To Be Argued By:
Joshua D. Kelner
Time Requested: 30 Minutes

APL-2023-00203

Bronx County Clerk's Index No. 33964/2020E
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.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

Uber does not deny that it specifically intended to use the 2021 "update" to its terms as a vehicle to remove pending cases from the courts, without notice to opposing counsel, in furtherance of its desire to force "all personal injury actions into arbitration." (Def.Br.71). It also makes no attempt to disavow the potentially harmful effects of its position for consumers. It argues, though, that there is nothing the courts can do about it.

It says that the law of attorney ethics poses no obstacle because it was trying to impact many cases, and not just one. (Def.Br.67-70).

It says that the law of contracts poses no obstacle because a court's only proper role is to make sure a consumer knew that there was some sort of agreement in front of her (Def.Br.42), even if that agreement contained oppressive terms beyond the realm of her reasonable expectations for the transaction or was worded misleadingly.

It says the law of unconscionability poses no obstacle because an agreement to delegate a particular issue to an arbitrator is just a procedural detail. (Def.Br.85). Besides, it continues, the ability to use its product is consideration enough for virtually whatever onerous clause it might write into its terms. (Def.Br.87).

This is wrong. Uber's calculated circumvention of Ms. Wu's attorneys through an "update" to its terms of use, in order to displace the forum she had already chosen for her lawsuit, should not be rewarded. First, the whole point of the no-

contact rule is to prevent attorneys from taking advantage of represented parties. Uber was no more permitted to use mass communications to accomplish that purpose than it would have been to call each individual on the phone. Second, Ms. Wu did not assent to the arbitration of her case; the notion that an "update" to generally applicable terms of use for a software application could affect a pending lawsuit was far beyond the reasonable expectations of an offeree in context of the transaction at issue. This is no less true under New York law than that of any other state. Third, the agreement was unconscionable, as plaintiff received no meaningful consideration for sacrificing a right she *already* had invoked to seek recourse through the courts.

Uber also contends that some benefit should inure to it because it had an arbitration clause in its 2016 terms, which existed when Ms. Wu first signed up for the service. The problem is that Uber did not give its users reasonable notice of these terms either. Uber *chose* to push the envelope in 2016, when it was facing stiff competition for market share in a growing industry, by trying to downplay the gravity of its terms to new users. For that reason, courts across the country have found the 2016 terms unenforceable, including the Massachusetts Supreme Court in *Kauders*. It is precisely *because* Uber has now learned through litigation that its 2016 attempt to mislead its new customers was ineffectual that, in 2021, it wishes to

find a way to bring those same once-misled customers into an arbitration agreement retroactively. It is trying to mislead the same people a second time.

This case underscores why there must be guardrails in place to protect consumers doing business on the internet from predatory behavior they have no realistic chance of expecting or avoiding. The Appellate Division's order should be reversed.

ARGUMENT

I. Uber Violated The No-Contact Rule And Should Be Precluded From Enforcing Its Unethically Obtained Waiver And Otherwise Sanctioned

Uber violated the no-contact rule. It should, at minimum, be barred from making use of its unethically obtained jury trial waiver. Its evasions here are unavailing.

A. There is no reasonable question that plaintiff preserved her objection to the terms themselves, as it was the entire subject of the motion practice below

First, Uber's claim that plaintiff's argument in the underlying motion practice was limited to complaints about its having e-mailed her (Def.Br.70-71) is simply wrong. Indeed, the First Department rejected defendant's preservation argument on this point and addressed the issue on its merits. (R660-61).

Plaintiff's submissions in the motion court repeatedly argued that Uber acted unethically by putting new terms before her that retroactively affected her pending lawsuit without notice to her attorney. Her argument very clearly was not restricted

to the act of sending an e-mail. To offer one example from her papers in the motion court: "[U]ber intentionally and carefully drafted new terms of service so that they would apply to past claims, including those that were the subject of pending lawsuits in which a person was already represented by counsel…This was an intentional, unethical policy by the company…." (R75). This same argument appeared throughout her briefs, starting in her preliminary statement in her motion (R62) and continuing through her affirmation opposing Uber's cross-motion (R346-47). She also argued that the clickwrap dialogue box, in particular, was "underhanded and improper." (R357). Even Uber did not contend that plaintiff failed to object to the terms themselves.

