Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

No. SJC-12883

CHRISTOPHER P. KAUDERS and HANNAH KAUDERS,
Plaintiffs-Appellees

v.

UBER TECHNOLOGIES, INC. and RASIER LLC,
Defendants-Appellants

On Appeal From An Order Of The Suffolk Superior Court

BRIEF FOR *AMICI CURIAE*
MASSACHUSETTS ACADEMY OF TRIAL ATTORNEYS
AND AMERICAN ASSOCIATION FOR JUSTICE
IN SUPPORT OF PLAINTIFFS-APPELLEES

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STATEMENT OF THE *AMICI CURIAE*

The Massachusetts Academy of Trial Attorneys (the Academy) and the American Association for Justice (AAJ) offer this *amicus curiae* brief in the above-captioned case.

The Academy is a voluntary, non-profit, Commonwealth-wide professional association of lawyers. The Academy's purpose is to uphold and defend the Constitutions of the United States and the Commonwealth of Massachusetts; to promote the administration of justice; to uphold the honor of the legal profession; to apply the knowledge and experience of its members so as to promote the public good; to reform the law where justice so requires; to advance the cause of those who seek redress for injury to person or property; to ardently resist efforts to curtail the rights of injured individuals; and to help them enforce their rights through the courts and other tribunals in all areas of law. The Academy has been actively addressing various areas of the law in the courts and the Legislature of the Commonwealth since 1975.

The American Association for Justice is a national, voluntary bar association founded in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have

been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its more than seventy-year history, AAJ has served as a leading advocate of the right of all Americans to seek legal recourse for wrongful conduct.

The *amici* urge this Court to recognize the rule in *Cullinane* as valid and to hold that the arbitration clause in Uber's rider agreements is not a valid contract and is therefore unenforceable.

RULE 17(c)(5) DECLARATION

No affirmative declaration pursuant to the conditions set forth in Mass. R. App. P. 17(c)(5) is warranted by the preparation and financing of this brief.

INTRODUCTION

Two federal courts applying Massachusetts law have already told Uber Technologies, Inc., that the claim-suppressing arbitration clause Uber seeks to enforce in this case—a hidden contract provision that, Uber hopes, will strip unwitting Commonwealth citizens of their right to a jury trial—was not sufficiently conspicuous to be enforced. The reference to the

"Terms of Service & Privacy Policy" in which Uber buried its claim-suppressing arbitration clause was hidden: in lettering barely visible, Uber implied (but did not say outright) that when a prospective rider was "DONE" entering credit card information, she was bound to a contract dozens of pages long with an arbitration clause buried inconspicuously at the end.

Now, Uber seeks to persuade this Court to reject the First Circuit's decision in *Cullinane* v. *Uber Techs., Inc.*, 893 F.3d 53 (1st Cir. 2018). But *Cullinane* is nothing more than a straightforward application of Massachusetts law requiring reasonably conspicuous notice of a contract's terms and unambiguous evidence of assent to those terms. So to rule in Uber's favor on its argument would require this Court to fundamentally alter the Commonwealth's contract law. Uber does not claim that the plaintiff in this case read the then-operative Terms and Conditions containing Uber's claim-suppressing arbitration clause. Rather, Uber wants this Court to hold, as a matter of law, that "Done" (on a screen asking users to input credit card information) means "I agree to forfeit my Seventh Amendment right to a jury trial." Such a holding would require the Court to all but discard the requirements of reasonably conspicuous notice of the

terms of the contract, and an unambiguous manifestation of the plaintiffs' intent to be bound by those terms, simply because Uber got creative with its user interface.

The way we contract is certainly evolving: an ever-growing portion of consumer transactions—from online shopping to all manner of services provided through the "sharing economy"—takes place through websites and mobile phones. But the fundamental law of contract, which requires mutual manifestation of assent, holds steady. The evolution of the forum in which we contract should not be seen as an opportunity to jettison the fairness considerations inherent in black letter contract law in favor of contract-by-trickery. This Court should decline Uber's invitation to rewrite that law, and refuse to empower Uber (and the many other companies that would be tempted to follow suit) to strip unsuspecting consumers of fundamental constitutional rights.

ARGUMENT

I. Uber asks this Court to discard the Commonwealth's fundamental contract law principles requiring a manifestation of mutual assent to a conspicuous arbitration clause.

The Internet and smartphone applications have changed the way that citizens of the Commonwealth enter into agreements with corporations for the many services those corporations provide. But "[p]ertinent legal principles do not change simply because a contract was entered into online." *Ajemian* v. *Yahoo, Inc.*, 83 Mass. App. Ct. 565, 574 n.12 (2013) (collecting cases). See *Register.com, Inc.* v. *Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004) ("While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract" law.). Indeed, with the vast majority of consumer contracts taking place in electronic format, it is all the more important that the bedrock principles of contract formation continue to apply to these online agreements.

A. Massachusetts law requires unambiguous evidence of assent to conspicuous contract terms before a consumer can be said to have agreed to forfeit his or her jury trial rights.

Whether there is a valid, enforceable agreement to arbitrate "is a matter of contract." *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 67

(2010). And an arbitration clause—like any other contract term—is subject to "generally applicable contract defenses." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 343 (2011); *St. Fleur* v. *WPI Cable Systems/Mutron*, 450 Mass. 345, 349-350 (2008) ("[C]ourts may apply generally applicable State-law contract defenses . . . to determine the validity of an arbitration agreement.").

Even online, it is "ordinary state law principles that govern the formation of contracts." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995). Thus, faithful adherence to Massachusetts contract law requirements is "essential if electronic bargaining is to have integrity and credibility." *Ajemian*, 83 Mass. App. Ct. at 574-575, quoting *Specht* v. *Netscape Communications Corp.*, 306 F.3d 17, 35 (2d Cir. 2002). A contract cannot be enforced—in fact, it cannot even be formed—absent clear evidence showing that (1) the contract terms were "reasonably communicated" to the consumer, and (2) the consumer "unambiguous[ly] manifest[ed] . . . assent" to those terms. *Id.* at 574-576.

Under Massachusetts law, a contract provision is not "conspicuous" unless it is "so written, displayed or presented that a reasonable person against which it is to operate ought to have noticed it." G.L. c. 106, § 1-

201(b)(10) (also noting conspicuousness is for court to decide as matter of law). See G.L. c. 156D, § 1.40(a) (defining "conspicuous" as "written so that a reasonable person against whom the writing is to operate should have noticed it").

Courts addressing the operation of Massachusetts' contract principles to online contracts follow the analysis laid out in *Ajemian*, which hues faithfully to these black letter principles. *Ajemian* established a two-part test to determine the enforceability of terms in online agreements: a term or clause in an online agreement is enforceable only if: (1) the contract terms were reasonably communicated to the user; and (2) the record establishes that the terms were accepted. *Ajemian*, 83 Mass. App. Ct. at 575.

Ajemian held that merely giving a user the opportunity to review the terms is not enough to establish that the terms were communicated to the user. *Id.* at 575. Rather, courts assessing whether the terms were reasonably conspicuous must examine the language used to notify the user that the terms of the agreement could be found by following the link, "how prominently displayed the link was," and "any other information that would bear on the reasonableness of communicating [the terms of the agreement to the user] via a link." *Id.* Federal courts following *Ajemian*'s

application of Massachusetts law have consistently looked for certain characteristics of the online interface to determine whether the terms of the agreement are sufficiently conspicuous. See *Theodore* v. *Uber Techs, Inc.*, D. Mass., No. 18-cv-12147, slip op. at *4 (D. Mass. Mar. 3, 2020) (attached). These characteristics include "using larger and contrasting font, the use of headings in capitals, or somehow setting off the term from the surrounding text by the use of symbols or other marks." *Cullinane*, 893 F.3d at 62, citing G.L. c. 106, § 1-201(b)(10). See *Theodore*, slip op. at *4.

Ajemian discerns a general rule regarding what constitutes "clear evidence" that the terms of the agreement were accepted by the user: where "clauses contained in online contracts have been enforced, courts have done so only where the record established that the terms of the agreement were displayed, at least in part, on the user's computer screen and the user was required to signify his or her assent by 'clicking' 'I accept.'" *Ajemian*, 83 Mass. App. Ct. at 576. The same cannot be said where a company purports to bind an online interface user to terms of a contract that are merely present somewhere on the interface, but where the interface does not direct the user to their existence and does not prompt the user to agree to them. See *id.* (contrasting enforceable "clickwrap" agreements

where a user is "required to signify his or her assent" with unenforceable "browsewrap" agreements where the terms are merely "'posted on the website typically at the bottom of the screen.'"), quoting *Hughes* v. *McMenamon*, 204 F. Supp. 2d 178, 181 (D. Mass. 2002). The rule is simple: where the record does not establish that the user was prompted to, and did, manifest assent by clicking "I accept" or some similar action, the terms of the agreement will not be enforced. *Id.* at 576.

B. *Cullinane* faithfully applies Massachusetts contract law, and Uber's challenge to *Cullinane* is therefore an assault on black letter contract principles.

Uber asks this Court to read *Cullinane* as a radical departure from Massachusetts' settled contract law, suggesting *Cullinane* announced some newfangled, heighten notice requirement beyond providing reasonably conspicuous notice. Uber Br. at 40-41.[1] But this misreads *Cullinane* badly.

In *Cullinane,* the First Circuit applied the two-part test outlined in *Ajemian*. *Cullinane,* 893 F.3d at 62. As Massachusetts law requires, *Cullinane*'s analysis focused on whether the contract terms were reasonably communicated to the user, and if so whether the user unambiguously manifested assent to those terms. *Id.* at 61-62.

[1] The *amici* cite Uber's Brief as "Uber Br."

In conducting its analysis under the first prong of the *Ajemian* test, the First Circuit understood that in order for terms to be "reasonably communicated" to the user, those terms must be clear and conspicuous, *id.* at 62, a concept the *Cullinane* court derived directly from *Ajemian*. See *Ajemian*, 83 Mass. App. Ct. at 574-575. The First Circuit acknowledged that, in the context of Internet-based contracts, clarity and conspicuousness of the terms "are a function of the design and content of the relevant interface." *Cullinane*, 893 F.3d at 62, quoting *Meyer* v. *Uber Techs., Inc.*, 868 F.3d 66, 75 (2d Cir. 2017). Again, *Cullinane's* reasoning is on all fours with *Ajemian*: in *Ajemian,* the Appeals Court examined the language used to direct users to the hyperlink to the agreement, along with the (lack of) prominence of the terms of the agreement on the webpage, when deciding whether the terms of the agreement were reasonably communicated to the user. *Ajemian*, 83 Mass. App. Ct. at 575. And lest there be any doubt that *Cullinane* constituted a careful application of Massachusetts law, the First Circuit expressly consulted the Legislature's statutory definition of "conspicuous," as well as the various examples given in the statute as to the general characteristics that make a term conspicuous, when assessing Uber's interface. *Cullinane*, 893 F.3d at 62, citing G.L. c. 106, § 1-201(b)(10);

G.L. c. 156D, § 1.40. Applying this framework—a framework indistinguishable from black letter Massachusetts law and the decisions of Massachusetts' courts—the First Circuit held that the plaintiffs were not reasonably notified of the terms of the agreement. *Id.* at 62.

Despite Uber's protestations to the contrary, "*Cullinane* did not 'substantial[ly] change' the applicable law." *Bekele* v. *Lyft, Inc.*, 918 F.3d 181, 187 (1st Cir. 2019), quoting *United States* v. *Mayendía-Blanco*, 905 F.3d 26, 33 (1st Cir. 2018). Rather, it is a faithful application of Massachusetts law regarding the enforceability of terms in an online agreement. *Cullinane* applied the customary requirement that terms of a contract be "reasonably communicated and accepted" to be enforced—the standard which, according to Massachusetts' own courts, has "been adopted for online contracts." *Bekele*, 918 F.3d at 187, citing *Ajemian*, 83 Mass. App. Ct. 565.

Cullinane has been "recognized as a paradigm of judicial reliance on analysis of the general context in answering questions regarding reasonable notice to consumers in online contracts of adhesion." *Theodore,* slip op. at *6 (collecting scholarship).[2] The two-part test developed in

[2] Uber cites only *one* judge's decision to disparage *Cullinane* as evidence that it represents some rogue judicial activism in the contract-law

Ajemian and employed in *Cullinane* "is consistent with the approach taken by other courts in the country." *Id.*, quoting K. Conroy & J. Shope, Look Before You Click: The Enforceability of Website and Smartphone App Terms and Conditions, 63 Boston B.J. 23 (Spring 2019).

Uber seeks to undermine this paradigm case: it asks this Court to hold that *Cullinane* is an "outlier" that applies some "heightened notice standard[.]" Uber Br. at 41. See Uber Br. at 44. That is simply untrue: *Cullinane* faithfully applied the Appeals Court's explanation of how to apply the standard to electronic contracts, which was in turn derived from fundamental Massachusetts decisional and statutory law concerning contracts generally. Thus, by asking this Court to apply some lower standard than that applied in *Cullinane*, Uber is not asking this Court to simply realign the case law with contract principles; it is asking this Court

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realm. See Uber Br. at 40, quoting *West* v. *Uber Techs.*, C.D. Cal., No. 18-cv-3001, slip op. at *4 (Sept. 5, 2018) (Guttierez, J.) (attached). But, as another federal judge recently concluded in carefully examining that critique of *Cullinane*, "Judge Gutierrez's view that 'the *Cullinane* decision departs dramatically both from what other courts have found regarding Uber's registration process, and from the overall legal landscape regarding assent to online agreements'" is "overstated"—the result of Judge Guttierez's "failure to distinguish" between the principles applied in *Cullinane* and the fact-intensive application of those principles to the facts of the case. *Theodore*, slip op. at *6, quoting *West*, slip op. at *4.

to fundamentally alter, and weaken, the requirements for formation of a valid contract writ large.

Because *Cullinane* follows *Ajemian*, which simply sets forth basic Massachusetts contract principles in the context of an electronic contract, this Court cannot upset *Cullinane* without upsetting settled Massachusetts contract law. *Cullinane* is sound; given the First Circuit's correct application of Massachusetts law to facts nearly identical to those at issue in this case, this Court ought not disturb *Cullinane* here.

II. This Court should decline to endorse Uber's contract-by-trickery approach.

A. Uber has demonstrated that it knows how to give conspicuous notice of an arbitration provision—when it wants to form an enforceable electronic agreement to arbitrate.

Despite Uber's protestations here, providing reasonably conspicuous notice of the terms of an online contract "is not hard to accomplish." *Sgouros* v. *TransUnion Corp.*, 817 F.3d 1029, 1035 (7th Cir. 2016). Uber's competitor, Lyft, does just that. Indeed, even Uber it*self* has demonstrated that it knows how to ensure that a would-be user has assented to contract terms drawn to the users' attention—when it wants to.

1. Uber's contract with its drivers provides conspicuous notice of its arbitration agreement, to which a prospective driver must *twice* click "Yes, I agree."

When a prospective driver looks to join Uber's forces, that driver—like riders—is offered an electronic agreement. After entering his or her personal information on the screen, the prospective driver is confronted with a precaution "prominently displayed within the Uber App's Terms and Conditions page." *Singh* v. *Uber Techs. Inc.*, 235 F. Supp. 3d 656, 666 (D.N.J. 2017) (finding Uber-driver contract contains binding and enforceable arbitration agreement), *vacated and remanded on other grounds*, 939 F.3d 210 (3d Cir. 2019). That disclaimer reads, in all capital letters, "TO GO ONLINE, YOU MUST REVIEW ALL THE DOCUMENTS BELOW AND AGREE TO THE CONTRACTS BELOW." *Id*. Uber then provides the prospective driver with conspicuous hyperlinks to those contracts, including a link directly to the agreement containing an arbitration clause. *Id*. The prospective driver is "not required to scroll down through the page" to find the relevant contract terms, "nor [is] it hidden or buried within the Terms and Conditions page"—"[r]ather, it was prominently displayed and conspicuously located directly beneath the aforementioned instruction." *Id*.

The very first page of that agreement contains a statement, in bold, capital letters, advising the prospective driver that, to join Uber's driving forces, he or she must agree to arbitrate:

> **IMPORTANT: PLEASE NOTE THAT TO USE THE UBER SERVICES, YOU MUST AGREE TO THE TERMS AND CONDITIONS SET FORTH BELOW.** ***PLEASE REVIEW THE ARBITRATION PROVISION SET FORTH BELOW CAREFULLY, AS IT WILL REQUIRE YOU TO RESOLVE DISPUTES WITH THE COMPANY ON AN INDIVIDUAL BASIS THROUGH FINAL AND BINDING ARBITRATION UNLESS YOU CHOOSE TO OPT OUT OF THE ARBITRATION PROVISION*** **. . . . IF YOU DO NOT WISH TO BE SUBJECT TO ARBITRATION, YOU MAY OPT OUT OF THE ARBITRATION PROVISION BY FOLLOWING THE INSTRUCTIONS PROVIDED IN THE ARBITRATION PROVISION BELOW.**

(Boldface in original; italics added). *Id.* at 662. The arbitration provision referenced in this conspicuous, up-front disclaimer also contained similarly cautionary language, again set apart from other contractual terms by the use of capital letters and boldface type, acknowledging that the question of whether to agree to an arbitration provision "**IS AN IMPORTANT BUSINESS DECISION**" that warrants careful consideration of "**THE CONSEQUENCES OF [THE] DECISION**" to sign away one's Seventh Amendment rights. *Id.* After twice cautioning a would-be driver about the importance of informed consent to the arbitration provision—and even

encouraging the applicant to consult an attorney—Uber spells out, once again in boldface type, the essential terms of the arbitration provision:

> IMPORTANT: This arbitration provision will require you to resolve any claim that you may have against the Company or Uber on an individual basis pursuant to the terms of the Agreement unless you choose to opt out of the arbitration provision. This provision will preclude you from bringing any class, collective, or representative action against the Company or Uber.
>
> ...
>
> **Except as it otherwise provides, this Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration. This Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative action.**

Id. at 662-663.

In response to the disclaimer and the hyperlinks, the prospective driver must click on an icon that reads "YES, I AGREE." *Id.* at 666. But there is more. "After clicking 'YES, I AGREE,'" the prospective driver encounters "a second screen" that encourages re-reading the arbitration-clause-containing agreement: "PLEASE CONFIRM THAT YOU HAVE REVIEWED ALL THE DOCUMENTS AND AGREE TO ALL THE NEW CONTRACTS." *Id.* The prospective driver cannot access Uber's interface or

drive for Uber without "manifest[ing] an intent to be bound to the terms and conditions . . . for a *second time* by *once again* clicking on the 'YES, I AGREE' icon" (emphasis added). *Id.*

Most courts have found the arbitration clause in the driver agreement sufficiently conspicuous.[3] As the *Singh* court explained, the arbitration agreement was not "hidden or buried within the Terms and Conditions page, but "prominently displayed and conspicuously located" to ensure that the prospective driver knowingly waived his or her Seventh Amendment rights. *Singh*, 235 F. Supp. 3d at 666. See, e.g., *O'Connor* v. *Uber Techs., Inc.*, 904 F.3d 1087, 1095 (9th Cir. 2018) (finding driver arbitration agreement enforceable); *Carey* v. *Uber Techs., Inc.*, N.D. Ohio, No. 1:16-cv-1058, slip op. at *7-*8 (Mar. 27, 2017) (attached) (same); *Sena* v. *Uber Techs., Inc.*, D. Ariz., No. CV-15-02418-PHX-DLR, slip op. at *6 (Apr. 7, 2016)

[3] But see *O'Connor* v. *Uber Techs., Inc.*, N.D. Cal., No. 13-cv-3826, slip op. (Dec. 6, 2013), the court struck the driver arbitration provision from the agreement because it was "buried in" a "larger, overall Licensing Agreement"—"the penultimate paragraph of a fourteen-page agreement presented to Uber drivers electronically in a mobile phone application interface." *Id.* at *6. See *Mohammed* v. *Uber Techs., Inc.*, 237 F. Supp. 3d 719, 732 (N.D. Ill. 2017) (declining to compel arbitration because "the link to the agreement is situated at the bottom of the page in small font under the vague heading, 'Contracts,' with the unilluminating title, 'Raiser Software Sublicense Agreement June 21, 2014'" and therefore raised questions of fact regarding existence of binding arbitration agreement).

(attached) (granting motion to compel arbitration; finding driver arbitration agreement terms conspicuous); *Mohamed* v. *Uber Techs., Inc.*, 109 F. Supp. 3d 1185, 1197 (N.D. Cal. 2015) ("[I]t is beyond dispute that [drivers] had the opportunity to review the relevant terms of the hyperlinked agreements, and the existence of the relevant contracts was made conspicuous in the first application screen which the drivers were required to click through in order to continue using the Uber application."), *aff'd in relevant part*, 836 F.3d 1102 (9th Cir. 2016), *amended and superseded on other grounds*, 836 F.3d 1201 (9th Cir. 2016).

2. Uber's rider contract, by contrast, hides the arbitration clause within dozens of pages of fine print, and only asks riders to confirm that they are "done" entering their credit card information.

While Uber goes to such lengths to provide its prospective drivers with an opportunity to review and assent to (or even opt out of) the arbitration provision, Uber does not afford its riders the same courtesy. The interface at issue in this case does not provide a prominent statement that a prospective rider is about to enter into a binding contract. It does not provide a clear hyperlink to that contract. That contract does not highlight, up front, that it contains an arbitration clause that will strip riders of their

ability to seek meaningful redress for wrongs by Uber. The arbitration clause is not prominently displayed in the contract. And at no time must a prospective rider signify agreement to those terms by clicking "Yes, I Agree."

After a prospective passenger navigates two screens on which she is invited to "Create an Account" and then "Create a Profile" by entering her name, contact information, and a password, *Cullinane*, 893 F.3d at 56,[4] the app tells her to "Link Card" or "Link Payment"—requiring entry of "the appropriate payment information for Uber's services." *Id.* Half of the screen is taken up with a number keypad; on the other half, a white box stands out against a black background, and instructions (such as "scan your card" or "enter promo code") appear in bold, light gray font that, again, stands out against the black. *Id.*

The screen also contains small, *dark* grey lettering—not boldface—that all but fades into the black background, reading "By creating an Uber account, you agree to the," followed by white font stating "The Terms of

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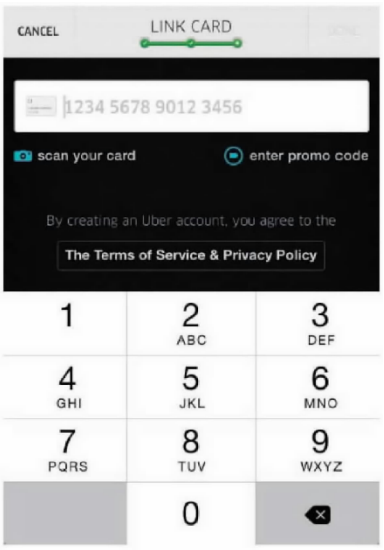
[4] As Uber concedes, the rider sign-up process in this case is "***the same***" as the one described in careful detail in *Cullinane*. RA 33 (emphasis in original). Accordingly, the *amici* adopt the images used by the First Circuit in *Cullinane* to illustrate how inconspicuous the relevant terms are.

