**No. 2023-P-0074**

# COMMONWEALTH OF MASSACHUSETTS
# APPEALS COURT

WILLIAM GOOD,

*Plaintiff-Appellee*,

*v.*

UBER TECHNOLOGIES, INC., RASIER, LLC, JONAS YOHOU,

*Defendants-Appellants*.

On Appeal from an Order of the Superior Court for Suffolk County
Denying Defendants' Motion to Stay and Compel Arbitration

## BRIEF FOR AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLANTS AND FOR REVERSAL

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to S.J.C. Rule 1:21, the Chamber of Commerce of the United States of America states that it is a nonprofit, tax-exempt organization incorporated under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation has ten percent or greater ownership in the Chamber. The Chamber does not issue stock.

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## STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, legislatures, and executive branches of the Federal and State governments. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community, including cases involving the enforceability of their online contractual agreements.

This is such a case. Many of the Chamber's members and affiliates regularly rely on online agreements to form contractual relationships. The Chamber's

[1] Pursuant to Mass. R. A. P. 17 (c) (5), the Chamber states that no party or party's counsel authored this brief in whole or in part, and that no party, party's counsel, or other person or entity—other than the Chamber, its members, or its counsel—contributed money that was intended to fund the preparation or submission of the brief. The Chamber has not represented any of the parties to the appeal in any proceeding involving similar issues, nor has it been a party or represented a party in a proceeding or transaction that is at issue in the present appeal. The law firm that represents the Chamber (but not the same attorneys) represented the defendants in *Kauders* v. *Uber Techs., Inc*., 486 Mass. 557 (2021), which involved a different form of online agreement between Uber and its customers; the firm did not and does not represent any of the current parties in litigation involving the form of the agreement at issue in this case, and did not and does not represent any of the parties in any proceeding or legal transaction that is at issue in the present appeal.

members and affiliates have entered millions of online contractual relationships, including large numbers of relationships with consumers who purchase goods and services online through computer web sites and smartphone apps, and including agreements that contain arbitration provisions as here. The Chamber therefore has a significant interest in the correct development of the law applicable to the creation and enforceability of such online agreements. The Chamber has a particular interest in the reversal of the Superior Court's order in this case, which is based on an incorrect and unduly restrictive application of the law governing formation of online contracts.

## SUMMARY OF ARGUMENT

The online marketplace is enormous. Goods and services are sold every moment of every day on web sites and on smartphone apps everywhere. Online sellers of goods and providers of services regularly include "terms of use," in one form or another, on their sites and apps to define the terms and conditions under which they operate and to establish contractual relationships with their customers. Without "terms of use" agreements, online sellers and providers could not manage their businesses responsibly. It is therefore necessary for the online business community to know that their agreements can and will be enforced. (pp. 8-10, *infra*)

In Massachusetts, as elsewhere, courts apply a two-part test to determine whether an online agreement will be enforced. First, they ask whether the user of

the site or the app has been given reasonable notice of the contractual terms and an opportunity to review them. Second, they ask whether the user has reasonably manifested agreement to the terms. (pp. 10-14, *infra*)

The online agreement in this case easily satisfies the two-part reasonableness test. It afforded ample notice of the terms and required the user's express assent to them. The Superior Court erred in holding the agreement unenforceable based on features that did not detract from the reasonable notice given to the user. The court's unduly restrictive application of the existing Massachusetts standard should be reversed. (pp. 15-25, *infra*)

## ARGUMENT

### I. THE ONLINE MARKETPLACE DEPENDS ON THE ENFORCEABILITY OF CONTRACTS CREATED ONLINE

The online economy for retail goods and services is massive. In 2020, e-commerce retail revenues were approximately $815 billion, representing approximately 14.6% of the total sales revenue for the retail trade sector. In the same year, service industries revenue from e-commerce was approximately $1.3 trillion, or approximately 8.2% of the total for the service industries sector. See U.S. Dep't of Commerce, *E-Stats 2020: Measuring the Electronic Economy* (May 26, 2022).[2] The online marketplace is not only vast, but also diverse. One can purchase

[2] Available at https://www.census.gov/library/publications/2022/econ/2020-e-stats.html.

online something as grand as a luxury automobile or as mundane as a bar of soap; an expensive first-class flight to an exotic location or a seat on a puddle-jumper to another part of the State; a ride-share across the country or a trip to the next street over in inclement weather. Large or small, expensive or not, the possibilities are almost limitless.