B. The court has the inherent authority to impose an appropriate remedy for Uber's violation of Rule 4.2

Uber, consistent with its view that the law cannot stop it from targeting unwitting represented parties, argues that the Court lacks the ability to sanction it for violating Rule 4.2. (Def.Br.64-65). At a bare minimum, the Court has the authority to prevent Uber from enforcing a jury trial waiver procured in violation of attorney ethical rules. In her prior brief, plaintiff cited a number of cases which held that courts can (and should) estop parties from utilizing unethically obtained advantages in litigation. *See* Pltf.Br.31; *United States v. Hammad,* 858 F.2d 834, 842 (2d Cir. 1988); *Salgado v. Carrows Restaurants, Inc.*, 2021 WL 2199436 (Cal. Ct. App. 2021). *See also Harris v. Erie County Med. Ctr. Corp.*, 175 A.D.3d 1104, 1107 (4th

Dept. 2019). Uber does not so much as mention these cases in its brief, let alone explain why they should not be followed.

Uber devotes a great deal of attention to arguing that its Answer cannot be stricken. (Def.Br.65). It appears to be of the view that the courts' authority to sanction misconduct is limited to whatever power is expressly conferred through the CPLR. Courts have the *inherent* authority to impose appropriate penalties on litigants for misconduct, which can include striking a pleading. *See, e.g., Wehringer v. Brannigan*, 232 A.D.2d 206, 207 (1st Dept. 1996) (noting inherent power of court to issue orders necessary to "perform efficiently its judicial functions, to protect its dignity, independence and integrity" and directing dismissal). Uber even conceded in the motion court that courts have "intrinsic authority to sanction egregious misconduct by striking pleadings." (R518).

Uber next asserts that it did not violate Rule 4.2. We will address its contentions in turn.

First, it argues that its communications did not relate to the subject of plaintiff's representation by counsel, which is specious. (Def.Br.66). The reason we are here is because Uber itself claims that the terms of use were intended to affect plaintiff's pending lawsuit.

Second, it asserts, again, that it did not know Ms. Wu was represented. In an attempt to avoid scrutiny of its manifestly deficient evidentiary submissions below,

it contends that this Court "lacks jurisdiction" to review what it refers to as the motion court's "fact finding." (Def.Br.67-68). It cites *Congel v. Malfitano*, 31 N.Y.3d 272, 294 (2018), a case in which the Court found it could not review a factual determination that a trial court made after hearing "expert testimony and other evidence" concerning the value of a partnership. The motion court did not conduct any such fact finding here. It was presented with what Uber itself describes as, in effect, a summary judgment motion (Def.Br.43) and misapplied settled law about how to treat a party's conclusory denial of actual notice of service. *See* Pltf.Br.24-27. This Court has addressed that same legal question on numerous occasions. *See, e.g., Engel by Engel v. Lichterman*, 62 N.Y.2d 943 (1984); *CIT Bank N.A. v. Schiffman*, 36 N.Y.3d 550, 556 (2021); *Kihl v. Pfeffer*, 94 N.Y.2d 118, 122 (1999).

In plaintiff's opening brief, she discussed why the conclusory affidavit of a paralegal who had never even been to the New York office did not represent probative evidence. (Pltf.Br.24-27). Uber does not devote a single word of its lengthy brief to trying to explain how this affidavit could even possibly suffice under New York's settled law. The affidavit also is demonstrably untrue, as Uber answered in numerous cases where it was served at the same address. Uber ventures that it could have been served in other ways, such as at its headquarters in California. But as the motion court noted, there were at least 26 cases where it was served only at the allegedly shuttered New York office and still somehow managed to answer.

(R52 n.20). To offer one example, in late 2020, Shantassia Lee sued Uber Technologies. She did not name any other parties. (R421-22). She served it through the Secretary of State on November 3, 2020, a few weeks before Ms. Wu did so. (R421). Uber responded to the Complaint through counsel. (R422).

Uber also does not deny that it would have sent plaintiff the exact same communication, and taken the exact same position in this litigation, regardless of its knowledge of Ms. Wu's representation status. It contends, however, that its claimed lack of knowledge meant it was allowed to do whatever it wished because it would be "unfair to sanction an attorney who did not know…that he was communicating with a represented person." (Def.Br.69).

This ignores that, under RPC 4.2, "the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious." RPC 4.2, comment [8]; *Schmidt v. State*, 279 A.D.2d 62, 66 (4th Dept. 2000). Plaintiff previously discussed *Scott v. Chipotle Mexican Grill, Inc.*, 2014 WL 4852063 (S.D.N.Y. 2014) (Pltf.Br.27-28), in which Chipotle's lawyers inadvertently failed to recognize that a witness was a member of a class before interviewing him and were precluded from using a statement they obtained because it was procured in violation of RPC 4.2. Uber tries to distinguish the case on the basis that the witness' party status in *Scott* was available on ECF and it had "no comparable reason to know that any of the millions of users….was a represented claimant." (Def.Br.67). Laying

aside that Ms. Wu's represented status was also available on NYSCEF, this ignores the fact that Uber *intended* to reach represented claimants *en masse*. The fact that a party tried to violate many attorney-client relationships at the same time, rather than just one, does not make it more palatable. In the class action context, Rule 4.2 prevents lawyers from engaging in contact with members of a certified class that would affect a case, regardless of whether they can name all the class members.

