber chooses, it must apply that
4 same method to determine time and distance amounts for both charging its passengers and
5 remitting payments to its drivers — or so the amended complaint plausibly alleges.

6 Uber attempts to distinguish the driver agreement from the “upfront pricing” policy on
7 the basis that the “Fare” defined in the former contemplates *only* a base amount plus time and
8 distance amounts, whereas the “fare” described in the latter is expressly “not limited to” those
9 amounts (*see* Dkt. No. 45 at 7). But this may turn out to be a specious distinction, easily
10 explained by the fact that the “upfront pricing” policy, unlike the driver agreement, defines the
11 word “fare” as “the exact cost of [a] trip” — including “[a] booking fee and any applicable
12 surcharges, fees, and tolls,” as well as any adjustments for “a different destination,” “extra stops
13 along the route,” or a trip that “takes much longer than expected.” The “not limited to”
14 language in the “upfront pricing” policy therefore does not detract from the plausible inference
15 that Uber remains contractually obligated to use the *same* time and distance amounts —
16 whether estimated or actual — to calculate *both* charges to passengers under the “upfront
17 pricing” policy *and* payments remitted to drivers under the driver agreement.

18 Uber also suggested, both in briefing and at oral argument, that it can retain more than
19 just the Booking Fee and Service Fee provided by the driver agreement because nothing therein
20 purported to limit Uber’s ability to charge its passengers. In response to questions posed by the
21 Court in advance of the hearing (Dkt. No. 49), counsel for Uber offered up UberPOOL (which
22 allows passengers to share rides and split trip costs with each other), surge pricing, and other
23 promotions and discounts that Uber offers its passengers as examples of “charges” not covered
24 by the driver agreement. None of these examples render implausible the amended complaint’s
25 theory that the driver agreement obligated Uber to honor the fixed, percentage-based split of the
26 calculated Fare for each ride between its Service Fee and the driver’s remittance.

27 *First*, according to counsel, UberPOOL and other promotions and discounts that Uber
28 offers to attract passengers do not result in any lower compensation for drivers. Rather, Uber

1 itself bears the cost of offering those promotions and discounts. But Uber can use various
 2 promotions and discounts to offset the cost of a calculated Fare to the passenger without ever
 3 actually altering either the calculation of that Fare or the corresponding remittance to the driver
 4 pursuant to the driver agreement. *Second*, according to counsel, surcharge pricing is simply a
 5 multiplier that increases the overall Fare calculated pursuant to the driver agreement. That
 6 multiplier applies equally to both a driver’s remittance and Uber’s Service Fee from the
 7 increased Fare and in no way affects the contractually-determined breakdown of the Fare as
 8 between Uber and its driver.

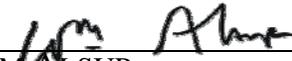
9 In short, the amended complaint plausibly alleges that, after shifting to “upfront
 10 pricing,” Uber had to calculate Fares for drivers under the driver agreement using the same
 11 aggressively *estimated* time and distance amounts that it uses for charging passengers. Uber,
 12 however, continues to use *actual* time and distance amounts to calculate Fares and shortchange
 13 its drivers under the driver agreement, while retaining more money for itself. At this stage,
 14 these allegations are sufficient to survive dismissal.

CONCLUSION

For the foregoing reasons, defendants’ motion to dismiss is **DENIED**.

IT IS SO ORDERED.

Dated: July 31, 2017.



 WILLIAM ALSUP
 UNITED STATES DISTRICT JUDGE