To facilitate this commerce, protect their business interests, and help consumers understand their contractual obligations, online sellers of goods and providers of services typically inform users of their sites and apps of the "terms of use" or "terms of service." These are the terms and conditions under which the seller agrees to provide the goods or services available through the site or the app. Terms of use might limit the provider's liability, protect its content, prevent abuse, declare the choice of law or forum for disputes, or, as here, call for arbitration of claims arising from the use of the site or the app and the provision of the goods or services.[3]

Online terms of use are delivered to consumers in a variety of shapes and sizes. "Browsewraps," "clickwraps," "scrollwraps," and "sign-in-wraps" are among the shorthand terms commonly used to describe them. See, e.g., *Sarchi* v. *Uber Techs., Inc*., 2022 ME 8, ¶¶ 18-24 (describing variations).[4] However the agreements

[3] See Crail & Haskins, Terms of Use Agreement: What Is It & Do You Need It? (Aug. 25, 2022), https://www.forbes.com/advisor/business/why-your-website-needs-terms-of-use-agreement/.

[4] The terms of use agreement in this case was a classic, well-designed

are structured, online businesses depend on the courts to provide consistent, fair, predictable decisions to which they can tailor the agreements to ensure their enforceability. Without this measure of predictability and reliability, the relationships between online merchants and users would be chaotic.

In Massachusetts, this Court and the Supreme Judicial Court, drawing on State law contract principles, have set the legal standards that govern the enforceability of online agreements. See section II, *infra*. The clickwrap agreement in this case easily meets the standards for an enforceable contract. See section III, *infra*. The Superior Court's decision, however, departs from those standards and results in an unduly restrictive view of terms of use agreements that, if not corrected, would unnecessarily limit the ways in which online merchants provide goods and services to Massachusetts users. This threatens to disrupt the predictability and reliability that online businesses and online consumers in Massachusetts deserve.

## II. THE TOUCHSTONE FOR ASSESSING ONLINE CONTRACT FORMATION IN MASSACHUSETTS IS "REASONABLENESS"

Both this Court and the Supreme Judicial Court have addressed the formation of contracts online. This Court was the first to do so in *Ajemian* v. *Yahoo!, Inc*., 83 Mass. App. Ct. 565 (2013), *S.C*., 478 Mass. 169 (2017), cert. denied, 138 S. Ct. 1327

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clickwrap, as explained in section III, *infra*. The Supreme Judicial Court of Maine, citing several of the leading cases in this area—including the leading Massachusetts case discussed in section II, *infra*—correctly observed that "courts generally uphold clickwrap agreements." *Sarchi*, 2022 ME at 8, ¶ 20.

(2018), followed by the Supreme Judicial Court in *Kauders* v. *Uber Techs., Inc*., 486 Mass. 557 (2021), and *Archer* v. *GrubHub, Inc*., 490 Mass. 352 (2022). Two main themes emerge from these decisions. The first is that the same basic legal principles of contract law that apply to traditional paper contracts also apply to online contracts. See *Archer*, *supra* at 361; *Kauders*, *supra* at 571; *Ajemian*, *supra* at 574 n.12. The second is that, to be enforceable, the terms and conditions of an agreement, whether presented on a web site or in a smartphone app, must be reasonably communicated to the users and reasonably assented to by them. See *Archer*, *supra* at 361*; Kauders*, *supra* at 572; *Ajemian*, *supra* at 574.[5] The two-part reasonableness test, "focusing on whether there is reasonable notice of the terms and a reasonable manifestation of assent to those terms," *Kauders*, *supra* at 572, is "consistent with the approach taken

