AMERICAN ASSOCIATION FOR JUSTICE®
The Association for Trial Lawyers

October 27, 2023

Francis V. Kenneally, Clerk of Court
Supreme Judicial Court for the Commonwealth
John Adams Courthouse
One Pemberton Square, Suite 1400
Boston, Massachusetts 02108

Re: *Good v. Uber Technologies, Inc.*, SJC No. 13490

Dear Mr. Kenneally:

On behalf of the American Association for Justice (AAJ), formerly the Association of Trial Lawyers of America (ATLA), I write to adopt the position of amicus curiae Massachusetts Academy of Trial Attorneys (MATA) in support of Plaintiffs-Appellees and affirmance of the Superior Court's ruling in this case.

AAJ 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 members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions nationwide, including in Massachusetts. Throughout its more than 75-year history, AAJ has served as a leading advocate of the right of all Americans to seek legal recourse for wrongful conduct.

In *Kauders v. Uber Technologies*, 486 Mass. 557 (2021), this Court was presented with Uber's then-standard customer agreement, including its forced arbitration provision. MATA and AAJ together filed a brief as amici curiae, contending that Uber had failed to meet the ordinary contract prerequisites of conspicuous notice and unambiguous manifestation of agreement to terms that waived users' right to access to the courts and trial by jury. This Court agreed, holding that "the fundamentals of online contract formation should not be different from ordinary contract formation." *Id.* at 571. Specifically, "for there to be an enforceable contract, there must be both reasonable notice of the terms and a reasonable manifestation of assent to those terms." *Id.* at 572. This Court concluded that Uber failed to carry its burden of proof as to either prong. *Id.* at 579–81.


In the case currently before the Court, Uber seeks to enforce a post-*Kauders* version of its arbitration provision. MATA's amicus curiae brief to this Court sets forth in detail its concern that Uber has ignored this Court's instructions and continues to pursue a strategy of "contract-by-trickery."

AAJ wholeheartedly agrees with and adopts MATA's arguments in this case. This Court should affirm the order of the superior court.

Respectfully submitted,

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# Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. DOCKET NO. SJC-13490

WILLIAM GOOD,
*Plaintiff-Appellee,*

vs.

UBER TECHNOLOGIES, INC., RAISER, LLC, and JONAS YOHOU,
*Defendants-Appellants*.

On Appeal from Suffolk County Superior Court
Case No. 2284-cv-0173

***Amici Curiae* Brief for Massachusetts Academy of Trial Attorneys In Support of Plaintiff-Appellee**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to S.J.C. Rule 1:21, the Massachusetts Academy of Trial Attorneys states that it is a nonprofit, tax-exempt organization. It has no parent corporation, no publicly held corporation has ten percent or greater ownership in MATA and MATA does not issue stock.

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Massachusetts Academy of Trial Attorneys (the Academy) offers 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 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 Academy urges this Court to affirm that Uber disregarded the Supreme Judicial Court's ruling in *Kauders* v. *Uber Techs., Inc.*, designed its interface to trick riders into forfeiting their constitutional rights, and thus did not form a valid contract with Mr. Good that strips him of the ability to seek lawful redress for his injuries.

## RULE 17(c)(5) DECLARATION

Pursuant to Mass. R. App. P. 17(c)(5), the Academy states that no party or party's counsel authored this brief in whole or in part, and that no party, party's counsel, or other person or entity, other than the Academy, its members, or its counsel, contributed money that was intended to fund preparation or submission of the brief. Neither the Academy nor counsel of record for the Academy has represented any of the parties to the appeal in any proceedings involving similar issues, nor has it been a party or represented a party in a proceeding or transaction that is at issue in the present appeal.

## SUMMARY OF ARGUMENT

The case begins and ends with *Kauders* v. *Uber Techs., Inc.*, 486 Mass. 557 (2021); that decision provided Uber with specific, detailed, and binding instructions on how to form a valid, enforceable agreement under Massachusetts law. (pp. 14–17).

Yet Uber chose to disregard that guidance when it rolled out its updated terms of service—an update spurred by *Kauders* itself. Uber could have required Mr. Good to click on its terms of service and scroll through it before proceeding; it did not. Uber could have presented its purported

notice of its terms of service to riders on a page that did not address any other aspects of its service; it did not. It could have required users to click a conspicuous button reading "I agree" to the terms of use; but it did not. (pp. 17–22).

This raises a telling question: why not? After all, Uber has demonstrated that it knows quite well how to form a valid arbitration agreement in an electronic contract: it does so when its drivers sign up on its app. (pp. 28–31). To shed light on why Uber refuses to deploy its existing adequate driver interface to riders, this Court should examine what Uber gains from users' agreement to give up the right to a jury trial and how proper notice would undermine Uber's legerdemain. By getting users to arbitrate, Uber can suppress claims, minimize its liability, and financially punish riders determined enough to arbitrate. (pp. 31–37). On the other hand, if Uber were to provide riders with adequate notice—if it required its riders to read its claim-suppressing contractual terms—riders would be less likely to accept those terms, causing Uber to lose customers and money. (pp. 37–42).

Massachusetts residents "have the right to a trial by jury; and this method of procedure shall be held sacred" Mass. Const. Art. XV. This right is too important to be stripped away by Uber's chicanery. This Court should decline Uber's invitation to rewrite *Kauders* and refuse to empower Uber to divest consumers of their fundamental constitutional rights. The Academy joins Mr. Good in asking this Court to affirm the Superior Court's ruling. (p. 43).

## ARGUMENT

### I. Uber ignored, if not defied, the teachings of *Kauders*.

Not long ago, the Supreme Judicial Court gave Uber particularized and binding feedback about Uber's deficient attempts to shackle riders to an arbitration agreement. Uber then pushed an updated consent interface onto riders' phones. But that update failed to follow the Supreme Judicial Court's instructions.

#### A. *Kauders* provided Uber with explicit instructions for how to form an enforceable clickwrap contract.

*Kauders* adopted a "two-prong test" for judging the validity of online contracts. *Kauders*, 486 Mass. at 572. That test asks two distinct questions:

does a user have "reasonable notice of the terms," and has the user given "a reasonable manifestation of assent to those terms." *Id*.

"Reasonable notice" is a "fact-intensive inquiry" that balances the form of the contract presentation against users' reasonable expectations. *Id*. This requires consideration not only of "the interface by which the terms are being communicated" and "whether the notice conveys the full scope of the terms and conditions," but also whether "[r]easonable users" could discern from context that they were entering "a contractual relationship" at all. *Id*. at 573, 575.

Whether a party has reasonably manifested assent to terms depends on the "totality of the circumstances." *Id*. at 575. This requires courts to look askance at interfaces that purport to bind users to contractual terms using language other than "'I Agree' or its equivalent." *Id*. at 574. "Where the connection between the action taken and the terms is unclear, or where the action taken does not clearly signify assent, it will be difficult for the offeror to carry its burden to show that the user assented to the terms." *Id*. at 575.

In *Kauders*, the Supreme Judicial Court carefully explained why Uber's rider sign-up interface in 2013 and 2014 satisfied neither prong.

The Court gave three reasons why the agreement did not provide riders with reasonable notice of the terms of use. First, the Court explained that, because Uber's interface facilitated "short-term, small-money transactions . . . [,] [r]easonable users may not understand that, by simply signing up for future ride services over the Internet, they have entered into a contractual relationship." *Id*. Second, the Court found it "important[]" that "the interface did not require the user to scroll through the conditions or even select them." *Id*. at 576. A user could "fully" access Uber's services "without ever clicking the link to the terms and conditions." *Id*. And third, the interface did not focus solely on contract formation. It purported to combine notice of and assent to the terms of use with the process of inputting payment information. *Id*. at 577–578.

Although *Kauders*'s finding that Uber's sign-up interface did not provide "reasonable notice of the terms" meant that "a contract cannot have been formed," the Supreme Judicial Court went further to help Uber understand how flaws in the interface also "obscured the manifestation of assent . . . ." *Id*. at 579. The interface required users to click "DONE" after inputting payment information on a screen that also referenced the terms of use. *Id*. at 580. As *Kauders* explained, clicking "'DONE'" was "different

from, and less clear than, other affirmative language such as 'I agree,'" so "[t]he connection between the action and the terms was thus not direct or unambiguous." *Id*. at 580. Once again, the fact that Uber did not require users to open the terms of use was important:

> Uncertainty and confusion in this regard could have simply been avoided by *requiring* the terms and conditions to be reviewed and a user to agree. By obscuring this process, the app invited questions about whether the interface was designed to enable a user to sign up for services without requiring him or her to understand that he or she was contractually bound.

(Emphasis added). *Id*. at 580.

*Kauders*, therefore, provided Uber with clear instructions for creating an interface that reasonably provides notice and invites assent. First, provide more notice where it is less obvious that an online interaction would entail a binding contract. Second, require users to access and review the terms before proceeding. Third, dedicate the interface to only one thing: disclosing and obtaining assent to the terms. And fourth, present users with an "I agree" button ensuring that users understand the import of accepting the terms of a contract.

### B. Uber ignored *Kauders*'s express directive.

*Kauders* invalidated any agreements between Uber and consumers who had signed up as riders with Uber when its inadequate sign-up scheme was in effect. *Cf.* RA/241[1] (noting Uber conceded that "as of 2021, as a matter of law, [Mr.] Good had not entered an enforceable online contract with Uber"). In the months after *Kauders*, Uber scrambled to bind riders to its onerous terms of use. Those attempts are the focus of this litigation.

In April 2021, Uber deployed a pop-up interface that barred riders' access to its services until users interacted with the pop-up. RA/63–64. The top of this pop-up reads "We've updated our terms." RA/66. Near the center of the screen and in the most prominent font used in the interface, Uber advised: "We encourage you to read our updated Terms in full." *Id*. Below that appeared two hyperlinks: one labeled "Terms of Use," the other "Privacy Notice": a slightly larger font was used to display the hyperlink for the Privacy Notice than for the Terms of Use. *Id*. Near the bottom of the

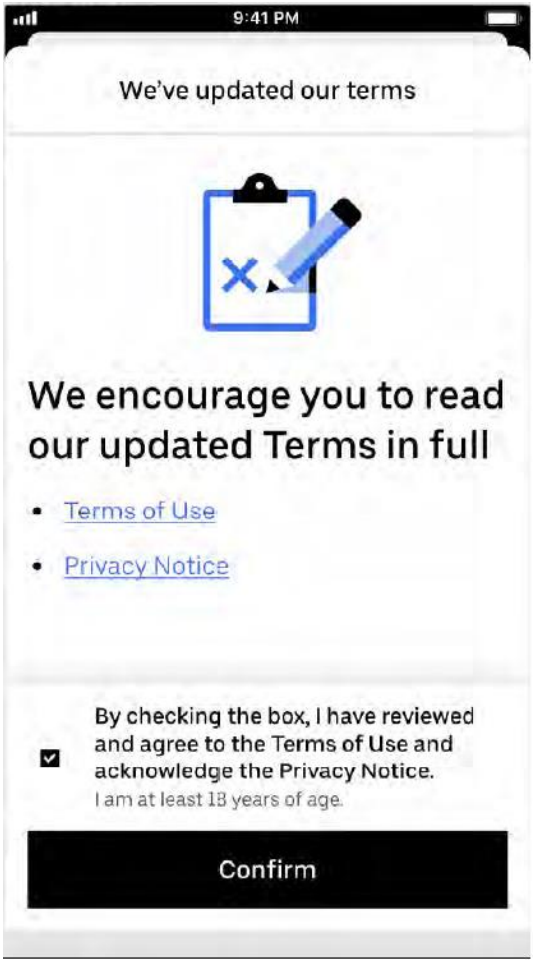
[1] Citations are: the Record Appendix as "RA/[page(s)]"; Good's Brief at "GoodBr/[page(s)]"; Uber's Brief as "UberBr/[page(s)]"; *amicus* Chamber of Commerce's Brief as "ChamberBr/[page(s)]."

screen, in far smaller and less prominent font size than the "encourage[ment]" above, Uber implemented a checkbox next to text reading "By checking the box, I have reviewed and agree to the Terms of Use and acknowledge the Privacy Notice." *Id*. A user could check the box without clicking on either of the hyperlinks.[2] RA/93.

Below the checkbox are the words "I am at least 18 years of age," and directly below that, a black button with white text reading "Confirm." RA/66. Users must check the box stating that they have read and agree to the terms before they can click "confirm" and hail a ride. RA/92.

[2] Uber, the party with the burden of establishing the validity and enforceability of the arbitration agreement, has cited no evidence demonstrating that Mr. Good ever clicked on either hyperlink. See *Kauders*, 486 Mass. at 572 ("[T]he burden of proof . . . is on Uber, the party seeking to enforce the contract"). Uber kept records of whether a user clicked "confirm," see RA/68; it could have, but chose not to, keep records of whether a user clicked on either hyperlink.

For his part, Mr. Good has sworn that it was his practice to "simply click the button that allowed [him] to continue using the app as quickly as possible so that [he] could request a ride." RA/149. Uber has not offered any evidence rebutting this fact.




RA/66.

Uber has once again designed an interface that "enables, if not encourages, users to ignore the terms and conditions." *Kauders*, 486 Mass. at 576. The 2021 pop-up interface defies each of the four rules provided in *Kauders*.

First, Uber disregarded *Kauders*'s admonition that more notice is required where it is less obvious that the parties are forming a binding contract. *Id*. at 573. Massachusetts riders could not be faulted for not

realizing that the pop-up—which suddenly appeared years after they first signed up for the app—was Uber's latest attempt to bind them to claim-suppressing arbitration terms. After all, Uber downplayed the significance of clicking both the check box and the "confirm" button. The 2021 pop-up told riders that the Terms of Use had just been "updated." RA/66. It did not disclose that, for riders like Mr. Good, this interface presented not updated terms, but a new offer to contract. A reasonable rider may have assumed that he or she was already bound by a contract with Uber, and the pop-up interface did nothing to correct that misimpression. In fact, it encouraged it.

Second, Uber ignored *Kauders*'s admonition to "require the user to scroll through the conditions" or, at the very least, "select them." *Kauders*, 486 Mass. at 576. The Supreme Judicial Court told Uber that requiring a user to access and review the terms of service is "important[]" in forming a valid online agreement. *Id*. at 576, 580. Yet even though validity issues could have "simply been avoided by *requiring* the terms and conditions to be reviewed and a user to agree," see *id*. at 580, Uber chose not to do so.

Third, Uber ignored *Kauders*'s concern for user confusion that arises with attempts to use an interface to multitask. Contrary to the Chamber's

arguments, the 2021 pop-up did not focus solely on obtaining consent to the terms of use; it also asked users to "confirm" that they are "at least 18 years of age." Compare ChamberBr/15 with RA/66.

Fourth, Uber ignores the importance of using "'I agree' or its equivalent" to demonstrate assent. *Kauders*, 486 Mass. at 574. "I agree," like "'I assent' has no meaning or purpose other than to indicate such assent." *Specht* v. *Netscape Communications Corp.*, 150 F. Supp. 2d 585, 595 (S.D.N.Y. 2001). Instead, Uber chose the cryptic "Confirm." RA/66. What are users confirming by clicking that button? That Uber "encourage[d]" users "to read [its] updated Terms in full"? *Id*. That the reader "reviewed and agree[d] to" the terms? *Id*. Or that they are "at least 18 years of age"? *Id*.

"Confirm," like "DONE," is, in this context, "less clear than" affirmative, unequivocal language like "'I agree.'" *Kauders*, 486 Mass. at 580. See *Specht*, 150 F. Supp. 2d at 595. Uber's choice of indirect and ambiguous language appears deliberate, even devious. "Confirm" is a logical response to the additional language on the page asking users to acknowledge that they are "at least 18 years of age." RA/66. Buried within the Terms of Use is a requirement that riders "must be at least 18 years of age . . . to obtain an Account." RA/75. If, as Uber argues, clicking a

checkbox next to the words "I have reviewed and agree to the Terms of Use" could bind a user, Uber's Br. 35, this age-requirement affirmation on the 2021 pop-up would be unnecessary. Adding it merely enabled Uber to use vague language ("Confirm" instead of "I agree") to obscure its attempts to trick riders into entering a contract. Because Uber chose, again, to use an interface that made "the connection between the action taken and the terms . . . unclear," it failed to "carry its burden to show that the user assented to the terms." *Kauders*, 486 Mass. at 575.

### C. To defend its disregard for the Supreme Judicial Court's instructions, Uber contorts *Kauders*'s reasoning and ignores one of the two *Kauders* prongs.

On appeal, Uber argues, belatedly,[3] that its 2021 pop-up notice complied with *Kauders*. UberBr/25–38. It claims that, because a user must acknowledge the disclaimer "I have reviewed and agree to the Terms of Use," the 2021 pop-up was, *ipso facto*, a "clickwrap" agreement,

[3] Uber did not raise its argument that its 2021 pop-up interface complied with *Kauders* in its motion to compel arbitration below, nor in its reply. See RA/54 (arguing in one sentence that *Kauders* did not apply); RA/112 (calling *Kauders* "inapplicable and outdated" because "*Kauders* involved an older version of the Uber App that has since been changed").

UberBr/32–37, and, therefore, unquestionably valid, UberBr/27–32. Nonsense.

### 1. Uber cannot fold *Kauders*'s two-pronged inquiry into one.

Uber claims that its 2021 pop-up provided "[r]easonable notice" because "the interface . . . 'requir[ed] [Good] to click a box stating that [he] agree[d] to a set of terms . . . .'" (alterations in original). UberBr/35, quoting *Kauders*, 486 Mass. at 575. Yes, *Kauders* did criticize Uber's old interface because it allowed a rider to "create an account without ever affirmatively stating that he or she agreed to the terms and conditions[.]" *Kauders*, 486 Mass. at 580. But it did so when addressing whether Uber's old interface obtained a reasonable manifestation of assent, see *id*. at 579–580, not whether it provided reasonable notice, *id*. at 575–579.

Reasonable notice and reasonable manifestation of assent are two distinct inquiries; both must be shown to prove the existence of a contract. *Cf. id*. at 572. An "electronic 'click' can" ("can," not "does") "suffice to signify the acceptance of a contract"—but only "so long as the layout and language of the site give the user reasonable notice[.]" *Sgouros* v. *TransUnion Corp.*, 817 F.3d 1029, 1033–1034 (7th Cir. 2016). Terms of use

"will not be enforced where there is no evidence that the website user had notice of the agreement," *Berkson* v. *Gogo, LLC*, 97 F. Supp. 3d 359, 401 (E.D.N.Y. 2015), because the validity of an online agreement interface "puts a reasonably prudent user on inquiry notice of the terms of the contract." *Nguyen* v. *Barnes & Noble, Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014). Assent means nothing if a user has no notice of the terms. See *Ranchau* v. *Rutland R. Co.*, 43 A. 11, 13 (Vt. 1899) (absent evidence that a party "had knowledge of the conditions" of the agreement, "his assent thereto will not be implied").

Uber conflates the two-prong test in *Kauders* by recycling evidence that could indicate assent (the second prong) as evidence that it gave reasonable notice (the first). But Uber cannot escape the conclusion that its 2021 pop-up interface defies *Kauders*'s edict to provide reasonable notice to users, including Mr. Good. This Court should reject Uber's attempt to ignore or, at best, rewrite *Kauders*.

**2. Uber cannot satisfy the fact-intensive notice inquiry by branding its pop-up "clickwrap."**

Uber ignores *Kauders*'s admonition that reasonable notice is "'clearly a fact-intensive inquiry.'" *Kauders*, 486 Mass. at 573, quoting *Myer* v. *Uber*

*Techs., Inc.*, 868 F.3d 66, 76 (2d Cir. 2017). Uber argues that "*Kauders* held that clear and simple 'clickwrap' agreements to arbitrate are enforceable," so its 2021 pop-up, which it characterizes as a "clickwrap agreement," therefore "created an enforceable contract." UberBr/23. That argument relies upon an underlying assumption that, if Uber just calls the 2021 pop-up a "clickwrap" agreement, then that agreement must be valid.[4] This is, at best, a flawed tautology.

Courts can presume clickwraps valid. See, *e.g.*, *Gaker* v. *Citizens Disability, LLC*, U.S. Dist. Ct., No. 20-CV-11031, 2023 WL 1777460, at *8 (D. Mass. Feb. 6, 2023). Clickwrap agreements may be "regularly enforced." *Kauders*, 486 Mass. at 574. But their validity is not, as Uber suggests, a foregone conclusion.

[4] Uber argues that *Kauders* "involved a 'browsewrap' agreement," not a clickwrap agreement. UberBr/20. See *id*. at 31. So does Uber's *amicus*, the Chamber of Commerce. See, *e.g.*, ChamberBr/20 (arguing *Kauders* involved "a passive browsewrap"). In *Kauders*, however, Uber (and its counsel there, now counsel for the Chamber, see *id*. at 6) argued vehemently that the interface was a "'clickwrap' agreement and not a 'browsewrap' agreement." ReplyBr/6, *Kauders* v. *Uber Techs., Inc.*, No. SJC-12883 (filed Jan. 29, 2020). See, *e.g.*, ReplyBr/21 (arguing sign-up interface was "a clickwrap agreement," and "superior court's description of the smartphone registration process as a 'browsewrap agreement' was wrong").

As multiple courts have told Uber, "[c]lassification of web-based contracts alone . . . does not resolve the notice inquiry." *Meyer* v. *Uber Techs., Inc.*, 868 F.3d 66, 76 (2d Cir. 2017). The question of "[w]hether an interface provides reasonable notice," does not "turn on the classification of the agreement as a scrollwrap, clickwrap, browsewrap, or sign-in wrap agreement[.]" *Sarchi* v. *Uber Techs., Inc.*, 268 A.3d 258, 268–269 (Me. 2022).

Clickwrap interfaces that fail to provide adequate notice are invalid. In *RealPage, Inc.* v. *EPS, Inc.*, 560 F. Supp. 2d 539 (E.D. Tex. 2007), for example, a court acknowledged that a purported agreement was a "clickwrap" agreement and that Texas law "recognizes the validity of clickwrap agreements." *Id*. at 545. Yet it found no valid agreement existed because the clickwrap described "three types of licenses" but provided "no indication" of which of the three applied. *Id*. at 546. In other words, the clickwrap interface failed to provide adequate notice of the terms. Other courts have reached similar conclusions in the face of ambiguity or inadequate notice. See, *e.g.*, *Pennhall* v. *Young Living Essential Oils*, U.S. Dist. Ct., No. 20-cv-617, 2022 WL 3716928, at *5 (D. Utah Aug. 29, 2022) (finding inconsistent terms "indicate[d] that there was no meeting of the minds"); *Grosvenor* v. *Qwest Communications, Int'l*, U.S. Dist. Ct., No. 09-cv-2848, 2010

WL 3906253, at *8 (D. Colo. Sept. 30, 2010) (finding ambiguous terms failed to provide adequate notice). *Cf. Hine* v. *LendingClub Corp.*, U.S. Dist. Ct., No. 22-cv-362, 2022 WL 16950409, at *5 (W.D. Pa. Nov. 15, 2022) (ordering discovery into "how the Arbitration Agreements were presented," despite use of clickwrap).

### 3. Uber's reasoning here cannot be squared with *Kauders*.[5]

Both of Uber's arguments—that adding a click box provides adequate notice and that calling the pop-up a "clickwrap" agreement makes it so—ask this Court to ignore the first half of the two-pronged *Kauders* test. The first argument seeks to substitute questionable evidence of assent for non-existent evidence of notice. The second seeks to reduce the first prong to a question of the label Uber slaps on its 2021 pop-up. Both defy *Kauders*'s mandate.

## II. Uber knows how to form a valid electronic contract when it wants to.

Uber's decision not to present riders with a valid opportunity to contract is galling considering that it knows how to, and does so in other

[5] The Academy focuses principally on the question of reasonable notice here, but joins Mr. Good's brief insofar as it explains how the 2021 pop-up also failed to obtain a user's manifestation of assent. See GoodBr/39–42.

contexts. Uber's interface for its drivers has, since long before *Kauders*, provided ample notice and permitted a reasonable manifestation of assent. *Kauders*, 486 Mass. at 576–577, 579–581.

Prospective drivers are instructed that they "MUST" review the "CONTRACTS" imposed by Uber. *Singh* v. *Uber Techs. Inc.*, 235 F. Supp. 3d 656, 666 (D.N.J. 2017). That is, they are required (not just "encourage[d]," RA/66) to review the agreements governing their use of the app.[6] *Singh*, 235 F. Supp. 3d at 666. They must then twice agree to be bound by those terms. After clicking "Yes, I agree" under a prompt to "CONFIRM THAT [THEY] HAVE REVIEWED ALL THE DOCUMENTS AND AGREE TO ALL THE NEW CONTRACTS," *id*., prospective drivers encounter "a second screen" stating "please confirm that you have reviewed [*sic*] all the documents and agree

[6] Those terms, once accessed, warn prospective drivers that agreeing to forfeit their rights to a jury trial and instead to engage in lopsided arbitration is an "**IMPORTANT BUSINESS DECISION**" that warrants careful consideration of "**THE CONSEQUENCES OF [THE] DECISION**," and encourage the driver to consult an attorney. *Singh*, 235 F. Supp. 3d at 666. No such admonitions (much less in CAPITAL **BOLDFACE** LETTERS) appear in Uber's terms of use for riders.

to all the new contracts,"[7] *Okereke* v. *Uber Techs., Inc.*, U.S. Dist. Ct., No. 16-cv-12487, 2017 WL 6336080, at *2 (D. Mass. June 13, 2017). See *Capriole v. Uber Techs., Inc.*, U.S. Dist. Ct., No. 19-cv-11941, 2020 WL 1536648, at *2 (D. Mass. Mar. 31, 2020).

As *Kauders* explained to Uber, "[i]t is by no means obvious" that the simple act of hailing a ride "would be accompanied by the type of extensive terms and conditions present here." *Kauders*, 486 Mass. at 575. *Kauders* and common sense thus require more express disclosure of a contract where it is less obvious that a transaction is burdened by contractual terms. *Id.* at 573, 575.

But instead, Uber does the opposite. It provides conspicuous notice to would-be drivers during a sign-up process that a reasonable person would

[7] Courts in almost three dozen cases have found that this driver sign-up interface created a valid, enforceable agreement. See, *e.g., Singh*, 235 F. Supp. 3d at 661; *Capriole*, 2020 WL 1536648, at *5; *Mwithiga* v. *Uber Techs., Inc.*, 376 F. Supp. 3d 1052, 1061 (D. Nev. 2019); *O'Callaghan* v. *Uber Corp. of Cal.*, U.S. Dist. Ct., No. 17-cv-2094, 2018 WL 3302179, at *7 (S.D.N.Y. July 5, 2018); *Mohammed* v. *Uber Techs., Inc.*, U.S. Dist. Ct., No. 16-cv-2537, 2018 WL 1184733, at *7 (N.D. Ill. Mar. 7, 2018); *Okereke*, 2017 WL 6336080, at *6; *Saizhang Guan* v. *Uber Techs., Inc.*, 236 F. Supp. 3d 711, 726–727 (E.D.N.Y. 2017); *Geraci* v. *Uber Techs., Inc.*, U.S. Dist. Ct., No. 21-cv-07-151, 2021 WL 5028368, at *2 (Del. Super. Ct., Oct. 29, 2021). The Academy has found no case holding to the contrary.

expect to lead to an employment relationship. It requires prospective drivers to access the terms, it calls those terms a "CONTRACT," and it requires prospective drivers to "AGREE" to those terms; not once but twice. *Id.* at 576–577. As the Supreme Judicial Court observed, Uber "knows how to obtain clear assent to its terms." *Id.* at 580. Yet Uber provides less clear disclosure in circumstances where it is less obvious that a transaction would be subject to extensive, burdensome contractual terms. Hailing a ride is the sort of "short-term, small-money transaction[]" in which "[r]easonable users may not understand that . . . they have entered into a contractual relationship." *Id.* at 575.

Nowhere has Uber explained why it chose to provide robust disclosure and ample opportunity to its drivers, but not to its riders. Not in its *Kauders* brief. See Uber's Br., *Kauders* v. *Uber Techs., Inc.*, No. SJC-12883 (filed Jan. 29, 2020), Doc. No. 3 (never referencing driver interface). Not in its *Kauders* reply brief. Reply Br., *Kauders* v. *Uber Techs., Inc.*, No. SJC-12883 (filed Jan. 29, 2020), Doc. No. 5 (same). Not at oral argument in *Kauders*.[8]

[8] During the *Kauders* argument, Uber refused to answer when Justice Kafker asked: "What do we make of the fact that, with the drivers, there is an elaborate agreement process, and with the users, there's no . . . formal

Not in its motion to compel arbitration below. RA/43–59. Not in its reply. RA/112–116. Not even in its briefing here. See generally UberBr.

## III. Uber's defiance of the Supreme Judicial Court betrays its dogged pursuit of contract-by-trickery, rather than contract-by-notice-and-assent.

Uber's intransigence is flummoxing. It has refused to comply fully with *Kauders*. It has not deployed the sign-up interface the Supreme Judicial Court has hailed as adequate for its drivers. Instead, it appears to have sought to do what it believes is the bare minimum.

"I agree to the terms and conditions" has been called "The Biggest Lie on the Internet." See generally Obar & Oeldorf-Hirsch, The Biggest Lie On the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services, 18 Info., Communication & Soc'y 1 (2018). Uber appears happy to exploit that lie. Balancing what Uber stands to lose by providing adequate notice and opportunity for assent with what Uber stands to gain by engaging in its contract-by-trickery lays bare Uber's ruse.

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requirement of hitting the word, Agree or Accept?" Oral Argument 15:52 – 17:25, *Kauders* v. *Uber Techs., Inc.*, No. SJC-12883 (Sept. 10, 2020), https://boston.suffolk.edu/sjc/pop.php?csnum=SJC_12883.

### A. Tricking consumers into an arbitration agreement allows Uber to evade the consequences of its actions.

Forced arbitration clauses with class action waivers, like the one at issue here, are ubiquitous: conservative estimates predict that more than 800 million arbitration provisions permeate our everyday lives. Szalai, The Prevalence of Consumer Arbitration Agreements by America's Top Companies, 52 U.C. Davis L. Rev. Online 233, 234 (2019). Binding customers to an arbitration clause of which they are unaware can put a (very heavy) thumb on the scales of justice against consumers, make pursuit of a claim economically impossible, or even suppress the claim entirely. This has led one scholar to exclaim, "let's stop calling it 'mandatory arbitration,' that bloodless, hypertechnical, and misleading term . . . . It is claim-suppressing arbitration. It is designed and intended to suppress claims, both in size and number." Schwartz, Claim-Suppressing Arbitration: The New Rules, 87 Ind. L.J. 239, 239 (2012).

First, large companies that force consumers to arbitrate are motivated by the fact that few consumers bring such arbitrations.[9] Despite the

[9] This is due, at least in part, to the fact that most claim-suppressing arbitration clauses include a class action waiver. See *id*. at 242 ("[B]arring

pervasive use of arbitration agreements, only 6,000 consumer-versus-corporation arbitrations occur each year. Am. Ass'n Justice, The Truth About Forced Arbitration at 12 (Sept. 2019), bit.ly/43drPbV. For example, in a five year period from 2014 to 2018, Amazon, with 101 million Prime subscribers, faced only fifteen consumer arbitrations; General Motors sold 40 million vehicles yet faced five consumer arbitrations; and Wal-Mart served 275 million customers per week yet faced two consumer arbitrations. *Id*. at 12.

These low arbitration rates do not suggest that consumers have no claims to pursue: over two million small claims cases were filed each year from 2012 to 2017. Nat'l Center for State Courts, State Court Caseload

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class actions has become a primary factor in companies' choice to use pre-dispute arbitration."). This type of clause "operates to immunize a corporation from liability for consumer fraud because individual claims are too uneconomical to pursue." See Goldstein, The Federal Arbitration Act and Class Action Waivers in Consumer Contracts: Are These Waivers Unenforceable?, 63 Disp. Resol. J. 54, 59 (2008). Uber's terms of use at issue here contain just such a claim-suppressing clause. RA/71. While Mr. Good's suit for catastrophic personal injuries as a result of Uber's negligence is not the sort of claim that would be pursued as a class or suppressed as uneconomical, ruling for Uber here would have the effect of suppressing most of the typical claims against Uber. See, *e.g.*, *Ortega* v. *Uber Techs. Inc.*, U.S. Dist. Ct., No 15-cv-7387, 2017 WL 1737636, at *1 (E.D.N.Y. May 2, 2017) (addressing Uber drivers' claim to recoup inflated service fees).

Digest: 2017 Data 4 (2019), bit.ly/3JESnvF (summarizing data from thirty-seven states for which data existed). Rather, it reflects the cold reality that "[o]nce blocked from going to court as a group, most people dropped their claims entirely." Greenberg & Gebeloff, Arbitration Everywhere, Stacking the Deck of Justice, N.Y. Times (Oct. 31, 2015).

Second, arbitration decreases consumers' chances of winning. A 2019 study by the American Association for Justice (AAJ) scrutinized arbitration data from the two major arbitration providers, the American Arbitration Association and JAMS. Over a five-year period, consumers prevailed in just 6.3 percent of arbitrations. The Truth About Forced Arbitration, *supra* at 15. That is just 382 consumers per year: "More people are struck by lightning each year in the United States." *Id*. This is *not* a reflection on the merits of consumers' claims: in court, plaintiffs prevail 56 percent of the time. 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 if consumers win an arbitration, the process does not make them whole. In arbitration disputes initiated by companies, the companies recovered ninety-one cents for every dollar of damages claimed;

in disputes initiated by consumers, 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), bit.ly/3rFdAzk.

Fourth, compounding consumers' dismal chances of winning is the risk of ruinous fees foisted upon consumers. The Supreme Court may believe that arbitration is cost-efficient, see, *e.g.*, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 345 (2011), but there is no evidence that it is cost-efficient when it comes to pre-dispute take-it-or-leave-it consumer adhesion contracts. Arbitration removes a consumer's claims from the judicial system where judges, personnel, and physical infrastructure are funded by taxpayers. Instead, private arbitration requires parties to purchase services from a for-profit arbitration administrator, pay for the arbitrator's time, rent a hearing room, and pay for all needed ancillary services.

And there is more: arbitration eschews our justice system's default rule that each party bears its own legal costs. While some corporations may claim they will pay the arbitration costs, they often do not. Bland, Bait and Switch: Many Corporations Promise to Pay Arbitration Fees, But Don't,

Public Justice (Mar. 25, 2014), bit.ly/3XEBJBT. That is how one consumer who initiated an arbitration against Fairfield Imports Three LLC for $60,000 lost the arbitration, and then was charged $600,000 for Fairfield's attorneys' fees. The Truth About Forced Arbitration, *supra* 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. Sometimes, even when consumers 'win,' they lose, such as a homeowner who took Advantage Contractor Solutions to arbitration claiming $300,000, won one-tenth of that, and saw that pyrrhic victory eviscerated by an order to pay a $52,000 arbitration fee. *Id*. at 17–18. Overall, consumers claimed an average of $170,000 per case, won an average of just $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.