Service & Privacy Policy," faintly enclosed in a thin, dark grey rectangle. *Id.*

Here is what the "Link Card" screen looks like:[5]



Id. Once credit card payment information is entered, an additional button labeled "DONE" appears in the top right corner of the screen.[6] *Id.* at 58-59. The app does not require the prospective rider to click on the Terms of Service & Privacy Policy button before proceeding. *Id.* at 59. Rather, once a prospective rider is "DONE" entering credit card information and has clicked that button, she is free to use the app. *Id.* Never—not once, let alone

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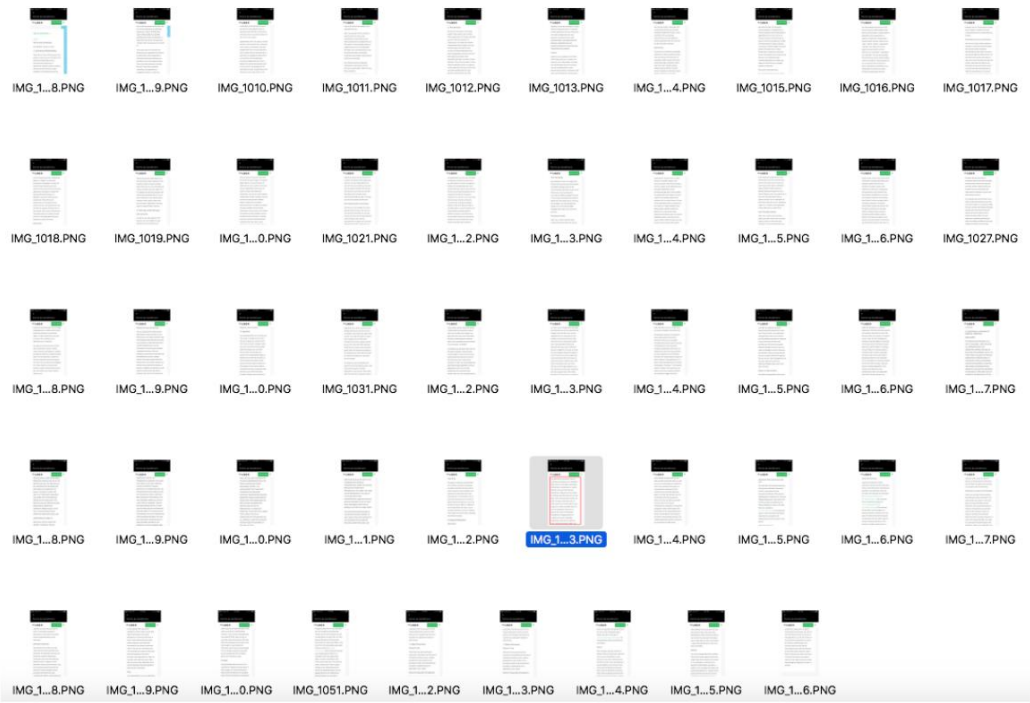
[5] The *Cullinane* court "reproduce[d] the screenshots found in the record as they would appear in a smartphone's display that is approximately 3.5 inches, measured diagonally." 893 F.3d at 56 n.3. Accordingly, the screen is here displayed in the same dimensions.

[6] In the image above, it is barely visible because no credit card information has been entered. *Id.*

twice, as in the case of the driver agreement—is a prospective rider asked to read the agreement, or to manifest an assent to its claim-suppressing terms by clicking a button reading "Yes, I Agree." Uber nonetheless boldly asks this Court to hold, as a matter of law, that the credit card screen provides sufficiently conspicuous notice and unambiguous assent to the arbitration clause.

What arbitration clause? Those riders who, on a small smartphone screen, could perceive the thin, faint, dark-grey line surrounding the phrase "The Terms of Service and Privacy Policy," and understand that it denoted a clickable link, would be brought to the first page of the agreement. A prospective rider would then have to scour dozens of paragraphs—more than *4,400 words*, totaling more than *three dozen pages of text* on a smartphone screen—before encountering a provision describing a "Dispute Resolution" process (emphasized, for illustrative purposes only, with a red box, below):



Appellants' Br. 11-12, *Cullinane*, 893 F.3d 53 (1st Cir., filed Feb. 9, 2017). In that provision, Uber asserts that prospective riders "agree[d] that any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof or the use of the Service or Application (collectively, **'Disputes'**) will be settled by binding arbitration," except for certain small claims or copyright and intellectual-property claims. *Cullinane*, 893 F.3d at 59. It continues, "**You acknowledge and agree that you and Company are each waiving the right to a trial by jury or to participate as a plaintiff or class User in any purported class action or representative proceeding**." *Id.*

Unlike the driver agreement set forth above, the rider agreement has no up-front disclaimer that the agreement contains provisions stripping a user of the right to go to court. Despite the fact that Uber acknowledges in the prospective *driver's* agreement that the decision of whether to waive jury trial rights is an "important business decision," which should be made after careful contemplation and consulting a lawyer, Uber provides no such admonishment to prospective *riders*.[7]

B. Because the app does not reasonably communicate the arbitration clause to prospective riders, Uber cannot carry its burden to show that consumers give unambiguous assent to forfeit their Seventh Amendment rights.

Uber not only denies users of "reasonable notice" of the contract terms—including the claim-suppressing arbitration clause—it also robs them of the opportunity to manifest their assent to those terms, *Ajemian*, 83 Mass. App. Ct. at 574-575. Thus, Uber cannot meet its burden to show that the agreement at issue here meets the second prong of the *Ajemian* test.

Securing clear and unambiguous assent "is not hard to accomplish." *Sgouros*, 817 F.3d at 1035. A user may "signify his or her assent by 'clicking'

[7] Finally, unlike the driver agreement, the rider arbitration clause does not provide riders with the opportunity to opt-out of the arbitration clause.

'I accept'" next to the terms of the contract, displayed, at least in part, on the user's computer screen," because it requires an affirmative acknowledgement of intent to be bound. *Ajemian*, 83 Mass. App. Ct. at 576.

In its online *driver* agreement, Uber requires drivers to "confirm that they reviewed and accepted the [] agreement by clicking 'YES, I AGREE'" in order to "advance past the screen with the hyperlink to the agreement." *Singh*, 235 F. Supp. 3d at 661. See *Richemond* v. *Uber Techs., Inc.*, 263 F. Supp. 3d 1312, 1316-1317 (S.D. Fla. 2017) (requiring prospective drivers to "agree to the terms of the agreement twice on [a] mobile device" provides sufficient opportunity for prospective drivers to manifest assent). Uber affords prospective drivers the opportunity to unambiguously manifest assent to the terms of the contract.

In the online *consumer* agreement, however, Uber deploys a misleading registration process against users, and simply asks prospective riders to tap a button labeled "DONE" to indicate that they have finished entering their credit card information. A prospective rider, therefore, can complete the registration process "without explicitly indicating [his or her] assent to the terms and conditions that included the arbitration provision."

Meyer v. *Kalanick*, 200 F. Supp. 3d 408, 420 (S.D.N.Y. 2016), *rev'd on unrelated grounds* in *Meyer* v. *Uber Techs., Inc.*, 868 F.3d 66 (2d Cir. 2017).[8]

With this scheme, Uber has chosen to forsake the clearest "method of ensuring that terms are agreed to"—expressly clicking "I agree" after being shown the essential terms of the contract. *Nicosia* v. *Amazon.com, Inc.*, 834 F.3d 220, 238 (2d Cir. 2016). Instead, Uber has opted for a process that (at best) obtains assent through "largely passive" measures. *Schnabel* v. *Trilegiant Corp.*, 697 F.3d 110, 120 (2d Cir. 2012). Given this choice, Uber cannot meet its burden of showing that consumers unambiguously agreed to forfeit their Seventh Amendment rights, absent a showing that "circumstances" surrounding the interface design support an assumption that "a reasonable person in the [prospective rider's] shoes would have realized that he was assenting to" an arbitration clause. *Sgouros*, 817 F.3d at 1035.

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[8] In *Meyer*, the Second Circuit applied substantially the same legal test at issue here. *Meyer*, 868 F.3d at 75. However, it found that the user interface at issue in that case provided sufficiently conspicuous notice of the existence of the agreement. *Id.* at 78. The Second Circuit based its reasoning on a number of attributes of that interface that materially differ from the interface in *Cullinane* and here: the disclaimer appeared "directly below the buttons for registration"; the disclaimers' "dark print contrast[ed] with the bright white background"; and the terms of service appeared as blue and underlined hyperlinks. *Id.*

When a company such as Uber looks to show informed assent, the "[c]larity" of the words used matters. *Nicosia*, 834 F.3d at 236. Clicking on a button that reads "Done" (or, in *Nicosia*, "Place your order") does not "specifically manifest" that the consumer is agreeing to any terms whatsoever, because the consumer "is not specifically asked whether she agrees or to say 'I agree.'" *Id*. See *Specht*, 306 F.3d at 29-30 ("[A] consumer's clicking on a . . . button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the . . . button would signify assent to those terms."). That is why courts consistently "decline[] to hold that an electronic agreement was formed" absent affirmative assent to specific contract terms. *Meyer*, 200 F. Supp. 3d at 419 (collecting cases). Uber did not inform consumers that clicking "DONE" would bind them to the terms of a contract; thus, a court "cannot presume that a person who clicks on a box that appears on a computer screen has notice of all contents not only of that page but of other content that requires further action (scrolling, following a link, etc.)." *Sgouros*, 817 F.3d at 1035.

More is required: if Uber wanted to carry its burden of showing that being "DONE" entering credit card information is the legal equivalent of

expressly assenting to be bound by an arbitration clause, it would have to demonstrate that the "fact-intensive" "circumstances" surrounding the design of its page "support the assumption" that a "reasonable person in [the prospective rider's] shoes would have realized he was assenting to" contractual terms. *Id.* at 1034-1035. This is not mere "hairsplitting," as Uber derisively characterizes the *Cullinane* court's fact-intensive application of *Ajemian*'s teaching. Uber Br. at 40. Rather, this is a necessary element of the analysis of online contracts—and it is Uber's burden to show it has done enough to ensure assent. See *Ajemian*, 83 Mass. App. Ct. at 574-575.

This is not a radical idea; other courts agree with this analysis. For example, the Second Circuit has held it necessary, though not sufficient, to show that a button, whether reading "DONE," "Finish," or "Place your order," is in close "proximity" to the contract terms, or a hyperlink to them. *Nicosia*, 834 F.3d at 236. A hyperlink to an agreement "immediately below" a button stating "Sign Up" might be enough if the user was "informed of the consequences of his assenting click" and "was shown . . . where to click to understand those consequences." *Fteja* v. *Facebook, Inc.*, 841 F. Supp. 2d 829, 835, 840 (S.D.N.Y. 2012). See *Swift* v. *Zynga Game Network*, 805 F. Supp. 2d 904, 911 (N.D. Cal. 2011) (finding passive assent where hyperlink was

"directly above" the button). But a company *cannot* show passive assent to the terms of a contract where hyperlinked terms and conditions are "not directly adjacent" to the button. *Nicosia*, 834 F.3d at 236-237.

Here, Uber's prospective rider interface does not provide a hyperlink to the Terms of Service & Privacy Policy directly adjacent to the "DONE" button: the terms and conditions appear at the bottom of the screen; and the "DONE" button is in the upper right corner—as far away from the hyperlink as possible on the interface. This, as the Second Circuit held in *Nicosia*, fails to "indicate that a user should construe clicking as acceptance." *Nicosia*, 834 F.3d at 236-237. Thus, Uber's interface is indistinguishable from other failed attempts to trick consumers into agreeing to terms through unclear means. Clicking a button that reads "download" is not sufficient to manifest unambiguous assent. *Specht*, 306 F.3d at 32. Nor is a button that reads "Place your order." *Nicosia*, 834 F.3d at 236. Nor is a button reading "Proceed with checkout." *Nguyen* v. *Barnes & Noble, Inc.*, 736 F.3d 1171, 1178 & n.1 (9th Cir. 2014). Nor are buttons reading "SIGN IN" or "NEXT." *Berkson* v. *Gogo LLC*, 97 F. Supp. 3d 359, 404 (E.D.N.Y. 2015). Nor is a button reading "DONE." In short, "where a website specifically states that clicking means one thing"—such as, for

example, that a user is "DONE" entering credit card information—"that click does not bind the users to something else." *Sgouros*, 817 F.3d at 1035.

Uber's competitor has outperformed Uber—at least in terms of respecting the legal rights of Massachusetts consumers. To sign up for Lyft, "both prospective passenger and prospective drivers" must unambiguously agree to Lyft's terms of service. After a prospective Lyft user creates an account by entering basic personal information, the *full text* of the terms of service "appears on the user's screen," and the user "can scroll through the entire agreement. . . ." *Bekele* v. *Lyft, Inc.*, 199 F. Supp. 3d 284, 289 (D. Mass. 2016). At the bottom of the terms of service, Lyft asks prospective users to "Please agree to the Terms of Service to continue." *Id.* "All users must click the 'I accept' button to accept the TOS and begin using the App," and thus "cannot complete the registration process or use the App without accepting the TOS." *Id.*

C. Allowing Uber to trick users into giving up their right to go to court burdens the judicial system and disserves important policy goals of Massachusetts' consumer protection regime.

There are clear, and superior, alternatives to secure the informed consent of riders. Companies doing business online—even Uber—know how to design a system that provides reasonable notice of contractual

terms, and obtain meaningful assent to those terms. It is simple: online consumers should be "encouraged by the design and content of the website and the agreement's webpage to examine the terms clearly available through hyperlinkage." *Berkson*, 97 F. Supp. 3d at 401. So "there is no policy rationale supporting" Uber's approach. *Schnabel*, 697 F.3d at 128.

1. Uber's contract-by-trickery bid would unduly burden Massachusetts courts.

To accept Uber's argument that clicking "DONE" after entering credit card information is sufficient to bind an unsuspecting user to an arbitration agreement, this Court would have to endorse a race to the bottom—a free-for-all in which companies seek to make contract terms as obscure as possible, and yet binding so long as a user clicks any button at all. More fundamentally, this would lower the bar for securing informed assent to the "most precious and fundamental right" citizens have—"the right to a jury trial." *Meyer*, 200 F. Supp. 3d at 410.

Online companies that fail to meet the minimum requirement of clear assent to contractual terms impose a tremendous burden on the courts: when assent is not clear and express, courts must wade into the morass of font color, page layout, and proximity of the hyperlink to the button in

order to divine whether a contract has been formed. *Nicosia*, 834 F.3d at 236. This not only consumes judicial resources, it also presents the real risk of inconsistent judgments and, thus, subjects consumers to an unequal guarantee of their Seventh Amendment rights. See *id.* at 237 (noting "reasonable minds could disagree" as to whether interface at issue provided "reasonably conspicuous notice").

2. Allowing Uber to enforce a contract, simply because a prospective rider was "DONE" entering credit card information, will suppress claims.

Make no mistake: binding unsuspecting consumers to arbitration agreements by trickery affects not only the *forum* in which Massachusetts consumers could seek redress from Uber's various wrongdoings, whether charging fraudulent or fictitious fees, *Cullinane*, 893 F.3d at 55-56; violating the Americans with Disabilities Act, *Theodore*, slip op. at *6 (finding Uber's terms and conditions not sufficiently conspicuous to be binding); or otherwise discriminating against disabled customers, as is the case here. Binding such customers to an arbitration clause of which they are unaware can put a thumb on the scales of justice *against* consumers, make pursuing a claim economically impossible, and even suppress the claim entirely.

First, large companies that force consumers to use arbitration to resolve their claims are rewarded by the fact that very few consumers bring such arbitrations. The use of forced arbitration agreements has become almost ubiquitous. Conservative estimates are that more than 800 *million* arbitration provisions permeate our everyday lives. Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies,* 52 U.C. Davis L. Rev. Online 233, 234 (2019). Yet there are an average of just 6,000 consumer-versus-corporation arbitrations per year. American Association for Justice, The Truth About Forced Arbitration at 12 (Sept. 2019), https://facesofforcedarbitration.com/wp-content/uploads/2019/09/Forced-Arbitration-Report-2019.pdf. For example, Amazon, with 101 million Prime subscribers, faced only fifteen arbitrations brought by consumers over five years; General Motors sold approximately 40 million vehicles over five years and faced only five arbitrations during that time; and Walmart, which serves 275 million customers per week, faced just two consumer arbitrations. *Id*. at 12. It is not that consumers have few legal claims to pursue. The National Center for State Courts reports that well over 2 million small claims cases were filed every year from 2012 to 2017 in the 37 states for which it had data. National

Center for State Courts, State Court Caseload Digest: 2017 Data 4 (2019), http://www.courtstatistics.org/~/media/Microsites/Files/CSP/Overview/CSP%2020 17%20Data%20-%20Spreads%20for%20viewing.ashx. The disparity is stark, and proves that, "[o]nce blocked from going to court as a group, most people dropped their claims entirely." Jessica Silver Greenberg & Robert Gebeloff, Arbitration Everywhere, Stacking the Deck of Justice, N.Y. Times (Oct. 31, 2015) (finding that consumers bring few claims under forced arbitration provisions).

Second, it is no mystery why consumers decline the opportunity to arbitrate their claims: they almost never win. A 2019 study by AAJ scrutinized the available data for arbitration before the American Arbitration Association (AAA) and JAMS, two major arbitration providers. See generally The Truth About Forced Arbitration, *supra*. The data showed that, over a five-year period, consumers prevailed in less than 10% of forced arbitrations—just 6.3%. *Id.* at 15. That amounts to just 382 consumers per year on average: "More people are struck by lightening each year in the United States." *Id.*, citing National Lightning Safety Institute, Lightning Strike Probabilities, http://lightningsafety.com/nlsi_pls/probability.html. By contrast, "[p]laintiffs won in more than half (56%) of all general civil

trials." Bureau of Justice Statistics Special Report, Civil Bench and Jury Trials in State Courts, 2005, U.S. Dep't of Justice 4 (Oct. 2008), https://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf.

Third, even those consumers who doggedly pursue an arbitration are severely disadvantaged: in arbitration disputes initiated by *companies*, the companies recovered ninety-one cents for every dollar of damages claimed; in disputes initiated by *consumers*, however, consumers recovered just thirteen cents on the dollar. Consumer Financial Protection Bureau, Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a) at 19 (2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

Finally, compounding consumers' dismal chances of success is the risk of ruinous fees foisted upon non-prevailing consumers. Although the Supreme Court has construed the Federal Arbitration Act broadly because of arbitration's purported cost efficiency, see, *e.g.*, *AT&T Mobility LLC* v. *Concepcion,* 563 U.S. 333, 345 (2011), there is no evidence that arbitration is cost-efficient when it comes to pre-dispute take-it-or-leave-it consumer contracts. Arbitration moves a consumer's claims from the public justice

system where judges, supporting personnel, and physical infrastructure are funded by taxpayers for public use. The parties are instead required to purchase the services of a for-profit arbitration administrator, such as AAA or JAMS, the services of an arbitrator, as well as the costs of hearing rooms and other needed services.

While our justice system is premised on the default rule that each party bears its own legal costs, that rule does not translate into arbitrations. For example, although some corporations agree to pay arbitration's costs, Public Justice's executive director Paul Bland has highlighted that many corporations go back on their promises to pay arbitration's costs. Paul Bland, Bait and Switch: Many Corporations Promise to Pay Arbitration Fees, But Don't (Mar. 25, 2014), https://www.publicjustice.net/bait-and-switch-many-corporations-promise-to-pay-arbitration-fees-but-dont/. That is how one consumer who initiated an arbitration against Fairfield Imports Three LLC for $60,000 not only lost the arbitration, but was charged $600,000 for Fairfield's attorney's fees. *The Truth About Forced Arbitration* at 17. Or how an employee took an employer to arbitration, claiming $13 million in damages, but left *owing his employer* $13 million instead. *Id.* at 18.

And sometimes, even when consumers "win" according to AAA or JAMS, they lose—like the homeowner who took Advantage Contractor Solutions to arbitration claiming $300,000, won just one-tenth of that ($30,228) a year and a half later, and saw even those meager winnings wiped out when ordered to pay an arbitration fee of $52,000. *Id.* at 17-18. Over all, consumers claimed an average of $170,000 per case, won an average of only $1,400, and were forced to pay an average of $27,000 in arbitration fees and payments to the defendant and its attorneys. *Id.* at 17.

Businesses prefer arbitration, quite simply, because the consumer's chances of winning a meritorious claim are exceedingly low and failure to win may entail a crippling financial penalty. Arbitration agreements that are not designed to provide "a just and efficient means of dispute resolution" but rather "to avoid state and federal law and to game the entire system," are not worthy of enforcement. *Hayes* v. *Delbert Servs. Corp.*, 811 F.3d 666, 676 (4th Cir. 2016). Thus, an arbitration agreement effectively shields a business from having to face any consumer claims at all. "Binding, predispute arbitration imposed on the weaker party in an adhesion contract . . . should be recognized for what it truly is: claim-suppressing arbitration." David S. Schwartz, *Claim-Suppressing Arbitration:*

The New Rules, 87 Ind. L.J. 239 (2012). By suppressing consumers' right to recover money wrongfully taken from their pockets, and leaving that money in the hands of the corporations who did not earn it, arbitration should be called what it really is: "a wealth transfer" away from consumers and into the coffers of large corporations. Deepak Gupta & Lina Khan, *Arbitration as Wealth Transfer*, 35 Yale Law & Pol'y Rev. 495, 498 (2017).

3. Altering contract law to accommodate Uber's approach would undermine Massachusetts' consumer protection law's goals.

Adopting a regime under which Uber can trick consumers into forfeiting their right to go to court—a move that would mean most consumer protection claims are never redressed—not only disadvantages consumers, it undermines the very purpose of Massachusetts' consumer laws. Those laws are meant not only to return money to wronged consumers, but to divest the wrongdoers of ill-gotten gains and deter future wrongdoing. Cf. *Kraft Power Corp.* v. *Merrill*, 464 Mass. 145, 157–158 (2013) (noting multiple damages under G.L. c. 93A "serve the twin goals of punishment and deterrence"). A system that shunts those claims to arbitration—where most claims would never be pursued—would eviscerate a key punitive and deterrent tool in Massachusetts' arsenal to

protect its citizenry from corporate greed, and worse, by closing the courthouse doors to consumers, it would "erod[e] the cornerstone of democracy." *Kilgore* v. *Mullenax*, 520 S.W.3d 670, 676 (Ark. 2017).

Respectfully submitted,

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ADDENDUM

ADDENDUM
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M.G.L.A. 106 § 1-201

§ 1-201. General Definitions

Effective: July 1, 2013
Currentness

(a) Unless the context otherwise requires, words or phrases defined in this section, or in the additional definitions contained in other articles of this chapter that apply to particular articles or parts thereof, have the meanings stated.

(b) Subject to definitions contained in other articles of this chapter that apply to particular articles or parts thereof, the following words shall have the following meanings:

(1) "Action", in the sense of a judicial proceeding, includes recoupment, counterclaim, set-off, suit in equity and any other proceeding in which rights are determined.

(2) "Aggrieved party", a party entitled to pursue a remedy.

(3) "Agreement", as distinguished from "contract", means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing or usage of trade, as provided in section 1-303.

(4) "Bank", a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union and trust company.

(5) "Bearer", a person in control of a negotiable electronic document of title or a person in possession of a negotiable instrument, a negotiable tangible document of title or certificated security that is payable to bearer or indorsed in blank.

(6) "Bill of lading", a document of title evidencing the receipt of goods for shipment issued by a person engaged in the business of directly or indirectly transporting or forwarding goods. The term does not include a warehouse receipt.

