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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

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| EMILY WU,<br><br>*Plaintiff-Appellant*,<br><br>- against -<br><br>UBER TECHNOLOGIES, INC.,<br><br>*Defendant-Respondent*,<br><br>- and -<br><br>JERRY ALVAREZ, AHMED ELHASHASH, and ARMAN KHAN,<br><br>*Defendants*. | Case No. 2022-05749<br><br>**NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*** |

PLEASE TAKE NOTICE that, upon the annexed affirmation of Andrew J. Pincus, dated March 31, 2023, the Chamber of Commerce of the United States of America and the Business Council of New York State, Inc. will move this Court, at a term of the Appellate Division of the Supreme Court, First Department, at the Courthouse located at 27 Madison Avenue, New York, NY 10010, at 10:00 a.m. on April 10, 2023, or as soon thereafter as counsel may be heard, for an order granting leave to file a brief as *amici curiae* in support of Defendant-Respondent Uber Technologies, Inc. Copies of the proposed brief, the notice of appeal, and the order being reviewed on appeal are attached to this motion.

Dated: March 31, 2023

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SUPREME COURT OF THE STATE OF NEW YORK
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ANDREW J. PINCUS, an attorney admitted to practice in the State of New York, hereby affirms under penalty of perjury:

1. I am a partner at the law firm of Mayer Brown LLP, counsel for the Chamber of Commerce of the United States of America ("the Chamber") and the Business Council of New York State, Inc. ("the Business Council"). I am familiar with the legal issues involved in the above-captioned action. I submit this affirmation in support of the motion of the Chamber and the Business Council for leave to file the accompanying brief as *amici curiae* in support of Uber Technologies, Inc.

2. The Chamber is the world's largest business federation. It directly 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 the courts on issues of concern to the business community.

3. The Business Council is the leading business organization in New York State, representing the interests of large and small firms throughout the state. The Business Council's membership is made up of more than 3,000 companies, local chambers of commerce, and professional and trade associations. The Business Council's membership consists of both small businesses and some of the largest corporations in the world. The Business Council serves as an advocate for businesses in the state's political and policy-making arenas, working for a healthier business climate, economic growth, and jobs.

4. This case presents important questions about the formation and enforceability of online contracts. Many of *amici*'s members conduct substantial business online. Indeed, trillions of dollars' worth of e-commerce transactions are conducted every year in the United States. The enforceability of online contracts is therefore of critical importance to *amici* and their members, as well as to the Nation's economy more generally.

5. Moreover, many of *amici*'s members regularly employ arbitration agreements in their online contracts. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Based on the legislative policy embodied in the Federal Arbitration Act and the United States Supreme Court's consistent affirmation of the legal protection the Federal Arbitration Act provides for arbitration agreements, *amici*'s members have structured millions of contractual relationships—including enormous numbers of online contracts—around arbitration agreements.

6. For these reasons, *amici* have a strong interest in the issues raised in this appeal and in affirmance of the order below. Participation of the Chamber and the Business Council as *amici curiae* in this appeal would assist the Court by providing their perspective on these issues of great importance to businesses.

WHEREFORE, I respectfully request that this Court enter an order (i) granting the Chamber and the Business Council leave to submit their brief as *amici curiae* in support of Defendant-Respondent Uber Technologies, Inc.; (ii) accepting the brief that has been filed and served along with this motion; and (iii) granting such other and further relief as this Court deems just and proper.

Dated: March 31, 2023 MAYER BROWN LLP

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SUPREME COURT OF THE STATE OF NEW YORK
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| - against - | : | |
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| *Defendant-Respondent*, | : | |
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| JERRY ALVAREZ, AHMED ELHASHASH, and ARMAN KHAN, | : | |
| *Defendants*. | : | |

# *AMICI CURIAE* BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE BUSINESS COUNCIL OF NEW YORK STATE, INC. IN SUPPORT OF DEFENDANT-RESPONDENT UBER TECHNOLOGIES, INC. AND AFFIRMANCE

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## INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents approximately 300,000 direct 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 Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases, like this one, that raise issues of concern to the nation's business community. The Chamber has frequently filed amicus briefs in the New York courts.[1]

The Business Council of New York State, Inc. ("the Business Council") is the leading business organization in New York State, representing the interests of large and small firms throughout the state. The Business Council's membership is made up of more than 3,000 companies, local chambers of commerce, and professional

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[1] *See, e.g.*, Amicus Curiae Brief of Chamber of Commerce of the United States of America, *Britton v. Seneca Meadows, Inc.*, No. 21-00681 (4th Dep't) (mass tort and class action abuses); Amicus Curiae Brief of Chamber of Commerce of the United States of America, *Burdick v. Tonoga*, No. 527117 (3d Dep't) (class certification requirements); Amicus Curiae Brief of Coalition for Litigation Justice, Inc. et al., *In re New York City Asbestos Litig.*, No. APRL-2017-00114 (N.Y.) (punitive damages); Amicus Curiae Brief of Business Council of New York State, Inc. et al., *Caronia v. Philip Morris UAS, Inc.*, No. CTQ-2013-00004 (N.Y.) (medical monitoring); Amicus Curiae Brief of Chamber of Commerce of the United States of America et al., *Sperry v. Crompton Corp.*, No. 2004-6518 (N.Y.) (indirect purchaser class actions).

and trade associations. The Business Council's membership consists of both small businesses and some of the largest corporations in the world. The Business Council serves as an advocate for businesses in the state's political and policy-making arenas, working for a healthier business climate, economic growth, and jobs.

Many of *amici*'s members conduct substantial business online. Indeed, hundreds of billions of dollars' worth of e-commerce transactions are conducted every year in the United States, topping $1 trillion in 2022. *See* U.S. Census Bureau, *Quarterly Retail E-Commerce Sales, 4th Quarter 2022* (Feb. 17, 2023), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf. The enforceability of online contracts is therefore of critical importance to *amici* and their members, as well as to the Nation's economy more generally.

Moreover, many of *amici*'s members regularly employ arbitration agreements in their online contracts. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Based on the legislative policy embodied in the Federal Arbitration Act and the United States Supreme Court's consistent affirmation of the legal protection the Federal Arbitration Act provides for arbitration agreements, *amici*'s members have structured millions of contractual relationships—including enormous numbers of online contracts—around arbitration agreements.

*Amici* accordingly have a strong interest in this Court's resolution of the appeal and in affirmance of the trial court's order compelling arbitration. As explained below, several of plaintiff's arguments for reversal, if accepted, would have broad adverse consequences for companies doing business in New York.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The trial court issued a comprehensive order granting Uber's motion to compel arbitration. On appeal, the plaintiff has filed a 115-page brief raising a panoply of arguments in an effort to avoid her obligations under her contract with Uber, including to resolve her disputes with Uber by arbitration. But as Uber's brief persuasively explains, the trial court's order was correct in its entirety, and plaintiff's arguments are precluded by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, and generally applicable principles of New York law.

*Amici* write separately to focus on three of the arguments presented by plaintiff, which, if accepted, would have broad adverse consequences for companies doing business in this State.

*First*, plaintiff is flat wrong in characterizing Uber's promulgation of updated contract terms to millions of its users in the ordinary course of business as a "flagrant and deliberate ethical violation." Appellant Br. 23. As plaintiff concedes, Uber "updated its terms of service for *all* users" (*id.* at 21 (emphasis added)) and the email from Uber informing users of the forthcoming update to its terms came from its non-

legal department; plaintiff nonetheless insists that, because she had filed a lawsuit, Uber was required to carve her out from any communications about its contract terms sent en masse to all of its users.

Plaintiff cites no authority accepting that argument, and that is not surprising. As Judge Nathan—now on the U.S. Court of Appeals for the Second Circuit—recently put it in rejecting a virtually identical argument, such a "rule would be unworkable in practice." *Haider v. Lyft, Inc.*, 2021 WL 3475621, at *3 (S.D.N.Y. Aug. 6, 2021), *reconsideration denied*, 2022 WL 1500673 (S.D.N.Y. May 11, 2022). "A large corporation like [Uber] may face a number of lawsuits at any given time, and prohibiting routine amendments to their terms of service would essentially freeze their contracts in place." *Id.*

Indeed, because most businesses face litigation at all times, it is commonplace—and inevitable—for businesses to make generally-applicable revisions to their terms during the pendency of litigation. Yet under plaintiff's proposed rule, every business would have to track and exclude every existing plaintiff in a pending lawsuit from routine contract updates.

Moreover, Judge Nathan further explained that the fact that lawyers are presumably involved in drafting contract terms makes no difference; as she held, nothing in "the New York Rules of Professional Conduct bar[s] routine amendments to a company's terms of service." *Id.* Rule 4.2—the rule plaintiff relies upon here—

applies only to communications by lawyers themselves or at lawyers' direction, and the trial court made a factual finding that no such communication occurred here.

Plaintiff offers no basis to disturb that finding. More fundamentally, the heart of her argument appears to be that it is ethically improper for lawyers to draft revisions to contract terms that apply to parties in pending lawsuits. But she has no support for that position. On the contrary, as detailed below, courts routinely enforce post-litigation modifications to standard contract terms.

*Second*, plaintiff's argument that she did not agree to Uber's contract terms in January 2021, if accepted, would cause this Court to diverge from an overwhelming consensus upholding the type of contract formation process used by Uber here. Plaintiff's own principal authorities confirm the validity of Uber's "clickwrap" process—in which plaintiff and other Uber users clicked both a check box to expressly "agree to the Terms of Use" available by a hyperlink on the same screen and a "Confirm" button to advance past the screen and continue to use the Uber application. While, as discussed below, clicking a separate check box is not required to form an online contract under New York law, its presence makes this an easy case.

The contrary result urged by plaintiff would generate substantial uncertainty for businesses by undermining the longstanding and predictable rule that contract terms accepted online are enforceable in this State. Given the ubiquity today of electronic commerce, uncertainty about the standards for online contract formation

would impose massive and unwarranted costs on the tens of thousands of businesses that enter into transactions in the mobile economy.

*Third*, and relatedly, plaintiff is wrong in asserting that New York can impose a higher "clear, explicit, and unequivocal" standard for proving the existence of an arbitration agreement than for proving other types of contracts. As the trial court here recognized, the Second Circuit held three decades ago that the FAA preempts application of such a rule to arbitration agreements. Instead, the party moving to compel arbitration must satisfy only the preponderance of the evidence standard that New York courts generally apply to a party seeking to enforce contract terms. *See Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela*, 991 F.2d 42, 46 (2d Cir. 1993).

The trial court had no occasion to resolve this preemption question, because it concluded that Uber's evidence that plaintiff agreed to arbitrate satisfied even the heightened standard plaintiff urges. This Court could take the same approach. But to the extent it decides the issue, it should join the Second Circuit in holding that the FAA preempts a heightened standard for proving the formation or existence of an arbitration agreement that does not apply to contracts in general.

Indeed, the Second Circuit's holding in *Progressive* foreshadowed the U.S. Supreme Court's subsequent decision in *Kindred Nursing Centers Limited Partnership v. Clark*, which makes clear that the FAA applies with full force to

issues of "contract formation" and prohibits States from making arbitration agreements harder to form than other types of contracts. *Kindred* controls on the federal preemption question raised here and makes clear that the Second Circuit in *Progressive* correctly interpreted the FAA.

The trial court's order compelling arbitration should be affirmed.

## ARGUMENT

### I. Plaintiff's Acceptance Of Contract Terms Updated In The Ordinary Course Of Business During The Pendency Of Litigation Does Not Raise Any Ethical Issues.

There is nothing improper about a company issuing a routine, widespread update of its contractual terms while litigation is pending against the company. Plaintiff's insinuation that the update—sent to millions of users—was somehow targeted at her or at this litigation is without foundation, and her attempts to convert Uber's routine update into "a flagrant and deliberate ethical violation" (Appellant Br. 23) are meritless.

To begin with, plaintiff's argument that the January 2021 pop up screen in the Uber application qualifies as an ex parte communication suffers from the fundamental problem that it was plaintiff's own affirmative use of the application that caused the screen to appear. As Uber demonstrated, the screen automatically appeared only when, and because, plaintiff chose to use the Uber application to obtain a ride. *See* Uber Br. 83.

Plaintiff's primary contention is that Rule 4.2 applies even to contractual terms communicated and agreed to in the ordinary course of business, because lawyers are the ones who draft contracts. *See*, *e.g.*, Appellant Br. 22, 31-35. But the fact that lawyers draft legal terms cannot possibly mean that presenting those terms in the ordinary course of business triggers the rule about attorney communications with represented parties.

As Judge Nathan recognized, "drafting revisions" to any contractual term, arbitration agreement or otherwise, is not the same as a communication, by or on behalf of counsel, with a represented party about pending litigation. *Haider*, 2021 WL 3475621, at *3. Simply put, "[a]n amendment to a company's terms of service is not a prohibited communication with a represented party merely because the company's counsel presumably drafted the amendment." *Haider*, 2022 WL 1500673, at *3. It is telling that plaintiff cites no case concluding (or even suggesting) that a contractual update communicated to millions of users in the ordinary course of business implicates the ethical rules.

Plaintiff's unsupported argument also is breathtaking in its implications. It would mean that whenever an individual files a lawsuit, the agreements governing her ongoing relationship with the defendant are effectively frozen in time. Every defendant would have to track and exclude every such plaintiff from routine updates

to contracts until and unless the litigation was complete.[2] During pending litigation, defendants' only option would be to seek consent to such routine contract modifications from every plaintiff's counsel, which would be completely impractical.

Plaintiff further argues that Uber and its attorneys were ethically obligated to exclude pending lawsuits from the arbitration provision in Uber's Terms of Use. Appellant Br. 37. That argument also lacks any support. On the contrary, just as Judge Nathan did in *Haider*, courts across the country regularly enforce post-litigation modifications to existing contractual terms, including arbitration clauses, that govern a plaintiff's ongoing relationship with the defendant.

For example, the Second Circuit held that a plaintiff was bound by an arbitration clause that he agreed to when making multiple post-litigation purchases. *See Nicosia v. Amazon.com, Inc.*, 815 F. App'x 612, 614 (2d Cir. 2020). *Nicosia* is especially instructive here, given that plaintiff repeatedly used Uber's application after filing her lawsuit and being put on additional notice that her use of the

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[2] As Uber demonstrated and the trial court found, plaintiff also cannot satisfy the requirements of Rule 4.2 because she has not shown that Uber had actual knowledge of this lawsuit and her representation by counsel in January 2021. That is an additional reason to reject plaintiff's asserted ethical violations in this case, but, for the above reasons, Rule 4.2 should not be interpreted to require companies to exclude even known plaintiffs from routine updates to contract terms issued in the ordinary course of business.

application was governed by Uber's Terms of Use, including the terms' arbitration provision. *See* Uber Br. 54-58.

In the foundational case of *AT&T Mobility LLC v. Concepcion*, AT&T likewise sent the controlling arbitration provisions as an update during the litigation. 563 U.S. 333, 336-37 (2011) (litigation filed in March 2006 and governed by AT&T's "revised" arbitration terms dated December 2006). On these facts, the U.S. Supreme Court issued a sweeping decision on the enforceability of arbitration clauses in service agreements between businesses and consumers.

In another recent decision, a federal district court in Chicago compelled arbitration notwithstanding the defendant technology company's issuance of a nationwide update to its terms of service (including the arbitration clause) after the litigation was filed. *Miracle-Pond v. Shutterfly, Inc.*, 2020 WL 2513099, at *9 (N.D. Ill. May 15, 2020). The court there rejected the plaintiff's argument that the update was improper, finding "no indication that Shutterfly engaged in improper conduct" by issuing a regular update to its terms of service. *Id.* Other cases have reached the same conclusion. *See Enderlin v. XM Satellite Radio Holdings, Inc.*, 2008 WL 830262, at *2, *7 (E.D. Ark. Mar. 25, 2008) (named plaintiff compelled to arbitration based on changes to arbitration agreement more than a year after suit filed); *Goetsch v. Shell Oil Co.*, 197 F.R.D. 574, 575-78 (W.D.N.C. 2000) (named

plaintiff precluded from pursuing class action based on class waiver added during litigation).[3]

Plaintiff necessarily is asserting that the courts in *Nicosia*, *Shutterfly*, and the numerous other cases just discussed both erroneously decided those cases *and* (from plaintiff's perspective) disregarded breaches of ethical rules. Fortunately, plaintiff's baseless position is not the law in any jurisdiction in the United States.

## II. Uber's Contract Formation Process Produces Enforceable Online Contracts.

**1.** "While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract." *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004). Both online and off, mutual assent is the "touchstone of contract." *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 29 (2d Cir. 2002) (Sotomayor, J.) (citing *Binder v. Aetna Life Ins. Co.*, 75 Cal. App. 4th 832, 850 (1999)).

While the Second Circuit in *Specht* was applying California law, the principles of contract formation are the same under New York law. *See, e.g.*, *Express Indus. & Terminal Corp. v. N.Y. Dep't of Transp.*, 93 N.Y.2d 584, 589-90 (N.Y. 1999); *see also Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 74 (2d Cir. 2017)

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[3] These cases also accord with the text of the Federal Arbitration Act and of New York's arbitration statute, both of which mandate the enforcement of agreements to arbitrate "an existing controversy." 9 U.S.C. § 2; NY CPLR § 7501.

(applying California law but noting that "New York and California apply substantially similar rules for determining whether the parties have mutually assented to a contract term.") (quotation marks omitted).

In both the online and offline contexts, contract terms are binding under New York law if "the user takes some action demonstrating that they have at least constructive knowledge of the terms of the agreement, from which knowledge the court can infer acceptance." *Hines v. Overstock.com, Inc.*, 380 F. App'x 22, 25 (2d. Cir. 2010) (citing *Moore v. Microsoft Corp.*, 293 A.D.2d 587 (2d Dep't 2002)). Applying that principle, New York—like many other states—requires only that a reasonably prudent person would be on inquiry notice of the contract terms. *See Starke v. SquareTrade, Inc.*, 913 F.3d 279, 289 (2d Cir. 2019) (citing 22 N.Y. Jur. 2d Contracts § 29; *Arthur Philip Ex. Corp. v. Leathertone, Inc.*, 275 A.D. 102 (1st Dep't 1949)).

That standard is readily satisfied here. Plaintiff concedes that she clicked through the January 2021 pop up screen in the Uber application, which:

- concerned only Uber's updated contract terms;
- encouraged users in large bold font "to read our terms in full";
- provided a blue, underlined hyperlink to the full "Terms of Use" right below that encouragement;
- required the user to check a box right next to the statement "By checking the box, I have reviewed and agree to the terms of use"; and

- also required the user to click a "Confirm" button at the bottom of the screen in order to move past the screen and continue using the Uber application.

*See* Uber Br. 36; R. 38.

As Uber demonstrates, courts have overwhelmingly concluded that the same or similar means of presenting contract terms provides sufficient notice for contract formation. Uber Br. 36-39. Indeed, the separate check box makes this an easy case. Even plaintiff's principal case, *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359 (E.D.N.Y. 2015), recognizes that courts generally enforce agreements formed under processes that "require a user to affirmatively click a box." *Id.* at 397.

In *Meyer*, the Second Circuit upheld a version of Uber's registration process that did *not* require clicking on a separate check box, recognizing that smartphones and mobile transactions are commonplace and concluding that the "uncluttered" design of Uber's payment screen and the use of a link pointing to the Terms put a "reasonably prudent smartphone user" on "constructive notice" of those Terms. 868 F.3d at 77-79. The federal appellate court governing New York therefore has already placed both businesses and consumers on notice that it will uphold the validity of a notification process *less* robust than the process Uber used here. Plaintiff has no basis for asking this Court to create a higher standard out of whole cloth.

Further, a federal district court in Brooklyn explained that the use of a similar check box makes the interface "even clearer" than the Uber process upheld by the

Second Circuit in *Meyer*: "[t]he explicit acceptance required here [by requiring the user to check a box] is an even clearer signal that a Coinbase account would be subject to terms and conditions, and an even stronger prompt to a reasonably prudent user to click on the link to see what those terms and conditions were before agreeing." *Sultan v. Coinbase, Inc.*, 354 F. Supp. 3d 156, 161 (E.D.N.Y. 2019); *see also*, *e.g.*, *In re Juul Labs, Inc. Antitrust Litig.*, 555 F. Supp. 3d 932, 951 (N.D. Cal. 2021) (noting the same distinction in enforcing a contract formed using a screen containing a separate check box).

**2.** The "transactional context of the parties' dealings"—in particular, the ongoing relationship between plaintiff and Uber—reinforces the conclusion that plaintiff consented to Uber's terms. *Meyer*, 868 F.3d at 80. As the Third Circuit has explained, "it is impossible to infer that a reasonable adult in [plaintiffs'] position would believe that" a company was offering to provide recurring access to its services without any kind of contract. *Schwartz v. Comcast Corp.*, 256 F. App'x 515, 519-20 (3d Cir. 2007).

A reasonably prudent smartphone user must realize that an e-commerce transaction involves terms and conditions. That is especially true for consumers, like plaintiff, who are knowledgeable enough about the Internet and mobile devices to use Uber's services through its mobile application. Such users must, at minimum (1) have a smartphone; (2) have registered for an account to use Apple's or Google's

application store (for iPhone or Android users);[4] (3) know how to search for and download Uber's application; (4) insert their credit card or other payment information; and (5) know how to and be willing to use Uber's application to obtain ridesharing services.

