To be Argued by:
MICHAEL R. HUSTON
(of the bars of the District of Columbia and State of Arizona)
by permission of the Court
(Time Requested: 30 Minutes)

APL-2023-00203
Bronx County Clerk's Index No. 33964/20E
Appellate Division–First Department Case No. 2022-05749

Court of Appeals

of the

State of New York

EMILY WU,

Plaintiff-Appellant,

– against –

UBER TECHNOLOGIES, INC.,

Defendant-Respondent,

– and –

JERRY ALVAREZ, AHMED ELHASHASH and ARMAN KHAN,

Defendants.

BRIEF FOR DEFENDANT-RESPONDENT

PERKINS COIE LLP
Attorney for Defendant-Respondent
1155 Avenue of the Americas,
22nd Floor
New York, New York 10036
Tel.: (212) 262-6900
Fax: (212) 977-1649

Corporate Disclosure Statement

Pursuant to Rule 500.1(f) of the Rules of Practice for the Court of Appeals of the State of New York, Defendant-Respondent Uber Technologies, Inc. states that it is a corporation incorporated in Delaware and headquartered in San Francisco, California. Uber Technologies, Inc. has no parent company, and has the following wholly or majority-owned direct U.S.-based subsidiaries and affiliates:

Aleka Insurance, Inc.

Cornershop Global LP

Danach, LLC

Dreist, LLC

Drinnen, LLC

Gegen, LLC

Neben, LLC

Ohne, LLC

orderTalk Holding Corp

Postmates, LLC

Rasier, LLC

Rennpferd, LLC

SMB Holding Corporation

The Drizly Group, LLC

Uber Carshare US LLC

Uber Insurance Holdings LLC

Uber International Holding Corporation

Uber Lending, LLC

Uber Payments Holdco, LLC

Uber USA, LLC

Uber Works, Inc.

UFS, Inc.

Voraus-NY, LLC

Zwaschen, LLC

Zwischen, LLC

Zwuschen, LLC

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Defendant-Respondent Uber Technologies, Inc. respectfully submits this brief in response to the appeal by Plaintiff-Appellant Emily Wu. Plaintiff appeals from the September 21, 2023 Decision and Order of the Appellate Division (First Department) unanimously affirming the order of the Supreme Court granting Uber's motion to compel arbitration and stay proceedings, and denying Plaintiff's motion for sanctions.

Preliminary Statement

Uber offers valuable services to millions of users in New York and around the country. Like many companies, Uber offers its services to users pursuant to a contract: its Terms of Use. Uber periodically updates its Terms of Use, and when it does it asks users to read and agree to the new terms. For as long as Plaintiff Emily Wu has been an Uber user, Uber's Terms of Use have included a conspicuous and unambiguous agreement that most personal injury disputes that might arise between Uber and Plaintiff will be resolved through binding arbitration, rather than in court. That arbitration agreement advances New York's "long and strong public policy favoring arbitration" as a means of efficiently resolving disputes. *Stark* v. *Molod Spitz DeSantis & Stark, P.C.*, 9 N.Y.3d 59, 66 (2007).

Plaintiff's appeal brief fundamentally mischaracterizes the facts as found by the Supreme Court and as affirmed by the First Department. To hear Plaintiff tell it, she filed a lawsuit against Uber in 2020 and only afterward was "tricked" into agreeing to arbitration in January 2021. But that is just not true. The Terms of Use that Plaintiff digitally agreed to when she first signed up for an Uber account back in 2016 included an agreement to arbitrate this personal injury dispute.

Below, the parties and the courts naturally focused primarily on the January 2021 updated Uber Terms of Use (the "2021 Terms") because that was the *operative* contract for Uber's motion to compel arbitration—it was the most recent version to which the parties had agreed. Plaintiff gave her assent to that contract multiple times in independently sufficient ways, as the Supreme Court and Appellate Division explained. And in agreeing to that contract in January 2021, Plaintiff committed to arbitrate "*any dispute* … arising out of or relating to" her use of Uber's services, whether the claim arose "*before* or after" the date of her agreement. (R.118 (emphasis added).) But even if there were some legal defect in Plaintiff's assent to the 2021 Terms, then Plaintiff's earlier contract with Uber would control and it too had a very similar arbitration clause. Plain-

tiff's obligation to arbitrate this dispute thus was not "retroactive," as she repeatedly claims (*e.g.*, Br.2, 7, 12). Plaintiff agreed to arbitration years before the auto accident at issue.

The lower courts' reasons for enforcing arbitration were sound, and this Court should affirm. *First*, Plaintiff's January 2021 agreement with Uber more than met the New York standard for contract formation: a reasonable opportunity to review the 2021 Terms and a reasonable manifestation of assent to them. Uber's clickwrap interface (a digital pop-up screen) ensured that Plaintiff received notice of Uber's updated Terms of Use, provided her with a conspicuous hyperlink to the full Terms, and required her to both check a box and hit a button confirming her agreement to the Terms. The unrebutted evidence indicates that Plaintiff gave assent with *actual* notice of the 2021 Terms. She has never denied her own digital confirmation that she "reviewed" the Terms of Use before agreeing to them; and she took more than a dozen rides knowing that doing so was conditioned on her agreement to arbitration. But regardless, Plaintiff at least had inquiry notice because she had an opportunity to review the 2021 Terms before assenting. New York contract law has never required, as Plaintiff now demands, a special "warning" before con-

sumers give assent to an arbitration provision—and the Federal Arbitration Act ("FAA") would not permit that rule in any event. *See* 9 U.S.C. § 2.

Second, as explained above, Plaintiff and Uber also formed an enforceable contract containing an arbitration agreement in 2016. This case therefore does not concern the application of a retroactive arbitration provision. But even if it did, agreements to arbitrate existing disputes are commonplace and regularly enforced by New York courts.

Third, this Court should join the lower courts in rejecting Plaintiff's novel attempt to dramatically expand the scope of New York's professional-responsibility rule to cover unnamed in-house attorneys with no knowledge of or connection to a court action. Plaintiff asks this Court to analogize this individual personal injury action to inapplicable federal class-action cases, but no court has accepted that analogy because class actions raise different concerns. More fundamentally, there was no violation of the no-contact rule when *Plaintiff reached out to Uber* seeking its services, and Uber (not any attorney) responded by offering its standard terms of use for all U.S. riders. That interaction does not show any communication related to this action by or at the direction of counsel. Plaintiff has not even attempted to show an abuse of discretion that

would warrant setting aside the well-reasoned decision of the Supreme Court denying her motion for sanctions.

Fourth, under the FAA, Plaintiff's attempt to evade the arbitration agreement on the ground that it is unconscionable must be decided by the arbitrator, not a court. *See Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 586 U.S. 63, 68 (2019). The parties agreed to delegate all threshold issues of arbitrability (including, expressly, unconscionability) to the arbitrator, and Plaintiff failed to argue *specifically* that anything about that delegation agreement was unenforceable. Even if Plaintiff's unconscionability challenge were properly before this Court, it is meritless: Arbitration agreements in consumer contracts are routinely enforced by New York courts. Plaintiff failed to adduce any facts showing that the arbitration agreement does not apply to both sides or that Uber obtained her assent improperly.

In short, Plaintiff entered into an enforceable Terms of Use contract with Uber containing a clearly stated arbitration clause. Under the plain terms of that agreement, Plaintiff is required to resolve her personal-injury claim against Uber through arbitration. This Court should reject Plaintiff's invitation to destabilize long-settled New York contract law.

Counterstatement of Questions Presented

1. Plaintiff encountered a digital pop-up screen that: informed her that Uber's terms of use were changing; provided conspicuous hyperlinks to the full terms of use for Plaintiff to read; and required Plaintiff to "confirm" twice that she had "reviewed and agreed to" those updated terms. Plaintiff thereafter repeatedly used Uber's services, with actual knowledge (through counsel) that her doing so was conditioned on her agreement to the terms of use. Did the First Department correctly hold that Plaintiff had adequate notice of the contract terms?

Yes.

2. Did Plaintiff agree to arbitration in 2016 before her auto accident, and in any event was Plaintiff's 2021 agreement to arbitrate her existing court action legally enforceable?

Yes.

3. Did the First Department correctly hold that the Supreme Court did not abuse its discretion by declining to sanction Uber for responding to *Plaintiff's request* for services by offering the same updated terms of service that Uber offered to all other U.S. riders?

Yes.

4. Did the First Department correctly hold that Plaintiff's unconscionability challenge to arbitration must be resolved by an arbitrator, not a court, where the parties' contract clearly agreed to delegate all arbitrability issues (including unconscionability) to an arbitrator, and Plaintiff never challenged that delegation clause specifically?

Yes.

Statement of the Case

A. Plaintiff used the Uber Rides platform.

Uber is a technology company that uses its proprietary technology to develop and maintain digital multi-sided marketplace platforms. (R.225 ¶ 4.) On one side of the marketplace are individuals and businesses wishing to offer various services to the public, who use Uber's platforms to connect with users and obtain payment-processing services. On the other side are users who can use the platforms to connect with and obtain various services from those businesses and individuals. This case concerns the Uber Rides platform. (R.225 ¶ 5.) On that platform, users seeking transportation can download Uber's "Rider App" and connect with independent drivers willing to provide rides for a fee. (*Id.*)[1]

[1] New York courts have recognized that drivers use the Uber App to provide transportation services to users as independent contractors, not employees of Uber. *See,*

Plaintiff is a frequent user of Uber's services. Her complaint in this case alleges that she was injured in July 2020 after she exited a car driven by defendant Jerry Alvarez and was struck by a car being driven by defendant Ahmed Elhashash that was owned by defendant Arman Khan. (R.108, 113 ¶¶ 8, 14, 66-72.) Plaintiff had used the Uber Rider App to connect with Alvarez. (R.112-113 ¶¶ 60, 66.) She alleges that Alvarez was negligent in dropping her off and that Elhashash was negligent in his operation of Khan's vehicle. (R.113-114 ¶¶ 67-68, 75.) But Plaintiff seeks to hold *Uber* responsible for those drivers' actions. Plaintiff does not allege any connection between Elhashash or Khan and Uber.

B. Plaintiff formed an arbitration agreement with Uber in 2016, including an agreement to delegate all challenges to arbitrability to the arbitrator.

When Plaintiff first registered for an Uber account in November 2016, she agreed to Uber's then-operative Terms of Use (dated January 2, 2016). (R.225-226 ¶¶ 8-9; R.233.) To register, Plaintiff entered information such as her phone number and email address on successive screens. (R.270-271 ¶ 4.) The last screen asked Plaintiff "What's your

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e.g., *Duncan* v. *Uber Techs., Inc.*, No. 700606/2020, 2023 WL 7198189 (N.Y. Sup. Ct. Queens Cty. Sept. 27, 2023); *Shenouda* v. *Uber Techs., Inc.*, No. 601854/2020 (N.Y. Sup. Ct. Nassau Cty. Jan. 3, 2024) (NYSCEF Doc. No. 120).

name?" (R.271 ¶ 4; R.288-291.) The only other text on that screen, immediately next to the button to navigate to the next screen, said: "By continuing, I confirm that I have read and agree to the Terms & Conditions and Privacy Policy." (*Id.*) The words "Terms & Conditions" and "Privacy Policy" were blue (unlike the other text), indicating they were clickable hyperlinks. (*Id.*) The Second Circuit and First Department have both held that very similar digital interfaces gave users reasonably conspicuous notice of the contract terms and created an enforceable contract under New York law. *See Meyer* v. *Uber Techs., Inc.*, 868 F.3d 66, 70-80 (2d Cir. 2017); *Mejia* v. *Linares*, 219 A.D.3d 1251, 1252 (1st Dep't 2023).

Section 6 of Uber's January 2016 Terms was introduced by a large, all-capital heading entitled "DISPUTE RESOLUTION." (R.242.) The first subheading of Section 6, entitled "ARBITRATION," stated: "You agree that any dispute, claim or controversy arising out of or relating to these Terms … or the use of the Services … will be settled by binding arbitration between you and Uber[.]" (*Id.*) The Arbitration agreement selected the American Arbitration Association's ("AAA") Commercial Arbitration Rules to govern the arbitration. (R.243.) Those rules contained a provision delegating all threshold questions of arbitrability to

the arbitrator. *See* American Arbitration Association, *Commercial Arbitration Rules & Mediation Procedures*, R-7(a) (2013).[2]

On November 20, 2016, Uber sent Plaintiff an email with the subject line "We've Updated Our Terms of Use." (R.226 ¶ 11.) Plaintiff opened the email the following day. (R.246.) That email highlighted the fact that the Uber Terms of Use to which Plaintiff had already agreed contain an arbitration agreement. (R.247-248 ("We revised our arbitration agreement which explains how legal disputes are handled.").) The email also advised Plaintiff to read the updated Terms of Use and provided a clickable hyperlink to the full November 2016 Terms. (R.226 ¶ 11; R.248.) The email expressly stated that continued use of Uber's Rider App would constitute assent to the updated Terms. (R.226 ¶ 12; R.248.)

The November 2016 Terms stated in bolded text: "By agreeing to the Terms, you agree that you are required to resolve any claim that you may have against Uber on an individual basis in arbitration, as set forth in this Arbitration Agreement." (R.251.) Those Terms went on to say that the parties agreed to arbitrate "any dispute, claim or controversy arising out of or relating to … [the user's] access to or use of the Services at any

[2] https://www.adr.org/sites/default/files/CommercialRules_Web-Final.pdf.

time, whether before or after the date you agreed to the Terms[.]" (*Id.*) The November 2016 Terms also expressly delegated all disputes over arbitrability to the arbitrator. (*Id.*) In particular, they provided that the arbitrator shall be "responsible for determining all threshold arbitrability issues, including issues relating to whether the Terms are unconscionable or illusory and any defense to arbitration, including waiver, delay, laches, or estoppel." (*Id.*)

C. Plaintiff agreed to updated Terms of Use in 2021, again including an arbitration agreement and a delegation clause.

Uber made additional updates to its standard Terms of Use for all U.S. users in January 2021.