Third, Uber contends that there is no proof lawyers were involved in drafting the relevant communications and terms. (Def.Br.67). Plaintiff's motion sought a hearing to determine the nature and extent of the lawyers' involvement. If there is any question on this record at all about whether a multinational company's sizeable legal department was involved in a complex legal decision, it would be a matter for a hearing. The only reason we do not know the identities of the lawyers involved is because Uber chose to hide them behind the affidavit of a paralegal who lived halfway across the country from its main office and knew nothing about the circumstances under which the terms were drafted. It also says that the communications were sent by its "operations team (nonlegal) and not by any attorney." (Def.Br.67) (quotations omitted). "A lawyer may not make a communication prohibited by [RPC 4.2(a)] through the acts of another." RPC 4.2, comment [10].

Fourth, Uber dwells on the fact that the update was sent to all users. While that may be so, the update contained a term that was intended to relate specifically to represented parties. An unethical term buried in the haystack of a larger agreement remains unethical.

Uber fails to offer any persuasive distinction between this case and the class action decisions plaintiff cited, in which courts found that corporations violated Rule 4.2 by using mass communications to try to gain advantage in litigation. It writes that these cases related to the "specific (and unique) power under Federal Rule of Civil Procedure 23(d) to supervise communications between attorneys and putative class members." (Def.Br.74). FRCP 23(d) gives courts the authority to "protect class members and fairly conduct the action," which can include issuing prophylactic orders relating to certain kinds of communications or imposing penalties for misleading ones. But in the cases plaintiff cited, courts specifically found violations *of Rule 4.2*. *See* Pltf.Br.20-22; *Gortat v. Capala Bros., Inc.*, 2010 WL 1879922, *2 (E.D.N.Y. 2010); *Tedesco v. Mishkin*, 629 F. Supp 1474, 1483 (S.D.N.Y. 1986). In cases like these, FRCP 23 was sometimes the procedural mechanism by which a litigant brought on an application for relief; but it was not the *substantive* basis for the court's finding of an ethical breach.

Uber committed exactly the same kind of ethics violation here: it systematically violated the rights of represented parties by circumventing their

attorneys through mass communications. It does not matter whether a case was a class action or one for personal injury. In either instance, the plaintiff has the same relationship with her counsel and the corporation's mass communication identically breaches its sanctity.

While Uber contends that class action lawsuits have no relevancy to this case, *it* relies heavily on two such cases for its own arguments. (Def.Br.72-73). Those cases are readily distinguishable. In one of them, *Haider v. Lyft, Inc.,* 2021 WL 3475621 (S.D.N.Y. 2021), Lyft sent new terms of service to drivers who were putative class members, with a specific notice to "inform potential class members of their impact on pending litigation and provide a mechanism for opt-out." *Id.*, *2. The court held that, because the drivers already were subject to an undisputedly valid arbitration clause, the company merely had made "minor revisions to existing arbitration provisions in the ordinary course of business" that were well described and explicitly disclosed. *Id.* Here, Ms. Wu, unlike the plaintiffs in that case, never previously validly assented to arbitration and Uber, unlike Lyft, did not provide a detailed explanation of the update's effect on ongoing lawsuits or an opt-out mechanism. The court explicitly distinguished its holding from cases in which there were "major" changes, like "introducing a novel arbitration agreement." *Haider v. Lyft, Inc.*, 2022 WL 1500673, at *2 (S.D.N.Y. 2022). It therefore sheds no light on the issues at bar. *See also Miracle-Pond v. Shutterfly, Inc.*, 2020 WL 2513099 (N.D.

Ill. 2020) (revision to existing, enforceable arbitration agreement circulated to uncertified potential class members).

Uber also contends that preventing corporations from weaponizing their terms of use would somehow "make it impossible for companies to respond to routine customer inquiries" because "[a]ny given employee will have no way to know which consumers may have legal claims against the company." (Def.Br.73). It is difficult to see how any of this is so – particularly given that, as Uber itself acknowledges, companies already deal with similar restrictions during class action lawsuits after certification. Rule 4.2 allows litigants to interact with each other on matters unrelated to the subject of a case. As long as the employee did not enter his or her "routine" interactions with customers secretly brandishing liability waivers, the interaction would not run afoul of any rule.

II. Emily Wu Did Not Agree To Arbitration With Uber, As It Failed To Procure Her Legitimate Assent To Its Terms

Ms. Wu did not agree to arbitration. The clause was beyond her reasonable expectations and she should not have been required to ferret out Uber's trickery. It should not be enforced.

