APL-2023-00203
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Appellate Division, First Department Case No. 2022-05749

Court of Appeals

STATE OF NEW YORK

EMILY WU,

Plaintiff-Appellant,

against

UBER TECHNOLOGIES, INC.,

Defendant-Respondent,

and

JERRY ALVAREZ, AHMED ELHASHASH, and ARMAN KHAN,

Defendants.

BRIEF OF *AMICUS CURIAE* PUBLIC JUSTICE IN SUPPORT OF PLAINTIFF-APPELLANT

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INTRODUCTION

Uber seeks to retroactively enforce an arbitration agreement that Emily Wu inadvertently accepted—without sufficient notice that it was retroactive and without advice of her counsel—while her case against Uber was pending in court. Uber contends that Ms. Wu should be bound by the agreement, which it disguised as a routine "update" to its terms of service, even though Uber took no steps to warn Ms. Wu that the updated terms could affect her existing litigation and buried the retroactivity provision in fine print and legal jargon. This Court should decline Uber's invitation to approve its deceptive practice of contacting represented litigants to obtain waivers of fundamental rights, including the right to a jury trial, in an effort to stymy existing litigation against it. The provision requiring Ms. Wu to arbitrate her existing claims was never formed and is unenforceable for at least two reasons.

First, black-letter New York contract law requires a meeting of the minds—and thus sufficient notice—of all material terms of a contract. Thus, when Uber wants to modify an agreement, it must provide at least inquiry notice of what the modifications to the agreement are in language that the consumer can understand, particularly for any modifications that would go beyond the expectations of a reasonable consumer. It failed to do so here, suggesting in its notice to Ms. Wu that its "update" applied prospectively and then burying a retroactivity provision filled with legal jargon in the fine print of the agreement.

Second, even if a contract were formed that applies retroactively, it should not be enforced, both because it is unconscionable and because it is an improper communication with a represented party that a court can decline to enforce under its inherent authority to manage the case. Although the arbitration agreement contains a delegation clause, the Court, not an arbitrator, must consider the enforceability question because, under the Supreme Court's recent decision in *Coinbase, Inc. v. Suski*, Ms. Wu specifically challenged the validity and enforceability of the delegation clause. And case law from New York and around the country establishes that agreements like this one obtained under misleading and coercive circumstances are not enforceable.

INTEREST OF AMICUS CURIAE

Public Justice is a national public interest advocacy organization that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting to preserve access to justice for victims of corporate and governmental misconduct and to preserve the civil justice system as an effective tool for holding the powerful accountable. To further its goal of defending access to justice for workers, consumers, and others harmed by corporate wrongdoing, Public Justice has long conducted a special project devoted to fighting abuses of mandatory arbitration. As part of that project, Public Justice represented the respondent in *Rent-A-Center West, Inc. v. Jackson*, the Supreme Court case requiring parties to separately

challenge delegation clauses. Since then, Public Justice has represented workers and consumers in litigation to advocate for a consistent interpretation of *Rent-A-Center* that protects the rights of vulnerable people and ensures that parties to an arbitration agreement are forced to arbitrate only when there is an enforceable agreement to do so. Likewise, Public Justice has represented consumers in numerous cases involving the enforceability of online agreements generally, and it has litigated and filed amicus briefs in cases involving the formation and enforceability of Uber's arbitration agreements specifically.

ARGUMENT

I. No Retroactive Agreement to Arbitrate was Formed in 2021

The Appellate Division erred in concluding that Ms. Wu agreed in 2021 to arbitrate her existing claims in this litigation because Uber has not established that Ms. Wu had actual or inquiry notice of the retroactivity provision. As Uber acknowledges, for a contract to be formed, New York law requires "a meeting of the minds" and "a manifestation of mutual assent" regarding "all material terms" of the contract. Uber Br. at 26 (citing *Stonehill Cap. Mgmt., LLC v. Bank of the West*, 28 N.Y 3d 439, 448 (2016)). For there to be a meeting of the minds, both parties must have either actual or inquiry notice of all the terms to which they are agreeing. *See Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 394 (E.D.N.Y. 2015).