1. Uber first notified users by email that, to continue using their account, they would need to agree to forthcoming changes to the Terms. On January 15, 2021, Uber sent its U.S. users (including Plaintiff) an email with the subject: "Changes to our Terms of Use on January 18." (R.260; 227 ¶ 16.) The email included a large black button marked "Review terms" and stated: "Updated Terms of Use: Starting on January 18, you'll be asked to review and agree to our updated terms." (R.261.) The email expressly advised users that "[w]e recommend that you review

the updated Terms." (*Id.*) The email also highlighted that the updated Terms would make changes to the parties' *already existing* arbitration agreement: "Some of the updates include changes to the Arbitration Agreement, the terms related to access and use of the Uber platform, and procedures and rules for filing a dispute against Uber." (*Id.*) Plaintiff opened the email alerting her to the 2021 Terms with the arbitration agreement on January 15, 2021. (R.260.)

Plaintiff concedes that she digitally agreed to Uber's updated terms of use on or about January 25, 2021. (R.227-228 ¶¶ 19-20; *see* Pl.Br.10.) When Plaintiff opened the Rider App that day to request a ride, she was presented with an in-app pop-up screen that blocked her from using her Uber account until she addressed the prompt. (R.227 ¶ 19.) A picture of the pop-up screen appears in the record at page 262.

The pop-up screen had the header: "We've updated our terms." (R.262.) It stated in large, clear type: "We encourage you to read our updated Terms in full," and it provided conspicuous, clickable hyperlinks to the Terms of Use and Privacy Notice offered by Uber. (*Id.*) The hyperlinks were displayed underlined and in bright blue text. (*Id.*) When Plaintiff clicked the hyperlinks, they would display the full text of the revised

Terms of Use and Privacy Notice for Plaintiff to review. (*Id.*) The screen also displayed an image of a blue pencil signing on a signature line marked by an "X." (*Id.*)

On the updated-terms pop-up screen, underneath the two hyperlinks was a checkbox. (R.228 ¶ 20; R.262.) The text next to the checkbox read, in bold text: "By checking this box, I have reviewed and agree to the Terms of Use and acknowledge the Privacy Notice." (*Id.*) The screen also stated, in less prominent text: "I am at least 18 years of age." (*Id.*) Underneath the checkbox was a button marked "Confirm." (*Id.*)

Plaintiff concedes (Br.10) that she saw the pop-up screen and "clicked the button" confirming her agreement to the 2021 Terms. Uber's business records show the same thing: On January 25, 2021, Plaintiff both placed a check in the checkbox on the updated-terms screen in the Rider App and then "[c]onfirm[ed]" her assent to the statement: "I have reviewed and agree to the Terms of Use and acknowledge the Privacy Notice." (R.228 ¶ 20; R.233.)

2. When Plaintiff agreed to the 2021 Terms, she reiterated her agreement that most disputes between her and Uber—including personal injury disputes from auto accidents that had arisen before the date of the

agreement—would be resolved through binding arbitration. (R.227-228 ¶¶ 19-20.) She also agreed that any disputes over arbitrability would be delegated to the arbitrator.

The first paragraph of the 2021 Terms states in all caps: "PLEASE READ THESE TERMS CAREFULLY, AS THEY CONSTITUTE A LEGAL AGREEMENT BETWEEN YOU AND UBER." (R.117.) The first page of the agreement says (*id.*), in bold and all caps:

> IMPORTANT: PLEASE BE ADVISED THAT THIS AGREEMENT CONTAINS PROVISIONS THAT GOVERN HOW CLAIMS BETWEEN YOU AND UBER CAN BE BROUGHT, INCLUDING THE ARBITRATION AGREEMENT (SEE SECTION 2 BELOW). PLEASE REVIEW THE ARBITRATION AGREEMENT BELOW CAREFULLY, AS IT REQUIRES YOU TO RESOLVE ALL DISPUTES WITH UBER ON AN INDIVIDUAL BASIS AND, WITH LIMITED EXCEPTIONS, THROUGH FINAL AND BINDING ARBITRATION (AS DESCRIBED IN SECTION 2 BELOW). BY ENTERING INTO THIS AGREEMENT, YOU EXPRESSLY ACKNOWLEDGE THAT YOU HAVE READ AND UNDERSTAND ALL OF THE TERMS OF THIS AGREEMENT AND HAVE TAKEN TIME TO CONSIDER THE CONSEQUENCES OF THIS IMPORTANT DECISION.

Section 2 of the 2021 Terms bears the large, bolded heading "Arbitration Agreement." (R.118.) The first paragraph of Section 2 describes, in plain language, the effect of the Arbitration Agreement: "By agreeing to the Terms, you agree that you are required to resolve any claim that you may have against Uber on an individual basis in arbitration as set

forth in this Arbitration Agreement." (*Id.*) The arbitration agreement thus applies to any claim that Plaintiff may "have"—not merely to claims that might arise in the future.

Section (2)(a) of the agreement bears the heading "Agreement to Binding Arbitration Between You and Uber" in large, bold font. (R.118.) It informed Plaintiff in relevant part that:

> [A]ny dispute, claim or controversy in any way arising out of or relating to … access to or use of the Services at any time [or] incidents or accidents resulting in personal injury that you allege occurred in connection with your use of the Services, whether the dispute, claim or controversy occurred or accrued before or after the date you agreed to the Terms …, will be settled by binding arbitration between you and Uber, and not in a court of law.

(*Id.*) Notably, that provision—as in the 2016 Terms—expressly required Plaintiff to agree to arbitrate disputes related to her use of Uber's platforms *regardless* of whether the dispute accrued "before or after the date [Plaintiff] agreed to the Terms." (*Id.*) Section 2(a) also contains an express waiver of the right to a jury trial. (*Id.*) And Section 2(c) provides that the "interpretation and enforcement" of the arbitration agreement will be governed by the FAA. (R.119.)

Section 2(c) also contains a clause delegating threshold questions of arbitrability to the arbitrator. (R.119.) It provides that:

> The parties agree that the arbitrator ("Arbitrator") and not any federal, state, or local court … , shall have exclusive authority to resolve any disputes relating to the interpretation, applicability, enforceability or formation of this Arbitration Agreement, including any claim that all or any part of this Arbitration Agreement is void or voidable. The Arbitrator shall also be responsible for determining all threshold arbitrability issues, including issues relating to whether the Terms are applicable, unconscionable or illusory and any defense to arbitration, including waiver, delay, laches, or estoppel.

(*Id.* (emphasis added).)

D. Uber enforced its contractual right to arbitrate this dispute, and Plaintiff thereafter continued using Uber's services.

Plaintiff filed this lawsuit against Uber (and others) on November 19, 2020. (R.105.) But as the Supreme Court later found, Uber did not receive actual notice of Plaintiff's lawsuit because her summons and complaint were not sent to Uber's registered agent but instead to Uber's New York office, which was then closed due to the COVID-19 pandemic. (R.51-52; *see* R.229 ¶¶ 24-26.) Because Uber lacked notice of the summons and complaint, it did not timely file an answer. Plaintiff filed a motion for default judgment against Uber in early March 2021 (R.633), at which point Uber learned about the complaint. Uber then quickly filed an answer on March 15, 2021. (R.635.) Uber's answer asserted, among other affirmative defenses, that "this dispute is subject to an arbitration agree-

ment between the Plaintiff and [Uber]" and accordingly must be "brought before a qualified arbitrator rather than in the instant court." (R.646.) Plaintiff then stipulated to withdraw her motion for a default judgment. (R.652.)

On March 23, 2021, Uber sent Plaintiff (via her counsel) a Notice of Intention to Arbitrate pursuant to CPLR § 7503(c). (R.220.) That Notice quoted multiple paragraphs of the 2021 Terms and reminded Plaintiff that she had agreed to those Terms on January 25, 2021. (R.220-221.) Uber subsequently provided Plaintiff's counsel with the full text of the 2021 Terms. (R.46.)[3]

Plaintiff moved Supreme Court to stay the arbitration. (R.57.) She also moved for sanctions against Uber for allegedly "having engaged in improper ex parte contact with plaintiff" (*id.*) when Uber updated its standard terms of use for *all U.S. user*s in January 2021, and required all users (including Plaintiff) to agree to those Terms as a condition of continuing to access Uber's services. Uber filed a cross-motion to compel arbitration. (R.163.)

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[3] Plaintiff asserted in the Supreme Court that she initially did not receive Uber's Notice because it was mailed to an incorrect address. The parties stipulated that the Notice would be deemed served as of April 6, 2021, for purposes of CPLR § 7503(c). (R.67 n.2; R.131.)

Uber's Notice of Intention to Arbitrate indisputably provided Plaintiff with actual knowledge of Uber's full Terms of Use—including the specification that any continued use of Uber's services would constitute "agreement to be bound by" the terms. (R.117.) Plaintiff thereafter elected to reiterate her assent to those Terms by repeatedly using Uber's services. Uber maintains records in the regular course of business documenting users' use of Uber's services, including rider trip history. (R.225 ¶ 7.) Those records show that Plaintiff continued to use Uber's platform to connect with drivers at least 19 times after Uber's April 6, 2021 Notice. (R.66-67, 228 ¶ 22; R.264.)

E. The Supreme Court required Plaintiff to arbitrate.

The Supreme Court denied Plaintiff's motion to stay the arbitration and impose sanctions, and it granted Uber's cross-motion to compel arbitration. (R.6.)

The Supreme Court first determined that it lacked the authority to resolve Plaintiff's contentions that the arbitration agreement was unconscionable and an unenforceable adhesion contract, because the parties had delegated *all* threshold issues of arbitrability to the arbitrator. (R.20-

29.) The Supreme Court observed that Plaintiff had "never directly attack[ed] the validity or enforceability of the delegation provision." (R.29.)

The Supreme Court then explained that Plaintiff's challenge to the *formation* of a contract in the first place was for it (not the arbitrator) to decide. (R.30.) On that issue, the court explained why standard principles of New York contract law establish that Plaintiff received adequate notice of the 2021 Terms and unambiguously assented to them. (R.35-39.) Uber's clickwrap user interface was "clear and conspicuous": it provided easily accessible hyperlinks to the full Terms of Use, and it required Plaintiff to "confirm her review and acceptance of the January 2021 terms *twice* before being permitted to" use Uber's services. (R.38.) Moreover, the Supreme Court found that the 2021 Terms themselves "comprise 12 pages of reasonably clear and concise legal terms logically arranged under clear and conspicuous headings and subheadings," and Uber "made the Arbitration Agreement obvious" to Plaintiff by including a bold-face, all-caps notice on the first page. (*Id.*)

The Supreme Court further explained that, "[e]ven if [Plaintiff] were somehow not put on inquiry notice of or did not assent to the January 2021 Terms through the January 2021 Pop-Up," Plaintiff's "contin-

ued use of Uber's services" after receiving actual notice of the arbitration provision through litigation "bound [Plaintiff] to the Arbitration Agreement." (R.44.) Plaintiff used Uber's services to connect with drivers *knowing* that her use of the app was contingent on her agreement to arbitrate any personal injury claims she may have against Uber, including claims that had arisen before January 2021. (R.44-48 (citing *Nicosia* v. *Amazon.com, Inc.*, 815 F. App'x 612, 613-614 (2d Cir. 2020)).)

Last, the Supreme Court rejected Plaintiff's request for sanctions. The in-app pop-up screen by which Plaintiff chose to agree to the 2021 Terms was not an ex parte communication from an Uber attorney because it was *Plaintiff* who contacted Uber to "affirmatively [seek] to access Uber's services"—to which *Uber* (not any attorney) responded by offering Uber's standard terms of service for all U.S. riders. (R.50.) The court further explained that there was no ex parte communication for the additional reasons that Plaintiff had failed to establish *both* that Uber's messages in January 2021 were sent by or at the direction of any Uber attorney, and that such attorney had knowledge of Plaintiff's complaint at the time of the communication. (R.50-51.)

F. The First Department affirmed the grant of Uber's cross-motion to compel arbitration.

The First Department unanimously affirmed the Supreme Court's order in full. The court first held, applying its decision in *Brooks* v. *Lang Yang*, 216 A.D.3d 505 (1st Dep't 2023), that Uber's clickwrap interface in January 2021 was sufficient under New York law to provide Plaintiff with reasonable notice of the 2021 Terms. (R.660-661.) The First Department further observed that Plaintiff's checkbox affirmation that she had "reviewed" the 2021 Terms provided evidence of her *actual* knowledge of those terms, and Plaintiff had failed to offer any admissible evidence contesting her actual knowledge. (R.661.)

Next, the First Department applied the FAA and held that Plaintiff's "arguments disputing the validity of the terms and raising unconscionability" were not properly before the court because the 2021 Terms "contain a delegation provision that plaintiff did not specifically challenge" in the Supreme Court. (*Id.*)

Finally, the First Department affirmed that the Supreme Court had "providently exercised its discretion in declining to sanction Uber and its employees" for offering Uber's standard updated terms of use to Plaintiff in January 2021. (R.661-662.)

Argument

This Court has "repeatedly recognized New York's 'long and strong public policy favoring arbitration.'" *Stark*, 9 N.Y.3d at 66 (citation omitted). "Arbitration serves the laudable objective of conserving the time and resources of the courts and the contracting parties." *American Int'l Specialty Lines Ins. Co.* v. *Allied Cap. Corp.*, 35 N.Y.3d 64, 70 (2020) (internal quotation marks omitted).

Below, the First Department (unanimously) and the Supreme Court both correctly held that an enforceable "agreement to arbitrate existed between plaintiff and Uber": the 2021 Terms of Use. (R.660-661.) Uber offered to provide its services according to those terms, and Plaintiff digitally "[c]onfirm[ed]" her agreement to the statement: "I have reviewed and agree to the Terms of Use." (R.262.) That contract unambiguously requires arbitration of Plaintiff's personal injury claim here. (R.118.)