A. In New York, as elsewhere, inquiry notice takes account of the expectations of the offeree

Uber attempts to cast New York law as rigid and inflexible, incapable of accommodating even minimal scrutiny of standardized agreements. In doing so, it

devotes the bulk of its time to discussing principles no one here is disputing. It cites a number of cases holding that the failure to read a contract does not excuse a person from compliance with it. *See, e.g., Morris v. Snappy Car Rental, Inc.*, 84 N.Y.2d 21 (1994). That is certainly true, as a general proposition. But the question here is whether, when evaluating electronic contracts, that principle is qualified by any exceptions when necessary to protect the core principle that contractual agreements require mutual assent.

Uber appears to agree that "inquiry notice" is a relevant factor in assessing an electronic agreement. (Def.Br.41). But it refuses to accept the conceptual implications of using that doctrine as conventionally understood. In plaintiff's brief, she cited a series of cases which explained that inquiry notice, by definition, entails consideration of the circumstances surrounding a transaction, including the offeree's reasonable expectations as to the nature and scope of the agreement. (Pltf.Br.38-39). Uber distinguishes some of these cases on their facts (Def.Br.37-38), but never meaningfully refutes the point that inquiry notice does not typically just mean that a party knew there was some form of agreement at play. Nor could it. "Under New York law, inquiry notice calls for a highly fact-specific inquiry" which takes account of whether "the offeree is an unsophisticated party, or where the relevant terms are not diligently and conspicuously called to the offeree's attention by the offeror." *Fisher v. Aetna Life Ins. Co.*, 32 F.4th 124, 138 n.4 (2d Cir. 2022).

Uber says that the concept that a party is bound to a writing, even if she did not read it, dates back in New York law to "at least 1871." (Def.Br.33). The concept that a party is not necessarily bound to inquiry notice of unexpected terms in form contracts under New York law dates back to at least 1870. *See Blossom v. Dodd*, 43 N.Y. 264 (1870) ("the circumstances attending the delivery of the card repel the idea that the plaintiff had such knowledge [of the waiver], or assented in fact to the terms of the alleged contract").

In *Healy v. New York Cent.*, 153 A.D.3d 516 (3rd Dept. 1912), *aff'd*, 210 N.Y. 646 (1914), this Court addressed an early antecedent of Ms. Wu's case. The plaintiff checked a valuable handbag at a train station package room and was given a claim "coupon." It said on the front "N.B. See conditions on back." *Id.* at 517. A number of terms were printed on the back, including a clause limiting the station's liability in the event of loss. The Third Department held that the term was unenforceable because there "no notice whatever was given to the bailor of the existence of this condition" and nothing about the transaction "would tend in any way to suggest to a reasonably prudent man or lead him to suspect the existence of such a special contract." *Id.* at 519. In the "mind of the bailor," the Court reasoned, "the little piece of cardboard which was undoubtedly hurriedly handed to him and which he doubtless as hurriedly slipped into his pocket…did not arise to the dignity of a contract by which he agreed that in the event of a loss of the parcel," he would accept

only a limited sum as compensation. This Court affirmed. *See Healy*, 210 N.Y. 646 (1914). *See also Klar v. H. & M. Parcel Room*, 270 A.D. 538 (1st Dept. 1946) ("it cannot be said that a mere acceptance of the parcel check by the bailor with the printed matter thereon, as a matter of law, sufficiently brought to plaintiff's attention the limitation of liability"), *aff'd*, 296 N.Y. 1044 (1947); *Arthur Philip Export Corp. v. Leathertone, Inc.*, 275 A.D. 102, 106 (1st Dept. 1949) (issue of fact as to whether "presence of" arbitration clause "on the back of respondent's confirmatory order was" properly "called to its attention"). *See also Lipper Holdings v. Trident Holdings,* 1 A.D.3d 170, 171 (1st Dept. 2003) ("contract should not be interpreted to produce a result that …contrary to the reasonable expectations of the parties").

While the answer to this case is not wholly to be found in turn of the century case law, the notion that New York law requires a superficial and mechanistic application of the inquiry notice standard that excludes consideration of the circumstances of a transaction is simply not true.

B. The Restatement restricts use of terms that are onerous, oppressive, or otherwise beyond the reasonable expectations of an offeree presented with a form contract, which is particularly important in context of electronic contracts