Moreover, when plaintiff clicked to accept Uber's terms in 2021, there was nothing novel or unusual about being presented with, and agreeing to, contract terms on a smartphone or other mobile device. E-commerce transactions are rapidly growing in number: As the Supreme Court noted five years ago, "[t]he Internet's prevalence and power have changed the dynamics of the national economy," citing data showing that "e-commerce grew at four times the rate of traditional retail" in 2016, "and it shows no sign of any slower pace." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018).

The explosion in the use of smartphones is equally well documented. The Second Circuit in *Meyer*, for instance, echoed the Supreme Court's colorful observation that "'modern cell phones . . . are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an

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[4] *See* Where Can I Use My Apple ID, Apple, https://support.apple.com/en-us/HT202659 (last visited Mar. 24, 2023) ("Your Apple ID is the account you use to access Apple Services like the App Store, Apple Music, iCloud, iMessage, FaceTime, and more."); Google Play - Apps, Google, https://play.google.com/store/apps?hl=en (last visited Mar. 24, 2023) (requiring users to "Sign In" to download applications).

important feature of human anatomy.'" 868 F.3d at 77 (alteration in original; quoting *Riley v. California*, 573 U.S. 373, 385 (2014)). And the *Meyer* court further cited empirical evidence showing that nearly two-thirds of American adults owned a smartphone as of 2015 (*id.*)—a figure that had grown to 85% as of 2021. *See* Pew Research Center, *Mobile Fact Sheet* (Apr. 7, 2021), http://www.pewinternet.org/fact-sheet/mobile/. Indeed, roughly 15% of American adults *exclusively* use their smartphones for broadband access to the Internet. *Id.* And Americans have grown accustomed to using their mobile devices to read documents. *See* Jennifer Maloney, *The Rise of Phone Reading*, Wall St. J. (Aug. 14, 2015), http://www.wsj.com/articles/the-rise-of-phone-reading-1439398395.

For all of these reasons, plaintiff is wrong in contending that a reasonably prudent smartphone user would not understand that her ongoing relationship with Uber was governed by terms and conditions.

**3.** This is an easy case because it is undisputed that plaintiff affirmatively clicked a separate check box to accept Uber's Terms of Use. Accordingly, the Court need not opine further about what other types of contract formation processes might suffice under New York law.[5] But should the Court decide to address other

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[5] In addition to the separate check box that courts have uniformly recognized as sufficient, the hyperlink to Uber's Terms in this case was blue and underlined. That suffices to distinguish cases like *Cullinane v. Uber Techs., Inc.*, 893 F.3d 52 (1st Cir. 2018) and *Kauders v. Uber Techs., Inc.*, 159 N.E.3d 1033 (Mass. 2021),

processes, it should recognize that the combination of hyperlinked terms and a conspicuous notice that clicking or pressing a button accepts those terms is more than enough to form a valid contract.

Again, the Uber process at issue in *Meyer* did *not* require clicking on a separate check box. Judge Chin, writing for the Second Circuit, had little difficulty concluding that, nonetheless, a user was on "reasonable notice" of Uber's Terms because they were "available … by hyperlink" and "the hyperlinked text was itself reasonably conspicuous." 868 F.3d at 78-79. So too here.

Numerous decisions from other courts have upheld similar online registration processes. After all, the use of a link to a company's full terms of service along with an acknowledgment that completing the sign-up process constitutes assent to those terms is simply the twenty-first century equivalent of incorporating terms by reference on the back of a printed form.

The Second Circuit in *Meyer* cited with approval *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829 (S.D.N.Y. 2012), in which a federal district court offered the following instructive analogy. Imagine that a customer takes an apple from a roadside bin with a sign that reads: "By picking up this apple, you consent to the

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although *amici* do not agree with those courts' outdated views of how hyperlinks should be presented. *See Cullinane*, 893 F.3d at 63 (expressing the view that hyperlinks are "commonly blue and underlined").

terms of sales by this fruit stand. For those terms, turn over this sign." *Id.* at 839. Nobody would dispute that those terms bind the customer whether the customer chooses to review them or not. *Id.* at 839-40 (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587 (1991)).

That principle applies equally in cases where a company uses a hyperlink to its terms and conditions in order to communicate those terms to the user. Indeed, the existence and function of hyperlinks cannot be considered a plausible source of mystery or confusion. As another Southern District judge put it a decade ago: "Not so long ago, the Second Circuit could not discuss the hyperlink without defining the innovation for its readers. . . . Nearly two decades later, it is simply assumed that persons navigating the Internet understand hyperlinks as means of connecting one webpage to another." *Adelson v. Harris*, 973 F. Supp. 2d 467, 483 (S.D.N.Y. 2013); *see also Fteja*, 841 F. Supp. 2d at 839.

What was true in 2013 is even truer now. Indeed, given the increasing ubiquity of smartphones and other mobile devices, using links to navigate to related pages on the Internet is an everyday occurrence. *See* pages 14-16, *supra*.

Just as obvious to today's Internet users is the reality that virtually every purchase of goods or services online carries with it a set of terms and conditions. Accordingly, a reasonable user who signs up to purchase goods or services on the Internet knows that (i) the transaction is governed by terms and conditions, and

(ii) those terms are available via a link to a different screen. And that is especially so when notice of both facts appears on the user's screen.

Given these commonsense understandings of how the Internet works, it is unsurprising that courts have repeatedly held that mutual assent is established by the combination of linked terms and an acknowledgment that a user, by clicking or pressing a button, is accepting those terms. In *Fteja*, for example, the court held that a sign-up process containing a button, an acknowledgment that clicking the button constitutes assent to the contract terms, and a hyperlink to the terms themselves formed a valid contract because the plaintiff "was informed of the consequences of his assenting click and he was shown, immediately below, where to click to understand those consequences. That was enough." 841 F. Supp. 2d at 840.[6]

Should this Court weigh in on the issue, it should similarly conclude that, as a matter of New York law, a customer has received sufficient notice of terms when

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6 In addition to the Second Circuit in *Meyer*, many other courts have relied on the analysis in *Fteja*. *See*, *e.g.*, *Feld v. Postmates, Inc.*, 442 F. Supp. 3d 825, 831-32 (S.D.N.Y. 2020); *Hosseini v. Upstart Network, Inc.*, 2020 WL 573126, at *5 (E.D. Va. Feb. 5, 2020); *Harbers v. Eddie Bauer, LLC*, 2019 WL 6130822, at *6-7 (W.D. Wash. Nov. 19, 2019); *Temple v. Best Rate Holdings, LLC*, 360 F. Supp. 3d 1289, 1303-05 (M.D. Fla. 2018); *Beture v. Samsung Electronics Am., Inc.*, 2018 WL 4259845, at *5 (D.N.J. July 18, 2018); *Tompkins v. 23andMe, Inc.*, 2014 WL 2903752, at *8 (N.D. Cal. June 25, 2014), *aff'd*, 840 F.3d 1016 (9th Cir. 2016); *Zaltz v. JDATE*, 952 F. Supp. 2d 439, 453-54 (E.D.N.Y. 2013).

he or she is presented with (1) clear language stating that clicking or pressing a button manifests assent to contract terms and (2) a hyperlink to those terms.

## III. The FAA Precludes States From Imposing A Standard For Demonstrating The Existence Of An Arbitration Agreement More Demanding Than The Test For Other Types Of Contracts.

Section 2 of the FAA makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The United States Supreme Court has explained that "the judicial hostility towards arbitration that prompted the FAA had manifested itself in 'a great variety' of 'devices and formulas.'" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011) (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959)); *accord Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018).

Accordingly, Section 2's savings clause prohibits courts from invaliding arbitration provisions through state-law rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339 (citing *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). The FAA therefore preempts not only laws that outright prohibit arbitration agreements, but also "any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581

U.S. 246, 251 (2017). The FAA's robust protection of arbitration clauses has afforded businesses and consumers access to swift and predictable dispute resolution proceedings.

Relevant here, *Kindred* expressly held that discriminatory state-law rules making arbitration agreements harder to form than other contracts are just as impermissible as rules making arbitration agreements harder to enforce once formed: "the Act cares not only about the 'enforce[ment]' of arbitration agreements, but also about their initial 'valid[ity]'—that is, about what it takes to enter into them." 581 U.S. at 251. "Or said otherwise: A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made." *Id.* at 251-52.

As the Ninth Circuit recently summarized, *Kindred* and the U.S. Supreme Court's other cases have "made clear that the FAA's preemptive scope is not limited to state rules affecting the enforceability of arbitration agreements, but also extends to state rules that discriminate against the formation of arbitration agreements." *Chamber of Commerce v. Bonta*, 62 F.4th 473, 483-84 (9th Cir. 2023).

The Second Circuit held thirty years ago that New York's heightened state-law standard requiring "express, unequivocal" proof of an agreement to arbitrate is just such a discriminatory rule. *Progressive*, 991 F.2d at 46 (quoting *Marlene Indus.*

*Corp. v. Carnac Textiles, Inc.*, 45 N.Y.2d 327, 333 (1978)); *see also Matter of Waldron v. Goddess*, 61 N.Y.2d 181, 183-84 (1984) (intent to form an arbitration agreement must be "clear, explicit, and unequivocal"). The Second Circuit explained that "New York law requires that nonarbitration agreements be proven only by a mere preponderance of the evidence," and the FAA "prohibits such discriminatory treatment of arbitration agreements." *Progressive*, 991 F.2d at 46 (citing *Fleming v. Ponziani*, 24 N.Y.2d 105, 110 (1969)).

*Kindred* confirms that *Progressive*'s holding is correct. In *Kindred*, the U.S. Supreme Court held that the FAA preempts a Kentucky state law specifying that a general power of attorney "could not entitle a representative to enter into an arbitration agreement without *specifically* saying so." 581 U.S. at 250. The Kentucky Supreme Court justified that heightened clear-statement rule as "safeguard[ing] a person's 'right to access the courts and to trial by jury.'" *Id.* at 252. In rejecting the Kentucky rule, the U.S. Supreme Court observed that Kentucky "adopt[ed] a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial." *Id*. "Such a rule is too tailor-made to arbitration agreements-subjecting them, by virtue of their defining trait, to uncommon barriers—to survive the FAA's edict against singling out those contracts for disfavored treatment." *Id.*

The New York rule plaintiff invokes here is indistinguishable from the Kentucky rule invalidated in *Kindred*. The rationale the New York courts have provided for the rule—that a higher standard of proof is required because an arbitration agreement involves the waiver of "rights under the procedural and substantive law of the State" (*Marlene Indus.*, 45 N.Y.2d at 333-34)—is the very same rationale that the Kentucky courts offered for their arbitration-specific rule. But that rationale just confirms that the New York rule impermissibly targets arbitration agreements, because the waiver of a jury trial and right to go to court are defining characteristics of such agreements.

Plaintiff attempts to defend the New York rule as requiring a higher standard for all forum-selection clauses, not just arbitration agreements. Appellant Br. 72-73. But that "attempt to cast the rule in broader terms cannot salvage" it from preemption. *Kindred*, 581 U.S. at 253. Indeed, plaintiff's principal case involved an arbitration agreement, not a forum-selection clause outside of the arbitration context. *See Gangel v. DeGroot*, 41 N.Y.2d 840, 841 (1977). As Uber's brief explains (at 29), none of plaintiff's other cases demonstrates that New York courts apply this heightened standard outside of the arbitration context either.

But even if the New York rule applied to forum-selection clauses, it still would be preempted. Section 2 of the FAA requires placing arbitration agreements "on an equal plane with other contracts" in general, *Kindred*, 581 U.S. at 252, not merely

on an equal plane with a limited subset of contracts. *See* 9 U.S.C. § 2 (requiring state-law ground for refusing to enforce an arbitration agreement to be one that exists "for the revocation of *any* contract") (emphasis added).

The party defending the Kentucky rule in *Kindred* argued that FAA preemption should not apply because Kentucky's clear-statement rule governed all contractual waivers of jury trials and rights to sue in court. But the Supreme Court squarely rejected that argument, stating arbitration agreements must be subject to the rules that apply to contracts generally. 581 U.S. at 252-54. That principle applies here and requires preemption of New York's rule disfavoring arbitration agreements.

## CONCLUSION

The trial court's order compelling arbitration should be affirmed.

Dated: March 31, 2023

Respectfully Submitted,

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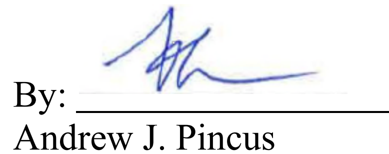
## PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR 1250.8(j), the undersigned states that this brief was prepared on a computer using the Microsoft Word 2016 word processing proagram in double-spaced 14-point Times New Roman font. According to the program's word count function, this brief is 5,667 words, inclusive of point headings and footnotes and excluding signature blocks and the other material specified in Rule 1250.8(f)(2).



By: ___________________
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
-------------------------------------------------------------------X
EMILY WU,

Plaintiff,

-against-

UBER TECHNOLOGIES, INC., JERRY ALVAREZ,
AHMED ELHASHASH, and ARMAN KHAN,

Defendants.
-------------------------------------------------------------------X

Index No.: 33964/2020E

**NOTICE OF APPEAL**

**C O U N S E L O R S:**

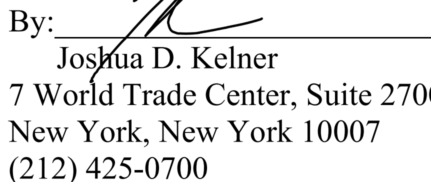
**PLEASE TAKE NOTICE** that plaintiff, by his attorneys, KELNER & KELNER, ESQS., hereby appeals to the Appellate Division of the Supreme Court, First Judicial Department, from the Decision and Order of the Honorable Veronica G. Hummel, dated December 20, 2022, entered in the office of the Clerk of Court for the Supreme Court of the State of New York, County of Bronx, on December 21, 2022, and served, with Notice of Entry, by electronic filing on December 21, 2022.

Plaintiff appeals from each and every part of said order, and the whole thereof.

Dated: New York, New York
December 21, 2022

Yours etc.,

KELNER & KELNER, ESQS.



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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

---------------------------------------------------------------------- X

EMILY WU,

Plaintiff,

-against-

UBER TECHNOLOGIES, INC., JERRY ALVAREZ, AHMED ELHASHASH, and ARMAN KHAN,

Defendants.

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**DECISION & ORDER WITH NOTICE OF ENTRY**

Index No. 33964/2020E

**PLEASE TAKE NOTICE**, that the within is a true copy of a Decision and Order of the Honorable Veronica G. Hummel, A.J.S.C. dated December 20, 2022 (NYSCEF #74), duly entered in the office of the Clerk of the within named Court on December 21, 2022.

Dated: New York, New York
December 21, 2022

Yours, etc.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

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NYSCEF DOC. NO. 74
INDEX NO. 33964/2020E
RECEIVED NYSCEF: 12/21/2022

**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF BRONX, IAS PART 31**

| | |
|---|---|
| EMILY WU,<br><br>Plaintiff,<br><br>-against-<br><br>UBER TECHNOLOGIES, INC., JERRY ALVAREZ, AHMED ELHASHASH, and ARMAN KHAN,<br><br>Defendants. | **Index No. 33964/2020E**<br><br>**HON. VERONICA G. HUMMEL, A.J.S.C.**<br><br>**DECISION & ORDER**<br><br>**Mot. Seq. No. 2** |

In accordance with CPLR 2219(a), this decision is made upon consideration of all papers filed in NYSCEF in connection with Motion Sequence No. 2, comprising plaintiff EMILY WU's ("Wu") motion and defendant UBER TECHNOLOGIES, INC.'s ("Uber") cross-motion. Wu's motion seeks an order (a) striking Uber's Answer based on its alleged improper *ex parte* contact with Wu; (b) staying, pursuant to CPLR § 7503, Uber's demand for arbitration of Wu's claims; and (c) setting this action down for a hearing to determine the appropriate monetary sanction and other penalties as may be warranted against Uber. Uber's cross-motion, in turn, seeks an order (a) compelling Wu to arbitrate, before the American Arbitration Association (the "AAA"), the claims against Uber and (b) dismissing Wu's Complaint and any cross-claims asserted against Uber or, alternatively, staying the action and any cross-claims asserted against Uber until the arbitration is complete. For the reasons discussed below, Wu's motion is **DENIED**, Uber's cross-motion is **GRANTED**, and the action is **STAYED**.

## I. FACTUAL BACKGROUND

This personal-injury action arises from a motor-vehicle accident. On July 25, 2020, Wu used the Uber software application (which Uber calls the "Rider App") installed on her smartphone to hail an Uber vehicle. (Affidavit of Emily Wu, sworn to on April 7, 2021 ("Wu Moving Aff.") [NYSCEF Doc. 23], ¶ 2; Affidavit of Ryan Buoscio, sworn to on May 12, 2021 ("Buoscio Aff.") [NYSCEF Doc. 38], ¶ 8 & Ex. A; Affidavit of Alexander Perez, sworn to on May 12, 2021 ("Perez Aff.") [NYSCEF Doc. 39], ¶ 2.) Defendant Jerry Alvarez, an Uber driver, responded to Wu's cyber-hail. (Wu Moving Aff. ¶ 2.) Upon reaching the appointed destination in Brooklyn, Wu was discharged from Alvarez's vehicle into the middle of the street, where she was struck by another vehicle and allegedly suffered injuries. (*Id.*)

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Wu filed the Complaint in this action on November 19, 2020. [NYSCEF Doc. 1] Wu alleges negligence against each of the defendants, including against Uber pursuant to a theory of respondeat superior.

Wu served the Complaint on Uber a few days after its filing, on November 23, 2020, by personal service upon the New York Secretary of State (the "Secretary"), as authorized under BCL § 306. [NYSCEF Doc. 2.] Uber acknowledges that service was properly made upon it but, as further addressed below, disputes that it received actual notice of the lawsuit contemporaneously with such service. (Affirmation of Rory L. Lubin, dated May 13, 2021 ("Lubin Affirm."), at 15 n.2.)

### A. The January 2021 Email

On January 15, 2021, approximately two months after Wu filed and served the Complaint, Uber sent an email to Wu with the subject line "Changes to our Terms of Use on January 18" (the "January 2021 Email"). (Buoscio Aff. ¶ 16.) Uber asserts that its *non-legal* operations team "caused the [January 2021 Email] to be sent to [Wu] on a mass basis along with millions of other registered U.S. Uber App users at the same time." (*Id.* ¶ 17.)

In the body of the January 2021 Email (reproduced in full in Figure 1 below), recipients were informed that changes to Uber's Terms of Use would go into effect on January 18, 2021 (the "January 2021 Terms"), and that users of the Rider App would begin to see a pop-up screen in the application after that date asking them to review and confirm agreement to the January 2021 Terms before they could continue using the application. (*Id.* Ex. G.) Additionally, recipients of the January 2021 Email were expressly notified that the updates included, among other things, "changes to the Arbitration Agreement . . . and procedures and rules for filing a dispute against Uber." (*Id.*) The January 2021 Terms were made available for the recipient's review via hyperlinked text, which was distinguished from the surrounding black text by its blue color (*see* Figure 1 below).

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**Figure 1**

Updated Terms of Use

Starting on January 18, you'll be asked to review and agree to our updated terms

Review terms →

Hi

You can now review our updated Terms of Use ("Terms"), which will go into effect on January 18, 2021. Beginning on or after January 18, you'll see a pop-up in the Uber or Uber Eats app that will enable you to review and agree to the updated Terms. After indicating that you have read and agree to the Terms, tap **Confirm** in order to continue using the app.

We recommend that you review the updated Terms. Some of the updates include changes to the Arbitration Agreement, the terms related to access and use of the Uber platform, and procedures and rules for filing a dispute against Uber.

Please note that we are not making any changes to the ways in which we use your personal data. We will continue to uphold our long-standing policy of not sharing or selling your data for third-party marketing or advertising purposes, unless we have your consent. For information on our privacy practices, please see our Privacy Notice.

Thank you,
The Uber team

Source: Buoscio Aff. Ex. G

According to Uber's records, the January 2021 Email was sent to Wu at 8:10 p.m. on January 15, 2021, and it was opened by Wu approximately two hours later at 10:04 p.m. (Buoscio Aff. Ex. F.) Wu does not dispute receiving, opening, or reading the January 2021 Email. (*See generally* Wu Moving Aff.) Wu does not state, one way or the other, however, whether she reviewed the hyperlinked January 2021 Terms, although Wu's submitted affidavit implies that Wu did not. (*See generally id.*)

**B. Uber's Notice of Wu's Complaint**

Uber claims that it did not have actual notice of Wu's filing of this action and of Wu's legal representation when the January 2021 Email was sent. (Buoscio Aff. ¶ 23.)

According to Uber, when Wu served the Complaint on the Secretary on November 23, 2020, the Secretary was sending legal process for Uber to its regional office at 111 Eighth Avenue, New York, New York. (*Id.* ¶ 26.) That regional office, however, had been closed in March 2020 due to the COVID-19 pandemic. (*Id.* ¶ 24.) Mail sent there was, as a result, allegedly not being fully processed until the office reopened in April 2021. (*Id.* ¶ 25.) Thus, Uber claims, the Complaint was not processed and did not actually come to Uber's attention until *after* January 15, 2021. (*See id.* ¶¶ 23, 26.)

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Uber claims that it first became aware of Wu's lawsuit and legal representation on February 25, 2021, after a copy of the Complaint was mailed to Uber's registered agent, CT Corporation, which, in turn, provided the Complaint directly to Uber via email and via regular mail to its headquarters in San Francisco, California. (*See id.* ¶ 27; Reply Affirmation of Rory L. Lubin, dated June 18, 2021 ("Lubin Reply Affirm."), Ex. A.)