Plaintiff objects on various grounds to the lower courts' enforcement of her arbitration agreement with Uber, but none of those objections has merit. *First*, the parties' operative contract from January 2021 was legally valid. The clear and conspicuous clickwrap interface in Plaintiff's

Uber app gave her reasonable notice of the contract terms, and she unambiguously assented to them. Plaintiff then assented to those terms again through her conduct by using Uber's services 19 more times in 2021 with *actual knowledge*—through her counsel via Uber's Notice of Intention to Arbitrate this action—that her use of the services would constitute acceptance of the requirement to arbitrate *all* disputes, future *or past*. Plaintiff was not entitled to avail herself of Uber's services while rejecting the contract governing those services. The interface and the Terms were both written in clear, easy-to-understand language. And contrary to Plaintiff's assertion, nothing in the interface or Terms was misleading.

Second, this case does not involve a purely "retroactive" arbitration provision because Plaintiff agreed to arbitration in 2016, years before the auto accident at issue. Those 2016 Terms, too, contained an agreement to arbitrate personal injury disputes, past and future. And in any event, New York law enforces agreements to arbitrate an existing court action.

Third, the First Department correctly found that the Supreme Court's decision refusing Plaintiff's requested sanctions against Uber's in-house counsel was not an abuse of discretion. Plaintiff has not identified any ex parte communication between herself and an Uber *attorney*—

much less an attorney with knowledge of her court case. And Plaintiff has not located any court that has recognized a violation of the attorney professional-responsibility rules in circumstances like those here.

Fourth and finally, the lower courts correctly determined that the judiciary lacks authority to consider Plaintiff's unconscionability challenge to her arbitration agreement with Uber: Plaintiff and Uber specifically agreed that all threshold arbitrability issues, in particular unconscionability, would be resolved solely by the arbitrator. That delegation clause is enforceable under both federal and New York law, and Plaintiff has never specifically challenged it. In any event, there is nothing unconscionable about a clear and conspicuous arbitration agreement that applies equally to both sides in a consumer contract.

I. Plaintiff agreed to arbitrate her claim against Uber.

Plaintiff, a consistent user of Uber's services since 2016, formed multiple arbitration agreements with Uber both before and after she filed this lawsuit. Plaintiff now seeks to evade every one of those agreements by arguing that consumer contracts should be unenforceable in this State unless the consumer receives "forceful warnings" of arbitration, which she describes as an "unexpected" contractual term. (Pl.Br.38-50.) But the

Federal Arbitration Act, which requires that arbitration provisions be treated no less favorably than other kinds of contractual provisions, would preempt any such arbitration-specific rule. *See Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 581 U.S. 246, 248, 253-254 & n.2 (2017).

In any case, Plaintiff's argument is not the law of New York. This State's contract law has for decades provided that, where a party has a reasonable opportunity to read a contract and chooses to sign it without reading, she is bound no matter how surprised she might later claim to be about "unexpected" terms. That is why Plaintiff cannot point to any appellate precedent in this State (or another) refusing to enforce a "clickwrap" agreement like the one here: an interface that provided the consumer with a conspicuous hyperlink to the full terms of use and asked the user to check a box or click a button confirming that she agreed to those terms. Courts around the country "routinely uphold" clickwrap agreements. *Meyer*, 868 F.3d at 74-75.

The First Department thus correctly determined that Plaintiff formed a binding contract with Uber because she gave unambiguous assent to the 2021 Terms (including the arbitration agreement), with both actual notice and inquiry notice of those Terms.

A. New York contract law requires a reasonable opportunity to review contractual terms and a reasonable manifestation of assent to them.

"The creation of online contracts has not fundamentally changed the principles of contract." *Weiss* v. *Revel Transit, Inc.*, Index No. 651018/2021, 2021 WL 2889933, at *3 (N.Y. Sup. Ct. N.Y. Cty. July 9, 2021) (cleaned up). Forming a contract in New York requires "a meeting of the minds" and "a manifestation of mutual assent" that is "sufficiently definite" regarding "all material terms." *Stonehill Cap. Mgmt., LLC* v. *Bank of the West*, 28 N.Y.3d 439, 448 (2016). Notice and assent to contract terms are established by a preponderance of the evidence. *See Fleming* v. *Ponziani*, 24 N.Y.2d 105, 110 (1969).

1. Federal law requires assessing an arbitration agreement by the same standard that governs non-arbitration contracts.

At the outset, Plaintiff's brief continues to invoke the wrong legal standard. She asserts (Br.50) that her multiple arbitration agreements with Uber are invalid because she did not "clearly and unambiguously" agree to arbitration, implicitly invoking *God's Battalion of Prayer Pentecostal Church, Inc.* v. *Miele Assocs. LLP*, 6 N.Y.3d 371, 374 (2006). While the courts below correctly held (R.660) that Uber's January 2021 click-

wrap interface was so clear and simple that it would satisfy even that heightened contract-formation standard, in truth that standard is improper: Federal law does not permit a "clear and unambiguous" formation standard that applies only to arbitration agreements.

The "clear, explicit, and unequivocal" test advocated by Plaintiff, *God's Battalion*, 6 N.Y.3d at 374, has been superseded by more-recent decisions of the Supreme Court of the United States interpreting the FAA to preempt *any* state-law rules that do not "apply generally" but rather "single[ ] out arbitration agreements for disfavored treatment." *Kindred Nursing*, 581 U.S. at 248, 253-254 & n.2 (2017); *see also AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011). In *Concepcion*, the U.S. Supreme Court clarified that the FAA's non-discrimination principle extends to common-law rules that apply a "doctrine normally thought to be generally applicable, such as duress or … unconscionability … in a fashion that disfavors arbitration." 563 U.S. at 341. And in *Kindred Nursing*, the Court explained that a state-law rule with an "arbitration-specific character" cannot be justified on the grounds that it might also apply in some other contexts, or applies to contract formation rather than enforceability. *Id.* at 254-255.

Concepcion and *Kindred Nursing* make clear that the arbitration-specific *God's Battalion* standard is preempted because it subjects arbitration to "uncommon barriers"; the whole point of that heightened evidentiary requirement is to make it harder to prove the existence of an arbitration agreement than other kinds of contracts. The Second Circuit has thus observed that the FAA preempts an "express [and] unequivocal" standard. *Progressive Cas. Ins. Co.* v. *C.A. Reaseguradora Nacional De Venezuela*, 991 F.2d 42, 46 (2d Cir. 1993). And federal courts since *Concepcion* have repeatedly evaluated arbitration agreements by applying the same preponderance-of-the-evidence standard that New York law applies to all other contractual terms. (R.33-34 (citing cases).)

Respectfully, this Court should overrule *God's Battalion* in cases governed by the FAA. A preponderance of the evidence proves the formation of an arbitration agreement, as for any other New York contract.

2. Clickwrap agreements like Uber's are enforceable under New York contract law.

Traditionally, a party's assent to contract terms was proven by an ink signature on paper. But "[t]here is no requirement that the agreement be signed by the parties as long as there is other proof that the parties reached an agreement." *Weissman* v. *Revel Transit, Inc.*, 217

A.D.3d 430, 430 (1st Dep't 2023). Because mutual assent can be demonstrated in different ways, electronic agreements take various forms. One of the most common is the "clickwrap agreement": a contractual interface whereby "a user must click 'I agree,' but not necessarily view the contract to which she is assenting." *Berkson* v. *Gogo LLC*, 97 F. Supp. 3d 359, 394-395 (E.D.N.Y. 2015).[4]

State and federal courts have repeatedly held that clickwrap agreements are "[g]enerally … enforceable" under New York law because "they necessitate an active role by the user of a website." *Harrison* v. *Revel Transit, Inc.*, 2022 N.Y. Slip Op. 30430(U), at *18 (Sup. Ct. Kings Cty. Feb. 7, 2022); *see Mejia*, 219 A.D.3d at 1252; *Weissman*, 217 A.D.3d at 430; *Brooks*, 216 A.D.3d at 506; *Meyer*, 868 F.3d at 74-75. Courts across the country agree, finding clear and simple clickwraps enforceable under standard principles of contract law. *See, e.g.*, *StubHub, Inc.* v. *Ball*, 676 S.W.3d 193, 200-201 (Tex. App. 2023); *Airbnb, Inc.* v. *Doe*, 336 So.3d 698, 700 (Fla. 2022); *Airbnb, Inc.* v. *Rice*, 518 P.3d 88, 89 (Nev. 2022); *Sellers* v. *JustAnswer LLC*, 73 Cal. App. 5th 444, 476 (2021); *Skuse* v. *Pfizer, Inc.*,

[4] *Berkson* also describes other types of digital contracts. A "browsewrap" is where the "online host dictates that assent is given merely by using the site." *Berkson*, 97 F. Supp. 3d at 394. A "scrollwrap" agreement "requires users to physically scroll through an internet agreement and click on a separate 'I agree' button." *Id.* at 395.

244 N.J. 30, 59-61 (2020); *State ex rel. U-Haul Co. of W. Va.* v. *Zakaib*, 232 W. Va. 432, 440 (2013); *Vacco* v. *Microsoft Corp.*, 260 Conn. 59, 62 & n.7 (2002).[5]

As the First Department explained in *Brooks*, the "keys to enforceability" of a digital agreement in New York are (1) "a reasonable indication" for the user "of the existence of the additional [contract] terms"; and (2) "the user's being required to manifest assent to them." 216 A.D.3d at 506. In other words, the user must know that she is being asked to agree to something, and must agree to it. Clickwrap interfaces like Uber's (R.262) make both questions easy by "eliminat[ing] any uncertainty as to the consumer's notice of contractual terms and assent to those very terms." *Sellers*, 73 Cal. App. 5th at 476. The pop-up notice and conspicuous hyperlinks ensure that a user knows about the contractual terms of use and can readily review them before deciding whether to agree. *Meyer*, 868 F.3d at 78-79. And checking a box or clicking a button labeled "I agree" could hardly be a more unambiguous manifestation of assent. *Id.* at 75 ("Courts routinely uphold clickwrap agreements for the principal

[5] *See also Trulogic, Inc.* v. *Gen. Elec. Co.*, 177 N.E.3d 615, 626 (Ohio Ct. App. 2021); *Newell Rubbermaid Inc.* v. *Storm*, No. 9398, 2014 WL 1266827, at *1 (Del. Ch. Mar. 27, 2014); *Durrett* v. *ACT, Inc.*, 130 Haw. 346, 2011 WL 2696806, at *4 n.6 (Haw. Ct. App. July 12, 2011); *Adsit Co.* v. *Gustin*, 874 N.E.2d 1018, 1023 (Ind. Ct. App. 2007).

reason that the user has affirmatively assented to the terms of agreement by clicking 'I agree.'").

3. New York has long enforced contracts that consumers may choose to sign without reading.

Plaintiff contends (Br.39) that she should not be held to the contract to which she digitally assented because, although she "appreciated [she was] agreeing to *something*," she purportedly was not sure "what was in it." That argument is flawed for multiple reasons. For one, Plaintiff's assertion in her brief that she did not actually read the January 2021 Terms of Use before agreeing to them is contradicted by the record and the lower courts' findings, as explained below. *See* Part I.B.1, *infra.* Plaintiff confirmed to Uber that she had "*reviewed*" the Terms (R.262), and she has never introduced any evidence rebutting that confirmation.

In any event, even if Plaintiff did not review the 2021 Terms of Use before agreeing to them, that would not diminish their enforceability under New York law. For more than a century, this Court has recognized that a person "who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them" whether she read it or not. *Metzger* v. *Aetna Ins. Co.*, 227 N.Y. 411, 416

(1920); *see also Morris* v. *Snappy Car Rental, Inc.*, 84 N.Y.2d 21, 24, 30 (1994); *Miller* v. *Phoenix Mut. Life Ins. Co.*, 107 N.Y. 292, 296 (1887) ("Neither is it generally a defense to an action founded upon such agreement, that the party did not read the contract, or was ignorant of its contents or that it was prepared by the party claiming the benefit of it, unless he also shows that his signature thereto was obtained by misrepresentation or fraud."). To permit a person who signs a contract without reading it to substitute her own expectation of what the contract *might* say for the actual written terms to which she objectively manifested assent "would introduce into the law a dangerous doctrine" that "does not exist" in New York. *Metzger*, 227 N.Y. at 415-416.

New York courts routinely hold consumers to the terms of contracts they freely agreed to notwithstanding objections that they did not read the contracts before signing. *See, e.g.*, *Morris*, 84 N.Y.2d at 30; *Brower* v. *Gateway 2000, Inc.*, 246 A.D.2d 246, 252 (1st Dep't 1998) ("That a consumer does not read the agreement or thereafter claims he or she failed to understand or appreciate some term therein does not invalidate the contract any more than such claim would undo a contract formed under other circumstances."); *Fritsche* v. *Carnival Corp.*, 132 A.D.3d 805, 806

(2d Dep't 2015) (cruise ship passengers who "had a reasonable opportunity to review their tickets" were bound by forum-selection clause); *Molino* v. *Sagamore*, 105 A.D.3d 922, 923 (2d Dep't 2013) (similar for hotel-room agreement). Plaintiff's contention (Br.39) that "there was essentially no [New York] appellate precedent on the issue until 2023" is thus incorrect. Since at least 1871, New York law has held that a person who, in Plaintiff's words, "appreciated they were agreeing to *something*" without availing herself of the opportunity to review the agreement that she signed (*id.*), is bound by that agreement. *See, e.g.*, *Breese* v. *U.S. Tel. Co.*, 48 N.Y. 132, 141 (1871) (holding telegram sender bound by limitation of liability printed on message "blank" even though the sender did not read that limitation).