Finally, arbitration confers an unfair advantage on companies, even when they lose. "Because arbitrations are essentially confidential and set no precedents . . . each arbitration is an island unto itself, not governed by any prior arbitration outcomes and incapable of having an effect on any future arbitration." Abraham & Montgomery, The Lawlessness of Arbitration, 9 Conn. Ins. L.J. 355, 360 (2003). A company that forces consumers to

arbitration thus "gets as many bites at the apple as it wishes," arguing and re-arguing meritless positions in successive litigations "without being bound by prior precedent." *Id*. at 364.

### B. Providing adequate notice decreases Uber's odds of binding users to coercive contract terms.

Given the allure of the claim-suppressing effect of forced arbitration clauses, one would think Uber would want to be sure its arbitration clause sticks. But the more users are alerted to the terms, the more they object to them.

As Uber well knows, "most of those registering via mobile applications do not read the terms of use or terms of service included with the applications." *Kauders*, 486 Mass. at 578. An empirical study shows that "only one or two in 1,000 shoppers," or 0.2 percent, read terms and conditions. Bakos et al., Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts, 43 J. Legal Studies 1, 3 (2014).

Failure to read terms and conditions can have grave results. See *Kauders*, 486 Mass. at 576. In April 2010, online game seller Gamestation added a provision to its terms: "By placing an order via this website on the first day of the fourth month of the year 2010 *Anno Domini*, you agree to

grant Us a non-transferable option to claim, for now and forever more, your immortal soul." An opt-out link below this term revealed this as an April Fools' joke,[10] and rewarded "vigilant" users who found the link with a £5 voucher. Seventy-five hundred people made purchases from Gamestation that day; not one clicked the link. Nobody reads terms and conditions: it's official, Out-Law News (Apr. 19, 2010), bit.ly/46CIc4K. See Sandle, Report finds only 1 percent reads 'Terms & Conditions', Digital Journal (Jan. 29, 2020), bit.ly/449cVVm (describing study in which proposed terms requiring user to forfeit "[t]he naming rights to their first born child," "[p]ermission to give their mom full access to their browsing history," and obligation to "'invite' a personal FBI agent to Christmas dinner for the next 10 years").

Several factors contribute to non-readership. Almost a quarter of users who do not read online terms of service complain that they have no choice but to accept the terms if they want to use an online service. Nearly

[10] Gamestation's terms may have been a joke; but Uber's are no laughing matter. Its onerous terms "literally require an individual user to sign his or her life away." *Kauders*, 486 Mass. at 576. Uber's terms purport to "disclaim[]" any liability for "PERSONAL INJURY" "RELATED TO, IN CONNECTION WITH, OR OTHERWISE RESULTING FROM ANY USE OF THE SERVICES, *REGARDLESS OF THE NEGLIGENCE ... OF UBER*." (emphasis added). RA/79.

a fifth believe the terms do not meaningfully affect them. And nearly another fifth expressed apathy about the terms. Plaut & Bartlett, Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements, 36 Law & Hum. Behav. 293, 296 (2012). Studies show, however, that users are more likely to read and scrutinize clickwrap agreements if these assumptions are challenged.

Professors Bartlett (a law professor) and Plaut (a psychologist) studied how the presentation of terms and conditions influences readership. They presented several versions of a fictitious clickwrap agreement for a made-up music download website and monitored how study participants engaged with the hyperlinked terms and conditions. *Id*. at 299–302.

A control group received a milquetoast "statement" about a hyperlinked agreement on a registration webpage:

> Your use of this service is expressly conditioned upon your acceptance of our Terms of Use set forth on the following page. Please read it carefully. Click below to continue to the Terms of Use."[11]

*Id*. at 300.

[11] This admonition, as bland as it was, still provided a stronger admonition than Uber provided to Mr. Good. See RA/66.

To test how the assumption that the terms of use were irrelevant, leading to user apathy, an experimental group was shown a slightly modified registration-page statement:

> Your use of this service is expressly conditioned on your acceptance of our Terms of Use as set forth on the following page. Please read it carefully. *It contains important information concerning your ability to use this service, legal rights that YOU have against US, and legal rights that WE have against YOU.* Click below to continue to the Terms of Use.

(Emphasis added) *Id*. Users who were told on the registration page that the terms affected their legal rights spent almost twice as long reading the terms of use than those who were not. *Id*. at 302. The more that users read the terms of use, the better they understood them. *Id*. at 303.

More importantly, however, Professors Bartlett and Plaut discovered "a strong positive association between readership and . . . rejection" of the terms of use. Of the 240 study participants, thirteen rejected the terms of use due to "concern[s] with various provisions in the" terms. *Id*. at 304. All thirteen had read the terms. *Id*. at 304. In other words, 100 percent of people who did not read the terms of use blindly consented to them; and encouraging users to read the terms decreased the likelihood that they would accept them.

"At the heart of" Uber's 2021 pop-up design, then, "is a concern over lost sales." Marks, Online Terms as *In Terrorem* Devices, 78 Md. L. Rev. 247, 259 (2019). Each step Uber interposes, "such as a checkbox or pop-up screen," between a rider and the ability to hail a ride, may cause some consumers not to proceed with the service. *Id*. at 260.

This may explain Uber's reticence to provide sufficient notice of its Terms of Use. The provisions that scared off participants in Professors Plaut and Bartlett's study concerned privacy practices. See Plaut & Bartlett, *supra* at 304. Uber's Terms of Use raise similar privacy concerns: they allow Uber to sell personal data, including riders' locations, to third parties. RA/75; Uber, Privacy Policy, bit.ly/3NDw4aR. That may deter some riders. But Uber's terms are even worse. Reasonable users could also be wary of a contract term that strips them of their right to bring Uber to court or to prosecute small-dollar claims in an economically rational fashion through a class action. RA/71. And any reasonable user would be concerned after reading that the Terms of Use claim to absolve Uber from any liability for grave personal injury or even death. RA/79.

If Uber provided more robust notice of its Terms of Use, more riders would scrutinize those terms. More riders scrutinizing those terms would

lead to at least some of them refusing to use Uber's services. See Plaut & Bartlett, *supra* at 302-303. Uber would lose money.

Perhaps that is why Uber has refused to explain why it has not deployed its driver app interface to give reasonable notice to users. Uber, like other online businesses, is "perfectly capable of designing [its interface] to incorporate active, as opposed to passive, assent by consumers." It chooses not to because more "[a]ctive forms of assent could cost [Uber] money." Marks, *supra* at 260.

## CONCLUSION

*Kauders* rejected a regime under which Uber could lull consumers into forfeiting their right to a jury trial—a move that would mean most claims would never be redressed—as contrary to Massachusetts law. Uber then chose to ignore *Kauders*, doubling down on its attempts to trick riders into onerous contractual terms.

Uber's post-*Kauders*'s pop-up interface is opaque where the Supreme Judicial Court requires transparency. This Court should not allow a litigant to thumb its nose at Massachusetts' highest Court; it should reject Uber's quest to form a contract under these ambiguous conditions and hold that Uber's 2021 pop-up interface again failed to form a valid, binding contract.

Respectfully submitted,

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Dated: September 18, 2023

# ADDENDUM

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United States District Court, D. Massachusetts.

John CAPRIOLE, individually and on behalf of all others similarly situated, Plaintiff,

v.

UBER TECHNOLOGIES, INC., and Dara Khosrowshahi, Defendants.

Civil Action No. 1:19-cv-11941-IT
|
Signed 03/31/2020

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MEMORANDUM AND ORDER

TALWANI, D.J.

***1** Plaintiff John Capriole brings this action, on his own behalf and on behalf of drivers who have worked in Massachusetts for Defendant Uber Technologies, Inc. (Uber), based on Uber's alleged misclassification of drivers as independent contractors.[1] For the reasons that follow, Defendants' Motion to Transfer Venue [#12] to the United States District Court for the Northern District of California pursuant to 28 U.S.C. § 1404(a) and a forum selection clause is ALLOWED, and Defendants' Emergency Motion for a Stay of All Proceedings Pending Resolution of their Motion to Transfer [#53] is DENIED as moot. The court defers ruling on Plaintiff's Emergency Motion for a Preliminary Injunction [#42] and Plaintiff's Motion for Leave to File Second Amended Complaint [#43].

I. Procedural History

Plaintiff filed this putative class action, on his own behalf and on behalf of similarly situated Uber drivers in Massachusetts, under the Massachusetts Wage Act, M.G.L. c. 149, §§ 148, 148B, and M.G.L. c. 151, §§ 1, 1A, and the Uniform Declaratory Judgment Act, 28 U.S.C. §§ 2201, et seq., alleging misclassification and non-payment of minimum wage and overtime.[2]

Defendants responded with a Motion to Compel Arbitration and to Stay Proceedings [#10] and a Motion to Transfer Venue [#12]. Defs.' Mot. to Transfer Venue 9, n.2 [#12].

While these motions were pending, Capriole amended his complaint in light of the ongoing COVID-19 pandemic to add a claim alleging violations of the Massachusetts Earned Sick Time Law, M.G.L. c. 149, § 148C. Am. Compl. [#40]. Plaintiff also filed



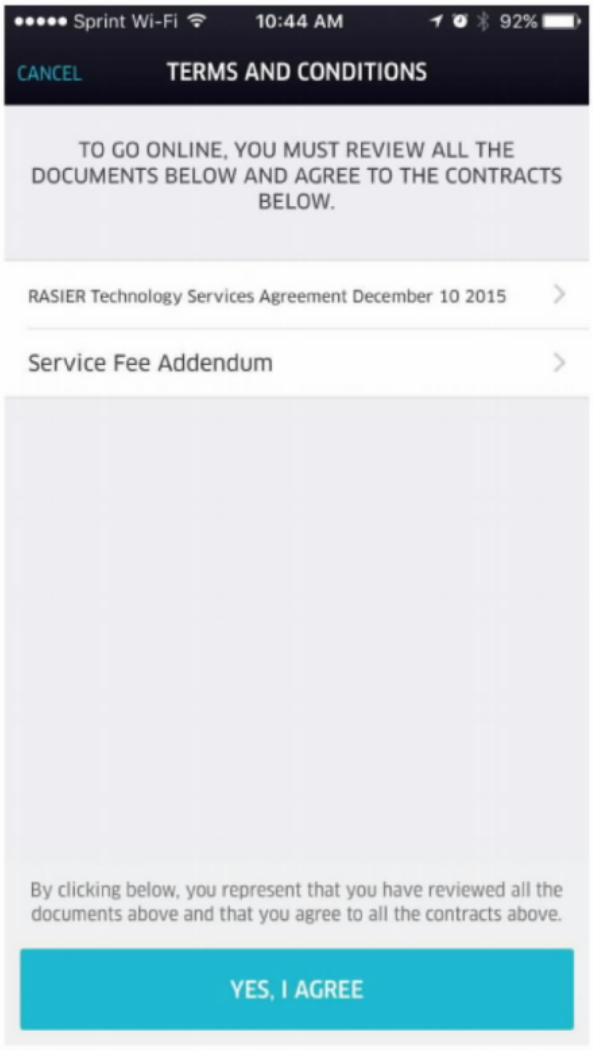
an Emergency Motion for a Preliminary Injunction [#42] based on the sick leave claim[3] and a Motion for Leave to File Second Amended Complaint [#43] to add additional plaintiffs.[4]

Defendants subsequently filed a Notice [#47] withdrawing their Motion to Compel Arbitration and to Stay Proceedings [#10] on the ground that it was moot because the Amended Complaint [#40] superseded the Complaint [#1] to which it was directed.[5] Defendants also filed their Emergency Motion for a Stay of All Proceedings Pending Resolution of their Motion to Transfer [#53].[6]

II. Background

***2** Uber is a ridesharing company that uses a smartphone application ("Uber App" or "App") to allow customers to hail rides. Boggs Decl. ¶ 5 [#13]. To become an Uber driver, an individual must download the App and agree to Uber's Technology Services Agreement ("Agreement") with Raiser, LLC, a subsidiary of Uber. Boggs Am. Decl. ¶ 3 [#33-1].

In 2016, when drivers first opened the App, they were presented with the following screen:




Id. at ¶ 6; Ex. 2 – Screenshot (Boggs Am. Decl.) [#33-1].

At the top, the screen read "TO GO ONLINE, YOU MUST REVIEW ALL THE DOCUMENTS BELOW AND AGREE TO THE CONTRACTS BELOW." Boggs Am. Decl. ¶ 6 [#33-1]. Drivers had the option of clicking on two links in black typeface, either the "RAISER Technology Services Agreement December 10 2015" or the "Service Fee Addendum." Id. At the bottom of the page, a large blue button was presented to drivers with white typeface stating, "YES I AGREE." Id.; Ex. 2 – Screenshot (Boggs Am. Decl.) [#33-1]. In smaller letters above the blue button, the screen read "[b]y clicking below, you represent that you have reviewed all the documents above and that you agree to all the contracts above." Id.

After a driver clicked the "Yes I Agree" button, a new box popped up in the middle of the screen, which read "PLEASE CONFIRM THAT YOU HAVE REVIEWED ALL THE DOCUMENTS AND AGREE TO ALL THE NEW CONTRACTS." Id. ¶ 7; Ex. 3 – Screenshot (Boggs Am. Decl.) [#33-1]. Drivers at this point had the option of clicking "No" or "Yes I Agree." Id.

If a driver clicked the "RAISER Technology Services Agreement December 10 2015" link, the Agreement opened. Ex. 1 at 1 (Boggs Am. Decl.) [#33-1].[7] At the beginning of the Agreement, the document stated:

> 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.

Ex. 1 at 1 (Boggs Am. Decl.) [#33-1].[8]

Section 15.1 of the Agreement included a forum selection clause and a choice of law provision, stating:

> The choice of law provisions contained in this Section 15.1 do not apply to the arbitration clause contained in Section 15.3, such arbitration clause being governed by the Federal Arbitration Act. Accordingly, and except as otherwise stated in Section 15.3, the interpretation of this agreement shall be governed by California law, without regard to the choice or conflicts of law provisions of any jurisdiction. Any disputes, actions, claims or causes of action arising out of or in connection with this Agreement or the Uber Services that are not subject to the arbitration clause contained in Section 15.3 shall be subject to the exclusive jurisdiction of the state and federal courts located in the City and County of San Francisco, California.

***3** Id. at § 15.1 [#33-1].

The Agreement also contained an arbitration provision, which stated, in relevant part:

> This Arbitration Provision will require you to resolve any claim that you may have against the Company or Uber on an individual basis, except as provided below, pursuant to the terms of the agreement unless you choose to opt out of the Arbitration Provision.
>
> ...
>
> (i) This Arbitration Provision is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (the "FAA") and evidences a transaction involving interstate commerce. This Arbitration Provision applies to any dispute arising out of or related to this Agreement or termination of the Agreement ...
>
> **Except as it otherwise provides, the Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before any forum other than arbitration ... Except as it otherwise provides, 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 § 15.3 (emphasis in the original) [#33-1].



The Agreement also contained a delegation clause, stating:

> Except as provided in Section 15.3(v), below, regarding the Class Action Waiver, 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.

Id. at § 15.3(i) [#33-1].

The Agreement also included a class action waiver, which read:

> **You and the Company agree to resolve any dispute that is in arbitration on an individual basis only, and not on a class, collective action, or representative basis ("Class Action Waiver"). The Arbitrator shall have no authority to consider or resolve any claim or issue any relief on any basis other than an individual basis. The Arbitrator shall have no authority to consider or resolve any claim or issue any relief on a class, collective, or representative basis.** Notwithstanding any other provision of this Agreement, the Arbitration Provision or the JAMS Streamlined Arbitration Rules & Procedures, disputes regarding the enforceability, revocability or validity of the Class Action Waiver may be resolved only by a civil court of competent jurisdiction and not by an arbitrator. In any case in which (1) the dispute is filed as a class, collective, or representative action and (2) there is a final judicial determination that all or part of the Class Action Waiver [is] unenforceable, the class, collective, and/or representative action to that extent must be litigated in a civil court of competent jurisdiction, but the portion of the Class Action Waiver that is enforceable shall be enforced in arbitration.

Id. at § 15.3(v) (Boggs Am. Decl.) [#33-1].

***4** Capriole began working as an UberX[9] driver in March or April 2016. Capriole Decl. ¶ 4 [#16-8]; Boggs Decl. ¶ 16 [#13]. Capriole clicked "Yes, I Agree" on Uber's Agreement on March 27, 2016, on both the first page and on the pop-out box. Boggs Am. Decl. ¶ 11 [#33-1].

Drivers had the option to opt out of the arbitration agreement within 30 days of registering by sending an email or letter to Uber. Id. at ¶ 15.3(viii) [#33-1]. Capriole did not opt out. Boggs Am. Decl. ¶ 12 [#33-1].

As part of his work, Capriole brought passengers to and from Logan Airport in Boston. Capriole Decl. ¶ 6 [#16-8]. He also drove passengers over state lines into New Hampshire, Rhode Island, and Maine. Id. ¶ 7.

III. Motion to Transfer Venue [#12]

Defendants argue that Capriole's agreement to a forum selection clause requires that this case be transferred to the Northern District of California. Defs' Mot. to Transfer Venue 2 [#12] (citing Ex. 1 at § 15.1 (Boggs Am. Decl.)) [#33-1]).[10] Plaintiff responds that: 1) Capriole's statutory claims are not covered by the forum selection clause and therefore transfer, if considered at all, should be governed solely by factors under 28 U.S.C. § 1404(a); 2) transfer is not warranted under the 1404(a) factors, including public interest factors; 3) the forum selection clause is not enforceable because it was not reasonably communicated; and 4) extraordinary circumstances exist that disfavor transfer. Pl.'s Opp'n to Mot. to Transfer Venue 3-10 [#15]. For the reasons that follow, the court finds that Capriole's action is subject to transfer.

A. Plaintiff Entered into an Agreement that Contains an Enforceable Forum Selection Clause Covering the Plaintiff's Claims Under Massachusetts Wage Act

Under Massachusetts law, a forum selection clause is enforceable if it was "reasonably communicated and accepted." Ajemian v. Yahoo!, Inc., 83 Mass. App. Ct. 565, 573 (2013). For online agreements, courts must consider "the language that was used to notify users that the terms of their arrangement with [the company] 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. at



575. "Clickwrap" agreements, where a user checks or clicks a box to agree to contractual terms are generally enforced. Wickberg v. Lyft, Inc., 356 F.Supp. 3d 179, 183 (D. Mass. 2018).

In Cullinane, the First Circuit held that Uber's arbitration agreement – an iteration applicable to customer users of the App – was not reasonably communicated to and accepted by customers and therefore, those customers were not bound by the arbitration agreement. Cullinane v. Uber Techs., Inc., 893 F.3d 53, 62-64 (1st Cir. 2018). See also Theodore v. Uber Techs., Inc., 2020 WL 1027917 at *3-4 (D. Mass. Mar. 3, 2020) (finding, based on Cullinane, that plaintiff was not bound by Uber's arbitration agreement).

***5** Applying Ajemian, the Cullinane court considered whether the online agreement provided "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms." 893 F.3d at 62 (quoting Ajemian, 83 Mass. App. Ct. at 574). The court first noted that Uber's agreement did not require users to click a button to accept the terms, but instead allowed for acceptance through a "notice of deemed acquiescence." Id. The court also noted other general methods that internet companies use to make terms conspicuous to users, including "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," id., and noted that Uber did not follow these procedures. Id. at 63. Based on these facts, the court determined that Uber's agreement was not reasonably communicated and agreed upon, and therefore was unenforceable. Id. at 62.

Capriole argues that Uber's agreement as presented to drivers in 2016 is substantially similar to the agreement in Cullinane. However, critical differences exist. Here, when Capriole first signed up for the Uber App and logged on, he was presented a screen that instructed him that "TO GO ONLINE, YOU MUST REVIEW ALL THE DOCUMENTS BELOW AND AGREE TO THE CONTRACTS BELOW." Boggs Am. Decl. ¶ 6 [#33-1]; Ex. 2 (Boggs Am. Decl.) [#33-1]. Below this instruction were hyperlinks to two documents, including the Agreement. Boggs Am. Decl. ¶ 6 [#33-1]. At the bottom of the page, in order to continue to use the App, Capriole had to click a large blue button that said "YES, I AGREE." Id. In response to clicking the button, a pop-out box was presented to Capriole reading "PLEASE CONFIRM THAT YOU HAVE REVIEWED ALL THE DOCUMENTS AND AGREE TO ALL THE NEW CONTRACTS" and Capriole had to choose between Yes I Agree and No. Id. ¶ 7. Uber has submitted evidence that Capriole clicked both buttons to agree to the Agreement on March 27, 2016, at 5:04 p.m. Id. ¶ 11.

Uber may have been better served by using a blue hyperlink for the Agreement as the First Circuit suggested in Cullinane. 893 F.3d at 63 ("Though not dispositive, the characteristics of the hyperlink raise concerns as to whether a reasonable user would have been aware that the gray rectangular box was actually a hyperlink"). However, the other aspects of how Uber communicated its Agreement to Capriole conform with First Circuit precedent and with Ajemian's definition of reasonable communication in the context of clickwrap agreements. See Bekele v. Lyft, Inc., 918 F.3d 181, 187 (1st Cir. 2019) ("The reasonable notice standard has governed online contracts across jurisdictions since the early days of the internet, and the inquiry has always been context and fact-specific."). Uber provided notice of the existence of the Agreement using capital letters, gave the opportunity to Capriole to read the Agreement prior to assent, and did not allow Capriole to move forward with using the App until Capriole agreed, twice, that he had reviewed the Agreement and agreed to the contract. Furthermore, unlike in Cullinane where there was no opportunity for customers to affirmatively accept the agreement, Uber has provided proof that Capriole clicked to agree. Boggs Am. Decl. ¶ 11 [#33-1].

Therefore, following the aforementioned Massachusetts and First Circuit precedent, the Agreement was reasonably communicated to Capriole and he manifested his assent.

B. The Forum Selection Clause Covers the Disputes Here

"[I]t is the language of the forum-selection clause itself that determines which claims fall with its scope." Rivera v. Centro Medico de Turabo, Inc., 575 F.3d 10, 19 (1st Cir. 2009). Here, the forum selection clause provides that "[a]ny disputes, actions, claims or causes of action arising out of or in connection with this Agreement or the Uber Services that are not subject to the



arbitration clause contained in Section 15.3 shall be subject to the exclusive jurisdiction of the state and federal courts located in the City and County of San Francisco, California." Ex. 1 at § 15.1 (Boggs Am. Decl.) [#33-1].

***6** Plaintiff contends his Wage Act claims "do not arise out of or in connection with Plaintiff's contract with Uber." Pl.'s Opp'n to Mot. to Transfer Venue 4 [#15]; see also id. at 6 n.3 (asserting statutory wage-and-hour claims do not "arise out of" a contract). Defendants respond that the language of the forum selection clause is sufficiently broad to encompass Plaintiff's Wage Act claims as they are claims "in connection to" Capriole's use of Uber Services. Defs' Reply in Support of Mot. to Transfer Venue 6-7 [#21].

"[C]ourts describe the phrase ... 'in connection with' ... to mean simply connected by reason of an established or discoverable relation." Huffington v. T.C. Group, LLC, 637 F.3d 18, 22 (1st Cir. 2011) (quoting Coregis Ins. Co. v. Am. Health Found., Inc., 241 F.3d 123, 128-29 (2d Cir. 2001)). "Uber Services" are defined in the contract as "Uber's on-demand lead generation and related services licensed by Uber to Company that enable transportation providers to seek, receive and fulfill on-demand requests for transportation services by Users seeking transportation services." Ex. 1 at § 1.13 (Boggs Am. Decl.) [#33-1]. The forum selection clause thus covers disputes related to Capriole's use of the Uber App as a driver. Therefore, the forum selection clause reaches claims that are brought "in connection to" Capriole's relationship with Uber. Since Capriole asserts that he has been misclassified by Uber based on their relationship, the court concludes that the forum selection clause encompasses Capriole's claims.

The court notes that there is an additional dispute subject to the forum selection clause, namely, Plaintiff's contention that Uber drivers are transportation workers, and that the arbitration provision of the Agreement is not enforceable under the Federal Arbitration Act. Pl.'s Opp'n to Mot. To Transfer Venue 1 [#15]; Pl.'s Opp'n to Mot. to Compel Arbitration and to Stay Proceedings 6-12 [#16]. A court, rather than an arbitrator, must resolve that issue. See New Prime Inc. v. Oliveira, 139 S. Ct. 532, 538 (2019) ("a court should decide for itself whether § 1's 'contracts of employment' exclusion applies before ordering arbitration."). Under the forum selection clause, the determination of whether the arbitration provision is enforceable should be made in San Francisco, California.

C. Neither the Public Interest nor Extraordinary Circumstances Bar Transfer to Address the Motion to Compel Arbitration

District courts should transfer a case, pursuant to a valid and enforceable forum selection clause upon a party's motion under 28 U.S.C. § 1404(a) unless "extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer." Atl. Marine Const. Co., Inc. v. U.S. Dist. Court for W. Dist. of Tex., 571 U.S. 49, 52 (2013). In evaluating a motion to transfer based on a forum selection clause, the court may give "no weight" to the plaintiff's choice of forum and no consideration to arguments about parties' private interests. Id. at 63-64. Instead, the court "may consider arguments about public-interest factors only." Id. at 64. These include " 'the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; [and] the interest in having the trial of a diversity case in a forum that is at home with the law.' " Id. at 62, n.6 (quoting Piper Aircraft v. Reyno, 454 U.S. 235, 241 n.6 (1981)). Plaintiff bears the burden of showing that public interests "overwhelmingly disfavor a transfer." Id. at 67.

***7** Although Plaintiff has not argued that court congestion or similar administrative matters would disfavor transfer, the court is reluctant to burden another District with a transferred case (particularly one with an emergency motion for a preliminary injunction pending) in light of the unprecedented staff shortages and delays throughout the courts as a result of the COVID-19 pandemic. The court also sees some efficiencies in resolving the issues here, where the court has recently resolved a motion to compel arbitration presenting similar legal issues, see Cunningham v. Lyft, Inc., No. 1:19-cv-11974-IT, 2020 WL 1323103 (D. Mass. Mar. 20, 2020), and briefing is almost complete in that case on a similar emergency motion for a preliminary injunction. Accordingly, this factor disfavors transfer to some degree.

Plaintiff argues against transfer in the interest of having localized controversies decided at home. Here, Plaintiff lives and works in Massachusetts, claims a violation of Massachusetts law, seeks to represent a class comprised only of Massachusetts workers, seeks injunctive relief that would apply to Massachusetts based workers, and argues that the public is harmed by



Uber's alleged violations of the Wage Act. That the controversy is of local import is underscored by the recent filing of an amicus brief by the Attorney General for the Commonwealth, in which she contends that "misclassification remains particularly prevalent throughout the transportation sector, including for those based here in Massachusetts." Amicus Curiae Brief of the Mass. Attorney General in Support of Pl.'s Emergency Motion for Preliminary Injunctive Relief 2 [#46]. Accordingly, this factor also disfavors transfer to some degree.

On "the interest in having the trial of a diversity case in a forum that is at home with the law," Plaintiff raises no argument, and the court knows of none as to why the Northern District of California would not be able to apply Massachusetts law as to arbitrability under Massachusetts law or with regard to the Wage Act Claims. This is also suggested by a case with similar facts, where the California court faithfully applied Massachusetts law when considering plaintiffs' classification claims brought under the Massachusetts Wage Act. Yucesoy v. Uber Techs., Inc., 109 F.Supp. 3d 1259, 1261-62, 1269-70 (N.D. Cal. 2015); see also Atencio v. TuneCore Inc., 2017 WL 10059254 at *3-4 (C.D. Cal. Aug. 17, 2017) (applying Massachusetts law when analyzing claim brought under the Massachusetts Wage Act). Thus, there is no indication that Capriole will not have his substantive rights protected under Massachusetts law if the case is transferred to the Northern District of California. Accordingly, this factor does not weigh against transfer.

In sum, while the court finds that the public interest disfavors transfer, it does not find that to be overwhelmingly so. That said, nothing in this Memorandum and Order would bar the judge in the Northern District of California (who will be better acquainted with the administrative matters in that District) from reconsidering the issue, and as appropriate, returning the matter to Massachusetts.

IV. Impact on Plaintiff's Pending Appeal

The court considers the impact a transfer may have on Plaintiff's right to appellate review of the order denying Plaintiff's motion for injunctive relief. Mem. and Order [#41]; Notice of Appeal [#51]. If the First Circuit finds the denial of a preliminary injunction to have been in error, a remand to correct that decision may be frustrated if the case has been transferred.

The court presumably could stay the action and transfer pending resolution of the appeal to safeguard Plaintiff's appellate rights here. However, a stay would prevent those aspects of the case not involved in the appeal from moving forward.

***8** This conundrum can be resolved, however, as this court's Memorandum and Order [#41] was issued less than thirty days ago. The court sees no reason why Plaintiff could not file a timely Notice of Appeal of the Memorandum and Order [#41] to the Ninth Circuit.

V. Conclusion

Accordingly, for the aforementioned reasons, the court deems the forum selection clause to be valid and enforceable. Therefore, Defendants' Motion to Transfer Venue [#12] is ALLOWED and Defendants' Emergency Motion for a Stay of All Proceedings Pending Resolution of their Motion to Transfer [#53] is DENIED as moot. The court defers ruling on Plaintiff's Emergency Motion for Preliminary Injunction [#42] and Plaintiff's Motion for Leave to File Second Amended Complaint [#43]. The clerk shall transfer this action to the United States District Court for the Northern District of California.

IT IS SO ORDERED.

**All Citations**

Not Reported in Fed. Supp., 2020 WL 1536648

Footnotes



1 Plaintiff also names Defendant Dara Khosrowshahi, as President and Chief Executive Officer of Uber.

2 Capriole also filed a motion for a preliminary "public injunction." Pl.'s Mot. for Injunctive Relief [#4]. The motion was briefed before the current COVID-19 pandemic and does not address allegations of individual or class-wide harm posed by the pandemic. Plaintiff has filed a Notice of Appeal [#51] of the Memorandum and Order [#41] denying this motion.

3 Plaintiff's counsel's Local Rule 7.1(a) certification states that Defendants oppose the relief requested. [#42]. The court has ordered Defendants to file their response by April 3, 2020, and has granted their emergency request to file an oversized brief. Elec. Orders [#49], [#55].

4 Plaintiff's counsel's Local Rule 7.1(a) certification states that Defendants oppose the relief requested. Pl.'s Mot. for Leave to File Second Am. Compl. 5 [#43]. Defendants have not yet filed their opposition to this motion.

5 Defendants state further that they intend to file a new motion to compel arbitration of Plaintiff's claims in the First Amended Complaint. Notice ¶ 3 [#47].

6 Defendants' counsel's Local Rule 7.1(a) certification states that Plaintiff opposes the relief requested. Defs' Emergency Mot. to Stay Proceedings 12 [#53]. Plaintiff has not yet filed his oppositions to this motion.

7 The Agreement attached as Ex. 1 is dated December 11, 2015. It was the only Agreement presented to drivers between December 11, 2015 and November 2019. Boggs Am. Decl. ¶ 3 [#33-1].

8 "Uber Services" is defined in the Agreement as "Uber's on-demand lead generation and related services licensed by Uber ... that enable transportation providers to seek, receive and fulfill on-demand requests for transportation services by Users seeking transportation services; such Uber Services include access to the Driver App and Uber's software, websites, payment services ... and related support service systems." Id. at § 1.13 [#33-1].

9 UberX is a version of Uber that connects riders with drivers in more "cost-effective" vehicles. Boggs Decl. ¶ 8 [#13].

10 Defendants also assert that transfer is warranted because Plaintiff's counsel has a parallel case currently pending in the Northern District of California, Colopy v. Uber Techs. Inc., Civ. A. No. 3:19-CV-06462-EMC, and therefore transfer would "promote administrative efficiency." Defs' Mot. to Transfer Venue 1 [#12].

2023 WL 1777460
Only the Westlaw citation is currently available.
United States District Court, D. Massachusetts.

Heather GAKER, Plaintiff,

v.

CITIZENS DISABILITY, LLC, Defendant.

Case No. 20-CV-11031-AK

|

Signed February 6, 2023

**Synopsis**

**Background:** Consumer brought action against telemarketer, alleging violations of Telephone Consumer Protection Act (TCPA) based on telemarketer's seven calls to consumer's cell phone after obtaining her information from marketing vendor which operated website used by consumer. Parties cross-moved for summary judgment.

**Holdings:** The District Court, A. Kelley, J., held that:

[1] telemarketer did not obtain prior express written consent to contact consumer, and

[2] statutory damages would not be trebled.

Plaintiff's motion granted; defendant's motion denied.

West Headnotes (13)

**[1]** **Summary Judgment** Purpose

The purpose of summary judgment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. Fed. R. Civ. P. 56.

**[2]** **Telecommunications** Permission or Consent

A defendant who establishes that a consumer consented to receive telemarketing calls is not liable for a violation of the Telephone Consumer Protection Act (TCPA). Communications Act of 1934 § 227, 47 U.S.C.A. § 227(c); 47 C.F.R. § 64.1200(c)(2)(ii).

**[3]** **Telecommunications** Advertising, canvassing, and soliciting; telemarketing

The defendant bears the burden of proof to establish that the consumer consented to receive telemarketing calls under the Telephone Consumer Protection Act (TCPA), and lack of consent is not an element that the consumer must prove to establish her cause of action. Communications Act of 1934 § 227, 47 U.S.C.A. § 227(c); 47 C.F.R. § 64.1200(c)(2)(ii).



**[4]** **Contracts** Necessity of assent

**Contracts** Acceptance of Offer and Communication Thereof

In order to form contract online under Massachusetts law, user of online interface must have been given reasonable notice of terms of agreement and must have made reasonable manifestation of assent to those terms.

**[5]** **Contracts** Acceptance of Offer and Communication Thereof

Under Massachusetts law, a user of an online interface is given reasonable notice of the terms of an agreement, as required for formation of online contract, when the user has actual notice of its terms, such as would be case if that party had reviewed those terms or must somehow interact with terms before agreeing to them.

**[6]** **Contracts** Acceptance of Offer and Communication Thereof

Under Massachusetts law, a party seeking to enforce online contract against a user of an online interface may satisfy requirement that the user be given reasonable notice of the terms of the agreement if the totality of circumstances indicates that user was provided with such notice of terms.

**[7]** **Contracts** Acceptance of Offer and Communication Thereof

Under Massachusetts law, the question of reasonable notice of terms, as required to form online contract, is whether offeror has reasonably notified a user that there are terms to which the user will be bound and has given the user the opportunity to review those terms.

**[8]** **Copyrights and Intellectual Property** Technology and software agreements

Under Massachusetts law, the most robust form through which a website may establish assent by an online user to terms of an online contract is a "clickwrap agreement," by which a user is required to expressly and affirmatively manifest assent to an online agreement by clicking or checking a box that states that the user agrees to the terms and conditions, and such agreements are regularly enforced.