[5] In *Ajemian*, which involved a forum selection clause in an online agreement, this Court spoke of "[r]easonably conspicuous notice of the existence of contract terms" being necessary. *Ajemian*, 83 Mass. App. Ct. at 574-575. The Supreme Judicial Court in *Kauders* attributed that language, specifically the word "conspicuous," to the fact that "forum selection clauses must meet higher standards than other contractual provisions." *Kauders*, 486 Mass. at 572 n.25. For cases not involving forum selection clauses (or other contractual provisions requiring a higher standard of clarity), the Supreme Judicial Court has dispensed with any requirement that the online provision of contract terms be conspicuous. *Id*. ("We only adopt the reasoning of *Ajemian* to the extent it requires reasonable notice of the terms of a contractual provision and reasonable manifestation of assent to those terms. We do not require that the notice be 'conspicuous,' as required for certain types of contractual provisions or as required by other jurisdictions"). *Kauders*, like this case, involved an arbitration provision in an online agreement, to which no "higher standard[]" applies.

by other courts around the country." Conroy & Shope, Look Before You Click, The Enforceability of Website and Smartphone App Terms and Conditions, 63 Boston B.J. 23, 23 (Spring 2019), cited with approval in *Kauders*, *supra*. See *Ajemian*, *supra* at 574 n.12 ("Other jurisdictions uniformly require proof that the terms of an online agreement be reasonably communicated and accepted").

With respect to notice, "[w]here the offeree has actual notice of the terms, this prong is satisfied without further inquiry." *Kauders*, 486 Mass. at 572. "Absent actual notice, the totality of the circumstances must be evaluated in determining whether reasonable notice has been given of the terms and conditions." *Id.* at 573. Massachusetts courts take into account, among other things, the nature of the transaction, the scope of the terms and conditions, and the design and content of the user interface by which the terms are communicated. *Id*.[6]

[6] The court in *Kauders* also referred to the size of the transaction as a possible consideration, *Kauders*, 486 Mass. at 573, and suggested later in the opinion that users entering into small-money transactions might not understand that they are entering a contractual relationship. *Id*. at 575. This caveat must be read carefully and in context. The court was faced with a situation in *Kauders* where it thought that the app's terms of use were not reasonably communicated to users through the app's interface. *Id.* at 576-576. The court was simply saying that, without reasonable notice of the terms, users might not ordinarily associate small-money transactions with contractual terms of use. *Id*. at 575-576. The court was *not* saying that small-money transactions cannot be made subject to detailed terms that have been reasonably communicated.

Regarding the user interface, courts consider the clarity and simplicity of the notice and the ease with which the user can access the terms. *Kauders*, 486 Mass. at 573. The court asks whether the interface makes the terms readily available, how many steps must be taken to access the terms, and how clear and extensive the process is by which the user can access the terms. *Id.* "Ultimately," as the court said in *Kauders*, "the [provider] must reasonably notify the user that there are terms to which the user will be bound and give the user the opportunity to review those terms." *Id*.

While it is important for notice purposes that users be afforded a reasonable opportunity to review the terms, it is not necessary that they actually see and read the terms. See *Archer*, 490 Mass. at 361 ("Reasonable notice of a contract's terms exists even if the party did not actually view the agreement, so long as the party had an adequate opportunity to do so"). See also *Meyer* v. *Uber Techs., Inc*., 868 F.3d 66, 79 (2d Cir. 2017) ("While it may be the case that many users will not bother reading the additional terms, that is the choice the user makes; the user is still on inquiry notice"). Well-designed clickwrap agreements—in which the user accesses the contract terms by tapping a clearly marked, prominently displayed hyperlink—are paradigmatic examples of users being afforded reasonable notice through an opportunity to review terms. *Archer*, *supra* at 361-362, and cases cited.