Wu responds to Uber's claims with a list of more than 80 other cases, drawn from NYSCEF searches, in which Uber was allegedly served via the Secretary and then entered an appearance in the action during the period in which Uber alleges that its New York office was closed due to the pandemic. (*See* Affidavit of Candi Lee, sworn to on June 3, 2021 ("Lee Aff.") [NYSCEF Doc. 44], ¶¶ 2-5.)

### C. The January 2021 Pop-Up Screen

As the January 2021 Email stated, beginning on January 18, 2021, users of the Rider App were presented with an in-app "blocking" pop-up screen (reproduced in full in Figure 2 below) bearing the heading "We've updated our terms" (the "January 2021 Pop-Up"). (Buoscio Aff. ¶ 19, Ex. H.) The January 2021 Pop-Up encouraged users to read the January 2021 Terms in full and linked directly to those Terms via the hyperlinked text—displayed in contrasting blue color and underlined—"Terms of Use." (*Id.*) Additionally, the January 2021 Pop-Up contained a checkbox and, to its right, expressly stated: "By checking the box, I have reviewed and agreed to the Terms of Use and acknowledge the Privacy Notice." (*Id.* ¶ 20, Ex. H.) Although Uber does not explain what the term "blocking" means in the context of this pop-up screen, the Court understands it to mean that the user could not advance past the screen and continue using the Rider App until the checkbox was checked and the "Confirm" button pressed.

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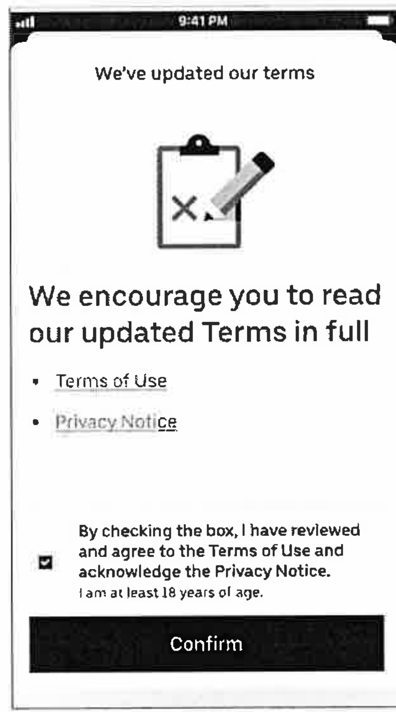
**Figure 2**




Source: Buoscio Aff. Ex. H

According to Uber's records, Wu checked the box and clicked the "Confirm" button in the January 2021 Pop-Up in Wu's Rider App on January 25, 2021, at 11:23 a.m. (*Id.* ¶ 20, Ex. A.) Wu does not dispute doing so, although, once again, there is nothing in the record demonstrating that Wu actually reviewed the January 2021 Terms before checking the box and clicking the "Confirm" button. (*See generally* Wu Moving Aff.; Affidavit of Emily Wu, sworn to on May 26, 2021 ("Wu Opp. Aff.") [NYSCEF Doc. 46].)

**D. The January 2021 Terms**

The January 2021 Terms that Wu would have seen by clicking on the "Terms of Use" hyperlink in the January 2021 Pop-Up provide, initially, that, "[b]y accessing or using [Uber's] Services, [the user] confirm[s] [Wu's] agreement to be bound by these Terms." (Buoscio Aff. Ex. I, § 1.) They further provide that if the user "do[es] not agree to these Terms, [the user] may not access or use [Uber's] Services." (*Id.*)

Uber's "Services" are defined broadly as "[t]he Uber Marketplace Platform and the Uber content or services described in [Section 3 of the January 2021 Terms]." (*Id.* § 3.) As relevant to the definition of Uber's "Services," Section 3 provides that

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> Uber operates a multi-sided digital marketplace platform [defined earlier as the "Uber Marketplace Platform"] that is offered in a number of forms, including mobile and/or web[-]based applications ("Applications"). Among other things, the Uber Marketplace Platform enables you to receive: (i) services rendered by Uber that facilitate your connection to independent third[-]party providers, including drivers and restaurants ("Third Party Providers"), for the purchase of services or goods such as transportation, logistics and/or delivery services from those Third Party Providers; and (ii) any related content or services, including payment processing and customer support.

(*Id.*)

While Section 2 of the January 2021 Terms contains the full arbitration agreement at issue here (the "Arbitration Agreement"), Section 1 provides a separate notice of the existence of the Arbitration Agreement and an acknowledgment of the user's understanding of and agreement thereto:

> IMPORTANT: PLEASE BE ADVISED THAT THIS AGREEMENT CONTAINS PROVISIONS THAT GOVERN HOW CLAIMS BETWEEN YOU AND UBER CAN BE BROUGHT, INCLUDING THE ARBITRATION AGREEMENT (SEE SECTION 2 BELOW). PLEASE REVIEW THE ARBITATION 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.

(*Id.* § 1.)

Section 2 of the January 2021 Terms comprises a number of subsections containing the complete terms of the Arbitration Agreement. The Court recites below only those provisions of Section 2 relevant to this dispute.

Subsection A—the core provision of the Arbitration Agreement—provides, in relevant part, that

> [the user] and Uber agree that any dispute, claim or controversy in any way arising out of or relating to (i) these Terms and prior versions of these Terms, or the existence, breach, termination, enforcement, interpretation, scope, waiver, or validity thereof, (ii) [the user's] access to or use of the Services at any time, (iii) incidents or accidents resulting in personal injury that [the user] allege[s] occurred in connection with [the user's] use of the Services, whether the dispute, claim or controversy occurred or accrued before or after the date [the user] agreed to the Terms, or (iv) [the user's] relationship with Uber, will be settled by binding arbitration between [the user] and Uber, and not in a court of law.

(*Id.* § 2(a).)

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Subsection C, in turn, sets forth the rules and law that the user and Uber agree will govern the Arbitration Agreement and any arbitration proceeding between them. Initially, subsection C provides that any such arbitration proceeding will be administered by the AAA under its Consumer Arbitration Rules. (*Id.* § 2(c).) Those rules, which are publicly available, provide, in relevant part, that the "arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." (Am. Arbitration Assoc., *Consumer Arbitration Rules* R-14 (eff. Sept. 1, 2014), *available at* http://www.adr.org/sites/default/files/Consumer_Rules_ Web_2.pdf.)

Next, subsection C sets forth a so-called "delegation" provision, which assigns to the arbitrator responsibility for determining a broad array threshold issues:

> The parties agree that the arbitrator ("Arbitrator"), and not any federal, state, or local court or agency, shall have exclusive authority to resolve any disputes relating to the interpretation, applicability, enforceability or formation of this Arbitration Agreement, including any claim that all or any part of this Arbitration Agreement is void or voidable. The Arbitrator shall also be responsible for determining all threshold arbitrability issues, including issues relating to whether the Terms are applicable, unconscionable or illusory and any defense to arbitration, including waiver, delay, laches, or estoppel. If there is a dispute about whether this Arbitration Agreement can be enforced or applies to a dispute, [the user] and Uber agree that the [A]rbitrator will decide that issue.

(Buoscio Aff. Ex. I, § 2(c).)

Subsection C then provides that the user and Uber agree that the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 1 *et seq.*, will govern the Arbitration Agreement, "[n]otwithstanding any choice of law or other provision in the Terms." (Buoscio Aff. Ex. I, § 2(c).) Subsection C goes on to provide that, should the FAA or AAA rules be "found not apply to any issue regarding the interpretation or enforcement of this Arbitration Agreement, then that issue shall be resolved under the laws of the state where [the user] reside[s] when [the user] accept[s] these Terms." (*Id.*)

Finally, subsection C provides that "[a]ny dispute, claim, or controversy arising out of or relating to incidents or accidents resulting in personal injury . . . that [the user] allege[s] occurred in connection with your use of the Services, whether before or after the date [the user] agreed to the Terms, shall be governed by and construed in accordance with the laws of the state in which the incident or accident occurred." (*Id.*)

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### E. Uber's Arbitration Notice

On April 6, 2021, Uber's counsel served on Wu's counsel a written Notice of Intention to Arbitrate (the "Arbitration Notice"). (*See* Affirmation of Joshua D. Kelner, dated April 21, 2021 ("Kelner Affirm.") [NYSCEF Doc. 22], Exs. F, G.) The Arbitration Notice requested that Wu agree to arbitrate the claims against Uber pursuant to the Arbitration Agreement and informed Wu that, if Wu did not so agree, Uber would file a motion to compel arbitration. (*Id.* Ex. G.) Wu refused to agree to arbitration and, instead, demanded that Uber withdraw the Arbitration Notice. (*See id.* Ex. H.) Uber elected not to do so.

Wu filed the motion for sanctions and to stay arbitration on April 21, 2021. [NYSCEF Doc. 21] Uber, in turn, filed its cross-motion to compel arbitration and stay this action on May 13, 2021. [NYSCEF Doc. 34]

Notably, according to Uber's records, between January 25, 2021 (when Wu clicked the "Confirm" button in the January 2021 Pop-Up), and May 10, 2021 (shortly before Uber filed its cross-motion), Wu used the Rider App to hail rides *more than 50 times*. (*See* Buoscio Aff. Ex. J.) Of those 50 cyber-hails, 19 occurred *after* Uber served the Arbitration Notice on Wu's counsel. (*See id.*)

## II. ANALYSIS

### A. Wu's Claims Against Uber Must Be Arbitrated

#### i. *The Parties' Contentions*

##### a. Wu's Moving Papers

Wu advances a number of arguments as to why the liability claims against Uber should not be sent to arbitration pursuant to the January 2021 Terms.

Initially, Wu contends that the January 2021 Terms are unconscionable, both procedurally and substantively. (*See* Kelner Affirm. at 20-23.) As to procedural unconscionability, Wu points to the January 2021 Email and argues that she did not expect to receive anything directly from Uber concerning or affecting her lawsuit because she was represented by counsel at the time; thus, sending Wu the January 2021 Email was allegedly inappropriate and deceptive. (*Id.* at 20.) Wu argues further that the January 2021 Email failed to indicate that it would impact Wu's pending lawsuit, instead claiming that Uber had merely "made minor updates to its terms of service." (*Id.*

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at 20-21.) As to the January 2021 Terms themselves, Wu argues that they also failed to explicitly state that they might bear on a pending lawsuit and instead relied on "implication, by an oblique reference to claims that 'accrued before or after the date [the user] agreed to the Terms.'" (*Id.* at 21 (quoting Buoscio Aff. Ex. E, § 2(a)).)[1] This clause, Wu argues further, "was tucked into a densely worded, ten page long legal document that a layperson like . . . Wu could not possibly have known to scrutinize for its potential interplay with a lawsuit in which she was represented by counsel." (*Id.* at 21.) Finally, and further to Wu's alleged layperson status, Wu points to the alleged inequality of sophistication between Wu (a barista at Starbucks) and Uber (a large, publicly traded company). (*Id.*)

As to substantive unconscionability, Wu identifies two reasons why the terms are "unreasonably favorable" to Uber and, therefore, should not be enforced. (*Id.* at 22.) First, Wu argues that when she received that January 2021 Email, Wu "had already explicitly demanded that her claims arising from the motor vehicle case be decided by a jury" and that Wu received no consideration for the waiver of that "bedrock legal right"—except, perhaps, that Wu be allowed to continue to use Uber taxis in the future. (*Id.*) Second, Wu points to the waiver of Wu's right to join any class-action lawsuit against Uber as further proof of the imbalance of the January 2021 Terms. (*Id.*)

Wu also contends that the January 2021 Terms are "an unenforceable contract of adhesion, for much the same reasons" that they are unconscionable. (*Id.*) Specifically, Wu argues that "the [January 2021 Terms] and the [January 2021 Email] were both deceptively worded, and sent without notice to counsel, resulting in substantive unfairness to" Wu. (*Id.* at 23.)

Wu also contends essentially that the Arbitration Agreement is void as against New York public policy. (*See id.*) Wu argues that the right to a jury trial is guaranteed by the New York State Constitution, and that CPLR § 4102(c) sets forth certain procedures that must be followed in order to waive that right in a pending action—procedures that Wu claims were not followed here. (*Id.*) According to Wu, through deceptive means, "Uber attempted an end-run around the legal system, for the specific purpose of removing a case from it." (*Id.* at 23-24.)

Even if the January 2021 Terms are not unconscionable or a contract of adhesion, and even if the Arbitration Agreement is not void as against public policy, Wu contends that she never

[1] Wu's citation to Exhibit E to the Buoscio Affirmation is incorrect. Exhibit E is a prior version of Uber's Terms and Conditions that does not contain the quoted language. Wu evidently meant to cite to Exhibit I, which is the January 2021 Terms.

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assented to them. (*See id.* at 25-29.) Once again, Wu argues that the January 2021 Terms were difficult for someone "such as herself" to understand. (*Id.* at 28.) Wu further argues that "[t]his is particularly true given the process by which Uber transmitted the new terms," and that the email downplayed the significance of the updates to the January 2021 Terms, discouraged recipients from reviewing them, and characterized the updates as "being purely prospective in nature." (*Id.* 28-29.) Consequently, Uber attempted to acquire Wu's agreement to arbitrate through "implication or subtlety" rather than through a "clear, explicit and unequivocal" agreement as required under New York law. (*Id.* at 25 (quoting *In re Waldron (Goddess),* 61 N.Y.2d 181, 183-84 (1984)), 28-29.)

Finally, Wu contends that the liability claims against Uber in this action fall outside of the scope of the Arbitration Agreement. (*See id.* at 30-32.) Wu specifically refers to that clause of subsection A of the Arbitration Agreement providing that "incidents or accidents resulting in personal injury that [the user] allege[s] occurred in connection with [the user's] use of the Services" are subject to arbitration and argues that her claims against Uber do not fall within the definition of "Services," as set forth in Section 3 of the January 2021 Terms. (*See id.* at 31-32 (quoting Buoscio Aff. Ex. E, § 2(a)).

b. Uber's Opposition

Uber, in turn, opposes each of Wu's positions and offers its own set of arguments as to why Wu's underlying liability claims should be sent to arbitration pursuant to the January 2021 Terms.[2]

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[2] In addition to the January 2021 Terms, Uber also contends that Wu was bound by prior agreements containing arbitration provisions. First, Uber contends that Wu agreed to Uber's Terms and Conditions, effective January 2, 2016 (the "January 2016 Terms"), when Wu registered her Uber account through the Rider App on November 18, 2016. (*See* Lubin Affirm. at 4-6, 18-26; Buoscio Aff. ¶¶ 8-9, Exs. A-B; *see also generally* Perez Aff.) Wu effectively concedes that she registered an Uber account on the date and through the process claimed by Uber, but disputes that the sign-up process provided Wu with sufficient notice of the January 2016 Terms or acquired Wu's assent to them. (*See* Affirmation of Joshua D. Kelner, dated June 7, 2021 ("Kelner Opp. Affirm.") [NYSCEF Doc. 43], at 20-34; Wu Opp. Aff. ¶ 2.)

Second, Uber contends that Wu agreed to Uber's Terms and Conditions, effective November 21, 2016 (the "November 2016 Terms"), through the continued use of the Rider App subsequent to receiving an email from Uber on November 20, 2016 (the "November 2016 Email"), expressly informing Wu that such use would constitute agreement to the November 2016 Terms. (*See* Lubin Affirm. at 7-9, 18-26; Buoscio Aff. ¶¶ 11-15, Exs. C-E.) Wu acknowledges receiving the November 2016 Email but denies ever opening or reading it. (Wu Opp. Aff. ¶ 3.) Wu argues further that, even if she had opened and read the November 2016 Email, it was insufficient to garner her assent to the November 2016 Terms. (*See* Kelner Opp. Affirm. at 20-24, 34-35.) Additionally, and more broadly, Wu suggests that Uber cannot rely on either the January 2016 Terms or the November 2016 Terms to compel arbitration in this matter because Uber's Arbitration Notice expressly relied on the January 2021 Terms, in effect waiving Uber's right to subsequently rely on the prior terms. (Kelner Opp. Affirm at 3-5.)

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Uber argues, first, that the process through which Wu was presented with the January 2021 Terms for Wu's review and acceptance—*i.e.*, via the January 2021 Pop-Up —adequately put Wu on notice of the Arbitration Agreement and acquired her assent both to it and the overarching January 2021 Terms. (*See* Lubin Affirm. at 18-25.) Uber relies on numerous cases examining the differences between "click-wrap" and "browsewrap" agreements and which, taken together, demonstrate courts' relative willingness to find a user's assent in cases involving one type of agreement versus the other. (*See id.*) Because the January 2021 Terms were presented to Wu in a manner constituting a click-wrap agreement, Uber argues that the January 2021 Terms were assented to by Wu, regardless of whether Wu actually read them. (*Id.*)

Uber next argues that Wu's liability claims are, in fact, within the scope of the Arbitration Agreement, because the underlying factual basis for Wu's lawsuit falls squarely within the January 2021 Terms' definition of Uber's "Services." (*See id.* at 25-26.)

According to Uber, moreover, "even though there is a current dispute as to agreement formation and validity," that dispute must itself be arbitrated, along with any other threshold arbitrability questions presented by the motions, pursuant to the delegation provision contained in the Arbitration Agreement. (*Id.* at 27.)

Uber next addresses Wu's claims of unconscionability and adhesiveness directly, arguing that both are meritless. (*See id.* at 30-34.) Uber denies that Wu was the subject of "high pressure tactics" or was discouraged from reading the January 2021 Terms. (*Id.* at 30.) Further, rather than lacking any meaningful choice, Uber contends that Wu had numerous other transportation alternatives that Wu could have opted to use instead of Uber if Wu disagreed with the January 2021 Terms. (*Id.* at 32-33.) Moreover, Uber argues that Wu's continued use of the Rider App even after she filed the motion belies Wu's contention that the January 2021 Terms are substantively unconscionable and, additionally, constitutes Wu's ratification of the January 2021 Terms. (*Id.* at 30-32.) Finally, Uber argues that the January 2021 Terms do not unduly favor it, because arbitration is "a common and routine method of resolving disputes" and Wu should not be

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The Court need not decide the existence, validity, or effect of the January 2016 Terms or the November 2016 Terms, or whether Uber can even rely on one or both of them, however, because, for the reasons set forth herein, Uber has established that Wu assented to the January 2021 Terms and that they require that Wu's claims be arbitrated. Thus, to the extent that either of the parties' arguments relate exclusively to the January 2016 Terms or the November 2016 Terms, the Court does not address them.

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surprised at having to arbitrate a dispute relating to a transaction of the nature involved here. (*Id.* at 33.)

Finally, as to the claim that the Arbitration Agreement is against New York public policy, Uber argues that Wu "did not come forward with a single instance, example or statute that she claims [the Arbitration Agreement] violates," and that the New York State Constitution's "guarantees of right to a jury trial do not prevent parties from entering into their own agreements about how their disputes should be resolved." (*Id.*) Uber further argues that, rather than being consistent with New York's public policy, Wu's contention actually conflicts with New York's public policy *favoring* arbitration. (*Id.*)

c. Wu's Opposition and Reply

In opposition to Uber's cross-motion and in reply in further support of the motion, Wu essentially repeats many of the same arguments made in the initial moving papers, with the following exceptions.

As to the question of whether an arbitrator, rather than the Court, should decide the threshold issues presented by Wu's motion pursuant to the Arbitration Agreement's delegation provision, Wu contends that before any arbitration can take place, the existence of a valid and enforceable arbitration agreement must first be determined by a court. (Kelner Opp. Affirm. at 21.) Because the "question of whether a contract is unconscionable bears on whether an agreement can be legally enforced in the first place," Wu contends further, that question is "necessarily an issue for the Court to decide." (*Id.* at 15 n.5.)

Wu also disputes Uber's assertion that Wu ratified the Arbitration Agreement by continuing to use the Rider App after filing the motion. (*See id.* at 17.) According to Wu, Uber's argument is contrary to New York's long-standing requirement that arbitration agreements be "clear, explicit and unequivocal" and not procured through "implication or subtlety." (*Id.* at 17-18.) Wu distinguishes the case on which Uber primarily relies—*Nicosia v. Amazon, Inc.*, 815 F. App'x 616 (2d Cir. 2020)—by pointing out that it applies the less stringent law of Washington State. (*Id.* at 18.)

Wu next disputes Uber's grounds for opposing Wu's public-policy argument. Wu argues, first, that, contrary to Uber's contentions, Uber's actions did indeed violate a statute, as the New York Rules of Professional Conduct are codified in New York at 22 N.Y.C.R.R. § 1200 and the

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CPLR is itself a statute. (*Id.* at 19.) Wu then raises, for the first time on reply, the possibility that Uber's alleged conduct—*i.e.*, "going around [a] represented part[y's] attorneys to obtain [a] jury trial waiver[]"—also violated New York's General Business Law § 349(a), which provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." (*Id.*)

d. Uber's Reply

Finally, in reply in further support of its cross-motion, Uber argues that, by failing to dispute that Wu clicked her acceptance of the January 2021 Terms in the January 2021 Pop-Up, Wu essentially concedes that she is bound by the January 2021 Terms. (Lubin Reply Affirm. at 13.) Uber also argues that Wu has failed to come forward with any legal authority or evidentiary facts supporting the contention that the January 2021 Terms were unconscionable because they applied to existing claims. (*Id.* at 13-14.) Regardless, Uber argues, the issue of whether the Arbitration Agreement applies to claims accruing prior to the date when the agreement was entered into is one that should be decided by an arbitrator pursuant to the Arbitration Agreement's delegation provision. (*Id.* at 14.)