**[9]** **Copyrights and Intellectual Property** Technology and software agreements

For purposes of determining whether an online contract has been formed, "browsewrap agreements" do not require a user to check a box indicating assent, but merely post terms and conditions of use on the website, typically as a hyperlink at the bottom of the screen.

**[10]** **Copyrights and Intellectual Property** Technology and software agreements

A "browsewrap agreement" attempts to bind a user to terms of an online contract simply because the terms appear on a page the user visited, with no further showing that the user read or agreed to the terms.

1 Case that cites this headnote

**[11]** **Copyrights and Intellectual Property** Technology and software agreements



Under Massachusetts law, browsewrap agreements are often unenforceable because there is no assurance that the online user was ever put on notice of the existence of the terms or the link to those terms.

**[12]** **Telecommunications** Do-not-contact lists; unsubscribing

Marketing vendor's website, from which telemarketer obtained information entered by consumer who used it, did not clearly and conspicuously disclose that, by entering personal information and clicking button which read "CONFIRM YOUR ENTRY," consumer was consenting to be contacted by vendor's marketing partners, including telemarketer, and thus, telemarketer did not obtain prior express written consent to contact consumer seven times, on cell phone registered in national do not call list, in violation of Telephone Consumer Protection Act (TCPA); terms indicating consent to be contacted were located at bottom of page, below confirmation button, in smaller font than other language on page, and appeared in blue font against blue background, and totality of page strongly indicated intent to distract reasonable users from terms. Communications Act of 1934 § 227, 47 U.S.C.A. § 227(c); 47 C.F.R. § 64.1200(c)(2)(ii).

1 Case that cites this headnote

**[13]** **Telecommunications** Advertising, canvassing, and soliciting; telemarketing

Telemarketer's violations of Telephone Consumer Protection Act (TCPA), in contacting consumer's cell phone which was registered in national do not call list, were not willful or made in knowing violation of regulations implementing TCPA, and thus, statutory damages awarded to consumer would not be trebled, where telemarketer believed it had consumer's express written consent when it placed offending calls. Communications Act of 1934 § 227, 47 U.S.C.A. § 227(c)(5)(B).

**Attorneys and Law Firms**

Craig Thor Kimmel, Jacob U. Ginsburg, Pro Hac Vice, Kimmel & Silverman, PC, Ambler, PA, for Plaintiff.

Liam C. Floyd, Stanzler Levine, Boston, MA, Richard E. Levine, Stanzler Levine, LLC, Wellesley, MA, for Defendant.

**MEMORANDUM AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT**

A. KELLEY, District Judge

***1** This is a consumer protection action brought pursuant to the Telephone Consumer Protection Act ("TCPA"). The plaintiff, Heather Gaker ("Ms. Gaker") alleges that defendant Citizens Disability, LLC ("Citizens") violated the TCPA by placing telemarking calls to her cell phone without her prior consent despite her being on the Do Not Call Registry. Citizens argues that Ms. Gaker consented to receive such calls. The parties have cross-moved for summary judgment.

**I. BACKGROUND**

In evaluating the cross motions for summary judgment, the Court relies upon Ms. Gaker's response [Dkt. 77] to Citizens' statement of undisputed material facts [Dkt. 66, "Def. SMF"], and Citizens' response [Dkt. 74] to Ms. Gaker's statement of undisputed material facts [Dkt. 70, "Pl. SMF"]. All facts admitted by both parties are deemed true, and all facts contested by one party are deemed to be in dispute pending trial.



**a. Uncontested Facts**

Ms. Gaker is a Boynton Beach, Florida resident with a recognized disability who has received Supplemental Security Income benefits since 2015. [Pl. SMF ¶¶ 1–2]. On or around November 15, 2019, Ms. Gaker registered her cell phone number on the Do Not Call Registry. [Id. ¶ 4].

Citizens is a Massachusetts for-profit corporation which assists persons with disabilities in claiming benefits from the Social Security Administration, deriving its revenue from contingency fees from awarded benefits. [Id. ¶ 6; Def. SMF ¶ 1]. Citizens relies on telemarketing to reach potential clients. [Pl. SMF ¶ 7]. Approximately 40 to 50 percent of Citizens' "leads" are generated through Digital Media Solutions, a marketing vendor. [Id. ¶ 7; Def. SMF ¶ 3]. A "lead" typically includes an individual's name, telephone number, mailing address, and email address. [Def. SMF ¶ 4]. After receiving a "lead," Citizens confirms that the individual's IP address is within the United States before placing a telemarketing call, but does not use two-factor authentication to confirm the lead. [Pl. SMF ¶¶ 25–27]. The corporate designee of Citizens gave deposition testimony that people "looking for free money online" are people Citizens wants to "talk with," as there is a chance these people have a disability. [Pl. SMF ¶ 24]. Citizens does not subscribe to the Do Not Call Registry, [Def. SMF ¶ 6], and does not check the Do Not Call Registry before calling a "lead" if it has what it considers to be express written consent from that "lead," [Pl. SMF ¶ 29].

On January 3, 2020, Citizens received Ms. Gaker's personal information through a website operated by Digital Media Solutions. [Pl. SMF ¶ 7; Def. SMF ¶ 10]. A "Trusted Form" report documented the entry of Ms. Gaker's personal information from an IP address located in Hollywood, Florida. [Pl. SMF ¶¶ 11–12]. This report, which contains a visual playback link recreating the entry of Ms. Gaker's information, shows that the information was entered on the Super-Sweepstakes.com website that was in effect as of January 2020. [Pl. SMF ¶¶ 12–14]. Ms. Gaker does not have a specific recollection of visiting this website or entering her personal information on it.[1] [Pl. SMF ¶ 15; Def. SMF ¶¶ 17–18].

***2** A reproduction of the Super-Sweepstakes.com website contains images of gold coins, dollar signs, and text reading "Where should we send YOUR $50,000 if you win?" [Pl. SMF ¶¶ 16–17]. Beneath this question, there are fields in which an individual can enter personal data. [Pl. SMF ¶ 18]. Beneath these fields, there are additional promotional offers, a box reading "CONFIRM YOUR ENTRY," and at the bottom of the website, a royal blue box containing a disclaimer written in small navy blue font. [Pl. SMF ¶¶ 19–21]. This disclaimer reads:

> By clicking confirm your entry I consent to be contacted by any of our *Marketing Partners*, which may include artificial or pre-recorded calls and or text messages, delivered via automated technology to the phone number(s) that I have provided above including wireless number(s) that I have provided including wireless number(s) if applicable regarding financial, home, travel, health, and insurance products and services. Reply 'STOP' to unsubscribe from SMS service. Reply 'Help' for help. Standard Message & data rates may apply. I understand these calls may be generated using an autodialer and may contain pre-recorded messages and that consenting is not required to participate in the offers promoted. I declare that I am a U.S. resident over the age of 18 and agree to this site's terms.

[Pl. SMF ¶ 21; Def. SMF ¶ 13 (emphasis added)]. The words "Marketing Partners" in this disclaimer contained a hyperlink to a separate page containing an alphabetized list of companies, including Citizens. [Pl. SMF ¶ 22; Def. SMF ¶ 14].

In April 2020, Citizens placed seven calls to Ms. Gaker's cell phone regarding its disability services. [Pl. SMF ¶ 8]. Ms. Gaker contends that these calls were placed in violation of the TCPA.

**b. Procedural History**

Ms. Gaker filed this matter as a putative class action in May 2020. [Dkt. 1]. Following discovery, Ms. Gaker moved to certify a class, [Dkt. 42], but she withdrew this motion before the Court could take action, [Dkt. 47]. Ms. Gaker then filed an amended complaint in April 2022 asserting only individual claims against Citizens. [Dkt. 58]. The parties filed the instant cross-motions for summary judgment, and the Court heard oral argument on January 23, 2023.



## II. STANDARDS OF LAW

### a. Summary Judgment

**[1]** The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Mesnick v. Gen. Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991) (citing Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990)). Summary judgment may be granted when the record, viewed in the light most favorable to the non-moving party, presents no "genuine issue of material fact," and the moving party is entitled to judgment as a matter of law. Paul v. Murphy, 948 F.3d 42, 49 (1st Cir. 2020). The Court must determine (1) whether a factual dispute exists; (2) whether the factual dispute is "genuine," such that a "reasonable fact-finder could return a verdict for the nonmoving party on the basis of the evidence"; and (3) whether a fact that is genuinely in dispute is material, such that it "might affect the outcome of the suit under the applicable substantive law." Scott v. Sulzer Carbomedics, Inc., 141 F. Supp. 2d 154, 170 (D. Mass. 2001). Courts must draw all reasonable inferences in the non-moving party's favor, and "[t]he non-moving party may 'defeat a summary judgment motion by demonstrating, through submissions of evidentiary quality, that a trialworthy issue persists.' " Paul, 948 F.3d at 49 (citation omitted). On issues where the non-moving party bears the ultimate burden of proof, the non-moving party "must present definite, competent evidence to rebut the motion." Mesnick, 950 F.2d at 822.

### b. TCPA Claims

***3** The TCPA empowers the Federal Communications Commission (FCC) to establish regulations "concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object." 47 U.S.C. § 227(c)(1). Among the tools the statute creates to protect telephone consumers is the Do Not Call Registry, "a single national database ... of telephone numbers of residential subscribers who object to receiving telephone solicitations." Id. § 227(c)(3). Further, the statute creates a private right of action available to any "person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations" established by the FCC. Id. § 227(c)(5). A prevailing party under this right of action is entitled to statutory damages of up to $500 per violation (which may be trebled upon a finding that a violation was willful or knowing), actual monetary losses, and injunctive relief. See id.

The FCC regulations implementing the TCPA prohibit any telephone solicitation to any residential telephone subscriber who has registered her number on the Do Not Call Registry unless the solicitor "has obtained the subscriber's prior express invitation or permission." 47 C.F.R. § 64.1200(c)(2)(ii) (2022). This permission "must be evidenced by a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by this seller and includes the telephone number to which the calls may be placed." Id. The regulations further define the closely related concept of "prior express written consent" as "an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages" that must include "a clear and conspicuous disclosure" that the consumer is authorizing the calls and that the person is not entering the agreement as a condition of purchasing any property, goods, or services. Id. § 64.1200(f)(9). The FCC's guidance directs that, where there is a question about whether a consumer has given consent, the telemarketer bears the burden to demonstrate that "a clear and conspicuous disclosure was provided and unambiguous consent was obtained." In the Matter of Rules & Regs. Implementing the TCPA of 1991, 27 FCC Rcd. 1830 ¶¶ 26, 32, 33 (2012).

The protections of the TCPA and its implementing regulations apply only to "residential" telephone numbers. See 47 U.S.C. § 227(c)(1). The FCC interprets the term "residential" to relate to the statutory goal "to curb the 'pervasive' use of telemarking 'to market goods and services to the home.' " In re Rules & Regs. Implementing the TCPA of 1991, 18 FCC Rcd. 14014, 14038–39 (2003). The FCC thus applies a presumption that any cell phone subscriber who asks to be put on the Do Not Call Registry is a residential subscriber, but in enforcement actions, may require a subscriber to "provide further proof of the validity" of the presumption that they use the cell phone in question as a residential, rather than business, line. Id. at 14039.

## III. DISCUSSION



**[2]** **[3]** It is beyond dispute that Ms. Gaker has satisfied most of the elements of a TCPA claim: she placed her cell phone number, which she uses as her primary residential line, on the Do Not Call Registry, and subsequently received seven telemarking calls from Citizens. Her claim thus hinges on Citizens' affirmative defense that it obtained Ms. Gaker's express consent to be contacted through her submission of her personal information on the Super-Sweepstakes.com website. A defendant who establishes that a consumer consented to receive telemarking calls is not liable for a violation of the TCPA. Rosenberg v. LoanDepot.com LLC, 435 F. Supp. 3d 308, 314–15 (D. Mass. 2020). The defendant bears the burden of proof to establish that the consumer consented; lack of consent is not an element that the consumer must prove to establish her cause of action. Breda v. Cellco P'ship, 934 F.3d 1, 4 n.4 (1st Cir. 2019).

***4** Citizens obtained Ms. Gaker's personal information through the Super-Sweepstakes.com website. The bottom of this website contains a disclaimer indicating that, by confirming one's entry, a participant "consent[s] to be contacted by any of our Marketing Partners," and a hyperlink embedded in the words "Marketing Partners" connects to a page listing Citizens, among many other companies. Citizens rests on this as evincing clear and conspicuous disclosure, and unambiguous consent. Ms. Gaker challenges the sufficiency of this disclosure on a number of grounds.

**a. Clear and Conspicuous Disclosure**

This jurisdiction has not directly interpreted the "clear and conspicuous disclosure" and "unambiguous consent" standard as implemented by the FCC's TCPA regulations. See 27 FCC Rcd. 1830 ¶¶ 26, 32, 33. However, the broader concepts of disclosure and consent in the context of online agreements have been thoroughly litigated. Although the TCPA is the specific provision creating this cause of action, the essential question is whether the Super-Sweepstakes website adequately disclosed its language regarding marketing partners, such that it can be said that Ms. Gaker gave "unambiguous consent" to be bound by those terms —and thus, to be contacted by Citizens despite her registration on the Do Not Call Registry. The Court thus begins by reviewing relevant precedent on disclosure of, and consent to, online terms and conditions.

i. **Assent to Online Agreements**

**[4]** **[5]** **[6]** **[7]** In Emmanuel v. Handy Technologies, 992 F.3d 1 (1st Cir. 2021), the First Circuit reviewed the Massachusetts law "framework for analyzing issues of online contract formation." Id. at 7 (quoting Kauders v. Uber Techs., 486 Mass. 557, 159 N.E.3d 1033, 1049 (2021)). Kauders established that, in order to form a contract online, "the user of the online interface must have been given 'reasonable notice of the terms' of the agreement and must have made a 'reasonable manifestation of assent to those terms.' " Id. (quoting Kauders, 159 N.E.3d at 1049). This "reasonable notice requirement" is satisfied where "a party to the online contract has 'actual notice' of its terms, such as would be the case if that party had 'reviewed' those terms or 'must somehow interact with the terms before agreeing to them.' " Id. However, even absent actual notice, the party seeking to enforce the online contract may satisfy the reasonable notice requirement if " 'the totality of the circumstances' indicates that the user of the online interface was provided with such notice of the terms." Id. at 7–8. The question at the heart of this "totality of the circumstances" inquiry is "whether the offeror has reasonably notified the user that there are terms to which the user will be bound and has given the user the opportunity to review those terms." Id. at 8 (citation and alterations omitted). Courts will more likely find that reasonable notice was provided "where the notice conveys the full scope of the terms and conditions,' " and "the interface adequately communicates the terms of the agreement." Id. (citation and alterations omitted).

**[8]** Emmanuel and Kauders further recognized a distinction between the forms in which website may present terms to users. The most robust form through which a website may establish assent to terms is a "clickwrap agreement," by which "a user is 'required to expressly and affirmatively manifest assent to an online agreement by clicking or checking a box that states that the user agrees to the terms and conditions.' " Emmanuel, 992 F.3d at 8 (quoting Kauders, 159 N.E.3d at 1050). In other words, a clickwrap agreement requires that a user take an affirmative step to agree to the proposed terms (most commonly, checking a box indicating he or she has read and agreed to the terms) *separately* from merely clicking a "continue" or "submit" button. Because clickwrap agreements require this express showing of intent, they are "are 'regularly enforced' and are the 'clearest

manifestations of assent.' " Id. (quoting Kauders, 159 N.E.3d at 1050); see also Anand v. Heath, No. 19-CV-00016, 2019 WL 2716213, at *3 (N.D. Ill. June 28, 2019) (citation omitted) (defining clickwrap agreements as those in which "users are required to click on an 'I agree' box after being presented with a list of terms and conditions of use").

***5 [9] [10] [11]** At the other end of the spectrum, "browsewrap agreements" do not require a user to check a box indicating assent, but merely post terms and conditions of use on the website, "typically as a hyperlink at the bottom of the screen." Kauders, 159 N.E.3d at 1054 n.26 (quoting Hines v. Overstock.com, Inc., 668 F. Supp. 2d 362, 366 (E.D.N.Y. 2009)); see Nguyen v. Barnes & Noble, Inc., 763 F.3d. 1171, 1175–76 (9th Cir. 2014) (defining browsewrap agreements as those where "where a website's terms and conditions of use are generally posted on the website via a hyperlink at the bottom of the screen"). In other words, a browsewrap agreement attempts to bind a user to terms simply because they appear on a page the user visited, with no further showing that the user read or agreed to the terms. Browsewrap agreements "are often unenforceable because there is no assurance that the user was ever put on notice of the existence of the terms or the link to those terms." Kauders, 159 N.E.3d at 1054 n.26.

Although the term is not in use in this circuit, several federal courts have defined a third category of online agreements between clickwrap and browsewrap, appropriately called a "hybridwrap." A hybridwrap agreement incorporates elements of clickwrap and browsewrap agreements; generally, these types of agreements provide greater notice of the terms and conditions—and of the website's intent to bind the user to them—than a browsewrap agreement, but do not require the affirmative manifestation of intent that a clickwrap agreement does. One court defined a hybridwrap agreement as one that "merely present[s] the user with a hyperlink to the terms and conditions, rather than displaying the terms themselves." Nicosia v. Amazon.com, Inc., 384 F.Supp.3d 254, 266 (E.D.N.Y. 2019). Another court found a hybridwrap agreement where the terms and conditions were presented by hyperlink, and "the user's ability to continue through the site was not conditioned on her express assent to the terms and conditions." Anand, 2019 WL 2716213 at *4. Generally, courts "will give effect to hybridwrap terms where the button required to perform the action manifesting assent ... is located directly next to a hyperlink to the terms and a notice informing the user that, by clicking the button, the user is agreeing to those terms." Id. (quoting Nicosia, 384 F.Supp.3d at 266). Conversely, a court generally will not enforce a hybridwrap agreement where the website did not explicit condition the user's "continued navigation on the site to acceptance of the terms and conditions available through the hyperlink." Id.

ii. **Out-of-Circuit TCPA Precedent**

Courts in this circuit have not yet established a framework for determining whether online terms were sufficiently disclosed to provide a consent defense to a TCPA claim. However, the Ninth Circuit recently created such a rule in Berman v. Freedom Financial Network, 30 F.4th 849 (9th Cir. 2022). The plaintiffs in Berman had filed a TCPA class action against a telemarketer, which sought to enforce a mandatory arbitration clause, of which the plaintiffs argued they had not been given proper notice. The court synthesized earlier precedent on the clickwrap-browsewrap distinction into a two-part test for determining whether terms and conditions presented on websites constitute "reasonably conspicuous notice." Id. at 856. To be binding on a plaintiff, a notice first "must be displayed in a font size and format such that the court can fairly assume that a reasonably prudent Internet user would have seen it." Id. On this element, the Berman court announced it would consider the size of the notice's font, the comparative size and visibility of the notice's font to that of the surrounding text, and whether the surrounding website design draws the user's attention away from the text. See id. at 857. Secondly, if the website provided the challenged terms via hyperlink rather than on the webpage itself, "the fact that a hyperlink is present must be readily apparent." Id. The court emphasized here that "[s]imply underscoring words or phrases ... will often be insufficient to alert a reasonably prudent user that a clickable link exists." Id. Rather, a website may satisfy this requirement by using a contrasting font color or all capital letters to draw attention to the link. Id.

***6** Further, the Berman court held that in order to demonstrate that a user had unambiguously manifested assent to terms and conditions, the website "must explicitly notify a user of the legal significance of the action she must take to enter into a



contractual agreement." Id. at 858. The opinion advises courts to look to whether the text of the website indicated "what action would constitute assent to those terms and conditions." Id.

Berman's application of its two-part standard to its at-bar facts is instructive. The court described the website's text disclosing the challenged terms as "the antithesis of conspicuous," id. at 856, finding that it appeared only in "tiny gray font considerably smaller than the font used in the surrounding website elements ... barely visible to the naked eye." Id. at 856–57. Further, the text of the notice was "deemphasized by the overall design of the webpage, in which other visual elements draw the user's attention away from the barely readable critical text," and the website made no attempt to distinguish the hyperlink to the terms and conditions from the surrounding text. Id. at 857.

The Northern District of Illinois' decision in Sullivan v. All Web Leads, Inc., No. 17-C-1307, 2017 WL 2378079 (N.D. Ill. June 1, 2017), is similarly instructive, as it directly considered the merits of a TCPA claim similar to Ms. Gaker's. In that case, a telemarketer placed consent language in small print at the bottom of a page collecting personal information. Id. at *1. The plaintiff alleged that he had not seen the consent language before submitting his information, and had not realized that in submitting his information, he was consenting to telemarketing calls. Id. The telemarketer moved to dismiss, arguing, in part, that it had adequately procured the plaintiff's express consent. Id. at *6

On the more deferential posture of a motion to dismiss, the court concluded that the plaintiff had plausibly stated a claim that he had not expressly given consent. Id. at *8. It declined to hold that, as a matter of law, the notice the telemarketer had given on the website was "clear and conspicuous." Id. at *7. In doing so, the court evaluated seven cases—all outside of the TCPA context—which had considered various terms and conditions presented to consumers who had purportedly given some sort of consent via an internet form. Id. (collecting cases). From these cases, the court divined a general synthesis that a consumer is less likely to be bound to terms agreed to on the internet where the terms were located below the "accept" or "submit" button or were otherwise hidden or difficult to access, and were more likely to be bound where the website gave the consumer clear notice of the terms. See id. The court relied significantly upon the defendant's website's general silence on phone solicitations and placement of its purportedly binding consent disclosures below the "submit" button in holding that the plaintiff had stated a plausible claim that he had not given express consent to phone solicitations. Id. at *8.

**b. Application**

In full consideration of all of the above precedent, the Court interprets the TCPA's "clear and conspicuous disclosure" and "unambiguous consent" standard, see 27 FCC Rcd. 1830 ¶¶ 26, 32, 33, similarly to the general Massachusetts and First Circuit standard for assent to online terms. The Court will apply a "totality of the circumstances" inquiry to determine whether the Super-Sweepstakes website "reasonably notified the user that there are terms to which the user will be bound," to wit, terms assenting to telephone solicitations; and further, "has given the user the opportunity to review those terms." Emmanuel, 992 F.3d at 8 (quoting Kauders, 159 N.E.3d at 1050).

***7** The distinction between "clickwrap," "browsewrap," and "hybridwrap" agreements that many courts have drawn is a useful tool for framing this analysis, but is not dispositive: as far as the Court is aware, no court has deemed an online agreement valid or invalid merely because it fits into one of these categories. Rather, this method of classification assists in the ultimate totality-of-the-circumstances inquiry by allowing courts to draw parallels between similarly categorized online agreements.

**[12]** Here, the Court concludes that Citizens has not met its burden to establish that "a clear and conspicuous disclosure was provided and unambiguous consent was obtained." 27 FCC Rcd. 1830 ¶¶ 26, 32, 33. The terms indicating that users who submitted their information on the Super-Sweepstakes website consented to be contacted by the site's marketing partners were printed in small font at the very bottom of the page. The Court accorded significant weight to the fact that the terms appeared below the "CONFIRM YOUR ENTRY" button, [Pl. SMF ¶¶ 19–21], such that a user could—and in all likelihood, would—click on the button without ever reaching the portion of the page disclosing the terms. Further, the terms were printed in smaller font than other language on the page, and appeared in blue font against a blue background, with only slight variation in color between the language and the background. Although the terms were legible to an ordinary reader, no other language on



the Super-Sweepstakes site was presented so inconspicuously, and all promotional language appeared in colors that distinctly contrasted from the background. Further, the website plainly does all that it can to divert the user's attention away from the terms: the page is replete with images of gold coins and dollar signs and is headlined with large text reading "Where should we send YOUR $50,000 if you win?" [Pl. SMF ¶¶16–17]. Beneath the fields where users can enter their personal information, but above the "CONFIRM YOUR ENTRY" button and the small font disclosing the terms, the page presents advertisements for additional services in larger and more legibly colored font. As Citizens' corporate designee suggested in his deposition, the website seems designed to appeal to people "looking for free money online," [see id. ¶ 24], with text and graphics promoting the supposed opportunity to win free money dominating the page.

Citizens argues that the mere appearance of the challenged term—"By clicking confirm your entry I consent to be contacted by any of our Marketing Partners"—in full on the website, without requiring the user to click a hyperlink, constitutes clear and conspicuous disclosure. This statement of the legal significance of the user's submission of her entry, in plain language, favors Citizens. However, the mere presence of this disclosure on the webpage is insufficient to establish that the website "reasonably notified the user" of the terms. The totality of the page, including the size and color of the font and particularly the placement of the disclaimer at the bottom of the page, where a user who simply scrolled to the "CONFIRM YOUR ENTRY" button and clicked on it would never have seen it, strongly indicates an intent to distract a reasonable user from the language. See Sullivan, 2017 WL 2378079 at *8 (finding plaintiff stated an actionable TCPA claim where webpage had placed the disclosure at issue below the "submit" button). Accordingly, Citizens has not established that it "reasonably notified the user" of the terms, nor that it gave "the user the opportunity to review those terms" prior to clicking "CONFIRM YOUR ENTRY." Emmanuel, 992 F.3d at 8 (quoting Kauders, 159 N.E.3d at 1050).

***8** Analysis of the Super-Sweepstakes website under the various frameworks the parties have cited reinforces the court's conclusion. The terms do not meet any court's definition of a "clickwrap" agreement, which would carry a degree of presumption of validity. Ms. Gaker was not required to check a box or otherwise indicate that she had read the terms and conditions before submitting her information.[2] See id. (stating Massachusetts-law definition of a clickwrap agreement). The Court could reasonably characterize these terms as either a "browsewrap" or "hybridwrap"; the latter term is not in use in all jurisdictions, and because neither classification carries a presumption of validity, it is not necessary to draw this distinction in order to conclude that Citizens has not met its burden to prove that the disclosure was clear and conspicuous.

Further, the disclosure would fail the two-part test that the Ninth Circuit articulated in Berman. The first prong of that test requires the defendant to establish that the "notice [was] displayed in a font size and format such that the court can fairly assume that a reasonably prudent Internet user would have seen it." Berman, 30 F.4th at 856. The court there described the text disclosing the terms at issue as "the antithesis of conspicuous," relying on the text's small size (noting that it was both generally small, and small in comparison to other text on the page), its appearance in an inconspicuous color, and the overall design of the page deemphasizing the text by diverting the user's attention elsewhere through more striking visual elements. Each of these factors the Berman court relied on is present here, and the Court reaches the same conclusion: the Super-Sweepstakes website from which Citizens obtained Ms. Gaker's information is a textbook example of a webpage that attempts to hide its consent language from its users.

**c. Objective Standard**

Citizens also argues that Ms. Gaker's deposition testimony renders her unable to rebut its affirmative defense of consent. At her deposition, Ms. Gaker repeatedly testified that she did not recall ever visiting the Super-Sweepstakes website or entering her personal information there, a point both parties restate in their statements of material facts. Ms. Gaker does not seriously contest the fact that she did enter the information, but Citizens argues that her lack of recollection of the event would prevent her from offering testimony as to whether the disclosure was "clear and conspicuous." See Fed. R. Evid. 602 (permitting a witness to testify to a matter "only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter"). Accordingly, because Ms. Gaker's testimony on the disclosure would be inadmissible, Citizens argues that she may



not object to its assertion that she knowingly consented to phone solicitations, as Rule 56 requires that "the material cited to support or dispute a fact ... be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2).

This argument is inapposite, as it improperly places a burden on Ms. Gaker to affirmatively disprove consent *subjectively.* There is no obligation upon Ms. Gaker to prove that the disclosure was not clear and conspicuous *to her, personally.* Rather, the regulations enforcing the TCPA characterize the term "clear and conspicuous" as an *objective* standard, applying the standard of whether the disclosure would be "apparent to the reasonable consumer." 47 C.F.R. § 64.1200(f)(3); see also Berman, 30 F.4th at 856 (adopting the objective standard of "a reasonably prudent Internet user"). The question for the finder of fact in this case would be how a reasonable person in Ms. Gaker's position would have interpreted the disclosure, and not how Ms. Gaker did herself. Ms. Gaker's inability to testify to how she perceived the disclosure is thus irrelevant to the strength of her claim or of Citizens' defense.

## IV. DAMAGES

***9 [13]** Having held as a matter of law that Citizens cannot prove that it obtained Ms. Gaker's consent to telephone solicitations, the Court finds that each of the seven calls Citizens placed to Ms. Gaker in April 2020 constitutes a violation of the TCPA. The Court will award Ms. Gaker the maximum $500 in statutory damages available for each violation, 47 U.S.C. § 227(c)(5)(B), for a total of $3,500.

Statutory damages under the TCPA may be trebled where the defendant "willfully or knowingly violated the regulations" implementing the statute. Id. § 227(c)(5). Here, the parties agreed in their summary judgment briefing that Citizens "believed it had [Ms. Gaker's] express written consent" when it placed the offending calls. [Pl. SMF ¶ 28]. Accordingly, Ms. Gaker has conceded that treble damages are not appropriate in this case.

## V. CONCLUSION

Citizens' Motion for Summary Judgment [Dkt. 64] is **DENIED**. Ms. Gaker's Motion for Summary Judgment [Dkt. 68] is **GRANTED**. Judgment will enter for Ms. Gaker in the amount of $3,500.

**SO ORDERED.**

### All Citations

--- F.Supp.3d ----, 2023 WL 1777460

Footnotes

1 Although Ms. Gaker denies any recollection of visiting the Super-Sweepstakes website, she does not contest the strong circumstantial evidence that she was the individual who entered her personal information on the website from the IP address located near her home in Florida.

2 Citizens' statement of material facts alleges that the Super-Sweepstakes website contained the language "By checking this box I agree that I am a US Resident over the age of 18, to the Privacy Policy, Terms and Conditions and to receive emails from Super-Sweepstakes & LivingLargeSweeps." [Def. SMF ¶ 11]. Ms. Gaker denies this allegation. Citizens cites a screenshot of the website and deposition testimony in support of this assertion. However, the screenshot contains no such language, [Dkt. 66-1], and the deposition testimony is inconsistent with this assertion, [Dkt. 66-4]. Thus, the Court accorded no weight to this allegation.

2021 WL 5028368
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

Matthew Anthony GERACI, Plaintiff,

v.

UBER TECHNOLOGIES, INC., Defendant.

C.A. No. N21C-07-151 CLS

|

Date Submitted: October 6, 2021

|

Date Decided: October 29, 2021

*On Defendant's Motion to Dismiss and Compel Arbitration.* **GRANTED, in part.**

**Attorneys and Law Firms**

Matthew Anthony Geraci, Florence, Kentucky, 41042, pro se.

Henry E. Gallagher, Jr., Esquire, and Lauren P. DeLuca, Esquire, Connolly Gallagher LLP, Wilmington, Delaware, 19801, Attorneys for Defendant.

**ORDER**

SCOTT, J.

**INTRODUCTION**

***1** Before this Court is Uber Technologies, Inc.'s ("Defendant") Motion to Dismiss and Compel Arbitration. The Court has reviewed the parties' submissions and the record below. For the following reasons, Defendant's Motion to Compel Arbitration and to Dismiss is **GRANTED, in part** and Plaintiff's Complaint is **DISMISSED WITHOUT PREJUDICE.**

**FACTS**

This civil action arises from Matthew Anthony Geraci's ("Plaintiff") complaint filed on July 21, 2021, regarding his driver account associated with Defendant being deactivated due to Defendant's claims of misuse of trademark and harm to Defendant's brand.

Plaintiff voluntarily entered into two separate agreements with Rasier, LLC, a wholly owned subsidiary of Defendant, to participate as a driver in the ride sharing application as evidenced by Defendant's Exhibit E, containing Plaintiff's log of accepted agreements from Defendant's application.



One agreement was entered into on September 22, 2019, which contained an arbitration provision which "applies, without limitation, to all disputes ... arising out of or related to this Agreement and disputes arising out of or related to Plaintiff's relationship with Defendant, including termination of the relationship. This arbitration provision also applies, without limitation, to disputes regarding ... termination, ... federal and state statutory and common law claims."

The second agreement was entered into on January 6, 2020, which applied the arbitration provision to all claims whether brought by Plaintiff or Defendant and "applies, without limitation to disputes between Plaintiff and Defendant ... arising out of or related to Plaintiff's application for and use of the account to use Defendant's Platform and Driver App as a driver, ... Plaintiff's contractual relationship with Defendant or the termination of that relationship ... federal state or local statutory, common law and legal claims."

Plaintiff had thirty (30) days from the time he entered into the agreements to opt out of the arbitration provisions. He failed to do so.

Defendant moves to dismiss Plaintiff's complaint, arguing the Court lacks subject matter jurisdiction because the matter is subject to binding arbitration pursuant to agreements signed by Plaintiff to work as a ride-sharing driver. In response, Plaintiff relies on an opinion rendered by the Canadian Supreme Court, which has no binding or persuasive authority to this Court.

**STANDARD OF REVIEW**

Defendant moves to dismiss based on Superior Court Civil Rule 12(b)(1), claiming that the Superior Court lacks subject matter jurisdiction over the claims in the Complaint. It is well-settled in Delaware that the power to compel arbitration lies exclusively with the Court of Chancery.[1] Therefore, this Court cannot render an opinion on compelling arbitration.

However, this Court has held it has jurisdiction to determine whether a valid and enforceable arbitration agreement exists for purposes of determining whether it has subject matter jurisdiction.[2] The Court may dismiss a complaint for lack of subject matter jurisdiction after determining, at most, (1) whether a valid and enforceable arbitration agreement exists and (2) whether the scope of that agreement covers the plaintiff's claims.[3] In reviewing such a motion, a court may consider matters outside the pleadings, such as testimony and affidavits.[4] On a Motion to Dismiss under Rule 12(b)(1), the Court must accept every well-pled allegation as true and draw all reasonable inferences in the non-movant's favor.[5] A Motion to Dismiss should be denied unless it appears to a "reasonable certainty" that the plaintiff would not be entitled to relief under any set of facts that could be proved to support them.[6]

**DISCUSSION**

***2** This Court lacks subject matter over this claim because (1) Plaintiff entered into a valid and enforceable arbitration agreement and (2) the scope of the agreement cannot be determined by this Court.

The agreements before the Court are in the form of a valid "clickwrap" agreement. "A clickwrap agreement is an online agreement that requires a 'webpage user [to] manifest assent to the terms of a contract by clicking an 'accept' button in order to proceed.' "[7] Clickwrap agreements are routinely recognized by courts and are enforceable under Delaware law.[8] Here, Plaintiff clicked "YES, I AGREE" to the terms of the agreement to create an account and continue to use such account. Plaintiff agreed to the terms of the agreement and clickwrap agreements, such as the one present in this case, are enforceable, therefore, Plaintiff entered into a valid and enforceable arbitration agreement.