With respect to the second part of the test—manifestation of assent—Massachusetts courts look at the specific actions that the user is asked to take to indicate agreement to the proffered terms and conditions. Again, the courts apply a standard of reasonableness. *Kauders*, 486 Mass. at 573-574. Clickwrap agreements—in which users are "required to expressly and affirmatively manifest assent to an online agreement by clicking or checking a box that states that the user agrees to the terms and conditions," *id.* at 574—provide "the clearest manifestations of assent," *id*., and for that reason are "regularly enforced." *Id*. By "[r]equiring a user to expressly and affirmatively assent to the terms, such as by indicating 'I Agree' or its equivalent," a well-designed clickwrap "serves several important purposes. It puts the user on notice that the user is entering into a contractual arrangement … [and] can help alert users to the significance of their actions. Where they so act, they have reasonably manifested their assent." *Id*. at 574-575. Moreover, for manifestation of assent purposes, "[s]o long as the party is required to make some indication of assent, such as selecting 'I agree' or 'I accept,' the fact that the party chooses not to read the agreement does not render it unenforceable." *Archer*, 490 Mass. at 362.

## III. THE CLICKWRAP AGREEMENT IN THIS CASE SATISFIED THE REASONABLENESS REQUIREMENTS FOR ENFORCEABILITY

### A. The Agreement Provided Both Reasonable Notice Of The Contract Terms And Reasonable Manifestation Of Assent

The clickwrap agreement in this case contained all the indicia of an enforceable contract.[7] First, the user received notice of the new terms of use on a screen that was dedicated exclusively to the terms of use and privacy notice; the screen had no purpose other than to communicate the new terms and obtain the user's agreement to them. The screen was clear, uncluttered, and easy to read. In a large, conspicuous font located prominently in the center of the page, users were expressly encouraged to read the terms of use in full. And the terms themselves were made quickly and easily accessible with a simple tap of a fingertip on the hyperlink entitled "Terms of Use." The hyperlink was in the classic blue underlined font that any reasonable Internet user would readily recognize to be a hyperlink. In short, no reasonable and reasonably-attentive user could have failed to understand from this screen that the terms of use had been updated and where and how the terms could be viewed.

In addition to providing reasonable notice of the terms, the clickwrap screen also easily satisfied the second part of the test for an enforceable online contract, i.e.,

[7] The agreement, as it would have appeared on a smartphone user's device, appears at A.66.

it elicited from the user a reasonable manifestation of assent to the terms. Before proceeding beyond this screen, the user was required to check the box indicating both that they had reviewed the terms *and* that they agreed to the terms. It is difficult to imagine a clearer indication of assent to terms than an express representation from a user that they have read the terms and agree to them. And if that were not enough, the user was also required to click the oversized button labeled "Confirm" before proceeding, thereby ratifying what appeared elsewhere on the screen (i.e., that they were encouraged to read the updated terms in full, had in fact done so, and agreed to the terms).

### B. The Superior Court's Concerns Were Misplaced And Resulted In An Improperly Restrictive Test For Contract Enforceability

The Superior Court found what it perceived to be deficiencies in this clickwrap agreement. But the features the court identified did not detract from the reasonableness of the notice and assent provided, which are all that Massachusetts law requires.

**User's awareness of contractual relationship**. The Superior Court's primary concern was that the terms of use screen did not itself contain the word "contract" or, the court concluded, inform the user that by clicking forward they were entering into a contractual relationship with Uber. A.242-243. This concern was misplaced for at least two reasons. First, the court failed to give any consideration to the intelligence of a reasonable online user. In this age of Internet

use, and especially when it comes to the use of apps on smartphones, "terms of use" are frequently presented in one form or another. A reasonable app user would immediately recognize that these are, just as the words suggest, the terms and conditions that govern the user's use of the app and their relationship with the seller of goods or provider of services with whom they are dealing. To discount the plain meaning of those words, and to require instead the use of the magic word "contract," incorrectly presumes that a reasonable user would understand "terms of use" to be anything other than the binding terms of an agreement. See *Archer*, *supra* at 362 (noting objective nature of reasonableness inquiry, i.e., sufficiency of notice turns on what reasonably prudent user would have understood).