The relevant question under longstanding New York law is not whether a user read the agreement, but rather whether the user was given a "sufficient opportunity to read the agreement." *Saizhang Guan* v. *Uber Techs., Inc.*, 236 F. Supp. 3d 711, 723 (E.D.N.Y. 2017) (cleaned up); *see also Breese*, 48 N.Y. at 141 (enforcing contract because the plaintiff had received "abundant opportunity to read" the terms); *cf. Roger's Fence, Inc.* v. *Abele Tractor & Equip. Co.*, 26 A.D.3d 788, 789 (4th Dep't 2006)

(enforcing agreement after second page was inadvertently not provided to plaintiff before signing because the additional terms were "called to the attention of [the] plaintiff"). Plaintiff cannot plausibly deny that Uber's interface with its conspicuous hyperlinks gave her a fair opportunity to review the 2021 Terms.

Plaintiff also complains (Br. 36) that electronically signed agreements should not be enforceable because consumers often decline to read them. But that is hardly a recent development. The law review article relied on by Plaintiff (Br.36) describes varieties of *paper* contracts that consumers often purportedly sign without reading, including "rental car" agreements, "credit card and cell phone contracts, insurance policies, gym membership agreements, or mutual fund prospectuses." Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 546 (2014). This Court has long enforced such agreements. *E.g.*, *Morris*, 84 N.Y.2d at 30 (paper rental car agreement). The fact that contract terms and manifestations of assent are shifting from paper to digital is no reason to set aside over a century of consistent New York law on contract formation.

4. New York law rejects Plaintiff's proposal that contract formation be contingent on "forceful warnings of adverse terms."

Plaintiff asks this Court to reject the great weight of trial court decisions and federal cases applying New York law holding that a party is bound by contractual terms to which she objectively assented after an opportunity to review them. (Br.39-40.) But all of Plaintiff's arguments reduce to an attempt to create the very escape hatch for a party who chooses to sign without reading that this Court has refused to endorse for over a century. That request should be rejected. This Court should instead continue to apply bedrock New York contract law and enforce contracts as written, rather than the imaginary contract "supposed by" a party who chose not to read the terms. *Metzger*, 227 N.Y. at 415-416.

a. Plaintiff relies heavily (Br.40-42) on dicta in *Berkson*—which has never been adopted by the Second Circuit or any New York appellate court—that an electronically signed agreement should not be enforceable unless the "merchant clearly dr[ew] the consumer's attention to material terms that would alter what a reasonable consumer would understand to be her default rights" or "forcefully dr[ew] purchasers' attention to terms disadvantageous to them." 97 F. Supp. 3d at 402. That is not the law of

New York—and it should not be. The *Berkson* court, which did not apply that proposed rule, never explained that proposal's basis or cited any New York precedent applying it. Nor did the court explain how judges might ferret out the particular contractual terms that reasonable consumers would and would not expect.

The *Berkson* court also made clear that its proposed warning requirement for unexpected terms in electronic agreements was intended to single out arbitration agreements for special treatment:

> Unlike the basic internet contract for a sale and payment, arbitration and forum selection clauses materially alter the substantive default rights of a consumer. They are not enforceable against ordinary consumers who are unlikely to be aware of them.

97 F. Supp. 3d at 404; *see also id.* at 403 (identifying "compelled arbitration" as an adverse term requiring a warning). That proposed rule—which would presumptively reject arbitration agreements unless "offerors draw purchasers' attention to" them—would be clearly preempted by the FAA by singling out arbitration agreements for disfavored treatment. *Kindred Nursing*, 581 U.S. at 252.

In any event, even under the "reasonable communicativeness" test hypothesized in *Berkson*, 97 F. Supp. 3d at 382, Uber's user interface here

provided adequate notice to Plaintiff. The pop-up screen stated in large, bold text "We encourage you to read our updated Terms in full." (R.262.) No more is required. *Compare Effron* v. *Sun Line Cruises, Inc.*, 67 F.3d 7, 9 (2d Cir. 1995) (enforcing forum-selection clause on cruise ticket because the bold warning "IMPORTANT NOTICE—READ BEFORE ACCEPTING" provided reasonable notice), *with O'Brien* v. *Okemo Mountain, Inc.*, 17 F. Supp. 2d 98, 103 (D. Conn. 1998) (declining to enforce clause on lift ticket because the "front of the ticket contain[ed] no instruction to read its back"). In Plaintiff's view (Br.47), only scrollwrap agreements putting the full terms on the digital interface itself—not clickwraps where the terms are provided by hyperlink—should be legally enforceable. But Plaintiff identifies no New York appellate decision that has ever adopted that rule, and Uber is aware of none.

b. Plaintiff also relies on two out-of-state cases applying Massachusetts and Maine law: *Kauders* v. *Uber Technologies, Inc.*, 486 Mass. 557 (2021), and *Sarchi* v. *Uber Technologies, Inc.*, 268 A.3d 258 (Me. 2022). Neither supports Plaintiff's arguments because neither involved a clickwrap screen like the one here, but instead a different type of interface that did *not* require the user to check a box saying: "I agree." *Kaud-*

ers, 486 Mass. at 576, 580; *see Sarchi*, 268 A.3d at 270-272. *Kauders* observed that a clickwrap like the one here, "[r]equiring an expressly affirmative act … such as clicking a button that states 'I Agree,' can help alert users to the significance of their actions. Where they so act, they have reasonably manifested their assent." 486 Mass. at 575.

The other authorities cited by Plaintiff to support imposing a "warning" requirement about arbitration provisions are no more helpful to her. (Br.46-47.) Both *Schnabel* v. *Trilegiant Corp.*, 697 F.3d 110, 124 (2d Cir. 2012), and *Ferrie* v. *DirecTV, LLC*, No. 15-cv-409, 2016 WL 183474, at *3-7 (D. Conn. Jan. 12, 2016), concerned what the *Schnabel* court referred to as "terms-later contracting"—that is, contractual terms delivered by mail or email *after* the plaintiff has initiated the contractual relationship, where assent is given only through silence. That is not how Plaintiff received the 2021 Terms or gave her assent to them. And the outcome in *Scotti* v. *Tough Mudder Inc.*, 63 Misc. 3d 843 (Sup. Ct. Kings Cty. 2019), turned on a failure of proof—defendant did not "set forth sufficiently detailed evidence as to how its online registration webpage appeared to the plaintiffs." *Id.* at 854. Plaintiff's last case is *In re Bayou Group, LLC*, 439 B.R. 284 (S.D.N.Y. 2010), but it is not even a contract-

formation case. It instead set the standard for a good-faith defense to a fraudulent conveyance claim. *Id.* at 309-314.

Nor does Section 211 of the Restatement (Second) of Contracts support setting aside an arbitration agreement to which Plaintiff objectively manifested her assent—even if her attention was not "draw[n]" specifically to particular terms. (*Contra* Pl.Br.45.) Section 211 advises that form contracts should be enforced *in toto* "with respect to the terms included in the writing" unless "the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term." Second Restatement § 211(1), (3). This is not a subjective test. Rather, comment f clarifies that only terms that are essentially "unconscionable" ought not be enforced, such as terms that are "bizarre or oppressive," that "eviscerate[ ]" other terms "explicitly agreed to" by the parties, or that "eliminate[ ] the dominant purpose of the transaction." The contract here contains none of those.[6]

[6] Plaintiff attributes a quote from the Restatement's summary of an Ohio intermediate appellate decision, *Sterling Merchandise Co.* v. *Hartford Insurance Co.*, 30 Ohio App. 3d 131 (1986), to the Restatement itself. But the Restatement's comments nowhere state that customers "are not bound to unknown terms which are beyond the range of reasonable expectation." (Br.45.)

Courts considering the salience of Section 211(3) generally reason that form agreements should be enforced "if they satisfy a threshold of substantive reasonableness—that is, if they are not unconscionable." *Nicosia* v. *Amazon.com, Inc.*, 384 F. Supp. 3d 254, 265 (E.D.N.Y. 2019); *see also Rosenberg* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 17 (1st Cir. 1999); *Doctor's Assocs., Inc.* v. *Stuart*, 85 F.3d 975, 980 (2d Cir. 1996). In other words, it is the doctrine of unconscionability—not rules of contract formation—that guards against Plaintiff's hypothesized companies sneaking egregiously unfair terms into form contracts. *See Brower*, 246 A.D.2d at 253 (observing that unconscionability can counsel against enforcement of clauses that are "hidden" or "tucked away"). But arbitration provisions in consumer agreements obviously are not *per se* unconscionable under New York law; New York public policy *favors* their enforcement. *Stark*, 9 N.Y.3d at 66. The Second Circuit accordingly refused to set aside a clear and conspicuous arbitration agreement under Section 211 because it "did not ambush" the defendants. *Doctor's Associates*, 85 F.3d at 980.

In sum, Plaintiff has not shown that New York law requires (or should require) a form customer agreement to be prefaced by "warnings"

regarding "unexpected" or "consequential" terms like an arbitration clause. (Br.45, 47.) Such a regime would be preempted by the FAA, expensive, and unworkable, requiring judges to exercise standardless discretion about what consumers might or might not expect. This would surely lead to inconsistent results and diminish the reliability and predictability that are a key societal benefit of form contracts.

B. Plaintiff formed an enforceable contract by giving assent to Uber's Terms of Use after receiving adequate notice.

As the First Department determined, the record demonstrates that Uber and Plaintiff formed a binding contract containing a plainly worded arbitration agreement. That contract was enforceable under New York law for two independent reasons. First, unrebutted evidence establishes that Plaintiff gave assent with actual notice of Uber's January 2021 contract terms. And even if Plaintiff did not have actual notice, the clear and conspicuous clickwrap interface in the Uber Rider app in January 2021 put Plaintiff at least on inquiry notice (*i.e.*, reasonable notice) of the 2021 Terms of Use.

1. Plaintiff had actual notice of the 2021 Terms.

It is settled that actual notice of contractual terms plus assent (whether written or through conduct) forms a binding contract. *See. e.g.*, *Schnabel*, 697 F.3d at 120; *Starke* v. *SquareTrade, Inc.*, 913 F.3d 279, 289 (2d Cir. 2019). Uber introduced evidence in the Supreme Court that Plaintiff had actual notice of the January 2021 Terms: her own digital confirmation that she had "*reviewed* and agree[d] to the Terms of Use." (R.227-228 ¶¶ 19-20; R.262 (emphasis added).) And as the First Department correctly observed (R.661), Plaintiff never testified to the contrary or introduced any evidence contradicting her own representation. The First Department therefore did not abuse its discretion in finding that Plaintiff had actual notice of the 2021 Terms at the time she gave assent.

Plaintiff contends (Br.53-54) that the First Department erred by considering Uber's "actual notice" argument for the first time on appeal. But where the Appellate Division chooses to exercise its "interests of justice jurisdiction," this Court has "no power to review either the Appellate Division's exercise of its discretion to reach that issue, or the issue itself." *Hecker* v. *State*, 20 N.Y.3d 1087, 1087 (2013). Plaintiff's belated attempt to contest her actual notice therefore cannot support reversal here.

Regardless, even if this Court had jurisdiction to consider Plaintiff's argument contesting her actual notice, the record amply justifies the First Department's conclusion. Plaintiff has never testified that her representation to Uber—her confirmation that she reviewed the terms before agreeing to them—was false. Plaintiff points (Br.55) to her statements that she "expected that anything that could affect [her] lawsuit would be sent to [her] lawyers" and purportedly "never imagined" she was "being asked to waive [her] right to a jury trial against Uber." (R.92-93.) But actual notice turns on Plaintiff's *actions*, not her expectations, and in any event her affidavit addresses only Uber's January 15 email describing the forthcoming new terms of use. (*Id.*) Plaintiff offered *no testimony* regarding her January 25, 2021 confirmation on the in-app pop-up screen to reviewing the Terms before agreeing—the act that the First Department found proved actual notice. By declining to contest her own actual knowledge through competent evidence in the Supreme Court, Plaintiff conceded the point. *See* CPLR § 7503, *McKinney's Practice Commentaries, Legislative Studies and Reports* (explaining that the court handles a motion to compel arbitration under CPLR § 7503(a) "similar to a … motion for summary judgment").

2. Uber's digital interface gave Plaintiff reasonable notice of the agreement's terms.

Even setting aside Plaintiff's actual notice, the Supreme Court correctly found that the 2021 Terms are enforceable because Uber provided inquiry notice. (R.38.) "Where an offeree does not have *actual* notice of certain contract terms, he is nevertheless bound by such terms if he is on *inquiry* notice of them and assents to them through conduct that a reasonable person would understand to constitute assent." *Starke*, 913 F.3d at 289; *see Smith* v. *RPA Energy, Inc.*, __ F. Supp. 3d __, 2024 WL 1869325, at *7-8 (S.D.N.Y. Apr. 30, 2024) (plaintiff's denial of actual notice did not defeat formation of arbitration agreement because plaintiff "was given an opportunity to review [the contract] terms prior to signing"). Indeed, Uber's notice was more than reasonable: the Supreme Court found it "clear and conspicuous." (R.38.)

a. There was no way for Plaintiff to misunderstand the in-app pop-up screen from January 2021, which expressly "encourage[d]" Plaintiff "to read [the] updated Terms in full," (R.262), and "convey[ed] to a reasonable user that the January 2021 Terms … are available for the user's review by clicking on the corresponding hyperlink," (R.38). Plaintiff does not seriously dispute that Uber's user interface provided reason-

able notice under New York law. *See Brooks*, 216 A.D.3d at 506 ("[P]laintiff … agreed to be bound by the arbitration agreement when he affirmatively indicated and confirmed, by taking two separate actions, that he had reviewed and agreed to Uber's updated terms of use, which were overtly hyperlinked as part of the pop-up screen and sufficient to form a binding contract."); *Meyer*, 868 F.3d at 78 (enforcing Uber user interface where "hyperlinks to the Terms and Conditions" appeared "directly below the buttons for registration" and "in blue and underlined"); *Mejia*, 219 A.D.3d at 1252; *Weissman*, 217 A.D.3d at 430; *Qwil PBC* v. *Landow*, 180 A.D.3d 593, 593 (1st Dep't 2020); *Peiran Zheng* v. *Live Auctioneers LLC*, No. 20-cv-9744, 2021 WL 2043562, at *5 (S.D.N.Y. May 21, 2021); *Hidalgo* v. *Amateur Athletic Union of U.S., Inc.*, 468 F. Supp. 3d 646, 656-658 (S.D.N.Y. 2020).