Subsequently, the Court must determine whether the scope of the agreements covers the claims made by Plaintiff. Plaintiff's claims seem to be covered by the agreements because his claims arise from the termination of the relationship between Plaintiff and Defendant, which is specifically referenced in both agreements. However, ultimately, the arbitrator must decide whether Plaintiff's claims fall under the agreements because the Technology Services Agreement, Defendant's Exhibit C, delegates the issues of arbitrability to the arbitrator. "When ... parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator."[9] Parties can agree to arbitrate questions of "arbitrability"[10] and the agreement expressly provides issues of arbitrability would be subject to the arbitrator by providing:

> 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.

Plaintiff agreed to the arbitration agreements by assenting to the terms by clicking "YES, I AGREE" when prompted to, so he agreed to arbitrate questions of arbitrability. This Court cannot decide whether Plaintiff's claims fall under the agreements.

**CONCLUSION**

WHEREFORE, for the foregoing reasons, Defendant's Motion to Dismiss and Compel Arbitration is **GRANTED, in part** and Plaintiff's Complaint is **DISMISSED WITHOUT PREJUDICE.**

**IT IS SO ORDERED.**

**All Citations**

Not Reported in Atl. Rptr., 2021 WL 5028368

Footnotes

1 10 Del. C. § 5701.

2 *Bruce Jones, et al. v. 810 Broom Street Operations Inc.*, 2014 WL 1347746 (Del Super. 2014); *Aquila of Delaware, Inc. v. Wilmington Trust Company*, 2011 WL 4908406 (Del. Super. 2011).

3 *Jones*, 2014 WL 1347746, at *1.

4 *Cecilia Abernathy, et al. v. Brandywine Urology Consultants, PA*, 2021 WL 211144 (Del. Super. 2021).

5 *Donald H. Loudon, Jr., v. Archer-Daniels-Midland Co., et al.*, 700 A.2d 135, 140 (Del. Supr. 1997).

6 *Id.*

7 *Newell Rubbermaid Inc. v. Storm*, 2014 WL 1266827, at *1 (Del. Ch. Mar. 27, 2014) (*citing Van Tassell v. United Mktg. Gp., LLC*, 795 F.Supp.2d 770, 790 (N.D. Ill. 2011)).

8 *Newell Rubbermaid*, 2014 WL 1266827, at * 1.

9 *Behm v. Am. Int'l Grp., Inc.*, 2013 WL 3981663, at *6 (Del. Super. Ct. July 30, 2013) (citations omitted).

10 *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-69, 130 S. Ct. 2772, 2777, 177 L. Ed. 2d 403 (2010).

2010 WL 3906253
Only the Westlaw citation is currently available.
United States District Court, D. Colorado.

Rick GROSVENOR, on behalf of himself and all others similarly situated, Plaintiffs,

v.

QWEST COMMUNICATIONS INTERNATIONAL, INC., a Delaware corporation, Qwest Services Corporation, a Colorado corporation, Qwest Corporation, a Colorado corporation, Qwest Communications Corporation, a Delaware corporation, and Qwest Broadband Services, Inc., a Delaware corporation, Defendants.

Civil Action No. 09–cv–2848–WDM–KMT.
|
Sept. 30, 2010.

**ORDER**

MILLER, J.

***1** This case is before me on Defendants Qwest Communications International, Inc., Qwest Services Corporation, Qwest Corporation, Qwest Communications Corporation, and Qwest Broadband Services, Inc.'s ("Qwest") Motion to Compel Arbitration (ECF No. 13) and Motion for Stay (ECF No. 62). I have reviewed the parties' written arguments and conclude that oral argument is not required. For the reasons that follow, the Motion to Compel Arbitration (ECF No. 13) will be denied. The Motion to Stay (ECF No. 62) will be denied.

*BACKGROUND*

Grosvenor claims that Qwest enticed him and other Qwest customers to purchase high-speed Internet service by promising a "Price for Life Guarantee" ("Price for Life") but, after the customers agreed to subscribe to the service, Qwest routinely raised their monthly rates. Qwest contends that when Grosvenor subscribed to high speed Internet services, he agreed to its Subscriber Agreement, which requires arbitration of disputes, precluding Grosvenor's lawsuit in this forum.

The Subscriber Agreement "governs [the consumer's] use and Qwest's provision of Service, Software and Equipment." Subscriber Agreement at 1, ECF No. 13–1. The Subscriber Agreement is available to consumers at www.Qwest.com/legal. It provides that Qwest will supply equipment and services to provide a high speed Internet connection for the customer and the customer will pay Qwest for them. *See id.* In addition, it describes the consumer's responsibilities connected with the use of email, a website, web hosting services, web design services, and equipment. It notifies the consumer that he may not modify the software, that Qwest and third-party licensors are the owners of the intellectual property, that there are limitations on the use of the service, billing, and termination. *See id.* The Subscriber Agreement limits Qwest's liability. *See id.* Most importantly for this Motion, it requires that all disputes concerning the Subscriber Agreement be resolved by arbitration or in small claims court and not in a class action:



17. Dispute Resolution and Arbitration; Governing Law. PLEASE READ THIS SECTION CAREFULLY. IT AFFECTS RIGHTS THAT YOU MAY OTHERWISE HAVE. IT PROVIDES FOR RESOLUTION OF DISPUTES THROUGH MANDATORY ARBITRATION WITH A FAIR HEARING BEFORE A NEUTRAL ARBITRATOR INSTEAD OF IN A COURT BY A JUDGE OR JURY OR THROUGH A CLASS ACTION.

(a) Arbitration Terms. You agree that any dispute or claim arising out of or relating to the Services, Equipment, Software, or this Agreement (whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory) will be resolved by binding arbitration. The sole exceptions to arbitration are that either party may pursue claims: (1) in small claims court that are within the scope of its jurisdiction, provided the matter remains in such court and advances only individual (non-class, non-representative, nonconsolidated) claims; and (2) in court if they relate solely to the collection of any debts you owe to Qwest.

***2** *Id.* at ¶ 17 ("Arbitration Clause").

*Grosvenor's Initial Subscription to High Speed Internet Service in 2006*

Grosvenor subscribed to Qwest high-speed Internet service in 2006. Qwest claims that a clickwrap agreement was presented when Grosvenor installed the High Speed Internet Services ("Clickwrap Agreement") from a compact disk ("QuickConnect CD") at that time, which bound him under the Subscriber Agreement.

A clickwrap license (or "click-to-accept") is a common tool used by Internet merchants to obtain electronic signatures as agreement to terms of licensing contracts. *See Mortg. Plus, Inc. v. DocMagic, Inc.,* 2004 WL 2331918 (D.Kan.2004). Clickwraps generally display a screen containing terms and conditions that the user must accept to continue to install or use the product. As a rule, a clickwrap is valid where the terms of the agreement appear on the same screen with the button the user must click to accept the terms and proceed with the installation of the product. *Id.* Typically, the user is asked whether he accepts all of the terms of the preceding agreement and is told that choosing "no" or "decline" will end set-up of the product. *Id.*

The Clickwrap Agreement, here, contains pages entitled "High–Speed Internet Modem Installation Legal Agreements" ("Legal Agreements Pages"). In pertinent part it states:

Please read the terms ***including arbitration and limits on Qwest liability*** at www.qwest.com/legal ("Qwest Agreement")[1] that govern your use and Qwest's provision of the service(s) and equipment you ordered from the list below. [Emphasis in the original].

- Qwest High–Speed Internet Service
    - Qwest Choice™ Office Plus or Office Basic service
    - Qwest-provided modem
    - Qwest Home Network Backer™ or Office Network Backer service™
    - Microsoft Internet Software

Please also read the (1) information on term and early termination fee, and (2) disclaimers and end user license agreement related to this installation and software you receive during it ("Install Agreements") in the scroll box below.

IMPORTANT, BINDING LEGAL INFORMATION.



> Your click below on "I Accept" is an electronic signature and acknowledges: (1) you agree the Qwest Agreement contains the terms under which service and equipment are offered and provided to you, (2) you understand and agree to such terms (even if you don't read them), and (3) you understand and agree to the Install Agreements.

Sur-reply at 2, ECF No. 53–1[2]; *see also,* Kohler Aff. ¶ 8; Ex. A at 2 (ECF No. 53–1).

The Legal Agreements Pages of the Clickwrap Agreement continue for ten pages of "Important, Binding Legal Information," which include Install Agreements, Temporary Internet Connection Disclaimer, End User License Agreement, Software Product License, Limitation of Liability, and other General Provisions such as the Basis of Bargain (Ex. A at 2–6, ECF No. 53–1), and Remedies and Legal Actions (*id.* at 6–7, § 7.2).

***3** The Clickwrap Agreement section entitled, "Remedies and Legal Actions" (Section 7.2(b)), provides exclusive jurisdiction in the courts of San Mateo County, California or the United States District Court for the Northern District of California for disputes with SupportSoft, Inc. [a Qwest vendor]. *Id.* Section 7.2(c) provides exclusive jurisdiction in the courts of Denver County, Colorado or the United States District Court for the District of Colorado for all other disputes concerning "this Agreement." Section 7.2(d) provides a one-year limitation for bringing an action related to "this Agreement."

At the bottom of the Legal Agreement Pages, the customer is directed that:

> Your click on "I Accept" is an electronic signature to the agreements and contracts set out herein. Please review the material in the above box for important, binding, legal information.

Kohler Aff. ¶ 9; Sur–Reply at 2, ECF No. 53–1 (similar but not identical language). In order to complete installation of the high speed Internet services and configure the computer, Grosvenor would have been required to click on the "I Accept" button. In order to refuse the terms of the Agreement, he would have had to click "Cancel." *Id.* at ¶¶ 10–11.

The Legal Agreements Pages do not reproduce the Subscriber Agreement. In order to read the Subscriber Agreement, Grosvenor would have had to exit the installation program, log onto the Internet (to which he did not yet have access), and navigate to the specific pages containing the Subscriber Agreement. Having read the Subscriber Agreement, he would have had to reinsert the QuickConnect CD into his computer, read the remaining ten pages of the Legal Agreements Pages, and determine whether he would accept or decline the terms of the agreements. *See* Sur-reply, Ex. A at 1, ECF No. 53–1

Qwest asserts its practice is to send a Welcome Letter to each of its new and renewing customers. *See* Aff. of Lucia Beardsley ¶¶ 1 & 10, ECF No. 34–1. After the closing signature, on the back of the letter, Qwest states:

> Qwest High–Speed Internet ® Service and related products are offered under the Subscriber Agreement terms, which are located at www.qwest.com/legal (*may also be enclosed* ). Please review the terms, which include arbitration and limits on Qwest liability. If you do not agree, call Qwest to cancel your service within 30 days.

Reply, Ex. B at 3 (emphasis added), ECF No. 34–3.

Qwest also contends that Grosvenor received a Welcome Letter confirming his order when he first subscribed to the Qwest service in 2006, which provided him with sufficient notice of the terms of the Subscriber Agreement, including the Arbitration Clause, by referencing the location of the Subscriber Agreement on the Qwest website (www.qwest.com/legal). *See* Beardsley Decl. ¶¶ 5–10, ECF No. 34–1. Reply at 5, ECF No. 34.

Grosvenor states that he did not receive such a notice in 2006 and does not recall having received a Welcome Letter. *See* Grosvenor Decl. ¶ 8, ECF No. 26–23. When Grosvenor first subscribed to Qwest high speed Internet services in 2006, Price for Life was not among the pricing programs offered by Qwest. He states that he is very confident that Qwest never called his attention to the Subscriber Agreement's provision barring consumers from suing in any court other than small claims court or participation in a class action lawsuit. *Id.* at ¶¶ 10–11.



*2007 Upgrade and Subscription to Price for Life*

***4** Grosvenor switched from his original plan to Price for Life in October 2007. He spoke to a customer service representative by telephone to make the switch. Grosvenor Decl. ¶ 6, ECF No. 26–23. Grosvenor states that, under Price for Life, he locked in the same monthly rate for as long as he maintained his Internet service with Qwest. Compl. ¶ 11, ECF No. 1. After he had signed up for Price for Life, he responded to an offer from Qwest for higher speed Internet services for an additional $5 per month. Again, he made the change by telephone. Grosvenor Decl. ¶ 6, ECF No. 26–23. In November 2007, he began to pay $31.99 for the service, which he expected to be the price he would pay "for life." Compl. ¶ 15, ECF No. 1.

Qwest contends that Grosvenor received a second Welcome Letter confirming his order when he upgraded his service in 2007. Beardsley Aff. ¶ 11, ECF No. 34–1. The 2007 letter is similar to the one Qwest was sending in 2006. *See* Ex. B to Beardsley Aff., ECF No. 34–3 Grosvenor does not recall having received a Welcome Letter when he changed to Price for Life or upgraded to a higher speed Internet service in 2007. Grosvenor Decl. ¶ 8, ECF No. 26–23. In addition, Grosvenor testifies that he did not have to install new software when he changed to Price for Life. *Id.* at ¶ 7. Qwest does not state that Grosvenor would have received a second QuickConnect CD to install Price for Life. *See id.; see also,* Beardsley Aff., ECF No. 34–1.

*2008 Price Increase*

In August 2008, Qwest's invoice to Grosvenor increased to $49.99 for a month's Internet service. *Id.* at ¶ 16. He complained to Qwest about the price increase. The customer service representative offered Grosvenor a different promotional offer, which Grosvenor rejected. *Id.* at ¶ 17. He told the customer service representative that the only offer he had accepted was the $31.99 Price for Life. *Id.* In response, Qwest reduced Grosvenor's monthly Internet charge from $49.99 to $36.99. *Id.* Grosvenor accepted the new, higher price under protest. *Id.* at ¶ 18.

This lawsuit followed. The Complaint claims breach of contract; specifically, that the Price for Life Guarantee is an enforceable term of a contract between Grosvenor and Qwest. Compl. ¶¶ 34–38, ECF No. 1. In the alternative, Grosvenor claims Promissory Estoppel because the Price for Life Guarantee was a promise made by Qwest on which Grosvenor relied to his detriment and suffered damages. *Id.* at ¶¶ 39–44. He claims that Qwest was unjustly enriched by consumers in the Price for Life program who paid more than other customers receiving identical service. *Id.* at ¶¶ 45–49. He further claims violation of the Colorado Consumer Protection Act (Colo.Rev.Stat. § 6–1–101 *et seq. Id.* ¶¶ at 50–59.

Qwest has answered and moves the court to dismiss Grosvenor's complaint, to stay Grosvenor's claims, and to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 3[3] and Colorado law, or in the alternative, to dismiss the case while Grosvenor pursues his claim individually in small claims court.

*STANDARD OF REVIEW*

***5** "A motion to compel arbitration under the Federal Arbitration Act is governed by a standard similar to that governing motions for summary judgment." *Stein v. Burt–Kuni One, LLC,* 396 F.Supp.2d 1211, 1213 (D.Colo.2005) (citing *SmartText Corp. v. Interland, Inc.,* 296 F.Supp.2d 1257, 1262 (D.Kan.2003)). Accordingly, "in this case, [Qwest] must present evidence sufficient to demonstrate an enforceable arbitration agreement." *Id.* (citing *SmartText Corp.,* 296 F.Supp.2d at 1263). "If this is shown, the burden shifts to [Grosvenor] to raise a genuine issue of material fact as to the making of the agreement, using evidence comparable to that identified in Fed.R.Civ.P. 56." *Id.; see also,* 9 U.S.C. § 4. "To accomplish this, the facts 'must be identified by reference to an affidavit, a deposition transcript, or a specific exhibit incorporated therein.' " *Adams v. Am. Guar. & Lab. Ins. Co.,* 233 F.3d 1242, 1246 (10th Cir.2000) (quoting *Thomas v. Wichita Coca–Cola Bottling Co.,* 968 F.2d 1022, 1024



(10th Cir.1992)). If Grosvenor "demonstrates a genuine issue of material fact, then a trial on the existence of the arbitration agreement is required." *Stein,* 396 F.Supp.2d at 1213 (citing 9 U.S.C. § 4); *see also, Aedon Eng'g, Inc. v. Seatex,* 126 F.3d 1279, 1283 (10th Cir.1997) (holding that the district court must hold a jury trial on the existence of the agreement to arbitrate where the parties raise genuine issues of material fact regarding the making of the agreement to arbitrate).

*DISCUSSION*

*Jurisdiction to Determine Validity of Arbitration Agreement.*

Initially, I address whether I have jurisdiction to rule on the Motion to Compel Arbitration. Under the Federal Arbitration Act, if a party challenges the validity of an agreement to submit disputes over the agreement to arbitrate at issue, the court must consider the challenge before ordering compliance with that agreement. *Rent–a–Center v. Jackson,* 130 S.Ct. 2772 (June 21, 2010). If a party challenges the enforceability of the agreement as a whole, the challenge is for the arbitrator. *Id.* "Courts should not assume that the parties agree to arbitrate arbitrability unless there is a clea[r] and unmistakeabl[e] evidence that they did so." *Id.* at 2278 (quoting *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944 (1995); *see also, AT & T Techs., Inc. v. Comm'cns. Workers,* 475 U.S. 643, 649 (1986) ("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.").

Qwest argues that, not only must Grosvenor arbitrate, an arbitrator must make the decision whether the Subscriber Agreement requires arbitration. In support of this contention, Qwest cites *Pikes Peak Nephrology Assocs., P.C. v. Total Renal Care, Inc.,* 2010 WL 1348326 (D.Colo.2010) ("*PPNA* "). *See* Defs'. Notice of Supplemental Authority in Support of their Mot. to Compel Arbitration & Mot. for Stay (ECF No. 60). *PPNA* holds that where the parties agree to arbitrate under AAA rules, they agree to the procedural rules of AAA, unless the party indicates otherwise in the contract. *See PPNA; see also, P & P Indus., Inc. v. Sutter Corp.,* 179 F.3d 861, 867 (10th Cir.1999). The parties must still "clearly and unmistakably" give the arbitrator exclusive authority to decide whether the agreement is enforceable. *Rent–a–Center,* 130 S.Ct. at 2275.

***6** In *PPNA,* there are two arbitration agreements at issue (one drafted and executed in 1998 and one drafted and executed in 2005). The *PPNA* 1998 agreement states: "Any controversy, dispute or claim arising out of or in connection with this Agreement, or the *breach,* termination or *validity* hereof, shall be settled by final and binding arbitration" *Id.* at *6 (emphasis in *PPNA* ). Further, the parties were required to first negotiate a resolution of " '[disputes arising] ... under [the] Agreement.' If negotiation fails, 'the dispute [except for alleged breaches of the non-competition and non-solicitation provision] shall be settled by final and binding arbitration ... in *accordance with the Commercial Arbitration Rules of the [AAA].*" *Id.* at *6 (emphasis added).

The Qwest Arbitration Procedures are much more general:

> (I) *Arbitration Procedures*. Before commencing arbitration you must first present any claim or dispute to Qwest in writing to allow Qwest the opportunity to resolve the dispute. If the claim or dispute is not resolved within 60 days, you may request arbitration. The arbitration shall be conducted by the American Arbitration Association ("AAA").

Subscriber Agreement ¶ 17(a)(I), ECF No. 13–1. They do not incorporate by reference the specific AAA rules, nor do they state that the validity of the Arbitration Terms shall be decided by the arbitrator, as *PPNA* does.

Having expressly incorporated the AAA Rules by reference in the contract, Rule 7 of the AAA Rules provides: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." *Id.* Accordingly, under these terms, the arbitrator was to decide questions of jurisdiction.

In contrast, Qwest's Arbitration Procedures do not expressly incorporate specific AAA Rules. Accordingly, the Arbitration Procedures are not a "clear and unmistakable" choice of arbitration of the validity of whether the parties agreed to arbitrate.

Qwest also cites *Rent–a–Center, West, Inc. v. Jackson,* 130 S.Ct. 2772 (2010) for the proposition that the arbitrator should decide the validity of the Arbitration Clause contained in the Subscriber Agreement. *Rent–a–Center* is distinguishable for two reasons. First, in *Rent–a–Center,* Jackson challenged the contract as a whole, not the arbitration clause. Here the challenge is to the arbitration clause, not the Subscriber Agreement as a whole. Grosvenor argues only that the dispute resolution provision is unconscionable pursuant to factors set forth in *Davis v. M.L.G. Corp.,* 712 P.2d 985, 991 (Colo.1986). *See* Resp. Part B, ECF No. 26.

Second, the *Rent–a–Center* arbitration clause states expressly: "The Arbitrator ... shall have exclusive authority to resolve any dispute relating to the ... enforceability ... of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." *Id.* at 2777. In contrast, as noted above, the Arbitration Procedures do not mention the power of the arbitrator to resolve enforceability of the Subscriber Agreement. Accordingly, the Qwest Arbitration Clause does not give clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.[4]

***7** In these circumstances, I find that the Qwest Arbitration Clause does not specify that an arbitrator is to determine issues of arbitrability. Accordingly, this court should determine whether a valid arbitration clause exists.

*Existence of Valid Arbitration Clause*

In its Motion to Compel Arbitration, Qwest relies on the general federal policy favoring arbitration of disputes. The presumption in favor of arbitration falls away, however, "when the parties dispute the existence of a valid arbitration agreement." *Dumais v. Am. Golf Corp.,* 299 F.3d 1216, 1220 (10th Cir.2002). "The existence of an agreement to arbitrate is a threshold matter which must be established before the FAA can be invoked." *Aedon Eng'g, Inc.,* 126 F.3d at 1287.

The Tenth Circuit relies on state law principles of contract formation to determine whether parties have agreed to arbitrate an issue or claim. *Aedon Eng'g, Inc.,* 126 F.3d at 1287. Colorado applies principles governing contract formation to determine whether parties have agreed to submit a claim to arbitration. *Allen v. Pacheco,* 71 P.3d 375, 378 (Colo.2003). "A contract is formed when an offer is made and accepted ... and the agreement is supported by consideration.... Acceptance of an offer is generally defined as words or conduct that, when objectively viewed, manifests an intent to accept an offer. *Marquardt v. Perry,* 200 P.3d 1126, 1129 (Colo.App.2008) (internal citations omitted). I must construe the language of any arbitration agreement to give effect to the parties' intent as determined from the plain language of the agreement. *Pacheco,* 71 P.3d at 378.

To prevail on its motion, Qwest must show sufficient evidence that an enforceable contract exists. *See SmartText Corp.,* 296 F.Supp.2d 1257 (D.Kan.2003). In support of its claim that the Subscriber Agreement and Arbitration Clause are enforceable, Qwest presents the two pieces of evidence introduced above—the QuickConnect CD that requires an electronic signature and references the Subscriber Agreement and the Welcome Letter which mentions the requirement to arbitrate.

1. *Electronic Signature*

Qwest claims that Grosvenor signed his electronic signature to Qwest's Clickwrap Agreement when he activated the QuickConnect CD containing the software for Qwest high speed Internet service in 2006, and that it applies to Price for Life as well as the original high speed Internet services. Reply at 5–6, ECF No. 34 (citing Kohler Aff., ECF No. 34–4).

Courts have found clickwrap agreements to be valid and binding. For instance, in *Mortg. Plus, Inc.,* the defendant, DocMagic, Inc., supplied its software on a CD and presented its terms of agreement on a scrollable window on the same page as the acceptance button. The buyer (or user), here Mortgage Plus, Inc., was required to affirmatively click the "Yes" button to assent to the Software Licensing Agreement as a prerequisite to installing the software. *Mortg. Plus,* 2004 WL 2331918 at *5. The court stated that Mortgage Plus, Inc. had "a choice as to whether to download the software and utilize the related services; thus, ... installation and use of the software with the attached license constituted an affirmative acceptance of the license terms by

Mortgage Plus and the licensing agreement became effective upon this affirmative assent." *Id.* The court found that DocMagic, Inc.'s clickwrap agreement was a valid contract for the enclosed software. *Id.; see also, Recursion Software, Inc. v. Interactive Intelligence, Inc.,* 425 F.Supp.2d 756, 781–83 (N.D.Tex.2006) (website provided terms in scrollable window on same page as the button to accept those terms); *Caspi v. Microsoft Network, L.L.C.,* 732 A.2d 528, 530 ("I Agree" and "I Don't Agree" buttons appear on same page as scroll down window containing terms of agreement); *Barnett v. Network Solutions, Inc.,* 38 S.W.3d 200 (Tex.App.2001) (determining clickwrap contract with forum selection clause valid where plaintiff had to scroll through portion of contract to find clause).

***8** Another example of an approved clickwrap agreement is *Hugger–Mugger L.L.C. v. Netsuite, Inc.,* 2005 WL 2206128 (D.Utah 2005). In *Hugger–Mugger L.L.C.,* the License Agreement expressly incorporated by reference certain "Terms of Service," which were posted online by Netsuite, Inc. The "Terms of Service" document was not physically attached to the written License Agreement but its online location was printed in the License Agreement as part of the incorporation clause.

Specifically, the Netsuite, Inc. License Agreement stated:

> In consideration of the license fee paid by Customer [Hugger–Mugger] and *subject to the terms of this agreement and the Terms of Service posted at www.NetSuite.com,* or successor Web site, NetSuite grants Customer, its employees, and agents a nonexclusive, nontransferable license to use the Service for internal business purposes....

*Id.* at *2 (emphasis added in *Hugger–Mugger L.L.C. v. Netsuite, Inc.*).

Qwest's Clickwrap Agreement is unlike any of the clickwraps described above. The Qwest Subscriber Agreement and the Arbitration Clause do not appear on the same scroll down box or page as the "I Accept" and the "I Do Not Accept" buttons. Unlike the Netsuite, Inc. clickwrap, the Subscriber Agreement is referenced by the Legal Agreements page but it is not expressly incorporated into the Clickwrap Agreement:

> Please read the terms ***including arbitration and limits on Qwest liability*** at www.qwest.com/legal ("Qwest Agreement") that govern your use and Qwest's provision of the service(s) and equipment you ordered from the list below.

*See* Kohler Aff. ¶ 4 (emphasis in the original), ECF No. 34–4. This is the sole reference to the Subscriber Agreement in ten pages of agreements, which include Install Agreements, Temporary Internet Connection Disclaimer, End User License Agreement, Software Product License, Limitation of Liability, and other General Provisions such as the Basis of Bargain (Ex. A at 2–6, ECF No. 53–1), and Remedies and Legal Actions (*id.* at 6–7, § 7.2) (providing exclusive jurisdiction for dispute resolution in the courts of San Mateo County, California or Denver, Colorado, or the United States Districts in which these counties are located and providing a one-year limitation for filing actions).

As presented, the Clickwrap Agreement does not clearly incorporate the Subscriber Agreement by reference and to reach the arbitration clause requires the user to leave the installation program, log onto the Internet (if possible), navigate to the proper page, and read the Subscriber Agreement, then return to the installation program's scroll down window to read the remaining ten pages of the High–Speed Internet Modem Installation Legal Agreement before choosing whether to agree to the terms. In addition, the arbitration issue is confused by the fact that the readily available agreements that provide a forum in the court system for resolution of conflicts springing from the scroll box contracts. This creates an ambiguity regarding recourse in the event of a dispute. These circumstances demonstrate a genuine issue of fact.

2. *Welcome Letter*

***9** As noted above, after the closing of the Welcome Letters, on the back of the page, readers are informed:

> Qwest High–Speed Internet ® Service and related products are offered under the Subscriber Agreement terms, which are located at www.qwest.com/legal (*may also be enclosed* ). Please review the terms, which include arbitration and limits on Qwest liability. If you do not agree, call Qwest to cancel your service within 30 days.



Reply, Ex. B at 3 (emphasis added), ECF No. 34–3. From this language, it is uncertain whether any letter contained an actual copy of the Subscriber Agreement because it may or may not have been enclosed. However, the reader is asked to review the terms of the Subscriber Agreement on the Qwest website and is given thirty days in which to review the terms. *Id.* The thirty-day look-back period is significant because it gives the consumer time to set up his Internet service, log-on to the Qwest website to examine the terms of the Subscription Agreement, and reject the terms by canceling his subscription.

*Bischoff v. DirecTV, Inc.,* 180 F.Supp.2d 1097, 1103 (C.D.Cal.2002) presents a similar situation. In *Bischoff,* DirecTV provided the customer with an arbitration agreement after the parties had entered a contract for satellite programming, which was delivered after the customer had purchased the equipment and after DirecTV had activated the service. *Id.* The *Bischoff* court held that the arbitration agreement was valid, noting, "[p]ractical business realities make it unrealistic to expect DirecTV, or any television programming service provider for that matter, to negotiate all of the terms of their customer contracts, including arbitration provisions, with each customer before initiating service." *Id.* at 1105.

However, Grosvenor has raised material questions of fact as to contract formation, including: whether he ever received the Subscriber Agreement, and whether he received the Welcome Letters.

Grosvenor also questions whether the Subscription Agreement, containing the Arbitration Clause that Qwest was using at the time Grosvenor subscribed to Price for Life, applies to the program. Resp. at 7–8, ECF No. 26. He argues that a form agreement is part of a contract only if the plaintiff was aware of it and assented to it. *Id.* at 7 (citing *Vasey v. Martin Marietta Corp.,* 29 F.3d 1460, 1465 (10th Cir.1994) (no implied contract where employee unaware of document prior to termination)).

Grosvenor also contends that he has not alleged that Qwest breached the Subscriber Agreement. Resp. at 7, ECF No. 26. He alleges that Qwest breached its contract to provide Internet services at a set "Price for Life." Compl. ¶¶ 34–38, ECF No. 1. He reiterates that the Subscriber Agreement was not a part of his agreement with Qwest because Qwest did not inform him of the terms of the Subscriber Agreement when he enrolled in Price for Life. Resp. at 7–8, ECF No. 26; Grosvenor Decl. ¶ 10, ECF No. 26–23.

***10** Qwest counters that Grosvenor cannot state that he never agreed to the Subscriber Agreement because Grosvenor admits that he agreed to the Subscriber Agreement in the Complaint where he stated that customers like him "entered into contracts" for Price for Life [High Speed Internet] service." (Reply at 9 (citing Compl. ¶ 1, (ECF No. 1)), ECF No. 34) and that the "Price for Life Guarantee is an enforceable term of the contract which Mr. Grosvenor ... entered with Qwest relating to Qwest's [I]nternet service." *Id.* (citing Compl. ¶ 35).

Again, the circumstances present genuine issues of fact as to whether Grosvenor agreed to arbitrate his claims, precluding a ruling as a matter of law. *See Stein,* 396 F.Supp.2d at 1213 (citing 9 U.S.C. § 4); *see also, Aedon Eng'g, Inc.,* 126 F.3d at 1283.

C. *Motion to Stay*

Qwest filed Defendants' Notice of Supplemental Authority in Support of Their Motion to Compel Arbitration and Motion for Stay (ECF No. 62) pending a decision in *AT & T Mobility, LLC v. Concepcion,* 130 S.Ct. 3322 (*cert. granted,* May 24, 2010).

Qwest requests that I stay the Motion pending the United States Supreme Court's decision in *Concepcion,* on the basis that it presents issues similar to those before me on the Motion to Compel Arbitration. The issue raised by AT & T Mobility, LLC is "[w]hether the FAA preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures—here, class-wide arbitration, when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims." *Id.* at 2. *Concepcion* concerns the California unconscionability law and its unique test for contracts requiring that disputes be resolved on an individual basis. Pet. for Cert at 5. My review of the Petition for Certiorari reveals that the outcome of *Concepcion* is not likely to affect my decision on the Motion to Compel Arbitration.

Accordingly, it is ORDERED that:



1. Defendants Qwest Communications International, Inc., Qwest Services Corporation, Qwest Corporation, Qwest Communications Corporation, and Qwest Broadband Services, Inc.'s Motion to Compel Arbitration (ECF No. 13) is denied;

2. The Motion for Stay (ECF No. 62) is denied;

3. The parties shall schedule a trial to determine whether a valid arbitration agreement exists.

**All Citations**

Not Reported in F.Supp.2d, 2010 WL 3906253

Footnotes

1 "Qwest Agreement" is the Subscriber Agreement.

2 While not expressly authorized by federal or local rules, a sur-reply is not improper where it addresses facts or law newly raised in the reply. *See Tnaib v. Document Techs. LLC,* 450 F.Supp.2d 87 (D.D.C.2006). Although Grosvenor did not file a motion for leave to file a sur-reply, I find that the Sur-reply (ECF No. 53) addresses issues and facts raised for the first time in the Reply (ECF No. 34). Accordingly, I shall consider the argument and evidence presented in the Sur-reply.

3 This Court's jurisdiction over the case depends on the arbitration issue. 9 U.S.C. § 4 (motion to compel arbitration under written agreement may be filed in federal district court "which, save for such agreement, would have jurisdiction under Title 28").

4 Qwest also offers *Stolt–Nielson, S.A. v. Animal Feeds Int'l. Corp.,* 130 S.Ct. 1758 (April 27, 2010). *Stolt–Nielson, S.A.* holds that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. Accordingly, where a contract is silent, the court cannot provide a term that would fundamentally change the nature of the proceeding. Here, the Qwest Subscriber Agreement is not silent. Qwest's Subscriber Agreement requires arbitration and prohibits any court action other than in small claims court and specifically bars class actions. Consequently, the issue is one of formation, not construction. Accordingly, *Stolt–Nielsen* is not relevant to the issue at hand.

In addition, Qwest uses *Stolt–Nielsen* to raise the issue of class arbitration for the first time. The Arbitration Clause clearly differentiates between arbitration on one hand and court actions "by a judge or jury or through a class action" on the other hand. *See* ECF No. 13–1 ¶ 17. Neither party connected arbitration with a class arbitration prior to Defendants'Notice of Supplemental Authority in Support of their Mot. to Compel Arbitration and Mot. to Stay (ECF No. 60). Accordingly, class arbitration is not only irrelevant to the issue at hand; it is improperly raised. Grosvenor has no opportunity to respond to the argument that class arbitration would be improper in this matter. I do not consider *Stolt–Nielsen* for this proposition.

2022 WL 16950409
Only the Westlaw citation is currently available.
United States District Court, W.D. Pennsylvania,
Pittsburgh.

Nicole HINE, Individually and on Behalf of All Others Similarly Situated, Plaintiff,

v.

LENDINGCLUB CORPORATION, Defendant,

2:22-CV-00362-CRE
|
Signed November 15, 2022

**Attorneys and Law Firms**

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Justin G. Weber, Troutman Pepper Hamilton Sanders LLP, Harrisburg, PA, Victoria D. Summerfield, Troutman Pepper Hamilton Sanders LLP, Pittsburgh, PA, for Defendant.

**MEMORANDUM OPINION**[1]

CYNTHIA REED EDDY, United States Magistrate Judge.

## I. INTRODUCTION

***1** This civil action was initiated in the Court of Common Pleas of Westmoreland County, Pennsylvania and removed to this Court by Defendant LendingClub Corporation ("LendingClub"). In this action, Plaintiff Nicole Hine alleges that Lending Club violated the Pennsylvania Loan Interest and Protection Law, 41 Pa. Stat. Ann. § 101 *et seq.* ("LIPL"), the Pennsylvania Consumer Discount Company Act, 7 Pa. Stat. Ann. § 6201, *et seq.* ("CDCA"), and the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann. § 201 *et seq.*, when it allegedly charged an impermissibly high simple annual interest rate on Plaintiff's loan. Plaintiff seeks class treatment of her claims.