(7) "Branch", includes a separately incorporated foreign branch of a bank.

(8) "Burden of establishing", the burden of persuading the trier of fact that the existence of the fact is more probable than its nonexistence.

(9) “Buyer in ordinary course of business”, a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices. A person that sells oil, gas or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in ordinary course of business may buy for cash, by exchange of other property or on secured or unsecured credit, and may acquire goods or documents of title under a preexisting contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under article 2 may be a buyer in ordinary course of business. Buyer in ordinary course of business does not include a person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(10) “Conspicuous”, with reference to a term, means so written, displayed or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is “conspicuous” or not is a decision for the court. Conspicuous terms include the following:

(A) a heading in capitals equal to or greater in size than the surrounding text or in contrasting type, font or color to the surrounding text of the same or lesser size; and

(B) language in the body of a record or display in larger type than the surrounding text or in contrasting type, font or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

(11) “Consumer”, an individual who enters into a transaction primarily for personal, family, or household purposes.

(12) “Contract”, as distinguished from “agreement”, means the total legal obligation that results from the parties' agreement as determined by this chapter as supplemented by any other applicable laws.

(13) “Creditor”, includes a general creditor, a secured creditor, a lien creditor and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity and an executor or administrator of an insolvent debtor's or assignor's estate.

(14) “Defendant”, includes a person in the position of defendant in a counterclaim, cross-claim or third-party claim.

(15) “Delivery”, with respect to an electronic document of title means voluntary transfer of control and with respect to an instrument, a tangible document of title or chattel paper means voluntary transfer of possession.

(16) “Document of title”, a record that: (i) in the regular course of business or financing is treated as adequately evidencing that the person in possession or control of the record is entitled to receive, control, hold and dispose of the record and the goods the record covers; and (ii) purports to be issued by or addressed to a bailee and to cover goods in the bailee's possession, which are either identified or are fungible portions of an identified mass. The term includes a bill of lading, transport document, dock warrant, dock receipt, warehouse receipt and order for delivery of goods. An electronic document of title means a document

of title evidenced by a record consisting of information stored in an electronic medium. A tangible document of title means a document of title evidenced by a record consisting of information that is inscribed on a tangible medium.

(17) “Fault”, a default, breach or wrongful act or omission.

(18) “Fungible goods”,

(A) goods of which any unit, by nature or usage of trade, is the equivalent of any other like unit; or

(B) goods that by agreement are treated as equivalent.

(19) “Genuine”, free of forgery or counterfeiting.

(20) “Good faith”, except as otherwise provided in article 5, honesty in fact and the observance of reasonable commercial standards of fair dealing.

(21) “Holder”,

(A) the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession;

(B) the person in possession of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in possession; or

(C) the person in control of a negotiable electronic document of title.

(22) “Insolvency proceeding”, includes an assignment for the benefit of creditors or other proceeding intended to liquidate or rehabilitate the estate of the person involved.

(23) “Insolvent”,

(A) having generally ceased to pay debts in the ordinary course of business other than as a result of bona fide dispute;

(B) being unable to pay debts as they become due; or

(C) being insolvent within the meaning of federal bankruptcy law.

(24) “Money”, a medium of exchange currently authorized or adopted by a domestic or foreign government. The term includes a monetary unit of account established by an intergovernmental organization or by agreement between 2 or more countries.

(25) “Organization”, a person other than an individual.

(26) “Party”, as distinguished from “third party”, a person that has engaged in a transaction or made an agreement subject to this chapter.

(27) “Person”, an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency or instrumentality, public corporation or any other legal or commercial entity.

(28) “Present value”, the amount as of a date certain of 1 or more sums payable in the future, discounted to the date certain by use of either an interest rate specified by the parties if that rate is not manifestly unreasonable at the time the transaction is entered into or, if an interest rate is not so specified, a commercially reasonable rate that takes into account the facts and circumstances at the time the transaction is entered into.

(29) “Purchase”, taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift or any other voluntary transaction creating an interest in property.

(30) “Purchaser”, a person that takes by purchase.

(31) “Record”, information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(32) “Remedy”, any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

(33) “Representative”, a person empowered to act for another, including an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate.

(34) “Right”, includes remedy.

(35) “Security interest”, an interest in personal property or fixtures which secures payment or performance of an obligation. Security interest includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible or a promissory note in a transaction that is subject to article 9. Security interest does not include the special property interest of a buyer of goods on identification of those goods to a contract for sale under section 2-401, but a buyer may also acquire a security interest by complying with article 9. Except as otherwise provided in section 2-505, the right of a seller or lessor of goods under article 2 or 2A to retain or acquire possession of the goods is not a security interest, but a seller or lessor may also acquire a security interest by complying with article 9. The retention or reservation of title by a seller of goods, notwithstanding shipment or delivery to the buyer under section 2-401, is limited in effect to a reservation of a security interest. Whether a transaction in the form of a lease creates a security interest is determined pursuant to section 1-203.

(36) “Send”, in connection with a writing, record or notice means:

(A) to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and, in the case of an instrument, to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances; or

(B) in any other way to cause to be received any writing, record or notice within the time it would have arrived if properly sent.

(37) “Signed”, includes using any symbol executed or adopted with present intention to adopt or accept a writing.

(38) “State”, state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States.

(39) “Surety”, includes a guarantor or other secondary obligor.

(40) “Term”, a portion of an agreement that relates to a particular matter.

(41) “Unauthorized signature”, a signature made without actual, implied or apparent authority. The term includes a forgery.

(42) “Warehouse receipt”, a document of title issued by a person engaged in the business of storing goods for hire.

(43) “Writing”, includes printing, typewriting or any other intentional reduction to tangible form. “Written” has a corresponding meaning.

Credits
Added by St.2013, c. 30, § 2, eff. July 1, 2013.

Editors' Notes

UNIFORM COMMERCIAL CODE COMMENT

Source: Former Section 1-201.

Notes of Decisions (53)

M.G.L.A. 106 § 1-201, MA ST 106 § 1-201
Current through Chapter 44 of the 2020 2nd Annual Session

End of Document

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXII. Corporations (Ch. 155-182)
Chapter 156D. Business Corporations (Refs & Annos)
Part 1
Subdivision D. Definitions

M.G.L.A. 156D § 1.40

§ 1.40. Chapter definitions

Effective: January 5, 2009
Currentness

Section 1.40. CHAPTER DEFINITIONS

(a) As used in this chapter the following words shall have the following meanings, unless the context requires otherwise:

“Articles of organization”, the original and any amended and restated articles of organization and articles of merger, and special acts of incorporation, as amended from time to time by various articles and certificates provided for by this chapter.

“Authorized shares”, the shares of all classes a domestic or foreign corporation is authorized to issue.

“Conspicuous”, written so that a reasonable person against whom the writing is to operate should have noticed it.

“Corporation”, “domestic corporation” or “domestic business corporation”, a corporation for profit, which is not a foreign corporation, incorporated under or subject to this chapter.

“Deliver”, any method of delivery used in conventional commercial practice, including mailing, delivery by hand, messenger or delivery service and delivery by electronic transmission; however the secretary of state is not required to accept delivery of electronic documents or transmissions unless he adopts regulations authorizing this practice.

“Distribution”, a direct or indirect transfer of money or other property, except its own shares, or incurrence of indebtedness by a corporation to or for the benefit of its shareholders in respect of any of its shares. A distribution includes a declaration or payment of a dividend; a purchase, redemption, or other acquisition of shares; a distribution of indebtedness; and a distribution in voluntary or involuntary liquidation.

“Domestic other entity”, an other entity organized under the laws of the commonwealth.

“Effective date of notice”, as defined in section 1.41.

“Electronic document” or “electronic transmission”, any process of communication not directly involving the physical transfer of paper that is suitable for the retention, retrieval and reproduction of information by the recipient.

“Employee”, includes an officer but not a director. A director may accept duties that make him also an employee.

“Entity”, a corporation and a foreign corporation; a nonprofit corporation; a profit and a nonprofit unincorporated association; a limited liability company; a business trust; an estate; a partnership; a registered limited liability partnership; a trust, and two or more persons having a joint or common economic interest; and a state, the United States, and a foreign government.

“Filing entity”, an other entity that is of a type created by filing a public organic document.

“Foreign business corporation”, a corporation for profit incorporated under a law other than the law of the commonwealth.

“Foreign corporation”, a corporation for profit or a nonprofit corporation incorporated under a law other than the laws of the commonwealth.

“Foreign nonprofit corporation”, a corporation incorporated under a law other than the laws of the commonwealth, which if incorporated under the laws of the commonwealth would be a nonprofit corporation.

“Foreign other entity”, an other entity organized under a law other than the laws of the commonwealth.

“Governmental subdivision”, an authority, county, district or municipality.

“Individual”, includes the estate of an incompetent or deceased individual.

“Interest holder”, a person who holds of record:

(i) a right to receive distributions from an other entity either in the ordinary course of business or upon liquidation, other than as an assignee; or

(ii) a right to vote on issues involving its internal affairs, other than as an agent, assignee, proxy or person responsible for managing its business and affairs.

“Interests”, the interests in an other entity held by its interest holders.

“Membership”, the rights of a member in a nonprofit corporation.

“Nonfiling entity”, an other entity that is of a type that is not created by filing a filed organizational document.

“Nonprofit corporation” or “domestic nonprofit corporation”, a corporation incorporated under the laws of the commonwealth and subject to chapter 180.

“Notice”, as defined in section 1.41.

“Organic document”, a public organic document or a private organic document.

“Organic law”, the law governing the internal affairs of an entity.

“Other entity”, any association or entity other than a domestic or foreign business corporation, a domestic or foreign nonprofit corporation or a governmental or quasi-governmental organization. The term includes, without limitation, limited partnerships,

general partnerships, limited liability partnerships, limited liability companies, joint ventures, joint stock companies, business trusts and profit and not-for-profit unincorporated associations.

“Owner liability”, personal liability for a debt, obligation or liability of an entity that is imposed on a person:

(i) solely by reason of the person's status as a shareholder or interest holder; or

(ii) by the articles of organization, bylaws or an organic document under a provision of the organic law of an entity authorizing the articles of organization, bylaws or an organic document to make one or more specified shareholders, members or interest holders liable in their capacity as shareholders, members or interest holders for all or specified debts, obligations or liabilities of the entity.

“Person”, includes individual and entity.

“Principal office”, the office, within or without the commonwealth, so designated in the annual report where the principal executive offices of a domestic or foreign corporation are located.

“Private organic document”, any document, other than the public organic document, if any, that determines the internal governance of an other entity.

“Proceeding”, includes civil suit and criminal, administrative, and investigatory action.

“Public corporation”, any corporation to which this chapter applies to, and which has a class of voting stock registered under the Securities Exchange Act of 1934, as amended; provided, that if a corporation is subject to paragraph (b) of section 8.06 at the time it ceases to have any class of voting stock so registered, such corporation shall nonetheless be deemed to be a public corporation for a period of twelve months following the date it ceased to have such stock registered.

“Public organic document”, the document, if any, that is filed of public record to create an other entity, including amendments and restatements thereof.

“Record date”, the date established under PART 6 or PART 7 hereof on which a corporation determines the identity of its shareholders for purposes of this chapter.

“Secretary”, the corporate officer to whom the board of directors has delegated responsibility under subsection (c) of section 8.40 for custody of the minutes of the meetings of the board of directors and of the shareholders and for authenticating records of the corporation, and includes a “clerk” appointed under chapter 156B unless the corporation has also appointed a “secretary” or the context otherwise requires.

“Secretary of state”, the state secretary.

“Shares”, the units into which the proprietary interests in a corporation are divided.

“Shareholder”, the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation.

“Sign” or “signature”, includes any manual, facsimile, conformed or electronic signature.

"State", when referring to a part of the United States, includes a state and commonwealth, and their agencies and governmental subdivisions, and a territory and insular possession, and their agencies and governmental subdivisions, of the United States.

"Subscriber", a person who subscribes for shares in a corporation, whether before or after incorporation.

"United States", includes a district, authority, bureau, commission, department, and any other agency of the United States.

"Voting group", all shares of one or more classes or series that under the articles of organization or this chapter are entitled to vote and to be counted together collectively on a matter at a meeting of shareholders. All shares entitled by the articles of organization or this chapter to vote generally on the matter are for that purpose a single voting group.

(b) In this chapter, use of the masculine gender includes the feminine gender or, where the context permits, an entity.

Credits
Added by St.2003, c. 127, § 17, eff. July 1, 2004. Amended by St.2008, c. 451, §§ 93 to 96, eff. Jan. 5, 2009.

Editors' Notes

COMMENT

Section 1.40 collects in a single section definitions of terms used throughout the Act. In a few instances, however, subdivisions and sections of the Act contain specialized definitions applicable only to those subdivisions or sections.

Most of the definitions of § 1.40 are reasonably self-explanatory and follow the RMBCA. A few definitions, however, differ from the RMBCA or deserve further explanation.

1. Conspicuous

"Conspicuous" is defined in § 1.40(a)(3) basically as defined in 1-201(10) of the Uniform Commercial Code. Examples of conspicuous writing include printing in italics or boldface or contrasting color, typing in capitals or underlining.

2. Corporation, Domestic Corporation, Domestic Business Corporation, Foreign Corporation and Foreign Business Corporation.

"Corporation" "domestic corporation," "domestic business corporation," "foreign corporation" and "foreign business corporation" are defined in §§ 1.40(4) and (14). The word "corporation," when used alone, refers only to domestic corporations. In a few instances, the phrase "domestic corporation" has been used in order to contrast it with a foreign corporation. The phrase "domestic business corporation" has been used on occasion to contrast it with a domestic nonprofit corporation.

3. Deliver

"Deliver" is defined more broadly than in the RMBCA, which confines the definition to "mail." The expanded definition includes delivery by messenger or delivery service, or by electronic transmission. Other provisions of the Act (*e.g.*, § 1.41) may require acknowledgment of receipt of deliveries by messenger or electronic transmission. The secretary of state may adopt regulations authorizing the filing of electronic documents or transmissions, but is not required to accept such deliveries in the absence of regulations. See Comment 5 to § 1.20.

4. Distribution

Section 6.40 sets forth a single, unitary test for the validity of any "distribution." Section 1.40(a)(6) in turn defines "distribution" to include all transfers of money or other property made by a corporation to any shareholder in respect of the corporation's shares, except mere changes in the unit of interest such as share dividends and share splits.

If a corporation incurs indebtedness in connection with a distribution (as in the case of a distribution of a debt instrument or an installment purchase of shares), the creation, incurrence or distribution of the indebtedness is the event which constitutes the distribution rather than the subsequent payment of the debt by the corporation.

The term "indirect" in the definition of "distribution" is intended to include transactions like the repurchase of parent company shares by a subsidiary whose actions are controlled by the parent. It also is intended to include any other transaction in which the substance is clearly the same as a typical dividend or share repurchase, no matter how structured or labeled.

Section 6.41 addresses the liability of directors for wrongful distributions, and §§ 14.06 and 14.07 authorize certain distributions following dissolution.

5. Electronic transmission

"Electronic document" is intended to include all forms of recording a document electronically so that it can be transmitted to others, such as the recording of a document on tapes, disks, or in the memory of a computer. "Electronic transmission" is intended to include all forms of electronic communication which in the normal course produce paper, such as telegrams, telegraphs, facsimile transmissions (fax), as well as electronic communications between computers, and any other systems which transmit and retain data subject to retrieval and capable of reproduction in paper form. These terms would include all of the evolving forms of electronic recording or communication, but are not intended to include voice mail or similar systems which do not automatically provide for the retrieval of data in printed or typewritten form.

6. Entity

The term "entity," defined in § 1.40(11), is included to cover all types of artificial persons. The term "entity" is broader than the term "other entity" which is defined in § 1.40(30). See also the definitions of "governmental subdivision" in § 1.40(18), "state," in § 1.40(42), and "United States," in § 1.40(44).

7. Membership

"Membership" is defined in § 1.40(24) for purposes of this Act to refer only to the rights of a member in a nonprofit corporation. Although the owners of a limited liability company are generally referred to as "members," for purposes of this Act they are referred to as "interest holders" and what they own in the limited liability company is referred to in this Act as an "interest."

8. Organizational Documents, Filed Organizational Documents and Private Organizational Documents

The term "organizational document" in § 1.40(29) includes both filed organizational documents and private organizational documents. The term "filed organizational document" includes such documents as the certificate of limited partnership of a limited partnership, the articles of organization or certificate of organization of a limited liability company and comparable documents, however denominated, that are publicly filed to create an other entity. The term "private organizational document" includes such documents as a partnership agreement of a general or limited partnership, an operating agreement of a limited liability company and comparable documents, however denominated, of an other entity. The declaration of trust of a business trust would, in Massachusetts, also be a "private organizational document" since, although it is required to be filed, the filing is not necessary to create the trust, which exists as a matter of common law. See §§ 1 and 2 of MGL chapter 182.

9. Person

With respect to a "person" who is an individual, this Act assumes that the person is competent to act in the matter under general state law independent of the corporation statute.

10. Owner Liability

The term "owner liability" is used in the context of provisions in Parts 9 and 11 that preserve the personal liability of shareholders and interest holders when the entity in which they own shares or interests is the subject of a transaction under those Parts. The term includes only liabilities that are imposed pursuant to statute on shareholders or interest holders. Liabilities that a shareholder or interest holder incurs by contract are not included. Thus, for example, the liability of a shareholder under § 6.41 for an improper distribution would be an "owner liability." If, on the other hand, a shareholder were to guarantee payment of an obligation of a corporation, that liability would not be an "owner liability." The reason for excluding contractual liabilities from the definition of "owner liability" is because those liabilities are constitutionally protected from impairment and thus do not need to be separately protected in Parts 9 and 11.

11. Secretary

Section 8.40 requires a corporation to have a corporate "secretary". There is no requirement that the secretary reside in Massachusetts, in contrast to the requirement of § 48 of the BCL that the clerk be a Massachusetts resident unless the corporation has a resident agent. Section 5.01 of the Act requires a corporation to have a registered agent in Massachusetts, which was an optional provision under BCL § 49. A corporation may, but is not required to, appoint its "secretary" or another officer who resides in Massachusetts as its registered agent.

For existing corporations that become subject to this Act, the officer with the title of "clerk" shall become the officer initially responsible to act as the "secretary" for purposes of this Act, unless the corporation already has a secretary, or the context otherwise requires. The intention is to phase out the office of "clerk" because it is unique to Massachusetts practice and confusing to parties and governmental officials in other jurisdictions.

12. Shareholder

The definition of "shareholder" in § 1.40(a)(40) includes a beneficial owner of shares named in a nominee certificate under § 7.23, but only to the extent of the rights granted the beneficial owner in the certificate (*e.g.*, the right to receive notice of, and vote at, shareholders' meetings). Various substantive sections of the Act also permit holders of voting trust certificates or beneficial owners of shares (not subject to a nominee certificate under § 7.23) to exercise some of the rights of a "shareholder." See, for example, subdivision 7D (derivative proceedings).

13. Signature

The definition of signature includes all forms of manual, facsimile, conformed or electronic signatures intended to evidence authorization or execution of a document. Electronic signatures would include any methodology which the secretary of state approves in connection with his adoption of regulations to permit electronic filings.

14. Voting group

Section 1.40(a)(45) defines as a "voting group" all shares of one or more classes or series that under the articles of organization or this Act are entitled to vote and be counted together collectively on a matter. Shares entitled to vote "generally" on a matter under the articles of organization or this Act are for that purpose a single voting group. The word "generally" signifies all shares

entitled to vote on the matter by the articles of organization or the Act that do not have the right to be counted or tabulated separately.

Because the RMBCA and the Act put little weight on distinctions between classes and series, voting groups become the basic units of collective voting at a shareholders' meeting. Depending on the circumstances, two classes or series of shares may vote together collectively on a matter as a single voting group, they may be entitled to vote on the matter separately as two voting groups, or one or both of them may not be entitled to vote on the matter at all. Voting by voting groups may provide essential protection to one or more classes or series of shares against actions that are detrimental to the rights or interests of that class or series. The determination of which shares constitute part of a voting group and which shares constitute separate voting groups must be based on the provisions of the Act and, where authorized by the Act, the articles of organization.

Members of the board of directors are usually elected by the single voting group of shares entitled to vote generally; in some circumstances, however, certain members of the board may be selected by one voting group and other members by one or more different voting groups. See § 8.03.

The concept of a voting group permits the establishment by statute of differing quorum and voting requirements for different matters to be considered at shareholders' meetings in corporations with multiple classes or series of shares. See §§ 7.25 and 7.26.

M.G.L.A. 156D § 1.40, MA ST 156D § 1.40
Current through Chapter 44 of the 2020 2nd Annual Session

End of Document

2017 WL 1133936
Only the Westlaw citation is currently available.
United States District Court,
N.D. Ohio, Eastern Division.

Duane CAREY, Plaintiff,
v.
UBER TECHNOLOGIES, INC., Defendant.

CASE NO. 1:16–cv–1058
|
Signed 03/27/2017

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MEMORANDUM OPINION AND ORDER

HONORABLE SARA LIOI, UNITED STATES DISTRICT JUDGE

***1** This matter is before the Court on the motion of defendant Uber Technologies, Inc. ("defendant" or "Uber") to dismiss the complaint of plaintiff Duane Carey ("plaintiff" or "Carey"), compel arbitration, and strike plaintiff's class allegations. (Doc. No. 5 ["Mot."].) Plaintiff opposed the motion (Doc. No. 9 ["Opp'n"]), and defendant replied (Doc. No. 10 ["Reply"]). After the briefing was complete, defendant filed five (5) notices of supplemental authority in support of the motion. (Doc. Nos. 12, 13, 15, 16 and 17.) Plaintiff has not responded to any of defendant's notices.

For the reasons that follow, defendant's motion is granted.

I. BACKGROUND

Beyond general allegations concerning defendant's violation of federal and state wage and hour laws, the complaint is devoid of any specific information about the parties or plaintiff's relationship with Uber. Defendant has provided background information through the declaration of Michael Colman ("Colman"), attached to the motion. (Doc. No. 5–6 ["Colman Dec."].) Plaintiff also attaches Colman's declaration to his opposition, in addition to his own affidavit. (Doc. No. 9–2 ["Carey Aff."].)

Uber is a technology company that connects drivers and riders through the use of the Uber App. (Colman Dec. ¶ 3.) Riders can select from several different Uber products depending upon what type of vehicle they desire for transportation. The uberX product connects riders to vehicles operated by private individuals as well as by transportation companies that desire to be part of the uberX product line. (*Id*. ¶ 4.) Rasier, one of Uber's wholly owned subsidiaries, contracts with independent transportation providers that desire to access the uberX product. (*Id*. ¶¶ 2, 4.)

Any driver who desires to utilize uberX must first enter into the Rasier Software Sublicense & Online Services Agreement. (*Id*. ¶ 7.) To do this, a driver must login to the Uber App with a unique username and password. After logging in, the driver may review the agreement by clicking a hyperlink presented on the screen within the Uber App. (*Id*. ¶ 9.) There is no time limit imposed for reviewing the agreement. When the driver is ready to accept the agreement, he must click "YES, I AGREE" once, and then again, to confirm agreement. (*Id*.) After the second confirmation, the agreement is sent to the driver's "driver portal" which is automatically created for each driver who signs up on the Uber App. (*Id*. ¶¶ 10, 15.) The driver can then access the agreement at any time through his driver portal by viewing it online, or by printing a copy. (*Id*. ¶¶ 10, 15.)