Uber's discussion of the Restatement (Second) on Contracts §211(3) is similarly flawed. It contests the *meaning* of the Restatement, which it claims only prohibits the inclusion of terms that are "essentially 'unconscionable'" in standard form contracts. (Def.Br.39). But it does not appear to deny that an oppressive or

unconscionable term in a standardized contract can properly be read out of a standardized agreement. The term in Ms. Wu's case *was* oppressive and unconscionable. And regardless, §211(3) is not restricted to unconscionable terms. It relates to instances where the offeror "has reason to believe the party manifesting such assent would not do so if he knew that the writing contained a particular term," which can be "inferred from the circumstances." Restatement (Second) on Contracts §211, Commentaries. Section 211 "provides a seemingly reasonable compromise to address the problems of standard consumer contracting" by allowing sellers to "utilize standardized agreements and to rely on assent to them, even if customers do not read them" while also restricting "a seller's use of onerous, objectionable, or unexpected terms when that seller is attempting to take advantage of a consumer's blanket assent." Eric A. Zacks, *The Restatement (Second) of Contracts § 211: Unfulfilled Expectations and the Future of Modern Standardized Consumer Contracts*, 7 Wm. & Mary Bus. L. Rev. 733, 757 (2016). It, in other words, it "recognize[s] the marketplace as it now exists, while imposing just limits on business practice." *Darner Motor Sales Inc. v. Universal Underwriters Ins. Co.*, 140 Ariz. 383, 394 (Ariz. 1984).

The principle expressed in the Restatement is violated when, as here, the consumer "did not receive full and adequate notice of the term in question, and the provision is either unusual or unexpected…." *Gordinier v. Aetna Casualty and*

Surety Co., 154 Ariz. 266, 273 (1987). *See also State Farm Mut. Auto. Ins. Co. v. Roberts*, 166 Vt 452, 461 (Vt. 1997) ("The reasonable expectations of the parties are important in considering the scope of coverage provided in insurance contracts because such contracts, largely adhesive in nature, often contain boilerplate terms that are not bargained for, not read, and not understood by the insureds"); *Sutton v. Banner Life Ins. Co.*, 686 A.2d 1045, 1050 (D.C. 1996) (adopting Restatement in interpretation of insurance contract); *Max True Plastering Co. v U.S. Fid. and Guar. Co.*, 1996 OK 28, ¶ 8 (Ok. 1996) (taking account of reasonable expectations for insurance contracts with technical, potentially obscure provisions); *Lauvetz v. Alaska Sales and Serv.*, 828 P.2d 162, 165 (Alaska 1991) (employing analysis based on Section 211).

Uber complains that paying any heed to whether a consumer was surprised by an unexpected term in an electronic contract would "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…." (Def.Br.32). But the Restatement "does not set a premium on failure to read." *Darner*, 140 Ariz. at 383. It only "applies to contracts…made up of standardized forms which, because of the nature of the enterprise, customers will not be expected to read and over which they have no real power of negotiation." *Id.* In the unique context of electronic contracts, that principle is of vital importance.

Uber also contends that electronic contracts are no different than paper ones and should be approached in exactly the same way. (Def.Br.34). This case does not require any new doctrinal concepts inapplicable to paper contracts. It merely requires the application of traditional contract law doctrines – inquiry notice, the Restatement's treatment of standardized terms, and the core principle that no agreement can exist without a meeting of the minds – to a kind of agreement that has only recently become ubiquitous.

Electronic contracts are not, however, identical to paper ones. A paper contract will have clearly visible clauses, which at least are sufficient to show an offeree there is an agreement of significant scope being put before her. Electronic contracts contain far more terms than a user might expect because they have no physical length limit. They are often presented with breezy notices like the one Uber included here, which obscure that the user is being asked to accept anything of significance. The euphemistic phrase "Terms of Use" lacks an identifiable meaning and, without proper notice, a user may not appreciate she is being asked to accept a weighty contract. *See Kauders v. Uber Technologies*, 486 Mass. 557, 575-76 (Mass. 2021); *Applebaum v. Lyft*, *Inc.*, 263 F. Supp. 3d 454, 466 (S.D.N.Y. 2017).

We know from the research that consumers are not reading or understanding electronic contracts and from cases like this one that they are subject to significant abuses. (Pltf.Br.37). That is all the more reason to bring to bear the traditional tools

of contract law that protect the requirement of mutual assent when evaluating them. Despite its protestations that electronic contracts are no different from paper ones, even Uber itself proposes a specialized test (*Brooks*) for the evaluation of electronic contracts. (Def.Br.30).

C. A sensible approach to electronic contracts takes account of the expectations of the reasonable consumer in entering the transaction

A sensible approach to electronic contracts takes account of the expectations of the reasonable consumer in entering the transaction, which includes consideration whether the reasonably prudent offeree would have been on notice of what they were agreeing to. (Pltf. Br.44-45).