Similarly, the Superior Court's suggestion that a terms of use screen needs to use the word "contract" or "agreement" to indicate that a user would be bound by the provisions (A.242) does not withstand scrutiny. The screen unequivocally indicated that there were "terms," and unambiguously required the user to "agree" to those terms if they wished to use the services. Users who wished to proceed, like the plaintiff in this case, indicated that they agreed to the provider's terms. A reasonable online customer knows that, when they "agree" to "terms" in any sort of transaction, they have made an "agreement" and must abide by the terms to which they just agreed.[8]

[8] This is not to suggest that reasonable users will necessarily know and

Second, the contractual nature of the relationship is immediately apparent to anyone who takes even a brief peek at the terms of use. (Users of this app were expressly and strongly encouraged—in large font centered on the terms of use screen—to read the terms in full, and they affirmatively represented that they had done so.) The message was delivered clearly and upfront. The very first heading of the terms stated, in large bold font, "**1. Contractual Relationship**." A.70. And the second sentence of that section stated, in all capital letters, "PLEASE READ THESE TERMS CAREFULLY, AS THEY CONSTITUTE A LEGAL AGREEMENT BETWEEN YOU AND UBER." *Id*. There was no mistaking it. On the first screen the users saw when reviewing the terms of use (which the users were encouraged to do and represented they had done), users were informed that they were entering into a contractual relationship.[9]

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understand the content of the various terms and conditions without reading them. Of course not. The point here is only that a reasonable Internet user, faced with a prominently displayed, clearly marked hyperlink to "Terms of Use," will quickly recognize that this is where they will find what is commonly (and pejoratively) referred to as the legal "fine print"—just as they might find detailed contract terms and conditions on a paper form that they sign to rent a car or open a bank account. That is all that is necessary to satisfy the requirement that users be given reasonable notice of the contract terms. It is then up to the user to decide whether they want to read the terms or ignore them.

[9] The specific term of use at issue in this case, the arbitration provision, was likewise prominently displayed to users. In bold capital letters in the first section of the terms of use, again under the heading "**1. Contractual Relationship,**" the document states, "**IMPORTANT: PLEASE BE ADVISED THAT THIS AGREEMENT CONTAINS PROVISIONS THAT GOVERN HOW CLAIMS**

**User not required to click hyperlink.** The Superior Court expressed concern that an app user "was not required to click on the hyperlink before continuing and ordering a vehicle" (A.243), i.e., was "not compelled to follow [the] link." A.246. But that is true of every clickwrap agreement with a hyperlink; yet, as this Court and the Supreme Judicial Court have acknowledged, courts have consistently held that well-designed agreements such as this—those which provide reasonable notice of the terms (including by hyperlink) and require reasonable manifestation of assent—are enforceable regardless of whether the terms are displayed on the screen or accessed by tapping the hyperlink. See *Archer*, *supra* at 362.

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**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.**" A.70. Visually speaking, the language jumps off the page and cannot be missed.

The arbitration provision itself appears in the very next section, which is entitled, in large bold font, "**2. Arbitration Agreement**." A.71-73. Compare *Kauders*, 486 Mass. at 563 (noting that arbitration provision, entitled "Dispute Resolution," appeared "near the end of the terms and conditions"). Again, for any reasonable person who followed the hyperlink, the existence of the arbitration provision and the terms of the provision could not be missed.

Along the same lines, the Superior Court made this statement: "As in *Kauders*, to move on from the pop-up and order a vehicle, a user like [the plaintiff] needed only check a box and hit confirm and nothing more. Two easy clicks on a smartphone." A.244. First, that statement incorrectly describes *Kauders*. The user in that case was not required to check a box and confirm that they had reviewed and agreed to the terms. Indeed, that was part of what the Court perceived to be a problem with the form of agreement in that case; that agreement was a passive browsewrap, which required nothing affirmative from the user other than to furnish registration and payment information and use the app—no affirmative indication of agreement was necessary. Second, and more to the court's point, while it may have been easy, as the court observed, for the plaintiff to skip over the terms without using the hyperlink, it was just as easy and convenient for the user to access the terms that were provided, if they were so inclined—just one "easy click on a smartphone."