A. Plaintiff's Relationship with Uber

Using the Uber App, Carey signed up to use the uberX product on April 29, 2015, and accepted the November 10, 2014 Raiser Partner Agreement ("Agreement") the same day. (*Id*. ¶ 12 and Exhibit D.) The Agreement is attached as Exhibit C to Colman's declaration. (*Id*.) A screen shot of Carey's driver portal showing a link to the Agreement is attached as Exhibit E to Colman's declaration. (*Id*. ¶ 15.)

***2** On June 5, 2015, Uber terminated Carey as a driver. (Carey Aff. ¶ 13.) According to Uber's records, Carey accepted the Agreement on the Uber App for a second time on August 12, 2015. (Colman Dec. ¶14 and Exhibit D.)

Carey brings this collective action under the Fair Labor Standards Act, as amended, 29 U.S.C. § 216(b) ("FLSA"),

and Ohio's wage and hour laws. (Doc. No. 1 (Complaint ["Compl."]) ¶ 4.) Plaintiff claims that defendant failed to pay him, and similarly situated employees, overtime for hours worked over forty (40) hours in a work week in violation of the FLSA (*Id*. ¶¶ 67–71 (Count I)) and Ohio Rev. Code § 4111.03(A) (*Id*. ¶¶ 72–76 (Count II)). Plaintiff also alleges that defendant failed to pay him and similarly situated employees the minimum wage rate required by the FLSA (*Id*. ¶¶ 77–80 (Count III)) and Ohio Rev. Code § 4111.02 (*Id*. ¶¶ 81–84 (Count IV)).

B. Agreement's Arbitration Provision

The portions of the Agreement relevant to defendant's motion are the terms relating to arbitration. The Agreement contains an arbitration provision, which is prominently announced on the first page, along with notice of the opt-out option.

> **IMPORTANT: PLEASE NOTE THAT TO USE THE UBER SERVICES, YOU MUST AGREE TO THE TERMS AND CONDITIONS SET FORTH BELOW. PLEASE REVIEW THE ARBITRATION PROVISION SET FORTH BELOW CAREFULLY, AS IT WILL REQUIRE YOU TO RESOLVE DISPUTES WITH THE COMPANY ON AN INDIVIDUAL BASIS THROUGH FINAL AND BINDING ARBITRATION UNLESS YOU CHOOSE TO OPT OUT OF THE ARBITRATION PROVISION. BY VIRTUE OF YOUR ELECTRONIC EXECUTION OF THIS AGREEMENT, YOU WILL BE ACKNOWLEDGING THAT YOU HAVE READ AND UNDERSTOOD ALL OF THE TERMS OF THIS AGREEMENT (INCLUDING THE ARBITRATION PROVISION) AND HAVE TAKEN TIME TO CONSIDER THE CONSEQUENCES OF THIS IMPORTANT BUSINESS DECISION. IF YOU DO NOT WISH TO BE SUBJECT TO ARBITRATION, YOU MAY OPT OUT OF THE ARBITRATION PROVISION BY FOLLOWING THE INSTRUCTIONS PROVIDED IN THE ARBITRATION PROVISION BELOW.**

(Doc. No. 5–6 (Exhibit C) at 101 (bolding and capitalization in original.)

Section 15.3 of the Agreement is entitled "Arbitration Provision." Among other terms, the arbitration provision requires individual resolution of claims against Uber, and precludes class and collective actions, unless the driver opts out of the arbitration provision:

> IMPORTANT: This arbitration provision will require you to resolve any claim that you may have against the Company or Uber on an individual basis pursuant to the terms of the Agreement unless you choose to opt out of the arbitration provision. This provision will preclude you from bringing any class, collective, or representative action against the Company or Uber. It also precludes you from participating in or recovering relief under any current or future class, collective, or representative action brought against the Company or Uber by someone else.

(*Id*. at 114.)

***3** The Agreement urges drivers to conduct research, including consulting with an attorney, regarding the consequences of arbitration:

> **WHETHER TO AGREE TO ARBITRATION IS AN IMPORTANT BUSINESS DECISION. IT IS YOUR**

DECISION TO MAKE, AND YOU SHOULD NOT RELY SOLELY UPON THE INFORMATION PROVIDED IN THIS AGREEMENT AS IT IS NOT INTENDED TO CONTAIN A COMPLETE EXPLANATION OF THE CONSEQUENCES OF ABRITRATION. [sic] YOU SHOULD TAKE REASONABLE STEPS TO CONDUCT FURTHER RESEARCH AND TO CONSULT WITH OTHERS—INCLUDING BUT NOT LIMITED TO AN ATTORNEY–REGARDING THE CONSEQUENCES OF YOUR DECISION, JUST AS YOU WOULD WHEN MAKING ANY OTHER IMPORTANT BUSINESS OR LIFE DECISION.

(*Id*. at 115 (bolding and capitalization in original).)

The arbitration provision also contains a conspicuous opt-out provision, which informs drivers that arbitration is not a condition the driver's relationship with Uber, and provides specific instructions for opting out of the arbitration provision:

viii. Your Right To Opt Out Of Arbitration.

Arbitration is not a mandatory condition of your contractual relationship with the Company. If you do not want to be subject to this Arbitration Provision, you may opt out of this Arbitration Provision by notifying the Company in writing of your desire to opt out of this Arbitration Provision, either by (1) sending, within 30 days of the date this Agreement is executed by you, electronic mail to optout@uber.com, stating your name and intent to opt out of the Arbitration Provision or (2) by sending a letter by U.S. Mail, or by any nationally recognized delivery service (*e.g*, UPS, Federal Express, etc.), or by hand delivery to: Legal

Rasier, LLC

1455 Market St., Ste. 400

San Francisco CA 94103

In order to be effective, the letter under option (2) must clearly indicate your intent to opt out of this Arbitration Provision, and must be dated and signed. The envelope containing the signed letter must be received (if delivered by hand) or post-marked within 30 days of the date this Agreement is executed by you. Your writing opting out of this Arbitration Provision, whether sent by (1) or (2), will be filed with a copy of this Agreement and maintained by the Company. Should you not opt out of this Arbitration Provision within the 30–day period, you and the Company shall be bound by the terms of this Arbitration Provision. You have the right to consult with counsel of your choice concerning this Arbitration Provision. You understand that you will not be subject to retaliation if you exercise your right to assert claims or opt-out of coverage under this Arbitration Provision.

(*Id*. at 118–19 (bolding in original).)

II. DISCUSSION

A. Standard of Review

A motion to compel arbitration and dismiss the case is governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.,* which provides that " '[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition' for an order compelling arbitration." *Wallace v. Red Bull Distrib. Co.*, 958 F. Supp. 2d 811, 816 (N.D. Ohio 2013) (quoting 9 U.S.C. § 4). "[T]he FAA preempts state laws and policies regarding arbitration." *Fazio v. Lehman Bros., Inc.*, 340 F.3d 386, 393 (citing *Southland Corp. v. Keating*, 465 U.S. 1, 10–11, 104 S. Ct. 852, 79 L.Ed. 2d 1 (1984)); *see also Great Earth Cos., Inc. v. Simons*, 288 F.3d 878, 889 (6th Cir. 2002) ("[T]he FAA preempts state laws applicable *only* to arbitration provisions.") (quotation marks and citation omitted) (emphasis in original).

Arbitration is a matter of contract, and a party cannot be required to submit to arbitration if he has not agreed to do so. *Nestle Waters N. Am., Inc. v. Bollman*, 505 F.3d 498, 504 (6th Cir. 2007) (citation omitted) "Before compelling arbitration, a court must determine whether a dispute is arbitrable, 'meaning that a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of the agreement.' " *Id*. at 502 (quoting

Javitch v. First Union Securities, Inc., 315 F.3d 619, 624 (6th Cir. 2003) (further citations omitted)).

B. The Agreement Governs Carey's Relationship with Uber

1. Choice of Law

***4** Whether the parties agreed to arbitrate is a matter of contract, which is matter of state law. *Fazio*, 340 F.3d at 393 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L.Ed. 2d 985 (1995)). The applicable state law is determined by using the choice-of-law rules of the forum state. *Wallace*, 958 F. Supp. 2d at 818 (citing *Pokorny v. Quixtar, Inc.,* 601 F.3d 987, 994 (9th Cir. 2010)). "Under Ohio law, 'the governing law specified in a contract is applied unless the chosen state lacks a substantial relationship to the parties or the transaction or unless the application of the law of the chosen state would be contrary to a fundamental policy of a state with a materially greater interest in the transaction.' " *Id*. (quoting *Cincinnati Gas & Elec. Co. v. Westinghouse Elec. Corp.,* 165 F.3d 26 (Table), at *2 (6th Cir. 1998) (citing *Schulke Radio Prods., Ltd. v. Midwestern Broad. Co.,* 453 N.E.2d 683, 686 (Ohio 1983))).

2. Carey Entered the Agreement with Uber

Defendant has offered evidence showing that plaintiff accepted the Agreement on April 29, 2015. Carey confirms that he completed an application to drive for Uber on April 29, 2015, using his mobile phone. (Carey Aff. ¶¶ 2, 3.) Plaintiff does not dispute defendant's evidence that he would have been unable to use the uberX product without entering into a Rasier agreement, or that he clicked on "I AGREE" twice in order to complete the process to access the uberX product. Carey does aver, however, that he was not required view the Agreement before using Uber's products, and was never required to access his driver portal. (*Id*. ¶¶ 8, 12.)

Carey is a resident of Ohio, and there is no evidence in the record that he accepted the Agreement, or worked as a driver for Uber, anywhere but in Ohio. The Agreement provides generally that California law controls. (Doc. No. 5–6 at 113 (¶ 15.1).) A choice-of-law analysis, however, is not necessary because courts in both Ohio and California have found that clicking through relevant screens, as plaintiff did here in order to sign up to use the uberX product, "is an acceptable method to manifest assent to the terms of an agreement[ ]" even where disputed terms are contained in a hyperlink. [1] *See Ranazzi v. Amazon.com, Inc.*, 46 N.E.3d 213, 217 (Ohio Ct. App. 2015) (clicking "I agree" resulted in acceptance of agreement terms, including arbitration provisions) (citations omitted). "This is so even where the user has failed to actually review the terms of use prior to manifesting assent." *Id*. at 217–18 (citing *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 838 (S.D.N.Y. 2012); *Swift v. Zynga Game Network, Inc.,* 805 F. Supp. 2d 904, 910–12 (N.D. Cal. 2011)). [2]

1 Carey incorrectly characterizes the Agreement as a "browsewrap" agreement, rather than a "clickwrap" agreement. *See Traton News, LLC v. Traton Corp.*, 528 Fed.Appx. 525, 526 n.1 (6th Cir. 2013).

2 The other elements of contract formation are not in dispute. *Spectrum Benefit Options, Inc. v. Med. Mut. of Ohio*, 880 N.E.2d 926, 935 (Ohio Ct. App. 2007) (elements of contract formation are offer, acceptance, contractual capacity, consideration (the bargained-for legal benefit and/or detriment), a manifestation of mutual assent, and legality of object and of consideration) (citations omitted); *Netbula, LLC v. BindView Dev. Corp.*, 516 F. Supp. 2d 1137, 1155 (N.D. Cal. 2007) ("Under California law, in order to form a valid and enforceable contract, it is essential that there be: (1) parties capable of contracting; (2) their consent; (3) a lawful object; and, (4) a sufficient consideration.") (citations omitted).

***5** Thus the Court finds that Carey accepted the Agreement and that it governs his relationship with Uber.

C. The Delegation Clause is Valid

Defendant maintains that the Court must compel arbitration and dismiss this case because the Agreement's arbitration provision specifically delegates gateway issues of arbitrability to the arbitrator, including the determination of the enforceability, revocability, or validity of the arbitration provision. " '[T]he question [of] who has the primary power to decide arbitrability turns upon what the parties agreed about *that* matter. Did the parties agree to submit the arbitrability question itself to arbitration?' " *Crossville Med. Oncology, P.C. v. Glenwood Sys., LLC*, 485 Fed.Appx. 821, 823 (6th Cir. 2012) (internal quotation marks omitted) (quoting *First Options of Chicago, Inc.,* 514 U.S. at 943) (emphasis in original).

While the parties may agree to delegate authority to the arbitrator to decide gateway issues of arbitrability, "the presumption in favor of arbitration does not apply to delegation clauses." *Bruster v. Uber Techs. Inc.*, 188 F. Supp.

3d 658, 662 (N.D. Ohio 2016), *reconsideration denied,* No. 15–CV–2653, 2016 WL 4086786 (N.D. Ohio Aug. 2, 2016) (citing *Rent–A–Ctr., West, Inc. v. Jackson*, 561 U.S. 63, 69–70, 130 S. Ct. 2772, 177 L.Ed. 2d 403 (2010) (holding that delegation of authority to arbitrator to determine the enforceability and scope of arbitration agreement was valid under FAA)).

1. Delegation clause is clear and unmistakable

" 'Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.' " *Bruster*, 188 F.Supp.3d at 662 (quoting *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L.Ed. 2d 648 (1986)).

The delegation provision at issue in the Agreement provides that:

> **Except as it otherwise provides, this Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration. This Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative action.**
>
> *Such disputes include without limitation disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision. All such matters shall be decided by an Arbitrator and not by a court or judge.*

(Colman Dec. at 115–16 (bolding in original, italics added).)

This Court finds, as have numerous other courts considering identical or nearly identical language, the language of the Agreement's delegation provision clearly and unmistakably evinces the parties' intent to submit *all* issues under the Agreement, including issues of arbitrability, to the arbitrator. *Bruster*, 188 F. Supp. 3d at 663–64 (finding an identical delegation provision valid); *Mohamed v. Uber Techs., Inc.*, No. 15–16178, ——F.3d——, 2016 WL 7470557, at *3–4 (9th Cir. Dec. 21, 2016) (the provision clearly and unmistakably delegates threshold issues of arbitrability to the arbitrator); *Lamour v. Uber Techs., Inc.*, No. 1:16–CIV–21449, 2017 WL 878712, at *13 (S.D. Fla. Mar. 1, 2017) (citing *Mohamed*, 2016 WL 7470557, at *3) (every court to consider this delegation provision has held it is "clear and unmistakable" that the parties agreed to delegate the question of arbitrability to the arbitrator); *Zawada v. Uber Techs., Inc.*, No. 16–CV–11334, 2016 WL 7439198, at *4 (E.D. Mich. Dec. 27, 2016) ("The Ninth Circuit's conclusion [in *Mohamed*]—that the delegation provision properly delegated questions of arbitrability to an arbitrator—is consistent with every other district court to reach the issue when examining the same or substantially similar Raiser agreements since *Mohamed*.") (collecting cases); *Gunn v. Uber Techs., Inc.*, No. 116CV01668SEBMJD, 2017 WL 386816, at *3 (S.D. Ind. Jan. 27, 2017).

***6** This, however, does not end the analysis. Even if the delegation provision clearly and unmistakably manifests the parties' intent to delegate the issue of arbitrability to the arbitrator, the Court may nevertheless refuse to enforce the delegation provision if it is unconscionable. *Zawada,* 2016 WL 7439198, at *5 (citing *Rent–A–Ctr*, 561 U.S. at 72–74); *Bruster*, 188 F. Supp. 3d at 664.

Carey contends the defendant's motion should be denied because the "arbitration agreement" is unconscionable, but does not specifically challenge the delegation provision. Arguably, this ends the analysis. *Wynn v. Five Star Quality Care Trust*, No. 3:13–CV–01338, 2014 WL 2560603, at *7 (M.D. Tenn. June 5, 2014) ("The Supreme Court has expressly found that delegation clauses must be enforced, absent a valid challenge specific to the delegation clause —as opposed to a challenge to the enforceability of the Agreement as a whole.") (citing *Rent–A–Center,* 561 U.S. at 70–71) (additional citations omitted); *see also Flint v. Bank of Am., N.A.*, No. 15–13006, 2016 WL 1444505, at *6 (E.D. Mich. Apr. 13, 2016) (if plaintiff challenges the arbitration agreement as a whole, rather than the delegation provision specifically, then the delegation provision remains enforceable and the issue of unconscionability is reserved for arbitration). Nevertheless, in an abundance of caution, the Court will analyze the unconscionability of the delegation provision.

2. Ohio law governs unconscionability analysis of the delegation provision

Whether the delegation provision is unconscionable is a question of state law. The Agreement generally provides that California law applies, but challenges to the validity of an arbitration provision are considered independently from the

rest of the Agreement. *Bruster*, 188 F. Supp. 3d at 662 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04, 87 S. Ct. 1801, 18 L.Ed. 2d 1270 (1967)). "As a matter of substantive federal arbitration law, an arbitration provision is severable from the rest of the remainder of the contract....*Rent–A–Center* extended the separability rule [ ] to delegation provisions within arbitration agreements." *Zawada*, 2016 WL 7439198, at *5 (citations and internal quotation marks omitted); *Bruster*, 188 F. Supp. 3d at 662 (citation omitted).

Neither the arbitration provision nor the delegation provision contain a choice-of-law clause. "Absent an effective choice of law provision, Ohio courts apply the law of the state with the most significant relationship to the contract." *Bruster*, 188 F. Supp. 3d at 663 (quoting *Andrews v. Columbia Gas Transmission Corp.*, 544 F.3d 618, 623 (6th Cir. 2008) (further citation omitted)).

Plaintiff is a citizen of Ohio and resident of Cuyahoga County, Ohio. There is no evidence in the record that plaintiff entered into the Agreement, or provided transportation services using the Uber App, anywhere but in Ohio. Thus, Ohio has the most significant relationship to the contract and the Court will apply Ohio law to plaintiff's argument that the delegation provision is unconscionable. *See Bruster*, 188 F. Supp. at 664; *Zawada*, 2016 WL 7439198, at *6 (the arbitration provision is severable from the rest of the contract and does not contain a choice of law provision, thus Michigan's choice-of-law rules apply). Both parties use Ohio law in arguing their respective positions regarding unconscionability.

3. The delegation provision is not unconscionable

***7** The burden of establishing unconscionability is on the plaintiff. *Jean v. The Stanley Works*, No. 1:04CV1904, 2008 WL 2778849, at *7 (N.D. Ohio July 14, 2008) (report and recommendation adopted). In order for a contract provision to be unconscionable under Ohio law, it must be both procedurally and substantively unconscionable. *Bruster*, 188 F. Supp. 3d at 664 (citing *Scovill v. WSYX/ABC*, 425 F.3d 1012, 1017 (6th Cir. 2005)). With respect to the first-prong of unconscionability analysis:

> [p]rocedural unconscionability exists where the circumstances surrounding a party to the contract were such that no voluntary meeting of the minds was possible. *Jeffrey,* 758 N.E.2d at 1181. Ohio courts look to "factors bearing on the relative bargaining position of the contracting parties, including their age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, and whether alterations in the printed terms were possible." *Cross v. Carnes,* 132 Ohio App. 3d 157, 169, 724 N.E.2d 828 (1998). Further, it is not enough that the parties have unequal bargaining power, a vast disparity is required. *Faber v. Menard, Inc.,* 367 F.3d 1048, 1054 (8th Cir. 2004).

Scovill, 425 F.3d at 1017–18.

Carey argues that the delegation provision is procedurally unconscionable for a number of reasons. First, he claims he was required to click on "I AGREE" after reviewing the Agreement and was never informed that he was agreeing to an enforceable contract or given a meaningful choice about whether to enter the Agreement before driving for Uber. Second he contends that he had no opportunity to negotiate or alter the terms of the Agreement. (Carey Aff. ¶¶ 9, 10.) Finally, he maintains that he only possesses a high school education and could not be expected to know or understand the implications and consequences of arbitration, and that the only thing he did understand was "that he would not be able to work for Uber until he clicked 'I AGREE.' " (Opp'n at 143–44.)

Plaintiff's arguments are not supported by the undisputed record and are otherwise unavailing. Uber drafted the Agreement, and it is true that plaintiff could not access the uberX product without clicking "I AGREE." After clicking "I AGREE," however, plaintiff had the ability to unilaterally alter the written terms of the Agreement by eliminating the arbitration provision, including the delegation provision. Even a cursory examination of the Agreement establishes that it repeatedly and conspicuously informs a driver that he may "opt out" of the arbitration provision (which contains the delegation provision) if he chooses to do so, that arbitration is not a condition of utilizing Uber's products, and that the driver will not be subject to retaliation if he chooses to opt out. Finally, the Agreement provides the driver with specific instructions regarding the actions required to opt out, which could be as simple as sending an email. Carey had the unilateral power alter the terms of the Agreement and opt out of the arbitration provision, including the delegation provision, in its entirety, and had sufficient time (30 days) to consider his options. Carey, however, did not opt out of either of the Agreements that he accepted. (Colman Dec. ¶¶ 13, 14.)

***8** Thus, the Court concludes that the delegation provision is not procedurally unconscionable under Ohio law.[3] *See Scovill*, 425 F.3d at 1017–18; *Bruster*, 188 F. Supp. 3d at 664; *Ranazzi*, 46 N.E.3d at 219 ("Under Ohio law, unconscionability includes both an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.") (internal quotation marks and citations omitted).

3 The result is the same applying California law. *See Bruster v. Uber Techs. Inc.*, No. 15–CV–2653, 2016 WL 4086786, at *2 (N.D. Ohio Aug. 2, 2016) (citations omitted). " 'A finding of unconscionability requires a 'procedural' and a 'substantive' element, the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results.' " *Wallace*, 958 F. Supp. 2d at 819 (applying California law) (quoting *AT & T Mobility LLC v. Concepcion,* 563 U.S. 333, 340, 131 S. Ct. 1740, 179 L.Ed. 2d 742 (2011)); *see also Lara v. Onsite Health, Inc.*, 896 F. Supp. 2d 831, 839–42 (N.D. Cal. 2012) (citations omitted). "Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice[,] and [s]urprise involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms." *Wallace*, 958 F. Supp. 2d at 821 (internal quotation marks omitted) (quoting *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 486, 186 Cal. Rptr. 114, 122 (Ct. App. 1982)). Carey had a meaningful choice as to whether he would be subject to arbitration because he could have unilaterally opted out of the arbitration provision. Moreover, the arbitration provision and the opt-out alternative were not hidden in the Agreement, but appeared in bold text in multiple locations in the Agreement.

Under Ohio law, a contract provision is unconscionable only if it is both procedurally and substantively unconscionable. Because the Court concludes that the arbitration and delegation provisions are not procedurally unconscionable, the Court will not address the issue of substantive unconscionability. That said, the Court notes that the opt-out provision also protects the arbitration provision from a finding of invalidity and substantive unconscionability based on the class-action waiver. *See Zawada*, 2016 WL 7439198, at *9–10 (citations omitted).

Having determined that the delegation provision is not unconscionable and valid, it is not for the Court to decide the merits of plaintiff's claims or whether the arbitration provision is enforceable with respect to plaintiff's claims. The parties have delegated those issues to the arbitrator, not the Court, to decide. Thus, defendant's motion to compel arbitration is granted.

D. Motion to Strike Class Allegations

The arbitration provision precludes class and collective actions. (*See* Doc. No. 5–6 (Exhibit C) at 114.) Defendant argues that the Agreement's arbitration provision regarding class and collective action waivers are *enforceable* under the law and should be stricken. (Mot. at 59–61 (citations omitted).) Plaintiff's opposition does not address the motion to strike.