Plaintiff does not cite any case applying New York law and finding a user interface similar to Uber's insufficient to provide inquiry notice of terms of use.[7] Clickwrap agreements are routinely enforced where the

[7] The *Davitashvili* case cited by Plaintiff (Br.49) held that a clickwrap interface similar to the one here provided reasonable notice of the arbitration agreement. *Davitashvili* v. *Grubhub Inc.*, No. 20-cv-3000, 2023 WL 2537777, at *6-7 (S.D.N.Y. Mar. 16, 2023). But in a ruling that Uber has appealed, the court found that the plaintiffs' antitrust claims were unrelated to their use of the defendants' services and for that reason were outside the arbitration agreement's scope. *Id.* at *10.

terms are made available to the user only through a hyperlink. *Meyer*, 868 F.3d at 78 ("That the Terms of Service were available only by hyperlink does not preclude a determination of reasonable notice."); *see, e.g.*, *Weissman*, 217 A.D.3d at 430; *Valelly* v. *Merrill Lynch, Pierce, Fenner & Smith Inc.*, 464 F. Supp. 3d 634, 643 (S.D.N.Y. 2020).

b. The Uber interface also secured a clear manifestation of Plaintiff's assent *twice* by requiring her to check a box next to easy-to-understand text—"By checking the box, I have reviewed and agree to the Terms of Use and acknowledge the Privacy Notice"—and then further clicking a separate "Confirm" button. *See Brooks*, 216 A.D.3d at 506; *see also, e.g.*, *Harrison*, 2022 N.Y. Slip Op. 30430(U), at *19-20 (user indicated her assent by clicking a button next to the statement "I accept the Terms of Use and Privacy Policy"); *Edmundson* v. *Klarna, Inc.*, 85 F.4th 695, 708 (2d Cir. 2023) (button marked "Confirm and continue" immediately below statement "I agree to the payment terms" manifested assent to the hyperlinked payment terms); *Feld v. Postmates, Inc.*, 442 F. Supp. 3d 825, 831 (S.D.N.Y. 2020) (the language "you agree to [Postmates'] Terms of Service … put reasonably prudent users on inquiry notice").

The checkbox appeared very close to the hyperlink to the full text of the Terms of Use. *See Hidalgo*, 468 F. Supp. 3d at 658. And the language "I agree to the Terms of Use" is a "clear prompt directing users to read the [Terms of Use] and signaling" that their assent would subject them "to contractual terms." *Valelly*, 464 F. Supp. 3d at 643 (quoting *Meyer*, 868 F.3d at 79). Plaintiff's assent was thus unambiguous. Any reasonably prudent person understands that "I agree" communicates the existence of an agreement.

c. In an attempt to cast doubt on the enforceability of clickwrap agreements, Plaintiff's Brief substantially mischaracterizes the facts of *Berkson*. (Br.40-41.) *Berkson* concerned two different user interfaces, encountered by two putative class representatives, *neither* of which was found to be a clickwrap agreement. 97 F. Supp. 3d at 369-375. The first plaintiff encountered a sign-in portal containing a checkbox, but the court found that users were not required to click the checkbox to move forward, and there was no evidence that the plaintiff there had done so. *Id.* at 370-371, 403. That is very different from the situation here, where the interface *required* Plaintiff to agree to the 2021 Terms and Plaintiff admits having checked the box and hit the button. (Br.10.)

The second *Berkson* plaintiff encountered a user interface that included no checkbox but rather the statement: "By clicking 'Sign in' I agree to the *terms of use* and *privacy policy*" above a button marked "Sign In." 97 F. Supp. 3d at 373-374. It was in describing that second interface *without* a checkbox that the *Berkson* court stated, in the language quoted by Plaintiff (Br.41), that the "design and content of the website, including the homepage, did not make the 'terms of use' readily and obviously available" to the plaintiff. *Id.* at 404. That conclusion had nothing to do with a clickwrap agreement like the one here.

d. The January 2021 Terms of Use themselves—which Plaintiff had the opportunity to review—also clearly and conspicuously put Plaintiff on notice of the arbitration agreement, as the Supreme Court concluded. (R.38-39.) The 2021 Terms disclose the arbitration provision in bolded all-cap text on the *very first page*, informing the user that the agreement requires "arbitration" of most "disputes" and that agreeing to arbitration is an "important decision" with "consequences." (R.117.) The arbitration agreement itself then appears on the next page under the prominent heading "**Arbitration Agreement**." (R.118.) Multiple courts have enforced arbitration provisions that were less conspicuous and

clear. *See, e.g.*, *Peiran Zheng*, 2021 WL 2043562, at *5 ("The arbitration provision itself was not hidden in the Terms & Conditions. Rather, it was given its own section with a bolded and numbered heading entitled 'Arbitration.'"); *Plazza* v. *Airbnb, Inc.*, 289 F. Supp. 3d 537, 554 (S.D.N.Y. 2018); *Starke* v. *Gilt Groupe, Inc.*, No. 13-cv-5497, 2014 WL 1652225, at *2 (S.D.N.Y. Apr. 24, 2014) (enforcing arbitration agreement appearing in "the sixteenth paragraph" of terms of use because "reading the various terms is no harder than reading the pages of an agreement").

Plaintiff asserts (Br.51-52) that the Arbitration Agreement is "actively misleading" because the summary on the first page, in bold and all caps, states that the agreement "contains provisions that govern how claims between You and Uber can be brought." (R.117.) But highlighting certain provisions that the agreement "contains" is not a representation that the agreement *only* contains those provisions. That same paragraph expressly states that the arbitration agreement applies to "all disputes with Uber," including existing disputes. (*Id.*) And on the very next page, under "Arbitration Agreement," the Terms clearly state that the parties agree to arbitrate disputes arising out of "incidents or accidents resulting in personal injury" that "occurred or accrued before or after the date [the

user] agreed to the Terms." (R.118.) Uber never assured Plaintiff that the arbitration agreement was purely prospective, and Plaintiff's own subjective belief that the Terms would apply only to disputes that might arise in the future is no basis to refuse to enforce the terms to which Plaintiff actually gave her assent. *Metzger*, 227 N.Y. at 416. It is black letter law that a "bare claim of unilateral mistake by plaintiff, unsupported by legally sufficient allegations of fraud on the part of defendant[ ], does not state a cause of action for reformation." *Barclay Arms, Inc.* v. *Barclay Arms Assocs.*, 74 N.Y.2d 644, 646 (1989); *see Kotick v. Shvachko*, 130 A.D.3d 472, 473 (1st Dep't 2015).

Any reasonably prudent person reading the plain language of the Arbitration Agreement would understand that she was agreeing to resolve any personal injury dispute she might have with Uber in arbitration rather than a court of law, and that she was waiving her right to a jury trial. (R.118.) The words "dispute, claim, or controversy" are not confusing; a reasonable person understands that they include a "lawsuit," especially where the context of the paragraph refers to substituting arbitration for a "court of law" and "trial by jury." (*Id.*) Nor is the wording of the "before or after" clause confusing. The meaning of the phrase

"whether the dispute, claim or controversy occurred or accrued before or after the date you agreed to the Terms" is plain: everyone knows what "occurred" means and what it means if an event "occurred before" another event. (*Id.*)

*

Uber's 2021 clickwrap interface, which made the full text of the 2021 Terms readily available and to which Plaintiff unambiguously gave her assent, put Plaintiff on both actual and inquiry notice of the clear and unambiguous 2021 Terms. Those Terms are an enforceable contract.

C. Plaintiff additionally gave assent to the arbitration agreement by continuing to use Uber's services with actual notice of that agreement.

When the Supreme Court granted Uber's motion to compel arbitration, it held that Plaintiff had *further* assented to Uber's 2021 Terms when she continued using Uber's services even after receiving actual notice through the litigation that her use of the Uber app was conditioned on her agreement to arbitrate. (R.44 (citing *Nicosia*, 815 F. App'x at 613-614).) Plaintiff undeniably received that notice when Uber sent her counsel its Notice of Intention to Arbitrate and provided the 2021 Terms. (R.220-221.) Those Terms reiterated that Plaintiffs' use of Uber's services would constitute acceptance of all the Terms of Use, including the arbi-

tration agreement. (R.117.) And because Plaintiff received actual notice of those terms through her counsel, she cannot protest that her assent is invalid because Uber did not notify her attorneys.

The First Department did not directly address the Supreme Court's assent-by-conduct holding, but it affirmed the Supreme Court's order in its entirety. (R.660.) Despite Plaintiff's knowledge of this independent ground for the Supreme Court's order enforcing the arbitration agreement, Plaintiff's opening brief does not challenge the Supreme Court's assent-by-conduct holding. Any such challenge is therefore abandoned, and the lower courts' orders should be affirmed on that basis. *See People* v. *Couser*, 28 N.Y.3d 368, 380 (2016); *Misicki* v. *Caradonna*, 12 N.Y.3d 511, 519 (2009); *Matter of Scotto* v. *Dinkins*, 85 N.Y.2d 209, 215 (1995); *see also* 4 N.Y. Jur. 2d Appellate Review § 577 ("Even though a question was raised below, it may be waived by failure to urge it in the appellate court, the ordinary rule being that an exception not raised in the party's brief on the argument is deemed abandoned.") (citations omitted).

If this Court were prepared to overlook Plaintiff's forfeiture, it should affirm the Supreme Court's holding that Plaintiff gave further assent to the 2021 arbitration agreement through her conduct: her con-

tinued use of Uber's services with actual notice that her use was contingent on her agreement to the 2021 Terms. Even after Plaintiff received that notice again (through her attorney), she continued using the Uber app to take 19 more rides. (*See* R.66-67; R.228 ¶ 22; R.264.) Because Plaintiff "continued to avail [herself] of [Uber's] services" after she unquestionably "became aware of the existence of the arbitration clause through this litigation," she is "bound by the agreement to arbitrate." *Nicosia*, 815 F. App'x at 614.

"[C]onduct manifesting … assent [to a contract] may be words or silence, action or inaction." *Schnabel*, 697 F.3d at 120. *Nicosia* and the Supreme Court's decision here were both applications of the "standard contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms, which accordingly become binding on the offeree." *Register.com, Inc.* v. *Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004) (citing multiple authorities). Multiple courts have recognized that "the mere acceptance of a benefit … may constitute assent," so long as "the 'offeree makes a decision to take the benefit with knowledge [actual or constructive] of the

terms of the offer.'" *Schnabel*, 697 F.3d at 120 (quoting *Register.com*, 356 F.3d at 403 (alteration in original)); *see also McDaniel* v. *Home Box Office, Inc.*, No. 22-cv-1942, 2023 WL 1069849, at *3 (S.D.N.Y. Jan. 27, 2023); *Enderlin* v. *XM Satellite Radio Holdings, Inc.*, No. 06-cv-0032, 2008 WL 830262, at *6-7 (E.D. Ark. Mar. 25, 2008) (enforcing amended arbitration agreement that plaintiff agreed to by continuing to use the defendant's services during litigation).

The point is straightforward: When a party like Plaintiff knows that her use of services like Uber's is conditioned on a contractual promise (here, to arbitrate), that party may not avail herself of the benefits of those services while avoiding the conditions that accompany them. *Nicosia*, 815 F. App'x at 614; *see Register.com*, 356 F.3d at 401. At the latest, once Plaintiff received Uber's Notice of Intention to Arbitrate, she knew the conditions on which Uber's services were offered: her agreement to the 2021 Terms, including the arbitration agreement. Plaintiff's decision to "take the [offered] benefit with knowledge of the terms of the offer … constitute[d] an acceptance of the terms" and made them "binding on [her]." *Register.com*, 356 F.3d at 403.

* * *

In sum, the First Department correctly determined that the operative contract between Plaintiff and Uber—the January 2021 Terms of Use—is valid under New York's standard for contract formation for multiple independent reasons. Plaintiff did not put in any evidence refuting her own statement that she had *actual notice* of the 2021 Terms; she had *inquiry notice* from the clear and conspicuous clickwrap interface to which she unambiguously assented; and she then further *assented through conduct* by continuing to use Uber's services after receiving a Notice of Intention to Arbitrate. This Court should affirm the First Department's conclusion.

II. Plaintiff's agreement to arbitrate both existing and future claims is enforceable.

The central theme of Plaintiff's appellate brief, beginning with her first sentence and repeated over and over again, is that Uber allegedly "tricked" her into digitally signing an arbitration agreement after she had already retained counsel and initiated this lawsuit. But that is not what happened: this case does not concern a purely retroactive arbitration clause because Plaintiff first agreed to arbitrate any personal injury claims against Uber back in 2016, years before the accident at issue. And

in any event, even if the facts were as Plaintiff describes them, New York courts routinely enforce agreements to arbitrate existing legal disputes.

A. Plaintiff agreed to arbitration with Uber in 2016.

When Plaintiff filed this lawsuit, she had long ago entered an agreement with Uber containing a broad arbitration agreement in the 2016 Terms. There was no "legal landmine" or "retroactive" effect (Pl.Br.30) in January 2021 when Plaintiff reaffirmed her *existing* agreement to arbitrate personal injury claims.

1. Plaintiff registered for her Uber account on November 18, 2016 via Uber's Rider App on a smartphone. (R.270 ¶ 3.) The last screen in the registration process said: "By continuing I confirm that I have read and agree to the Terms & Conditions and Privacy Policy." (R.288.) The words "Terms & Conditions" were blue, signifying that they were a clickable hyperlink. (R.271, 288.) This is typically referred to as a "sign-in wrap." *Berkson*, 97 F. Supp. 3d at 395.