Presently before the Court is a motion to compel arbitration by LendingClub pursuant to Federal Rule of Civil Procedure 12(b)(6). (ECF No. 4). The motion is fully briefed and ripe for consideration. (ECF Nos. 5, 10, 12, 12, 14, 18). For the reasons that follow, LendingClub's motion to compel arbitration is denied without prejudice and LendingClub may refile its motion upon the completion of limited discovery related to the arbitrability of Plaintiff Hine's claims.

## II. BACKGROUND

### LendingClub's Operations

LendingClub operates an online lending platform through which it accepts loan applications. Compl. (ECF No. 1-1) at ¶¶ 16-17. After LendingClub evaluates a consumer's creditworthiness and makes an offer, it requests WebBank to issue the loan to the consumer. *Id.* at ¶ 18. Thereafter, WebBank sells the loan to LendingClub or one of its non-bank entities that LendingClub controls. *Id.* at ¶ 19. The loans issued through LendingClub's online platform are simple interest loans and most if not all the loans are high interest, with interest rates reaching up to 36% simple interest per year. *Id.* at ¶¶ 20-21. The loans also include



 

an origination fee, which is generally a percentage of the loan's principal balance. *Id.* at ¶ 22. Origination fees are often in the hundreds to thousands of dollars. *Id.* at ¶ 23. When consumers default on a loan, LendingClub sells the loan to a debt buyer and by doing so, Plaintiff alleges that LendingClub can turn a profit even when consumers are unable to pay the high interest rates and origination fees that LendingClub charges. *Id.* at ¶¶ 24-25. When LendingClub sells a loan, it sells all rights, title and interest in and to the loans to the debt purchaser. *Id.* at ¶ 26.

**Plaintiff Nicole Hine's Lending Club Loan**

In June 2015, LendingClub issued a personal loan to Plaintiff Hine that was used for personal, family and/or household purposes. *Id.* at ¶¶ 27-28. The loan was issued in the amount of $16,000, but Plaintiff Hine only received $15,200.00 of actual money because LendingClub charged and deducted an $800.00 "origination fee." *Id.* at ¶¶ 29-30. Plaintiff Hine was also charged interest on the loan and the interest and fees were charged at an annual percentage rate of close to 19%. *Id.* at ¶¶ 31-32. Plaintiff Hine made payments on the loan, and at a certain point the loan was charged-off. *Id.* at ¶¶ 33-34. After the loan was charged-off, LendingClub allegedly sold all rights and interests in the loan to a debt buyer, called Oliphant Financial, LLC ("Oliphant"). *Id.* at ¶ 35. After buying the loan, Oliphant attempted to collect the loan by suing Plaintiff Hine in Westmoreland County Court of Common Pleas. *Id.* at ¶ 36. Plaintiff Hine hired an attorney to defend the lawsuit and eventually Oliphant dismissed its case with prejudice. *Id.* at ¶¶ 36-37.

***2 Plaintiff Hine's Claims against LendingClub**

Plaintiff Hine contends that LendingClub and its non-bank designees are non-banks without CDCA licenses and as such, it is not authorized under any law to charge interest above the LIPL's 6% interest rate cap on any loan for which LendingClub seeks to charge interest on behalf of itself or its non-bank designees. *Id.* at ¶¶ 39-40. Plaintiff Hine maintains that the CDCA prohibits LendingClub from charging, collecting, contracting for, or receiving interest and fees that aggregate in excess of 6% simple interest per year, yet it routinely issues loans with interest and fees that aggregate in excess of 6% simple interest per year and it charges, collects, contracts for, or received such interest and fees from Pennsylvania consumers. *Id.* at ¶¶ 41-42. Plaintiff alleges that LendingClub cannot charge, collect, contract for, or receive most of the interest and fees it charges, collects, contracts for, or received because LendingClub and its non-bank designees do not have the license to do so and that LendingClub partners with WebBank in an attempt to circumvent the CDCA and the LIPL. *Id.* at ¶¶ 43-44. Plaintiff maintains that although banks like WebBank may lawfully charge interest and fees at the rates and amounts charges on LendingClub's loans, LendingClub cannot take advantage of the rights granted to banks once a loan is sold, WebBank is not the true lender of the loans at issue because the loans are not made by a bank and the LendingClub/WebBank partnership is an attempt to evade Pennsylvania law. *Id.* at ¶¶ 45-47. Plaintiff Hine alleges that these actions make loans more expensive, increase the risk of default and make the consequences of default much worse and by example, she paid more than she would have paid had LendingClub charged interest and fees at the lawful rates and amounts, her monthly payments would have been much less making it easier for her to repay the loan and decreasing the chance of her default. *Id.* at ¶¶ 48-55.

Plaintiff Hine seeks class treatment of her claims and seeks to certify the following class: "All persons who obtained a loan from LendingClub with a Westmoreland County address and paid interest and fees that aggregated in excess of 6% simple interest per year within the applicable statute of limitations." *Id.* at ¶ 58.

Plaintiff Hine asserts the following claims against LendingClub:

1. A violation of the LIPL (Count I);

2. A violation of the CDCA (Count II); and

3. A violation of the UTPCPL (Count III).



 

LendingClub moves to compel arbitration of Plaintiff Hine's claims and argues that her loan is subject to an arbitration agreement. According to LendingClub, Plaintiff Hine applied for and obtained a loan from WebBank through LendingClub's website and to obtain this loan, she electronically signed a Borrower Membership Agreement by checking a box indicating her electronic signature and acceptance. Def's Br. (ECF No. 5 at 7). LendingClub asserts that these agreements are often referred to as "clickwrap" agreements which appear on an internet webpage and require that a user consent to any terms or conditions by clocking on a dialog box on the screen in order to proceed with the internet transaction. According to LendingClub, the clickwrap agreements included an arbitration agreement in which Plaintiff Hine agreed to binding arbitration for disputes "relating to ... the activities ... that involve, lead it, or result from" the agreement, loan, or relationship with LendingClub. *Id.* at 8. The Arbitration Agreement provides as follows:

***3** 18. Arbitration

a. Either party to this Agreement, or WBK [WebBank], may, at its sole election, require that the sole and exclusive forum and remedy for resolution of a Claim be final and binding arbitration pursuant to this section 18 (the "Arbitration Provision"), unless you opt out as provided in section 18(b) below. As used in this Arbitration Provision, "Claim" shall include any past, present, or future claim, dispute, or controversy involving you (or persons claiming through or connected with you), on the one hand, and us and/or WBK (or persons claiming through or connected with us and/or WBK), on the other hand, relating to or arising out of this Agreement, any Note, the Site, and/or the activities or relationships that involve, lead to, or result from any of the foregoing, including (except to the extent provided otherwise in the last sentence of section 18(f) below) the validity or enforceability of this Arbitration Provision, any part thereof, or the entire Agreement. Claims are subject to arbitration regardless of whether they arise from contract; tort (intentional or otherwise); a constitution, statute, common law, or principles of equity; or otherwise. Claims include matters arising as initial claims, counter-claims, cross-claims, third-part claims, or otherwise. The scope of this Arbitration Provision is to be given the broadest possible interpretation that is enforceable.

* * *

f. ... NO ARBITRATION SHALL PROCEED ON A CLASS, REPRESENTATIVE, OR COLLECTIVE BASIS (INCLUDING AS A PRIVATE ATTORNEY GENERAL ON BEHALF OF OTHERS), EVEN IF THE CLAIM OR CLAIMS THAT ARE THE SUBJECT OF ARBITRATION HAD PREVIOUSLY BEEN ASSERTED (OR COULD HAVE BEEN ASSERTED) IN A COURT AS A CLASS REPRESENTATIVE, OR COLLECTIVE ACTION IN A COURT....

g. This Arbitration Provision is made pursuant to a transaction involving interstate commerce and shall be governed by and enforceable under the FAA....

h. This Arbitration Provision shall survive (i) suspension, termination, revocation, closure, or amendments to this Agreement and the relationship of the parties and/or WBK; (ii) the bankruptcy or insolvency of any party or other person; and (iii) any transfer of any loan or Note or any other promissory note(s) which you owe, or any amounts owed on such loans or notes, to any other person or entity. If any portion of this Arbitration Provision other than section 18(f) is deemed invalid or unenforceable, the remaining portions of this Arbitration Provision shall nevertheless remain valid and in force. If an arbitration is brought on a class, representative, or collective basis, and the limitations on such proceedings in section 18(f) are finally adjudicated pursuant to the last sentence of section 18(f) to be unenforceable, then no arbitration shall be had. In no event shall any invalidation be deemed to authorize an arbitrator to determine Claims or make awards beyond those authorized in this Arbitration Provision.

THE PARTIES ACKNOWLEDGE THAT THEY HAVE A RIGHT TO LITIGATE CLAIMS THROUGH A COURT BEFORE A JUDGE OR JURY, BUT WILL NOT HAVE THAT RIGHT IF ANY PARTY ELECTS ARBITRATION PURSUANT TO ARBITRATION PROVISION. THE PARTIES HEREBY KNOWINGLY AND VOLUNTARILY WAIVE THEIR RIGHTS TO LITIGATE SUCH CLAIMS IN A COURT BEFORE A JUDGE OR JURY UPON ELECTION OF ARBITRATION BY ANY PARTY.



 

***4** Borrower Membership Agreement at ¶ 18 (ECF No. 5-1 at 11-12).

The Borrower Membership Agreement further provided that Plaintiff Hine had thirty days to opt out of the Arbitration Agreement, but according to LendingClub, Plaintiff Hine did not do so. The Arbitration Agreement also expressly precluded arbitration of a class. Def's Br. (ECF No. 5 at 9).

## III. STANDARD OF REVIEW

*a. Motion to Compel Arbitration*

While LendingClub argues that the standard set forth in Federal Rule of Civil Procedure 12(b)(6) should be applied to decide this motion to compel arbitration, when determining whether a valid arbitration agreement exists, courts must initially determine whether to apply the standard set forth in Rule 12(b)(6) or the summary judgment standard set forth in Rule 56. *Guidotti v. Legal Helpers Debt Resol., L.L.C.*, 716 F.3d 764, 771–76 (3d Cir. 2013). In so deciding, courts apply the following framework:

> [W]hen it is apparent, based on "the face of a complaint, and documents relied upon in the complaint," that certain of a party's claims "are subject to an enforceable arbitration clause, a motion to compel arbitration should be considered under a Rule 12(b)(6) standard without discovery's delay." But if the complaint and its supporting documents are unclear regarding the agreement to arbitrate, or if the plaintiff has responded to a motion to compel arbitration with additional facts sufficient to place the agreement to arbitrate in issue, then "the parties should be entitled to discovery on the question of arbitrability before a court entertains further briefing on [the] question." After limited discovery, the court may entertain a renewed motion to compel arbitration, this time judging the motion under a summary judgment standard.

*Guidotti*, 716 F.3d at 776 (citations omitted). "The centerpiece of that framework is whether the existence of a valid agreement to arbitrate is apparent from the face of the complaint or incorporated documents." *Singh v. Uber Techs. Inc.*, 939 F.3d 210, 218 (3d Cir. 2019) (citing *Guidotti*, 716 F.3d at 774–76). While "the enforceability of web-based agreements will often depend on a 'fact-intensive inquiry,' the Court may determine that a web-based agreement to arbitrate exists where notice of the agreement was 'reasonably conspicuous and manifestation of assent unambiguous as a matter of law.' " *HealthplanCRM, LLC v. AvMed, Inc.*, 458 F. Supp. 3d 308, 331 (W.D. Pa. 2020) (quoting *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 76 (2d Cir. 2017)).

b. Discussion

LendingClub argues that because the Membership Agreement contained an Arbitration Agreement that Plaintiff Hine agreed to and Plaintiff Hine did not opt out of the agreement to arbitrate within thirty days, that her claims must be compelled to arbitration. In so arguing, LendingClub included as an exhibit to its brief a Declaration of Jeremy Carlson its Principal Electronic Discovery Manager who testifies regarding Plaintiff Hine's purported execution of the Borrower Membership Agreement and agreement to the Arbitration Provision. LendingClub further attaches as exhibits to its motion the Borrower Membership Agreement and the Loan Agreement and screen grabs from LendingClub's purported webpages. Notably, no document attached by LendingClub includes any specific reference to Plaintiff Hine, her loan amount, or any specific loan terms. LendingClub also includes an "exemplar" dialog screen with an electronic check box and accompanying text that it claims Plaintiff Hine "would have been presented with" as she accepted the terms of her loan. Carlson Dec. (ECF No. 5-1 at ¶ 10).

***5** Plaintiff Hine responds that LendingClub's online platform failed to provide her with reasonable notice of the arbitration agreement and the agreement process "actively misled" Plaintiff Hine "to believe she was not agreeing to limit her legal rights." Pl. Resp. (ECF No. 10 at 6). Plaintiff Hine argues that the Arbitration Agreement was contained in nondescript hyperlinks to the Membership Agreement and the main webpage with the material terms of Plaintiff Hine's loan did not mention arbitration, and therefore misled her, and any reasonable user, to believe that arbitration was not a term of the loan transaction. *Id.* Plaintiff Hine further responds that LendingClub has failed to prove that the Agreements it supplies in support of its motion are the same

ones to which she assented and fails to prove that the screenshot it provides is an accurate portrayal of the webpage presented to Hine because neither provided Agreement is signed by Plaintiff Hine and are "devoid of information tying the documents to Hine or the loan transaction at issue." Pl.'s Resp. (ECF No. 10 at 15).

In the instant matter, the summary judgment standard must apply to the motion to compel arbitration because it is not apparent from the face of the complaint, nor documents relied upon in the complaint that a valid arbitration agreement exists. Plaintiff Hine has raised additional sufficient facts to place the agreement to arbitrate in issue. Specifically, the documents attached by LendingClub to its motion to dismiss purporting to be the Agreements that Plaintiff Hine executed to obtain her loan are only exemplars of the type of agreement Plaintiff Hine could have executed and do not include her signature or any specific information regarding her loan including loan amounts, interest rates, effecting dates, etc., and while LendingClub includes a declaration from its corporate representative to prove that the exemplar agreements attached to the motion to dismiss would have been of the type that Plaintiff Hine signed – and they may be – it would be improper for the Court to consider this testimony without affording Plaintiff Hine the opportunity to conduct discovery as to the veracity of LendingClub's assertions.[2] The Court cannot make the determination that as a matter of law that the notice of the Arbitration Agreement was "reasonably conspicuous and [Plaintiff's Hine's] manifestation of assent unambiguous as a matter of law" without the benefit of limited discovery into what Arbitration Agreement was entered into or how the Arbitration Agreements were presented to Plaintiff Hine. *Meyer*, 868 F.3d at 76. Moreover, this conclusion is supported by several other courts who have also concluded that materials attached to a motion to compel arbitration should not be considered under the Rule 12(b)(6) standard. *Nicasio v. L. Offs. of Faloni & Assocs., LLC*, No. 2:16-0474 (WJM), 2016 WL 7105928 at *2 (D.N.J. Dec. 5, 2016); *Hosang v. Midland Credit Mgmt., Inc.*, No. 19CV21740BRMJAD, 2020 WL 8366284, at *3 (D.N.J. Dec. 15, 2020), report and recommendation adopted, No. 219CV21740BRMJAD, 2021 WL 307544 (D.N.J. Jan. 29, 2021); *Powell v. Midland Credit Mgmt., Inc.*, No. CV2119836KMWMJS, 2022 WL 3681257, at *4 (D.N.J. Aug. 25, 2022). "Because the question of arbitrability cannot be resolved without considering evidence extraneous to the pleadings, it would be inappropriate to apply a Rule 12(b)(6) standard in deciding the instant motion." *Torres v. Rushmore Serv. Ctr., LLC*, No. CV189236SDWLDW, 2018 WL 5669175, at *2 (D.N.J. Oct. 31, 2018). *But see Liptak v. Accelerated Inventory Mgmt., LLC*, No. 2:20-CV-967, 2021 WL 650514, at *2 (W.D. Pa. Feb. 19, 2021) (finding that a "clickwrap" arbitration agreement was enforceable as a matter of law under Rule 12(b)(6) and compelling arbitration). Therefore, the parties should be afforded the opportunity to conduct discovery to determine the arbitrability of this matter.

## IV. CONCLUSION

***6** Based on the foregoing, LendingClub's motion to compel arbitration is denied without prejudice to refile once the parties have completed limited discovery on the arbitrability of Plaintiff Hine's claims. An appropriate Order follows.

### All Citations

Slip Copy, 2022 WL 16950409

Footnotes

1 Motions to compel arbitration are non-dispositive motions under 28 U.S.C. § 636(b). *See Virgin Islands Water & Power Auth. v. Gen. Elec. Int'l Inc.*, 561 F. App'x 131, 133–34 (3d Cir. 2014).

2 For example, Plaintiff Hine calls into question the veracity of the documents attached to LendingClub's motion and correctly indicates that timestamps on those documents indicate that the documents were created in 2019, whereas Plaintiff Hine's claims arose in 2015. Pl.'s Resp. (ECF No. 10 at 15). LendingClub responds that the documents were created in 2015, but were captured and timestamped in 2019, that the Court should consider those documents as emblematic of the type of agreement Plaintiff Hine would have signed and includes another Declaration from Jeremy Carlson to support that assertion. Def.'s Reply (ECF No. 12 at 6-9). While the documents attached to the motion by LendingClub may very well be the type of document Plaintiff Hine encountered and assented to, the Court



 

cannot make that determination as a matter of law under Rule 12(b)(6) where one party is asking the Court to rely on unauthenticated documents and declarations of witnesses that are extraneous to the pleadings.

**End of Document**

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Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.

Abdul MOHAMMED, Plaintiff,

v.

UBER TECHNOLOGIES, INC., Rasier, LLC, Travis Kalanick, and Ryan Graves, Defendants.

16 C 2537
|
Signed 03/07/2018

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## MEMORANDUM OPINION AND ORDER

John Z. Lee, United States District Judge

***1** Plaintiff Abdul Mohammed ("Mohammed") drove for Uber Technologies, Inc. ("Uber"). He has since filed a twenty-one count *pro se* complaint against Uber,[1] Uber's wholly owned subsidiary, Rasier, LLC ("Rasier"), as well as individuals Travis Kalanick, Garrett Camp, and Ryan Graves (collectively, "Defendants"),[2] raising claims under various state and federal laws and the U.S. Constitution. Defendants have moved to compel arbitration of Mohammed's claims. Having held a trial on the formation of the parties' arbitration agreement, the Court concludes that an agreement was formed. The Court therefore compels arbitration and stays this action.

## Procedural History

Mohammed filed his complaint on February 24, 2016. *See* ECF No. 1. On May 3, 2016, Defendants moved to compel arbitration of Mohammed's claims. *See* Defs.' Mots. Compel Arbitration, ECF Nos. 14, 17. The Court denied Defendants' motions on February 14, 2017. *Mohammed v. Uber Techs., Inc.*, 237 F. Supp. 3d 719, 724 (N.D. Ill. 2017).

In its opinion, the Court explained that, while the Federal Arbitration Act mandates the enforcement of valid, written arbitration agreements, a court must, before compelling arbitration, ensure that such an agreement exists. *Id.* at 725. (citing 9 U.S.C. §§ 2–4; *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 733 (7th Cir. 2002) ). The Court then analyzed the parties' competing versions of what transpired when Mohammed signed up to drive for Uber. *Id.* at *730–32. It ultimately determined that Mohammed, who denied ever seeing or agreeing to the arbitration agreement at issue, had raised a triable issue as to whether he had formed an arbitration agreement with Defendants. *Id.* at 732. In so holding, the Court accepted Mohammed's testimony as true and construed all justifiable inferences in his favor. *Id.* at 725 (quoting *Tinder*, 305 F.3d at 735).



 

Section 4 of the Federal Arbitration Act affords a party opposing arbitration a jury trial right where the formation of an arbitration agreement is at issue. 9 U.S.C. § 4. Here, however, Mohammed waived his jury trial right. *See* Orders of 3/07/17 & 4/4/17, ECF Nos. 52, 57; Pl.'s Limited Waiver of Jury & Consent to Bench Trial, ECF No. 59. Thus, after limited discovery related to the parties' formation of an arbitration agreement, the Court held a one-day bench trial on June 14, 2017.

## Standard of Decision

Where an action is "tried on the facts without a jury," Federal Rule of Civil Procedure 52 requires the district court to "find the facts specially and state its conclusions of law separately." Fed. R. Civ. P. 52(a); *see Khan v. Fatima,* 680 F.3d 781, 785 (7th Cir. 2012). In doing so, the district court must "explain the grounds" of its decision and provide a "reasoned, articulate adjudication." *Aprin v. United States.,* 521 F.3d 769, 776 (7th Cir. 2008).

***2** In rendering its decision in this case, the Court has considered the admissible testimony and documentary evidence offered at trial. In so doing, the Court has considered the weight to be given to the evidence and has assessed the credibility of the witnesses in light of their demeanor, their ability to see, hear, and know the matters about which they testified, and any potential for bias. Furthermore, the Court has considered the memoranda and proposed findings of facts submitted by the parties after the trial and the legal and factual arguments set forth therein.

## The Trial

### A. Defendants' Witnesses

Defendants called two witnesses.[3] The first was Brian Moloney, a Senior Operations Manager at Uber Chicago. Bench Trial Tr. ("Tr.") at 10:14–15, ECF No. 77. Moloney began working for Uber in June 2014. *Id.* at 10:16–17. In October 2014, when Mohammed signed up to drive with Uber, Moloney served as an Operations and Logistics Manager in Uber's Chicago office. *Id.* at 10:16–19. In this capacity, Moloney was responsible for, among other things, "in-person support." *Id.* at 10:20–22. This support consisted of assisting Uber drivers with inquiries regarding the Uber application ("app") used in conjunction with driving for Uber, including instances in which drivers "ha[d] an issue signing up" to drive with Uber. *Id.* at 11:1–7. Through his role, Moloney became familiar with the process Uber used to sign up drivers through the app, *id.* at 11:15–18, which was the subject of his testimony, *see generally id.* at 10:12–48:2.

The second was Shea Munion. Munion worked for Uber Chicago from late 2012 through March 2015. *Id.* at 49:3–8. As an Operations Coordinator, Munion's primary responsibilities at Uber were "providing support to the Uber driver-partners at the partner support center, which ranged from on-boarding them to supporting them once they were actually using the system." *Id.* at 49:11–16. In this role, Munion also became familiar with the driver sign-up process. *Id.* at 49:17–24. He testified about his practices as part of that process, particularly with respect to October 1, 2014, when Uber records indicate that Munion met with Mohammed and assisted him in signing up to drive with Uber. *See generally id.* at 48:23–63:1.

### B. Mohammed's Witnesses

Mohammed called only himself. He began driving for Uber on October 1, 2014. *Id.* at 64:23–25. He gave his account of what occurred when he signed up to serve as a driver on that day, as well as a number of other items related to his time as a driver. *See generally id.* at 64:6–102:5.

## Findings of Fact


 

1. Uber Technologies, Inc. provides transportation by utilizing an app to connect riders with independent drivers. *See* Defs.' Ex. 1. At all times relevant to this dispute, Uber partnered with Rasier, LLC, which licensed the Uber app and provided a platform for drivers to connect with riders. *Id.*

2. In October 2014, drivers' engagement with Uber was governed in part by the "Rasier Software Sublicense & Online Services Agreement," or the "Rasier Agreement." *See id.*; Tr. at 16:19–17:19.

***3** 3. The Rasier Agreement contains an arbitration provision. Defs.' Ex. 1, at 11–15; Tr. at 17:8–19. The provision is governed by the Federal Arbitration Act and mandates arbitration broadly, "without limitation, to disputes arising out of or related to [the] Agreement and disputes arising out of related to [a driver's] relationship with" Rasier or Uber. Defs.' Ex. 1, at 12–13. If a driver does not wish to be subject to the arbitration provision, the Rasier Agreement details how the driver may opt out. *Id.* at 15.

4. The first page of the Rasier Agreement states, in bold, capital font beginning with "**IMPORTANT**," that the Rasier Agreement contains an arbitration provision that mandates arbitration for disputes with the company. *Id.* at 1. The same paragraph explains that accepting the Rasier Agreement constitutes consent to the arbitration provision, and notes that it is possible to opt out of the arbitration provision by following instructions found later in the document. *Id.*

5. In October 2014, individuals seeking to drive for Uber first completed a number of preliminary steps, including creating an account and undergoing a background check. Tr. at 11:22–12:16. After completing these preliminary steps, Uber employees were responsible for ensuring compliance and "activating" drivers' accounts. *Id.* at 12:24–13:3. Without activation, a driver could not use the app and drive for Uber. *Id.* at 13:6–13:10.

6. Following activation, two steps remained before a driver could begin using the app. First, the app required assent to terms and conditions of service. *Id.* at 13:15–17. Then, the app requested bank account information in order to arrange for direct deposit. *Id.* at 13:23–14:1.

*7.* With respect to the first step—assent to terms and conditions—the app provided two screens by which it twice requested assent. First, the app populated a screen that stated, "TO GO ONLINE, YOU MUST REVIEW ALL THE DOCUMENTS BELOW AND AGREE TO THE CONTRACTS BELOW." Defs.' Ex. 2; Tr. at 14:12–16. Three contracts were listed on the screen, including the Rasier Agreement, which could be accessed by hyperlink. Defs.' Ex. 2; Tr. at 16:5–13. Below the contracts, this first screen explained, "[b]y clicking below, you represent that you have reviewed all the documents above and that you agree to all the contracts above." Defs.' Ex. 2. Below this explanation was a green button containing "Yes, I agree." *Id.*

8. If the user selected the green button containing "Yes, I agree," another screen appeared. Tr. at 15:11–12; *see* Defs.' Ex. 3. The screen stated, in bold font, "**Please confirm that you have reviewed all the documents and agree to all the new contracts.**" Defs.' Ex. 3.

9. The user was then given the option of selecting "No" or "Yes, I agree" for a second time. *Id.* Thus, in order to proceed with using the Uber app, the user was required to indicate his or her agreement to the contracts as issue—including the Rasier Agreement—two separate times. *See id.*; Tr. at 15:11–13.

10. In October 2014, when Mohammed signed up to drive for Uber, Uber had a partner support center in Chicago. *Id.* at 11:3–4. Moloney and Munion each provided partner support out of the Chicago center. *See id.* at 11:3–18, 35:9–19; 49:3–16.

11. Munion assisted Mohammed with the process of signing up to drive for Uber on October 1, 2014. *Id.* at 21:7–19; 22:9–17; 23:13–18, 51:1–13; *see* Defs.' Exs. 7–8.

12. Uber's records reflect that the "Yes I agree" buttons were selected in connection with Mohammed's account, indicating assent to the Rasier Agreement, on October 1, 2014. *Id.* at 19:18–21:2; Defs.' Ex. 9.



 

***4** 13. Munion does not remember assisting Mohammed. *Id.* at 51:12–15. As an Operations Coordinator, he assisted "many, many" drivers. *Id.* at 15:15.

14. In the course of assisting prospective drivers with the sign-up process, Munion adopted a "general practice" of ensuring that only the prospective driver—and not Munion—clicked to indicate acceptance of Uber's terms and conditions of service, including the Rasier Agreement. *Id.* at 53:20–54:24. Specifically, Munion required the prospective driver to hold the device or phone on which the prospective driver viewed the screens described above, informed the driver that they were agreeing to terms and conditions with Uber, gave the driver time to read the Rasier Agreement if the driver wished, and left the driver—and only the driver—to select "Yes, I agree." *Id.*

In finding that Munion adopted such a practice, the Court deems his testimony to this effect credible in light of several considerations.[4] First, Munion offered a sincere reason for adopting such a practice. He explained that he understood that the Rasier Agreement was between a prospective driver and Uber, and was therefore "personal[ ]" and "important ... to the person who's signing up." Tr. at 54:10–15. Second, Munion, who no longer works for Uber, *see id.* at 49:1–6, has no stake in the controversy, and thus no reason to testify untruthfully. Third, Moloney also testified that he was instructed to adopt a similar practice. *Id.* at 44:9–45:21.[5] The fact that another Uber employee believed that the company had adopted such a practice lends credence to Munion's testimony that he had adopted such a practice. Finally, Munion's demeanor and temperament as a witness reflected an intent to testify genuinely, honestly, and reliably.

***5** 15. Consistent with this practice, on October 1, 2014, Munion ensured that Mohammed selected "Yes, I agree" on each screen, reflecting his assent to the Rasier Agreement.

In finding that it was Mohammed (rather than Munion) who selected "Yes, I agree" on each screen, the Court does not find Mohammed's testimony otherwise, *see* Tr. at 66:8–67:19, to be credible for several reasons. First, Mohammed testified as to two aspects of his interaction with Munion that, according to both Munion and Moloney, are inconsistent with Uber's driver sign-up process as of October 1, 2014. According to Mohammed, he gave Munion a $100 cash deposit for a leased phone. *Id.* at 66:10–12. But in October 2014, Uber did not accept cash toward the then-$200 deposit on leased phones. *See id.* at 18:2–19:4; 51:20–52:22. In addition, Mohammed claimed that Munion logged him into a leased phone. *Id.* at 66:13–19. But Uber, which keeps records of every log-in to a leased phone, has no record of Munion logging Mohammed into a leased phone. *Id.* at 19:5–17. Mohammed makes no effort to explain these inconsistencies. They suggest that Mohammed's memory as to his interaction with Munion is unreliable or otherwise incorrect.

Second, unlike Munion, Mohammed has a direct stake in the controversy, which provides greater reason to doubt the credibility of his testimony. And, third, several of Mohammed's responses on cross-examination raised questions as to his credibility. For example, his Facebook page lists that he graduated from Stanford University, which he never attended. *Id.* at 67:25–69:19.[6] In addition, as part of an effort to obtain certain signing bonuses from both Uber and Lyft, Mohammed both (1) misrepresented to at least one of the companies that he was not yet an active driver for the company, *id.* at 83:22–87:22, and (2) falsely stated to Lyft that he was no longer driving with Uber, when he still was, *id.* at 85:2–86:2.[7] In addition, Mohammed testified that he could not remember or did not know if he had created certain fraudulent Uber rider accounts and driven the accounts in a circle near his home in order to manipulate an Uber promotion. Tr. at 88:3–98:6. The Court finds that these responses further undermine Mohammed's credibility and increase the likelihood that his testimony about his interaction with Munion is not accurate.

16. Mohammed thereafter used Uber's app and connection to riders to provide over 2000 rides. *Id.* at 90:17–18.

**Analysis**



 

The Federal Arbitration Act permits a court to compel arbitration where there is "a written agreement to arbitrate, a dispute within the scope of the arbitration agreement, and a refusal to arbitrate." *Zurich Am. Ins. Co. v. Watts Indus., Inc.*, 417 F.3d 682, 687 (7th Cir. 2005); *see* 9 U.S.C. §§ 3–4. Here, only the existence of an agreement to arbitrate is at issue. And, as the parties seeking to compel arbitration, Defendants bear the burden of proving the existence of an agreement to arbitrate by a preponderance of the evidence. *See Cwik v. First Stop Health, LLC*, No. 12 C 6238, 2016 WL 1407708, at *4–5 (N.D. Ill. Apr. 10, 2016); *see also Norcia v. Samsung Telecomms. Am., LLC*, 845 F.3d 1279, 1283 (9th Cir. 2017).

***6** The question of whether Mohammed formed an agreement to arbitrate with Uber is governed by state law. *Janiga v. Questar Capital Corp.*, 615 F.3d 735, 742 (7th Cir. 2010). In this case, the parties agree that Illinois law applies. Defs.' Stmts. of Fact & Conclusions of Law ¶ 72, ECF No. 76; Pl.'s Post-Trial Br. at 6–7.

"In Illinois, an offer, an acceptance and consideration are the basic ingredients of a contract." *Melena v. Anheuser-Busch, Inc.*, 847 N.E.2d 99, 109 (Ill. 2006). An offer is "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 561 (7th Cir. 2012) (internal quotation marks and citations omitted) (applying Illinois law). To accept an offer, a party must objectively manifest intent to be bound to the contract's terms. *See Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1034 (7th Cir. 2016) (applying Illinois law). And consideration is " 'a bargained-for exchange, whereby the promisor ... receives some benefit, or the promisee ... suffers detriment.' " *JPMorgan Chase Bank, N.A. v. Asia Pulp & Paper Co.*, 707 F.3d 853, 866 (7th Cir. 2013) (alteration in original) (quoting *Vassilkovska v. Woodfield Nissan, Inc.*, 830 N.E.2d 619, 624 (Ill. App. Ct. 2005) ).

Here, the Court finds that Defendants have established, by a preponderance of the evidence, that Uber offered the Rasier Agreement (and the arbitration provision contained therein) to Mohammed when it presented him with the agreement as part of the driver sign-up process. Tr. at 14:12–16, 15:11–13, 16:5–13; Defs.' Exs. 2–3.[8] Defendants have also proven that it is more likely than not that Mohammed accepted the agreement by clicking "Yes, I agree" to two different screens after being presented with a hyperlink to the agreement. *See id.* at 19:18–21:2, 21:7–19; 22:9–17; 23:13–18, 51:1–13, 53:20–54:21; Defs.' Exs. 7–9. Finally, Defendants have shown, by a preponderance of the evidence, that Uber provided consideration for the agreement through providing Mohammed with the benefits of its app and connection to riders in conjunction with over 2000 rides. *Id.* at 90:17–18.

In a last-ditch effort to avoid arbitration, Mohammed spends most of his post-trial brief arguing (for the first time) that the Rasier Agreement is indefinite or otherwise unenforceable because it contains an illusory promise. Pl.'s Post-Trial Br. at 7–8, 10–12. Mohammed grounds this argument in a provision of the Rasier Agreement titled "Modifications," which states:

> The Company reserves the right to modify or supplement the terms and conditions of this Agreement at any time, effective upon publishing a modified version of this Agreement, or upon publishing the supplemental terms to this Agreement, on the Software or via email or on your online Partner Dashboard.
>
> ***7** You hereby expressly acknowledge and agree that, by using or receiving the Service, and downloading, installing or using the Software, you and Company are bound by the then-current version of this Agreement, including any modifications and supplements to this Agreement or documents incorporated herein. Continued use of the Service or Software after any modifications or supplements to the Agreement shall constitute your consent to such modifications and supplements. You are responsible for regularly reviewing this Agreement.

*See* Defs.' Ex. 1, at 16. Mohammed contends, in pertinent part, that "Uber—like the proverbial hog—was overly greedy in reserving itself a right to change all terms of its 'contract,' including the arbitration clause," and thereby "rendered its contractual consideration illusory." Pl.'s Post-Trial Br. at 11.

This argument fails in two germane respects. First, it is impermissibly tardy. Mohammed could have raised this argument long before the Court and the parties went to the time and expense of conducting discovery and a trial on the parties' formation of an agreement to arbitrate. Mohammed should have sought leave to make such an argument at an earlier time. As such, he waived his opportunity to bring it now.