To the extent necessary to resolve the motions, the Court discusses the parties' respective contentions in more detail below, in the context of its analysis, after setting forth the law generally applicable to the motions.

ii. *Governing Law*

The FAA "creates a body of federal substantive law of arbitrability applicable to arbitration agreements . . . affecting interstate commerce." *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 121 (2d Cir. 2010) (internal quotation marks and citation omitted). Section 2 of the FAA provides that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. There is no dispute here that the FAA applies to the Arbitration Agreement.

Federal policy strongly favors arbitration. *E.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). "[T]he FAA was 'enacted to replace judicial indisposition to arbitration,' and is an expression of a 'strong federal policy favoring arbitration as an alternative means of dispute resolution.'" *Ross v. Am. Express Co.*, 547 F.3d 137, 142 (2d Cir. 2008) (quoting *Hall St.*

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*Assocs., L.L.C. v. Mattel, Inc.*, 55 U.S. 576, 581 (2008)). Indeed, it has been observed that "it is difficult to overstate the strong federal policy in favor of arbitration, and it is a policy [courts] have often and emphatically applied." *Ragone*, 595 F.3d at 121 (internal quotation marks and citation omitted).

New York[3] policy similarly favors arbitration, viewing it as a means of "conserving the time and resources of the courts and the contracting parties." *Am. Int'l Specialty Lines Ins. Co. v Allied Capital Corp.*, 35 N.Y.3d 64, 70 (2020) (quoting *Nationwide Gen. Ins. Co. v. Investors Ins. Co. of Am.*, 37 N.Y.2d 91, 95 (1975)). Accordingly, "'New York courts interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration.'" *Stark v. Molod Spitz DeSantis & Stark, P.C.*, 9 N.Y.3d 59, 66 (2007) (quoting *Smith Barney Shearson v. Sacharow*, 91 N.Y.2d 39, 49-50 (1997)).

Despite their strong policy preferences for arbitration, both federal and New York law recognize the "fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC*, 563 U.S. at 339 (internal quotation marks and citation omitted); *accord People ex rel. Cuomo v. Coventry First LLC*, 13 N.Y.3d 108, 113 (2009) ("However, the obligation to arbitrate depends on an *agreement* to arbitrate; arbitration is a matter of consent, not coercion." (internal quotation marks and citation omitted)). Thus, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986); *accord, e.g., Inland Shoe Mfg. Co., Inc. v. Pervel Indus., Inc.*, 81 A.D.2d 505, 505 (1st Dep't 1981) ("It is hornbook law that no one may be compelled to arbitrate unless he has agreed to do so. This is true under the Federal Arbitration Law . . . , as it is under the law of this State."); *Brean Capital LLC v. NewOak Capital LLC*, 46 Misc. 3d 1203(A), at *2 (N.Y. Sup. Ct. N.Y. Cty. Dec. 22, 2014) ("[T]he applicable federal and New York law is basically the same, namely a liberal public policy in favor of arbitration, the principle that a party cannot be forced to arbitrate unless they agreed to do so by contract, and that the existence of an agreement to arbitrate is a question for a court, not the arbitrator." (citations omitted)).

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[3] Although neither party has performed a choice-of-law analysis in their submissions, there does not appear to be any genuine dispute that New York law, to the extent applicable under the FAA, governs this dispute. The accident occurred in New York, and Wu would have accepted the January 2021 Terms, if at all, in New York, making New York's law applicable under Section 2(c) and Section 7 of the Arbitration Agreement. Even if, *arguendo*, another state's law might apply here, the only other possibility is the law of California, where Uber maintains its principal place of business. If California law applied to the determinative issues of notice and assent, the outcome would not change, because "New York and California apply substantially similar rules for determining whether the parties have mutually assented to a contract term." *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 74 (2d Cir. 2017) (internal quotation marks and citation omitted).

"[T]he purpose of Congress enacting the FAA was to make arbitration agreements as enforceable as other contracts, *but not more so*." *Ross*, 547 F.3d at 143 (internal quotation marks and citation omitted). Courts must, therefore, "place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." *AT&T Mobility LLC*, 563 U.S. at 339 (internal citations omitted). Hence, the FAA provides that arbitration agreements are unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "This savings clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *AT&T Mobility LLC*, 563 U.S. at 339 (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

A court deciding whether, under the FAA, all or part of an action should be sent to arbitration must determine, first, "whether the parties agreed to arbitrate" and, second, "the scope of the agreement." *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 169 (2d. Cir. 2004) (internal quotation marks and citation omitted). When deciding whether the parties agreed to arbitrate a particular matter, courts "apply ordinary state-law principles that govern the formation of contracts." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 73-74 (2d Cir. 2017) ("[T]he district court must first determine whether such agreement exists between the parties. This question is determined by state contract law." (citation omitted)).

iii. *Pursuant to the Arbitration Agreement's Delegation Provision, An Arbitrator Must Resolve the Threshold Issues of Unconscionability, Adhesion, Public Policy, and Scope*

"Generally, '[w]hen the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract [and] . . . possesses no power to decide the arbitrability issue.'" *Newton v. LVMH Moet Hennessy Louis Vuitton Inc.*, 192 A.D.3d 540, 541 (1st Dep't 2021) (quoting *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019)). Similarly, "[w]here there is a broad arbitration clause and the parties' agreement specifically incorporates by reference the AAA rules providing that the arbitration panel shall have the power to rule on its own jurisdiction, courts will leave the question of arbitrability to the arbitrators." *Zachariou v. Manios*, 68 A.D.3d 539, 539 (1st Dep't 2009) (internal quotation marks and citation omitted).[4] To delegate an arbitrability question to an arbitrator, however, there must

[4] This New York caselaw itself derives from federal caselaw: *Zachariou* cites *Life Receivable Trust v. Goshawk Syndicate 102 at Lloyd's*, 66 A.D.3d 495, 496 (1st Dep't 2009), *aff'd*, 14 N.Y.3d 580 (2010), *cert. denied*,

be clear and unmistakable evidence that the parties agreed to do so. *First Options*, 514 U.S. at 944-45.

Here, Uber invokes the delegation provision in the Arbitration Agreement to argue that all of the parties' disputes on these motions should be resolved by an arbitrator rather than the Court. Wu disagrees, contending that Wu is entitled by law to judicial resolution of her challenges to the formation and validity of the January 2021 Terms (not to mention the underlying liability claims against Uber).

Initially, the plain language of the delegation provision in the Arbitration Agreement clearly and unmistakably evinces the parties' intent to delegate to an arbitrator the responsibility for resolving essentially any and all threshold issues. Specifically, subsection C delegates to an arbitrator the "*exclusive* authority to resolve any disputes relating to the interpretation, applicability, enforceability or *formation* of [the] Arbitration Agreement, including any claim that all or any part of [the] Arbitration Agreement is *void or voidable*." (Buoscio Aff. Ex. I, § 2(c) (emphasis added)). Subsection C then goes on to further delegate to an arbitrator the responsibility for "determining all threshold arbitrability issues, including issues relating to whether the Terms are applicable, unconscionable or illusory and any defense to arbitration, including waiver, delay, laches, or estoppel." (*Id.* (emphasis added).) This is a clear and broad delegation of authority to an arbitrator to determine threshold issues.

In addition, subsection C of the Arbitration Agreement also expressly incorporates the AAA's Consumer Arbitration Rules, under which an arbitrator is empowered to rule on his or her own jurisdiction. (*Id.*; Am. Arbitration Assoc., *Consumer Arbitration Rules* R-14.). Subsection A of the Arbitration Agreement, furthermore, is a quintessentially broad arbitration clause, providing that "any dispute, claim or controversy in any way arising out of or relating to" the January 2021 Terms, access to or use of Uber's Services, any incident or accident resulting in personal injury in connection with the use of Uber's Services, or a user's relationship with Uber are all subject to arbitration. *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 300 (2010) (discussing arbitration clause contained in agreements at issue in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 442 (2006)); *Gavin/Solmonese LLC v. D'Arnaud-Taylor*, 639 F. App'x 664, 668-69 (2d Cir. 2016) (citing *Mehler v. Terminix Int'l Co.*, 205 F.3d 44, 49-50 (2d Cir. 2000)); *accord*

562 U.S. 962 (2010); which, in turn, cites *Smith Barney Shearson*, 91 N.Y.2d at 47; which, in turn, cites *FSC Securities Corp. v. Freel*, 14 F.3d 1310, 1312-13 (8th Cir. 1994), and *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1202 (2d Cir. 1996).

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*Bridger v. Fourth Ave. Capital Partners, L.P.*, 174 A.D.3d 450, 451 (1st Dep't 2019). Thus, under the applicable federal and state law, this provision further evidences the parties' intent to delegate all threshold issues to an arbitrator and, in turn, disempower a court from deciding them.

While it may seem that the Court's role in deciding the arbitration-related portions of these motions therefore ends, the Court must, in fact, engage in additional analysis before sending this dispute to an arbitrator. Though the specific facts of this case may be unique to it, this case nonetheless belongs to a long history of cases in which the contentions of the party challenging the underlying arbitration agreement raise the perennial question, "Who decides who decides?" The question arises here, despite the Arbitration Agreement's clear and broad delegation provision, as a consequence both of (a) Wu's various contentions concerning the formation and validity of the January 2021 Terms and (b) the well-settled proposition that a party cannot be forced to submit any matter to arbitration in the absence of an agreement to do so. In other words, how could Wu have agreed to delegate to an arbitrator the authority to determine whether the Arbitration Agreement or the January 2021 Terms were formed or otherwise valid and enforceable (including the related questions of whether the agreement is unconscionable, adhesive, or against public policy), when Wu claims not to have agreed to the January 2021 Terms in the first place? If Wu's claims ultimately prove well-founded, then sending Wu's challenge to an arbitrator could, without the necessary predicate of an agreement, deprive Wu of the judicial forum to which she would otherwise have been entitled.

The court's role under the FAA in deciding threshold issues in cases where such a question arises, was recently addressed at length by the U.S. Court of Appeals for the Third Circuit in *MZM Construction Company, Inc. v. New Jersey Building Laborers Statewide Benefit Funds*, 974 F.3d 386 (3d Cir. 2020). While neither of the parties have raised this case in their papers, it nonetheless effectively demonstrates the persistent difficulties that courts and parties have with applying the U.S. Supreme Court's arbitration precedents and, furthermore, serves as a useful medium through which the Court can frame and discuss the issues that exist in this case.

In *MZM*, the president of MZM Construction Company ("MZM Co.") signed a one-page, short-form agreement (the "SFA") with a local labor union in connection with a construction project at the Newark Liberty International Airport. *Id.* at 392. The SFA expressly incorporated a separate collective bargaining agreement (the "CBA"), which MZM Co. never signed. *Id.* at 392-94. MZM Co. was required under the CBA to make certain contributions to the New Jersey Building Laborers' Statewide Benefit Funds (the "Funds"). Further, the CBA provided that the

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parties agreed to arbitrate "questions or grievances involving the interpretation and application of" the CBA. *Id.* at 393. The CBA also contained a delegation provision providing that "[t]he Arbitrator shall have the authority to decide whether an Agreement exists, where that is in dispute." *Id.*

For approximately 16 years, MZM Co. contributed to the Funds for work related to the Newark Airport and other projects. *Id.* In 2018, the Funds invoked their authority under the CBA to audit MZM Co.'s books to determine whether contributions had been made in accordance with the CBA. *Id.* Based on its audit, the Funds claimed that MZM Co. owed approximately $230,000 in contributions for the relevant period. *Id.* According to the Funds, the CBA applied to all MZM Co. projects throughout New Jersey, even those for which MZM Co. had not hired union labor and made contributions to the Funds. *See id.* 393-94. The Funds unilaterally scheduled an arbitration to resolve the dispute. *Id.* at 393.

MZM Co. brought suit in federal court to enjoin the arbitration. *Id.* The "gravamen" of MZM Co.'s suit was that "fraud in the execution voided the SFA and the incorporation of the CBAs, and therefore, no agreement exists between MZM [Co.] and the Funds." *Id.* In support of that argument, MZM Co. claimed that a local union representative had asked MZM Co.'s president to sign a single-project agreement only for the Newark Airport project or else the union would pull its workers from the project. *Id.* at 394. Additionally, MZM Co. claimed that, based on its president's interactions with the union representative over a number of years, the union representative was aware that MZM Co. had no interest in becoming a party to any statewide CBA. *Id.* The Funds opposed the injunction application, arguing, in relevant part, that MZM Co. had stated a claim for fraud in the inducement rather than fraud in the execution, and that "this distinction is material to whether the court or the arbitrator decides if an enforceable contract exists." *Id.*

The Third Circuit began its decision in *MZM* by first articulating the very question that Wu's contentions raise in this case, as well as by recognizing that question's various policy implications:

> We are confronted with a "mind-bending" question that has been dubbed "the queen of all threshold issues" in arbitration law. Who decides—a court or an arbitrator—whether an agreement exists, when the putative agreement includes an arbitration provision empowering an arbitrator to decide whether an agreement exists?

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> This seemingly circular and esoteric inquiry implicates important concerns, from the more specific question of whether the parties' bargained-for forum is being enforced to broader questions about the allocation of powers between judges and arbitrators.

*Id.* at 392 (citing David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 370, 422 (2018)). The Third Circuit then went on to affirm the District Court's decision to decide the challenge to the SFA instead of sending it to an arbitrator pursuant to the CBA's delegation provision. The Third Circuit held that "[u]nder the [FAA], 9 U.S.C. § 4, questions about the 'making of the agreement to arbitrate' are for the courts to decide unless the parties have clearly and unmistakably referred those issues to arbitration in a written contract *whose formation is not in issue*." *Id.* (emphasis added).

With *MZM*, however, context is critical. In reaching its holding, the Third Circuit first reviewed the relevant precedent of the U.S. Supreme Court, beginning with *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). *Prima Paint*, explained the Third Circuit, "established what is known as the 'severability doctrine.'" *MZM*, 974 F.3d at 397 (citation omitted). Pursuant to that doctrine, "an arbitration clause is 'severable' and independently enforceable from the rest of the contract in which it is contained." *Id.* (citing *Prima Paint*, 388 U.S. at 400, 403-04). Thus, "a party cannot avoid arbitration by attacking the contract containing the arbitration clause as a whole (the 'container contract'). Rather, the party opposing arbitration must challenge 'the arbitration clause itself.'" *Id.* (citing *Prima Paint*, 388 U.S. at 403). Notably, the contract at issue in *Prima Paint* did not involve a delegation provision.

The Third Circuit next considered the Supreme Court's decision in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), in which the underlying contract *did* contain a delegation provision. As explained by the Third Circuit, in that case the Supreme Court "recognized that contracting parties can agree that arbitrators, not courts, shall resolve arbitrability issues by including in the contract a so-called 'delegation provision' conferring upon the arbitrators the 'exclusive authority' to decide those gateway matters." *MZM*, 974 F.3d at 399 (citing *Rent-A-Center*, 561 U.S. at 68-69, 71). Under the FAA, the Third Circuit continued, "a delegation provision is itself 'an additional, antecedent [arbitration] agreement,'' and, "consistent with the severability doctrine, unless the party opposing arbitration challenges 'the delegation provision specifically,' [a court] 'must treat it as valid' and 'must enforce it' by sending 'any challenge to the validity' of the underlying arbitration agreement to the arbitrator." *Id.* (emphasis in original)

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(quoting *Rent-A-Center*, 561 U.S. at 70, 72).[5] Thus, under *Rent-A-Center*, an "arbitrability challenge must . . . be directed at the delegation provision specifically to invoke a court's power to intervene." *Id.* (citing *Rent-A-Center*, 561 U.S. at 71).

MZM Co. failed to specifically direct its challenge at the delegation provision contained in the "container contract" (*i.e.*, the overarching agreement containing the arbitration provision). Instead, MZM Co. argued that the container contract was never formed due to alleged fraud in the execution. *See MZM*, 974 F.3d at 399-406.

To the Third Circuit, these allegations of fraud in the execution were sufficient to distinguish *MZM* from *Rent-A-Center* and allow the court, rather than an arbitrator, to adjudicate the contract challenge. Indeed, the Third Circuit found that it had the power to adjudicate the challenge to the container contract at issue in *MZM only* because the challenge was based on fraud in the execution rather than fraud in the inducement. 974 F.3d at 406. "[T]he difference between those claims matters," the Third Circuit explained, "because, unlike fraud in the execution, which renders the entire agreement void ab initio as if it never existed, fraud in the inducement only renders the contract voidable, giving the defrauded party the option of rescinding the contract or claiming damages for deceit." *Id.* at 405-06 (internal quotation marks and citation omitted); *id.* at 396 ("The critical question in this appeal is who decides MZM's contract defense . . . . [T]he answer to that question is bound up with the determination of whether MZM's claim sounds in fraud in the execution, which voids a contract as if it had never been executed, or fraud in the inducement, *which presumes the existence of a contract* but renders it voidable." (emphasis added)).[6] In other words, according to the Third Circuit, an attack grounded in fraud in the

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[5] The New York Court of Appeals has acknowledged and applied the severability doctrines articulated in *Prima Paint* and *Rent-A-Center*. *See Monarch Consulting, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 26 N.Y.3d 659, 675-76 (2016).

[6] The significance of a contract being void as opposed to being merely voidable, as articulated in *MZM*, is generally recognized in the law of this State and others. *See* 22 N.Y. Jur. 2d *Contracts* § 8 ("A void contract is no contract at all; it binds no one and is a mere nullity. A void contract requires no disaffirmance to avoid it. . . . Contracts are held to be voidable when one of the parties has the power either to avoid or to validate the agreement. Where a contract is voidable on both sides, the transaction is not wholly void; since, in order to prevent the contract from having its normal operation, the claim or defense must in some manner be asserted and also since the contract is capable of ratification, such a contract affects from the outset the legal relations of the parties." (footnotes omitted)); 17A Am. Jur. 2d *Contracts* § 9 ("A void contract is not a contract at all, and is without legal effect; it binds no one and is a mere nullity. . . . A voidable contract, on the other hand, is one in which one or both of the parties have the right to avoid the relations created by the contract, or by ratification of the contract to extinguish the power of avoidance." (footnotes omitted)). *American Jurisprudence* observes:

> There is an important distinction between "void" and "voidable" contracts, and confusion has resulted from the fact that a contract is sometimes said to be void although it is only voidable. Because a voidable contract continues in effect until

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inducement does not put the formation of the contract in question but rather presumes the contract's existence and seeks to relieve the allegedly aggrieved party from their obligation to abide by it. Therefore, "[b]ecause MZM [Co.] stated a claim of fraud in the execution of the container contract, [it] put the formation of the delegation provision in issue and thus triggered the District Court's power to adjudicate that claim." *Id.* at 406.

The Third Circuit utilized the void–voidable distinction (as derived from the remedies applicable to claims of fraud in the execution and fraud in the inducement, respectively) as a means to determine whether MZM Co.'s challenge to the overarching container contract implicated its formation, reasoning that if the container contract was never formed, then, per force, the delegation provision contained within it also could not have been formed. Through application of this analytical paradigm, the Third Circuit sought to ensure that the Supreme Court's severability doctrines did not force MZM Co. to arbitrate its claims when it never agreed to do so.

Nevertheless, the Court cannot reconcile *MZM*'s analytical underpinnings with the Supreme Court's decision in *Buckeye*, 546 U.S. 440. *Buckeye*—which *MZM* failed to address in any substantive manner—involved an appeal from a decision of the Florida Supreme Court. In that underlying decision, the Florida Supreme Court held that "an arbitration provision contained in a contract which is void under Florida law cannot be separately enforced while there is a claim pending in a Florida trial court that the contract containing the arbitration provision is itself illegal and void ab initio." *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860, 861 (Fla. 2005). In reaching that holding, the Florida Supreme Court attempted to distinguish the contract challenge at issue in *Buckeye* from the challenge at issue in *Prima Paint*:

> [I]n *Prima Paint,* the claim of fraud in the inducement, if true, would have rendered the underlying contract merely *voidable.* In the case before us today, however, the underlying contract at issue would be rendered void from the outset if it were determined that the contract indeed violated Florida's usury laws. Therefore, if the underlying contract is held entirely void as a matter of law, all of its provisions, including the arbitration clause, would be nullified as well.

*Id.* at 863. The Court notes that this logic is essentially identical to the logic animating the Third Circuit's decision in *MZM*.

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> active steps are taken to disaffirm the contract and because a void contract is wholly ineffective from the outset, the distinction is significant.

17A Am. Jur. 2d *Contracts* § 9 (footnotes omitted).