That user interface provided Plaintiff with reasonable notice of the 2016 Terms by making them available for review via a clear and conspicuous hyperlink. The First Department found a similar Uber sign-in wrap interface enforceable because the hyperlink "in effect included an arbi-

tration agreement." *Mejia*, 219 A.D.3d at 1252. That is consistent with the many courts applying New York law that have found sign-in wrap interfaces enforceable where the link to the contractual terms was spatially coupled with the mechanism for manifesting assent. *Qwil*, 180 A.D.3d at 593 (disclaimer linking terms was "directly under" account creation button); *Meyer*, 868 F.3d at 80 (enforcing Uber arbitration agreement because of "the physical proximity of the [terms] notice to the register button"); *Plazza*, 289 F. Supp. 3d at 552-553; *Fteja* v. *Facebook, Inc.*, 841 F. Supp. 2d 829, 839-840 (S.D.N.Y. 2012).

As in *Meyer*, the notice here was "temporally" and "spatially coupled with the mechanism for manifesting assent" (*i.e.*, the arrow button), because notice was provided "simultaneously to enrollment, thereby connecting the contractual terms to the services to which they apply." 868 F.3d at 78. The 2016 interface thus provided Plaintiff reasonable notice of the 2016 Terms. *Qwil*, 180 A.D.3d at 593.

2. None of Plaintiff's objections to the 2016 user interface (Br.68-72) is persuasive. Plaintiff first attacks the font size of the notice and hyperlink to the Terms & Conditions. That critique might matter for a dense website containing a large volume of information, but it has no

application here. The font size is appropriate because it allowed the notice to be placed immediately next to the arrow button (R.289-291), communicating the connection between the notice and the button. *Meyer*, 868 F.3d at 78. And Plaintiff's concern that the font is "smaller even than the letters on the keypad" (Br.67) is a complaint about smartphones themselves—keyboards need to accommodate human thumbs.

Plaintiff also feigns confusion that the blue text on the 2016 screen denoted a hyperlink. But the objective notice inquiry considers a "reasonably prudent user," who "is not a complete stranger to computers or smartphones, having some familiarity with how to navigate to a website or download an app." *Edmundson*, 85 F.4th at 704. A reasonably prudent user who saw the blue hyperlink to "Terms & Conditions" would have known that she was being asked to agree to a contract whose terms were available by following the link. *See id.* at 707 ("[B]lue font is a better signal to consumers that text contains a hyperlink.").

Plaintiff next challenges the 2016 sign-up process as misleadingly "fast and simple," citing *Schnabel*. But *Schnabel* held that presenting contract terms "at a place and time that the consumer will associate with the initial purchase or enrollment" provides notice that users of services

are "subject to additional terms and conditions that may one day affect [them]." 697 F.3d at 127. That is exactly what Uber did.

Plaintiff last challenges her manifestation of assent because she clicked an arrow button rather than a button that said "Confirm." (Br.70.) But she cannot dispute that the arrow button was immediately next to text informing her of the precise consequences of clicking: "By continuing, I confirm that I have read and agree to the Terms & Conditions and Privacy Policy." (R.288.) This interface is much clearer than the one at issue in *Kauders*, which lacked blue hyperlinks and which the court found confusing because it connected assent to the entry of a credit card number though a numerical keypad. 486 Mass. at 560; *see also Sarchi*, 268 A.3d at 270-272. Here, by contrast, there is no way to scan the full screen without seeing the "I agree" text against its "uncluttered" white background. *Meyer*, 868 F.3d at 78. A reasonably prudent user of the 2016 interface thus understood that, by clicking the arrow button, she was confirming having read and agreed to the Terms.

Last, Plaintiff cannot evade the 2016 terms on the ground that Uber's Notice of Intention to Arbitrate referred to the 2021 Terms. (*See* Pl.Br.12-13.) As the First Department explained in *Mejia*, New York law

provides that the parties' 2016 contractual agreement was not negated by the fact that Uber's arbitration demand identified the parties' most recently agreed-upon 2021 Terms as the operative contract, as opposed to the prior version. 219 A.D.3d at 1251 (citing authorities).

B. In any event, the retroactive arbitration clause in the 2021 Terms is enforceable.

Even if the 2016 Terms were for some reason not enforceable, the 2021 Terms contain a broad arbitration agreement that expressly extends to both existing and future claims. (R.118.) And retroactive arbitration agreements have long been enforceable in New York.

As a threshold matter, and as discussed more fully in Part IV below, this Court cannot resolve any challenge to the applicability of the 2021 arbitration agreement to claims that arose before it was formed: The 2021 Terms of Use expressly delegate to the arbitrator "exclusive authority" to resolve "any" threshold issues of arbitrability, including whether the arbitration agreement is "applicab[le]" to Plaintiff's specific claims against Uber. (R.119.) "When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue." *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 586 U.S. 63, 68

(2019); *accord Monarch Consulting, Inc.* v. *Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 26 N.Y.3d 659, 675-676 (2016).

Even if this Court could decide Plaintiff's challenge to the application of the arbitration clause, New York courts routinely enforce agreements to arbitrate already-existing claims. *See Town of Ramapo* v. *Ramapo Police Benevolent Ass'n*, 17 A.D.3d 476, 478 (2d Dep't 2005) (compelling arbitration of pre-existing grievances where collective bargaining agreement did "not appear to limit grievances to facts and events post-dating its effective date"); *Williams* v. *Joseph Dillon & Co.*, 243 A.D.2d 559, 560 (2d Dep't 1997) (compelling consumer who opened a second brokerage account with an agreement containing a broad arbitration provision to arbitrate claims "concerning transactions which occurred before the second agreement was executed"); *Matter of S. Orangetown Cent. Sch. Dist. (Civil Serv. Emps.' Ass'n)*, 173 A.D.2d 1071, 1073 (3d Dep't 1991); *Johnson* v. *Chase Manhattan Bank USA, N.A.*, 2004 N.Y. Slip Op. 50086(U), at *9 (Sup. Ct. N.Y. Cty. Feb. 27, 2004); *see also Plazza*, 289 F. Supp. 3d at 551 (applying broad arbitration clause retroactively to consumer claims); *O'Callaghan* v. *Uber Corp. of Cal.*, No. 17-cv-2094, 2018 WL 3302179, at *8 n.11 (S.D.N.Y. July 5, 2018); *Sacchi* v. *Verizon Online*

LLC, No. 14-cv-423, 2015 WL 765940, at *9 (S.D.N.Y. Feb. 23, 2015); *Valle* v. *ATM Nat'l, LLC*, No. 14-cv-7993, 2015 WL 413449, at *5 (S.D.N.Y. Jan. 30, 2015); *Clark* v. *Kidder, Peabody & Co.*, 636 F. Supp. 195, 197 (S.D.N.Y. 1986) (compelling consumer who amended account agreement to add broad arbitration agreement to arbitrate claims that arose "before this modification was effected").

Contrary to Plaintiff's assertion (Br.33, 52), there is nothing unusual or improper about retroactive contract provisions. Not only are expressly retroactive arbitration clauses enforceable, if a clause is sufficiently broad, New York courts will *assume* retroactivity unless the language specifically excludes pre-existing claims. *Town of Ramapo*, 17 A.D.3d at 477; *see Matter of Cent. Sch. Dist. No. 12, Middle Island, Town of Brookhaven, Suffolk Cty. N.Y.*, No. 74-5384, 1974 WL 18204, at *1 (Sup. Ct. Suffolk Cty. Sept. 30, 1974) ("Since the instant agreement does not specifically exclude arbitration of pre-existing disputes the respondent teacher's claim must be deemed arbitrable."); *Plazza*, 289 F. Supp. 3d at 551. Plaintiff's express agreement to arbitrate personal injury claims that "occurred or accrued before … the date [she] agreed to the Terms" is thus plainly enforceable. (R.118.)

III. The Supreme Court did not abuse its discretion by denying Plaintiff's frivolous motion for sanctions.

Plaintiff's brief repeats her audacious and unprecedented argument that Uber should be sanctioned with a *default judgment* and monetary penalties for supposed violations of New York Rules of Professional Conduct Rule 4.2. That "No-Contact Rule" prohibits an *attorney*—not a client—from speaking directly with a party that the attorney knows to be represented by counsel about the subject of the representation. A violation of the rule requires that (i) an attorney; (ii) while representing a client; (iii) communicate herself or cause an agent to communicate; (iv) with a party who is represented by counsel in connection with a particular matter; (v) on a subject related to the representation in that particular matter; (vi) with actual knowledge (not constructive) that the party is represented by counsel in connection with that particular matter. 22 N.Y.C.R.R. § 1200.0.

Plaintiff has not seriously attempted to establish several of those elements. The Supreme Court found that sanctions were not warranted here because no Uber attorney communicated with Plaintiff, or directed another to communicate with Plaintiff, about her pending lawsuit with knowledge of it. (R.49-54, 661-662.) This Court, like the First Depart-

ment, reviews that decision for abuse of discretion. *See Winkelman* v. *Furey*, 97 N.Y.2d 711, 712 (2002).[8]

Nothing in Plaintiff's brief shows that the Supreme Court committed any abuse of discretion in denying Plaintiff's proposed extreme sanctions. Plaintiff contends that some *unidentified* Uber in-house attorneys violated Rule 4.2 when Uber sent out the January 15, 2021 email notifying users about upcoming changes to the Rider service Terms of Use, and again when the Rider App's January 2021 clickwrap interface required all users to agree to Uber's updated terms as a condition of continuing to use the Rider service. (Br.19-20.) Plaintiff is wrong on both counts. She waived the latter argument by failing to raise it in the Supreme Court. (R.70-76.) And she has not shown that her requested sanctions are even legally available in this context.

A. Plaintiff has not shown any legal authority for her requested sanctions.

Plaintiff's argument is doomed at the start because she has not shown that her requested extraordinary sanction—striking Uber's an-

[8] Plaintiff submitted an affirmation by a purported "legal ethicist" in support of her sanctions request. (Br.29.) The Supreme Court correctly found that the affirmation "lack[ed] persuasive value." (R.50-51.) "Expert testimony regarding the meaning and applicability of the law, which is the province of the court," is not properly considered. *Franco* v. *Jay Cee of N.Y. Corp.*, 36 A.D.3d 445, 448 (1st Dep't 2007).

swer and precluding Uber from defending itself on liability—was even available under New York law in this instance. Plaintiff has not cited any New York case sanctioning a party for its attorney's alleged violation of Rule 4.2, and for good reason: there is no statutory authority authorizing the striking of Uber's answer and imposition of a forced default judgment in these circumstances. CPLR § 3103 and CPLR § 3126 authorize sanctions up to and including dismissal, but only in connection with discovery misconduct, which is not at issue here. *See Lipin* v. *Bender*, 84 N.Y.2d 562, 571 (1994). 22 N.Y.C.R.R. § 130-1.1 does not authorize the striking of pleading, but only monetary sanctions, and only for "frivolous" litigation conduct. And courts lack the inherent power to impose sanctions in connection with "motion practice." *Foxfire Enters., Inc.* v. *Enterprise Holding Corp.*, 140 A.D.2d 581, 581 (2d Dep't 1988).

A Supreme Court Justice recently concluded that an alleged violation of Rule 4.2 does not provide any basis for striking the defendant's answer. *Case* v. *Freed*, 2022 N.Y. Slip Op. 50348(U), at *3 (Sup. Ct. Suffolk Cty. Apr. 29, 2022). Indeed, that court found the plaintiff's sanctions request so frivolous as to itself be sanctionable. *Id.* Plaintiff's failure here to identify any legal basis for her requested sanctions defeats her argu-

ment that the Supreme Court's denial of her sanctions motion was an abuse of discretion.

B. Uber's January email did not violate Rule 4.2.

Uber's January 15, 2021 email was sent to millions of U.S. Uber users, including Plaintiff. (R.227 ¶¶ 16-17.) Plaintiff's assertion that the email was an impermissible ex parte communication fails for at least three reasons.

First, the January 15 email did not concern "the subject of the [Plaintiff's] representation" in this matter. That mass communication said nothing about Plaintiff, her accident, her alleged injuries, or her litigation against Uber. (R.95.) Nor did it purport to form a contract with Plaintiff. The email merely gave notice that Plaintiff would have the opportunity to "review and agree to the updated Terms" in the Uber App if she decided to continue using the app after January 18, 2021. (*Id.*) The *Cobell* case cited by Plaintiff (Br.23, 29), construing the District of Columbia's similar no-contact rule, explains: "communications occurring in the ordinary course of business between litigants," such as regular account statements that "would be distributed anyway, regardless of the instant litigation," are not communications "about the subject matter of

the representation." *Cobell* v. *Norton*, 212 F.R.D. 14, 22 (D.D.C. 2002). Uber sent the January 15 email to millions of users, "regardless of [its] litigation" with Plaintiff. *Id.* The email was not a communication about the subject matter of Plaintiff's representation. *See Miracle-Pond* v. *Shutterfly, Inc.*, No. 19-cv-04722, 2020 WL 2513099, at *8-9 (N.D. Ill. May 15, 2020) (email during pendency of class action informing all users that Terms of Use had been updated was not improper).

Second, the January 15 email was a communication from Uber, not its in-house counsel: The email was sent by Uber's "operations team (non-legal)" and not by any attorney. (R.227 ¶ 17.) Uber "is not its lawyers and is not bound by any Code of Professional Responsibility to refrain from communicating directly with a represented party." *In re St. Casimir Dev. Corp.*, 358 B.R. 24, 41 (S.D.N.Y. 2007); *see also* Rule 4.2 cmt. 11. Plaintiff's supposition that unknown Uber attorneys were involved in drafting the underlying Terms of Use does not transform this business message into a communication between an attorney and a represented party.

Third, the email did not violate Rule 4.2 because it was not sent to "a party the lawyer knows to be represented by another lawyer in the matter." 22 N.Y.C.R.R. § 1200.0. The Supreme Court made a finding of

fact on this point, which the First Department affirmed: Plaintiff "fail[ed] to establish that Uber had actual knowledge of [Plaintiff's] legal representation when the January 2021 Email was sent." (R.51.) Uber submitted competent testimony disclaiming actual notice and explaining that the New York office to which the Complaint was sent was closed at the time due to the COVID-19 pandemic. (R.229 ¶¶ 23-27.)