Here, when Ms. Wu clicked to call an Uber after being notified of the "update" to the terms of service, she did not have actual notice of the terms. Massachusetts' highest court recently rejected the same actual notice argument that Uber makes here: that checking a box next to a statement that the user had reviewed the terms was proof of actual notice. *See Good v. Uber Techs, Inc.*, 234 N.E.3d 262, 275 (Mass. 2024). As the court explained, "in the absence of record evidence that [the user] accessed the terms of use through the hyperlink or somehow interacted with the terms before agreeing to them, Uber has not met its burden to show actual notice." *Id.* (cleaned up). The same is true here.

Nor did Ms. Wu have inquiry notice. Uber did nothing to alert her that the terms of service included a buried provision that would apply retroactively to affect her rights in this existing lawsuit, forcing her to give up the right have her claims heard by a jury after she had already filed a complaint and invoked that right. *See Berkson*, 97 F. Supp. 3d at 382 (explaining that "the burden should be on the offeror to impress upon the offeree . . . the importance of the details of the binding contract being entered into," which includes "the duty to explain the relevance of the critical terms governing the offeree's substantive rights contained in the contract"); *see also Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171, 1179 (9th Cir. 2014) (explaining that "the onus must be on website owners to put users on notice of the terms to which they wish to bind consumers").

Uber contends that it was enough for inquiry notice under New York law that Ms. Wu had notice that she was agreeing to something, even if she did not know what the specific terms of that "something" were, and that the onus was on her to click on the hyperlink, read the new terms of service, and figure out what had been added or changed. Uber Br. at 33. That is wrong. "In determining whether an offeree is on inquiry notice of contract terms, New York courts look to whether *the term* was obvious and whether it was called to the offeree's attention." *Starke v. SquareTrade, Inc.*, 913 F.3d 279, 289 (2d Cir. 2019) (emphasis added). In other words, it is not enough to put a consumer on inquiry notice that a contract is being offered generally, the company must conspicuously call the key terms of that contract to the consumer's attention, particularly when the terms of service contain "material terms that would alter what a reasonable consumer would understand to be her default rights when initiating an online consumer transaction." *Berkson*, 97 F. Supp. 3d at 402; *see also Scotti v. Tough Mudder Inc.*, 97 N.Y.S.3d 825, 853 (N.Y. Sup. Ct. 2019) (same). As the American Law Institute recently confirmed in its draft of the Restatement of Consumer Contracts, a contract is deceptive if the business "obscure[es] the presentation of a material term of the contract or its effect" when presenting it to the consumer.[1] American Law Institute, Draft Restatement of the

[1] The Draft Restatement make contracts obtained by deception voidable by the consumer. *See* Draft Restatement of Consumer Contracts § 6(a). Under that approach, even if the agreement here were formed—which it was not—and even if it were not unconscionable—which it is—the

Law Consumer Contracts § 6 (b)(2) (April 2022). Here, therefore, if Uber wanted to apply its arbitration agreement retroactively to affect Ms. Wu's rights in her existing case, it was required to call her attention to the retroactive term specifically. It did not do so, instead burying it in pages of fine print and legalese.

To begin with, nothing in either the email or the pop-up notice of the updated terms mentioned that they applied retroactively to existing cases. R95, R262. If anything, they suggested the opposite, with the email, which was sent on January 15, 2021, stating that the new terms "will go into effect on January 18, 2021" and included changes to the procedure for "*filing* a dispute against Uber." R95 (emphasis added). And even if Ms. Wu had clicked on the hyperlink provided and read the terms of service carefully, it would not have been clear to her—a non-lawyer—that the terms would affect her existing case. The first page told her in all caps that "this agreement contains provisions that govern how claims between you an Uber *can be brought*," R250 (emphasis added), without telling her that it also governed claims that had *already* been brought. And even the provision that Uber now seeks to apply retroactively does not reference existing cases or lawsuits and instead states that it applies to a "dispute, claim, or controversy" that "occurred or accrued before or after the date you agree to the Terms." R118. It is simply not plausible that a reasonable

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Court cannot enforce it if it was procured by deception, and that is an independent basis for reversing the Appellate Division's decision.

consumer who read those words—if they even noticed them buried deep within the terms of service—would understand that they were giving up their right to proceed with their existing lawsuit in court.