The delegation provision provides that all disputes without limitation, "including the *enforceability*, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision[,] ... shall be decided by an Arbitrator and not by a court or judge." The Court has found that the parties clearly and manifestly agreed to delegate issues of enforceability of the arbitration provision to the arbitrator. Thus the enforceability of the Agreement's class and collective action waiver must be addressed by the arbitrator. *See Gunn*, 2017 WL 386816, at *4 ("In this case, the parties entered into a valid agreement to delegate to the arbitrator questions of arbitrability ["disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision ... shall be decided by an Arbitrator and not by a court or judge"]. Accordingly, the question of the enforceability of the collective action waiver must be resolved by the arbitrator."); *see also Gilbert v. Bank of Am.*, No. C 13–01171 JSW, 2015 WL 1738017, at *7 (N.D. Cal. Apr. 8, 2015) (defendant's motion to enforce the arbitration agreement's class action waiver, in light of the court's ruling on the delegation clause, is an issue for the arbitrator to address); *cf; Rimel v. Uber Techs., Inc.*, No. 615CV2191ORL41KRS, 2016 WL 6246812, at *8 (M.D. Fla. Aug. 4, 2016) (citations omitted). (striking class allegations finding that the court may resolve the issue of whether the class action waiver is enforceable, rather than deferring this issue to the arbitrator pursuant to a valid delegation clause) (citing *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 877 (11th Cir. 2005)).

***9** Because all of plaintiff's claims have been compelled to arbitration, it is appropriate for the Court to dismiss, rather

than stay, this case. *Wallace*, 958 F. Supp. 2d at 816 (citing *Hensel v. Cargill, Inc.,* No. 99–3199, 198 F.3d 245 (Table), 1999 WL 993775, at *4 (6th Cir. Oct. 19, 1999)) (further citation omitted).

III. CONCLUSION

For all of the foregoing reasons, defendant's motion to compel arbitration and dismiss this case is granted. Because the issue of the enforceability of the arbitration's class and collective action waiver has also been compelled to the arbitrator, defendant's motion to strike plaintiff's class allegations is moot.

IT IS SO ORDERED.

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United States District Court, N.D. California.

Douglas O'Connor, et al., Plaintiffs,
v.
Uber Technologies, Inc., et al., Defendants.

No. C–13–3826 EMC
|
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ORDER GRANTING IN PART PLAINTIFFS' "RENEWED EMERGENCY MOTION FOR PROTECTIVE ORDER TO STRIKE ARBITRATION CLAUSES"

(Docket No. 15)

EDWARD M. CHEN, United States District Judge

***1** Plaintiffs Douglas O'Connor and Thomas Colopy ("Plaintiffs") filed the current class action complaint against defendants Uber Technologies, Inc. ("Uber") and two of its executives, Travis Kalanick and Ryan Graves (collectively "Defendants"), seeking restitution, damages, and other relief for unremitted gratuity. Now pending before this Court is Plaintiffs' "Renewed Motion for Protective Order to Strike Arbitration Clauses" (Docket No. 15).

Having considered the parties' moving and response papers, as well as the oral argument of counsel, the Court hereby **GRANTS**, in part, Plaintiffs' motion.

I. *FACTUAL & PROCEDURAL BACKGROUND*

Uber offers a mobile phone application used by riders and drivers to facilitate an "on demand" car service. *See* Docket No. 1 (Compl., ¶¶ 1, 11). The application is used by riders and drivers alike. Riders and drivers begin by downloading the application to their mobile phones. Riders can request rides via the application and the fare is assigned to the first driver within the geographic area to respond to the rider's request via the application. *See* Docket No. 56 (Hearing Transcript, at pgs. 35:19–37:6). Plaintiffs, who are former drivers and users of the application, allege Uber advertises to riders that gratuity is included in the total cost of the service. *Id.* at ¶ 14. Plaintiffs contend that despite this advertisement, Uber does not remit the full amount of gratuity it receives from customers to the drivers. Plaintiffs have brought a putative class action against Uber to recover the full amount of gratuity they believe they are owed.

Prior to the instant case, Uber was sued in Massachusetts state court over its gratuity policy in 2012. *See* Docket No. 15 (Mot., at pg. 6, n. 11) (citing *Lavitman et al. v. Uber Technologies, Inc. et al.,* Mass.Super. Ct. (Suffolk), C.A. No. 12–4490). A similar action was filed against Uber in Illinois. *See id.* (citing *Ehret v. Uber Technologies, Inc.,* C.A. No. 12CH36714 (Circuit Court of Cook County, IL)). Both actions are class action lawsuits.

The following year, during the pendency of the Massachusetts and Illinois lawsuits against Uber, on July 22, 2013, Uber informed users (drivers) they would receive within two weeks an electronic notification asking them to approve new agreements. Docket No. 36–2 (Coleman Decl., ¶ 10). Continued use of the Uber application was conditioned on approval of these agreements. *See id.* One such agreement, titled Software Licensing and Online Services Agreement (the "Licensing Agreement"), contained an arbitration provision. *See id.* (Ex. A to Coleman Decl., § 14.3). Users could accept the Licensing Agreement, including its arbitration provision, by swiping a button on their mobile phones. Users were given thirty (30) days to opt out of the arbitration provision, *see id.* at § 14.3(viii) ("Your Right to Opt Out of Arbitration"). However, opting out required users to send a letter via hand delivery or overnight mail to Uber's general counsel, clearly indicating an intent to opt out. *See id.* Otherwise, the drivers would be bound by the arbitration agreement, potentially barring them from this or any other lawsuit.

***2** Plaintiffs filed the current action on August 16, 2013. Less than a week later, Plaintiffs consented to proceed before

Magistrate Judge Westmore and filed an "Emergency Motion for Protective Order to Strike Arbitration Clauses," requesting the Court strike the arbitration provision, or alternatively, to provide more time to opt out and notice of the pendency of the current class action. *See* Docket Nos. 3, 4. On August 23, 2013, Magistrate Judge Westmore denied Plaintiffs' motion without prejudice on grounds Plaintiffs had failed to first serve Defendants with summons and complaint. *See* Docket No. 14 (Order, at pg. 3–4). Three days later, Plaintiffs filed their "Renewed Emergency Motion for Protective Order to Strike Arbitration Clauses." *See* Docket No. 15. Plaintiffs personally served Uber with summons and complaint. *See* Docket No. 17. On September 4, Plaintiffs requested an order shortening time on Defendant's response to this motion. Docket No. 27. Defendants filed an ex parte application in response to this request. Docket No. 34. The Court denied Plaintiffs' emergency motion. Docket No. 37.

Currently before this Court is Plaintiffs' motion for a protective order, heard as a regularly noticed motion. Plaintiffs contend that because drivers are not informed of the pendency of the current action prior to approving the Licensing Agreement, and its arbitration provision, and the mode of opting out is unreasonably burdensome, "Uber's new agreement may deprive potential class members of their right to participate in this case." *See* Docket No. 15 (Mot., at pg. 5). Plaintiffs accordingly seek the following relief: (1) strike the arbitration provision in the Licensing Agreement; or, alternatively, (2) require Uber to (a) give notice of the current pending class action to its drivers, (b) explain that opting out of the arbitration provision is necessary to participate in the putative class, (c) extend the opt-out period beyond thirty (30) days, and (d) provide a less onerous means of opting out. *Id.* at pg. 4.

II. *DISCUSSION*

A. *Unconscionability: Striking the Arbitration Provision*

Plaintiffs contend that the Court should strike the arbitration provision as unenforceably unconscionable under California law. In their briefing, Plaintiffs contend procedural unconscionability on numerous grounds—*e.g.,* (1) Uber only provides thirty (30) days to opt out of the arbitration provision; (2) Uber's failure to identify prior litigation against it; (3) the arbitration provision appears towards the end (*i.e.,* at page eleven of a fourteen-page agreement); (4) a separate signature is not required to approve the arbitration provision; and (5) there are relatively onerous opt-out procedures: (a) failure to provide an opt-out form or prepaid envelope, and (b) requiring hand delivery or overnight mail of a letter to opt out, whereas only *clicking* "I accept" to opt in. *See* Docket No. 15 (Mot., at pgs. 6–7, n. 12). At the hearing, Plaintiffs' counsel identified the arbitration provision's fee-splitting clause as substantively unconscionable. *See* Docket No. 56 (Hearing Transcript, 7:17–8:5).

The Court declines to rule on the unconscionability of the arbitration provision as the issue is not properly before the Court at this juncture. Because there is no allegation that a motion to compel arbitration is pending or threatened, the issue of whether the arbitration provision is enforceable is not yet ripe for resolution. *See e.g., Lee v. American Exp. Travel Related Services, Inc.,* 348 Fed. Appx. 205, 207 (9th Cir.2009) (class representatives of a putative class action could not challenge inclusion of arbitration provision on unconscionability grounds because no arbitration was threatened or impending); *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1019–20 (1984) (challenge to constitutionality of arbitration scheme not ripe for resolution because Monsanto "did not allege or establish that it had been injured by actual arbitration under the statute"). *See also Posern v. Prudential Securities, Inc.,* No. C–03–0507 SC, 2004 WL 771399, at *8 (N.D.Cal. Feb. 18, 2004) (finding plaintiff's request to declare arbitration clause invalid speculative because defendant had not yet moved to compel arbitration). Even if an unnamed class member were faced with a motion to compel arbitration, Plaintiffs cite no authority establishing a putative class representative has standing to challenge the motion prior to certification of the class.

***3** This is not to say that the issue may not properly be addressed later in the proceedings. For example, unconscionability and hence enforceability of the arbitration provision may arise at the class certification stage. Its validity and enforceability may be material to factors under Rule 23(a)(3)—*e.g.,* numerosity, typicality, and adequacy of representation. Furthermore, Plaintiffs are not foreclosed from adding a new putative class representative to join the current class action, a representative who has not yet opted out of the arbitration provision. At this juncture, the Court declines to address whether the arbitration agreement is unenforceable as unconscionable without prejudice to further consideration at a later time. [1]

1 Since this Court declines to address unconscionability on ripeness grounds, the Court also declines to rule on Uber's contention, *see* Docket Nos. 36 (Opp'n, at pg. 10)

and 59 (12/5/2013 Letter Brief at pg. 3) (citing *Momot v. Mastro,* 652 F.3d 982, 988 (9th Cir.2011)), that this Court lacks jurisdiction to entertain the enforceability issue because the parties have clearly and unmistakably evinced an intent to delegate that issue to the arbitrator, as discussed in *Rent–A–Center, West, Inc. v. Jackson,* 130 S.Ct. 2772 (2010) and its progeny.

B. *Rule 23(d): Controlling Class Communications*

Plaintiffs alternatively request this Court to assert control over communications by Uber with members of the putative class, pursuant to Fed.R.Civ.P. 23(d). Specifically, Plaintiffs request this Court require (1) electronic notice of the current class action be given to the proposed class (*e.g.,* email or other electronic means); (2) to extend the opt-out period to sixty (60) days; and (3) to allow Uber drivers to opt out of the arbitration provision electronically—*i.e.,* swiping a button on their mobile phones or via email.

Uber responds threefold. First, exercising control over communications here would "chill Uber's ability to exercise rights afforded to it under the FAA" and Supreme Court precedent, as articulated in *AT & T Mobility LLC v. Concepcion,* 131 S.Ct. 1740, 1744 (2011). Second, circulation of the Licensing Agreement, and the arbitration provision included within it, is not a class communication. Third, the Court cannot assert control over class communications absent a "showing of misconduct."

Uber's argument that Plaintiffs' requested relief somehow pits the Federal Arbitration Act ("FAA") against Rule 23(d), wherein the latter should yield, is meritless. Neither *Concepcion* nor the FAA abrogates Rule 23(d). *Concepcion* imposed limitations on state law—California common law relating to the contractual defense to unconscionability—which would have effectively barred enforcement of an arbitration agreement. The Court did not address the ability of the district court under Rule 23(d) to control communication which would lead to an arbitration agreement in the midst of a class action lawsuit. *See e.g., Balasanyan v. Nordstrom, Inc.,* No. 11–CV–2609–JMWMC, 2012 WL 760566, *2, n. 1 (S.D.Cal., Mar. 8, 2012) (noting that the Supreme Court's holding in *Concepcion* does not affect that court's decision to control class communications or invalidate the arbitration agreement before it, where allowing parties to do so would "create an incentive to engage in misleading behavior"). Indeed, Uber recognizes the generally broad power to manage class actions and communications with the class. *See* Docket No. 36 (Opp'n, at pg. 22, n. 10) ("... Defendants do not contest, for the purposes of this Opposition, that a court may limit future communications with putative class members where such communications would be misleading or coerce a putative class member to repudiate a substantive right.").

***4** Uber's citation to *American Exp. Co. v. Italian Colors Restaurant,* 133 S.Ct. 2304, 2306–2307 (2013) for the proposition that Rule 23 must yield to the FAA is unavailing. While *Italian Colors* affirms that an otherwise valid arbitration agreement cannot be refused enforcement simply because it would undermine the efficacy of a class action, the Court did not discuss Rule 23(d) and the district court's ability to control communications with the class thereunder. *Italian Colors* is inapposite to the issue at bar. The issue now before this Court is not the substantive validity of an arbitration provision, but whether, as a procedural matter, a court may regulate an employer's attempt to impose an arbitration requirement and waiver of legal rights during the course of a class action lawsuit. Neither *Concepcion* nor *Italian Colors* addressed this question.

Next, Uber contends that circulating the Licensing Agreement, and its arbitration provision, is a business communication, not a class communication subject to Rule 23(d). However, the touchstone under Rule 23(d) is not whether the communication is of an ordinary business nature; rather, the inquiry is whether the communication is abusive, misleading, coercive, or otherwise affects the administration of justice in the context of a putative class action lawsuit. As the Ninth Circuit held in *Wang v. Chinese Daily News, Inc.,* 623 F.3d 743, 756 (9th Cir.2010), *judgment vacated on other grounds,* 132 S.Ct. 74 (2011), "... Rule 23(d) gives district courts the power to regulate the notice and opt-out processes and to impose limitations when a party engages in behavior that threatens the fairness of the litigation." Such a threat may exist regardless of whether the communication to the class is denominated as "business" in nature. No court has held that the characterization of the communication as official business in and of itself immunizes such a communication from Rule 23(d) scrutiny. At most, the existence of a possible business purpose may counsel that any regulation imposed by the Court be narrowly tailored. *Montgomery v. Aetna Plywood, Inc.,* No. 95–cv–3193, 1996 WL 189347, at *6 (N.D.Ill. Apr. 16, 1996) (noting that communications ban was narrowly tailored in that it was limited to "communications regarding the litigation").

Cases cited by Uber are distinguishable in that they involved or envisioned purely business communications, completely unrelated to litigation that had no substantial effect on class

members rights therein. *See e.g., Cobell v. Norton,* 212 F.R.D. 14, 20 (D.D.C.2002) (not addressing any particular business communication but allowing "regular sorts of business communications" that "do not purport to extinguish the rights of the class members in this litigation.").

The Court notes it would be particularly inappropriate to insulate the subject communications from review under Rule 23(d) where, as here, there is a distinct possibility that the arbitration provision and class waiver imposed by Uber was motivated at least in part by the pendency of class action lawsuits which preceded the new Licensing Agreement. Suspicion that the new Licensing Agreement's arbitration provision was intended by Uber as a means to thwart existing class action litigation is heightened by the misleading nature of the communication and the unusually onerous procedures for opting out discussed *infra.*

Uber's third argument that this Court must make an affirmative finding of misconduct before exercising control over class communications misconstrues binding precedent. In general, district courts have both a duty and broad authority to control communications to putative class members even before class certification and to enter appropriate orders governing the conduct of counsel and the parties. *See Gulf Oil Co. v. Bernard,* 452 U.S. 89, 100 (1981). The Supreme Court's articulation of the requisite factual finding for a district court to limit class communications pursuant to Rule 23(d) does not require a finding of actual misconduct:

> ***5** "[A]n order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the ***need for a limitation*** and the ***potential interference*** with the rights of the parties. Only such a determination can ensure that the court is furthering, rather than hindering, the policies embodied in the Federal Rules of Civil Procedure, especially Rule 23. In addition, such a weighing-identifying the potential abuses being addressed-should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances."

Gulf Oil, 452 U.S. at 101–02 (emphasis added). The key is whether there is "potential interference" with the rights of the parties in a class action. *See In re Currency Conversion Fee Antitrust Litigation,* 361 F.Supp.2d 237, 251 (S.D.N.Y.2005) (describing right to join potential class action), *order amended on other grounds,* 2005 WL 1871012 (S.D.N.Y. Aug. 9, 2005). Wilful misconduct on the defendant's part is not required so long as the effect is to interfere with class members' rights. In *In re School Asbestos Litigation,* 842 F.2d 671, 682 (3d Cir.1988), the court upheld the district court's finding that a booklet was misleading as a matter of law and impliedly rejected appellant's contention that the district court's findings "fail[ed] to present ... evidence of 'actual or threatened misconduct of a serious nature." In *In re Currency Conversion Fee Antitrust Litigation,* 361 F.Supp.2d 237 (S.D.N.Y.2005), *order amended by* No. M 21–95, 2005 WL 1871012 (S.D.N.Y., Aug. 9, 2005), the district court rejected defendant's contention that *Gulf Oil* requires a "specific finding of abuses." Relying on Rule 23(d), the district court found that it had the authority to prevent misleading communications, and in particular, those communications that would "undermine Rule 23 by encouraging class members not to join the suit." *Id.* at 254.

In *Balasanyan,* discussed *infra,* the district court found it sufficient to exercise control under Rule 23(d) where defendant's failure to disclose pending litigation when it circulated its arbitration agreement for approval "create[d] an incentive to engage in misleading behavior." *Balasanyan,* 2012 WL 760566, at *3. The court noted that one purpose of Rule 23 is to "prevent improper contacts that could jeopardize the rights of the class members," including inducing putative class members from participating in the class action. *Id. See also Piekarski v. Amedisys Illinois, LLC,* No. 12–CV–7346, 2013 WL 605548, at *2 (N.D.Ill. Nov. 12, 2013) (finding improper, abusive, and misleading arbitration program implemented during pendency of action which involved onerous opt-out procedure that likely prevented participation in the class action).

The cases cited by Uber do not support the opposite conclusion. In *Mevorah,* for example, the court described its prior ruling where the alleged misconduct involved similar potential abuses as those at play here. *Mevorah v. Wells Fargo Home Mortg., Inc.,* No. C05–1175 MHP, 2005 WL

4813532, at *3 (N.D.Cal., Nov. 17, 2005). The court stated, "For example, this court has restricted a defendant's ability to communicate with potential class members following the defendant's publication of a notice that, in relevant part, failed to disclose the pendency or scope of the class action and may have caused confusion among potential class members regarding their rights." *Id.* The court noted that a limitation on class communications must be "based on a clear record and specific findings that reflect a weighing of ***the need*** for a limitation and the ***potential interference*** with the rights of the parties." *Id.* (citing *Gulf Oil Co.,* 452 U.S. at 101) (emphasis added). Hence, *Mevorah* is consistent with this Court's reading of *Gulf Oil* that the focus is on the *effect* of interfering with the fair administration of a class action lawsuit. [2]

2 Even if intentional abuse or misconduct were required, as discussed above, there is a basis for inferring that the arbitration provision at issue here was imposed by Uber as a means of undermining pending class action lawsuit against it.

***6** Here, the risk of interfering with the pending class action and the need for a limitation on communication with the class that adversely affects their rights is palpable. The communication which is the subject of this motion is likely to mislead potential class members about their right to join the current class action. The arbitration provision at issue includes a class action waiver, purporting to contractually bar Uber drivers from participating and benefitting from any class actions. Yet, the waivers were shrouded under the confusing title "How Arbitration Proceedings Are Conducted." Despite the title's innocuous wording, only a single paragraph is devoted to discussing the what and how-to of arbitration. The remaining four paragraphs set forth three waivers of substantive rights—class action, collective action, private attorney general action. Furthermore, the arbitration provision is not conspicuous and was not presented as a stand alone agreement. Instead, it is one of many provisions in the Licensing Agreement.

Uber drivers likely did not know the consequences of assenting to the Licensing Agreement. Many likely were not aware they were losing the right to participate in this or any other lawsuit. Indeed, Uber drivers have no meaningful way of learning of the current lawsuit since there has been no class notice. Although Uber characterizes some of its drivers as large, sophisticated "transportation companies," they do not dispute Plaintiffs' factual contention that many, if not the majority of, Uber drivers are smaller outfits run by immigrants for whom English is not their native language. Docket No. 56 (Hearing Transcript, at pgs. 17:14–18:4). Uber made no effort to inform drivers of the legal consequence of the arbitration provision barring them from participation in pending and future class action lawsuit brought on their behalf. Moreover, Uber drivers who desired to continue using Uber's mobile phone application, and as a consequence to continue receiving leads from Uber, were *required* to assent to the terms of the Licensing Agreement, including its arbitration provision.

While the Licensing Agreement did afford Uber drivers thirty (30) days to opt out of the arbitration provision, the opt-out provision is buried in the agreement. It is part of the arbitration provision, which itself is part of the larger, overall Licensing Agreement. The opt-out clause itself is ensconced in the penultimate paragraph of a fourteen-page agreement presented to Uber drivers electronically in a mobile phone application interface. In sum, it is an inconspicuous clause in an inconspicuous provision of the Licensing Agreement to which drivers were required to assent in order to continue operating under Uber.

Even if a driver were aware of the arbitration provision, and its consequence, and of the opt-out clause, the opt-out procedure is extremely onerous. Whereas, opting in only requires an Uber driver to swipe a button on their mobile phones, opting out required Uber drivers to send a letter via *hand delivery or overnight mail* to Uber's general counsel, clearly indicating their desire to opt out. Defendants failed, at the hearing or in briefing, to rebut Plaintiff's contention that many Uber drivers are not native English speakers. Uber's requirement that an opt-out letter be hand delivered or overnighted goes beyond simply ensuring receipt. Other, less burdensome, means—*e.g.,* email or first class mail with return receipt requested—could credibly have accomplished the same end. [3]

3 Tellingly, Defendants cite no case where an opt-out procedure that mandates such onerous means has been upheld. Defendants' opt-out procedure is significantly more burdensome than others upheld in this circuit. *See e.g., Meyer v. T–Mobile USA Inc.,* 836 F.Supp.2d 994, 1002 (N.D.Cal.2011) (providing for thirty-day opt-out period via a toll free number or online form); *Alvarez v. T–Mobile USA, Inc.,* No. 10–cv–2373 WBS, 2011 WL 6702424, at *2 (E.D.Cal. Dec. 21, 2011) (same); *Circuit City Stores, Inc. v. Ahmed,* 283 F.3d 1198, 1199 (9th

Cir.2002) (providing thirty-day opt out period by mailing one-page form).