 

Even on the merits, however, Mohammed is mistaken. " 'An illusory promise appears to be a promise, but on closer examination reveals that the promisor has not promised to do anything.... An illusory promise is also defined as one in which the performance is optional.' " *Regensburger v. China Adoption Consultants, Ltd.*, 138 F.3d 1201, 1206–07 (7th Cir. 1998) (alteration in original) (quoting *W.E. Erickson Const., Inc. v. Chi. Title Ins. Co.*, 641 N.E.2d 861, 864 (Ill. App. Ct. 1994) ). Plainly, the modification provision in the Rasier Agreement does not indicate that Uber promises nothing, or that its performance is optional. Rather, the provision indicates only that Uber can modify the contract at a later date, to which the driver must assent. The initial agreement, in comparison, was enforceable against Uber upon its entry.

The authorities on which Mohammed relies do not indicate otherwise. *Druco Restaurants, Inc. v. Steak N Shake Enterprises, Inc.*, 765 F.3d 776 (7th Cir. 2014), involved a contract that permitted the defendant to unilaterally impose arbitration without assent from the plaintiff, *id.* at 780, 782–83, unlike the Rasier Agreement, which binds both parties to arbitration (unless Mohammed had opted out, *see* Defs.' Ex. 1, at 15) and requires both parties' assent to any modifications. Moreover, the very language Mohammed quotes from *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126 (7th Cir. 1997)—where the agreement at issue expressly disclaimed creation of a contract, and it was " 'quite clear that [the defendant] ha[d] committed itself to nothing,' " Pl.'s Post-Trial Br. at 11 (quoting *Gibson*, 121 F.3d at 1133 (Cudahy, J., concurring) )—indicates why it is inapposite. The decisions from other circuits on which Mohammed relies, *id.* at 7, 11, are distinguishable for the same reasons. Accordingly, the Court finds that Uber's promise underlying the Rasier Agreement was not illusory.

## Conclusion of Law

Based on the evidence submitted at trial, Defendants have sustained their burden of proving by a preponderance of the evidence that Mohammed entered into a written agreement to arbitrate his dispute with Uber when he signed up to drive on October 1, 2014.[9]

## Conclusion

***8** Mohammed formed a written agreement to arbitrate his dispute against Defendants on October 1, 2014. Pursuant to 9 U.S.C. § 3, the Court stays the case pending arbitration. *See Halim v. Great Gatsby's Auction Gallery, Inc.*, 516 F.3d 557, 561 (7th Cir. 2008). This case is placed on the Court's suspended trial calendar. The parties are instructed to inform the Court within thirty days of the conclusion of the arbitration proceeding.

**IT IS SO ORDERED.**

**All Citations**

Not Reported in Fed. Supp., 2018 WL 1184733

Footnotes

1 Subsequent to filing his complaint, Mohammed retained counsel to represent him in the proceedings discussed herein. At present, however, he stands on his original complaint.

2 Defendant Camp was dismissed on February 14, 2017, for want of personal jurisdiction. *Mohammed v. Uber Techs., Inc.*, 237 F. Supp. 3d 719, 735 (N.D. Ill. 2017).

3 Defendants also offered the testimony of a third witness, James Hawkins. Hawkins is a Product Operations Specialist who investigates fraud in conjunction with Uber's products and promotions. *Id.* at 113:7–21. He testified concerning conduct by which Uber believes



 

Mohammed created a number of fraudulent rider accounts. *See generally id.* at 112:22–146:21. The Court determined that this evidence was not relevant to the issue of whether Mohammed entered into an agreement with Uber to arbitrate disputes that might arise in his role as driver. *Id.* at 111:20–25. Nevertheless, the Court received the evidence on proffer. *Id.* at 111:2–4.

4 In his post-hearing brief, Mohammed challenges the existence of such a practice on the basis that Defendants adduced no evidence of formal training or a written document establishing this practice. Pl.'s Post-Trial Br. at 5, 8, ECF No. 78. Insofar as Mohammed challenges the admissibility of Munion's testimony for this purpose, however, his argument is too late, because he did not object at trial. *See Walker v. Groot*, No. 14-2478, 2017 WL 3474048, at *4 (7th Cir. Aug. 14, 2017).

In any event, his challenge falls flat. First, whether Munion received formal training or not, the Court finds that he adopted a personal practice of requiring prospective drivers to assent to the Rasier Agreement. Munion assisted so many prospective drivers (as many as thirty per day) so frequently in his role as an Operations Coordinator such that he repeatedly and systematically ensured that they clicked acceptance to the Rasier Agreement. Tr. at 51:14–15, 53:20–54:24, 55:14–24, 56:2–17; *see Simplex, Inc. v. Diversified Energy Sys., Inc.*, 847 F.2d 1290, 1293–94 (7th Cir. 1988). In addition, Federal Rule of Evidence 406 explains that there need not be any documentation of his practice in order for it to be admissible: "Evidence of a person's habit ... may be admitted to prove that on a particular occasion the person ... acted in accordance with the habit.... The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness." Fed. R. Evid. 406; *see Rosenburg v. Lincoln Am. Life Ins. Co.*, 883 F.2d 1328, 1336 (7th Cir. 1989) (holding that witnesses' testimony was sufficient to establish the existence of a practice).

5 Mohammed objects to this fact in his post-trial brief on the basis that it is founded on inadmissible hearsay. Pl.'s Post-Trial Br. at 5–6, 8; *see generally* Tr. at 46:19–47:23. Once again, this objection is offered too late. *Walker*, 2017 WL 3474048, at *4. But, in any event, the out-of-court statements on which Moloney relied are not taken here for their truth. Rather, they are admissible to demonstrate their effect on Moloney, who testified that he adhered to the practice during his employment at Uber, as did the other Uber employees he observed. Tr. at 45:3–21.

6 Mohammed initially suggested that he did not know why Stanford was listed, then said that he may have mistakenly selected it, and finally maintained that the account is not active. *Id.*

7 These statements must have been false irrespective of the fact that the terms of the promotion were not admitted into evidence, as Mohammed points out. *See* Pl.'s Post-Trial Br. at 12.

8 To the extent Mohammed argues that Uber's conduct did not constitute an offer because Munion did not explain the terms of the arbitration provision to him, Pl.'s Post-Trial Br. at 8, this argument is unavailing. *See Sgouros*, 817 F.3d at 1034 ("Generally, a party who signs a written contract is presumed to have notice of all of the contract's terms."); *accord Janiga*, 615 F.3d at 743. Moreover, the Court concurs with the conclusions of various other courts that Uber's sign-up process provided reasonable notice of the arbitration provision contained in the Rasier Agreement. *See* Defs.' Post-Trial Reply at 3–4, ECF No. 80 (collecting cases).

9 Because the Court finds that the parties entered into an agreement to arbitrate on this date, it need not consider Defendants' additional argument that Mohammed assented to the Rasier Agreement by his conduct after October 1, 2014.

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Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

James O'CALLAGHAN, Plaintiff,

v.

UBER CORPORATION OF CALIFORNIA, Defendant.

17 Civ. 2094 (ER)
|
Signed 07/03/2018
|
Filed 07/05/2018

**Attorneys and Law Firms**

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**OPINION AND ORDER**

Edgardo Ramos, U.S.D.J.

***1** James O'Callaghan, acting *pro se*, brings this action against Uber Technologies, Inc., sued herein as Uber Corporation of California. O'Callaghan, an Uber driver, alleges that Uber failed to inform him about his right to compensation under The Black Car Fund[1] for his injuries suffered as a result of a physical altercation with a New York City taxi driver, and that Uber incorrectly reported the incident to the New York State Compensation Committee.[2] Complaint ("Compl."), Doc. 2 at 2–7. In the instant motion, Uber moves to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (the "FAA"). Doc. 17. In response, O'Callaghan moved to deny arbitration and grant jury trial. Doc. 21. For the reasons set forth below, Uber's motion to compel arbitration is GRANTED and O'Callaghan's motion to deny arbitration and grant jury trial is DENIED.

## I. FACTUAL BACKGROUND

### A. The Allegations

O'Callaghan was an Uber driver that provided his services through the company's smartphone application ("the Uber App"). Uber's Memorandum of Law in Support of Its Motion to Compel Arbitration ("Def.'s Mem."), Doc. 18 at 1. On February 19, 2014, O'Callaghan was driving to pick up a client when he was involved in a motor vehicle accident with a New York City taxi driver. Compl. at 2. The accident occurred on 39th Street between 2nd and 3rd Avenues. *Id.* As O'Callaghan exited his vehicle to examine damage, he was assaulted by the taxi driver. *Id.* O'Callaghan suffered severe headaches after the assault and went to see three different doctors for treatment. *Id.* at 3. Two of the doctors concluded that O'Callaghan suffered a concussion. *Id.*

On February 22, 2014, O'Callaghan notified Uber about the accident and the assault via text. *Id.* at 4. Subsequently, O'Callaghan sent five separate emails to Uber asking for legal help. *Id.* at 5–6. Upon learning in May 2016 that Uber was part of The Black Car Fund, O'Callaghan immediately filed the necessary papers requesting compensation for his injury. *Id.* at 3. On May 22, 2016, Katy Mason, an Uber employee, allegedly wrongfully informed the New York State Compensation Committee that



 

O'Callaghan had never informed Uber of the February 19, 2014 incident. *Id.* at 4–5. O'Callaghan alleges that Mason denied the existence of the five emails and the text message he had previously sent to Uber. *Id.* at 6. On June 9, 2016, O'Callaghan contacted Mason and was informed that she would resend the letter detailing the accident to the Compensation Committee. *Id.* at 4. Mason allegedly never did so. *Id.* Instead, Mason submitted a letter with a chart showing the trips O'Callaghan took as an Uber driver on February 19, 2014, the date of the accident. *Id.* at 6, 12. O'Callaghan claims that this chart is fraudulent. *Id.* at 6.

***2** The Compensation Committee initially denied O'Callaghan's request and granted him a hearing. *Id.* at 3. With the assistance of an attorney, O'Callaghan was eventually able to receive $5,000 from The Black Car Fund. Response to Defendant's Request for Pre-Motion Conference on Motion to Compel Arbitration ("Pl.'s Resp."), Doc. 16 at 2. O'Callaghan alleges that Uber committed "fraudulent contract misrepresentation" because it failed to inform him of his right to compensation under The Black Car Fund and that it committed mail and wire fraud by submitting a fraudulent document to the Compensation Committee.[3] *See* Compl.

**B. Uber USA, LLC Technology Services Agreement**

An Uber driver cannot access the Uber platform to generate leads for potential riders unless she electronically accepts the agreement to use the Uber App. Def.'s Mem. at 2. To gain access to the platform, she must "log in to the Uber App using a unique surname ... and password selected by the driver to create an Uber account." *Id.* When a driver first activates the Uber App, she is presented with a screen containing a hyperlink to the operative agreement. *Id.* at 3. At the top of this screen, the Uber App states, "TO GO ONLINE, YOU MUST REVIEW ALL THE DOCUMENTS BELOW AND AGREE TO THE CONTRACTS BELOW." *Id.* The driver may review the agreement by clicking on the hyperlink. *Id.*

O'Callaghan first signed up to use the Uber App on or about February 25, 2013, and his account was activated on March 8, 2013. *Id.* at 4. From 2013 to 2015, Uber updated the operative agreement four times.[4] *Id.* Each time Uber updated the agreement, O'Callaghan was asked to "assent to [a] revised [version] of the contract in order to receive continued access to the Uber App." *Id.* O'Callaghan was required to click "YES, I AGREE" to advance past the screen that contained the updated agreement. *Id.* at 3. Above "YES, I AGREE," the Uber App reminded O'Callaghan that "[b]y clicking below, you represent that you have reviewed all the documents above and that you agree to all the contracts above." *Id.* After clicking "YES, I AGREE," O'Callaghan was asked to confirm acceptance a second time by clicking "YES, I AGREE" again. *Id.* Only then was O'Callaghan able to access the Uber App.[5] *Id.*

Although the original agreement that O'Callaghan first signed in February 2013 did not include an arbitration provision, the subsequent four versions of the agreement that O'Callaghan allegedly accepted did. *Id.* at 4. The most recent agreement, updated in December 2015 ("December 2015 agreement"), provides as follows:

***3** i. How This Arbitration Provision Applies.

> This Arbitration Provision is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (the "FAA") and evidences a transaction involving interstate commerce. This Arbitration Provision applies to any dispute arising out of or related to this Agreement or termination of the Agreement and survives after the Agreement terminates. [...]
>
> Except as provided in Section 15.3(v), below, regarding the Class Action Waiver, 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. [...]
>
> Except as it otherwise provides, this Arbitration Provision also applies, without limitation, to all disputes between You and Uber, as well as all disputes between You and Uber's fiduciaries, administrators, affiliates, subsidiaries, parents, and all successors and assigns of any of them, including but not limited to any disputes arising out of or related to this Agreement and disputes arising out of or related to Your relationship with Uber, including termination of the relationship. [...]



 

> This Agreement is intended to require arbitration of every claim or dispute that lawfully can be arbitrated, except for those claims and disputes which by the terms of this Agreement are expressly excluded from the Arbitration Provision. [...]
>
> ii. Limitations On How This Agreement Applies.
>
> The disputes and claims set forth below shall not be subject to arbitration and the requirement to arbitrate set forth in Section 15.3 of this Agreement shall not apply: [...]
>
> Claims for workers compensation, state disability insurance and unemployment insurance benefits; [...]

Declaration of Chad Dobbs in Support of Uber's Motion to Compel Arbitration ("Dobbs Decl."), Doc. 19 Ex. K § 15.3(i) and (ii) (emphasis omitted).

The agreement also notified O'Callaghan that he could opt out of the arbitration provision:

> viii. Your Right To Opt Out Of Arbitration.
>
> Arbitration is not a mandatory condition of your contractual relationship with Uber. If You do not want to be subject to this Arbitration Provision, You may opt out of this Arbitration Provision by notifying Uber in writing of Your desire to opt out of this Arbitration Provision, which writing must be dated, signed and delivered by electronic mail to optout@uber.com, by U.S. Mail, or by any nationally recognized delivery service [...]
>
> Should You not opt out of this Arbitration Provision within the 30-day period, You and Uber shall be bound by the terms of this Arbitration Provision. [...]

*Id.* at Ex. K § 15.3(viii) (emphasis omitted).

Uber has provided evidence that O'Callaghan accepted the new terms on each occasion the terms were updated. *Id.* ¶ 13. In addition, O'Callaghan did not avail himself of the opt out provision on any such occasions. *Id.* ¶ 15.

## II. PROCEDURAL BACKGROUND

***4** O'Callaghan commenced the instant action on March 22, 2017. *See* Compl. Uber requested a pre-motion conference to discuss its anticipated motion to compel arbitration and dismiss complaint on September 22, 2017. *See* Letter Motion for Conference for Defendant's Anticipated Motion to Compel Arbitration and Dismiss Complaint, Doc. 11. O'Callaghan filed response to Uber's request on November 2, 2017. *See* Pl.'s Resp. At a conference held on November 9, 2017, Uber was granted leave to file a motion to compel arbitration of O'Callaghan's claims. On December 8, 2017, Uber filed its motion to compel arbitration. *See* Motion to Compel Arbitration, Doc. 17. O'Callaghan moved to deny arbitration and grant a jury trial on January 5, 2018. *See* Notice of Motion to Deny Arbitration and Grant Jury Trial ("Pl.'s Opp'n"), Doc. 21.

## III. LEGAL STANDARD

### A. Federal Arbitration Act

Section 4 of the FAA requires courts to compel arbitration in accordance with the terms of an arbitration agreement upon the motion of either party to the agreement, provided that there is no issue regarding its creation. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 354–355 (2011) (citing 9 U.S.C. § 4). Whether the parties agreed to arbitrate is generally a question decided by the court unless the parties "clearly and unmistakably provide otherwise." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986). Determinations of arbitrability may be delegated to an arbitrator "if there is clear and unmistakable evidence from the arbitration agreement, as construed by the relevant state law, that the parties intended that the question of arbitrability shall be decided by the arbitrator." *Shaw Grp. Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 121 (2d Cir. 2003) (quoting *Bell v. Cendant Corp.*, 293 F.3d 563, 566 (2d Cir. 2002) ) (internal quotation marks omitted). In the absence of clear and unmistakable evidence that the parties intended to submit the question of arbitrability to the arbitrator, courts assume they, not arbitrators, were



 

intended to decide "certain gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy." *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003). To determine whether to compel arbitration, the Court must weigh four primary considerations: "(1) whether the parties in fact agreed to arbitrate; (2) the scope of the arbitration agreement; (3) if the parties assert federal statutory claims, whether Congress intended those claims to be nonarbitrable; and (4) if the court concludes that some, but not all, of the claims in the case are arbitrable, whether to stay the balance of the proceedings pending arbitration." *Application of Whitehaven S.F., LLC v. Spangler*, 45 F. Supp. 3d 333, 342 (S.D.N.Y. 2014) (citing *JLM Indus., Inc. v. Stolt–Nielsen SA*, 387 F.3d 163, 169 (2d Cir. 2004) ), *aff'd*, 633 Fed.Appx. 544 (2d Cir. 2015). "A party resisting arbitration on grounds that the arbitration agreement is invalid under a defense to contract formation, or that the arbitration contract does not encompass the claims at issue, bears the burden of proving such a defense." *Kulig v. Midland Funding, LLC*, 13 Civ. 4715 (PKC), 2013 WL 6017444, at *2 (S.D.N.Y. Nov. 13, 2013).

Moreover, "federal policy strongly favors arbitration as an alternative dispute resolution process," thus, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," and "[f]ederal policy requires [courts] to construe arbitration clauses as broadly as possible." *Collins & Aikman Prods. Co. v. Building Sys., Inc.*, 58 F.3d 16, 19 (2d Cir. 1995) (internal citations and quotations omitted); *see also, e.g., Champion Auto Sales, LLC v. Polaris Sales Inc.*, 943 F. Supp. 2d 346, 351 (E.D.N.Y. 2013) ("In keeping with this policy, the Court resolves doubts in favor of arbitration and enforces privately-negotiated arbitration agreements in accordance with their terms."). "[U]nless it may be said with positive assurance" that the arbitration clause does not cover the disputed issue, the court must compel arbitration. *Collins & Aikman Prods.*, 58 F.3d at 19 (quoting *David L. Threlkeld & Co. v. Metallgesellschaft Ltd. (London)*, 923 F.2d 245, 250 (2d Cir. 1991) ).

***5** Despite the federal policy favoring arbitration, courts only apply the "presumption of arbitrability" if an "enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 288 (2010); *see also Allstate Ins. Co. v. Mun*, 751 F.3d 94, 97 (2d Cir. 2014). "[D]oubts concerning the scope of an arbitration clause should be resolved in favor of arbitration," however, this "presumption does not apply to disputes concerning whether an agreement to arbitrate has been made." *Goldman, Sachs & Co. v. Golden Empire Sch. Fin. Auth.*, 764 F.3d 210, 215 (2d Cir. 2014) (quoting *Applied Energetics, Inc. v. NewOak Capital Mkts., LLC*, 645 F.3d 522, 526 (2d Cir. 2011) ). "It is the court's duty to interpret and construe an arbitration provision, but only where a contract is 'validly formed' and 'legally enforceable.' " *Kulig*, 2013 WL 6017444, at *2 (S.D.N.Y. Nov. 13, 2013) (citing *Granite Rock Co.*, 561 U.S. at 303).

**B. Summary Judgment**

In ruling on motions to compel arbitration brought under the FAA, "the court applies a standard similar to that applicable for a motion for summary judgment." *Bensadoun v. Jobe–Riat*, 316 F.3d 171, 175 (2d Cir. 2003). Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). "An issue of fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Senno v. Elmsford Union Free Sch. Dist.*, 812 F. Supp. 2d 454, 467 (S.D.N.Y. 2011) (quoting *SCR Joint Venture L.P. v. Warshawsky*, 559 F.3d 133, 137 (2d Cir. 2009) ). A fact is "material" if it might affect the outcome of the litigation under the governing law. *Id.* The party moving for summary judgment is first responsible for demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets its burden, "the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." *Saenger v. Montefiore Med. Ctr.*, 706 F. Supp. 2d 494, 504 (S.D.N.Y. 2010) (quoting *Jaramillo v. Weyerhaeuser Co.*, 536 F.3d 140, 145 (2d Cir. 2008) ).

In deciding a motion for summary judgment, the Court must "construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant." *Brod v. Omya, Inc.*, 653 F.3d 156, 164 (2d Cir. 2011) (quoting *Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123, 126 (2d Cir. 2004) ) (internal quotation marks omitted). However, in opposing a motion for summary judgment, the non-moving party may not rely on unsupported assertions, conjecture, or surmise. *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995). To defeat a motion



 

for summary judgment, "the non-moving party must set forth significant, probative evidence on which a reasonable fact-finder could decide in its favor." *Senno*, 812 F. Supp. 2d at 467–68 (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 256–57 (1986) ).

In the case of a *pro se* plaintiff, the Court is obligated to construe the complaint liberally, *Hill v. Curcione*, 657 F.3d 116, 122 (2d Cir. 2011), and to interpret the claims as raising the strongest arguments that they suggest. *Chavis v. Chappius*, 618 F.3d 162, 170 (2d Cir. 2010) (citing *Harris v. City of New York*, 607 F.3d 18, 24 (2d Cir. 2010) ). However, this does not "relieve plaintiff of his duty to meet the requirements necessary to defeat a motion for summary judgment." *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 50 (2d Cir. 2003).

## IV. DISCUSSION

### A. Choice of Law

***6** The issue of "whether or not the parties have agreed to arbitrate is a question of state contract law." *Whitehaven*, 45 F. Supp. 3d at 344 (quoting *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 119 (2d Cir. 2012) ). The December 2015 agreement states, "the choice of law provisions ... do not apply to the arbitration clause ..., such arbitration clause being governed by the Federal Arbitration Act." Dobbs Decl. Ex. K § 15.1. In the absence of an applicable choice of law provision, "courts in New York apply a 'center of gravity' approach to determine the governing law in contract cases." *Mumin v. Uber Techs., Inc.*, 239 F. Supp. 3d 507, 522 (E.D.N.Y. 2017) (quoting *In re Frito-Lay N. Am., Inc.*, 12 Md. 2413 (RRM) (RLM), 2013 WL 4647512, at *18 (E.D.N.Y. August 29, 2013) ). Under the "center of gravity" approach, courts "consider a spectrum of significant contacts, including the place of contracting, the places of negotiation and performance, the location of the subject matter [of the contract], and the domicile or place of business of the contracting parties." *Id.* (quoting *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1539 (2d Cir. 1997) ).

Here, O'Callaghan is a New York resident that performed transportation services under the agreement for Uber in New York. *See* Compl. at 2; Def.'s Mem. at 1. The issue in dispute involves contract formation in New York. *See* Def.'s Mem. at 2–3. Thus, the Court finds that New York law governs.[6] *See Mumin*, 239 F. Supp. 3d at 522 (applying New York law in determining whether a valid agreement to arbitrate exists between a New York Uber driver and Uber).

### B. A Valid Agreement to Arbitrate Exists Between the Parties

The Court next analyzes whether there is a valid agreement between the parties to submit their dispute to arbitration. The question of whether O'Callaghan assented to the December 2015 agreement is one for this Court to decide, notwithstanding the delegation clause in the agreement. *See Saizhang Guan v. Uber Techs., Inc.*, 236 F. Supp. 3d 711, 720–721 (E.D.N.Y. 2017) ("[t]he more basic issue ... of whether the parties agreed to arbitrate in the first place is one only a court can answer, since in the absence of any arbitration agreement at all, 'questions of arbitrability' could hardly have been clearly and unmistakably given over to an arbitrator." (quoting *VRG Linhas S.A. v. MatlinPatterson Glob. Opportunities Partners II L.P.*, 717 F.3d 322, 325 n.2 (2d Cir. 2013) ) ). "To form a valid contract under New York law, there must be an offer, acceptance, consideration, mutual assent and intent to be bound." *Id.* at 722 (quoting *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 427 (2d Cir. 2004) ) (internal quotation marks omitted). Courts can infer acceptance when the party demonstrated at least constructive knowledge of the terms through his actions. *Id.* (citing *Hines v. Overstock.com, Inc.*, 380 Fed.Appx. 22, 25 (2d Cir. 2010) ). Regarding clickwrap agreements,[7] when the party had a sufficient opportunity to read the agreement and assented to the agreement through an unambiguous method provided, the party is found to have demonstrated constructive knowledge of the terms and is thus bound by the agreement. *Serrano v. Cablevision Sys. Corp.*, 863 F. Supp. 2d 157, 164 (E.D.N.Y. 2012); *see also Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 397 (E.D.N.Y. 2015) (finding that almost every district court to consider the issue "has found 'clickwrap' licenses, in which an online user clicks 'I agree' to standard form terms, enforceable.").

***7** Here, the Court finds no genuine dispute that the parties are bound by the December 2015 agreement. Uber's electronic records show that O'Callaghan assented to four updated agreements, each of which contains the arbitration provision. Dobbs' Decl. ¶ 9, Ex. L. According to Uber, the only way through which O'Callaghan could have continued to access the Uber APP was



 

to click "YES, I AGREE" each time the operative agreements were updated. *Id.* ¶¶ 9–10. O'Callaghan's evidence shows that he continued to drive for Uber throughout 2014 and 2015.[8] His bare assertion that he never assented to the arbitration provision yet continued to have access to the Uber App is without any factual basis.[9] Pl.'s Resp. at 1.

O'Callaghan claims that he was never aware of the arbitration provision in these agreements. Pl.'s Resp. at 1. However, he was afforded sufficient opportunities to read them. Each time the agreement was updated, he was presented with a screen that clearly stated, "TO GO ONLINE, YOU MUST REVIEW ALL THE DOCUMENTS BELOW AND AGREE TO THE CONTRACTS BELOW." Dobb's Decl. ¶ 9; *id.*, Ex. A. The operative agreement was listed in a location near the center of the screen with a hyperlink. *Id.*, Ex. A. O'Callaghan could click on the hyperlink and scroll through the entire agreement for as long as he desired. *Id.* ¶ 9. After clicking "YES, I AGREE" the first time, O'Callaghan was asked to confirm that he "[had] reviewed all the documents and agree to all the new contracts." *Id.* Only after clicking "YES, I AGREE" the second time could O'Callaghan fully access the platform.[10] *Id.*

In *Kai Peng v. Uber Techs., Inc.*, 237 F. Supp. 3d 36 (E.D.N.Y. 2017), the plaintiffs, also Uber drivers, challenged whether they had voluntarily agreed to Uber's arbitration provision. Applying New York law, the court upheld the December 2015 agreement on the grounds that the process through which the plaintiffs purportedly agreed to the agreement provided the plaintiffs a sufficient opportunity to read it and an unambiguous method to assent to it. *See id.* at 48–49 (finding the agreement enforceable since "plaintiffs were required to *twice* click buttons labeled, 'YES, I AGREE,' and were clearly and repeatedly encouraged to click on the contract containing the terms to which they were agreeing"). The plaintiffs in *Kai Peng* assented to the same December 2015 agreement in the same fashion as O'Callaghan in this case. *Id.* at 40–43.

***8** O'Callaghan points out that the court in *Applebaum v. Lyft, Inc.*, 263 F. Supp. 3d 454 (S.D.N.Y. 2017) struck down the arbitration provision in a similar clickwrap agreement entered into between the ride-share company Lyft, Inc. and its consumers. In *Applebaum*, the Uber's signup screen displayed a jumbo-sized pink "Next" bar at the bottom and the bold header "**Add Phone Number**" at the top. *Id.* at 466. The text "I agree to Lyft's terms of service," in contrast, was in the smallest font on the screen with "terms of service" marked in light blue on a white background, which made the hyperlink difficult to read. *Id.* at 466–467. Finding that the hyperlink was inconspicuous and that the signup screen did not indicate that there were contractual terms for the consumer to review, the court concluded that a reasonable consumer would not have understood that he or she had agreed to the terms of service. *Id.* at 467–468. The process in *Applebaum*, however, is clearly distinguishable from the process in this case. The process by which O'Callaghan assented to the December 2015 agreement provided him reasonable notice of the terms of the operative agreements. This Court therefore finds that O'Callaghan had constructive knowledge of the arbitration provision. The fact that O'Callaghan may have failed to review the contract carefully is not a valid defense. *See Kai Peng*, 237 F. Supp. 3d at 49–50 ("Failure to read a contract is not a defense to contract formation."); *see also Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 839 (S.D.N.Y. 2012) ("Failure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract.") (quoting *Centrifugal Force, Inc. v. Softnet Commc'n Inc.*, 08 Civ. 5463 (CM)(GWG), 2011 WL 744732, at *7 (S.D.N.Y. Mar. 1, 2011) ). Accordingly, the Court concludes that the December 2015 agreement is enforceable.[11]

**C. Clear and Unmistakable Evidence of Intent to Delegate Arbitrability**

The Court finds that there is clear and unmistakable evidence from the arbitration provision in the December 2015 agreement that the parties intended to submit the question of arbitrability to the arbitrator. The agreement specifically states that with the exception of a Class Action Waiver, "[all] 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." Dobb's Decl. Ex. K § 15.3(i).

Courts have consistently held that such language clearly and unmistakably demonstrates the parties' intent to delegate the gateway questions. *See e.g., Guan*, 236 F. Supp. 3d at 727–29 (holding that the same agreement "clearly and unmistakably delegates the gateway issues to the arbitrator"); *Kai Peng*, F. Supp. 3d at 52–53 (same); *Mumin*, 239 F. Supp. 3d at 523 (same). Thus, it is left to the arbitrator to determine whether the arbitration provision in the December 2015 agreement applies to the



 

dispute here, and specifically, whether O'Callaghan's claims are workers' compensation claims to which the arbitration provision does not apply. Pl.'s Resp. at 3; Dobb's Decl. Ex. K. § 15.3(ii) (providing the "Limitations On How This Agreement Applies").

***9** Finally, O'Callaghan argues that the delegation clause is unconscionable. Pl.'s Resp. at 1, 3. Under New York law, a delegation clause is unconscionable only if it is "both procedurally and substantively unconscionable." *Mumin*, 239 F. Supp. 3d at 525 (quoting *Robinson v. Entm't One US LP*, 14 Civ. 1203 (AJN), 2015 WL 3486119, at *9 (S.D.N.Y. June 2, 2015) ). When a party was afforded an opportunity to opt out, the agreement is not procedurally unconscionable. *See Id.* at 525 ("An agreement is not procedurally unconscionable if there is a meaningful opportunity to opt out.") (first citing *Valle v. ATM Nat'l, LLC*, 14 Civ. 7993 (KBF), 2015 WL 413449, at *6 (S.D.N.Y. Jan. 30, 2015; then citing *Teah v. Macy's Inc.*, 11 Civ. 1356, 2011 WL 6838151, at *6 (E.D.N.Y. Dec. 29, 2011) ). Here, the December 2015 agreement clearly states that a driver may opt out of the arbitration provision by notifying Uber in writing within 30 days, Dobb's Decl. Ex. K § 15.3(viii), and Uber has provided evidence that thousands of drivers have, in fact, opted out of the arbitration provision. Dobb's Decl. ¶ 15. O'Callaghan, however, did not. *Id.* The Court thus concludes that the delegation clause is not procedurally unconscionable and may be enforced.

## V. CONCLUSION

For the reasons set forth above, Uber's motion to compel arbitration is GRANTED, and this action is STAYED pending arbitration. The Clerk of the Court is respectfully directed to stay this action pending arbitration and terminate the motions, Doc. 17 and Doc. 21.

SO ORDERED.

**All Citations**

Not Reported in Fed. Supp., 2018 WL 3302179

Footnotes

1 O'Callaghan alleges that Uber is a member of The Black Car Fund, which is part of the Workers' Insurance Compensation in New York State. Compl. at 4.

2 The New York State Compensation Committee is not defined in the Complaint. The Court understands this entity to be the New York State Workers' Compensation Board, a government agency that "protects the rights of employees and employers by ensuring the proper delivery of benefits to [employees] that are injured or ill, and by promoting compliance with the law." *Basic Facts About the Board*, New York State Workers' Compensation Board, http://www.wcb.ny.gov/content/main/TheBoard/factsht.jsp (last visited June 26, 2018).

3 Since the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (the "FAA") does not automatically confer federal subject matter jurisdiction, there must be an independent basis of jurisdiction before this Court can entertain petitions under the FAA. *Durant, Nichols, Houston, Hodgson & Cortese–Costa P.C. v. Dupont*, 565 F.3d 56, 63 (2d Cir. 2009). Construed liberally, the complaint alleges that Uber submitted a fraudulent document regarding O'Callaghan's accident to the New York State Compensation Committee and therefore committed mail and wire fraud. Compl. at 5–6. Both mail fraud and wire fraud are federal offenses under 18 U.S.C § 1341 and § 1343, respectively. This Court thus has original jurisdiction over this action pursuant to 28 U.S.C. § 1331.

4 The operative agreement was updated on July 31, 2013, September 11, 2014, March 24, 2015, and December 11, 2015. Declaration of Chad Dobbs in Support of Uber's Motion to Compel Arbitration ("Dobbs Decl."), Doc. 19, ¶ 13.

5 According to Uber, the July 2013 agreement required clicking "YES, I AGREE" only once. Dobb's Decl. ¶ 9.

6 Uber contends that under either New York or California law, a valid agreement to arbitrate exists between the parties. The Court notes that New York or California laws are substantially similar regarding whether the parties have mutually assented to a contract term. *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 74 (2d Cir. 2017).



 

7 In *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359 (E.D.N.Y. 2015), the court defined a clickwrap agreement as one that "require[s] a user to affirmatively click a box on the website acknowledging awareness of and agreement to the terms of service before he or she is allowed to proceed with further utilization of the website." *Id.* at 397 (quoting *United States v. Drew*, 255 F.R.D. 449, 462 n.22 (C.D. Cal. 2009) ). The Second Circuit adopted a similar definition in *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016). *Id.* at 233 ("[A clickwrap agreement] typically requires users to click an "I agree" box after being presented with a list of terms or conditions of use."). This Court finds that the operative agreements in this case fulfill the aforementioned definition of a clickwrap agreement.

8 O'Callaghan alleges that the accident occurred in February 2014 when he was on his way to pick up a client of Uber's. Compl. at 1. The two Form 1099-Ks O'Callaghan provided show that throughout 2014 and 2015, he continued to drive for Uber. *Id.* at Ex. B.

9 O'Callaghan argues that the process through which he assented to the operative agreements did not comply with the Electronic Signatures in Global and National Commerce Act ("E-Sign Act") and thus the agreements are not enforceable. Pl.'s Opp'n. at 2. This Court finds that by clicking "YES, I AGREE," O'Callaghan electronically signed the operative agreements. *See* 15 U.S.C. § 7006(5) ("The term 'electronic signature' means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record."). Such electronic signature cannot be "denied legal effect ... simply because it is in electronic form." *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 26 n.11 (2d Cir. 2002) (quoting 15 U.S.C. § 7001(a)(1) ); *see also* N.Y. State Tech. Law § 304 ("The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand.").