The approaches adopted by Judge Weinstein in *Berkson* and by the Massachusetts Supreme Court in *Kauders* both take account of settled contract law principles by finding that, for a consumer to be bound to an arbitration clause, there must be some consideration of whether the consumer was reasonably notified of, or could otherwise have expected, the *substance* of what she was agreeing to.[1] Uber devotes a great deal of attention to complaining about the *Berkson* approach, which

[1] Uber's brief includes a puzzling digression in which it asks the Court to overrule *God's Battalion of Prayer Pentecostal Church v. Miele Associates, LLP*, 6 N.Y.3d 371 (2006), which required, applying a longstanding rule, that an agreement to arbitrate be "clear, explicit, and unequivocal." (Def.Br.26-28). Uber claims the rule violates the FAA because it disfavors arbitration. The standard does not violate the FAA because it is not limited to arbitration and applies generally to forum selection clauses. *See Gangel v DeGroot*, 41 N.Y.2d 840, 841 (1977). But there is no need to address the issue here because it is purely academic. None of plaintiff's arguments rest on any application of this rule.

requires clear notice of terms adverse to the interests of an offeree.[2] *Berkson* is eminently sensible, given everything we know about the processes by which electronic contracts are formed.

Uber has much less to say about *Kauders*, which treats the question of "whether the notice conveys the full scope of the terms and conditions" as part of the consideration of whether there was "reasonable notice of the terms." *Kauders*, 486 Mass. at 573. Uber tries to sidestep *Kauders* – which invalidated essentially the same version of Uber's terms it is relying on here from 2016 – purely on its facts. (Def.Br.15). But it does not explain why the approach the Massachusetts Supreme Court unanimously adopted is either unworkable or unadvisable. Either *Berkson* or *Kauders* provides an appropriately balanced methodology for the evaluation of electronic agreements. Uber's framework, which gives it *carte blanche*, does not.

Uber also says that courts around the country "routinely uphold" clickwrap agreements. While we have no quarrel with the proposition that a properly constructed clickwrap can be a valid way to put an agreement before a user, the cases

[2] Uber argues, for the first time here, that *Berkson* violates the FAA by adopting a rule that impermissibly restricts arbitration. A nonpretextual rule of State law that happens to sweep in arbitration clauses is permissible. *See Morgan v. Sundance*, – U.S. – , 142 S.Ct. 1708 (2022) ("federal policy is about treating arbitration contracts like all others, not about fostering arbitration"); *Manhattan Cryobank, Inc., v. Hensley*, 2020 WL 4605236 (S.D.N.Y. 2020) (upholding CPLR provision relating to enforceability of arbitration clauses involving infants); *Blair v. Rent-A-Ctr., Inc.*, 928 F.3d 819, 824 (9th Cir. 2019) (California rule of law finding that the right to seek an injunction of a deceptive practice for benefit of the public could not be waived by contract did not violate the FAA). *Berkson* is not an arbitration-specific rule. It contains a detailed matrix of rules governing the interpretation of electronic contracts.

Uber cites on this point from other state courts largely do not support its position. (Def.Br.29). Uber cites three cases that did not address the enforceability of clickwraps (*Airbnb, Inc. v. Rice*, 518 P.3d 88 (Nev. 2022) and *Airbnb, Inc. v. Doe*, 336 So.3d 698 (Fla. 2022), and *Vacco v. Microsoft Corp.*, 260 Conn. 59, 62 (2002)); another two which found them unenforceable (*StubHub, Inc. v. Ball*, 676 S.W.3d 193, 201 (Tex. App. 2023) and *State ex rel. U-Haul Co. of W. Virginia v. Zakaib*, 232 W.Va 432, 444 (W.Va.2013)); and another that involved an internal corporate process for employees (*Skuse v. Pfizer*, *Inc.*, 244 N.J. 30, 58 (N.J. 2020).

Another of the cases it cites, *Sellers v. JustAnswer LLC,* 73 Cal.App.5th 444 (Cal. 2021), followed a methodology very much like *Berkson* and *Kauders* in invalidating a class action waiver provision that was included in the sign-in process for a product trial. The court conducted a lengthy and thoughtful discussion of the material differences between online and paper contracts. *See id.* at 461-63. It found that the "onus must be on website owners to put users on notice of the terms to which they wish to bind consumers" and concluded that the company had failed to provide sufficient notice of the waiver at issue. *See id.* at 480. It reasoned that the consumer would not have expected that a trial period for a new user "would be governed by 26 pages of contractual terms" and that the "transactional context is an important factor and is key to determining the expectations of a typical consumer." *Id.* at 30 (emphasis added). We agree with *Sellers*' mode of analysis.

D. Ms. Wu never agreed to remove her pending case from the courts

Uber failed to secure plaintiff's legitimate assent to remove her pending case from the courts.

It first tries to avoid consideration of the issue by arguing that Ms. Wu had actual notice of the 2021 terms. (Def.Br.42). It does not deny that it failed to raise this argument in the underlying motion practice and brought it up for the first time on appeal. While it tries to explain this away by saying that the First Department considered the issue in the "interests of justice" (Def.Br. 42), the court's decision said nothing of the sort. The First Department merely erroneously took up an argument that had not been preserved.