**Detailed terms and conditions.** Relatedly, the Superior Court stated that, without clicking the hyperlink, a user might not have anticipated that the terms of use were as detailed as they were. A.246. But this situation is very different from the situation that prompted the Supreme Judicial Court to raise this concern in *Kauders*. 486 Mass. at 575. The chief problems for the court in *Kauders* were (1) that the hyperlink to the terms and conditions appeared on a page that was devoted

primarily to the user's payment information,[10] (2) that the link was not prominently displayed,[11] and (3) that the design of the page did not encourage users to open the link and review the terms.[12] It was in that context that the Court said that detailed terms and conditions would not have been anticipated.

The clickwrap page in this case, by contrast, bore no resemblance to the browsewrap page in *Kauders*. Indeed, the page in this case addressed and eliminated each of the issues that the Supreme Judicial Court found distracting. Here, as described above, and as can readily be seen from the screen shot (A.66), the terms of use page in this case (1) was dedicated exclusively to the new terms of use and privacy policy, (2) prominently displayed the hyperlink to the new terms, (3) expressly and clearly encouraged users to open the link and review the terms in full,

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[10] See, e.g., *Kauders*, 486 Mass. at 578 ("[T]he title of the screen, as well as much of the information on the screen, focused on payment information, not the terms and conditions"; "[A] user could complete the [payment] screen and the account creation process without ever focusing on the link or the notice on the screen").

[11] See, e.g., *Kauders*, 486 Mass. at 578, quoting *Cullinane* v. *Uber Techs., Inc*., 893 F.3d 53, 64 (1st Cir. 2018) ("[T]he presence of other terms on the same screen with a similar or larger size, typeface, and with more noticeable attributes diminished the hyperlink's capability to grab the user's attention"). See also *Kauders*, *supra* at 560 (describing particulars of payment screen, including location, text, and color of browsewrap hyperlink).

[12] See, e.g., *Kauders*, 486 Mass. at 577 ("[T]he design of the interface for the app here enables, if not encourages, users to ignore the terms and conditions"); *id*. at 578 ("[T]he statement explaining the connection between creating the account and agreeing to the terms, which would encourage opening and reviewing the terms, was displayed less prominently than the other information on the screen").

and (4) asked the users to affirmatively indicate and confirm that they had reviewed the terms and agreed to them. If, in these circumstances, users did not realize that there were detailed terms and conditions for using the app and availing themselves of its benefits, it is for one reason only—not because they were not afforded reasonable notice and a fair opportunity to review the terms, but because, for whatever reason, they deliberately chose to ignore the terms by not even looking at them, despite affirming that they had done so.

**Other methods not employed.** The Superior Court also mentioned three other steps that Uber could have taken, namely (1) using a scrollwrap agreement instead of a clickwrap agreement; (2) including language on the terms of use page expressly stating that the terms of use constituted a legal agreement; and (3) notifying its users of the new terms in a telephone call or by first-class mail, e-mail, or a text message instead of an in-app terms of use page. A.244, 247-248.

The short answer to these concerns is that, while all these things may have been possible, they are not necessary, are not required by law, and have not been shown to be any more effective in delivering fair notice of terms to users. Indeed, this sort of Monday-morning quarterbacking is exactly the kind of approach to online contractual agreements that would make it difficult for businesses to operate in our increasingly online world.