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On appeal, the Supreme Court reversed the Florida Supreme Court, expressly rejecting its reliance "on the distinction between void and voidable contracts." *Buckeye*, 546 U.S. at 446, 449. According to the Supreme Court, *Prima Paint* makes that distinction "irrelevant": "[*Prima Paint*] rejected application of state severability rules to the arbitration agreement without discussing whether the challenge at issue would have rendered the contract void or voidable. Indeed, the opinion expressly disclaimed any need to decide what state-law remedy was available." *Id.* at 446 (citing *Prima Paint*, 388 U.S. at 400-04 & 400 n.3); *see also Rent-A-Center*, 561 U.S. at 84 (Stevens, J., dissenting) ("Whether the general contract defense renders the entire agreement void or voidable is irrelevant. All that matters is whether the party seeking to present the issue to a court has brought a discrete challenge to the validity of the . . . arbitration clause." (internal quotation marks and citations omitted)). The Supreme Court refused to "accept the Florida Supreme Court's conclusion that enforceability of the arbitration agreement should turn on 'Florida public policy and contract law.'" *Id.* (quoting *Cardegna*, 894 So. 2d at 864). And, as to the possibility that its ruling might lead to arbitration of claims under a contract later found to be void ab initio, the Supreme Court observed:

> It is true . . . that the *Prima Paint* rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void. But it is equally true that respondents' approach permits a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable. *Prima Paint* resolved this conundrum—and resolved it in favor of the separate enforceability of arbitration provisions.

*Id.* at 448-49. Ultimately, the Supreme Court "reaffirm[ed] . . . that . . . a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Id.* at 449.

The Court ventures to distill the relevant lessons of *Prima Paint*, *Rent-A-Center*, and *Buckeye* as follows: Particularized state-law–based challenges to an overarching container contract (*e.g.*, fraud, misrepresentation, contrary to public policy, unconscionability, contract of adhesion), regardless of whether such challenges carry a remedy under state law rendering the entire contract void ab initio, are, for purposes of the FAA, challenges to the contract's post-formation validity or enforceability and cannot be used to avoid the application of *Prima Paint*'s severability doctrine—either as to the contract's arbitration provision or, if present within the contract, its delegation provision. Furthermore, even where such a challenge is directed specifically at the arbitration provision, if the contract also contains a delegation provision delegating resolution of that challenge to an arbitrator and that delegation provision is not itself

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directly challenged, the *Prima Paint* severability doctrine, as extended by *Rent-A-Center*, operates to foreclose judicial review.

With respect first to Wu's unconscionability and adhesion claims, Wu's arguments vary between contending (a) that the overarching January 2021 Terms are unconscionable and a contract of adhesion and (b) that specific provisions of the Arbitration Agreement (*other than* the delegation provision) are unconscionable. (*Compare* Kelner Affirm. at 17 ("The Terms of Service, *Particularly* To The Extent They Affect A Pending Lawsuit, Represented An Unconscionable Contract, Not To Mention A Contract of Adhesion, And Are Unenforceable Here" (emphasis added)), 20 ("The terms of service represented an unconscionable contract."), 22 ("The terms of service also represented an unenforceable contract of adhesion, for much the same reasons."), *with id.* at 20 ("The arbitration clause is unenforceable here . . . ."). *Compare* Kelner Opp. Affirm. at 14 ("The Terms of Service, *Particularly* To The Extent They Affect A Pending Lawsuit, Represented An Unconscionable Contract, Not To Mention A Contract Of Adhesion, And Are Unenforceable Here" (emphasis added)), *with id.* at 14 ("The 2021 Terms of Service were also, to the extent they attempted to procure a waiver of Emily Wu's right to a jury trial in a pending case, an unconscionable contract of adhesion."), 14-15 ("[T]he arbitration clause is therefore unenforceable."), 18 ("The contract, to the extent it purported to affect her pending case, is unenforceable.").) Even presuming that the appropriate remedy for unconscionability or adhesion is to void the subject contract,[7] to the extent that Wu argues that the entire January 2021 Terms are

[7] Even if the void–voidable distinction utilized by the Third Circuit in *MZM* were a valid analytical construct under the FAA, it would not save Wu's claims of unconscionability and adhesion (the latter doctrine being so intertwined with unconscionability as to be practically indistinguishable from it, *see* 22 N.Y. Jur. *Contracts* § 2) from arbitration here. Under New York law, an unconscionable agreement "is *voidable*, [and] can nonetheless be ratified." *Gendot Assocs., Inc. v. Kaufold*, 56 A.D.3d 421, 423-24 (2d Dep't 2008) (emphasis added) (citing *King v. Fox*, 7 N.Y.3d 181, 191 (2006)); *McMahon v. Eke-Nweke*, 503 F. Supp. 2d 598, 603 (E.D.N.Y. 2007) (Weinstein, J.)). Accordingly, just like a claim of fraud in the inducement, a claim of unconscionability does not, in New York, typically equate to a claim that no agreement had been formed; rather, such a claim presupposes the existence of an agreement and then asks whether any element of the circumstances surrounding the agreement's formation, or any part of its substantive terms, are so fundamentally unfair as to permit the aggrieved party to elect to rescind the agreement or, alternatively, to continue operating with it in full force and effect.

Nevertheless, there is some indication in the law that, in certain instances, a contract may be so unconscionable as to call into question one party's assent to its terms. *See Rent-A-Center*, 561 U.S. at 81 (Stevens, J., dissenting) ("[G]ross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms." (quoting Restatement (Second) of Contracts § 208, cmt. d (1979))) ("[A] determination that a contract is 'unconscionable' may in fact be a determination that one party did not intend to agree to the terms of the contract." (quoting *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 249 (1995) (O'Connor, J., concurring in judgment and dissenting in part))). The doctrine of unconscionability may, therefore, straddle the line between questioning, on one hand, a contract's post-formation enforceability and, on the other hand, its very existence—in each case depending on the severity of the unconscionability. Given its potentially mutable nature, combined with the lack of any clear standard

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unconscionable or adhesive, *Prima Paint* and *Buckeye* clearly require an arbitrator, rather than the Court, to decide those claims. And, to the extent that Wu instead argues that only subsection A of the Arbitration Agreement is unconscionable or a contract of adhesion, the Court is still precluded from deciding those claims under *Rent-A-Center*. This is because Wu never directly attacks the validity or enforceability of the delegation provision. The delegation provision in the Arbitration Agreement is, therefore, itself separately severable and enforceable.

The contention therefore that claims of unconscionability and adhesion are "necessarily an issue for the Court to decide, because absent a valid agreement to arbitrate, no issue can properly be decided by an arbitrator" is without legal merit (Kelner Opp. Affirm. at 15 n.5.) *In re County of Rockland (Primiano Construction Co.)*, 51 N.Y.2d 1 (1980), on which Wu relies, is inapposite insofar as it was not decided under the FAA but, instead, purely under New York law. Thus, *Prima Paint*, and the severability doctrine that it recognized, did not apply in *In re County of Rockland*. Nor did *Rent-A-Center*'s extension of the severability doctrine to delegation provisions apply in that case, as the New York Court of Appeals gave no indication that the underlying contract delegated any responsibility for deciding threshold arbitrability issues to an arbitrator. *See generally id.*[8]

Furthermore, Wu's contention that the Arbitration Agreement is void as against New York public policy—an argument ancillary to Wu's unconscionability arguments—must also be decided

as to when the doctrine calls into question assent rather than enforceability, unconscionability could—quite understandably—prove an especially troublesome doctrine for courts when faced with the kinds of disputes that often arise on motions to compel or stay arbitration.

In the context of this case (and cases like it), however, the issue is irrelevant and resolved. First, because the FAA governs here, the Supreme Court precedent already discussed at length herein applies, and *Rent-A-Center* is directly on point. The party resisting arbitration in *Rent-A-Center* did so upon the contention that the overarching contract containing the arbitration agreement was unconscionable. 561 U.S. at 66, 72-73. Despite that contention, the Supreme Court held that the dispute had to be arbitrated in light of the contract's unchallenged delegation provision. *Id.* at 70-75. Second, the New York Court of Appeals has held that an unconscionable contract is usually voidable and ratifiable, *King*, 7 N.Y.3d at 191, which is a clear indication that, under New York law, unconscionability relates to a contract's *enforceability*, not its existence. Third, in her papers, Wu separates her unconscionability arguments from her notice and assent arguments, suggesting that she herself views them as distinct issues. (*Compare* Kelner Affirm. at 17-23, *with id.* at 25-29. *Compare* Kelner Opp. Affirm. at 14-17, *with id.* at 20-35.)

[8] To the extent that New York State courts have held that it is a court's responsibility, in the first instance, to determine whether a *valid* agreement to arbitrate exists where the contract at issue contains a broad delegation provision and is governed by the FAA, to be clear, under *Prima Paint*, *Buckeye*, and *Rent-A-Center*, barring a direct attack on the delegation provision itself, questions pertaining to a contract's post-formation validity belong exclusively to an arbitrator. In circumstances where the FAA governs and the contract at issue contains a broad delegation provision, courts' only concern is with determining the existence of a contract—*i.e.*, only to the extent that mutual assent to the contract exists and regardless of its ultimate enforceability. *See Granite Rock*, 561 U.S. at 299-300 ("[C]ourts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement *nor* (*absent a valid provision specifically committing such disputes to an arbitrator*) its enforceability or applicability to the dispute is in issue." (emphasis added)).

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by an arbitrator. Wu's argues that subsection A of the Arbitration Agreement, specifically, is against public policy. (*See* Kelner Affirm. at 23 ("The unenforceability of the clause [*i.e.*, subsection A of the Arbitration Agreement] is particularly clear in view of the significant public policy interests at stake . . . ."), 24 ("Uber's terms of service, *to the extent they bear on pending lawsuits with represented parties*, are offensive to the strong public policy of the state." (emphasis added)).) There is no argument, in other words, that any term of the January 2021 Terms *other than* a specific provision of the Arbitration Agreement somehow offends New York public policy. This is significant, of course, because, under *Rent-A-Center*, even if subsection A of the Arbitration Agreement is void, subsection C (the delegation provision) still stands as severable and enforceable.[9]

Finally, Wu's contention that the underlying liability claims against Uber in this action fall outside of the scope of the Arbitration Agreement because the definition of Uber's "Services" does not encompass them must also be decided by an arbitrator pursuant to the delegation provision. Similarly, insofar as it can be construed as a challenge to the scope of the Arbitration Agreement, Wu's contention that the Arbitration Agreement does not apply to pending actions must also be arbitrated.

#### iv. *The Court Must Resolve Whether Wu Agreed to the Arbitration Agreement, and It Determines That She Has*

By contrast, Wu's remaining contention that she never agreed to the January 2021 Terms must be decided by the Court. For purposes of the FAA, even where an agreement contains a broad delegation provision like the one contained in the January 2021 Terms, a party's claim that she never agreed to the agreement always remains for a court to decide, whereas a party's claim that the agreement is invalid or unenforceable for reasons of fraud, unconscionability, etc. belongs to an arbitrator (presuming that the delegation provision is not separately and directly challenged).

Federal appellate courts have interpreted the Supreme Court's arbitration precedent as requiring this result. For example, in *In re Automotive Parts Antitrust Litigation*, the U.S. Court of

[9] While, per this decision, leaving the ultimate determination of the unconscionability and adhesion issues to the arbitrator, the Court nonetheless observes that, based on all of the arguments and evidence submitted, as well as the applicable law, that Wu failed to demonstrate that either the January 2021 Terms, or the Arbitration Agreement, were unconscionable or unenforceable contracts of adhesion. The Court also views Wu's contention that the Arbitration Agreement is void as against public policy as lacking merit. Wu contends, as one prong of her public-policy argument, that Uber violated CPLR § 4102, but § 4102(c) only applies to waivers of jury trials demanded "under this section"—or, in other words, jury trials demanded *in a note of issue*. *See* CPLR § 4102(a). Naturally, at this initial stage in the action, before any discovery has even taken place, no note of issue has yet been filed.

Appeals for the Sixth Circuit expressly distinguished "challenges to the validity of an agreement ('whether it is legally binding')" from "challenges to the existence of an agreement in the first instance ('whether it was in fact agreed to' or 'was ever concluded')," holding that, even where the subject arbitration agreement contains a delegation provision, the former type of challenge belongs to an arbitrator while the latter belongs to a court. 951 F.3d 377, 385-86 (6th Cir. 2020) (citing, e.g., *Rent-A-Center*, 561 U.S. at 69 n.1, 71 & n.2; *Granite Rock Co.*, 561 U.S. at 299-300); *Doctor's Assocs., Inc. v. Alemayehu*, 934 F.3d 245, 251 (2d Cir. 2019) ("An agreement that has not been properly formed is not merely an unenforceable contract; it is not a contract at all. And if it is not a contract, it cannot serve as the basis for compelling arbitration. . . . To take the question of contract formation away from the courts would essentially force parties into arbitration when the parties dispute whether they ever consented to arbitrate anything in the first place."); *Edwards v. Doordash, Inc.*, 888 F.3d 738, 744 (5th Cir. 2018) ("[W]e first look to see if an agreement to arbitrate was formed, then determine if it contains a delegation clause. . . . Arguments that an agreement to arbitrate was never formed . . . are to be heard by the court even where a delegation clause exists."); *GateGuard, Inc. v. MVI Sys. LLC*, No. 19 Civ. 2472 (JPC), 2021 WL 4443256, at *4 (S.D.N.Y. Sept. 28, 2021) ("[P]arties can agree to arbitrate questions about a contract's enforceability and scope but *cannot* agree to arbitrate 'threshold questions concerning contract formation.'" (quoting *Alemayehu*, 934 F.3d at 251); *see also Granite Rock*, 561 U.S. at 299-300 ("[C]ourts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement *nor* (*absent a valid provision specifically committing such disputes to an arbitrator*) its enforceability or applicability to the dispute is in issue." (emphasis added)); *Rent-A-Center*, 561 U.S. at 70 n.2 ("The issue of the agreement's 'validity' is different from the issue whether any agreement between the parties 'was ever concluded,' and, as in [*Buckeye*], we address only the former.").

State law governs whether an arbitration agreement exists. *First Options*, 514 U.S. at 944; *Meyer*, 868 F.3d at 73-74. Wu argues that, under New York law, an agreement to arbitrate a matter "must be clear, explicit and unequivocal . . . and must not depend upon implication or subtlety." (Kelner Affirm. at 25 (quoting *In re Waldron (Goddess)*, 61 N.Y.2d at 183-84); Kelner Opp. Affirm. at 21 (quoting *God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Assocs., LLP*, 6 N.Y.3d 371, 371 (2006)).) Wu's arguments alleging a lack of consent to the Arbitration Agreement rely heavily on application of this standard, referred to hereinafter as the "New York Rule."

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The New York Rule is generally applied by the courts of this State. *E.g.*, *Fiveco, Inc. v. Haber*, 11 N.Y.3d 140, 144 (2008); *Marlene Indus. Corp. v. Carnac Textiles, Inc.*, 45 N.Y.2d 327, 413-14 (1978); *Ferarro v. E. Coast Dormer, Inc.*, 2022 N.Y. Slip. Op. 05679 (2d Dep't Oct. 12, 2022); *Bd. of Managers of 825 W. End. Condo. v. Grunstein*, 192 A.D.3d 500, 500 (1st Dep't 2021); *Rocco Rescelo & Son Plumbing & Heating, LLC v. Plank, LLC*, 191 A.D.3d 1217, 1218 (3d Dep't 2021); *Wilson v. PBM, LLC*, 193 A.D.3d 22, 30 (2d Dep't 2021); *Suckling v. Iu*, 151 A.D.3d 664, 664 (1st Dep't 2017); *Brady v. Williams Capital Grp., L.P.*, 64 A.D.3d 127, 131 (1st Dep't 2009); *Gerling Global Reins. Corp. v. Home Ins. Co.*, 302 A.D.2d 118, 123 (1st Dep't 2002); *Merrill Lynch & Co., Inc. v. Walrod*, 16 A.D.3d 1103, 1104 (4th Dep't 2005); *M.Z. v. Ortiz*, 76 Misc. 3d 1206(A), at *4-5 (N.Y. Sup. Ct. Kings Cty. Aug. 23, 2022); *In re N.Y.S. Dep't of Health*, 74 Misc. 3d 1205(A), at * 4 (N.Y. Sup. Ct. Albany Cty. Jan. 25, 2022); *Bedford Courts III, LLC v. Concrete Structures, Inc.*, 68 Misc. 3d 1224(A), at *2 (N.Y. Sup. Ct. Suffolk Cty. Sept. 17, 2020); *Rad v. IAC/InterActiveCorp*, 64 Misc. 3d 1201(A), at *5 (N.Y. Sup. Ct. N.Y. Cty. June 5, 2019); *Ramos v. Uber Techs., Inc.*, 60 Misc. 3d 422, 424-25 (N.Y. Sup. Ct. Kings Cty. May 31, 2018); *Graham v. Command Sec. Corp.*, 46 Misc. 3d 1224(A), at *6 (N.Y. Sup. Ct. Westchester Cty. Sept. 29, 2014); *Harford Ins. Co. v. Connolly*, 11 Misc. 3d 1079(A), at *1 (N.Y. Sup. Ct. Queens Cty. Mar. 15, 2006); *Rizer v. Breen*, 12 Misc. 3d 1183(A), at *2-3 (N.Y. Sup. Ct. N.Y. Cty. Nov. 23, 2005). Significantly, in several of these decisions, including some issued by the First Department, the court applying the New York Rule also acknowledged that the arbitration agreement in dispute was governed by the FAA. *E.g.*, *Brady*, 64 A.D.3d at 131, 133; *Gerling Global Reins. Corp.*, 302 A.D.2d at 124-25; *M.Z.*, 76 Misc. 3d at *4-5; *Bedford Courts III, LLC*, 68 Misc. 3d at *2; *Ramos*, 60 Misc. 3d at 424-25; *Graham*, 46 Misc. 3d at *6; *Rizer*, 12 Misc. 3d at *2-3. Indeed, the parties discuss one such decision, *Ramos*, in their submissions. (*See* Kelner Affirm. at 26-27; Lubin Affirm. at 36-37.)[10]

Neither party brought to the Court's attention that the Second Circuit has held that the FAA preempts the New York Rule. As previously mentioned, § 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." In *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987), the U.S. Supreme Court reflected on the preclusive effect of § 2 on conflicting state law, holding that

[10] *Ramos* is inapposite, however, because it addresses the Uber sign-up process. As mentioned *supra* n.2, the Court need not, and does not, consider the formation and enforceability of the January 2016 Terms, which would have been formed, if at all, through Wu's registration of an Uber account.

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> state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2. A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law.

In *Progressive Casualty Insurance Co. v. C.A. Reaseguradora Nacional de Venezuela*, the Second Circuit, purporting to apply § 2 as interpreted in *Perry*, held that because the New York Rule applies a disparate, heightened standard to arbitration agreements as compared to any other form of agreement (as to which the applicable standard of proof in New York is merely a preponderance of the evidence), the New York Rule is preempted. 991 F.2d 42, 46 (2d Cir. 1993) (citing *Marlene Indus. Corp.*, 45 N.Y.2d at 413-14; *Fleming v. Ponziani*, 24 N.Y.2d 105 (1969)). Thus, according to the Second Circuit, where the FAA applies, a party seeking to establish the existence of an arbitration agreement under New York law must do so by the less exacting standard—*i.e.*, by a mere preponderance of the evidence. *Id.*

On numerous occasions following *Progressive*, and as recently as March 2022, the Second Circuit has applied the preponderance standard in cases in which New York law governed the formation of the disputed arbitration agreement. *E.g.*, *Naylor v. Valicenti*, No. 20-4037-CV, 2022 WL 761891, at *1 (2d Cir. Mar. 14, 2022); *The Republic of Iraq v. BNP Paribas USA*, 472 F. App'x 11, 13-14 (2d Cir. 2012); *Aceros Prefabricados, S.A. v. TradeArbed, Inc.*, 282 F.3d 92, 99-100 (2002); *Chelsea Square Textiles, Inc. v. Bombay Dyeing & Mfg. Co., Ltd.*, 189 F.3d 289, 295 n.5 (2d Cir. 1999). New York federal district courts have also routinely followed *Progressive*'s holding and applied the less stringent standard in such cases. *E.g.*, *Ohanian v. Apple, Inc.*, No. 20 Civ. 5162 (LGS), 2021 WL 4806372, at *1 (S.D.N.Y. Oct. 14, 2021); *Charter Commc'ns, Inc. v. Garfin*, No. 20 Civ. 7049 (KPF), 2021 WL 694549, at *7 (S.D.N.Y. Feb. 23, 2021); *Samake v. Thunder Lube Inc.*, No. 19-CV-01094 (ENV) (RER), 2020 WL 11039197, at *2 (E.D.N.Y. Dec. 22, 2020); *Daniels v. Aaron's, Inc.*, No. 19-CV-6421 (CJS), 2020 WL 5810018, at *4 (W.D.N.Y. Sept. 30, 2020); *Jamieson v. Sec. Am., Inc.*, No. 19 CV 1817 (VB), 2019 WL 6977126, at *2 (S.D.N.Y. Dec. 20, 2019); *Galvez v. JetSmarter, Inc.*, No. 18-CV-10311 (VSB), 2019 WL 4805431, at *4 (S.D.N.Y. Sept. 30, 2019); *Olsen v. Charter Commc'ns, Inc.*, Nos. 18cv3388 (JGK), 18cv4972 (JGK), 2019 WL 3779190, at *4 (S.D.N.Y. Aug. 9, 2019); *Biggs v. Midland Credit Mgmt., Inc.*, No. 17-CV-340 (JFB)(ARL), 2018 WL 1225539, at *8 (E.D.N.Y. Mar. 9,

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2018); *Torres v. Major Auto. Grp.*, No. 13-CV-0687 (NGG)(CLP), 2014 WL 4802985, at *5 (E.D.N.Y. Sept. 25, 2014).