Because Uber failed to put Ms. Wu on notice that the arbitration agreement could affect her existing lawsuit, this case is distinguishable from cases that have found that Uber put users on inquiry notice of its arbitration agreement generally, an issue the Court need not reach here. For example, in finding inquiry notice in *Good*, the Massachusetts court relied on the fact that, if a user clicked on the hyperlinked terms, they would see on the first page the all-caps "important" warning that the terms contained an arbitration agreement that governed "how claims between you and Uber can be brought." 234 N.E.3d at 280. But although the Court found that the link to the terms was sufficient to put a reasonable user on inquiry notice of the arbitration agreement generally under Massachusetts law, it was not sufficient to provide inquiry notice that the terms would affect an existing lawsuit. In fact, as described above, it suggested the opposite by stating only that it would affect how "claims can be brought" going forward.

That the notice here was insufficient is underscored by comparing this to cases in which inquiry notice was found. For example, in *Sacchi v. Verizon Online, LLC*, 2015 WL 765940, at *3 (S.D.N.Y. Feb. 23, 2015), the court found that an email was sufficient to put a plaintiff on notice of a new arbitration agreement in Verizon's

terms of service, where the email stated "[T]he terms now require that you and Verizon resolve disputes only by arbitration or in small claims court," and then provided a link to the dispute resolution provision. Similarly, in *Plazza v. Airbnb, Inc.*, 289 F.Supp.3d 537, 544-45 (S.D.N.Y. 2018), the court found that Airbnb provided inquiry notice of additions to its terms of service where the user was presented with a link to a page that described in detailed plain language what had changed about the agreement and below the paragraph describing the changes was a scrollable version of the Terms of Service. *Id.* Here, unlike in those two examples, there was nothing explaining to Ms. Wu what had changed about the arbitration agreement or that, by continuing, she could be giving up significant rights in her existing litigation. Indeed, "framing the terms as only an 'update' obscured the importance and far-reaching consequences of the terms of use and thereby discouraged [Ms. Wu] from reviewing the terms," even though she was waiving her right to proceed with her existing case in court. *Good*, 234 N.E.3d 262, 297 (Mass. 2024) (Kafker, J., dissenting).

As a result, this case is more akin to *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1035 (7th Cir. 2016), where the Seventh Circuit found that "Transunion's site actively misleads the consumer" by stating that checking a box below the terms and conditions constituted authorization for TransUnion to obtain the user's personal information without mentioning other terms of the contract. Even though the terms

were displayed to the consumer in a scrollable box above the check box, the court held that "[n]o reasonable person would think that" clicking to agree to the personal information disclosure would also constitute acceptance of an arbitration agreement. *Id.* Likewise, here, no reasonable person would think that, by agreeing to an "update" that made "changes to the Arbitration Agreement," they were also agreeing to give up important rights in an existing lawsuit in which they were represented by counsel. R95.

II. The 2021 Terms of Service Should Not be Retroactively Enforced

Even if an agreement were validly formed in 2021—which it was not—that agreement should not be enforced. As an initial matter, contrary to the holding of the Appellate Division below, the enforceability of the arbitration provision must be decided by the Court, not the arbitrator. And the Court should find the arbitration agreement is unenforceable for two independent but related reasons. First, enforcing the agreement would condone Uber's contact with a represented party and interfere with the fair administration of this existing litigation, and therefore the Court should exercise its authority not to enforce the agreement, as courts around the country have routinely done under similar circumstances. Second, the agreement is unconscionable because Uber obtained Ms. Wu's agreement under circumstances

that were deceptive and coercive, and because the agreement waived her fundamental rights in an existing case without sufficient consideration.

A. The enforceability of the arbitration agreement is for the Court, not the arbitrator, to decide.

Uber argues—and the Appellate Division found—that the enforceability of the 2021 terms of service must be decided by an arbitrator because the terms contain a delegation clause. However, before the Court can compel arbitration pursuant to the delegation clause, it must address any challenge by Ms. Wu to the validity and enforceability of the delegation clause itself. *See Rent-A-Center West v. Jackson*, 561 U.S. 63, 71 (2010). Uber contends that Ms. Wu's challenge to the delegation clause is insufficiently specific under *Rent-A-Center* because she does not make any arguments about the delegation clause that are different from her arguments about the arbitration provisions as a whole: She argued that both the delegation clause specifically and the arbitration agreement generally are unenforceable and unconscionable because they were part of an unauthorized communication by counsel with a represented party and because they applied retroactively to require her to give up significant rights in her existing lawsuit. But the Supreme Court recently unanimously confirmed in *Coinbase, Inc. v. Suski*, 144 S.Ct. 1186, 1194 (2024), that the challenge to the delegation clause does not need to be different than the challenge to the arbitration agreement as a whole. The Supreme Court held that its precedent "does not require that a party challenge *only* the arbitration or