Uber also never even *alleged* that plaintiff accessed the terms. All Mr. Buoscio said in his affidavit was that she "clicked the box and tapped 'Confirm'" (R228) and all its counsel argued was that "[b]y not disputing her act of clicking her acceptance to the updated Terms…plaintiff essentially concedes she is bound…" (R523). Her only obligation in opposing Uber's motion was to respond to the argument Uber had raised about the legal significance of the checkbox.

In response, Uber argues that it is somehow significant the printed text below the checkbox said that a user had "reviewed and agree[d] to the terms of use." (Def.Br.42). But the mere fact that there was form language next to the box obviously does not signify she accessed the terms. If she had, Uber would

undoubtedly have a record of it – and it has never even *asserted* as much in its evidentiary submissions, let alone tried to show it. Her affidavit also broadly averred that she had no idea Uber was asking her to waive her right to a jury through its terms and was more than sufficient to establish she had, as she said, that she "never imagined" Uber was asking her to waive her right to a jury trial and was not actually aware she was being asked to do so. (R92-93). If there is any question on this point, it is a matter for a hearing.

Uber next argues that its 2021 terms were sufficient because (1) its application advised Ms. Wu she was being asked to accept an "update"; (2) she was required to click a checkbox, which had language beneath it purporting to signify she accepted the terms; and (3) if she had reviewed the terms, she allegedly should have been able to figure out what they meant. (Def.Br. 44-50).

Uber fails to acknowledge plaintiff's status as a represented party with a pending lawsuit. Nothing in Uber's process would have alerted a user to the possibility that she was being asked to waive a right to judicial process in a pending case without involvement of her attorney. The language in Uber's notices was particularly misleading, as it implied that the only effect of the "update" would be prospective in nature. Uber says that it never explicitly "assured Plaintiff that the arbitration agreement was purely prospective." (Def.Br.50). Perhaps. But it

certainly strongly implied as much by saying its "update" would "go into effect" on a later date.

Uber's attempt to explain away the importance of the prospectively phrased prefatory language in the terms themselves (R117) is also telling. It says that "[h]ighlighting certain provisions that the agreement 'contains' is not a representation that the agreement *only* contains those provisions." (Def.Br.49). Saying to a person, "Here is an agreement, it contains a provision about how future claims can be brought" may not be an affirmative *denial* that it contains retroactive ones too, but it is, at best, *highly* misleading. Even the rare user who clicked the link and tried to figure out what the terms meant would have been deceived.

For all these reasons, no reasonably prudent consumer would have anticipated that, by accepting what was portrayed as an unremarkable "update" to Uber's terms, she was being asked to remove a pending lawsuit, in which she was represented by counsel, from the courts. *See, e.g., Kauders*, 486 Mass. at 572; *Sarchi v. Uber Technologies*, 268 A.3d 258, 268 (Me. 2022); *Berkson*, 97 F. Supp.3d at 403.

Uber's resort to its 2016 terms is likewise unavailing. It does not meaningfully engage with the decisions that found the terms unenforceable. *See, e.g., Kauders, supra*; *Sarchi*, *supra; Cullinane v. Uber Technologies, Inc.*, 893 F.3d 53 (1st Cir. 2018). The process induced a user to proceed through an assembly line of repetitive clicking; the language about "acceptance" only appeared at the end of

this assembly line, in tiny print on a page that was otherwise devoted to entering the user's name. Uber makes two arguments. First, it contends that it is significant that the link to terms on the last page was colored blue. (Def.Br.53; R289). The blue color was the same shade it used for decoration earlier in the registration process. The text was not underlined and there was no prompt to click. "Courts have required more than mere coloring to indicate the existence of a hyperlink to a contract." *Applebaum v. Lyft, Inc.*, 263 F. Supp. 3d 454, 467 (S.D.N.Y. 2017). Second, Uber contends that the font size, which was barely noticeable on a page filled with more prominent text, needed to be small to fit next to the arrow icon. (Def.Br.58). The arrow icon was merely a programmed graphic on a blank screen, which Uber could have designed however it wished. (R288). Uber chose to leave almost the entire screen *blank* instead of making the language about the terms more prominent.

E. Plaintiff did not accidentally accept Uber's arbitration clause by taking a taxi during the two-year pendency of her motion

Uber next argues that plaintiff that plaintiff accidentally accepted the Terms while her motion specifically challenging their validity was pending by taking one of its taxis. *See* Def.Br. 54-56. By definition, a party cannot accidentally accept a contract; that requires a meeting of the minds. There was no such meeting of the minds here.[3]

[3] Uber's claim that plaintiff waived the right to dispute this argument is frivolous. Plaintiff disputed this argument at both the trial and appellate levels. The motion court raised it as dicta.