By contrast, however, few New York State courts have mentioned the existence of *Progressive* or grappled with its holding. Two decisions of note are *J.J.'s Mae, Inc. v. H. Warshow & Sons, Inc.*, 277 A.D.2d 128 (1st Dep't 2000), and *Kahan Jewelry Corp. v. Venus Casting, Inc.*, 17 Misc. 3d 684 (N.Y. Sup. Ct. N.Y. Cty. 2007). *J.J.'s Mae* involved a so-called "battle of the forms" pursuant to UCC § 2-207. *See* 277 A.D.2d at 128. Although the First Department in that case ultimately concluded that the outcome of the dispute did not turn on whether *Progressive* applied, the First Department nevertheless implied that it was skeptical that *Progressive* barred application of the New York Rule *per se* in all disputes involving interstate commerce (and thus governed by the FAA). *See id.* ("Even if we were to agree, however, that [*Progressive*] bars application of the *Marlene Industries* rule [*i.e.*, the New York Rule] per se in matters of interstate commerce . . . .").

The trial court in *Kahan Jewelry*, however, recognized *Progressive*'s applicability and applied the preponderance standard instead of the New York Rule. 17 Misc. 3d at 691 ("Accordingly, New York decisions which are based on *Marlene*[, 45 N.Y.2d 327] and its progeny . . . are subject to preemption by the FAA to the extent they require a court to apply stricter standards to determine whether the parties had an agreement to arbitrate than to determine whether they entered into a similarly situated agreement not involving arbitration."). In so doing, the trial court acknowledged the First Department's dubious view of *Progressive* but observed that the result reached in *J.J.'s Mae* "would be fully consistent with *Progressive* to the extent the standard as to whether the parties had agreed to the arbitration clause would be the same as the standard as to whether the parties had agreed to any other 'material alteration' under UCC § 2-207(2)(b)." *Id.* at 692.

The Court and the parties have been unable to identify any other New York State court decision substantively addressing or applying *Progressive*'s holding that the New York Rule is preempted in cases where the FAA governs.

This apparent conflict of federal and state law has not yet been squarely and explicitly addressed by a New York State appellate court. The Court is left confronting the question, therefore, of what it should do in light of (a) the Second Circuit's holding that the FAA preempts the New York Rule and (b) the conflicting existence of subsequently issued First Department

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decisions continuing to apply the New York Rule even while simultaneously acknowledging that the FAA governs.

The Court need not decide that issue or resolve the underlying conflict,[11] however, as Uber demonstrates the existence of an agreement to arbitrate under either the New York Rule or the more lenient preponderance standard.

In New York, "[t]o form a binding contract there must be a meeting of the minds, such that there is a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." *Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 448 (2016) (internal quotation marks and citations omitted). The parties' objective manifestations of assent, viewed within the totality of the surrounding circumstances, are determinative of the contract-formation question. *Id.* at 448-49 (citation omitted). Such manifestations may be expressed through a party's written or spoken words, silence, or conduct, so long as the party "intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents." *See id.*; Restatement (Second) of Contracts § 19(1)-(2). Thus, "[t]here is no requirement that [a] writing be signed so long as there is other proof that the parties actually agreed on it." *Crawford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 35 N.Y.2d 291 299 (1974) (internal quotation marks omitted). As to arbitration agreements, under New York law, "if a party signs or otherwise assents to an agreement with an arbitration provision, they will be bound by it even if they did not read it." *Lewis v. ANSYS, Inc.*, No. 19-cv-10427 (AJN), 2021 WL 1199072, at *5 (S.D.N.Y. Mar. 30, 2021) (internal quotation marks and citation omitted).

"[T]here is no general aversion to electronically executed arbitration agreements in New York law," *id.* at *5, and the same general principles that apply to other forms of agreements apply to arbitration agreements arising from online transactions, *see Starke v. SquareTrade, Inc.*, 913

[11] Given the well-settled law surrounding the Supremacy Clause of the U.S. Constitution and the preemption doctrine, it is unlikely a state court could overrule or disregard a federal appellate court on a matter of federal statutory preemption.

In terms of the formation-vs.-validity distinction, the Second Circuit, when deciding *Progressive,* and considering *Perry*, on which the Second Circuit relied, appears only to have addressed state laws that "govern issues concerning the validity, revocability, and enforceability of contracts." 482 U.S. at 492 n.9. And *Perry* was interpreting Congress's intent as manifested in § 2 of the FAA, which provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Arguably, then, the New York Rule falls outside of the scope of § 2 and *Perry* because the New York Rule regulates the burden of proof applicable to whether an arbitration agreement was ever *formed*, not whether it can be *invalidated, revoked, or found unenforceable* based on defenses unrelated to the agreement's initial formation.

F.3d 279, 289 (2d Cir. 2019) (citation omitted); *see also Feld v. Postmates, Inc.*, 442 F. Supp. 3d 825, 829 (S.D.N.Y. 2020) ("[N]ew commerce on the Internet . . . has not fundamentally changed the principles of contract." (quoting *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004))). "In the context of agreements made over the internet, New York courts find that binding contracts are made when the user takes some action demonstrating that they have at least constructive knowledge of the terms of the agreement, from which knowledge a court can infer acceptance." *Hines v. Overstock.com, Inc.*, 380 F. App'x 22, 25 (2d Cir. 2010) (citing *Moore v. Microsoft Corp.*, 293 A.D.2d 587 (2d Dep't 2002)); *Lewis*, 2021 WL 1199072, at *5-6; *Kai Pend v. Uber Techs., Inc.*, 237 F. Supp. 3d 36, 47 (S.D.N.Y. 2017). In other words, "[w]here an offeree does not have *actual* notice of certain contract terms, he is nevertheless bound by such terms if he is on *inquiry* notice of them and assents to them through conduct that a reasonable person would understand to constitute assent." *Starke*, 913 F.3d at 289 (citing *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 120 (2d Cir. 2012)).

"'Inquiry notice' is 'actual notice of circumstances sufficient to put a prudent man upon inquiry.'" *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 30 n.14 (2d Cir. 2002) (Sotomayor, J.) (citation omitted). "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*, 913 F.3d at 289 (citing 22 N.Y. Jur. 2d *Contracts* § 29). It is well-settled that "[c]larity and conspicuousness of arbitration terms are important" factors for a Court to consider in making the inquiry-notice determination. *Specht*, 306 F.3d. at 30; *Starke*, 913 F.3d at 289 ("[Inquiry notice] often turns on whether the contract terms were presented to the offeree in a clear and conspicuous way.").

"Internet-based agreements between users of a platform and a service provider have been grouped into four categories: (1) browsewrap; (2) clickwrap; (3) scrollwrap; and (4) sign-in-wrap." *Feld*, 442 F. Supp. 3d at 829 (citing *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 394 (E.D.N.Y. 2015) (Weinstein, J.)). "Browsewraps can take various forms but basically the website will contain a notice that—by merely using the services of, obtaining information from, or initiating applications within the website—the user is agreeing to and is bound by the site's terms of service." *Berkson*, 97 F. Supp. 3d at 395 (internal quotation marks and citation omitted). A user's acceptance of a browsewrap agreement is, therefore, passive in nature. *Id.* By contrast, "[c]lickwrap agreements necessitate an active role by the user of a website." *Id.* at 397. To wit, "[c]lickwrap agreements require a user to affirmatively click a box on the website acknowledging

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awareness of and agreement to the terms of service before he or she is allowed to proceed with further utilization of the website." *Id.* (internal quotation marks and citation omitted). "Courts, in general, find [clickwrap agreements] enforceable," *id.*, whereas "courts closely examine the factual circumstances surrounding a consumer's use" when evaluating a browsewrap agreement and, as a general matter, are not inclined to enforce such agreements against individuals, *id.* at 395-96 (collecting cases).

"The categorization of types of web-based contracts, however, is not dispositive." *Feld*, 442 F. Supp. 3d at 829 (citing *Meyer*, 868 F.3d at 76). Rather, "[w]hether a user is on inquiry notice is a fact-intensive analysis," *id.* at 830 (citing *Meyer*, 686 F.3d at 76), guided by the standards of clarity and conspicuousness.

"The party seeking to compel arbitration bears the burden of establishing the existence of an arbitration agreement." *Hines*, 380 F. App'x at 24. Here, Uber contends that the January 2021 Pop-Up, through which the January 2021 Terms were presented to Wu for her review and acceptance, constitutes a valid clickwrap agreement. (Lubin Affirm. at 19.) Uber further contends that, by failing to dispute that she clicked her acceptance to the January 2021 Terms in that screen, Wu essentially concedes that she is bound by the January 2021 Terms. (Lubin Reply Affirm. at 13.) The Court agrees.

Because Wu concedes that she clicked through the January 2021 Pop-Up that was presented to her when Wu accessed the Rider App on January 25, 2021, the first key question is whether that pop-up screen was sufficient to put Wu on inquiry notice of the January 2021 Terms. For the reasons that follow, the evidence submitted on these motions establishes that it was sufficient.

Again, the touchstones in the analysis are clarity and conspicuousness, and the January 2021 Pop-Up embodies both. Initially, on its face, the January 2021 Pop-Up concerns one thing and one thing only: securing a user's acknowledgment that they reviewed and agree to the January 2021 Terms (and the separate Uber Privacy Notice). (*See supra* Figure 1.) This is not a scenario, therefore, in which extraneous or unrelated information or purposes could be found to undermine the sufficiency of the notice provided to the user of the January 2021 Terms or the efficacy of the user's acceptance thereof. *See, e.g., Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 63-64 (1st Cir. 2018).

Further, the design and formatting of the January 2021 Pop-Up are clear and conspicuous. The January 2021 Pop-Up bears the heading "We've updated our terms," clearly suggesting to the user, from the outset, the purpose of the screen. Below the heading, in large, bold-face font, is the sentence "We encourage you to read our updated Terms in full," followed immediately by two bullet points reading, respectively, "Terms of Use" and "Privacy Notice." The text of both bullet points is colored blue and underlined, indicating to the user that each is a clickable hyperlink. The bullet points and the sentence immediately preceding them, when read together, convey to a reasonable user that the January 2021 Terms (and the separate Privacy Notice) are available for the user's review by clicking on the corresponding hyperlink. No other text appears in the body of the January 2021 Pop-Up to detract from the focus on encouraging the user to review the January 2021 Terms.

Moreover, the January 2021 Pop-Up requires a user to take not one, but *two* affirmative steps to move beyond the screen and continue use of the Rider App. *First*, immediately below the hyperlinked bullet points is a checkbox that a user can click to check or uncheck. Directly to the right of that checkbox appears the sentence, in bold-face font, "By checking the box, I have reviewed and agree to the Terms of Use . . . ." Thus, by checking the box, the user confirms to Uber that she reviewed the January 2021 Terms (which, again, were available in full via hyperlink immediately above the checkbox) and agrees to them. *Second*, after checking the box, the user must click a separate, large "Confirm" button located at and taking up much of the bottom of the January 2021 Pop-Up. In effect, then, a user must confirm her review and acceptance of the January 2021 Terms *twice* before being permitted to continue using the Rider App. Wu, once again, does not dispute doing so.

The second key question is whether the January 2021 Terms put Wu on inquiry notice of the Arbitration Agreement. The Court concludes that they did. Initially, as legal agreements go, the January 2021 Terms cannot fairly be characterized as prolix, opaque, or inscrutable; they (in the form presented to the Court by Uber) comprise 12 pages of reasonably clear and concise legal terms logically arranged under clear and conspicuous headings and subheadings. Further, and more important, Uber made the Arbitration Agreement obvious to a user reviewing the January 2021 Terms. Uber did this by including a conspicuous notice of the existence of the Arbitration Agreement—introduced by the word "IMPORTANT" and distinguished from the surrounding text by formatting in bold-face, all-caps font—in Section 1 of the January 2021 Terms. The Arbitration Agreement itself follows in the very next section, Section 2, under the clear and conspicuous

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heading "Arbitration Agreement." The Arbitration Agreement's individual subsections then follow under similarly conspicuous subheadings clearly and appropriately describing the focus of each subsection—*e.g.*, "Agreement to Binding Arbitration Between You and Uber," "Exceptions to Arbitration," "Rules and Governing Law," etc. The Arbitration Agreement, in short, is not hidden or disguised; rather, it is clear and conspicuous such that a prudent user would be on notice of it.

Based on the foregoing, the Court finds that Wu was on inquiry notice of both the January 2021 Terms and the Arbitration Agreement, assented to both through conduct that a reasonable person would understand to constitute assent (*i.e.*, by clicking the checkbox and the "Confirm" button), and, therefore, is bound to them.[12]

None of Wu's contentions mandate a different conclusion. Significantly, Wu never actually challenges the January 2021 Pop-Up under any of the applicable law or principles. To the extent that Wu challenges any of the processes through which Uber asserts that it provided notice of or acquired Wu's assent to an arbitration agreement, Wu focuses almost exclusively on Uber's account-registration process, the November 2016 Email, and the January 2021 Email. As the Court has already stated, however, it need not, and therefore does not, determine whether either Uber's account-registration process or the November 2016 Email can be considered on these motions or effectively acquired Wu's agreement to an arbitration agreement. (*See supra* Note 2.)

Wu's focus on the January 2021 Email, furthermore, is inapposite. If the January 2021 Email is at all relevant here, it is only to the extent that the email may bear on one element of Wu's agreement to the January 2021 Terms: notice. To be clear, the January 2021 Pop-Up was, *on its*

[12] *Accord Williamson v. Alexander*, Index No. 508671/21, NYSCEF Doc. 78 (N.Y. Sup. Ct. Kings Cty. July 27, 2022). In *Williamson*, the Kings County Supreme Court came to the same conclusion in almost identical circumstances. Uber properly brought the decision in *Williamson* to the Court's attention via letter submitted on August 25, 2022. [NYSCEF Doc. 71] By contrast, in *Zambrano v. Acevedo*, Index No. 154875/21, NYSCEF Doc. 47 (N.Y. Sup. Ct. N.Y. Cty. Nov. 5, 2021) (which Wu brought to the Court's attention by letter submitted on November 24, 2021 [NYSCEF Doc. 60]), the New York County Supreme Court rejected Uber's arguments in similar circumstances and stayed arbitration. The Court disagrees with the analysis in *Zambrano*, and because *Zambrano* is a decision of a court of coordinate jurisdiction, the Court is not bound by it.

By earlier letter, dated February 1, 2022, Uber argued that Wu agreed to updated Uber Terms of Use effective December 16, 2021, by again clicking through an in-app "blocking" pop-up screen similar to the January 2021 Pop-Up. [NYSCEF Docs. 62] The letter also argues, based on updated trip data attached to the letter [NYSCEF Doc. 66], that Wu continues to ratify Uber's Terms of Use through continued use of the Rider App. Wu objects to the Court's consideration of the February 1, 2022 letter. [NYSCEF Doc. 67] The Court agrees with Wu's objections and, for a number of reasons, declines to consider the letter or its attachments in deciding the instant motions. *First*, considering the letter and its arguments is unnecessary here, since the Court has already determined that Wu agreed to the January 2021 Terms and the Arbitration Agreement. *Second*, the letter essentially constitutes an unauthorized sur-reply raising new arguments that could not even have been considered on reply. And, *third*, none of the exhibits are authenticated by affidavit or otherwise.

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*own*, sufficient to acquire Wu's agreement to the January 2021 Terms and the Arbitration Agreement: the screen provided Wu with conspicuous notice of the terms and opportunity to review them and required her to take multiple affirmative actions to indicate her assent to them—actions as to which there is no dispute that she took. The January 2021 Email, by contrast, never even purported to seek Wu's assent to the January 2021 Terms upon receipt or review of the email; instead, it merely provided Wu with advance notice of the January 2021 Terms and opportunity to review them and then *expressly* informed her that she would soon be presented with the January 2021 Pop-Up in the Rider App and, *through it*, given the opportunity once more to review the January 2021 Terms *and agree to them*. The January 2021 Email also expressly provided Wu with advance notice that the January 2021 Terms would include changes specifically to the Arbitration Agreement.

Wu's argument that the "fragmentation" of the "update" of Uber's Terms of Use through the January 2021 Email and the January 2021 Pop-Up "rendered it confusing from the start" is, therefore, meritless. (Kelner Affirm. at 28.) The January 2021 Email, either in its substance or in its relation to the January 2021 Pop-Up and acceptance of the January 2021 Terms, was not confusing to a recipient who read it. Indeed, the Court finds that the January 2021 Email actually enhances Uber's position that Wu was put on inquiry notice of the January 2021 Terms and the Arbitration Agreement.

Wu's other arguments concerning the January 2021 Email are similarly meritless. *First*, Wu contends that the January 2021 Email "told users that they did not even need to read the new terms of use [*i.e.*, the January 2021 Terms] before signing them." (Kelner Affirm. at 28.) While Wu's contention is technically correct, it is only so in the most pedantic sense—and it is irrelevant. As Wu acknowledges (*id.* at 29), the January 2021 Email *did* clearly "recommend"[13] that recipients review the January 2021 Terms, to which the email then provided a link. Hornbook contract law, which applies with equal force in the digital domain, does not require that a party have actually read a contract before she could be bound to it. That Uber did not state that recipients *must* review the January 2021 Terms, but instead only *recommended* that they do so, does not, as Wu seems to contend, undermine the efficacy of the notice that the January 2021 Email provided to Wu.

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[13] Merriam-Webster defines "recommend" as "to suggest an act or course of action." *Recommend Definition & Meaning*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/recommend (last visited Sept. 29, 2022).

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*Second*, Wu argues that Uber downplayed the significance of the January 2021 Terms in the January 2021 Email by describing them as "minor 'updates.'" (Kelner Affirm. at 29.) The word "minor" does not appear anywhere in the January 2021 Email. The January 2021 Email instead repeatedly refers neutrally to "our updated Terms of Use" or "the updated Terms," without characterizing any changes. Thus, the January 2021 Email cannot reasonably be read as "downplaying" any updates made to a previous iteration of Uber's Terms of Use in the January 2021 Terms.

*Third*, Wu contends that the January 2021 Email described the January 2021 Terms as "being purely prospective in nature" and failed to "suggest[] that there would be any retroactive effect to the new terms" by indicating that the terms would go into effect after receipt of the email, on January 18, 2021. (*Id.*) While a recipient with legal knowledge and experience likely would not have conflated the effective date of the January 2021 Terms with whether they had any retroactive effect, the Court accepts, *arguendo*, Wu's position that a layperson might not be capable of such percipience. That does not mean, however, that, under the totality of the circumstances, the January 2021 Email was ineffective at putting a recipient like Wu on inquiry notice of the Arbitration Agreement.

The January 2021 Email informed Wu that Uber had updated its Terms of Use, including specifically the Arbitration Agreement within them; that the Terms of Use, as updated, would go into effect on a particular date in the future; that Wu should review the Terms of Use; and that Wu would have an opportunity to review the Terms of Use again and accept them in the future. A prudent recipient of the January 2021 Email, regardless of whether they currently had a lawsuit pending against Uber, would be on notice of the changes and of the need to review the January 2021 Terms. At a minimum, a prudent recipient of the January 2021 Email *with a lawsuit pending against Uber* would be on notice to review the terms and investigate whether accepting the January 2021 Terms and the Arbitration Agreement may impact the lawsuit. The undisputed evidence submitted on these motions indicates that Wu failed to make any inquiry in response to the January 2021 Email.[14]

[14] In Wu's affidavit, Wu makes many of the above arguments concerning the January 2021 Email, suggesting, without explicitly stating, that they form the basis for and excuse Wu's failure to review the January 2021 Terms upon receipt of the January 2021 Email. (*See* Wu Moving Aff. ¶¶ 4-7.) The inquiry-notice standard is, however, clearly an objective, rather than subjective, standard, so whether Wu personally believed that she did not have to review the January 2021 Terms based on the contents of the January 2021 Email is only one piece of evidence—and a minor one, at that—to be considered by the Court in determining whether, based on the same notice, a prudent person would have reviewed the January 2021 Terms.

The only criticism that Wu levels directly against the January 2021 Pop-Up is that it merely "encourages" users to review the January 2021 Terms, rather than, using more imperative language. (Kelner Opp. Affirm. at 20.) But Wu's criticism is meritless for the same reasons that the Court found meritless Wu's similar contention concerning the January 2021 Email's use of the term "recommend."[15]

Wu next takes issue with the language of the Arbitration Agreement itself. Specifically, Wu argues that Uber "buried the language that it now contends affects [Wu's] lawsuit in the middle of the arbitration clause, by way of a stray handful of words phrased in the most oblique, hypertechnical way possible." (*Id.*) The language to which Wu refers is the following from subsection A of the Arbitration Agreement:

> [The user] and Uber agree that any dispute, claim or controversy in any way arising out of or relating to . . . (iii) incidents or accidents resulting in personal injury that [the user] allege[s] occurred in connection with [the user's] use of the Services, whether the dispute, claim or controversy occurred or accrued before or after the date [the user] agreed to the Terms . . . will be settled by binding arbitration between [the user] and Uber, and not in a court of law.

(Buoscio Aff. Ex. E, § 2(a).) Wu argues that this language encompasses her pending action against Uber only by implication because it fails to "even use the term 'lawsuit' at all, [instead making] reference only to the less comprehensible terms 'dispute, claim, or controversy'—all of which appear[] to refer to inchoate disagreements, rather than pending cases." (Kelner Affirm. at 28.) Wu argues, further, that the language also relied on "implication, by an oblique reference to claims that 'accrued before or after the date [the user] agreed to the Terms.'" (*Id.* at 21.) As a result, Wu contends, "[i]t cannot possibly be said that Emily Wu knowingly agreed to arbitrate her *pending* claim." (Kelner Opp. Affirm. at 20.)