delegation provision. Rather, where a challenge applies 'equally' to the whole contract and to an arbitration or delegation provision, a court must address that challenge." *Id.* As the Supreme Court explained, "basic principles of contract and consent require that result. Arbitration and delegation agreements are simply contracts, and, normally, if a party says that a contract is invalid, the court must address that argument before deciding the merits of the contract dispute. So too here." *Id.*

In *Coinbase*, the plaintiffs had argued below only that "courts can refer the question of arbitrability to an arbitrator only 'if a valid [arbitration] agreement *exists*,'" and that no arbitration agreement existed. *Id.* at 1194 n.* (quoting plaintiff's argument in the district court). The Supreme Court held that "challenge was 'directed specifically to' the delegation provision" under *Rent-A-Center*. *Id.* (citation omitted). Here, the challenge made by Ms. Wu to the delegation clause is nearly identical to the challenge that was found to be specific in *Coinbase*. In response to Uber's argument "that the question of 'arbitrability' should itself be decided by an arbitrator," Ms. Wu argued that "for any issue in a case to be submitted to an arbitrator, the party claiming that arbitration should take place must first demonstrate the existence of a *valid and enforceable contract*." R362. "In the absence of an enforceable contract between the parties to arbitrate an issue," she explained, "the arbitrator has no authority to do anything at all." R363. Thus, Ms. Wu's challenge to

the delegation clause on the same basis as the arbitration agreement was sufficient under *Coinbase* and *Rent-A-Center* to require the Court to decide the enforceability of the delegation clause before compelling arbitration.

B. The Court should not retroactively enforce an agreement that Uber presented to a represented party under misleading circumstances after litigation had already commenced.

This Court has inherent authority to regulate the conduct of counsel in this litigation, including ensuring compliance with the New York Rules of Professional Conduct. *See Berkson*, 97 F. Supp. 3d at 411 (concluding that "when necessary" courts may "discount[] the relevance of actions taken in violation of [Rule 4.2]"). It should exercise that authority to refuse to enforce the 2021 arbitration agreement retroactively because it was obtained through an improper, misleading, and coercive communication with a represented party.

Courts routinely exercise their inherent authority to "refus[e] to enforce arbitration agreements instituted through improper means" after the filing of the complaint. *Billingsley v. City Trends, Inc.*, 560 F. App'x 914, 923 (11th Cir. 2014). Although, as Uber points out, some courts ground their authority to do this in Fed. R. Civ. P. 23(d), which allows the court to manage communications with class members, that is not the sole source of the authority. As the Supreme Court has explained, courts also have inherent authority to regulate communications during the pendency of an action in cases that are not governed by Rule 23. *Hoffman-La Roche*

Inc. v. Sperling, 493 U.S. 165, 172 (1989). "This authority is well settled, as courts traditionally have exercised considerable authority 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id.* at 172-73; *see also OConner v. Agilant Solutions, Inc.*, 444 F. Supp.3d 593, 600 (S.D.N.Y. 2020) (in collective action under the FLSA, explaining that court's authority is not limited to Rule 23 class actions and extends to managing communications with potential opt-ins). That is true in New York courts as well. Under the "inherent powers doctrine," each New York court is "vested with all powers reasonably required to enable it to 'perform efficiently its judicial functions to protect its dignity, independence and integrity, and to make its lawful actions effective." *Wehringer v. Brannigan*, 647 N.Y.S.2d 770, 770 (N.Y. App. Div. 1996); *see also Cnty. of Broome v. N.Y. State Law Enforcement Officers Union*, 915 N.Y.S.2d 708, 708 (N.Y. App. Div. 2011) (describing "the courts' inherent authority to maintain the integrity of the judicial process, manage their judicial functions, and guard their independence").