10 The July 2013 agreement required O'Callaghan to click "YES, I AGREE" only once. Dobb's Decl. ¶ 9.

11 O'Callaghan claims that since the December 2015 agreement does not explicitly govern past disputes, he preserves the right to argue that earlier versions of the agreement should govern the current dispute. However, the Second Circuit has held that arbitration provisions should be applied to any preexisting claims provided the clauses are not expressly limited to future disputes. *See Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1212 (2d Cir. 1972) (holding that arbitration under the New York Stock Exchange Rules applied to actions predating the signing of the contract by the petitioner because the contract stated that it governed "any controversy" between the parties); *see also Reid v. Supershuttle Intern., Inc.*, 08 Civ. 4854 (JG)(VVP), 2010 WL 1049613, at *5–6 (E.D.N.Y. Mar. 22, 2010) (following the Second Circuit ruling and applying the arbitration agreement retroactively); *Marcus v. Masucci*, 118 F. Supp. 2d 453, 457 (S.D.N.Y. 2000) (same). In any event that the arbitration provision in the December 2015 agreement is not applied retroactively to the dispute here, O'Callaghan was bound to the arbitration provision in the July 2013 agreement, which was the agreement in place in February 2014 when the accident occurred. *See* Compl. at 2; Dobb's Decl. ¶ 9. Its arbitration provision is materially identical to the arbitration provision in the December 2015 agreement. *See* Dobb's Decl. Ex. C; *id.*, Ex. K.

**End of Document**

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United States District Court, D. Massachusetts.

Precious OKEREKE, Plaintiff,

v.

UBER TECHNOLOGIES, INC., Defendant.

Civil Action No. 16-12487-PBS
|
Filed 06/13/2017

**Attorneys and Law Firms**

Precious Okereke, Boston, MA, pro se.

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REPORT AND RECOMMENDATION ON DEFENDANTS' MOTION TO COMPEL ARBITRATION AND DISMISS OR STAY THE PROCEEDINGS OR, IN THE ALTERNATIVE, TO DISMISS FOR FAILURE TO STATE A CLAIM [Docket No. 9]

JENNIFER C. BOAL, United States Magistrate Judge

***1** Pro se plaintiff Precious Okereke has brought this action against defendant Uber Technologies, Inc. ("Uber"), alleging that her independent contractor relationship with Uber was terminated "without pre- and post-deprivation hearing/s as mandated by the law of the land." Complaint at 1. She appears to be asserting, among other things, claims for intentional and negligent infliction of emotional distress, negligence, and employment discrimination. See Complaint at 2. Uber has moved for an order compelling Okereke to submit her claims to mediation and staying or dismissing this case. Docket No. 9.[1] In the alternative, Uber requests that the Court dismiss the Complaint for failure to state a claim. Id. For the reasons set forth below, the Court recommends that the District Judge assigned to this case grant the motion to compel arbitration and dismiss the case. In the alternative, should the District Court disagree with the Court's recommendation, the Court recommends that the District Judge dismiss the case for failure to state a claim.[2]

## I. FACTS

### A. The Agreement To Arbitrate[3]

Uber is a technology company that offers a smartphone application (the "Uber App") connecting riders looking for transportation to independent transportation providers ("drivers"),[4] such as Okereke, looking for riders. Colman Aff. ¶ 3. Uber offers the Uber App to both riders and drivers to facilitate transportation services, and it charges a service fee for use of the Uber App to drivers. Id. at ¶¶ 3-4.

***2** Uber has developed multiple software products, including uberX. Id. at ¶ 4. Rasier, LLC ("Rasier") is a wholly-owned subsidiary of Uber engaged in the business of providing lead generation services to drivers through the uberX product. Id. at ¶¶ 2, 4. Any driver who wishes to access the uberX product to generate leads for riders must first enter into an agreement with



 

the applicable Rasier entity. Id. at ¶ 7. Okereke entered into the November 10, 2014 Software License and Online Services Agreement (the "Rasier Agreement"). Id. at ¶ 9.

In order to accept the Rasier Agreement, Okereke had to first login to the Uber App using a unique username and password selected by her. Id. at ¶ 8. On or about July 23, 2015, Okereke signed up to use the uberX product. Id. at ¶ 11. Her account was activated on December 30, 2015. Id.

When a driver logs on to the Uber App after she has finished activating her account, she is given the opportunity to review the Rasier Agreement by clicking a hyperlink presented on the screen within the Uber App. Id. at ¶ 9. At the top of this screen, the Uber App states the following: "TO GO ONLINE, YOU MUST REVIEW ALL THE DOCUMENTS BELOW AND AGREE TO THE CONTRACTS BELOW." Id. For the Rasier Agreement that Okereke accepted, the hyperlink was entitled "Partner Agreement November 10 2014." Id. Clicking the link opens the Rasier Agreement, which can be reviewed beginning to end by scrolling through. Id. Okereke was free to spend as much time as she wished reviewing the Rasier Agreement on her phone. Id. To advance past the screen which contains the link to the document, Okereke had to click "YES, I AGREE" to the Rasier Agreement. Id. Directly above "YES, I AGREE," the App states the following: "By clicking below, you represent that you have reviewed all the documents above and that you agree to all the contracts above." Id. After clicking "YES, I AGREE," Okereke was prompted to confirm acceptance a second time. Id. On the second screen, the App states: "PLEASE CONFIRM THAT YOU HAVE REWIEWED ALL THE DOCUMENTS AND AGREE TO ALL THE NEW CONTRACTS." Id.

On September 23, 2015, Okereke accepted, through the Uber App, the Rasier Agreement. Id. Uber received an electronic receipt following Okereke's acceptance of the Rasier Agreement. Id. and Ex. D. The receipt only could have been generated by someone using Okereke's unique username and password and hitting "YES, I AGREE" twice when prompted by the Uber App. Id.

The Rasier Agreement contains an arbitration provision under which drivers who use the Uber App agree, if they do not opt out, to arbitrate all disputes "arising out of or related to" the Rasier Agreement or the drivers' "relationship with the Company." Id. at ¶ 12. More specifically, the arbitration provision states, in relevant part, that:

> 15.2 Other than disputes regarding the intellectual property rights of the parties, any disputes, actions, claims or causes of action arising out of or in connection with this Agreement or the Uber Services may be subject to arbitration pursuant to Section 15.3.
>
> * * *
>
> 15.3
>
> **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 ARBITRATION. 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.**
>
> ***3** i. How This Arbitration Provision Applies
>
> This Arbitration Provision is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (the "FAA") and evidences a transaction involving commerce. This Arbitration Provision applies to any dispute arising out of or related to this Agreement or termination of the Agreement and survives after the Agreement terminates. Nothing contained in this Arbitration Provision shall be construed to prevent or excuse you from utilizing any procedure for resolution of complaints established in this Agreement (if any), and this Arbitration Provision is not intended to be a substitute for the utilization of such procedures.



 

**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.

Except as it otherwise provides, this Arbitration Provision also applies, without limitation, to disputes arising out of or related to this Agreement and disputes arising out of or related to your relationship with the Company, including termination of the relationship. This Arbitration Provision also applies, without limitation, to disputes regarding any city, county, state or federal wage-hour law, trade secrets, unfair competition, compensation, breaks and rest periods, expense reimbursement, termination, harassment and claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans with Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act (except for claims for employee benefits under any benefit plan sponsored by the Company and covered by the Employee Retirement Income Security Act of 1974 or funded by insurance), Genetic Information Non-Discrimination Act, and state statutes, if any, addressing the same or similar subject matters, and all other similar federal and state statutory and common law claims.

This Agreement is intended to require arbitration of every claim or dispute that lawfully can be arbitrated, except for those claims and disputes which by the terms of this Agreement are expressly excluded from the Arbitration Provision.

The parties expressly agree that Uber is an intended third-party beneficiary of this Arbitration Provision.

Docket No. 10-4 at 14-16 (emphasis in original). Okereke was given thirty days to opt out of the arbitration requirement. Specifically, the Rasier Agreement provided that:

***4 viii. <u>Your Right To Opt Out Of Arbitration</u>**

**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 <u>optout@uber.com</u>, 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., Suite 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.**



 

Docket No. 10-4 at 18-19 (bold text in original). Okereke did not opt out of the arbitration agreement within thirty days of her acceptance of the Rasier Agreement. Colman Aff. at ¶ 12. Thousands of other drivers have in fact opted out of one or more than one of the arbitration provisions contained in the various agreements in place between Uber and Rasier and the drivers who used the Uber App. Id.

B. The Complaint's Allegations[5]

Okereke alleges that she was "in the so-called independent contractorship [sic] of the Defendant for a period of three or four weeks." Complaint at 1. She alleges that the independent contractor relationship was terminated "without pre- and post-deprivation hearing/s as mandated by the law of the land." Id. She appears to allege that she attempted to find out the reason for her termination but was unable to do so. Id. She maintains that if she was terminated for poor driving, Uber had a "provision for asking drivers to go for four-hour paid training usually." Id. Okereke made a great financial commitment before signing up as an independent contractor with Uber. Id.

***5** As the bases for her lawsuit, Okereke lists the following: (1) Uber knowingly failed to inform her of the reasons for the termination of the independent contractor relationship; (2) "the independent contractorship associated with a substantial income and property interest attached unquestionably;" (3) Uber's actions constituted an intentional infliction of emotional distress; (4) Uber's actions constituted negligent infliction of emotional distress; (5) Uber was negligent "per se"; (6) Uber "knew that deprivation of property interest associated with due process and failed to act in keeping with the law;" and (7) Uber's actions qualified as racial employment discrimination. Complaint at 2.

II. ANALYSIS

A. Motion To Compel Arbitration

First, Uber argues that the Court should dismiss or stay the proceedings and compel arbitration because Okereke entered into an enforceable arbitration agreement. Docket No. 10 at 5-10. The Court agrees.

1. Standard Of Review

Arbitration agreements are subject to the Federal Arbitration Act, 9 U.S.C. §§ 1-301 ("FAA"). The FAA governs arbitrability in both federal and state courts. See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 681-82 (2010). The FAA provides that an arbitration clause in "a contract evidencing a transaction involving commerce ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. § 2. The Supreme Court has stated that Section 2 of the FAA "was designed to promote arbitration" and "embod[ies] a national policy favoring arbitration" by placing arbitration agreements on equal footing with all other contracts. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 345 (2011).

The FAA, however, does not require parties to arbitrate when they have not agreed to do so. Grand Wireless, Inc. v. Verizon Wireless, Inc., 748 F.3d 1, 9 (1st Cir. 2014). As a result, if a party challenges the validity of an arbitration agreement itself, the court must consider the challenge before ordering compliance with that agreement. Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 71 (2010); see also Granite Rock Co. v. Int'l Broth. of Teamsters, 561 U.S. 287, 297 (2010) (a court may order arbitration of a particular dispute only where it is satisfied that the parties agreed to arbitrate that dispute).

To compel arbitration, a party must demonstrate "that a valid agreement to arbitrate exists, that [it 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." Grand Wireless, 748 F.3d at 6 (quoting Soto-Fonalledas v. Ritz-Carlton San Juan Hotel Spa & Casino, 640 F.3d 471, 474 (1st Cir. 2011)). The party opposing arbitration on grounds that the arbitration agreement is invalid under a defense of contract formation bears the burden of proving such defense. See Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 91-92 (2000).


 

2. Validity Of Arbitration Agreement

"The first step in determining whether [Okereke's] claims should be resolved by arbitration is deciding 'whether ... there exists a written agreement to arbitrate.' " Bekele v. Lyft, Inc., 199 F. Supp. 3d 284, 294 (D. Mass. 2016) (citing Lenfest v. Verizon Enter. Sols., LLC, 52 F. Supp. 3d 259, 262-263 (D. Mass. 2014)). "This is the first step of the analysis because, if the contract containing the arbitration agreement was never binding on the plaintiff[ ], the arbitration clause cannot be enforced against [her]." Cullinane v. Uber Techs., Inc., No. 14-14750-DPW, 2016 WL 3751652, at *4 (D. Mass. July 11, 2016).

To determine whether a valid agreement to arbitrate exists, federal courts "apply ordinary state-law principles that govern the formation of contracts." First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995). A valid and enforceable contract under Massachusetts law[6] exists when the parties agree to "the material terms" and "have a present intention to be bound by that agreement." Shen v. CMFG Life Ins. Co., C.A. No. 15-11593-MLW, 2016 WL 1129308, at *5 (D. Mass. March 4, 2016), adopted by 2016 WL 1189125 (D. Mass. March 22, 2016). In other words, there must be a meeting of the minds to create a valid arbitration agreement. Id. (citing Marino v. Tagaris, 395 Mass. 397, 403 (1985)); see also Vadnais v. NSK Steering Sys. Am., Inc., 675 F. Supp. 2d 205, 207 (D. Mass. 2009) (in Massachusetts, a contract requires an offer, acceptance, and an exchange of consideration or meeting of the minds). Where, for example, a party is a signator to a contract, he has agreed to be bound by it. Shen, 2016 WL 1129308, at *4.

***6** "When it comes to specific clauses in [online] adhesion contracts, as is the case here, under Massachusetts law, courts have held that such clauses will be enforced provided they have been *reasonably communicated* and *accepted*, and if, considering all the circumstances, it is reasonable to enforce the provision at issue." Bekele, 199 F. Supp. at 295 (emphasis in original; internal quotations and citations omitted). In the context of "clickwrap" agreements,[7] such as the one at issue here, Massachusetts courts have held that such contracts are enforceable "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.*' " Id. (emphasis in original; quoting Ajemian v. Yahoo!, Inc., 83 Mass. App. Ct. 565, 576 (2013)). Accordingly, Uber bears the burden of showing (1) that the arbitration provision was reasonably communicated to Okereke, and (2) that Okereke manifested assent to its terms. See id. (citing Acher v. Fujitsu Network Commc'ns, Inc., 354 F. Supp. 2d 26, 36 (D. Mass. 2005)).

"Massachusetts courts have routinely concluded that clickwrap agreements—whether they contain arbitration provisions or other contractual terms—provide users with reasonable communication of an agreement's terms." Bekele, 199 F. Supp. 3d at 295-296. Okereke argues that she "knew nothing about" and does not remember "signing" the Rasier Agreement. Docket No. 11 at 2, 9. However, "whether or not plaintiff[ ] had *actual* notice of the terms of the Agreement, all that matters is that plaintiff[ ] has *reasonable* notice of the terms." Cullinane 2016 WL 3751652, at *7 (emphasis in original). "In Massachusetts courts, it has long been the rule that '[t]ypically, one who signs a written agreement is bound by its terms whether he reads and understands them or not.' " Id. (citations omitted).

Here, Okereke accepted the Rasier Agreement through the Uber App. Colman Aff. at ¶ 11. The Uber App prominently states that "TO GO ONLINE, YOU MUST REVIEW ALL THE DOCUMENTS BELOW AND AGREE TO THE CONTRACTS BELOW." Id. at ¶ 9. Clicking on the link opened the Rasier Agreement, which could be reviewed by scrolling through. Id. To advance past that screen, Okereke had to click "YES, I AGREE" to the Rasier Agreement. Id. Directly above, "YES, I AGREE," the App states that "[b]y clicking below, you represent that you have reviewed all the documents above and that you agree to all the contracts above." Id. After clicking "YES, I AGREE," Okereke was prompted to confirm acceptance a second time. Id. Further, Okereke had the opportunity to opt out of the arbitration provision within thirty days after accepting the Rasier Agreement but she did not chose to do so. Id. at ¶ 12. Accordingly, the Court finds that Okereke had reasonable notice of the terms of the arbitration provision as well as that she manifested acceptance to its terms.[8]

3. The Parties Agreed To Delegate Arbitrability


 

***7** Having decided that the arbitration agreement is generally valid and enforceable, the Court must now determine whether the parties agreed to arbitrate the instant dispute. Questions of arbitrability are generally reserved for judicial determination, including whether an arbitration clause in a binding contract applies to a particular type of controversy. Mumin v. Uber Techs., Inc., —— F. Supp. 3d ——, 2017 WL 934703, at *7 (E.D.N.Y. 2017). "However, determinations of arbitrability may be delegated to an arbitrator 'if there is clear and unmistakable evidence from the arbitration agreement, as construed by relevant state law, that the parties intended that the question of arbitrability shall be decided by the arbitrator.' " Id. (citations omitted); see also Cordas v. Uber Techs., Inc., —— F. Supp. 3d ——, 2017 WL 658847, at *4 (N.D. Cal. Jan. 5, 2017); Cubria v. Uber Techs., Inc., Case No. A-16-CA-544-SS, 2017 WL 1034731, at *5 (W.D. Tex. Mar. 16, 2017). "A delegation provision need not recite verbatim that the parties agree to arbitrate arbitrability in order to manifest clear and unmistakable agreement." Cubria, 2017 WL 1034731, at *6 (internal quotation marks and citations omitted).

Here, the arbitration provision specifically states that it "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," including "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." Docket No. 10-4 at 15-16. This language clearly and unmistakably shows the parties' intent to submit to an arbitrator any disputes relating to the interpretation or application of the arbitration provision. See, e.g., Mumin, 2017 WL 934703, at *8 (same conclusion involving same language in Uber contract).

Having concluded that the parties agreed to arbitrate and that they delegated the issue of arbitrability to the arbitrator, the Court must leave all remaining issues for the arbitrator to decide. Accordingly, the Court finds that Okereke must be compelled to arbitrate.

4. Stay Or Dismissal

The remaining question is whether to stay this case pending arbitration or dismiss it:

> Section 3 of the FAA requires that where issues brought before a court are arbitrable, the court shall stay the trial of the action until such arbitration has been had in accordance with the terms of the [arbitration] agreement. However, a court may dismiss, rather than stay, a case when all of the issues before the court are arbitrable.

Cullinane, 2016 WL 3751652, at *10 (quoting Bercovitch v. Baldwin School, Inc., 133 F.3d 141, 156 n. 21 (1st Cir. 1998)). Having determined that all further issues shall be decided by the arbitrator, nothing remains for the Court to decide. Accordingly, this Court finds that the case should be dismissed, "with recognition that as a collateral aspect of that disposition, this decision is immediately appealable to permit plaintiff[ ] a timely opportunity to challenge it [before the First Circuit] if [she] so choose[s]." Bekele, 199 F. Supp. 3d at 313.

B. Motion To Dismiss For Failure To State A Claim

In the alternative, Uber moves to dismiss the complaint for failure to state a claim pursuant to Rule 12(b)(6). Docket No. 10 at 10-13. The Court finds that, even if the District Court disagrees that Okereke must be compelled to arbitrate, the case is subject to dismissal for failure to state a claim upon which relief could be granted.

A complaint must contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id.



 

***8** In assessing the sufficiency of the complaint, "an inquiring court must first separate wheat from chaff; that is, the court must separate the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited)." Guadalupe-Baez v. Pesquera, 819 F.3d 509, 514 (1st Cir. 2016) (citing Morales-Cruz v. Univ. of P.R., 676 F.3d 220, 224 (1st Cir. 2012)). The Court must then determine "whether the well-pleaded facts, taken in their entirety, permit 'the reasonable inference that the defendant is liable for the misconduct alleged.' " Id. (citations omitted).

Okereke appears to bring a number of legal claims against Uber, including intentional and negligent infliction of emotional distress, negligence, due process, racial discrimination, and violations of Chapter 93A. See Complaint, Bases of Lawsuit. However, she has failed to plead any facts that would support those claims. Reading the complaint generously, the only facts alleged by Okereke are that (1) she was in an independent contractor relationship with Uber; (2) Uber terminated that relationship without "pre- and post-deprivation hearing/s;" (3) if the termination was due to poor driving, Uber had a "provision for asking drivers to go for four-hour paid training;" and (4) Okereke made a financial commitment before signing up as an independent contractor with Uber. Those facts are woefully inadequate to plead plausible claims of emotional distress, negligence, racial discrimination, or due process. For example, she has not even pled that she suffered emotional distress, as required for both claims of intentional and negligent infliction of emotional distress, let alone that her distress was severe and of a nature that no reasonable person could be expected to endure it, as required for claims of intentional infliction of emotional distress. See In re Lopez, 486 B.R. 221, 234 (Bankr. D. Mass. 2013) (citing Payton v. Abbott Labs, 386 Mass. 540 (1982)); Conley v. Romeri, 60 Mass. App. Ct. 799, 803 (2004). Similarly, she has failed to plead any facts that would show that Uber discriminated against her on the basis of her race. Indeed, she has not even pled her race.

In addition, one of the listed "bases of lawsuit" is hard to decipher. Okereke lists as one of her claims that "the independent contractorship [sic] associated with a substantial income and property interest attached unquestionably." Complaint at p. 2. Although pro se pleadings are liberally construed, the burden is on Okereke to set forth plausible claims upon which relief may be granted and to provide sufficient notice to Uber of his claims. Ateek v. Massachusetts, No. 11-11566-DPW, 2011 WL 4529393, at *3 (D. Mass. Sept. 27, 2011) (citing to Rule 8 of the Federal Rules of Civil Procedure). The Court cannot fashion claims for Okereke.

Accordingly, the Court finds that the complaint is subject to dismissal without prejudice for failure to state a claim.

## III. RECOMMENDATION

For the foregoing reasons, this Court recommends that the District Judge assigned to this case grant Uber's motion to compel arbitration, order Okereke to submit her claims to arbitration, and dismiss the complaint. In the alternative, if the District Judge disagrees that Okereke must be compelled to arbitrate, the Court recommends that she dismiss the complaint for failure to state a claim.

## IV. REVIEW BY DISTRICT JUDGE

The parties are hereby advised that under the provisions of Fed. R. Civ. P. 72(b), any party who objects to these proposed findings and recommendations must file specific written objections thereto with the Clerk of this Court within 14 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made, and the basis for such objections. See Fed. R. Civ. P. 72. The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with Fed. R. Civ. P. 72(b) will preclude further appellate review of the District Court's order based on this Report and Recommendation. See Phinney v. Wentworth Douglas Hosp., 199 F.3d 1 (1st Cir. 1999); Sunview Condo. Ass'n v. Flexel Int'l, Ltd., 116 F.3d 962 (1st Cir. 1997); Pagano v. Frank, 983 F.2d 343 (1st Cir. 1993).



 

**All Citations**

Not Reported in Fed. Supp., 2017 WL 6336080

Footnotes

1 On December 8, 2016, the District Court referred this case to the undersigned for full pretrial management, including report and recommendation on dispositive motions. Docket No. 7.

2 The First Circuit has determined that motions to compel arbitration are non-dispositive. Next Step Med. Co., Inc. v. Johnson & Johnson Int'l, 619 F.3d 67, 69 n.2 (1st Cir. 2010) (citing PowerShare, Inc. v. Syntel, Inc., 597 F.3d 10, 14 (1st Cir. 2010)). However, Uber also requests dismissal of the Complaint for failure to state a claim under Rule 12(b)(6), which is a dispositive matter. Accordingly, the Court issues a report and recommendation under 28 U.S.C. § 636(b)(1)(B).

3 In support of its motion to compel arbitration, Uber has submitted the Declaration of Michael Colman (Docket No. 10-1) ("Colman Aff.") as well as certain exhibits, including the Software License and Online Services Agreement between Uber and Okereke. On a motion to compel arbitration, the Court may properly consider these documents. See Soto v. State Indus. Products, Inc., 642 F.3d 67, 72 n. 2 (1st Cir. 2011) (arbitration agreements may be considered in connection with a motion to compel arbitration without treating the motion as one for summary judgment).

4 Uber refers to independent transportation providers as "drivers" for convenience. Docket No. 10 at 2, n. 2. Because Uber does not prohibit a transportation provider from engaging another worker to drive his or her vehicle, it is not necessarily accurate to refer to the transportation provider as a driver because he or she may not do any driving. Id.

5 In determining whether Okereke's Complaint has sufficiently pled any claims, the Court takes as true all well-pleaded allegations in the complaint and draws all reasonable inferences in Okereke's favor. See Morales-Tañon v. P.R. Elec. Power Auth., 524 F.3d 15, 17 (1st Cir. 2008).

6 Although the Rasier Agreement contains a California choice-of-law provision, Massachusetts choice-of-law rules apply to the validity of the arbitration agreement. Bekele, 199 F. Supp. 3d at 294, n. 4. "Because the Agreement's choice-of-law provision does not apply to the validity of the contract's formation, Massachusetts choice-of-law rules will directly determine which state's law does apply." Id. (citations omitted). Massachusetts has adopted a "functional choice-of-law approach," which focuses on "the interests of the parties, the States involved, and the interstate system as a whole." Id. (citations omitted). "One guiding principle is the identification of that state which has 'the most significant relationship to the transaction and the parties.' " Id. (citations omitted). Here, Massachusetts appears to have the most significant relationship to the Rasier Agreement as Okereke is a Massachusetts resident. Complaint at 1. Although it is not entirely clear, it also appears that Okereke drove for Uber in Massachusetts. See Complaint at 1 (stating that Okereke went to defendant's office in Boston); March 4, 2016 Demand Letter (Docket No. 11-1) (stating that Okereke's "independent contract with your company in Boston was terminated without compliance to the pre- and post-deprivation hearings.").

In addition, both parties have cited to Massachusetts law. Docket No. 10 at 9; Docket No. 11 at 7-8. See Hershey v. Donaldson, Lufkin & Jenrette Sec. Corp., 317 F.3d 16, 20 (1st Cir. 2003) (citation omitted) (Where the parties have agreed as to the choice of law, courts are "free to 'forego an independent analysis and accept the parties' agreement.' ").

7 A "clickwrap" agreement "is an online contract 'in which website users are required to click on an 'I agree' box after being presented with a list of terms and conditions of use.' " Cullinane, 2016 WL 3751652, at *6 (quoting Nguyen v. Barnes & Noble, Inc., 763 F.3d 1171, 1175-1176 (9th Cir. 2014)).

8 Okereke also argues that arbitration "is optional not mandatory." Docket No. 11 at 1-2, 4. In making this argument, she cites to Patsy v. Board of Regents of the State of Florida, 457 U.S. 496 (1982) and Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965). Those cases, however, dealt with the exhaustion of administrative remedies and are inapplicable to the instant case. The FAA, by contrast, "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).



 

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United States District Court, E.D. New York.

Jose ORTEGA and Joce Martinez, on their own behalf,
and on behalf of those similarly situated, Plaintiffs,
v.
UBER TECHNOLOGIES INC., Rasier, LLC, Uber USA LLC, Uber New York LLC, Uber Transportation LLC, and John Doe "Uber Affiliates," Defendants.

15-CV-7387 (NGG) (JO)
|
Signed May 1, 2017
|
Filed 05/02/2017

**Attorneys and Law Firms**

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Andrew M. Spurchise, Kevin Robert Vozzo, Littler Mendelson P.C., New York, NY, for Defendants.

**MEMORANDUM & ORDER**

NICHOLAS G. GARAUFIS, United States District Judge

***1** On March 7, 2017,[1] the court issued a Memorandum and Order granting Defendants' motion to compel arbitration as to all claims brought by Plaintiff Joce Martinez and granting in part and denying in part Defendants' motion to dismiss claims brought by Plaintiff Jose Ortega. (Mar. 7, 2017, Mem. & Order ("Mem. & Order") (Dkt. 42).) On March 22, 2017, Plaintiffs moved for "reconsideration and/or clarification" of two parts of the court's decision. (See Mot. for Recons. ("Pls. Mot.") (Dkt. 44).) For the reasons discussed below, Plaintiffs' motion is denied.

**I. BACKGROUND**

The court assumes the parties' familiarity with the facts and procedural history of the case and so limits its discussion to the background relevant to the present motions. Plaintiffs brought this action in December 2011, alleging among other claims that Defendants (referred to collectively as "Uber") induced Plaintiffs (and other drivers) through false advertisements to drive for Uber (see Am. Compl. (Dkt. 16) ¶¶ 144-153) and breach edits contracts (sometimes referred to as "service agreements") with Plaintiffs by, among other things, inflating the "service fee" charged to drivers (id. at 132-33). Uber moved to dismiss all of Plaintiffs' claims for failure to state a claim upon which relief may be granted. (Mot. to Dismiss (Dkt. 22).) Uber separately moved to compel individual arbitration as to all of Martinez's claims on the basis of an arbitration provision contained within the operative service agreement. (See generally Defs. Mem. in Supp. of Mot. to Compel Arbitration (Dkt. 20).)

In its March 7, 2017, Memorandum and Order, the court agreed with Uber that Martinez had agreed not only to arbitrate his claims against Uber but also to "submit to an arbitrator any disputes relating to the interpretation or application of the arbitral clause." (See Mem. & Order at 17.) The court also concluded that Ortega had not made out a sufficient claim for breach of



 

contract. (See id. at 39-41.) Accordingly, the court dismissed Ortega's breach of contract claim (among other claims) and held that Martinez was compelled to submit all of his claims to arbitration. (Id. at 48.)

On March 22, 2017, Plaintiffs filed the present motion for reconsideration. (See generally Pls. Mot.) Defendants submitted their opposition on April 29, 2017. (Defs. Opp'n to Pls. Mot. (Dkt. 49).)

## II. LEGAL STANDARD

Under Local Rule 6.3, a party may move for reconsideration of a previously issued order by filing a notice of motion and memorandum identifying "the matters or controlling decisions which counsel believes the Court has overlooked." Local Civ. R. 6.3. The standard for a motion for reconsideration is "strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." Schrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995). Parties moving for reconsideration must generally show "an intervening change in controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust, 729 F.3d 99, 104 (2d Cir. 2013) (internal quotation marks and citation omitted). "A party seeking reconsideration may neither repeat arguments already briefed, considered and decided nor advance new facts, issues or arguments not previously presented to the Court." Schoolcraft v. City of N.Y., —— F. Supp. 3d ——, No. 10-CV-6005 (RWS), 2017 WL 1194703, at *1 (S.D.N.Y. Mar. 31, 2017) (internal quotation marks and citation omitted). "It is within the sound discretion of the district court whether or not to grant a motion for reconsideration." Markel Am. Ins. Co. v. Linhart, No. 11-CV-5094 (SJF) (GRB), 2012 WL 5879107, at *2 (E.D.N.Y. Nov. 16, 2012).

## III. DISCUSSION

***2** Plaintiffs ask the court to reconsider its determinations that (1) Martinez's false advertising claim is subject to arbitration under his contract with Uber; and (2) Ortega failed to state a claim for breach of contract. The court examines the requests for reconsideration separately and concludes that Plaintiffs fail to provide a sufficient basis to merit revising the prior order.

### A. Arbitrability of Martinez's False Advertising Claim

At the heart of Martinez's motion is his argument that a contract's arbitration provisions cannot be extended to cover disputes that arose prior to contracting. (See Pls. Mot. at 1.) He raised this argument in his opposition to Uber's motion to compel (see Pls. Mem. in Opp'n to Mot. to Compel (Dkt. 25) at 23-24), and correctly notes that the court did not directly address this point in its decision (Pls. Mot. at 2-3). Pointing to the language of the relevant arbitration provision, which states that it "applies to all disputes between [the driver] and Uber" (Ex. F to Decl. in Supp. of Mot. to Compel ("Dec. 2015 Agreement") (Dkt. 21-6) § 15.3(i)), Martinez argues that he could not have agreed to arbitrate his false advertising claims, as they predate his agreement to arbitrate (Pls. Mot. at 2).

The court's previous opinion concluded not only that Martinez agreed to arbitrate his claims against Uber but also that he agreed to delegate the question of arbitrability itself to the arbitrator. (Mem. & Order at 16-20.) In other words, Martinez agreed that the arbitrator should decide "(1) whether there exists a valid agreement to arbitrate at all under the contract in question ... and if so, (2) whether the particular dispute sought to be arbitrated falls within the scope of the arbitration agreement." See Hartford Acc. & Indem. Co. v. Swiss Reins. Am. Corp., 246 F.3d 219, 226 (2d Cir. 2001) (alteration in original) (internal quotation marks and citations omitted); see also Guan v. Uber Techs. Inc., —— F. Supp. 3d ——, No. 16-CV-598 (PKC) (CLP), 2017 WL 744564, at *10 (E.D.N.Y. Feb. 23, 2017) (discussing the scope of delegation under the same arbitration provision considered here). Whether Martinez's false advertising claims fall inside the scope of the claims covered by the arbitration clause is thus squarely within the realm of decisions that Martinez delegated to the arbitrator. Martinez presents no new challenge to the validity of this delegation and so provides no grounds to revisit the court's previous order. Accordingly, the motion for reconsideration as to Martinez' false advertising claim is denied.


 

**B. Ortega's Breach of Contract Claim**

Seeking reinstatement of his breach of contract claim, Ortega argues that the court overlooked other, potentially relevant iterations of the service agreements, pointing specifically to the April 2015 and December 2015 service agreements. (Pls. Mot. at 4.) Separately, Ortega also argues the court's prior order was "based on an incomplete [version of the relevant agreement] submitted by the defendants herein, which lacked the 'City Addendum.' " (Pls. Mot. at 4-5.) The court considers these points separately.

1. The 2015 Service Agreements

Plaintiffs' Amended Complaint alleges that, in its service agreement with drivers, Uber agrees to pay to its drivers amounts Uber collects from passengers, which includes a "Fare less UBER's applicable service fee" and, additionally, tolls, and taxes and "ancillary fees." (See Am. Compl. (Dkt. 16) ¶¶ 27, 90.) The "service fee" is calculated as a percentage of the fare, such that a higher fare results in a higher fee paid to Uber. (See id. ¶ 92.) Plaintiffs allege Uber breached its service agreements by artificially inflating the size of the fare by including taxes and ancillary fees. (Id. ¶¶ 92, 133; see also Pls. Mem. in Opp'n to Mot. to Dismiss ("Opp'n Mem.") (Dkt. 28) at 9-11.)

***3** Plaintiffs' opposition to the motion to dismiss references two iterations of Uber's service agreement in support of its breach of contract claim. (Opp'n Mem. at 9-10.) The first of these agreements, dated June 2014, defines the "fare" as "including [ ] taxes and fees" (i.e. explicitly allowing Uber to collect a higher service fee by defining the taxes as part of the "fare"). (See Ex. C to Decl. in Supp. of Mot. to Dismiss (Dkt. 21-3) § 1.12.) The second referenced agreement, from November 2014, defines fare without reference to taxes and applicable fees, while separately specifying that the service fee may be calculated based on the "Fare net of such taxes" where the locality requires taxes to be included in the fare charged to a rider. (See Ex. D to Decl. in Supp. of Mot. to Dismiss ("Nov. 2014 Agreement") (Dkt. 21-4) §§ 4.1, 4.4.) Plaintiffs argued that the June 2014 definition of "fare" constituted a "concession on Uber's part that it has been inflating its service fee ... by including taxes and other ancillary charges in the fare ... in breach of the agreements." (Opp'n Mem. at 9.) In adjudicating the Motion to Dismiss, the court found that Plaintiffs were conflating "differently defined terms in different agreements." (Mem & Order at 40). The court noted in its opinion that collecting tax-inflated service charges would be perfectly permissible under the June 2014 agreement and that the Amended Complaint presented "no indication that taxes or fees were included in the Fare under the November 2014 Agreement." (Id.)