***7** In sum, the promulgation of the Licensing Agreement and its arbitration provision, runs a substantial risk of interfering with the rights of Uber drivers under Rule 23. The Court concludes it has the authority to assert control over class communications in a manner that is narrowly tailored, supported by the record, and balances the interests of all parties involved consistent with *Gulf Oil*. While the Court will not regulate communications issued prior to the filing of this suit, as Plaintiffs have cited no authority where a court has asserted control under Rule 23(d) over class communications issued *prior* to the filing of a class action complaint, the Court clearly has the authority and jurisdiction to regulate post-filing communications by Uber under Rule 23(d). *See Gulf Oil,* 452 at 99–100 (noting district court's duty and broad authority to "enter appropriate orders governing the conduct of counsel and parties"). This discretion includes requiring the issuance of corrective notices and action to ameliorate confusing or misleading communications. *See e.g., Moulton v. U.S. Steel Corp.,* 581 F.3d 344, 353 (6th Cir.2009) (affirming district court's corrective notice and extension of the opt-out period to "unwind the confusion" caused by plaintiffs' attorney unilateral communication with putative class members to procure post-certification opt-outs) (citing *Gulf Oil*); *Belt v. Emcare, Inc.,* 299 F.Supp.2d 664, 667 (E.D.Tex.2003) (relying on *Gulf Oil* to enter "appropriate orders," such as requiring defendant to issue corrective notice to inform potential class members of their right to join a putative class action, where defendant sent letter discouraging participation in pending class action).

Uber drivers must be given clear notice of the arbitration provision, the effect of assenting to arbitration on their participation in this lawsuit, and reasonable means of opting out of the arbitration provision within 30 days of the notice. These requirements shall apply to new drivers (prospectively) and past and current drivers (retrospectively). As for arbitration provisions which have already been distributed after the filing of the complaint in this action (August 16, 2013) to past and current drivers who have approved the arbitration provision without opting out (or for whom approval during the 30 day notice period has begun to run but is still pending), Uber must seek approval of the arbitration provision for these drivers anew, giving them 30 days to accept or opt out from the date of the revised notice.

The foregoing approach is narrowly tailored as required under *Gulf Oil* and is based on factual findings discussed herein.

III. *CONCLUSION*

Based on the foregoing, the Court hereby rules as follows:

(1) The Court declines to rule on the alleged unconscionability of the arbitration provision in the Licensing Agreement, as that issue is not yet ripe for adjudication.

(2) Uber's efforts to seek approval of the arbitration provision in the Licensing Agreement during the pendency of this class action is potentially misleading, coercive, and threatens to interfere with the rights of class members. This Court shall exercise its discretion and authority to control communications to the putative class, pursuant to Rule 23(d), as follows:

(a) The parties shall meet and confer within seven (7) days of this Order to discuss and stipulate to the appropriate form, content, and procedures of the corrective notices consistent with this order. If the parties are unable to agree on a proposed corrective notice, they shall notify the Court by submitting their respective proposed notices and procedures for review and decision by the Court within fourteen (14) days of this Order.

(b) Until revised notices and procedures are approved by the Court and sent to drivers, Uber shall not issue to Uber drivers or prospective drivers the Licensing Agreement or any other agreement containing an arbitration provision which waives putative class members rights herein.

This order disposes of Docket No. 15.

IT IS SO ORDERED.

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United States District Court, D. Arizona.

David SENA, Plaintiff,
v.
UBER TECHNOLOGIES INCORPORATED, et al., Defendants.

No. CV-15-02418-PHX-DLR
|
Signed 04/07/2016

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ORDER

Douglas L. Rayes, United States District Judge

***1** Before the Court is Defendants Uber Technologies, Inc. and Rasier, LLC's Motion to Dismiss, Compel Individual Arbitration and Strike Class Allegations. [1] (Doc. 12.) For the following reasons, Defendants' motion is granted. [2]

1 Plaintiff David Sena filed a Motion to Stay Proceedings Pending the Judicial Panel on Multidistrict Litigation's ("JPML") Decision to Transfer. (Doc. 17.) On February 3, 2016, the JPML denied Plaintiff's motion for centralization of several related cases in another district pursuant to 28 U.S.C. § 1407. (Doc. 23.) Consequently, Plaintiff's motion is denied as moot.

2 Defendants' request for oral argument is denied. The issues are fully briefed, and the Court finds oral argument will not aid the resolution of the motion. *See Mahon v. Credit Bur. of Placer Cty.*, 171 F.3d 1197, 1200 (9th Cir. 1999).

BACKGROUND

"Uber is a car service that provides drivers who can be hailed and dispatched through a mobile application." (Doc. 1-1, ¶ 16.) Rasier is a subsidiary of Uber. (*Id.*, ¶ 3.) Plaintiff David Sena worked for Uber as an UberX driver from December 2012 through the end of 2014. (*Id.*, ¶ 19.) On June 21, 2014, via smartphone application, Sena electronically agreed to abide by the terms of the "Rasier Software Sublicense & Online Services Agreement" (the "Rasier Agreement"), (Doc 12-1 at 6-22), which includes an Arbitration Provision, (*Id.* at 16-20). [3] The Arbitration Provision provides, in relevant part:

> IMPORTANT: This arbitration provision will require you to resolve any claim that you may have against the Company or Uber on an individual basis pursuant to the terms of the Agreement unless you choose to opt out of the arbitration provision. This provision will preclude you from bringing any class, collective, or representative action against the Company or Uber. It also precludes you from participating in or recovering relief under any current or future class, collective, or representative action brought against the Company or Uber by someone else.

(*Id.* at 16.) It further provides:

> **Except as it otherwise provides, this Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration. This Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative action.**

(*Id.* at 17 (emphasis in original).) It also contains a Delegation Clause, which provides:

> Such disputes include without limitation disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision. All such matters shall be decided by an Arbitrator and not by a court or judge.

***2** (*Id.*) Near the end of the Arbitration Provision, there is a section entitled "Your Right to Opt Out of Arbitration," which states:

> **Arbitration is not a mandatory condition of your contractual relationship with the Company. If you do not want to be subject to this Arbitration Provision, you may opt out of this Arbitration by notifying the Company in writing of your desire to opt out of this Arbitration Provision, either by (1) sending, within 30 days of the date this Agreement is executed by you, electronic mail to optout@uber.com, stating your name and intent to opt out of the Arbitration Provision or (2) by sending a letter by U.S. Mail, or by any nationally recognized delivery service (*e.g.*, UPS, Federal; Express, etc.), or by hand delivery to [Raiser's legal department].**

(*Id.* at 20 (emphasis in original).)

3 These agreements appear when the Uber application is opened on a smartphone. When Uber updates the terms of the agreements, they appear the next time the Uber driver opens the application. The driver must accept the terms to continue driving, and each agreement supersedes the terms of the prior agreement. *See Mohamed v. Uber Tech., Inc.*, 109 F. Supp. 3d 1185, 1190-92 (N.D. Cal. 2015).

On September 18, 2015, Sena filed a seven count class action complaint on behalf of former and current Uber drivers against Defendants in Maricopa County Superior Court. (Doc. 1-1.) On November 25, 2015, Defendants removed the case to this Court pursuant to 28 U.S.C. § 1332. (Doc. 1.) Shortly thereafter, Defendants moved to dismiss the action, compel arbitration of Sena's claims, and strike the class allegations in the complaint. (Doc. 12.)

LEGAL STANDARD

The Federal Arbitration Act ("FAA") provides that written agreements to arbitrate disputes arising out of transactions involving interstate commerce "shall be valid, irrevocable, and enforceable except upon grounds that exist at common law for the revocation of a contract." 9 U.S.C. § 2; *see AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (discussing liberal federal policy favoring valid arbitration agreements). The FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis in original). The court's role is to answer two gateway questions: (1) does a valid agreement to arbitrate exist, and (2) does the agreement encompass the dispute at issue. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). If both questions are answered in the affirmative, the court must compel arbitration.

"Where a contract contains an arbitration clause, courts apply a presumption of arbitrability as to particular grievances, and the party resisting arbitration bears the burden of establishing that the arbitration agreement is inapplicable." *Wynn Resorts, Ltd. v. Atl.–Pac. Capital, Inc.*, 497 F. App'x 740, 742 (9th Cir. 2012) (internal citations omitted); *see also AT&T Mobility*, 563 U.S. at 339 ("We have described [§ 2 of the FAA] as reflecting...a 'liberal federal policy favoring arbitration[.]'"). Despite the federal policy favoring arbitration, "state law is not entirely displaced from federal arbitration analysis.... [G]enerally applicable [state law] contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Ticknor v. Choice Hotels Intern.*, 265 F.3d 931, 936-37 (9th

Cir. 2001) (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686 (1996)). However, "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006).

***3** Parties may also agree to delegate gateway issues of arbitrability to the arbitrator, even though these issues presumptively are reserved for the court. *Momot v. Mastro*, 652 F.3d 982, 987 (9th Cir. 2011); *see also Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 69-70 (2010) (holding that delegation of authority to arbitrator to determine the enforceability and scope of arbitration agreement was valid under FAA). A discrete agreement to submit gateway arbitrability questions to the arbitrator is treated as "an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce[.]" *Rent-A-Ctr.*, 561 U.S. at 70. In other words, a delegation provision is severable from the contract in which it is embedded, and challenges to the validity of the latter must be considered by the arbitrator in the first instance. *Id.* at 70-72.

However, the same presumption of arbitrability does not apply to agreements delegating authority over these gateway issues. Rather, "the Supreme Court has cautioned that '[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so.'" *Momot*, 652 F.3d at 987 (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). "Such '[c]lear and unmistakable evidence of agreement to arbitrate arbitrability might include... a course of conduct demonstrating assent... or ...an express agreement to do so.'" *Id.* (quoting *Rent-A-Ctr.*, 561 U.S. at 79-80).

ANALYSIS

Sena does not dispute that a valid contract was formed when he assented to the Rasier Agreement by clicking the box labeled "YES, I AGREE" on his Uber smartphone app, or that he did not opt out of the Arbitration Provision.[4] (Doc. 12-1 at 2-4.) Nonetheless, he argues that he should not be bound to arbitrate his claims because the Arbitration Provision is unconscionable. Defendants argue that, through the Delegation Clause, the parties clearly and unmistakably agreed to arbitrate questions of arbitrability. As a threshold matter, then, the Court must determine whether the parties' intent is clear and unmistakable and, if so, whether such delegation is enforceable under general contract principles.

4 Sena argues that he opted out of the arbitration provision on December 15, 2015. (Doc. 20 at 2.) By that time, however, Sena had not driven for Uber for over a year. (Doc. 1-1, ¶ 19.)

I. Clear and Unmistakable Intent

The Delegation Clause provides that "disputes arising out of or relating to interpretation or application of this Arbitration Provision, *including the enforceability, revocability or validity of the Arbitration Provision* or any portion of the Arbitration Provision...shall be decided by an Arbitrator and not by a court or judge." (*Id.* at 17 (emphasis added).) Despite this language, Sena argues that the parties' intent is ambiguous.

Sena relies almost exclusively on *Mohamed v. Uber Technologies, Inc.,* 109 F. Supp. 3d 1185 (N.D. Cal. 2015). In that case, two individuals, Ronald Gillette and Abdul Mohamed, filed a class action lawsuit on behalf of all Uber drivers in federal district court challenging Uber's use of background checks in its employment decisions. *Mohamed*, 109 F. Supp. 3d at 1189. As a condition of employment, both Gillette and Mohamed accepted the terms of Uber's "Software License and Online Agreement," which contained an arbitration clause, by clicking "Yes, I agree" on their smartphone app. *Id.* at 1190-91. Citing the plaintiffs' assent to the agreement, Uber moved to compel arbitration of their claims. *Id.*

Mohamed analyzed three of Uber's online service agreements: the 2013 Agreement, the 2014 Agreement, and the 2014 Raiser Agreement. *Id.* at 1192-94. Each agreement was governed by California law and contained an arbitration provision with a clause delegating questions of enforceability and validity of the arbitration provision to an arbitrator.[5] *Id.* at 1193. The court determined that the Delegation Clauses did not clearly and unmistakably show that the parties intended to refer arbitrability questions to the arbitrator. *Id.* at 1201-04. Although the court acknowledged that similar language had been deemed sufficiently clear and unmistakable evidence in *Rent-A-Center*, it nonetheless found that, when "read in context with other relevant contract provisions" in the Raiser Agreement, several inconsistencies rendered the Delegation Clauses ambiguous under California law. *Id.* at 1199. For example, the Raiser Agreements provided that "the state and federal courts in San Francisco will have '*exclusive jurisdiction*' of '*any* disputes, actions, claims, or causes of action arising out of or in connection with [the

agreements].'" *Id.* at 1201 (quoting the 2014 Agreement) (emphasis in original). The court determined this language was inconsistent with the Delegation Clauses' mandate that all disputes are subject to arbitration. *Id. Mohamed*, however, is not controlling authority, nor does this Court find its reasoning persuasive.

5 The agreements and provisions addressed in *Mohamed* are the same as those at issue in this case. The Court will refer to them interchangeably as the Raiser Agreement, Arbitration Provision, and Delegation Clause.

***4** The Supreme Court and the Ninth Circuit repeatedly have concluded that similar delegation language is sufficiently clear and unmistakable evidence that the parties intended to arbitrate questions of arbitrability. *See e.g.*, *Rent-A-Ctr.*, 561 U.S. at 68; *Momot*, 652 F.3d at 988 (language delegating to the arbitrator the authority to determine "the validity or application of any of the provisions" of the arbitration clause was clear and unmistakable); *Tuminello v. Richards*, 504 F. App'x 557, 558 (9th Cir. 2013) (language providing that an arbitrator shall decide "any and all controversies ... concerning any account(s), transaction, dispute or the construction, performance, or breach of this or any other Agreement" was sufficiently clear and unmistakable to delegate arbitrability); *Fadal Machining Ctrs., LLC v. Compumachine, Inc.*, 461 F. App'x 630, 632 (9th Cir. 2011) (language providing that any disputes "arising out of or relating to" the arbitration provision would be reserved for the arbitrator was sufficient evidence of an intent to clearly and unmistakably delegate arbitrability). The Court sees no reason to deviate from these authorities, particularly when the central purpose of the FAA "is to ensure that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2012) (internal quotations omitted).

Moreover, *Mohamed*'s approach is in tension with Supreme Court and Ninth Circuit authority regarding the severability of arbitration provisions. As previously noted, Courts distinguish between challenges to an arbitration provision and challenges to a larger contract within which an arbitration provision is embedded. The nature of the challenge determines the scope of a court's jurisdiction over it. The Rasier Agreement and the embedded agreement to submit questions of arbitrability to the arbitrator must, therefore, be treated as separate contracts. The Arbitration Provision spans pages 11-15 of the Rasier Agreement, concluding with the heading "Enforcement of This Agreement" on page 15. (Doc. 12-1 at 16-20.) The remainder of the Agreement, beginning with the heading "Notice" at the bottom of page 15, sets forth additional terms applicable to the Agreement as a whole; it does not mention arbitration specifically. (*Id.* at 20.) The Court is not convinced that it may look beyond the four corners of the Arbitration Provision to find ambiguity, as the court did in *Mohamed*. Without controlling guidance on this point, the Court will strictly apply severability principles and confine its analysis to the discrete agreement to arbitrate. Given the plain language of the Delegation Clause, the Court finds that the parties clearly and unmistakably intended to arbitrate questions of arbitrability.

II. Unconscionability

Notwithstanding the parties' clear and unmistakable intent to arbitrate questions of arbitrability, the Delegation Clause may be unenforceable if it is unconscionable. *Rent-A-Ctr.*, 561 U.S. at 72-74. When assessing whether a delegation clause is unconscionable, a court must sever it from the arbitration provision in which it is embedded. "It is not sufficient to prove that the arbitration provision as a whole, or other parts of the contract, are unenforceable." *Id.* at 71-74. Because unconscionability is a question of state contract law, *Omstead v. Dell, Inc.*, 594 F.3d 1081, 1085 (9th Cir. 2010), the Court first must determine which state's law applies.

A. Choice of Law

A federal court sitting in diversity applies the forum state's choice of law rules. *Bridge Fund Capital Corp.*, 622 F.3d at 1002 (quoting *Hoffman v. Citibank (S.D.), N.A.*, 546 F.3d 1078, 1082 (9th Cir. 2008)). Arizona's choice of law rules dictate that "[i]n the absence of an explicit choice of law by the parties, the contractual rights and duties of the parties are determined by the local law of the state having the most significant relationship to the parties and the transaction." *Cardon v. Cotton Lane Holdings, Inc.*, 841 P.2d 198, 202 (Ariz. 1992). Sena urges the Court to apply California law to the question of unconscionability because the Rasier Agreement contains a California choice of law provision, found in a section labeled "General" on page 17 of the Agreement. (Doc. 12-1 at 22.) But the Court must confine its analysis to the Arbitration Provision, which contains no choice of law provision. Given that Uber does business in Arizona, Sena lives in Arizona and worked as an Uber driver in Arizona, and the parties entered into the Raiser Agreement in Arizona, Arizona has the most significant relationship to this litigation.

***5** Under Arizona law, unconscionability has both procedural and substantive elements. *Maxwell v. Fidelity Fin. Servs., Inc.*, 907 P.2d 51, 58-59 (Ariz. 1995). However, an agreement may be found unenforceable based on substantive unconscionability alone. *Id.* at 59. [6] Sena argues that the Delegation Clause is both procedurally and substantively unconscionable.

6 In this respect, although the tests for unconscionability under Arizona and California law are substantially similar, Arizona law is more favorable to parties seeking to invalidate an agreement. California requires a showing of both procedural and substantive unconscionability, balanced on a sliding scale, meaning "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Gentry v. Superior Court*, 165 P.3d 556, 572 (Cal. 2007) (abrogated on other grounds). In other words, "a conclusion that a contract contains no element of procedural unconscionability is tantamount to saying that, no matter how one-sided the contract terms, a court will not disturb the contract because of its confidence that the contract was negotiated or chosen freely...." *Id.* at 573.

B. Procedural Unconscionability

Procedural unconscionability addresses the fairness of the bargaining process. It is "concerned with 'unfair surprise,' fine print clauses, mistakes or ignorance of important facts or other things that mean bargaining did not proceed as it should." *Clark v. Renaissance W., LLC*, 307 P.3d 77, 79 (Ariz. Ct. App. 2013) (quoting *Maxwell*, 907 P.2d at 57-58). Contracts offered on a "take it or leave it" basis, commonly known as "adhesion contracts," are often found procedurally unconscionable because they deprive a party of its contractual right to bargain. *Broemmer v. Abortion Servs. of Phx., Ltd.*, 840 P.2d 1013, 1015 (Ariz. 1992). The defining feature of an adhesion contract is that one party has no realistic choice as to its terms. *Id.* at 1016.

Relying on *Mohamed*, Sena argues that the Delegation Clause is necessarily an adhesion contract because it is part of the Raiser Agreement, which was offered on a take it or leave it basis. (Doc. 20 at 12.) He also asserts that the Delegation Clause is procedurally unconscionable because it is oppressive, results in "unfair surprise," and is "buried in the arbitration provision" at page 15 and not marked by a separate header. (*Id.* at 13.) The Court disagrees.

In *Mohamed*, the court found the Delegation Clause procedurally unconscionable because it satisfied both the "surprise" and "oppression" elements of California's unconscionability test. The "surprise" element was satisfied because the clause was "hidden in Uber's 'prolix form.'" *Mohamed*, 109 F. Supp. 3d at 1211. The "oppression" element was a much closer call because the Arbitration Provision's opt-out clause was "visually conspicuous" and provided drivers with "a reasonable means of opting out." *Id.* at 1211-12. Despite these findings and admitting that it was "an extremely close call," the court held that "Mohamed's ability to opt-out of the delegation clause was not sufficiently meaningful to eliminate *all* oppression from the contract," and the Delegation Clause was procedurally unconscionable under California law. *Id.* at 1216 (emphasis in original).

***6** *Mohamed*'s finding of "surprise" was based on a conclusion that the Raiser Agreement as a whole was adhesive. But, as previously noted, the Court must confine its analysis to the language of the challenged "agreement to arbitrate" and not look at the agreement as a whole. *Rent-A-Ctr.*, 561 U.S. at 72. Likewise, Sena's argument that the Raiser Agreement is an adhesion contract and therefore, as part of the Raiser Agreement, the Arbitration Provision and Delegation Clause are necessarily adhesion contracts is, of course, a challenge to the entire Raiser Agreement. Because the Court must confine its analysis to the language of the specific "agreement to arbitrate," Sena's argument is outside the scope of the Court's review.

Additionally, Sena's argument that the Delegation Clause results in unfair surprise is unpersuasive. The Delegation Clause is not hidden or "buried" in the Arbitration Provision. It appears on the second page of the Arbitration Provision, in normal font, conspicuously marked by the header, "How This Arbitration Provision Applies." (Doc. 12-1 at 17.) Moreover, the conspicuous opt-out provision and its accompanying language undermine Sena's argument that the Arbitration Provision and Delegation Clause were contracts of adhesion. The first page of the Arbitration Provision provides:

> IMPORTANT: This arbitration provision will require you to resolve any claim that you may have against the Company or Uber on an individual basis pursuant to the terms of the

> Agreement *unless you choose to opt out of the arbitration provision*.

(*Id.* at 16 (emphasis added).) Importantly, the last page of the Arbitration Provision conspicuously states: "**Arbitration is not a mandatory condition of your contractual relationship with the Company. If you do not want to be subject to this Arbitration Provision, you may opt out...in writing...within 30 days...[via email or U.S. Mail].**" (*Id.* at 20.) Sena had the opportunity to opt out of arbitrating his claims. Even as the party with less bargaining power, Sena had the ability to reject the Arbitration Provision without consequence to his employment. And in any event, "[t]here is [no] Arizona law supporting the assertion that a finding of adhesion equates to a finding of procedural unconscionability." *R & L Ltd. Inv., Inc. v. Cabot Inv. Prop., LLC*, 729 F. Supp. 2d 1110, 1115 (D. Ariz. 2010).

Sena argues that, notwithstanding the opt-out provision, he did not have a meaningful opportunity to negotiate any terms and he "could either wholly accept the agreement, or not work for Uber." (Doc. 20 at 14.) He points to the California Supreme Court's decision in *Gentry*, which held that an opt-out provision in an arbitration agreement embedded in an employee handbook did not rid the agreement of all procedural unconscionability because the terms of the handbook were "markedly one-sided," and "it [was] not clear that someone in [the plaintiff's] position would have felt free to opt out." 165 P.3d at 573-74. Further, the court noted that "it is likely that [the] employee felt at least some pressure not to opt out of the arbitration agreement." *Id.* at 574. But *Gentry* is not controlling, and Sena does not argue that he felt pressure to not opt-out of the Arbitration Provision. Rather, Uber made it clear that arbitration was not required of its drivers. The statement that "Arbitration is not a mandatory condition of your contractual relationship with the Company" appears twice in the Arbitration Provision, the first preceded by the word "IMPORTANT" in all capital letters, and the second in a paragraph with all bold text. The opt-out clause appears prominently in the Arbitration Provision, and Sena has not persuaded the Court that his ability to opt-out of the Provision was not meaningful. Therefore, because Sena was not required to accept the Arbitration Provision, the Delegation Clause is not procedurally unconscionable. [7]

7 The fact that arbitration was the default mechanism does not make it procedurally unconscionable. Such a conclusion would undermine the FAA's policy favoring arbitration of claims when possible.

C. Substantive Unconscionability

***7** Substantive unconscionability is concerned with the fairness of the terms in the contract. *Maxwell*, 907 P.2d at 58. It is present "when the terms of the contract are so one-sided as to be overly oppressive or unduly harsh to one of the parties." *Clark*, 307 P.3d at 79. Factors that indicate substantive unconscionability include one-sided terms, oppressive terms, an overall imbalance in obligations and rights imposed by the contract, and significant cost-price disparity. *Maxwell*, 907 P.2d at 58.