Here, the trial court should have exercised that authority and declined to enforce Uber's arbitration agreement retroactively because agreement to the retroactive term was obtained under circumstances that were both coercive and misleading. As explained by Ms. Wu, defense counsel's involvement in the roll out of the new terms violates Rule 4.2, making the circumstances in which the terms were presented to Ms. Wu improper and coercive. *See OConner*, 444 F. Supp. 3d at

603 (noting that defense counsel was "intimately involved in the rollout of the Arbitration Agreement" as one reason why it was improper and unenforceable); *see also Berkson*, 97 F. Supp. 3d 359, 411 (explaining that one primary purpose of Rule 4.2 is to prevent "attorneys from exploiting the disparity in legal skills between attorneys and laypeople").

Moreover, the way the agreement was presented to Ms. Wu was misleading and deceptive because neither the notice of the update nor the agreement itself disclosed that, by signing, Ms. Wu would be giving up her rights in this lawsuit. That is sufficient by itself to render the agreement unenforceable. *See* American Law Institute, Draft Restatement of the Law Consumer Contracts § 6(a), (b) (contracts obtained by deception, including "obscuring the presentation of a material term" are unenforceable); *see also OConner*, 444 F. Supp. 3d at 603 (arbitration agreement was unenforceable where employees were asked to sign within two days and employer "did not disclose that, by signing the Arbitration Agreements, putative plaintiffs would lose their right to participate in this lawsuit"); *Kater*, 423 F. Supp. 3d at 1063 (notice of updated terms of service that mentioned existing lawsuit were still misleading because "they fail[ed] to meaningfully inform users about their potential rights" and were "written in dense language, rather than in language designed for laypersons.").

The agreement was misleading in other ways, too. For example, as described above, the retroactivity term was buried deep in the terms of service and written in legalese that would be difficult for a reasonable consumer to understand. *Williams v. Securitas Sec. Servs. USA, Inc.*, 2011 WL 2713741, at *3 (E.D. Pa. July 13, 2011) (finding agreement misleading and unenforceable that was "crafted so as not to be easily understood by lay persons," including "heavy use of legal jargon"); *see generally* Roseanna Sommers, *What do consumers understand about predispute arbitration agreements? An empirical investigation*, 19 PLoS One (February 23, 2024).[2] And the notice of the update did nothing to draw attention to that term or any other new term, simply noting that the arbitration agreement had been changed. *See Chen-Oster v. Goldman, Sachs & Co.*, 449 F.Supp.3d 216, 271 (S.D.N.Y. 2020) (agreements were misleading because they were procured "using a new electronic procedure that obfuscated the expanded scope of mandatory arbitration").

Finally, the circumstances under which Ms. Wu entered the agreement were inherently coercive because the terms were presented to Ms. Wu as a condition of continuing to use Uber's service, without any option to opt out. *See Kater v. Churchill Downs Inc.*, 423 F. Supp. 3d 1055, 1062-63 (W.D. Wash. 2019) (finding that class action waiver was presented in coercive manner because users of an online game were presented with a pop-up window that gave them "a stark choice:

[2] *Available from* https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0296179.

relinquish your class action rights and continue playing or maintain your rights and forfeit access to [defendant's] games"); *McKee v. Audible, Inc.*, 2018 WL 2422582, at *6 (C.D. Cal. Apr. 6, 2018) (finding agreement was presented in coercive manner because "Audible asked putative class members to give up their ability to participate in the pending action (or any class action for that matter) in exchange for continued use of the Audible service"); *Jimenez v. Menzies Aviation Inc.*, 2015 WL 4914727, at *6 (N.D. Cal. Aug. 17, 2015) (holding that circumstances of post-litigation arbitration agreement were coercive because employer "provided no opportunity to opt-out of its new policy, making assent to the [arbitration] policy a condition of employment"); *Cf. Haider v. Lyft, Inc.*, 2021 WL 3475621, at *2 (S.D.N.Y. Aug. 6, 2021) (finding that "minor revisions" to existing arbitration agreements after litigation had commenced were not misleading where they "inform[ed] potential class members of their impact on pending litigation and provide[d] a mechanism for opt-out").

In short, Uber's updated terms of service are just the type of deceptive communication with an unrepresented party during pending litigation that courts have found to be unenforceable, and it should not have been enforced here.

C. The 2021 arbitration agreement is unconscionable because it purports to retroactively waive Ms. Wu's rights in this litigation.