Wu's contentions concerning the language of the Arbitration Agreement are meritless. Initially, the language in question is not "buried" within the first paragraph of subsection A. Rather, it is clearly enumerated using the Roman numeral "iii" and, thereby, distinguished from the other three clauses within the same paragraph, which are also preceded by corresponding Roman numerals. Of the enumerated clauses within this paragraph, it is the longest. The entire paragraph

[15] Although Wu's subjective reaction to the January 2021 Email and the January 2021 Pop-Up is not determinative, it should be noted that nowhere in Wu's affidavits did Wu aver that, had the January 2021 Email or the January 2021 Pop-Up used more imperative language indicating that a recipient or user "must" review the January 2021 Terms, Wu would actually have been inclined to and/or would have reviewed the January 2021 Terms prior to providing her assent.

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is itself only eight lines and takes up only approximately a fifth (or less) of the page on which it appears. In short, the clause is not hidden away or any less conspicuous than the other clauses within the same paragraph.

Nor is there any merit to Wu's assertion that the subsection A language in question only encompasses the pending lawsuit by implication. The terms "dispute," "claim," and "controversy" are all clearly broad enough in common meaning to encompass a lawsuit. A lawsuit, generally speaking, is a formal *dispute*[16] between two or more parties in which *claims* are made. The definition of "accrue," furthermore, is "to come into existence as a legally enforceable claim." *Accrue Definition & Meaning*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/accrue (last visited Sept. 29, 2022). Thus, the applicable language in subsection A does not "require a layperson to engage in a complex sequence of legal inferences to understand that [such language] might have any conceivable effect on a pending lawsuit." (Kelner Affirm. at 28.) To the contrary, the language is sufficiently clear and direct in its meaning to put Wu and any other user on notice that the Arbitration Agreement would apply to a dispute, such as a lawsuit, that arose from an accident that occurred before they agreed to the January 2021 Terms. Wu makes much of the fact that Wu's is a *pending* lawsuit, but, that fact is irrelevant to the operation of the clause in question.

The type of argument that Wu seems to be making is, in essence, either an argument as to the scope of the language or, alternatively, an argument that Wu made a unilateral mistake in how Wu interpreted it. If the former, as already determined herein, resolution of the argument belongs to an arbitrator pursuant to the delegation provision in the Arbitration Agreement. If the latter, resolution of the argument still belongs to an arbitrator under the delegation provision, because a claim of unilateral mistake constitutes an attack on the enforceability of the agreement akin to a claim of unconscionability. *See* 28 N.Y. Prac., *Contract Law* § 6:10. In any event, Wu has made no attempt to demonstrate that the alleged unilateral mistake was the product of Uber's fraud. *1225 Realty Owner LLC v. Mocal Enters., Inc.*, 66 A.D.3d 602, 602 (1st Dep't 2009).

By attempting to conflate scope (or mistake) with notice, Wu effectively seeks to transform the inquiry-notice standard into a requirement that a party not only put the counterparty on notice of the existence of a contractual term but also of the term's *legal meaning* or the *scope of its effect*.

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[16] "Controversy" is merely a synonym of "dispute." *See Controversy Definition & Meaning*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/controversy (last visited Sept. 29, 2022); *Controversy*, BLACK'S LAW DICTIONARY (11th ed. 2019).

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There is no legal basis for such a conclusion, and Uber provided Wu with adequate notice of the existence of the Arbitration Agreement and an opportunity to review it.

Even if Wu were somehow not put on inquiry notice of or did not assent to the January 2021 Terms through the January 2021 Pop-Up, Uber argues that Wu nonetheless ratified them by continuing to use the Rider App and Uber's services after Uber served her with the Arbitration Notice. (Lubin Affirm. at 30-32.) Wu disputes Uber's contention, labeling it "novel," "remarkable," and "absurd." (Kelner Opp. Affirm. at 17-18.). Wu claims that a finding that Wu ratified the agreements by the continued use of Uber's services is contrary to the New York Rule, that an agreement to arbitrate a matter "must be clear, explicit and unequivocal . . . and must not depend upon implication or subtlety." *In re Waldron (Goddess)*, 61 N.Y.2d at 183-84. Wu argues that Uber's reliance on *Nicosia*, 815 F. App'x 612, is inapposite, because there the Second Circuit applied the law of Washington State, which allegedly "employs a somewhat less stringent approach to the issue." (Kelner Opp. Affirm. at 18.)

The Court finds that Wu's continued use of Uber's services after receiving the Arbitration Notice bound Wu to the Arbitration Agreement and finds that the arguments to the contrary lack merit. Contrary to Wu's contention, *Nicosia* is directly on point. In that case, the Second Circuit found that an individual user of Amazon's services was bound to an arbitration agreement contained in Amazon's conditions of use, despite the user's claim that he never received notice of the agreement or manifested his assent to it. 815 F. App'x at 613-14. While the Second Circuit applied Washington State law to the question of whether the parties formed a valid agreement. *Id.* at 613, the Washington State law that it applied is *identical* to the applicable New York State law already discussed at length herein: "Under Washington law, . . . [w]here there is no actual notice of contractual terms, an offeree is still bound by the provision if he or she is on *inquiry* notice of the term and assents to it through the conduct that a reasonable person would understand to constitute assent." *Id.* at 613-14 (alterations and emphasis in original) (citing Wash. Rev. Code § 62A.1-202(a)(3), (d)). Based on this principle, the Second Circuit found that the user had been put on inquiry notice of the arbitration agreement when Amazon filed a letter motion in the litigation between the two parties raising the agreement as a ground for dismissal, and that the user assented to the agreement by making at least 27 purchases through Amazon's website after that filing, specifically noting that such conduct was "conduct that a reasonable person would understand to constitute assent." *Id.* at 614 (internal quotation marks omitted).

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*First*, while Uber argues, based on *Nicosia*, that Wu *ratified* the January 2021 Terms, what *Nicosia* really stands for is the dual propositions that: (a) the assertion by one party during the course of a litigation that a specific arbitration agreement exists within a set of terms and is applicable to the dispute can put the opposing party on inquiry notice of that agreement; and (b) the opposing party's continued use of the services provided subject to that set of terms can constitute assent to the agreement. In other words, *Nicosia* does not concern the legal concept of ratification of contractual terms (the term "ratification" is never even mentioned in the decision) but, rather, concerns another way in which inquiry notice of the terms can be provided and assent to them procured.[17]

*Second*, Wu failed to explain in what way the Washington State law applied by the Second Circuit in *Nicosia* is different from, and "somewhat less stringent" than, the applicable New York State law. Again, the Second Circuit found that Washington State would apply essentially the same inquiry-notice and assent principles that New York State would apply. The Second Circuit did not specify, however, what *standard of proof* applied to *evidence* of the formation of an arbitration agreement under Washington State law. Of note, Wu did not explain what the relevant standard of proof would have been, but, based on Wu's other arguments, Wu implies it is something other and less exacting than the New York Rule.

Wu in essence argues that the inquiry-notice and assent principles applied herein and in *Nicosia* are per se inconsistent with the New York Rule. Stated differently, Wu seems to be contending that where the New York Rule applies, an arbitration agreement can never be formed other than when the party to be bound by the agreement concedes to actually having reviewed and understood the agreement prior to indicating assent, and where that assent is manifested through a verbal or written statement such as "I agree" or, as in this case, through affirmatively clicking a box next to such language. But this is not the effect of the New York Rule, assuming the rule applies here.

The New York Rule is tautological, in that the terms "clear," "explicit," and "unequivocal" are merely synonyms for the same concept: unambiguousness.[18] The Court sees no inconsistency

[17] That does not mean, however, that ratification is irrelevant to the arguments raised by the parties in this case. Wu's continued use of Uber's services could possibly constitute ratification of the Arbitration Agreement to the extent it is unconscionable or adhesive. *See Gendot Assocs.*, 56 A.D.3d at 423-24 (citing *King*, 7 N.Y.3d at 191); *McMahon*, 503 F. Supp. 2d at 603.

[18] *See Clear Definition & Meaning*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/clear (last visited Sept. 29, 2022) ("3c. free from obscurity or ambiguity: easily understood: UNMISTAKABLE.");

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between that concept and the facts at issue here. Wu does not dispute that she became aware of the existence of the January 2021 Terms and the Arbitration Agreement through this litigation and the Arbitration Notice. Nor could Wu: it is undisputed that the Arbitration Notice directly quotes subsection A of the Arbitration Agreement; that the Arbitration Notice was served on Wu's counsel (Wu files a copy of it as an exhibit to the motion); and that Uber's counsel subsequently provided Wu's counsel, at the attorney's request, with a full copy of the January 2021 Terms [*see* NYSCEF Doc. 30]. Wu also does not dispute that the January 2021 Terms contain a provision, constituting the second paragraph thereof, expressly stating that "[b]y accessing or using [Uber's] Services, [the user] confirm[s] [her] agreement to be bound by these Terms." (Buoscio Aff. Ex. I.) Nor, moreover, does Wu dispute that, after becoming aware of the January 2021 Terms and the Arbitration Agreement, Wu continued to make use of Uber's services by hailing rides through the Rider App at *least 19 times*. Thus, because Wu was aware of the January 2021 Terms, the Arbitration Agreement, and the potential significance of both vis-à-vis the lawsuit, and yet continued to use Uber's services numerous times while possessing such knowledge, Wu's acceptance of the Arbitration Agreement *is* unambiguous—or, in other words, *clear, explicit, and unequivocal.*

Furthermore, the New York Rule governs the *standard of proof* necessary to demonstrate the existence of an arbitration agreement. That is why the Second Circuit in *Progressive* found that the alternative is a preponderance standard. 991 F.2d at 46. As an evidentiary rule, the New York Rule does not categorically preclude the use of inquiry notice and forms of assent manifestation other than written or spoken word to establish the existence of an arbitration agreement. Nor does it necessarily mandate that an arbitration agreement can only be formed in a very limited, specific set of circumstances. It simply calls for enhanced *evidence* of the agreement. Thus, under the rule, in circumstances such as those of this case, the party seeking to establish the formation of an arbitration agreement must come forward with sufficient evidence of circumstances establishing unambiguously that the party disputing the formation of the agreement was put on inquiry notice thereof and manifested her assent thereto. For the reasons already discussed herein, that is exactly

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*Clear*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("2. Free from doubt; sure. 3. Unambiguous."); *Explicit Definition & Meaning*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/explicit (last visited Sept. 29, 2022) ("1a. fully revealed or expressed without vagueness, implication, or ambiguity: leaving no question as to meaning or intent. . . . 3. Unambiguous in expression."); *Explicit*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("1. Clear, open, direct, or exact. 2. Expressed without ambiguity or vagueness; leaving no doubt."); *Unequivocal Definition & Meaning*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/unequivocal (last visited Sept. 29, 2022) ("1. Leaving no doubt: CLEAR, UNAMBIGUOUS."); *Unequivocal*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Unambiguous; clear; free from uncertainty.").

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what Uber has shown here—with respect both to the January 2021 Pop-Up *and* Wu's actions after receiving the Arbitration Notice.

Caselaw, moreover, demonstrates no inherent inconsistency between the New York Rule and the inquiry-notice and assent principles applied herein or in *Nicosia*. Those few federal district courts that have performed inquiry-notice and assent analyses while applying the New York Rule found no reason why an arbitration agreement could not be formed pursuant to those principles. *See Lewis*, 2021 WL 1199072, at *5-6; *Bar-Ayal v. Time Warner Cable, Inc.*, No. 03 CV 9905(KMW), 2006 WL 2990032, at *8-13 (S.D.N.Y. Oct. 16, 2006). And Wu, for her part, has failed to come forward with any apposite caselaw clearly precluding application of those principles under the New York Rule.

Wu relies heavily on *In re Waldron (Goddess)*, 61 N.Y.2d 181. (*See* Kelner Affirm. at 25, 28; Kelner Opp. Affirm. at 18, 20-21, 35.) In that case, the party seeking to compel arbitration and the party resisting it were both real estate brokers for the same firm. *In re Waldron (Goddess)*, 61 N.Y.2d at 183-85. Both parties' employment contracts contained an arbitration agreement. *Id.* at 184-85. The employment contract of the party seeking to compel arbitration had expired during the relevant period, however, whereas the other party's employment contract remained in effect. *Id.* at 183. The Court of Appeals held that the arbitration agreement in the effective employment contract could not be extended by "construction or implication" to a nonparty. *Id.* at 185. The circumstances at issue in *In re Waldron (Goddess)* are, therefore, entirely distinguishable from those at issue here, and do not suggest that the inquiry-notice and assent principles and approaches applied herein and in Nicosia violate the New York Rule.

The same can be said about *God's Battalion*, 6 N.Y.3d 371. There, a church hired an architectural firm to expand and renovate the church's facilities. *Id.* at 373. At the architectural firm's behest, the church hired a specific general contractor for the project. *Id.* When the general contractor failed to perform, the church sued the architectural firm for breach of contract. *Id.* The architectural firm moved to compel arbitration based on an arbitration clause in the party's contract. *Id.* The church resisted arbitration, however, pointing out that the contract was unsigned. *Id.* Despite that fact, the Court of Appeals found that the church was bound to the contract and the arbitration clause. *Id.* at 374. At the outset of its decision, the Court of Appeals "reiterate[d] [its] long-standing rule that an arbitration clause in a written agreement is enforceable, even if the agreement is not signed, when it is evident that the parties intended to be bound by the contract." *Id.* at 373. Next, the Court of Appeals held that it was evident that the church intended to be bound

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by the contract, and so too the arbitration clause, despite not having signed the contract, because (a) both parties operated under its terms and (b) the church relied on it to assert a breach-of-contract claim against the architectural firm. *Id.* at 374. Nothing in *God's Battalion* suggests, therefore, that this Court's approach herein or the Second Circuit's approach in *Nicosia* violates the New York Rule. To the contrary, *God's Battalion* actually *supports* the idea that an arbitration agreement can be agreed to via a party's conduct consistent with agreement to the overarching contract containing the arbitration agreement.

*Thomas Crimmins Contracting Co. v. City of New York*, 74 N.Y.2d 166 (1989), the final Court of Appeals decision on which Wu relies, is also distinguishable.[19] In that case, the Court of Appeals found that a clause in a city construction contract did not constitute "an explicit and unequivocal" agreement to alternative dispute resolution (a) because the clause had not been construed as such historically (at the time, the clause had been included in city contracts for "more than a century") and (b) because the language of the clause itself, read in context of the entire contract, did not clearly and unambiguously delegate resolution of *legal* disputes concerning the contract to the designated individual, as opposed to certain technical factual disputes within that individual's area of expertise. *Id.* at 171-73. Here, the Court has already rejected Wu's arguments concerning any ambiguity in the design or language of the January 2021 Pop-Up, the January 2021 Email, or the Arbitration Agreement itself.

In summary, Uber has established that an agreement to arbitrate exists between it and Wu, and that the agreement contains a delegation provision assigning determination of all threshold issues to an arbitrator. Accordingly, Wu and Uber shall proceed forthwith to arbitration of Wu's claims against Uber. CPLR § 7503(a).

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[19] Wu also relies on two Appellate Department cases, *Board of Managers of 825 West End Condominium v. Grunstein*, 192 A.D.3d 500 (1st Dep't 2021), and *Navillus Tile, Inc. v. Bovis Lend Lease LMB, Inc.*, 74 A.D.3d 1299 (2d Dep't 2010). Neither casts doubt on the validity of the inquiry-notice and assent approaches taken herein and in *Nicosia* under the New York Rule. In *Grunstein*, the First Department found that "there was no clear, explicit, and unequivocal agreement" between the parties to arbitrate their dispute because the applicable contractual clause called for arbitration only if one party first elected to proceed to mediation, and that party had not, in fact, elected to do so. 192 A.D.3d at 500-01. Thus, *Grunstein* is irrelevant to whether Wu received adequate inquiry notice of the Arbitration Agreement through the Arbitration Notice and agreed to the Arbitration Agreement through continued use of the Rider App. *Navillus Tile* is similarly inapposite, in that the Second Department in that case decided that an ADR provision in a "prime" contract was not incorporated into a subcontract because the subcontract did not explicitly reference the ADR provision. 74 A.D.3d at 1302. The court applied the rule that, "[u]nder New York law, incorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor." *Id.* (internal quotation marks and citation omitted). Thus, like *Grunstein*, *Navillus Tile* has no direct relevance to the inquiry-notice and assent issues in dispute in this case.

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v. *This Action Must Be Stayed*

Where, as here, it is determined that an arbitration agreement exists, a court's order directing arbitration "'*shall* operate to stay a pending . . . action.'" *Protostorm, Inc. v. Foley & Lardner LLP*, 193 A.D.3d 486, 487 (1st Dep't 2021) (emphasis and alterations in original) (quoting CPLR § 7503(a)). "Further, where 'arbitrable and nonarbitrable claims are inextricably interwoven, the proper course is to stay judicial proceedings pending completion of the arbitration, particularly where . . . the determination of issues in arbitration may well dispose of nonarbitrable matters.'" *Id.* (alteration in original) (quoting *Cohen v. Ark Asset Holdings*, 268 A.D.2d 285, 286 (1st Dep't 2000)).

Here, although the parties have not briefed the issue in detail, the Court determines that Wu's claims against Uber's co-defendants herein are inextricably intertwined with Wu's claims against Uber, in that resolution of the latter may include evidence and determination of the underlying negligence of the co-defendants. Therefore, to avoid conflicting rulings, this action is stayed in its entirety pending the outcome of the arbitration between Wu and Uber or upon further order of the Court.

**B. Wu Fails to Establish that Uber Engaged in an Unauthorized Ex Parte Communication or that the Proposed Sanctions Are Warranted and Appropriate**

i. *Wu Has Failed to Establish that the January 2021 Pop-Up Is a Prohibited Ex Parte Communication*

Initially, the parties overlook a crucial detail that warrants the denial of Wu's request for sanctions. The requested sanctions are drastic: Wu would have the Court strike Uber's Answer, effectively rendering Uber in default and unable to defend against Wu's negligence claims, and, additionally, impose monetary sanctions against not only Uber but certain of its unidentified in-house attorneys. Wu contends that the requested sanctions are warranted based on the alleged egregiousness of Uber's actions that derives, in turn, from their potential consequence: securing a waiver of Wu's right to a jury trial.

Wu's submissions focus *entirely* on the January 2021 Email. In so doing, Wu attempts to demonstrate that the January 2021 Email constitutes an unauthorized ex parte communication in violation of Rule 4.2 that resulted in Wu's unwitting waiver of her jury-trial right. As the Court has previously stated, however, the January 2021 Email did not lead to the formation of the Arbitration Agreement, which effected the waiver. On its face, the January 2021 Email merely

provided Wu notice that Uber would be updating its Terms of Use and, *at a future date*, seeking Wu's agreement to them through the January 2021 Pop-Up. *It was the January 2021 Pop-Up that ultimately acquired Wu's agreement to the Arbitration Agreement and, thereby, her waiver of a jury trial.*

Just as Wu's submissions fail to address the January 2021 Pop-Up in the context of Wu's challenge to the formation of the Arbitration Agreement, Wu's submissions are also devoid of any attempt to demonstrate that the January 2021 Pop-Up constitutes an unauthorized ex parte communication violative of Rule 4.2. Wu does not argue or present evidence that an attorney "sent" the January 2021 Pop-Up or otherwise caused it to be "sent." Nor does Wu attempt to establish that the January 2021 Pop-Up is even a type of communication that falls within the ambit of Rule 4.2. The answer to that latter question is not obvious: the in-app "blocking" pop-up screen is automatically generated by the Rider App upon a user, like Wu, affirmatively seeking to access Uber's services. Wu has not submitted any relevant legal or committee opinion to support the argument.

Because Wu fails to establish that the communication that actually effected the waiver of Wu's jury-trial right violated Rule 4.2, there is no basis to grant Wu's requested sanctions. For the sake of completeness, however, the Court also considers whether Wu has demonstrated that the January 2021 Email constitutes a Rule 4.2 violation and whether the requested sanctions are appropriate. For the reasons discussed below, the answer to both questions is no.

ii. *Wu Has Failed to Establish that the January 2021 Email Is a Prohibited Ex Parte Communication*

Given the potentially serious consequences to an attorney and a client for a Rule violation, any motion must be based on more than mere presumption or speculation. A movant must provide at least some *evidence* of a violation before a court will order a hearing or impose monetary or other sanctions.

Here, Wu fails to provide any evidence of certain essential elements of a Rule 4.2 violation and, therefore, fails to meet the necessary evidentiary burden. Wu *presumes* that an Uber in-house attorney drafted the January 2021 Email or otherwise caused it to be sent, but provides no proof, in any form, that either scenario is true. (*See* Kelner Affirm. at 12-13.) The affirmation of Lewis Tesser, Esq. lacks persuasive value for the same reason, as he expressly states that he *presumes* the existence of the same factual prerequisites to a Rule 4.2 violation. (*See* Affirmation of Lewis

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Tesser, dated April 19, 2021 [NYSCEF Doc. 31], ¶ 13 ("Here, the lawyers who *presumably* drafted the terms . . . ." (emphasis added)); *id.* ("Here . . . I *presume* that Uber's lawyers played a greater role with regard to the process by which the terms of use were circulated and assented to." (emphasis added). Mr. Tesser's opinions as to whether the January 2021 Email constitutes a Rule 4.2 violation are also couched in contingent language: "*In the event that* Uber's attorneys directly sent" the January 2021 Email or "*In the event that* Uber's attorneys caused the [January 2021 Email] to be sent." (*Id.* ¶ 12 (emphasis added).) Wu's and Mr. Tesser's beliefs as to these factual matters are unsupported in the record and are mere speculation.