Sena again relies on *Mohamed* to argue that the Delegation Clause is substantively unconscionable. In *Mohamed*, the court found the Delegation Clause substantively unconscionable to a significant degree because the Agreement "impermissibly subject[s] Uber drivers to the risk of having to pay significant forum fees, and because drivers are required to advance their share of such fees simply to start the arbitration." *Mohamed*, 109 F. Supp. 3d at 1211. It found Mohamed made a sufficient showing that, in arbitration, he would be subject to hefty fees of a type that he would not be subject to in court. *Id.* at 1208. Likewise, Sena contends that under the Agreement's fee-splitting clause, he and other Uber drivers would be "subject to hefty fees" in individual arbitration that would "chill them from exercising their rights." [8] (Doc 20 at 14.)

8 Additionally, Sena supports his unconscionability argument by pointing to several provisions in the Raiser Agreement that are not part of the Arbitration Provision. For example, he cites *Mohamed* as authority for the proposition that the confidentiality, IP carve-out, and unilateral modification provisions are substantively unconscionable. (Doc. 20 at 16.) Those provisions are found on Pages 6, 8, and 16 of the Agreement, respectively. The Court cannot consider whether those provisions are unconscionable because its unconscionability analysis is limited to the parties' discrete agreement to arbitrate questions of arbitrability.

The fee-splitting clause is found on the first page of the Arbitration Provision. It provides:

> Unless the law requires otherwise, as determined by the Arbitrator based upon the circumstances presented, you

> will be required to split the cost of any arbitration with the Company.

(Doc. 12-1 at 16.) This case is distinguishable from *Mohamed*, however, because Sena has not produced evidence that his cost to individually arbitrate questions of arbitrability would be prohibitively expensive. (Doc. 20 at 15.) As the party challenging the validity of the arbitration agreement, Sena has the burden of producing evidence that the clause is prohibitively expensive for him. Sena does not satisfy that burden simply by pointing to *Mohamed*, and invalidating the Delegation Clause based on mere speculation "would undermine the liberal federal policy favoring arbitration." *Harrington v. Pulte Home Corp.*, 119 P.3d 1044, 1055 (Ariz. Ct. App. 2005) (quoting *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000)).

Sena also argues that the Arbitration Provision's class action waiver is substantively unconscionable. (Doc. 20 at 15.) The relevant language is found on page 11, and states: "This provision will preclude you from bringing any *class, collective, or representative action* against the Company or Uber." (Doc. 12-1 at 16 (emphasis added).) Sena, pointing to *Mohamed*, insists that the class action waiver is substantively unconscionable as a matter of public policy. (Doc. 20 at 16.) However, in *AT&T Mobility*, the Supreme Court held that the FAA preempted California's rule that class action waivers in adhesion contracts were unconscionable under California law if the dispute involved small amounts of damages because the rule stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the FAA. 563 U.S. at 352. Here, the Arbitration Provision is governed by the FAA. (Doc. 12-1 at 17.) A ruling that the class action waiver is unconscionable would conflict with *AT&T Mobility* and impede the purpose of the FAA, which is to "ensure the enforcement of arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings." *AT&T Mobility*, 563 U.S. at 334. Accordingly, the Delegation Clause is not substantively unconscionable.

CONCLUSION

***8** The Court must compel Sena to submit to arbitration because the parties entered into a valid and enforceable agreement to arbitrate questions of arbitrability. Defendants request that the Court dismiss this action. (Doc. 12 at 16-17.) "Pursuant to [§ 3 of the FAA], the Court is required to stay proceedings pending arbitration if the Court determines that the issues involved are referable to arbitration under a written arbitration agreement." *Meritage Homes Corp. v. Hancock*, 522 F. Supp. 2d 1203, 1211 (D. Ariz. 2007). The Court, in its discretion, may also dismiss the case. *See id.* Here, although the case will proceed to arbitration, the Court will retain jurisdiction to enforce any arbitral award and stay this matter pending arbitration.

IT IS ORDERED that Defendants Uber Technologies, Inc. and Rasier, LLC's Motion to Dismiss, Compel Individual Arbitration and Strike Class Allegations, (Doc. 12), is **GRANTED**, and Plaintiff's Motion to Stay, (Doc. 17), is **DENIED**. Sena's class allegations are stricken from the complaint. The Clerk is directed to close this case, whereupon, by proper motion of the prevailing party at arbitration, it may be reopened or dismissed with prejudice.

Dated this 7th day of April, 2016.

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United States District Court, D. Massachusetts.

Dino N. THEODORE, and Access With Success, Inc., Plaintiffs,
v.
UBER TECHNOLOGIES, INC., Defendant.

CIVIL ACTION NO. 18-cv-12147-DPW
|
Filed March 3, 2020

Synopsis

Background: Potential customer of ride-sharing company, who used a wheelchair, and non-profit corporation of which customer was director brought action against ride-sharing company, alleging violation of Title III of Americans with Disabilities Act (ADA) resulting from company's alleged failure to provide wheelchair-accessible vehicles and seeking permanent injunctive relief barring practice of not providing such vehicles to all areas of state served by company. Ride-sharing company moved to compel arbitration.

Holdings: The District Court, Douglas P. Woodlock, Senior District Judge, held that:

non-profit corporation was co-plaintiff in representative capacity, and

terms and conditions on company's online account creation page were not conspicuous enough to reasonably communicate terms of any agreement between customer and company.

Motion denied.

Attorneys and Law Firms

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MEMORANDUM AND ORDER

DOUGLAS P. WOODLOCK, UNITED STATES DISTRICT JUDGE

***1** Dino Theodore and Access with Success, Inc. bring this action seeking permanent injunctive relief barring an allegedly discriminatory practice by Uber Technologies, Inc. of not providing wheelchair accessible vehicles to all areas of the Commonwealth of Massachusetts, or at least those currently served by Uber. In particular, Mr. Theodore and Access with Success contend in their now-operative second amended complaint that Uber's failure to provide wheelchair accessible vehicles in the suburb where Mr. Theodore resides, northwest of Boston near the border with New Hampshire, violates Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 *et seq*.

Uber has moved for an order to compel arbitration of all claims, under the Terms and Conditions to which Uber contends Mr. Theodore agreed when he created his account. More specifically, Uber argues that, at a minimum, an arbitrator should decide at the threshold the arbitrability of the claims set forth by Mr. Theodore and Access with Success under the delegation clause of the Terms and Conditions.

In opposition, Mr. Theodore and Access with Success contend that there was never any valid written agreement between Mr. Theodore and Uber through which the parties agreed to arbitrate the claims set forth in Plaintiffs' second amended complaint.

I. BACKGROUND

A. Factual Background

Mr. Theodore is a 58-year-old practicing attorney, who is paralyzed from the chest down; he lives in Dracut, Massachusetts. Due to his condition and other physical setbacks, he has begun to rely more heavily on a power wheelchair that does not allow him to use an automobile equipped with hand controls, which he otherwise could drive.

Access with Success is a non-profit corporation, whose "members are able-bodied individuals and qualified

individuals with disabilities as defined by the ADA." Mr. Theodore serves as a member and a director of Access with Success, with whom he has filed at least 45 federal actions as a co-plaintiff.

In October 2016, the Massachusetts Bay Transportation Authority began working with Uber, as well as its competitor ride-share company, Lyft Inc., to introduce a pilot program to provide subsidized rides in wheelchair accessible vehicles for disabled passengers in a specific region of the Commonwealth. [1] Dracut is outside the region served by the RIDE program, which is where Uber's pilot program operates; consequently, Uber allegedly has no wheelchair accessible vehicles available for Mr. Theodore to take from his home.

1 The pilot program is designed to operate within the region that is served by the MBTA's para-transit service, "The RIDE," which provides transportation for people who have a disability that prevents them from using typical MBTA services such as buses, subways, or trolleys.
To provide context for this Memorandum, I take notice that MBTA is of the view that, "[u]nder the ADA, paratransit functions as a safety net. It is not intended to be a comprehensive system of transportation, and it's different from medical or human services transportation." *See generally https://www.mbta.com/accessibility/the-ride* (last visited Mar. 3, 2020). The RIDE program is available in 58 cities and towns "in the greater Boston area..." *Id.* Dracut, Massachusetts is outside the RIDE Service Area. As of March 2017, the pilot program was expanded to "all eligible users of the RIDE." *See* https://www.mass.gov/news/governor-baker-mbta-celebrate-*expansion-of-the-rides-on-demand-paratransit-service* (last visited Mar. 3, 2020).

***2** Massachusetts General Law c. 161A provides statutory authority for the MBTA, including the definition of its "area constituting the authority." M.G.L. c. 161A § 1 (the "area constituting the authority" of the MBTA is "the service area of the authority consisting of the 14 cities and towns, the 51 cities and towns, and other served communities," which are all defined terms under the statute). Dracut is included under the "other served communities" within the "area constituting the authority" of the MBTA, *id.*, as well as the Lowell Regional Transit Authority, under M.G.L. c. 161B § 2. "The area constituting the authority and the inhabitants thereof are ... a body politic and corporate, and a political subdivision of the commonwealth, under the name of Massachusetts Bay Transportation Authority." M.G.L. c. 161A § 2. The MBTA's organic statute provides that "no person shall, on the grounds of... handicap, be denied participation in, or the benefits of, or be otherwise subjected to discrimination under any program or activity administered or operated by or for the authority." M.G.L. c. 161A § 5(a). Within the MBTA's statutory authority is the power to "conduct research... experimentation... and development, in cooperation with the [mass transit division within the] department [of transportation], and other governmental agencies and private organizations when appropriate, with regard to mass transportation ... services." M.G.L. c. 161A § 3(l).

On October 4, 2016, Mr. Theodore created an account on Uber's website and downloaded the app to his smartphone. None of the options presented for his desired destination included a wheelchair accessible vehicle, and after doing more research, Mr. Theodore concluded that this service was not available and deleted the app from his phone. On July 12, 2018, after hearing about the availability of Uber wheelchair accessible vehicles, Mr. Theodore logged onto the website and began to "sign-up" again; however, he did not complete the process once he determined that Uber's wheelchair accessible vehicles were not available to him in Dracut.

B. Questions Presented

Uber's motion to compel arbitration presents the need to make determinations regarding who will decide the applicability of the Terms and Conditions of the account agreement which Mr. Theodore created on October 4, 2016. [2]

2 In this connection, I note at the outset my conclusion that Mr. Theodore did not effectively cancel his account by his collateral act of deleting the related app. Indeed, the Terms and Conditions of that account agreement state that the dispute resolution section survives cancellation of a user's account. Thus, I find the argument by Mr. Theodore and Access with Success that his deletion of the app had the effect of freeing Mr. Theodore from the Terms and Conditions of the account agreement to be unavailing.

These determinations will be applicable both to Mr. Theodore and Access with Success. [3]

3 If Mr. Theodore is compelled to arbitrate, then so too is Access with Success because it is suing either as a membership organization, or as his alter ego. Access

with Success has served as an organizational co-plaintiff for Mr. Theodore on numerous occasions. In fact, it has joined Mr. Theodore as a co-plaintiff in the last 45 federal lawsuits filed by Access with Success. "Associations suing in a representative capacity are bound by the same limitations and obligations as their members ..." *Klay* v. *All Defendants*, 389 F.3d 1191, 1202-03 (11th Cir. 2004) (citing *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 65-66, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997)). Access with Success alleges it sues as a co-plaintiff here based on its "injury as a result of the defendant's actions or inactions ... [and] because of its association with Dino Theodore and his claims ..." Accordingly, it is a co-plaintiff in its representative capacity and would be bound by enforced arbitration against Mr. Theodore.

Moreover, "where corporations are formed, or availed of, to carry out the objectives and purposes of the corporations or persons controlling them," agency principles may dictate that the controlling person(s) and the entity not be regarded as separate. *My Bread Baking Co.* v. *Cumberland Farms, Inc.*, 353 Mass. 614, 233 N.E.2d 748, 751 (1968); *see also Iantosca* v. *Benistar Admin. Services, Inc.*, 567 Fed. Appx. 1, 7 (1st Cir. 2014) (citing *My Bread* as the "seminal Massachusetts case on disregarding the corporate form" and noting that it "does not suggest that making a 'sham' finding is a prerequisite" to do so)). Without prejudice to further factual development to test the proposition, I am presently of the view that the principles of *My Bread* appear to contemplate the circumstances here, given Mr. Theodore's office as a director of Access with Success.

II. STANDARD OF REVIEW

***3** A party seeking to compel arbitration "must demonstrate that a valid agreement to arbitrate exists, that the movant is entitled to invoke the arbitration clause, that the other party is bound by that clause, and that the claim asserted comes within the clause's scope." *Soto-Fonalledas* v. *Ritz-Carlton San Juan Hotel Spa & Casino*, 640 F.3d 471, 474 (1st Cir. 2011).

Section 2 of the Federal Arbitration Act provides that an arbitration clause in a written contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Congress passed the FAA to put into place a "policy favoring arbitration." *AT&T Mobility, LLC* v. *Concepcion*, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011). Nevertheless, "the FAA does not require parties to arbitrate when they have not agreed to do so." *Cullinane* v. *Uber Techs., Inc.*, 893 F.3d 53, 60 (1st Cir. 2018) (quoting *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) (internal quotation marks omitted)).

III. APPLICABILITY OF THE "TERMS AND CONDITIONS"

In answering whether or not the claims raised by Mr. Theodore and Access with Success should be resolved by arbitration, I first address the question "whether ... there exists a written agreement to arbitrate." *Lenfest* v. *Verizon Enter. Solutions, LLC*, 52 F. Supp.3d 259, 262-63 (D. Mass. 2014). "The burden of making th[e] showing [that there is a written agreement to arbitrate] lies on the party seeking to compel arbitration." *Id.* (citing *Dialysis Access Ctr., LLC* v. *RMS Lifeline, Inc.*, 638 F.3d 367, 375 (1st Cir. 2011)). Plainly there is such a written contract here. *See* note 2, *supra*. However, if such a written contract containing the arbitration agreement was never binding on the plaintiffs, its arbitration clause cannot be enforced against them.

When determining whether the parties agreed to arbitrate, courts apply "ordinary state-law principles that govern the formation of contracts." *Cullinane*, 893 F.3d at 61 (citing *First Options of Chi., Inc.*, v. *Kaplan*, 514 U.S. 938 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)).

In Massachusetts, "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers *are essential* if electronic bargaining is to have integrity and credibility." *Id.* (emphasis added) (citing *Ajemian* v. *Yahoo! Inc.*, 83 Mass.App.Ct. 565, 987 N.E.2d 604, 612 (2013)).[4] With that principle in mind, the Massachusetts Appeals Court in *Ajemian* has outlined a two-step inquiry, endorsed and applied by the First Circuit in *Cullinane*, to determine enforceability of clauses[5] in online agreements. *Id.* at 62. Consequently, here I must first determine whether the contract terms were "reasonably communicated to the plaintiffs." *Ajemian*, 987 N.E.2d at 612. Second, I must determine whether "the record shows that those terms were 'accepted and, if so, the manner of acceptance.' " *Cullinane*, 893 F.3d at 62 (citing *Ajemian*, 987 N.E. 2d at 613)).

4 In its most recent discussion of the applicable principles for requisite notice in online contracts of adhesion, the First Circuit in *Cullinane* v. *Uber Techs., Inc.*, 893 F.3d 53, 61-62 (1st Cir. 2018) expressly looked to *Ajemian*

v. *Yahoo! Inc.*, 83 Mass.App.Ct. 565, 987 N.E.2d 604, 611-15 (2013) as a decision containing "trustworthy data for ascertaining [Massachusetts] state law" on this issue.

5 The clause in question in *Ajemian* was a forum selection clause; however, nothing about the two-step inquiry is specific to that particular kind of clause. The same form of inquiry can guide determination of the enforceability of an arbitration clause. I will deploy it to do so here as the First Circuit did in *Cullinane*.

A. Reasonable Communication to Mr. Theodore

***4** As in *Cullinane*, Uber here does not argue that Mr. Theodore read the Terms and Conditions containing the arbitration clause, rather Uber "relies solely on a claim that its online presentation was sufficiently conspicuous as to bind the Plaintiffs whether or not they chose to click through the relevant terms." *Id.* In the "context of web-based contracts ... clarity and conspicuousness are a function of the design and content of the relevant interface." *Id.* (citing *Meyer* v. *Uber Techs., Inc.*, 868 F.3d 66, 75 (2d Cir. 2017).

Under the provisions of the Massachusetts Uniform Commercial Code, "conspicuous" is defined as "written, displayed or presented [such] that a reasonable person against which it is to operate ought to have noticed it." M.G.L. c. 106 § 1-201(b)(10); *cf.* M.G.L. c. 156D § 1.40 (under the general law of corporations established by the Massachusetts Business Corporation Act, a reasonable person standard is applied to whether someone "should have noticed it").

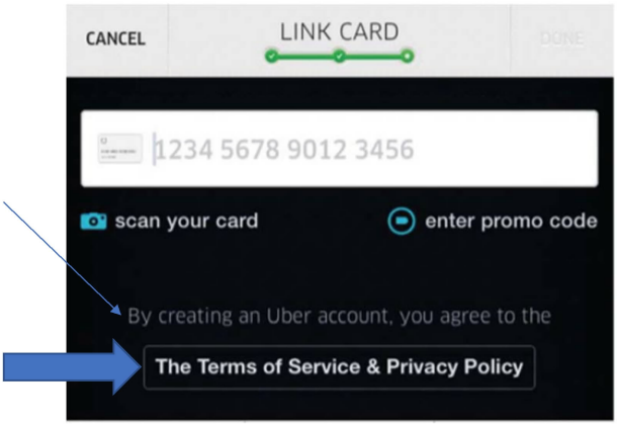
Characteristics that should generally be considered when determining whether terms are sufficiently conspicuous include: "larger and contrasting font, the use of headings in capitals, or somehow setting off the term from the surrounding text by the use of symbols or other marks." *Cullinane*, 893 F.3d at 62 (citing M.G.L. c. 106 § 1-201(b)(10)). There are additional considerations "when the terms of the agreement are only available by following a link." *Id.* Under those circumstances, "the court must examine the language that was used to notify users that the terms of their arrangement could be found by following the link, how prominently displayed the link was, and any other information that would bear on the reasonableness of communicating [the terms]." *Id.* (citing *Ajemian*, 987 N.E.2d at 612).

In *Cullinane*, inquiry stopped after the First Circuit concluded that Uber did not reasonably communicate the terms of their agreement with Plaintiffs. *Id.* at 64. As a result, the First Circuit determined Plaintiffs were not able to provide unambiguous assent and therefore were not bound by the arbitration clause. *Id.*

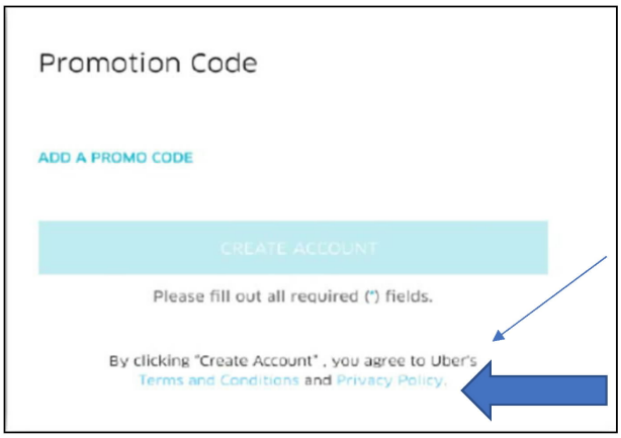
The screen that a new user sees when he or she is signing up for the Uber account at issue here is somewhat different from that at issue in *Cullinane*. I am consequently faced with the question whether the difference is enough to change the outcome reached by the First Circuit in *Cullinane*. [6]

6 On January 29, 2020, *Cullinane* was resolved on remand when I approved a settlement agreement between the parties. *See Cullinane* v. *Uber Technologies, Inc.*, No. 14-cv-14750-DPW, Dkt No. 130 (D. Mass. Jan. 29, 2020). The case was settled for a nominal $3 million amount, to be paid to Massachusetts residents (defined as persons who both registered for an Uber account via an iPhone in Massachusetts and had a Massachusetts billing address) who paid at least one of either the allegedly unlawful "Logan Massport Surcharge and Toll" and/or "East Boston Toll," between October 18, 2011 and August 14, 2015 and did not receive a refund for those charges. The payments are to be distributed in one of two ways: (1) class members with active Uber accounts will receive their payment in the form of a credit on their Uber accounts (a "customer loyalty" allocation), and (2) class members without active Uber accounts (or who do not use their app credits within 365 days of receipt) will receive their payment in the form of a mailed check (a "cash payment" allocation).

***5** In *Cullinane*, a new user was not required to click the "Terms and Conditions" link in order to proceed to the next step of creating an account, even though that was the point at which the new user would be bound to those Terms and Conditions. The link to the Terms and Conditions (and the Privacy Policy) was located in a gray rectangular box, written in white text. Other terms on the page had similar features, such that the hyperlink was not accentuated by comparison. *Id.* at 63. For example, " 'enter promo code' w[as] also written in bold and with a similarly sized font as the hyperlink ..." *Id.* The text of the "Terms and Conditions" link was not the largest font on the page. *Id.* Finally, the text used to put potential users on notice "that the creation of an Uber account would bind them to the linked terms was even less conspicuous than the" hyperlink to the "Terms and Conditions" themselves. *Id.*



Screenshot from *Cullinane* above



Screenshot from *Theodore* above

The only noteworthy differences between the features that relate to notice of the arbitration clause at issue here and those at issue in *Cullinane* are that (1) the links to the "Terms and Conditions" and "Privacy Policy" here appear in blue text against a white backdrop, whereas in *Cullinane*, those links were in white text against a black backdrop (as indicated by the wide, horizonal arrows at the bottom of the boxes shown above), and (2) the notification to new users that they would be bound by the "Terms and Conditions" (including arbitration) and "Privacy Policy" when they created their account here is in black text against a white backdrop, whereas in *Cullinane*, it was in gray text against a white backdrop (again, as indicated by the narrow, diagonal arrows in the boxes shown above).

Apart from those two differences, the relevant features present in *Cullinane*, as analyzed by the First Circuit, were operative at the time Mr. Theodore created his account. For example, some of the other terms on the page were still in the same color as the hyperlink, including "enter promo code," and the links to the "Terms and Conditions" and "Privacy Policy" were still not the largest text on the screen. The hyperlinks also continued to appear without any underlining. Finally, as before, the Terms and Conditions were linked at the bottom of the screen and did not require an affirmative acknowledgment [7] from the prospective user that he or she was agreeing to be bound by the Terms and Conditions or the Privacy Policy by creating an Uber account.

7 For this reason, in my decision in *Cullinane*, I adopted Judge Weinstein's shorthand phrase "sign-in-wrap" to describe the online agreement, through which "a user is notified of the existence and applicability of a site's "terms of use" when proceeding through the website's sign-in or login process," but does "not require the user to click on a box showing acceptance... in order to continue." *Berkson* v. *Gogo LLC*, 97 F. Supp. 3d 359, 399 (E.D.N.Y. 2015); *see also Cullinane*, 893 F.3d at 61 n. 10 (adopting Judge Weinstein's "four general types of online contracts").