While Ortega correctly notes that the court's decision did not address two later-in-time iterations of the service agreements, dated April 2015 and December 2015 (Pls. Mem. at 4-5), those agreements do not address the underlying issue with Ortega's claim. Plaintiffs' Amended Complaint never identifies which agreement(s) it alleges Uber breached, an essential allegation in the present case where, as discussed, the alleged "breach" was expressly valid under at least one of the relevant agreements.[2] Plaintiffs' failure to identify the agreement and terms alleged to have been breached necessitates dismissal of the claim, as the court cannot assess the plausibility of Plaintiff's claim. Cf., e.g., Window Headquarters, Inc. v. MAI Basic Four, Inc., Nos. 91-CV-1816 (MBM), 92-CV-5283 (MBM), 1993 WL 312899, at *3 (S.D.N.Y. Aug. 12, 1993) (collecting cases) ("[A] complaint in a breach of contract action must set forth the terms of the agreement upon which liability is predicated."). Pointing to two additional agreements,[3] again without specifying that Uber breached those particular agreements, does not remedy this pleading failure, and the court is not persuaded to reconsider its prior decision.

2. The City Addendum

Ortega likewise seeks reconsideration based on the "City Addendum" to the June 2014 Agreement, which he states "defined what constituted the Fares paid to the plaintiffs and what service Fees would be charged by the defendant." (Pls. Mot. at 5.) He does not, however, provide the addendum or any further information as to these additional definitions, nor does he state



 

how those definitions would be helpful to his claim. Absent further information regarding the addendum, the court declines to revisit its prior decision.

## IV. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Reconsideration is DENIED.

SO ORDERED.

### All Citations

Not Reported in Fed. Supp., 2017 WL 1737636

Footnotes

1 Though the order was signed on March 7, 2017, it was not entered on the Electronic Court Filing system until March 8, 2017, and so March 8 is the relevant date for purposes of calculating the 14 day time limit for motions raised under Local Rule 6.3.

2 Plaintiffs further muddied the waters in briefing their opposition to the motion to dismiss, stating that "[t]o the extent Uber claims Plaintiffs failed to identify 'which version' of the agreement Uber breached, it is clear that each version contains virtually identical applicable contract provisions, with no material differences." (Opp'n Mem. at 11; see also id. at 11 n. 15 (stating that the differences between the June 2014 agreement's definition of "Fare" and the definition of the same term in the other agreements "do not change the nature of Uber's contractual obligations to the Plaintiffs ... and Uber's breach, which remains the same").)

3 The court also notes that the relevant language in these two later-in-time contracts is either identical to or substantially indistinguishable from that in the November 2014 Agreement. (Compare Nov. 2014 Agreement §§ 4.1, 4.4 with Ex. E to Decl. in Supp. of Mot. to Compel (Dkt. 21-5) §§ 4.1, 4.4 and Dec. 2015 Agreement §§ 4.1, 4.4.)

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United States District Court, D. Utah, Central Division.

PENHALL, et al., Plaintiffs,

v.

YOUNG LIVING ESSENTIAL OILS, Defendant.

Case No. 2:20-cv-00617-DBB-CMR
|
Signed August 26, 2022
|
Filed August 29, 2022

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MEMORANDUM DECISION AND ORDER DENYING [96] MOTION TO COMPEL ARBITRATION

Cecilia M. Romero, Magistrate Judge

***1** This matter is referred to the undersigned in accordance with 28 U.S.C. § 636(b)(1)(A) (ECF 50; ECF 85). Before the court is Defendant Young Living Essential Oils' (Defendant) Motion to Compel Arbitration (Motion) (ECF 96) asking the court to compel Plaintiffs Lindsay Penhall (Penhall), Sarah Maldonado (Maldonado), and Tiffanie Runnel (Runnels) (collectively, Plaintiffs) to individual arbitrations and to stay this action pending these proceedings. Having carefully considered the relevant filings, the court finds that oral argument is not necessary and will decide this matter on the basis of written memoranda. *See* DUCivR 7-1(g). For the reasons stated below, the court hereby DENIES the Motion.

## I. FACTUAL BACKGROUND[1]

**Original Arbitration Agreement**

Defendant sells essential oils, and Plaintiffs are former distributors of Defendant's products, referred to as "members." During the relevant time period from August 2014 to July 2020, members were required to agree to Defendant's (1) Member Agreement (the Member Agreement); (2) Policies and Procedures (the P&Ps); and (3) Compensation Plan (the Compensation Plan) (collectively,



 

the Agreement). Defendant amended the Member Agreement and the P&Ps multiple times during this period. Notwithstanding, all versions of the P&Ps contained the following arbitration clause (the Original Arbitration Agreement):

> 13.2.2 ARBITRATION
>
> If mediation is unsuccessful, any controversy or claim arising out of or relating to the Agreement, or the breach thereof, will be settled by arbitration. The parties waive all rights to trial by jury or to any court. The arbitration will be filed with, and administered by, the American Arbitration Association ("AAA") or Judicial Arbitration and Mediation Services ("JAMS") under their respective rules and procedures. The Commercial Arbitration Rules and Mediation Procedures of the AAA are available at the AAA's website at adr.org. The Streamlined Arbitration Rules & Procedures of JAMS are available at the JAMS website at jamsadr.com.

(Def. Ex. D-F § 13.2.2). In addition, the pre-2019 versions of the Member Agreement contained a jurisdiction and choice of law clause (the Forum Selection Clause), which stated that "any legal action concerning the Agreement will be brought in the state and federal courts located in Salt Lake City, Utah" (Def. Ex. A-B at § 9).

**2020 Arbitration Agreement**

On December 2, 2019, Defendant published the 2019 Member Agreement, which removed the Forum Selection Clause and replaced it with the following:

> The parties consent to jurisdiction and venue before any state or federal court located in Salt Lake City, Utah for any legal action not subject to arbitration, including for purposes of enforcing an award by an arbitrator, or any other matter not subject to arbitration as specified in the Policies and Procedures[.]

(Def. Ex. C.). Defendant also published the 2020 P&Ps on that date, which, like the prior versions of the P&Ps, contains an arbitration clause incorporating the JAMS rules (the 2020 Arbitration Agreement). The 2020 P&Ps also contain a retroactive clause stating, "Amendments will not apply retroactively to conduct that occurred prior to the effective date of the amendment unless expressly accepted by the member" (the Retroactive Clause) (Def. Ex. G at §§ 1.4, 12.2).

**Distributor Enrollment Process**

***2** During the relevant time period of 2014 to 2020, members were presented with a clickwrap agreement through Defendant's online enrollment. The clickwrap agreement has remained substantially the same during this time period. Directly below the clickwrap agreement text, members were presented with distinct hyperlinks, each of which contained the then-operative versions of the Member Agreement, the P&Ps, and the Compensation Agreement. Included with the clickwrap agreement text was a checkbox requiring the prospective member to acknowledge that they read and agreed to the Agreement before completing enrollment. After enrollment, members could purchase Defendant's products from its website at wholesale prices.

**Plaintiffs Tiffanie Runnels and Sarah Maldonado**

Runnels and Maldonado became members with Defendant through online enrollment on September 4, 2014, and December 19, 2018, respectively. During that process, they were presented with the clickwrap agreement and with hyperlinks containing the then-operative Member Agreement, the P&Ps, and the Compensation Plan, including the Original Arbitration Agreement. They both checked the box in the clickwrap agreement and completed the enrollment process to become members. During their time as members, they made the required monthly purchases.

**Plaintiff Lindsay Penhall**

Penhall became a member through online enrollment on May 24, 2018. During that process, she was presented with the clickwrap agreement and with hyperlinks containing the Member Agreement, the P&Ps, and the Compensation Plan, including the Original Arbitration Agreement. Penhall checked the box in the clickwrap agreement and completed the enrollment process to become a member. During her time as a member, she made the required monthly payments to Defendant.



 

In November 2019, Penhall terminated her membership due to inactivity. On March 3, 2020, Penhall logged into and reactivated her member account. Penhall was presented with the clickwrap agreement and hyperlinks to the 2019 Member Agreement and the 2020 P&Ps, including the 2020 Arbitration Agreement and the Retroactive Clause. Penhall checked the box in the clickwrap agreement and completed the enrollment process to become a member. Penhall then made a purchase, and to place the order, she checked the box agreeing to the 2020 P&Ps.

## II. PROCEDURAL BACKGROUND

Penhall initiated this class action suit against Defendant in the Southern District of California on December 6, 2019 (ECF 1). On August 17, 2020, the Southern District of California transferred this case to the District of Utah (ECF 36-1). On September 30, 2020, Defendant moved to dismiss and compel arbitration (ECF 68). In response, on November 2, 2020, Penhall moved for leave to amend the complaint to add Runnels and Maldonado as parties (ECF 80). The court granted Plaintiffs leave to amend (ECF 88) and on this basis denied Defendant's motion to dismiss as moot (ECF 90).

On September 27, 2021, Defendant filed the instant Motion asking the court to stay this case and compel arbitration for all Plaintiffs under the Original Arbitration Agreement, or in the alternative, compel arbitration for Penhall under the 2020 Arbitration Agreement (ECF 96). Plaintiffs oppose the Motion on the grounds that (1) the Original Arbitration Agreement is not a valid agreement to arbitrate; (2) Penhall is not bound by the 2020 Arbitration Agreement; and (3) collateral and judicial estoppel bar Defendant's arbitration arguments (ECF 101). Defendant filed a Reply contesting each of these arguments (ECF 102). Defendant also filed a motion to dismiss and to strike class allegations (ECF 97), which the court later denied without prejudice pending resolution of this Motion (ECF 105).

## III. LEGAL STANDARDS

***3** The Federal Arbitration Act (FAA) provides that an arbitration agreement "shall be valid, irrevocable, and enforceable," and permits a "party aggrieved by the ... refusal of another to arbitrate" to petition a federal district court for an order compelling arbitration in the manner provided in the agreement and staying the litigation until such arbitration has been held. 9 U.S.C. §§ 2-4. The determination of "whether to compel claims to arbitration is a two-step inquiry. First, the court must determine whether a valid agreement to arbitrate exists; and then, whether the dispute in question falls within the scope of that agreement." *Carter v. C.R. England, Inc.*, No. 2:21-cv-00102-DBB, 2021 WL 1820717, at *2 (D. Utah May 5, 2021) (citing *Soc'y of Prof'l Eng'g Emples. in Aero., Local 2001 v. Spirit Aerosystems, Inc.*, 681 F. App'x 717, 721 (10th Cir. 2017)).

Courts have "long recognized and enforced a 'liberal federal policy favoring arbitration agreements' " in the FAA. *Ragab v. Howard*, 841 F.3d 1134, 1138 (10th Cir. 2016) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002)). However, the determination of "whether a party agreed to arbitration is a contract issue, meaning arbitration clauses are only valid if the parties intended to arbitrate." *Id.* (citing *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960)). Thus, "although the presence of an arbitration clause generally creates a presumption in favor of arbitration, ... 'this presumption disappears when the parties dispute the existence of a valid arbitration agreement.' " *Bellman v. i3Carbon, LLC*, 563 F. App'x 608, 613 (10th Cir. 2014) (quoting *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1220 (10th Cir. 2002)). The FAA "does not require parties to arbitrate when they have not agreed to do so." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). Rather, the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Id.*

The party "seeking to compel arbitration[ ] has the burden to show that arbitration agreements exist and apply to these [p]laintiffs." *Mitchell v. Wells Fargo Bank*, 280 F. Supp. 3d 1261, 1272 (D. Utah 2017) (citing *Hancock v. Am. Tel. & Tel. Co.*,


 

701 F.3d 1248, 1261 (10th Cir. 2012)). The court gives the party resisting arbitration "the benefit of all reasonable doubts and inferences that may arise." *Id.* (quoting *Hancock*, 701 F.3d at 1261). "If the court finds material factual disputes preclude it from determining the arbitration question as a matter of law, the court must proceed to summary trial to resolve those disputes of fact." *Id.* (citing *Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975, 987 (10th Cir. 2014)).

## IV. DISCUSSION

### A. This Court has the Authority to Determine the Validity of the relevant Arbitration Agreement.

Defendant argues that the court must compel arbitration because the Original Arbitration Agreement delegates the issue of arbitrability, including validity, to the arbitrator (ECF 96 at 9). Plaintiffs respond that the court must determine the validity of an arbitration agreement before reaching the applicability of a delegation clause (ECF 101 at 6). The court agrees. The Tenth Circuit makes clear that "[t]he issue of whether an arbitration agreement was formed between the parties must always be decided by a court, regardless of whether the alleged agreement contained a delegation clause or whether one of the parties specifically challenged such a clause." *Fedor v. United Healthcare, Inc.*, 976 F.3d 1100, 1105 (10th Cir. 2020) (citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 69 n.1, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010)). In ruling on a motion to compel arbitration, it is the court who must undertake the first step of "resolv[ing] any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297, 130 S.Ct. 2847, 177 L.Ed.2d 567 (2010) (citing *Rent-A-Center*, 561 U.S. at 68–70). Where there is no valid agreement to arbitrate, the court need not "proceed to the second step and consider any delegation language[.]" *See Puchalski v. TCFC HotelCo, LP*, No. 2:19-cv-00812-DBB, 2020 WL 1891885, at * 2 (D. Utah. Apr. 16, 2020); *see also Born v. Progexion Teleservices, Inc.*, No. 2:20-cv-00107, 2020 WL 4674236, at *10 (D. Utah Aug. 11, 2020) ("[W]hile the Supreme Court has endorsed a liberal policy favoring arbitration, it has also 'made clear there is an exception to this policy: The question whether the parties have submitted a particular dispute to arbitration, i.e., the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.' " (quoting *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002))).

***4** Defendant relies on cases that support this two-step approach. *See Cordas v. Uber Techs.*, Inc., 228 F. Supp. 3d 985, 988 (N.D. Cal. 2017) (addressing the threshold question of whether a valid arbitration agreement was formed between the parties before addressing the delegation clause); *Edwards v. Doordash, Inc.*, 888 F.3d 738, 744 (5th Cir. 2018) ("Arguments that an agreement to arbitrate was never formed ... are to be heard by the court even where a delegation clause exists."). Defendant also relies on cases compelling arbitration where, unlike this case, the validity of the arbitration agreement itself was not at issue, *see Born*, 2020 WL 4674236, at *9 (addressing whether the defendants waived the right to arbitration); *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1282–83 (10th Cir. 2017) (addressing whether the plaintiffs properly entered into the agreement to arbitrate), or not in dispute, *see Messerly Concrete, LC v. GCP Applied Techs., Inc.*, No. 1:21-cv-00074-DBB, 2021 WL 3145782, at *2 (D. Utah July 26, 2021) (noting the parties "do not dispute the validity of the [a]greement" to arbitrate). The court therefore concludes that it has the authority to determine the validity of the arbitration agreements at issue in this case and will therefore proceed to making this determination.

### B. The Original Arbitration Agreement is Not a Valid Agreement to Arbitrate.

The court will begin by addressing the validity of the Original Arbitration Agreement. The question of whether a valid agreement to arbitrate exists "is simply a matter of contract between the parties." *Bellman*, 563 F. App'x 612 (quoting *Walker v. BuildDirect.com Techs., Inc.*, 733 F.3d 1001, 1004 (10th Cir. 2013)). Courts therefore "apply ordinary state-law principles that govern the formation of contracts to determine whether a party has agreed to arbitrate." *Id.* (quoting *Walker*, 733 F.3d at 1004). Neither party disputes that Utah law applies in this case. Utah law provides that "[t]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration. Consideration sufficient to support the formation of a contract requires that a performance or a return promise must be bargained for." *Trans-Western Petroleum, Inc. v. United States Gypsum Co.*, 830 F.3d 1171, 1177 (10th Cir. 2016) (quoting *Aquagen Int'l Inc. v. Calrae Tr.*,


 

972 P.2d 411, 413 (Utah 1998)). To form "an enforceable contract, there must be a meeting of the minds on the essential terms of the agreement." *Id.* at 1176.

Here, the parties do not dispute that all three Plaintiffs completed the online enrollment process to become members and thereby entered into the Member Agreement and the P&Ps containing the Original Arbitration Agreement (ECF 96 at 9; ECF 101 at 8-9). The disagreement lies as to the issue of whether the Original Arbitration Agreement is a valid agreement to arbitrate. Plaintiffs argue that the Original Arbitration Agreement is not valid because it irreconcilably conflicts with the Forum Selection Clause (ECF 101 at 9). In support of this argument, Plaintiffs rely on the *O'Shaughnessy* case, where a former member filed a class action against Defendant in the Western District of Texas, and Defendant moved to compel arbitration pursuant to the Original Arbitration Agreement. In that case, the court denied the motion to compel arbitration and held that there was no binding arbitration agreement due to an irreconcilable conflict between the Original Arbitration Agreement and the Forum Selection Clause. *O'Shaughnessy v. Young Living Essential Oils, LC*, No. 19-CV-412-LY, 2019 WL 5296359, *4 (W.D. Tex. Oct. 18, 2019), *report and recommendation adopted*, 2019 WL 8587182 (W.D. Tex. Nov. 27, 2019), *aff'd*, No. 19-51169, 810 F. App'x 308 (5th Cir. 2020).[2]

***5** The court finds the reasoning in the *O'Shaughnessy c*ase to be persuasive. Courts have recognized that "the FAA does not require an arbitration provision to be enforced if the provision is defective for reasons other than public policy or unconscionability." *Ragab*, 841 F.3d at 1138 (citing *NAACP of Camden Cty. E. v. Foulke Mgmt. Corp.*, 24 A.3d 777, 792 (N.J. Super Ct. App. Div. 2011; *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 344, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011)). Although courts have granted motions to compel arbitration "despite the existence of conflicting arbitration provisions when the contracts themselves provide the solution," denial of the motion to compel is warranted where, as here, the conflict "indicate[s] that there was no meeting of the minds with respect to arbitration." *See Ragab*, 841 F.3d at 1138. Under a plain reading, the Original Arbitration Agreement requiring arbitration of "any controversy or claim" irreconcilably conflicts with the Forum Selection Clause requiring that "any legal action" be brought in the courts of Salt Lake City, Utah (ECF 101 at 9). These conflicting provisions as to the required forum for the resolution of Plaintiffs' claims indicate there was no meeting of the minds as to whether Plaintiffs must arbitrate their claims. "The conflict between these provisions would not leave [Plaintiffs] with a definite understanding that [they] agreed to arbitrate all claims arising out of the Member Agreement." *See O'Shaughnessy*, No. 2019 WL 5296359, *4 (citing *Mitchell*, 280 F. Supp. 3d at 1286 ("Where the essential terms of a contract conflict, there can be no agreement.")). The court therefore concludes that the Original Arbitration Agreement is not a valid agreement to arbitrate.

Defendant argues that the *O'Shaughnessy* case was wrongly decided and points to cases compelling arbitration after reconciling arbitration and choice of venue provisions (ECF 96 at 13-15). Defendant focuses in particular on two cases, neither of which is controlling precedent, and which the court finds to be factually distinguishable. *See G.W. Van Keppel Co. v. Dobbs Imports*, No. 2:14-CV-02236-JAR, 2014 WL 5302974, (D. Kan. Oct. 15, 2014), and *Personal Security & Safety Systems Inc. v. Motorola Inc.*, 297 F.3d 388 (5th Cir. 2002). In *G.W. Van Keppel*, the court acknowledged that "[c]ourts have found forum-selection and arbitration clauses to conflict ... where both clauses apply by their terms to the same types of claims." *See* 2014 WL 5302974, at *5. Unlike the "difference in terminology" present in *G.W. Van Keppel* where the arbitration provision applied to "any controversy, claim, or dispute," while the forum-selection clause applied to a "suit, action or proceeding," *id*. at *6, the Original Arbitration Agreement and the Forum Selection Clause here use the identical term of "any" in both provisions such that both clauses apply to the same types of claims. In the *Motorola* case, the Fifth Circuit gave effect to both the arbitration clause and the forum selection clause, holding that the forum selection clause covered "only those disputes that are not subject to arbitration." *See* 297 F.3d at 395–96. The Original Arbitration Agreement and the Forum Selection Clause in this case are distinguishable because of the breadth of their application to "*any* controversy or claim" and "*any* legal action." For these reasons, the court concludes that the Original Arbitration Agreement and the Forum Selection Clause irreconcilably conflict, and the Original Arbitration Agreement is therefore not a valid agreement to arbitrate.

**C. Disputes of Fact Exist as to Whether Penhall is Bound by the 2020 Arbitration Agreement.**



 

Defendant argues that even if the Original Arbitration Agreement is invalid, Penhall is bound by the 2020 Arbitration Agreement (ECF 96 at 19). Defendant contends that Penhall "expressly accepted" the 2020 Arbitration Agreement and Retroactive Clause contained in the 2020 P&Ps when she reactivated her member account and made a purchase in March 2020 (ECF 96 at 20). Defendant argues it is irrelevant that Penhall initiated this litigation prior to agreeing to the 2020 Arbitration Agreement because under the Retroactive Clause, the 2020 P&Ps apply retroactively to conduct that predates the effective date of the amendment when a member expressly accepts the amendment's terms as Penhall did here (ECF 96 at 20). In response, Penhall claims that she "never intended" to enter a new agreement with a company she had sued three months prior, and that if she did so, "it was by mistake" (ECF 101 at 16-17).[3] Defendant responds that Penhall's subjective intent is irrelevant, and she is nonetheless bound by her overt acts (ECF 102 at 10).

***6** Under these facts, the court is unable to determine whether there was a "meeting of the minds on the essential terms of the agreement" as required under Utah law. *See Trans-Western Petroleum, Inc.*, 830 F.3d at 1177. The court finds that factual issues relating to Penhall's intent, i.e., whether she "expressly accepted" the 2020 P&Ps or did so by mistake, are disputes of material fact that prevent the court from determining whether the 2020 Arbitration Agreement is a valid agreement to arbitrate between Penhall and Defendant. "When parties dispute the making of an agreement to arbitrate, a jury trial on the existence of the agreement is warranted unless there are no genuine issues of material fact regarding the parties' agreement." *Bellman*, 563 F. App'x at 612 (quoting *Hardin v. First Cash Fin. Servs., Inc.*, 465 F.3d 470, 475 (10th Cir. 2006)). As such, "when factual disputes [seem likely to] determine whether the parties agreed to arbitrate, the way to resolve them isn't by round after round of discovery and motions practice. It is by proceeding summarily to trial." *Id.* (quoting *Howard*, 748 F.3d at 984). In this case, resolution of the factual disputes relating to Penhall's intent is necessary to determine whether the Penhall is bound by the 2020 Arbitration Agreement and should therefore be resolved by summary trial.

In arguing Penhall is bound by the 2020 Arbitration Agreement, Defendant relies on a Northern District of California case compelling arbitration for plaintiffs who expressly accepted a clickwrap agreement (ECF 102 at 11). *See Trudeau v. Google, LLC*, 349 F. Supp. 3d 869, 879 (N.D. Cal. 2018). In that case, the defendant "implemented an extensive notice campaign and required that [plaintiffs] expressly accept the new [agreement]" and thereby "gave [the plaintiffs] direct notice and required express acceptance." *Id.* This case is factually distinguishable because Defendant has not provided evidence of any notice, direct or otherwise, to members like Penhall of the changes in the 2019 Member Agreement or the 2020 P&Ps. The issue of whether Penhall received notice of these changes is at least relevant to whether there was a meeting of the minds and is another issue of fact that may be addressed at a summary trial.

## V. CONCLUSION AND ORDER

Accordingly, the court hereby DENIES Defendant's Motion to Compel Arbitration and request for a stay of this action (ECF 96) without prejudice.[4] The court directs the parties to submit an attorney planning meeting report and proposed scheduling order within fourteen (14) days.

IT IS SO ORDERED.

### All Citations

Slip Copy, 2022 WL 3716928

Footnotes

1 Unless otherwise indicated, the facts stated herein are drawn from the factual background set forth in pages 2 through 6 of the Motion, as Plaintiffs did not include a separate statement of facts in their Opposition (ECF 101)



 

2 On June 29, 2020, pursuant to the Forum Selection Clause, the *O'Shaughnessy* case was transferred to the District of Utah where it is currently pending.

3 Plaintiffs also argue that the issue of retroactivity "was already litigated" when the Southern District of California transferred this action under the Forum Selection Clause (ECF 36-1) and that departing from this determination would violate the law-of-the-case doctrine (ECF 101 at 18). The court disagrees. The law-of-the-case doctrine is "not an absolute limit on the court's power ... Rather, it 'merely expresses the practice of the courts generally to refuse to reopen what has been decided.' " *See In re Adoption of EH*, 103 P.3d 177 (Utah Ct. App. 2004) (quoting *Messinger v. Anderson*, 225 U.S. 436, 444, 32 S.Ct. 739, 56 L.Ed. 1152 (1912)). Here, the court has addressed the validity and applicability of the Forum Selection Clause (ECF 36-1). The court has not yet decided the validity of the 2020 Arbitration Agreement or the Retroactive Clause or the arbitrability of Penhall's claims under the 2020 Arbitration Agreement. As discussed herein, these issues are more appropriately addressed at a summary trial.

4 Because the court has denied the Motion, the court does not at this time reach the issue of whether Defendant is estopped from compelling arbitration.

**End of Document**

Massachusetts General Laws Annotated
Constitution or Form of Government for the Commonwealth of Massachusetts [Annotated]
Part the First a Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts

M.G.L.A. Const. Pt. 1, Art. 15

# Art. XV. Right to trial by jury in controversies and suits

Currentness

Art. XV. In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it.

Notes of Decisions (211)

M.G.L.A. Const. Pt. 1, Art. 15, MA CONST Pt. 1, Art. 15
Current through amendments approved February 1, 2023.

**End of Document**

Massachusetts General Laws Annotated
Massachusetts Rules of Appellate Procedure (Refs & Annos)

Massachusetts Rules of Appellate Procedure (Mass.R.A.P.), Rule 17

# Rule 17. Brief of an Amicus Curiae

Effective: April 1, 2022
Currentness

**(a) General.** A brief of an amicus curiae may be filed only (1) by leave of the appellate court or a single justice granted on motion, (2) when solicited by the appellate court, or (3) if the Commonwealth or its officer or agency is an amicus on the brief. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable.

**(b) Timing.** In all cases, an amicus curiae shall file its brief no later than 21 days before the date of oral argument for that case unless the appellate court or a single justice for cause shown shall grant leave for later filing. Any party may request leave from the appellate court or a single justice to file a response to a brief filed by an amicus curiae.

**(c) Cover, Length, and Content.** An amicus brief must comply with Rule 20. In addition to the requirements of Rule 20, the cover must identify the party or parties supported and state whether the brief supports affirmance or reversal or neither. An amicus brief need not comply with all the requirements of Rule 16, but must include the following:

(1) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Supreme Judicial Court Rule 1:21;

(2) a table of contents with page references, in accord with Rule 16(a)(3);

(3) a table of authorities, in accord with Rule 16(a)(4);

(4) a concise statement of the identity of the amicus curiae and its interest in the case;

(5) a declaration by all amicus curiae, other than the Commonwealth or its officer or agency, that states whether

(A) a party or a party's counsel authored the brief in whole or in part;

(B) a party or a party's counsel, or any other person or entity, other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund the preparation or submission of the brief, and, if so, identifying each such person or entity; and



 

(C) the amicus curiae or its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal, and, if so, identifying the proceeding or transaction, its relevance to the present appeal, and the parties involved;

(6) a summary of argument, in accord with Rule 16(a)(8), if the argument is more than 20 pages in length or more than 4,500 words if produced in a proportionally spaced font;

(7) an argument, which need not include a statement of the applicable standard of review;

(8) a signature block, in accord with Rule 16(a)(12);

(9) a certificate stating that the brief complies with the requirements of this rule and Rule 20 and specifying how compliance with the length limit of Rule 20(a)(3)(E) was ascertained, by stating either (A) the name, size, and number of characters per inch of the monospaced font used and the number of non-excluded pages, or (B) the name and size of the proportionally spaced font used, the number of non-excluded words, and the name and version of the word-processing program used; and

(10) a certificate of service, in accord with Rule 13(e).

A brief not complying with these rules (including a brief that does not contain a certification) may be struck from the files by the appellate court or a single justice.

**(d) Filing.** The same number of copies of the brief of an amicus curiae shall be filed with the clerk and served on each party as required by Rule 19(d).

**(e) Oral argument.** A motion of an amicus curiae to participate in the oral argument will be granted only for good cause.

**Credits**

Amended October 30, 1997, effective January 1, 1998; October 31, 2018, effective March 1, 2019; February 22, 2022, effective April 1, 2022.

**Editors' Notes**

**REPORTER'S NOTES--1973**

No existing rule governs briefs of an amicus curiae. Appellate Rule 17, limiting the right to file such a brief to an amicus who has obtained leave of the full appellate court or a single justice on motion, follows existing practice. It should be noted that the Commonwealth need never obtain leave to file an amicus brief.

**REPORTER'S NOTES--1979**

Rule 17 is unchanged, its provisions having been incorporated into criminal appellate procedure by former Appeals Court and Supreme Judicial Court Rules 1:15 (1975: 3 Mass.App.Ct. 803, 366 Mass. 861).



 

**REPORTER'S NOTES--1997**

The 1997 amendment to Appellate Rule 17 added a new last sentence requiring that the number of copies of an amicus brief to be filed with the appellate court and served on counsel be the same as set forth in Appellate Rule 19(b).

**REPORTER'S NOTES--2019**

Rule 17 was divided into separate subdivisions for clarity and substantively revised as described below.

Rule 17(a) contains the first three sentences of prior Rule 17. The words "or its officer or agency" were added at the end of the second sentence to make it clear that an officer or agency of the Commonwealth may also file an amicus brief as of right. This language was adopted from a similar provision in Fed. R. App. P. 29(a)(2). The phrase "at the request of the appellate court" was amended to "when solicited by the appellate court" to clarify when an amicus brief may be filed without leave of court. In accordance with Rule 17(a)(2), an amicus curiae need not move for leave to file a brief in a case where an appellate court has issued an announcement requesting submission of amicus briefs. The words "consent or" were struck because they were redundant of "leave" of court to file an amicus brief.

Rule 17(b) revises the fourth sentence of prior Rule 17 to allow an amicus curiae to file an amicus brief no later than 21 days before the date of oral argument for that case, unless leave is granted for later filing. This is intended to establish an ascertainable date for the filing of an amicus brief on behalf of any party, provide all parties with sufficient time to prepare a response to an amicus brief, and allow the appellate court sufficient time to review any amicus brief or response. Rule 17(b) was also amended to explicitly allow any party to seek leave from the appellate court or single justice to respond to any amicus brief.

Rule 17(c) is a new subdivision that governs the cover, length, and content of an amicus brief. An amicus brief must comply with the formatting and length requirements of Rule 20. However, an amicus brief does not need to comply with all of the content requirements applicable to a party's brief under Rule 16. Instead, Rule 17(c) explicitly references certain provisions of Rule 16 that are applicable to an amicus brief. Text was also added to clarify an amicus brief may be struck by an appellate court or single justice if it does not comply with Rule 17(c).

Rules 17(c)(4) and (c)(5) require the amicus curiae to identify its interest in the case in an amicus brief, so that it will be readily apparent to the appellate court when considering the brief. These paragraphs were modelled on Fed. R. App. P. 29(a)(4)(D)-(E), with a few changes. As with the analogous Federal rule, these paragraphs are not intended to require the amicus to disclose mere coordination of arguments or sharing of drafts with a party. The paragraphs are, however, intended to discourage the use of amicus briefs as an instrument to reiterate arguments made by a party to the appeal.

Rule 17(c)(5)(D) requires disclosure concerning whether "the amicus curiae or its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal," in accord with Aspinall v. Philip Morris Co., Inc., 442 Mass. 381, 385 n.8 (2004), and Champa v. Weston Public Schools, 473 Mass. 86, 87 n.2 (2015). In determining whether another proceeding involves similar issues, the amicus and its counsel need only consider issues that have been explicitly raised in, and that are directly relevant to, the other proceeding and the present appeal. Likewise, in determining whether another proceeding or transaction is at issue in the present appeal, the amicus and its counsel need only consider whether that proceeding or transaction has been explicitly put at issue in the appeal. Similar to Fed. R. App. P. 29(a)(4)(E), the Commonwealth and its officer or agency are exempted from the requirements in Rule 17(c)(5).

Rule 17(d) contains the last sentence of prior Rule 17 as a stand-alone subdivision. The text "counsel for each party separately represented" was replaced with "each party," consistent with the with the new definition of "party" in Rule 1(c). The cross-reference to Rule 19(b) was changed to Rule 19(d) to conform to changes in Rule 19.



 

Rule 17(e) contains the fifth sentence of prior Rule 17 as a stand-alone subdivision. The standard for allowing a motion of an amicus curiae to participate in oral argument was changed from "extraordinary reasons" to "good cause" to reflect that an amicus curiae's participation at oral argument may be desirable for a variety of reasons, even if those reasons might not be fairly described as "extraordinary."

Further organizational and stylistic revisions were made to this rule in 2019 in accordance with a global review and revision of all of the Appellate Rules. These revisions are described in the 2019 Reporter's Notes to Rule 1.

With regard to the preparation of the 2019 Reporter's Notes to this Rule, see the first paragraph of the 2019 Reporter's Notes to Rule 1. For an overview of the 2019 amendments to the Rules and a summary of the global amendments to the Rules, see 2019 Reporter's Notes to Rule 1, sections *I.* and *II.*

**REPORTER'S NOTES--2022**

Rule 17(a) was amended in 2022 to clarify that if the Commonwealth, or any of its officers or agencies, is one of any number of individuals or organizations on the amicus brief, the brief may be filed as of right. This includes cases where the Committee for Public Counsel Services authors or joins the amicus brief. The Committee for Public Counsel Services is an agency of the Commonwealth. G.L. c. 211D, § 1. See *German v. Commonwealth*, 410 Mass. 445, 447 (1991) (describing CPCS as "a statutory agency of the Commonwealth").

Rule 17(c) was amended to clarify that the declarations mandated by Rule 17(c)(5) are not required for the Commonwealth or its officer or agency, including the Committee for Public Counsel Services. Such declarations must be included for all non-Commonwealth amici, even if the brief is also joined by a Commonwealth officer or agency.

In addition, minor revisions to word choice were made for consistency and clarity. The revisions were not intended to change the substance of the rule.

Notes of Decisions (1)

Rules App. Proc., Rule 17, MA ST RAP Rule 17
Current with amendments received through July 15, 2023. Some rules may be more current; see credits for details.

## CERTIFICATE OF COMPLIANCE

I, Kevin J. Powers, 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. 17 (brief of an amicus curiae);

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 6,046 words in Microsoft Word 2007.

/s/ Kevin J. Powers

Kevin J. Powers, BBO No. 666323

Date: September 18, 2023

## CERTIFICATE OF SERVICE

I certify that on the 18th day of September, 2023, 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 e-mail. The attorneys served are:

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