By contrast, Uber has submitted an affidavit from an employee, Mr. Buoscio, that specifically refutes the assertion that Uber's in-house attorneys caused the January 2021 Email to be sent. Mr. Buoscio states that Uber's non-legal operations team "caused the [January 2021 Email] to be sent to [Wu] on a mass basis along with millions of other registered U.S. Uber App users at the same time." (Buoscio Aff. ¶ 17.) Contrary to Wu's contentions, Mr. Buoscio's affidavit is not rendered conclusory or lacking in personal knowledge simply because Mr. Buoscio resides in Indiana rather than in New York. Mr. Buoscio specifically avers that his affidavit is based on personal knowledge as well as Uber's internal records. (*Id.* ¶ 3.) Mr. Buoscio's demonstrates that he possess relevant knowledge firsthand or by acquiring it through a review of the organization's records.

Wu similarly fails to establish that Uber had actual knowledge of Wu's legal representation when the January 2021 Email was sent, as required for that action to constitute a Rule 4.2 violation. 22 N.Y.C.R.R. 1200, R. 4.2 cmt. 8; *Shuler v. Liberty Consulting Servs., Ltd.*, No. 20 CV 5779 (KAM) (CLP), 2022 WL 1552039, at *10 (E.D.N.Y. Apr. 4, 2022), *adopted in full by* 2022 WL 1564109 (E.D.N.Y. May 2, 2022). Mr. Buoscio avers that Uber's New York office, to which the Secretary was sending process served on it, was closed in March 2020 due to the COVID-19 pandemic and not processing mail completely until after the office reopened in April 2021, resulting in Uber not receiving actual notice of Wu's lawsuit until after the January 2021 Email was sent on January 15, 2021. (*See* Buoscio Aff. ¶¶ 23-26.) Further, Uber submits a document purporting to show that Uber's designated agent for service of process, CT Corp., did not mail Wu's summons and complaint to Uber's California office until February 25, 2021. (Lubin Reply Affirm. Ex. A.) Wu's list of more than 80 cases in which Uber allegedly received process served

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on the Secretary, while potentially suggestive, does not definitively refute Uber's submitted proof.[20]

Nor does that list of cases necessarily call into question Uber's explanation for not having received actual notice in this specific case. Indeed, given the procedural circumstances of this case, the argument that Wu advances by putting forth these other cases actually works against Wu's position. Wu seeks to demonstrate that Uber received actual notice in the 80 other cases because retained counsel appeared on Uber's behalf and sought extensions of time to file answers or otherwise timely filed answers therein. But that is not what happened here. In this case, Uber did not appear by retained counsel and file an answer until *after* Wu had already filed, on March 3, 2021 (more than a month after the January 2021 Email was sent), a motion seeking the entry of a default judgment against Uber. [*See* NYSCEF Docs. 10-19.] By Wu's own argument based on the precedent of the 80 other cases that Wu identifies, if Uber had received actual notice of the lawsuit contemporaneously with its service on the Secretary in November 2020, it stands to reason that retained counsel would have appeared in this case and sought an extension of time to file an answer. Uber's explanation for it not having actual knowledge of Wu's lawsuit until after January 15, 2021, appears to be consistent, therefore, with Uber's delay in interposing an answer in this case.

Here, Uber is the only party who has come forward with competent evidence directly applicable to this case, and that evidence contradicts one or more elements of a Rule 4.2 violation. Because Wu has failed to establish these basic elements, the Court need not, and does not, delve into the parties' legal arguments concerning whether the January 2021 Email constitutes a Rule 4.2 violation.

iii. *Wu Has Failed to Establish that Its Requested Sanctions Are Appropriate*

There is no dispute here that the Court has "intrinsic authority" to issue the sanctions requested by Wu. (*See* Lubin Reply Affirm. at 8.) Assuming that Wu had otherwise established a Rule 4.2 violation, which Wu did not, the question is whether Wu establishes that the requested

[20] In its submissions, Uber points out that, "in the overwhelming majority of cases [Wu] listed . . . , Uber's subsidiaries were named defendants in addition to Uber Technologies, Inc., and in many of those cases plaintiffs filed affidavits of service confirming that a copy of the summons and complaint was mailed directly to Uber in San Francisco, California, in addition to service on the Secretary of State." By the Court's count, in approximately 61 of the 83 total cases that Wu has identified (or approximately 74%), at least one of Uber's subsidiaries was named as a party-defendant in addition to Uber Technologies, Inc. The Court has not independently verified, however, whether, in each of these instances, the subsidiary was served by mail to San Francisco, California, in addition to service on the Secretary.

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sanctions are appropriate. The Court concludes that the evidence is insufficient to warrant the striking of Uber's Answer.

Initially, Wu fails to come forward with any case in which a court struck a party's pleading for a counsel's violation of Rule 4.2 (or, for that matter, a violation of *any* Rule). The Court has been unable to find such a case in New York, at either the state or federal level, upon its own research. Nor has the Court been able to find a case in New York in which such relief was even requested for a Rule 4.2 violation. This requested relief is therefore unique and extraordinary.

Furthermore, the cases that Wu *does* present to the Court fail to support the sanctions request. In *Lipin v. Bender*, 84 N.Y.2d 562, 565-67 (1994), the plaintiff stole privileged, case-related documents from defense counsel during a court appearance, and she and her attorney then used the information contained in those documents to attempt to coerce a settlement favorable to plaintiff. Defense counsel moved pursuant to CPLR 3103(c) for dismissal of the complaint, and the Court of Appeals granted the motion, concluding that mere suppression of the stolen documents and information would not sufficiently address the prejudice to the defendants. *Id.* at 572-73.

Similarly, in *Lucas v. Stam*, 147 A.D.3d 921 (2d Dep't 2017), "defense counsel engaged in multiple instances of misconduct during discovery, including falsely representing that several important witnesses were no longer employed by the defendant, and failing to submit an affidavit concerning the existence of documents compliant with the court's directives." (Kelner Affirm. at 15-16 (citing *Lucas*, 147 A.D.3d at 924-25).) Finding defense counsel's actions to be willful and contumacious, the Second Department struck defendants' answers, reversing the lower court's refusal to do so and imposing only monetary sanctions against defendants. *Lucas*, 147 A.D.3d at 926.

Thus, *Lipin* and *Lucas* both involved discovery misconduct that significantly prejudiced one party's position in the action and could not be remedied by a sanction other than striking the offending party's pleading. The instant case presents an entirely different scenario. Uber's alleged violation of Rule 4.2, even if proven, is not discovery misconduct so severe that the nonoffending party could not, as a result, achieve a fair result in the litigation. By no means downplaying the importance of a litigant's right to a jury trial,[21] enforcement of the Arbitration Agreement nevertheless would not deprive Wu of the opportunity to fully prosecute her claims against Uber.

[21] Once again, however, as discussed *supra* Note 9, Wu has not yet even demanded a jury trial pursuant to CPLR § 4102.

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Furthermore, the requested relief is disproportionate in nature. If Uber's Answer is stricken, Uber's liability for Wu's alleged injuries is established by default. Uber would have no opportunity to present argument or evidence to the contrary. Even if the Arbitration Agreement is enforced, however, Wu still would have a full and fair opportunity to prosecute her claims.

Moreover, Wu's requested sanction of striking Uber's Answer does not address the alleged wrong. If the wrong is that Uber secured Wu's waiver of a jury-trial right through the Arbitration Agreement, then the most appropriate remedy for that wrong would be the voiding of the Arbitration Agreement. But Wu does not even suggest that more targeted remedy for the alleged Rule 4.2 violation. Regardless, even if the Court could read Wu's submissions as requesting such a remedy, Wu has not "pointed to any authority that a professional ethics violation requires the voiding of any agreement that resulted from the ethics violation." *Rosario v. 2022 Eastchester, LLC*, No. 20-cv-09182 (SHS), 2022 WL 7557701, at *2 (S.D.N.Y. Oct. 13, 2022) (applying New York law); *Haymount Urgent Care PC v. GoFund Advance, LLC*, No. 22-cv-1245 (JSR), 2022 WL 2297768, at *13 (S.D.N.Y. June 27, 2022) ("[S]ince defendants never raise these legal issues, the Court need not reach the question[] of . . . whether a settlement obtained in violation of Rule 4.2(b) may be voidable.").

Finally, the Court would be remiss if it did not also note that Wu fails to establish that the Arbitration Agreement could or should not be enforced *even if* Uber's Answer were struck. CPLR § 7503 contains no language apparently precluding a party from seeking to compel arbitration even in that situation.

## III. CONCLUSION

For the reasons discussed above, Uber has established that Wu assented to the Arbitration Agreement by actively acknowledging that she had read and agreed to the January 2021 Terms when prompted by the January 2021 Pop-Up, as well as by continuing to make use of Uber's services via the Rider App after Uber served the Arbitration Notice and during the pendency of these motions. Therefore, Uber has established that an arbitration agreement between it and Wu exists.

Uber has also established that the Arbitration Agreement contains a broad delegation provision assigning to an arbitrator the responsibility for determining all arbitrability and other threshold issues. Thus, to the extent that Wu argues that the Arbitration Agreement is unconscionable, a contract of adhesion, or contrary to public policy, or that the scope of the

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Arbitration Agreement does not encompass the negligence claims against Uber, those arguments must be decided by an arbitrator, who must also decide Wu's substantive negligence claims against Uber.

Wu, in turn, has failed to demonstrate that Uber violated Rule 4.2 of the Rules by either generating the January 2021 Pop-Up or sending the January 2021 Email to Wu. In the event that Wu had demonstrated that Uber violated Rule 4.2, Wu has also failed to demonstrate that the requested remedy of striking Uber's Answer in this action is an appropriate remedy for the violation.

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the movant was not addressed by the Court, it is hereby denied.

Accordingly, it is hereby

**ORDERED** that plaintiff EMILY WU's ("Wu") motion (Seq. No. 2) seeking an order (a) striking defendant UBER TECHNOLOGIES, INC.'s ("Uber") Answer based on its alleged improper ex parte contact with Wu; (b) staying, pursuant to CPLR § 7503, Uber's demand for arbitration of Wu's claims; and (c) setting this action down for a hearing to determine the appropriate monetary sanction and other penalties as may be warranted against Uber is **DENIED**; and it is further

**ORDERED** that Uber's cross-motion (Seq. No. 2) seeking an order (a) compelling Wu to arbitrate, before the American Arbitration Association, her claims against Uber and (b) dismissing Wu's Complaint and any cross-claims asserted against Uber or, alternatively, staying the action and any cross-claims asserted against Uber until the arbitration is complete is **GRANTED**; and it is further

**ORDERED** that Wu and Uber shall, as soon as practicable, proceed to arbitration pursuant to Section 2 of Uber's Terms of Use effective January 18, 2021; and it is further

**ORDERED** that the Clerk shall mark this action **STAYED** pending the outcome of the arbitration between Wu and Uber or upon further Order of the Court; and it is further

**ORDERED** that the Clerk shall mark the motion and cross-motion (Seq. No. 2) disposed in all court records; and it is further

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**ORDERED** that the parties shall upload a letter updating the court as to the status of the arbitration on March 1, 2023.

This constitutes the Decision and Order of the Court.

**Dated: December 20, 2022**

**Hon.** s/Hon. Veronica G. Hummel/signed 12/20/2022
**HON. VERONICA G. HUMMEL, A.J.S.C.**

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|---|---|---|---|---|---|
| 1. | CHECK ONE.......................................... | ☐ CASE DISPOSED IN ITS ENTIRETY | | ☐ CASE STILL ACTIVE | |
| | | ☒ CASE STAYED | | | |
| 2. | MOTION IS.......................................... | ☐ GRANTED | ☒ DENIED | ☐ GRANTED IN PART | ☐ OTHER |
| 3. | CROSS-MOTION IS.............................. | ☒ GRANTED | ☐ DENIED | ☐ GRANTED IN PART | ☐ OTHER |
| 4. | CHECK IF APPROPRIATE.................. | ☐ SETTLE ORDER | ☐ SUBMIT ORDER | ☐ SCHEDULE APPEARANCE | |
| | | ☐ FIDUCIARY APPOINTMENT | | ☐ REFEREE APPOINTMENT | |
| | | ☒ STAY CASE | | | |

15422.00935

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK )

I, ROCIO CORONEL, being duly sworn, deposes and says: that deponent is not a party to this action, is over 18 years of age and resides in Orange County, New York;

That on the Wednesday 21 December 2022, deponent served the within document(s) entitled **DECISION & ORDER WITH NOTICE OF ENTRY** upon:

KELNER & KELNER, ESQS
*Attorney for Plaintiff*
7 World Trade Center, Suite 2700
New York, New York 10007
(212) 425-0700
Attn: Joshua D. Kelner, Esq.

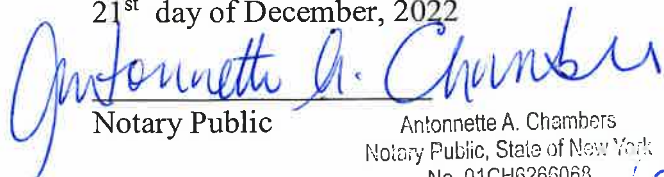
LAW OFFICE OF DENNIS C. BARTLING
*Attorneys for Defendants*
ARMAN KHAN and AHMED ELHASHASH
875 Merrick Avenue
Westbury, New York 11590
(516) 229-4541

BARKER MCEVOY & MOSKOVITS
*Attorneys for Defendant*
JERRY ALVAREZ
One Metro Tech Center, 8th Floor
Brooklyn, New York 11201
(212) 857-8230

at the address(es) designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.

ROCIO CORONEL

Sworn to before me this
21st day of December, 2022



Notary Public

Antonnette A. Chambers
Notary Public, State of New York
No. 01CH6266068
My Commission Expires 7/23/2024

Index No. 33964/2020E

Roberto Caruso
15422.00935.

SUPREME COURT OF THE STATE OF NEW YORK / COUNTY OF BRONX

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EMILY WU,

Plaintiff(s),

-against-

UBER TECHNOLOGIES, INC., JERRY ALVAREZ, AHMED ELHASHASH, and ARMAN KHAN,

Defendant(s).

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**DECISION & ORDER WITH NOTICE OF ENTRY**

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**WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP**

*Attorneys For* Defendant

150 East 42nd Street
New York, NY 10017-5639
212.490.3000

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Sir:--Please take notice

NOTICE OF ENTRY
that the within is a true (certified copy of a Decision and Order duly entered in the office of the clerk of the within named court on December 21, 2022 .

Dated, New York, New York
12/21/2022

To All Counsel

Attorneys(s) for Respective Parties

# Supreme Court of the State of New York
# Appellate Division: Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

| Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended. | For Court of Original Instance |
|---|---|
| Emily Wu,<br><br>Plaintiff,<br>- against -<br>Uber Technologies, Inc., Jerry Alvarez, Ahmed Elhashah, and Arman Khan,<br><br>Defendants. | Date Notice of Appeal Filed<br><br>For Appellate Division |

| Case Type | | Filing Type | |
|---|---|---|---|
| ■ Civil Action<br>☐ CPLR article 75 Arbitration | ☐ CPLR article 78 Proceeding<br>☐ Special Proceeding Other<br>☐ Habeas Corpus Proceeding | ☒ Appeal<br>☐ Original Proceedings<br>☐ CPLR Article 78<br>☐ Eminent Domain<br>☐ Labor Law 220 or 220-b<br>☐ Public Officers Law § 36<br>☐ Real Property Tax Law § 1278 | ☐ Transferred Proceeding<br>☐ CPLR Article 78<br>☐ Executive Law § 298<br>☐ CPLR 5704 Review |

**Nature of Suit:** Check up to three of the following categories which best reflect the nature of the case.

| | | | |
|---|---|---|---|
| ☐ Administrative Review | ☐ Business Relationships | ☐ Commercial | ☐ Contracts |
| ☐ Declaratory Judgment | ☐ Domestic Relations | ☐ Election Law | ☐ Estate Matters |
| ☐ Family Court | ☐ Mortgage Foreclosure | ☐ Miscellaneous | ☐ Prisoner Discipline & Parole |
| ☐ Real Property (other than foreclosure) | ☐ Statutory | ☐ Taxation | ■ Torts |

## Appeal

| Paper Appealed From (Check one only): | If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper. |
|---|---|

| | | | |
|---|---|---|---|
| ☐ Amended Decree | ☐ Determination | ☐ Order | ☐ Resettled Order |
| ☐ Amended Judgement | ☐ Finding | ☐ Order & Judgment | ☐ Ruling |
| ☐ Amended Order | ☐ Interlocutory Decree | ☐ Partial Decree | ☐ Other (specify): |
| ■ Decision | ☐ Interlocutory Judgment | ☐ Resettled Decree | |
| ☐ Decree | ☐ Judgment | ☐ Resettled Judgment | |

| | |
|---|---|
| Court: Supreme Court | County: Bronx |
| Dated: 12/20/2022 | Entered: 12/21/22 |
| Judge (name in full): Veronica G. Hummel | Index No.: 33964/2020E |
| Stage: ■ Interlocutory ☐ Final ☐ Post-Final | Trial: ☐ Yes ■ No If Yes: ☐ Jury ☐ Non-Jury |

### Prior Unperfected Appeal and Related Case Information

Are any appeals arising in the same action or proceeding currently pending in the court? ☐ Yes ■ No

If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.

N/A

Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:

N/A

## Original Proceeding

Commenced by: ☐ Order to Show Cause ☐ Notice of Petition ☐ Writ of Habeas Corpus | Date Filed:

Statute authorizing commencement of proceeding in the Appellate Division:

### Proceeding Transferred Pursuant to CPLR 7804(g)

| | |
|---|---|
| Court: Choose Court | County: Choose County |
| Judge (name in full): | Order of Transfer Date: |

### CPLR 5704 Review of Ex Parte Order:

| | |
|---|---|
| Court: Choose Court | County: Choose County |
| Judge (name in full): | Dated: |

### Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

By its decision, the Supreme Couirt, Bronx County (Hummel, J.) denied plaintiff's motion to strike defendant Uber Technologies' Answer or, in the alternative, to stay its demand for arbitration, and directed that the parties proceed to arbitration. Plaintiff appeals from each and every part of the order and the whole thereof.

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

This action arises from personal injuries sustained by the plaintiff, due in whole or in part to the negligence of Jerry Alvarez, a driver employed by defendant Uber Technologies. After joining issue, Uber demanded arbitration. Plaintiff moved to stay the demand for arbitration, contending, inter alia, that Uber had attempted to elicit her consent to arbitrate through improper ex parte contacts when it knew she was represented by counsel; that she had not knowingly agreed to arbitration; and that the contract was void as unconscionable or otherwise on policy grounds. It is respectfully submitted that, in denying plaintiff's motion, the Supreme Court, Bronx County, misapprehended the facts of the case and erroneously applied the governing law.

## Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

| No. | Party Name | Original Status | Appellate Division Status |
|---|---|---|---|
| 1 | Emily Wu | Plaintiff | Appellant |
| 2 | Uber Technologies, Inc. | Defendant | Respondent |
| 3 | Jerry Alvarez | Defendant | None |
| 4 | Ahmed Elhashash | Defendant | None |
| 5 | Arman Khan | Defendant | None |
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## Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: Kelner & Kelner, Esqs.
Address: 7 World Trade Center, Suite 2700
City: New York | State: New York | Zip: 10007 | Telephone No: 212-425-0700
E-mail Address: jkelner@kelnerlaw.com
Attorney Type: ■ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name: Wilson Elser Moskowitz Edelman & Dicker, LLP
Address: 150 East 42nd Street
City: New York | State: New York | Zip: 10017 | Telephone No: 212-490-3000
E-mail Address: roberto.caruso@wilsonelser.com
Attorney Type: ■ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above):

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Attorney Type: ■ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name: Baker McEvoy & Moskovits
Address: One Metrotech Center, 8th Floor
City: Brooklyn | State: New York | Zip: 11201 | Telephone No: 212-857-8230
E-mail Address: eservice@bm3law.com
Attorney Type: ■ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name:
Address:
City: | State: | Zip: | Telephone No:
E-mail Address:
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name:
Address:
City: | State: | Zip: | Telephone No:
E-mail Address:
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above):

**AFFIDAVIT OF SERVICE**

State of New York }
} ss:
County of New York }

**Candi Lee**, being duly sworn, deposes and says that I am over 18 years of age, reside in Richmond County, New York, and am not a party to this action.

That on the 21st day of December, 2022, I served the within **NOTICE OF APPEAL WITH INFORMATIONAL STATEMENT**, upon the attorneys or parties below set forth as indicated, at the address shown below:

BAKER, McEVOY, MORRISSEY & MOSKOVITS, P.C.
One Metrotech Center
Brooklyn, NY 11201

LAW OFFICE OF DENNIS C. BARTLING
875 Merrick Avenue
Westbury, NY 11590

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP
150 East 42nd Street
New York, NY 10017

***via New York State Courts Electronic Filing (NYSCEF) System***

Candi Lee
CANDI LEE

Sworn To Before Me This
21ST day of December, 2022

JOSHUA D. KELNER
Notary Public
**JOSHUA D. KELNER**
**Notary Public-State of New York**
**No. 02KE6378413**
**Qualified in New York County**
**Commission Expires 07/23/2026**