For many of the same reasons, applying the 2021 terms to retroactively to force Ms. Wu to arbitrate—whether on arbitrability or the merits—would be

unconscionable. Specifically, the retroactivity provision is procedurally unconscionable because, not only was it a take-it-or-leave-it contract that forced Ms. Wu to choose between getting an Uber ride or agreeing to the terms, but Uber failed to clearly disclose in either the notice or the agreement itself that it could affect Ms. Wu's rights in existing litigation. "A party acts unconscionably when it omits material information from a contract regarding the consumer forfeiture of important protections." *Id.* at 251. *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 250-51 (S.D.N.Y. 2005) (explaining that contract is unenforceable when "consumers are not advised of the rights they are forfeiting"); *see OConner*, 444 F. Supp. 3d at 603 (finding arbitration agreement unconscionable because employer asked employees to sign "without disclosing the pendency of this litigation"). Indeed, the retroactivity provision was buried deep within the terms of service without anything to draw attention to its importance regarding the existing litigation. *Cf. Gillman v. Chase Manhattan Bank, N.A.*, 534 N.E.2d 824, 828 (N.Y. 1988) (one factor courts should look at for procedural unconscionability is "the use of fine print" and finding no unconscionability where bold lettering drew the signatory's attention to contract terms).

And the retroactivity provision is substantively unconscionable because it requires Ms. Wu to waive rights she had already invoked in litigation without providing any additional consideration in exchange. *See Billingsley v. City Trends,*

Inc., 948 F. Supp. 2d 1287, 1298 (N.D. Ala. 2013), *aff'd* 560 F. App'x 914 (11th Cir. 2014) (arbitration clause imposed after litigation began was substantively unconscionable in part because it forced plaintiffs to forfeit their rights to participate in ongoing litigation); *see also In re Friedman*, 407 N.Y.S.2d 999, 999 (N.Y. App. Div. 1978) (explaining that "grossly inadequate consideration" is an example of a substantively unconscionable term).[3] Because Ms. Wu had already sued Uber and was represented by counsel, this case is different than those cited by Uber in which courts have upheld arbitration agreements that apply retroactively to claims that arose before the agreement was signed but had not yet been filed. *See* Uber Br. at 61. In short, Uber asked a represented party who had already initiated a claim in court to execute a waiver of their significant right to a jury trial, in exchange for nothing more than a few-dollar ride. No reasonable consumer would have expected that was the bargain they were making, and it should not be enforced here.

[3] Uber contends that applying the 2021 agreement retroactively is not substantively unconscionable because Ms. Wu had already agreed to arbitration in 2016, before she initiated suit. Yet that argument is belied by Uber's zealous efforts to enforce the 2021 agreement here. As explained persuasively in Ms. Wu's brief, the 2016 agreements were never formed and were unenforceable, meaning that, absent the retroactive enforcement of the 2021 agreement, there was no requirement that she arbitrate her claims. *See, e.g.*, *Castro v. Jem Leasing, LLC*, 183 N.Y.S3d 744, 744 (N.Y. App. Div. 2023) (finding that, as to terms in effect in 2018, "Uber failed to establish that the Uber app constituted a valid clickwrap agreement putting plaintiff on inquiry notice of contract terms"); *Kauders v. Uber Technologies, Inc.*, 159 N.E.3d 1033, 1055 (Mass. 2021) (concluding that Uber's pre-2021 update terms were invalid); *Cullinane v. Uber Technologies, Inc.*, 893 F.3d 53, 64 (1st Cir. 2018) (same). Further, even if Ms. Wu was required to arbitrate under the 2016 agreements, applying any different terms from the 2021 agreement to her existing lawsuit would still be unconscionable given the lack of notice of the retroactivity provision.

CONCLUSION

For the foregoing reasons, this Court should reverse the Order of the Appellate Division, and Uber's motion to compel arbitration should be denied.

Dated: July 3, 2024

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CERTIFICATION PURSUANT TO § 500.13(c)(1)

Pursuant to § 500.13(c)(1) of the Rules of Practice of the Court of Appeals of the State of New York, I hereby certify that this brief was prepared on a computer using Microsoft Word in double-spaced 14-point Times New Roman font, with 1-inch margins. According to the word count of the word-processing system used to prepare this brief, the total word count of this brief is 4,606 words, inclusive of point headings and footnotes, and excluding signature blocks and other material omitted under Rule 500.13(c)(3).

Shelby Leighton