Plaintiff now asks this Court to set aside these findings of fact. But the Court lacks jurisdiction to do so because they are supported by record evidence. *See* CPLR § 5501(b); *Congel* v. *Malfitano*, 31 N.Y.3d 272, 293-294 (2018). Anyway, Plaintiff adduces no evidence that Uber had actual notice of her Complaint filed in January 2021. Plaintiff asks the Court to *infer* from the fact that Uber filed appearances in other actions where it was served at its New York office that it must have received her Complaint, but that argument ignores the many other ways that Uber received notice of lawsuits, including direct mailing of the complaints to Uber's San Francisco headquarters (which continued to process mail) and from counsel-to-counsel communications. (R.514.) Mere speculation is not evidence. The Supreme Court's finding that Uber lacked actual notice of the Complaint on January 15, 2021 is conclusively established.

Plaintiff also asks the Court to find that Uber had *constructive* notice of the Complaint because of the legal presumption created by her filing an affidavit of service. (Br.24-25.) But Rule 4.2 requires *actual* knowledge, not constructive notice. *See* Rule 4.2 cmt. 8 ("The prohibition on communications with a represented party applies only" when a "lawyer has actual knowledge of the fact of the representation."); *Schmidt* v. *State*, 181 Misc. 2d 499, 508-509 (Ct. Cl. 1999), *aff'd*, 279 A.D.2d 62 (4th Dep't 2000). That is because it would be unfair to sanction an attorney who did not know (and did not have reason to know) that he was communicating with a represented person.

Plaintiff's reliance on *Scott* v. *Chipotle Mexican Grill, Inc.* (Br.27) is no help to her. No. 12-cv-08333, 2014 WL 4852063 (S.D.N.Y. 2014). In *Scott*, the court found that attorneys interviewing Chipotle employees who could be plaintiffs in a Fair Labor Standards Act ("FLSA") case, in connection with preparing Chipotle's defense to that *known action*, had an obligation to check the docket in that ongoing action to confirm the interviewees were not opt-in plaintiffs. *Id.* at *2-3. Uber's attorneys had no comparable reason to know that any of the millions of users to whom it sent the January 15 email was a represented claimant, and no reason-

able way to search every state and federal docket in the country to ferret out such possible newly filed lawsuits. Uber was not reckless in emailing Plaintiff among other Uber users.

Finally, even if Plaintiff had shown that Uber's *litigation* counsel had actual knowledge of her representation in this lawsuit, that still would not be enough to show that the unspecified in-house attorneys that Plaintiff seeks to sanction for allegedly revising the 2021 Terms had the requisite actual knowledge. Uber's litigation counsel would have no ethical duty or business reason to inform every in-house attorney at Uber about Plaintiff's particular lawsuit. The Supreme Court thus correctly determined that Plaintiff failed to show that any Uber attorney knew that the January 15 email was being sent to a represented party.

C. Uber's January 2021 updated Terms of Use did not violate Rule 4.2.

Plaintiff also argues that the January 2021 clickwrap interface violated the No-Contact Rule. The Supreme Court found that argument forfeited because Plaintiff's sanctions request addressed only the January email, not the clickwrap interface. (R.49-50; *see also* R.71.) It is therefore not preserved for appeal. *Henry* v. *N.J. Transit Corp.*, 39 N.Y.3d 361, 367 (2023).

Regardless, the 2021 Terms also were not a communication from an attorney and were not made with knowledge that Plaintiff was represented in this lawsuit. Even more importantly, the in-app pop-up screen that Plaintiff saw on January 25, 2021, was triggered by *Plaintiff*—it appeared when she opened her Uber app to request Uber's services as a customer. (R.227-228 ¶¶ 19-20.) The only "communication" that Uber made in response to Plaintiff's request was a routine business response: Uber offered to provide her with its services according to the same terms of use that Uber offered to all other users in January 2021, including the broadly worded arbitration agreement. Plaintiff mischaracterizes Uber's arbitration clause as "very carefully tailored" to undermine Plaintiff's claim specifically. (Br.30.) That is a bizarre way to describe a broad contractual provision that applies to *all* users and *all* personal injury claims allegedly arising out of the use of Uber's services that have occurred or may occur in the future. (R.118.) There is nothing hidden about Uber's desire to bring all personal injury actions into arbitration, which is less expensive and more efficient than litigation.

Plaintiff concedes (Br.20) that her attempt to apply Rule 4.2 to routine business communications like those here would be "unprecedented."

And Judge Nathan's opinion in *Haider* v. *Lyft, Inc.*, No. 20-cv-2997, 2021 WL 3475621 (S.D.N.Y. Aug. 6, 2021), persuasively explains why Plaintiff's argument is fundamentally unsound. In *Haider*, drivers using an app were presented with amended terms of use containing an arbitration provision during the pendency of litigation and agreed to those terms; they then tried to evade arbitration on the ground that "Lyft [had] introduced [the terms] after the outset of [the] litigation." *Id.* at *2. Judge Nathan explained that plaintiffs' requested interpretation of Rule 4.2 was "unworkable in practice" because large companies "may face a number of lawsuits at any given time, and prohibiting routine amendments to their terms of service would essentially freeze their contracts in place." *Id.* at *3. There was no violation of the No-Contact Rule because "Lyft's counsel did not communicate with the drivers about the subject of the litigation by drafting revisions to Lyft's arbitration agreement." *Id.*

This Court should reach the same conclusion. *See, e.g.*, *Jones* v. *Waffle House, Inc.*, 866 F.3d 1257, 1266 (11th Cir. 2017) (enforcing delegation clause in arbitration agreement that was knowingly signed by employee with a pending lawsuit against the defendant); *Oestreicher* v. *Equifax Info. Servs., LLC*, No. 23-cv-00239, 2024 WL 1199902, at *5

(E.D.N.Y. Mar. 20, 2024) ("The timing of the arbitration agreement mid-litigation does not negate a valid contract."); *McCumbee* v. *M Pizza, Inc.*, No. 22-cv-128, 2023 WL 2725991, at *10 (N.D. W. Va. Mar. 30, 2023) (enforcing arbitration agreement sent to employee by human resources department during pendency of employment discrimination action); *see also Miracle-Pond*, 2020 WL 2513099, at *9 (enforcing arbitration provision that was modified during pendency of class action).

Plaintiff asks this Court to step far beyond the bounds of Rule 4.2 as it has ever been judicially enforced and prohibit a company from contracting with a consumer, at the consumer's request, simply because the company allegedly received legal advice in drafting the form contract. That sweeping proposal would dramatically expand the No-Contact Rule and make it impossible for companies to respond to routine customer inquiries in the ordinary course of business. Any given employee that interacts with consumers will have no way to know which consumers may have legal claims against the company. And in-house corporate counsel to large companies will not know about every lawsuit that has been filed anywhere in the country.

D. Class action cases do not support Plaintiff's position.

Plaintiff (Br.20-23) asks this court to draw on a line of federal class action cases in which the district court exercised its specific (and unique) power under Federal Rule of Civil Procedure 23(d) to supervise communications between attorneys and putative class members. *See generally Gulf Oil Co.* v. *Bernard*, 452 U.S. 89 (1981). The *O'Connor* case cited by Plaintiff, for example, applies only Rule 23(d) and does not mention the no-contact rule at all. *O'Connor* v. *Uber Technologies, Inc.*, No. 13-cv-3826, 2013 WL 6407583 (N.D. Cal. Dec. 6, 2013).

Even those class action cases, which have no applicability here, do not suggest an absolute bar on attorney contact with absent class members. Contrary to Plaintiff's characterization, *O'Connor* did not hold that Uber was prohibited from supplying updated Terms of Use (containing a new class action waiver) to users or risked sanction by doing so (or that Uber "violated FRCP 23" (Br.22)). It merely required Uber to provide supplemental notice regarding the arbitration provision to potential class members who had "no meaningful way of learning of the current lawsuit" to avoid "potential interference with the rights of the parties in a class action." *O'Connor*, 2013 WL 6407583 at *4-7 (quotation marks omitted).

Another case cited by Plaintiff, *Lloyd* v. *Covanta Plymouth Renewable Energy, LLC*, 532 F. Supp. 3d 259 (E.D. Pa. 2021), allowed the defendant's counsel to conduct voluntary ex parte interviews of putative class members for the purpose of preparing a defense in litigation so long as they were first told about the existence of the class action. *Id.* at 262.

Even if Federal Rule 23 could apply to a state court individual tort action—and it plainly cannot—its purpose would not be served here. The rule exists to protect the interests of absent class members who may not be aware that they are parties to an action. But Plaintiff knew she had a lawsuit against Uber, and she had every opportunity to consult her attorney before continuing to use Uber's services or agreeing to its Terms. Judicial regulation of ordinary business communications between Uber and its customers is neither necessary nor warranted.

Plaintiff's federal class action cases also entailed substantial prejudice to class members' interests or direct connections to the underlying litigation—both of which are absent here. In *Impervious Paint Industries, Inc.* v. *Ashland Oil*, 508 F. Supp. 720 (W.D. Ky. 1981), the defendant impermissibly contacted members of a certified class "independent of any regular business contacts" to coerce them into opting out. *Id.* at 722. The

same thing happened in *Tedesco* v. *Mishkin*, 629 F. Supp. 1474 (S.D.N.Y. 1986). In *Jackson* v. *Bloomberg L.P.*, No. 13-cv-2001, 2015 WL 1822695 (S.D.N.Y. Apr. 22, 2015), an FLSA action, the defendant's counsel contacted class-member employees for the express purpose of interviewing them about "information germane to this lawsuit." *Id.* at *3. And in *Sullivan* v. *Saint-Gobain Performance Plastics Corp.*, No. 16-cv-125, 2020 WL 9762421 (D. Vt. Nov. 4, 2020), the court held that Rule 4.2 would bar a defendant from sending a direct settlement offer to class members, but that the court could (and would) authorize such a settlement communication under its own supervision. *Id.* at *6-7. Here, by contrast Plaintiff merely reaffirmed an agreement to arbitrate that she had already made. *See In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 258 (S.D.N.Y. 2005) (enforcing arbitration agreements that customers agreed to "*before* they became putative class members in this litigation").

* * *

This Court has observed that Rule 4.2, "[b]y preventing lawyers from deliberately dodging adversary counsel to reach—and exploit—the client alone, … safeguards against clients making improvident settlements, ill-advised disclosures and unwarranted concessions." *Niesig* v.

Team I, 76 N.Y.2d 363, 370 (1990). But that purpose would not be served by sanctioning in-house attorneys where, unbeknownst to them, a litigant requested and received Uber's standard Terms of Use in response to a routine customer inquiry. Imposing Plaintiff's requested expansion of Rule 4.2 would greatly harm companies throughout New York by deterring their counsel from providing legal advice on mass communications that might possibly be received by existing litigants. But it would offer no commensurate benefit to litigants like Plaintiff, whose own lawyer was fully capable of cautioning her against continuing to do business with her litigation adversary. Plaintiff failed to show any abuse of discretion by the courts below in denying her request for sanctions.

IV. Plaintiff's objections to arbitrability must be resolved by the arbitrator, and are meritless in any event.

Plaintiff's final argument is that the 2021 Terms were unconscionable. (Br.55-65.) The First Department correctly applied controlling federal precedent and held that this challenge could not properly be resolved by the court because the parties agreed to delegate all threshold issues of arbitrability to the arbitrator. (R.661 (citing *Rent-A-Center West, Inc.* v. *Jackson*, 561 U.S. 63 (2010).) As the Supreme Court of the United States has held: "if a valid agreement exists, and if the agreement delegates the

arbitrability issue to an arbitrator, a court may not decide the arbitrability issue." *Henry Schein*, 586 U.S. at 69; *see also Revis* v. *Schwartz*, 38 N.Y.3d 939 (2022), *aff'g* 192 A.D.3d 127, 134-135 (2d Dep't 2020).

Even if this Court were to take up Plaintiff's unconscionability challenge—and it cannot do so—Plaintiff has not shown that the inclusion of an arbitration agreement in an ordinary consumer contract is either substantively or procedurally unconscionable.

A. The Uber arbitration agreements unambiguously delegate all arbitrability questions to the arbitrator.

Both the 2021 and 2016 Uber Terms of Use expressly delegate all arbitrability issues, including any argument about unconscionability, to an arbitrator. The 2021 Terms expressly state that the arbitrator "shall have exclusive authority to resolve any disputes relating to the … enforceability … of this Arbitration Agreement" including "issues relating to whether the Terms are applicable, unconscionable or illusory." (R.119.) The delegation provision in the November 2016 arbitration agreement is materially identical. (R.251.) And the January 2016 Terms to which Plaintiff first agreed expressly incorporate the AAA's Consumer Arbitration Rules (R.243), which empower the arbitrator to rule on his or her own jurisdiction and therefore constitute "clear and unmistakable

evidence" that the parties delegated arbitrability to the arbitrator. *DISH Network L.L.C.* v. *Ray*, 900 F.3d 1240, 1246 (10th Cir. 2018); *see Lobel* v. *CCAP Auto Lease, Ltd.*, 2022 N.Y. Slip Op. 50256(U), at *10 (Sup. Ct. Westchester Cty. Apr. 8, 2022); *see also DDK Hotels, LLC* v. *Williams-Sonoma, Inc.*, 6 F.4th 308, 319 (2d Cir. 2021) (AAA Commercial Rules).

Plaintiff does not and cannot dispute that those delegation provisions clearly provide that an arbitrator must decide threshold issues of arbitrability, including her challenges regarding the enforceability and supposed unconscionability of the parties' agreements.