In *Cullinane*, the First Circuit grounded its determination that Plaintiffs lacked sufficient notice of the agreement based on the characteristics of the hyperlink itself and how it compared to other text on the screen. The Court observed that hyperlinks were generally blue and underlined, and "the presence of other terms on the same screen with similar or larger size, typeface..." did not render the agreement sufficiently conspicuous. While the Terms and Conditions in the agreement now before me appear in blue, but without underlining, the other characteristics that gave the First Circuit pause generally were found on the relevant Uber screen for Mr. Theodore.

The First Circuit has had one occasion to reflect further on the propositions for which *Cullinane* stands since it was decided in 2018. In *Bekele* v. *Lyft*, the court observed that *Cullinane* did not "substantially change" the applicable law and that the procedure for analyzing online contracts was and still is the *Ajemian* standard of "reasonably communicated and accepted." 918 F. 3d 181, 187 (1st Cir. 2019). The First Circuit also took the position that the importance of analyzing reasonable notice *in context* was clear before *Cullinane*. *Id.*

***6** In the meantime, the First Circuit's decision in *Cullinane* has received the attention of some legal scholars. It appears that *Cullinane* has been recognized as a paradigm of judicial reliance on analysis of the general context in answering questions regarding reasonable notice to consumers in online contracts of adhesion; but there appears to be little consideration in the academic literature of *Cullinane*'s more

particularized contextual requirements as a basis to satisfy adequate notice. *See, e.g.*, Nancy Kim, *Digital Contracts*, 75 BUS. LAW. 1683, 1692 (Winter 2019-20) (noting the First Circuit's emphasis on the "design and content" of the screen in question); Kevin Conroy & John Shope, *Look Before You Click: The Enforceability of Website and Smartphone App Terms and Conditions*, 63 BOS. BAR. J. 23, 23-24 (Spring 2019) (observing the "complicated and fact-intensive" inquiry associated with 'sign-in-wrap' agreements and *Cullinane*'s finding of inadequate notice based on the interface design); Mark Budnitz, *Touching, Tapping, and Talking: The Formation of Contracts in Cyberspace* 43 NOVA L. REV. 235, 277 n. 414-15 (Spring 2019) ("Even if there were more than a few appellate-level cases, it is questionable whether they could provide helpful guidance for legislators. Courts decide issues concerning contract formation based on a detailed examination of the content and format of the specific screens presented to the consumer in the case before the court.") The First Circuit's specific directives on how courts in this Circuit are to address these inquiries and what specific circumstances should be emphasized are, in any event, binding upon me when addressing reasonable notice for sign-in-wrap agreements.

Cullinane plainly provided both high level contextual analysis and micro-analysis of particular elements of that context. *Cullinane* as a whole has been characterized negatively by Judge Gutierrez, of the Central District of California. *West* v. *Uber Techs.*, No. CV 18-3001 PSG (GJSx), 2018 WL 5848903, at *4 (C.D. Cal. Sept. 5, 2018); *see also In re. Uber Techs., Data Security Breach Litig. Brittany Durgin* v. *Rasier, LLC*, No. CV 18-3169 PSG (GJSx), 2019 WL 6317770 at *4 (C.D. Cal. Aug. 19, 2019). With respect, I find Judge Gutierrez's view that "the *Cullinane* decision departs dramatically both from what other courts have found regarding Uber's registration process, and from the overall legal landscape regarding assent to online agreements" to be overstated. This overstatement appears to result from a failure to distinguish between the high level contextual analysis and the micro-analysis of particularized elements of the context. Nevertheless, in *Rasier*, 2019 WL 6317770 at *4, Judge Gutierrez adopted the *Meyer* approach, which was also expressly relied upon by *Cullinane*. *Cullinane*, 893 F.3d at 62, *supra* at 8 (citing *Meyer*).

In *Meyer*, the Second Circuit reversed and remanded the district court's denial of Uber's motion to compel arbitration, finding that a reasonably prudent smartphone user would understand the process of entering into contracts through smartphones apps. *Id.* at 77-79. The *Meyer* court specifically said that these users would recognize that "text that is highlighted in blue and underlined is hyperlinked to another webpage where additional information will be found." *Meyer*, 868 F.3d at 78. This approach essentially mirrors the First Circuit's focus in *Cullinane*. *See also*, Conroy at 23 ("This two-part test [from *Ajemian* and employed by the First Circuit in *Cullinane*] is consistent with the approach taken by other courts in the country. *E.g.*, *Meyer*..."). Indeed, the screen from *Meyer* appears to resemble the screen here closely. *See generally Meyer*, 868 F.3d at 81-82. Based on the guidance I have received from the First Circuit in *Cullinane*, I conclude the Terms and Conditions on the screen seen by Mr. Theodore when he created his Uber account were not conspicuous enough reasonably to communicate the existence or terms of the agreement. Therefore, Mr. Theodore cannot be bound by the mandatory arbitration provision.

B. Acceptance by Mr. Theodore

As a result of the want of legally sufficient notice to Mr. Theodore that under First Circuit law he was agreeing to be bound by the hyperlinked Terms and Conditions, which contained the mandatory arbitration clause at issue here, he could not have provided his "unambiguous consent to those terms." *Cullinane*, 893 F.3d at 64. Accordingly, Uber has not met its burden to justify compelling arbitration, and, under *Cullinane*, I must deny its motion seeking that relief because parties may not be compelled to arbitrate when they have not agreed to do so. *See*, *supra*, *Cullinane*, 893 F.3d at 60 (quoting *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)).

IV. CONCLUSION

***7** For the reasons outlined above,

I DENY Uber's Motion [Dkt No. 20] to compel arbitration. This case will follow the ordinary course of civil litigation in this court. The Clerk shall set the matter for a scheduling conference to chart the course toward resolution of this case.

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United States District Court, C.D. California.

Bradley WEST
v.
UBER TECHNOLOGIES, et al

Case No. 18-CV-3001-PSG-GJS
|
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Proceedings (In Chambers): The Court GRANTS Defendants' motion to compel arbitration

Philip S. Gutierrez, United States District Judge

***1** Before the Court is Defendants' Uber USA, Uber Technologies, Inc., and Rasier, LLC's ("Defendants" or "Uber") motion to compel arbitration. *See* Dkt. # 24 ("*Mot.*"). Plaintiff Bradley West ("Plaintiff") opposes, *see* Dkt. # 36 ("*Opp.*"), and Defendants replied, *see* Dkt. # 38 ("*Reply*"). The Court finds this matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78(b); L.R. 7-15. Having considered the moving papers, the Court **GRANTS** Defendants' motion to compel arbitration.

I. Background

Uber is a technology company that offers a smartphone application (the "Uber App") that connects riders ("Riders") looking for transportation to drivers ("Drivers") based on their location. *Mot.* 2. Uber offers the App as a tool to both Drivers and Riders in over 175 cities across the country. *Id.* Drivers and Riders must create an account operated by Defendants in order to use the service. Uber requires its users to provide personally identifiable information ("PII") upon registering as either a Driver or Rider via its website or mobile phone application. PII that Uber collects includes such information as names, email addresses, telephone numbers, dates of birth, credit card numbers, bank account numbers, Social Security numbers, driver's license numbers, and trip location histories. *See* Dkt. # 1, *Complaint* ("*Compl.*") ¶ 12.

A. Uber's Services Agreement

Uber's Services Agreement, to which a user must assent before using the service, contains an arbitration provision ("the Arbitration Agreement"). The Arbitration Agreement, which is prominently displayed in bolded, capitalized font on the first page of the Services Agreement, states:

> **PLEASE REVIEW THE ARBITRATION PROVISION SET FORTH BELOW CAREFULLY, AS IT WILL REQUIRE YOU TO RESOLVE DISPUTES WITH THE COMPANY ON AN INDIVIDUAL BASIS, EXCEPT AS PROVIDED IN SECTION 15.3, THROUGH FINAL AND BINDING ARBITRATION UNLESS YOU CHOOSE TO OPT OUT OF THE ARBITRATION PROVISION.**

Id. Ex. D (emphasis in original).

The Services Agreement also includes a clearly labeled "**Dispute Resolution**" provision, which states:

> You and [Uber] agree that any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof or the use of the Service or Application (collectively, "Disputes") will be settled by binding arbitration ....

DiMattina Decl. Ex. B (emphasis in original). This provision includes an agreement to resolve claims on an individual rather than class-wide basis, and to apply the American Arbitration Association Commercial Arbitration Rules ("AAA Rules"). *Id*. It also delegates to an arbitrator all questions about the enforceability and scope of the Arbitration Agreement. *Id*.

B. 2016 Data Breach and Present Litigation

In late 2016, users' PII was subject to a massive data security breach, in which hackers accessed Uber's data ("2016 Breach"). *Id*. Hackers obtained the names, emails, and phone numbers of Uber Drivers and Riders in the United States, as well as driver's license numbers for 600,000 Drivers. *Id*. Overall, the 2016 Breach affected approximately 600,000 Drivers' and 57 million Riders' PII. *Id*.

***2** Uber did not reveal the 2016 Breach for a full year. *Id*. ¶ 13. Uber released a statement on its website on November 21, 2017, publicly exposing details of the 2016 Breach for the first time. *Id*. ¶ 12. Plaintiff alleges that Uber failed to disclose that it had negotiated directly with the cyber attackers for a year to actively conceal the data breach from users and had compensated the hackers $100,000 for "assurances" that Uber users' stolen PII had been destroyed. *Id*. ¶ 13.

Plaintiff brings this action for himself and on behalf of a class defined as "all persons whose Private Information was accessed by the Security Breach." *Id*. ¶ 20. In the alternative, he brings the action on behalf of himself and "all persons in Illinois (and in those states with laws similar to the applicable law of Illinois) whose Private Information was accessed by the Security Breach." *Id*. ¶ 21.

He asserts causes of action for (1) violations of Illinois Consumer Fraud Act; (2) negligence; (3) breach of contract; (4) breach of implied covenant of good faith and fair dealing; (5) invasion of privacy by public disclosure of private facts; and (6) unjust enrichment. *See generally id*. On April 16, 2018, the Judicial Panel on Multidistrict Litigation consolidated the proceedings under the heading *In re: Uber Technologies, Inc., Data Security Breach Litigation*, and transferred the case to this Court. *See* Dkt. # 39.

Defendants move to compel arbitration, arguing that the arbitration provision ("the Arbitration Agreement") to which Plaintiff assented when he registered to become a Rider with Uber clearly delegates the action to an arbitrator. *See generally Mot*. Plaintiff argues that he was never on reasonable notice of the Arbitration Agreement, and thus did not assent to it. *See generally Opp*.

II. Legal Standard

"The 'principal purpose' of the FAA [Federal Arbitration Act] is to 'ensur[e] that private arbitration agreements are enforced according to their terms.' " *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)). The FAA states that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

The FAA allows "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States district court ... for an order directing that such arbitration proceed in the manner provided for in such agreement." *Id*. § 4. "Because the FAA mandates that 'district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed[,]' the FAA limits courts' involvement to 'determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue.' " *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008) (quoting *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000)) (emphasis in original). When deciding whether a valid arbitration agreement exists, courts generally apply "ordinary state-law principles that govern the formation of contracts." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Any doubts about the scope of arbitrable issues must be resolved in favor of arbitration. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).

***3** If an arbitration agreement exists and covers the dispute at issue, § 4 of the FAA "requires courts to compel arbitration in accordance with the terms of the agreement." *Concepcion*, 563 U.S. at 344 (internal quotation marks omitted).

III. Discussion

When deciding whether a valid arbitration agreement exists, courts generally apply "ordinary state-law principles that govern the formation of contracts." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). "Illinois law requires that a consumer be provided reasonable notice of all the terms

and conditions of an agreement as well as reasonable notice that, by clicking a button the consumer is assenting to the agreement." *Johnson v. Uber Techs., Inc*., 16 C 5468, 2017 WL 1155384, at *1 (N.D. Ill. Mar. 13, 2017).

Defendants correctly note that Plaintiff "does not contest that the Arbitration Agreement is enforceable; he does not dispute that his claims fall within the scope of that agreement; and he does not contest that the Arbitration Agreement delegates 'gateway' issues of enforceability and scope of the agreement to the arbitrator." [1] *Reply* 1. Rather, Plaintiff argues only that a valid contract between himself and Defendants was never formed. He states that he did not assent to the Arbitration Agreement in the first instance because he was never "on reasonable notice of the arbitration clause Uber seeks to enforce." *Opp*. 5.

1 The parties do not dispute that the Rider Terms contain an Arbitration Agreement that provides that an arbitrator "shall have exclusive authority to resolve any disputes relating to the interpretation, applicability, enforceability or formation of this Arbitration Agreement," including "all threshold arbitrability issues." *See* Dkt. 24-3, *Watkins Decl*. Ex. A.

A. Reasonable Notice

Plaintiff registered to become a Rider on March 2, 2014. *See* Dkt. # 24-2, *Declaration of Maxwell Watkins* ("*Watkins Decl*.") ¶ 6; Dkt. # 24-5, *Declaration of Naveen Narayanan* ("*Narayanan Decl*.") ¶ 5. He did so by accessing the App on a smartphone with an Android operating system. *See Narayanan Decl*. ¶ 6. The Terms and Conditions ("the Terms") in effect at the time Plaintiff registered were the May 2013 Terms. *See Reply* 4.

Plaintiff argues that "once the user navigates to the Link Payment screen, he is immediately prompted to input credit card information. The keyboard immediately pops up, obscuring the reference to Terms of Service." *Opp*. 5. Plaintiff does not allege that the Terms were obstructed or inconspicuous when he arrived at the payment screen, but that they *became* obscured after he began entering his credit card information, because the keypad blocked them from view. *See id*. 5–6.

At the time Plaintiff's rider account was created, the registration process for his Android-based Uber App involved three steps. *See Narayanan Decl*. ¶ 6 [2]. First, after successfully downloading the Uber App and clicking the "REGISTER" button, the user is prompted to enter his email address and mobile phone number, and to select a password. *Id*. ¶ 6(i) & Ex. A. The user can then advance to the second screen by clicking "NEXT." *Id*. On the second screen, the user is prompted to provide payment information. *Id*. ¶ 6(ii); Ex. B. This screen displays the following notice: "By creating an Uber account, you agree to the Terms of Service & Privacy Policy." *Id*. The words "Terms of Service & Privacy Policy" are contained within a stand-alone rectangular box. The user can click on this box, which takes him to a page featuring clickable buttons, including buttons entitled "Terms & Conditions" and "Privacy Policy." *Id*. ¶ 6(ii). When the user clicks the "Terms & Conditions" button, the Terms are displayed. *Id*.

2 The Court notes that declarations by Uber engineers relying on their personal knowledge have been routinely accepted by courts. *See, e.g*., *Cordas v. Uber Techs, Inc*., 228 F. Supp. 3d 985, 989 (N.D. Cal. 2017) (Uber engineer's declaration admissible despite "a litany of conclusory evidentiary objections").

***4** After the user enters payment information on the second screen, the user completes the registration process either by clicking "SAVE" in the upper-right corner of the screen, or by clicking "Done" on the Android keyboard. *Id*. ¶ 6(iv). When the user clicks "Done," the notice of Uber's Terms appear a second time before the registration process is complete. *Id*. ¶ 6(iv) & Ex. D.

Plaintiff relies on *Metter v. Uber Techs., Inc*., in which the court found that the pop-up keyboard could "obscure the terms of service alert before [the user had] time or wherewithal to identify other features of the screen, including the alert." *Metter v. Uber Techs., Inc*., No. 16-CV-6652-RS, 2017 WL 1374579, at *3 (N.D. Cal. Apr. 17, 2017). However, the plaintiff in that case used a different device running a different version of the Uber App from those used by Plaintiff. *See* Dkt. # 38-1, *Supplemental Declaration of Naveen Narayanan* ¶¶ 5, 9. In Plaintiff's registration process, the entire payment screen was visible when he arrived on it, making the Terms notice visible without scrolling. The notice did not disappear until Plaintiff affirmatively advanced to the keypad; even then, the Terms notice appeared again, a second time, before the registration process could be completed. *See Narayanan Decl*. ¶ 6(iv) & Ex. D.

Courts have found this registration process, on the same device used by Plaintiff, to provide reasonable notice of Uber's Terms because when the plaintiff arrived at the

payment screen, "the entire screen [was] visible at once." *Meyer v. Uber Techs., Inc.*, 868 F. 3d 66, 77–78 (2nd Cir. 2017); *Cordas v. Uber Techs., Inc.*, 228 F. Supp. 3d 985, 992 (N.D. Cal. 2017); *Cubria v. Uber Techs., Inc.*, 242 F. Supp. 3d 541, 548 (W.D. Tex. 2017).

Plaintiff also argues that Uber's Terms did not provide reasonable notice because they were in a gray, rectangular box with a black background that contained the phrase "Terms of Service & Privacy Policy." *Opp*. 6–7. The box is clickable and leads to a screen with more clickable buttons, including the Terms. *See Narayanan Decl*. ¶ 6(ii). Plaintiff argues that a reasonable user would not recognize that the Terms were accessible by clicking the box. *Id*. 7. Plaintiff points to the First Circuit's recent decision in *Cullinane v. Uber Techs, Inc*., 893 F.3d 53 (1st Cir. 2018), in which the court found the registration process for Riders did *not* afford users reasonable notice of the Terms. *See Cullinane*, 893 F.3d at 64. It held that a clickable button with white text reading, "The Terms of Service & Privacy Policy," enclosed in a rectangle, was not sufficiently conspicuous because it was not blue and underlined, and thus "did not have the common appearance of a hyperlink." *Id*. at 63.

The Court agrees with Defendants that the *Cullinane* decision departs dramatically both from what other courts have found regarding Uber's registration process, and from the overall legal landscape regarding assent to online agreements. *See* Dkt. # 7, *Defendant's Response to Plaintiff's Notice of Supplemental Authority* at 1. Clickable buttons come in all shapes and sizes, and courts properly apply a "reasonably prudent smartphone user" to the analysis. *See, e.g*., *Meyer*, 868 F.3d at 79 (holding that the Court "need not presume that [the reasonably prudent smartphone user] has never before encountered an app or entered into a contract using a smartphone" as "modern cellphones ... are now such a pervasive and insistent part of daily life."). The Court agrees with the holding in *Meyer* that a reasonably prudent smartphone user recognizes that a box with text inside labeled "Terms of Service" is clickable and would lead to a display of those Terms. As the *Cullinane* decision is not binding and departs from Ninth Circuit reasoning, the Court declines to adopt its position here.

B. When Terms Were Presented

***5** Plaintiff also argues that the Terms were presented to him only *after* he had completed the registration process, and "it cannot be inferred that his creation of an account manifested assent to unseen and unknown terms." *Opp*. 8. He argues that that the Terms were linked to the "Link Payment" screen, and that by the time he got to that screen, he had already created an account. *Id*. Language on that screen stating that "by creating an Uber account," the user was assenting to the Terms, cannot, then, have bound him. *Id*.

Uber characterizes this description of the registration process as "flatly wrong," and the Court agrees. *Reply* 6. Plaintiff could *not* have completed the registration process without agreeing to the Terms. *Id*. 7. Without completing every step of that process, Plaintiff could not have accessed the App and used Uber's services. Notice of the Terms and the fact that they would become binding upon completion of the process was provided on the "Link Payment" screen during the registration process; if Plaintiff had chosen *not* to input his credit card information, registration would not have been complete, and he would not have been bound by the Terms. As the Court in *Meyer* noted, "a reasonably prudent smartphone user would understand that the Terms were connected to the creation of a user account" when "notice of the Terms of Service is provided simultaneously to enrollment ...." *Meyer*, 868 F. 3d. at 78. Indeed, the process by which Plaintiff created a Rider account has been upheld by courts nationwide. *See id*. at 80; *Cordas*, 228 F. Supp.3d at 992; *Cubria*, 242 F. Supp. 3d at 548. The Ninth Circuit has also found reasonable notice where a user "is required to affirmatively acknowledge the agreement before proceeding with use of the" app or service, as Plaintiff was required to do here. *Nguyen v. Barnes & Noble Inc*., 763 F.3d 1171, 1176 (9th Cir. 2014).

C. Updated Terms

In addition to the registration process described above, Plaintiff also received an email on November 14, 2016 informing him of updates to the Arbitration Agreement; that email stated that continued use of the App would constitute agreement to the updated Terms. *Reply* 1–2; *Watkins Decl*. ¶ 9, Exs. D, E. The subject line of the email stated that Uber had updated its Terms of Use, and the body stated that Uber had "revised [the] arbitration agreement which explains how legal disputes are handled." The email provided a link to the updated Terms, and also explained that continued use of the App would confirm agreement to the updated Terms. *Watkins Decl*. ¶ 9, Exs. D, E.

Plaintiff continued using the App and Uber's services for a year after receiving that email, the last trip taking place on December 31, 2017. *See id*. ¶ 11. Courts have found that when consumers receive emails such as this one, continued use of the service or product constitutes assent to the updated

terms. *See Reply* 8; *In re Facebook Biometric Info. Privacy Litig*., 185 F. Supp. 3d 1155, 1167 (N.D. Cal. 2016) (finding updated terms of use enforceable where "plaintiffs accepted and agreed to the current terms by continuing to use Facebook after receiving" email notice of updated terms).

Plaintiff does not address this issue nor raise any argument in his opposition. *See Opp*. Arguments to which no response is supplied are deemed conceded. *See, e.g.*, *Tapia v. Wells Fargo Bank, N.A.*, No. CV 15-03922 DDP (AJWX), 2015 WL 4650066, at *2 (C.D. Cal. Aug. 4, 2015); *Silva v. U.S. Bancorp*, No. 5:10-cv-01854-JHN-PJWx, 2011 WL 7096576, at *3 (C.D. Cal. Oct. 6, 2011). For this additional reason, then, the Court determines that Plaintiff assented to the Terms, which included the Arbitration Agreement.

IV. Conclusion

***6** The Court determines that Plaintiff was on reasonable notice of Uber's Terms, which contain an Arbitration Agreement delegating all dispute resolution to an arbitrator. For the foregoing reasons, the Court **GRANTS** Defendants' motion to compel arbitration.

This case is **STAYED** pending completion of the arbitration. The case is also administratively closed and may be reopened by the filing of an ex parte application by any party.

IT IS SO ORDERED.

All Citations

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RULE 16 CERTIFICATION

I, Thomas R. Murphy, hereby certify that the forgoing brief complies with the rules of court, including, but not limited to:

Mass. R. App. P. 16(a)(13) (addendum);

Mass. R. App. P. 16(e) (references to the record);

Mass. R. App. P. 18 (appendix to the briefs);

Mass. R. App. P. 20 (form and length of briefs, appendices, and other documents); and

Mass. R. App. P. 21 (redaction).

I further certify, pursuant to Mass. R. App. P. 16(k), that the forgoing brief complies with the length limitation in Mass. R. App. P. 20 because it is printed in a proportional spaced font, Book Antiqua, at size 14 point, and contains 7,573 words in Microsoft Word 2013.

/s/ Thomas R. Murphy

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CERTIFICATE OF SERVICE

I certify that on the 17th day of April, 2020, I served the foregoing brief on the parties in this matter by electronic delivery via the efileMA system to their attorneys of record or, if such attorneys are not registered with efileMA or if such parties are *pro se* and not registered with efileMA, via Priority Mail. The attorneys served are:

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