First, the court did not identify, and the Chamber is not aware of, any authority in Massachusetts that requires scrollwraps in order for online agreements to be enforceable. To the contrary, the Court in *Kauders*, by comparing the browsewrap in that case unfavorably to clickwraps, and by extolling the advantages of clickwraps, plainly suggested that a well-designed clickwrap—one that delivers reasonable notice of the terms of use to users and requires a reasonable manifestation of users' assent—is enforceable. See *Kauders*, *supra*, at 574-575. And even if a provider chose to employ a scrollwrap instead, there is no assurance that any user would actually look at the terms, let alone read them (if that were even required, which it is not). A user who cares to read the terms of use, or even glance at them, has a perfectly reasonable opportunity to do so with the tap of a finger (on a hyperlink) just as easily as by scrolling through them (in a scrollwrap); but even with a scrollwrap, a user determined to skip the terms and insist on using the app without regard for them can quickly and easily scroll mindlessly through the terms in order to reach any check-box, button, or other device that will enable them to proceed.

With respect to possible different or additional language on the terms of use page, there are of course infinite possibilities, but, as far as the Chamber is aware, no court has prescribed one and only one permissible approach. The question is not whether the language used by a particular provider could be different, but rather whether the language chosen gives reasonable notice of the terms of the agreement.

As explained earlier, the language in this case was perfectly reasonable and more than adequate by the standard set by this Court and the Supreme Judicial Court. The notice that was given was not rendered unreasonable by the fact that it could have been worded differently.

The same can be said with respect to the Superior Court's suggestion of using a telephone call or other means to notify app users of updated terms of use. The provider in this case used what it reasonably believed was an effective method of catching the app users' attention, i.e., by a clear and unmistakable in-app notification, delivered at a time when the users were most focused on the app, the services they were purchasing, and anything else related to their purchases. Again, that the provider might have done something different, or that the Superior Court would have preferred that it have done so, is not the applicable legal standard. The settled standard in Massachusetts and elsewhere is whether the user was given reasonable notice of the terms and conditions of its relationship with the provider and reasonably manifested their agreement to the terms. That standard was satisfied here.

**Timing of the notice.** Finally, the Superior Court was concerned that the provider delivered the terms of use notification and obtained the user's agreement through an in-app pop-up, which, it stated, would only be received when a user was in the process of summoning a ride. The court posited that it would have been better

to deliver the notice at some other time. A.247-248. The court cited no empirical evidence or authority suggesting that an in-app terms of use screen does not provide reasonable notice. Similarly, businesses that require signatures on paper contracts before offering their services regularly obtain those signatures at the time the consumer requests the service; those businesses are not required to provide their terms with a telephone call, letter, or e-mail.

Businesses deciding ex ante when to communicate an update to their terms and conditions have a range of reasonable options. Certainly, businesses could decide to communicate an update by telephone, letter, or e-mail, but they could also reasonably decide to do what Uber did here—communicate with users about the terms of using their business at the time a user indicates an interest in doing so. A business could reasonably decide that a consumer is more likely to be attentive to the company's terms of use at the time the consumer is considering using the service, not at some other random time that the user receives a telephone call, letter, or e-mail.

## CONCLUSION

For the foregoing reasons, this Court should reverse the order of the Superior Court and direct entry of an order compelling arbitration.

Respectfully submitted,

/s/ Mark C. Fleming

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March 22, 2023

**CERTIFICATE OF COMPLIANCE**
**PURSUANT TO MASS. R. A. P. 17 (c) (9)**

I hereby certify that, to the best of my knowledge, this brief complies with Mass. R. A. P. 17 and 20. The brief is in Times New Roman 14-point font, contains 5,281 non-excluded words, and was prepared using Microsoft Word for Office 365. I have relied on the word count feature of this word processing system in preparing this certificate.

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March 22, 2023

## CERTIFICATE OF SERVICE

I, Mark C. Fleming, hereby certify, under the penalties of perjury, that on March 22, 2023, I caused a true and accurate copy of the foregoing to be filed and served via the Massachusetts Odyssey File & Serve site, or by first-class mail pursuant to Mass. R. A. P. 13 and 19 for those counsel or parties not registered in the Court's e-filing system:

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