B. The arbitrator must resolve Plaintiff's unconscionability challenge.

Plaintiff now seeks to evade her clear delegation agreement by attempting to recast her unconscionability challenge to the arbitration agreement *as a whole* as a challenge to the delegation provision specifically. But the U.S. Supreme Court has foreclosed that maneuver. As the First Department correctly held (R.661), Plaintiff "did not specifically challenge" the delegation clause in the Supreme Court and cannot do so now. *Rent-A-Center*, 561 U.S. at 72.

As a threshold matter, Plaintiff argues that Uber forfeited this argument by not raising it before the Supreme Court. (Br.63-64.) That is

incorrect. As Plaintiff concedes, Uber argued from the outset that the Supreme Court could not consider Plaintiff's unconscionability challenge because it was delegated to the arbitrator. (R.191.) Uber was not required to point out that Plaintiff had failed to qualify for the *Rent-A-Center* specific-challenge exception, which Plaintiff did not invoke below. (R.342-379.) A party does not waive an argument in its opening brief by declining to repeat it on reply. And even if Uber had failed to preserve the delegation argument, the First Department reached it in an exercise of discretion that this Court cannot review. *See Hecker*, 20 N.Y.3d at 1087.

In fact it is *Plaintiff* who failed to preserve any challenge to the delegation clause. While Plaintiff invokes her various trial-court arguments concerning the formation of the 2021 Terms contract (R.345, 361, 362-363), no arguments specifically regarding the delegation provision appear on those pages. The U.S. Supreme Court has squarely held that neither a challenge to an overarching agreement nor a challenge to an arbitration clause within that agreement qualifies as a valid objection to a delegation provision; only a *particularized* challenge to the delegation provision is for the court (rather than the arbitrator) to review. *See Rent-A-Center*, 561 U.S. at 67-72. Plaintiff made no such challenge.

While it is true that a party may employ the same *type* of arguments to challenge both a delegation clause and the arbitration agreement as a whole (*see* Pl.Br.62), *Rent-A-Center* requires that those arguments be directed against the delegation provisions *specifically* for the challenge to be resolvable by a court rather than the arbitrator. *See, e.g.*, *Holley-Gallegly* v. *TA Operating, LLC*, 74 F.4th 997, 1002 (9th Cir. 2023) ("[I]f a party cites provisions outside of the delegation clause in making an unconscionability challenge, it must explain how those provisions make *the fact of an arbitrator deciding arbitrability* unconscionable."); *In re StockX Customer Data Sec. Breach Litig.*, 19 F. 4th 873, 885-886 (6th Cir. 2021); *Lin* v. *DISH Network*, No. 19-cv-01087, 2020 WL 13845109, at *4 (E.D.N.Y. Feb. 5, 2020) (plaintiff's argument that the entire arbitration agreement was unconscionable was insufficient to specifically challenge the delegation clause). The cases cited by Plaintiff (Br.62) are not to the contrary. In *MacDonald* v. *CashCall, Inc.*, for example, the court held that "[c]ontesting the validity of an arbitration agreement as a whole, without specifically disputing the delegation clause contained therein, [was] not sufficient to challenge the delegation provision." 883 F.3d 220, 277 (3d Cir. 2018).

Plaintiff could have specifically challenged the delegation provision as unconscionable in the Supreme Court, if she could have devised a credible argument that it was somehow unconscionable for the parties to select an arbitrator to resolve a contract-enforcement dispute. (Br.65.) But the Record is clear: Plaintiff never did so. This Court therefore lacks authority to resolve any threshold issues of arbitrability—including Plaintiff's unconscionability challenge to the 2021 Terms.

C. Plaintiff's unconscionability arguments are meritless.

Even if this Court could consider Plaintiff's unconscionability arguments, it should reject them. "The doctrine of unconscionability contains both substantive and procedural aspects" in New York. *Sablosky* v. *Edward S. Gordon Co.*, 73 N.Y.2d 133, 138 (1989). A plaintiff must demonstrate *both* "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Gillman* v. *Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 10 (1988). Plaintiff has failed to show either.

1. Plaintiff's agreement to the 2021 Terms was not procedurally unconscionable.

Plaintiff first argues that it was procedurally improper for Uber to present the Terms of Service directly to her instead of to her attorneys.

(Br.57-58.) But as explained above, it was Plaintiff who approached Uber, not the other way around. Plaintiff came to Uber (through its App) seeking Uber's services, and Uber offered her the same Terms of Service that it offered every other U.S. user. Plaintiff chose to agree to the Terms in exchange for using Uber's services. The court in *Oestreicher* similarly found no procedural unconscionability where the plaintiff was presented with a routine terms of service update and could have consulted with her attorney before signing. 2024 WL 1199902, at *6.

Plaintiff next asserts that the manner in which Uber presented the Terms of Use was procedurally unconscionable because Uber purportedly characterized the Terms as a "minor update." (Br.57; *see also id.* at 9, 17-18, 51.) But Uber never once characterized its updates as "minor" or unworthy of users' attention. On the contrary, Uber repeatedly conveyed the importance of Plaintiff taking the time to review the updated Terms. The January 2021 email recommended that users review the terms. The in-app pop-up screen again encouraged users "to read our Updated Terms in full." (R.175.) And the first page of the 2021 Terms advised that the terms "constitute[d] a legal agreement," were "important," and should be "carefully" reviewed. (R.117.) Those statements, as well as the written

terms themselves, clearly conveyed the significance of agreeing to the Terms of Use.

Plaintiff also contends that the Terms of Use were not sufficiently clear that the arbitration agreement would govern pending claims. (Br.58; *see also id.* at 2, 10.) But the agreement plainly states that all claims for personal injuries in connection with the use of Uber's services must be resolved in arbitration, "whether the dispute, claim or controversy occurred or accrued *before or after the date* [*the user*] *agreed to the Terms*." (R.118 (emphasis added).) That provision could hardly be clearer that the arbitration agreement governs claims arising before the date of the agreement. Simply labeling that provision "incomprehensible" (Pl.Br.7) does not make it so.

Plaintiff invokes "the inequality of sophistication and bargaining power between the two parties." (Br.58 (referring to herself as a "layperson"); *see also id.* at 7, 12.) But inequality of sophistication or bargaining power has never been enough to invalidate consumer contracts as unconscionable in New York. This Court explained more than 40 years ago that unconscionability "is not aimed at disturbance of allocation of risks because of superior bargaining power but, instead, at the prevention of

oppression and unfair surprise." *State* v. *Avco Fin. Serv. of New York Inc.*, 50 N.Y.2d 383, 389 (1980) (cleaned up). Arbitration agreements in consumer contracts are enforceable—irrespective of bargaining power—because the consumer can choose not to do business with the company if she finds the terms unacceptable. *See, e.g.*, *Brower.*, 246 A.D.2d at 252 (citing *Carnival Cruise Lines* v. *Shute*, 499 U.S. 585, 593-594 (1991)); Glen Banks, *Elements of unconscionability—Procedural unconscionability—Adhesion contract*, 28 N.Y. Practice, Contract Law § 6:28 (July 2023) ("A party cannot avoid an adhesion contract based solely on an inequality in bargaining power if the party could contract elsewhere to receive a similar performance.").

Courts applying New York law thus routinely enforce arbitration provisions in consumer contracts. *See, e.g.*, *Ranieri* v. *Bell Atl. Mobile*, 304 A.D.2d 353, 353-354 (1st Dep't 2003) (cell phone service agreement); *Lobel*, 2022 N.Y. Slip Op. 50256(U), at *4-5 (motor vehicle lease agreement); *Long* v. *Revel Transit Inc.*, No. 150413/2021, 2021 WL 2457057, at *1 (N.Y. Sup. Ct. N.Y. Cty. June 15, 2021) (vehicle service agreement); *Glover* v. *Bob's Disc. Furniture, LLC*, 621 F. Supp. 3d 442, 448-450 (S.D.N.Y. 2022) (retail furniture purchase); *Feld*, 442 F. Supp. 3d at 833

(food delivery platform); *Plazza*, 289 F. Supp. 3d at 553-554 (short-term property rental platform).

Plaintiff does not (and cannot) point to any "high pressure tactics" in presenting the Uber Terms of Use that might arguably suggest procedural unconscionability. One of the only cases that Plaintiff cites in which an arbitration agreement was invalidated as procedurally unconscionable (Br.31) illustrates the extreme circumstances required. In *Salgado* v. *Carrows Restaurants, Inc.*, 2021 WL 2199436 (Cal. Ct. App. June 1, 2021), the defendant company coerced an employee plaintiff into signing an arbitration agreement without her counsel's input by telling her that she would be immediately fired unless she signed. *Id.* at *1, *5-7; *cf. Sablosky*, 73 N.Y.2d at 139 (enforcing arbitration clause in employment agreement). No similar duress existed here. Plaintiff agreed to the 2021 Terms because she wanted to use Uber's services of her own volition—not through any pressure from Uber. *See Oestreicher*, 2024 WL 1199902, at *6 ("The sequencing of when the TOU was signed in relation with the filing of this lawsuit is not enough to make it procedurally unconscionable where the TOU agreement was conspicuously presented.").

Plaintiff has not demonstrated any procedural unconscionability, which alone is fatal to her claim.

2. The January 2021 Terms are not substantively unconscionable.

Plaintiff's substantive unconscionability arguments fail as well. The crux of Plaintiff's argument is that the Terms of Use were "unreasonably favorable" to Uber because they supposedly "superseded [Plaintiff's] bedrock legal right" to trial in exchange for "no meaningful consideration." (Br.59.) But the Terms of Use did not require Plaintiff to "forgo" anything; she had already agreed to the 2016 Terms containing a nearly identical arbitration agreement. In light of her prior contractual commitments, Plaintiff already was not entitled to a jury trial when the accident occurred in July 2020, when she filed her lawsuit in November 2020, or when she agreed to the updated Terms of Use in January 2021.

Moreover, as Plaintiff acknowledges (Br.59) she *did* receive consideration in exchange for agreeing to the 2021 Terms: she gained the ability to continue to use Uber's services. *See Matter of Ball (SFX Broad. Inc.)*, 236 A.D.2d 158, 161 (3d Dep't 1997) (arbitration agreement was not void for lack of consideration because "the critical question here is whether

there was consideration for the [overarching] contract, of which the arbitration agreement is a component part").

The parties' arbitration agreement is not unfair or unconscionable for the additional reason that it is mutual: it applies equally to both sides to the contract. As multiple courts have held, "where both parties are subject to a mandatory arbitration clause, the agreement does not 'favor the stronger party unreasonably.'" *Benson* v. *Lehman Bros. Inc.*, No. 04-cv-7323, 2005 WL 1107061, at *2 (S.D.N.Y. May 9, 2005) (quoting *Desiderio* v. *Nat'l Assoc. of Sec. Dealers*, 191 F.3d 198, 207 (2d Cir. 1999)).

Moreover, there is "no substantive unfairness inasmuch as [Plaintiff] is not precluded from pursuing her claims and obtaining full compensation for her damages in the arbitral forum." *Matter of Ball*, 236 A.D.2d at 161. This Court has long recognized the strong public policy favoring the enforcement of agreements to arbitrate, which offer "an effective and expeditious means of resolving disputes between willing parties desirous of avoiding the expense and delay frequently attendant to the judicial process." *Maross Constr., Inc.* v. *Cent. N.Y. Reg'l Transp. Auth.*, 66 N.Y.2d 341, 345 (1985); *see also Sablosky*, 73 N.Y.2d at 138

("Nor should the court refuse to enforce the [arbitration] clause on policy grounds.").[9]

New York's commitment to freedom of contract also requires enforcing the parties' arbitration agreement here. As Chief Judge Wilson has explained, freedom of contract means the freedom to enter into agreements that society makes "legally enforceable because of the societal benefit from doing so, not because of the benefit to the contracting parties per se." *159 MP Corp.* v. *Redbridge Bedford, LLC*, 33 N.Y.3d 353, 369 (2019) (Wilson, J., dissenting). Arbitration agreements are enforceable in New York precisely because they "generally advance society's interests" in the efficient and inexpensive resolution of private disputes. *See id.* at 371; *Sablosky*, 73 N.Y.2d at 138. The 2021 Terms are not substantively unconscionable.

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[9] The district court in *Davitashvili* (cited at Pl.Br.59-60) held that Uber's arbitration clause did not "apply to plaintiffs' claims to the extent they lack any nexus to the underlying contracts – i.e., to the extent they are not brought by plaintiffs in their capacities as a current or former users of defendants' platforms." 2023 WL 2537777, at *11. But even if *Davitashvili* were correctly decided, that objection has no relevance here. The scope of the arbitration agreement here plainly includes "personal injury" claims (R.118) like Plaintiff's. *See Garcia* v. *Nabfly, Inc.*, No. 23-cv-1162, 2024 WL 1795395, at *9 (S.D.N.Y. Apr. 24, 2024) (rejecting unconscionability challenge to "infinite" arbitration clause because plaintiff's dispute "f[ell] within the scope of [defendant's] Terms of Use" and there is "no case law suggesting that parties may not freely contract that all disputes arising out of [parties'] relationship will be submitted to arbitration").

* * *

This Court must allow the arbitrator to resolve Plaintiff's unconscionability arguments, consistent with the terms of the parties' agreement. But even if this Court were to consider those arguments, it should reject them as contrary to well-settled New York law.

Conclusion

The Decision and Order of the Appellate Division should be affirmed.

Respectfully submitted,

PERKINS COIE LLP

JACOB TABER, ESQ.
1155 Avenue of the Americas,
22nd Floor
New York, New York 10036
(212) 262-6900
jtaber@perkinscoie.com

MICHAEL R. HUSTON, ESQ.
(of the bars of the District of Columbia and State of Arizona)
by permission of the Court
JORDAN M. BUCKWALD, ESQ.
(of the bar of the State of Arizona)
by permission of the Court
2525 E. Camelback Road
Phoenix, Arizona 85016
(202) 434-1630
mhuston@perkinscoie.com
jbuckwald@perkinscoie.com

Attorneys for Defendant-Respondent Uber Technologies, Inc.

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