Uber, as below, relies almost exclusively on a decision the Second Circuit specifically designated as non-precedential, *Nicosia v. Amazon.com, Inc.*, 815 Fed. App'x 612, 614 (2d Cir. 2020), interpreting a Washington State statute and a browsewrap contract that Amazon explicitly told its users would be considered to have been accepted from making purchases on its website. In this case, by contrast, the 2021 terms were originally presented to plaintiff with an instruction from Uber that, to accept them, she needed to click a checkbox.

While the content of the script accompanying the checkbox was misleading, Uber at least was clear about what actions a user needed to take to manifest assent (i.e., clicking the box and the "Confirm" button, *see* Def.Br.13). Plaintiff was not presented with any checkbox to click during the pendency of the motion practice and was not sent any communication to the effect that Uber would claim her continued use of the application while the court was considering her objections to the enforceability of the terms could represent acceptance of a contract. Uber essentially is claiming that it sent her a "clickwrap" that suddenly transformed, without any notice at all, into a "browsewrap" that it would deem accepted if she took another taxi ride. Or, put another way, that it could change the rules in the middle of the game without telling anyone.

The First Department then did not adopt it as rationale in its decision. Uber is certainly free to raise it as an alternative ground for affirmance, but plaintiff is similarly free to dispute it as she did below.

Uber recognizes that there was no communication to plaintiff suggesting any such consequence to using its taxis while the motion was pending, but writes that accepting a benefit "may constitute assent" if the "offeree makes a decision to take the benefit with knowledge…of the terms of the offer." Def.Br.53. Uber made no offer relating to the 2021 terms during the pendency of the motion practice. It merely provided her with taxis, without any claimed prerequisite. She never manifested any assent to be bound.

As *Kauders* and *Sarchi* both pointed out, and as even the First Department held in *Brooks*, a user must affirmatively manifest assent to terms. *Kauders*, 486 Mass. at 572; *Sarchi*, 268 A.3d at 273. Indeed, *Sarchi* specifically rejected a similar argument by Uber. In that case, the company sent an e-mail to its users, informing them it was updating its terms and that it would consider the update accepted by further use of its application. The court found that because the plaintiff "had no reason to know that her use of Uber constituted acceptance of the updated Terms, no contract was formed based on those terms." *Id.*, 268 A.3d at 272. "[S]ilence, when not misleading, may not be translated into acceptance merely because the offer purports to attach that effect to it." *Albrecht Chem. Co. v. Anderson Trading Corp.*, 298 N.Y. 437, 440 (1949)).

III. The Agreement, Which Was Intended To Prey On Unwitting Represented Parties, Was Unconscionable.

Finally, the agreement was unconscionable. Uber first reprises its argument that plaintiff failed to comply with the requirement that she challenge the delegation clause. It contends that it was not enough for plaintiff to object to the delegation of "any" issue to the arbitrator including the determination of arbitrability, because she did not specifically use the magic words "delegation clause." (Def.Br.79-81; *Rent-A-Center v. Jackson*, 561 U.S. 63 (2010)). The Fourth Circuit rejected an identical argument in *Minnieland Private Day School, Inc. v. Applied Underwriters Captive Risk Assur. Co., Inc.,* 867 F.3d 449, 455 (4th Cir. 2017). The plaintiff objected, much like Ms. Wu[4], to the delegation of "any" issue to the arbitrator, which the defendant contended was insufficient under *Rent-A-Cener*. The court found that the plaintiff's objection to "any" issue being delegated to the arbitrator "necessarily include[ed] the delegation provision, which is simply an additional, antecedent agreement to arbitrate." *Id.* at 455 (cleaned up). The same should be so here.

On the merits, the agreement was unconscionable. Uber's discussion contains no acknowledgement whatsoever of the core inequity of its conduct: plaintiff already had, through counsel, invoked the jurisdiction of the courts, and Uber went behind the back of her attorney to try to displace that choice. Uber contends that forcing

[4] See Pltf.Br.64.

someone to arbitration cannot be unconscionable because it does not prevent a determination on the merits of a claim. But a plaintiff has a right to choose the forum in which her lawsuit will be litigated. Ms. Wu received no meaningful consideration for waiving her right to a jury trial. *See, e.g., In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 252 (S.D.N.Y. 2005) (in "absence of candid disclosure, it would be unconscionable to…nullify cardholders' rights"); *OConner v. Agilant Sols., Inc*., 444 F. Supp. 3d 593, 603 (S.D.N.Y. 2020) (mid-litigation arbitration agreement unconscionable); *Salgado*, 2021 WL 2199436 (Cal. Ct. App. 2021) (same); *Wilcox v. Valero Ref. Co*., 256 F. Supp. 2d 687, 692 (S.D. Tex. 2003) (same).

CONCLUSION

WHEREFORE, it is respectfully submitted that the Order of the Appellate Division, First Department, should be reversed.

Dated: New York, New York
May 27, 2024

Respectfully submitted,

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