Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

No. SJC-12883

CHRISTOPHER P. KAUDERS and HANNAH KAUDERS,
Plaintiffs-Appellees

v.

UBER TECHNOLOGIES, INC. and RASIER LLC,
Defendants-Appellants

On Appeal From An Order Of The Suffolk Superior Court

BRIEF FOR *AMICI CURIAE* PUBLIC JUSTICE, P.C. and NATIONAL CONSUMER LAW CENTER IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to S.J.C. Rule 1:21, each of the *amici* states that it has no parent corporations and that there is no publicly held corporation that owns 10% or more of its stock.

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STATEMENT OF *AMICI CURIAE*

Public Justice, P.C. is a national public interest law firm that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting corporate and governmental misconduct. To further its goal of defending access to justice for workers, consumers, and others harmed by corporate wrongdoing, Public Justice has long conducted a special project devoted to fighting abuses of mandatory arbitration. Through its work on this project, Public Justice is well-acquainted with the developments in the law around contract formation on internet and mobile platforms.

Public Justice frequently represents consumers challenging unfair and adhesive contracts, many of which are presented through online Terms of Use. It has a strong interest in ensuring that consumers retain their rights to challenge deceptive and abusive corporate conduct and that their rights are not stripped away through inconspicuous, fine-print lists of terms of which they are not put on adequate notice and to which they do not unambiguously manifest assent.

The National Consumer Law Center ("NCLC") is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low income and elderly consumers. Since its founding as a nonprofit corporation in 1969, NCLC has been a resource center addressing numerous consumer finance issues. NCLC publishes a 21-volume Consumer Credit and Sales

Legal Practice Series, including Consumer Arbitration Agreements (8th ed. 2020) and Consumer Class Actions (10th ed. 2020) and actively has been involved in the debate concerning mandatory pre-dispute arbitration clauses, class action waivers and access to justice for consumers. NCLC frequently appears as *amicus curiae* in consumer law cases before trial and appellate courts throughout the country.

DECLARATION PURSUANT TO MASS. R. A. P. 17(c)5

Pursuant to Massachusetts Rule of Appellate Procedure 17(c)(5), *amici* state that no party or its counsel authored this brief in whole or in part, and no entity besides *amici*, their members, and their counsel provided money intended to fund preparation or filing of this brief. Neither of the amici, nor their counsel, represents or has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal

SUMMARY OF ARGUMENT

Uber seeks to confuse this Court with talk of heightened standards, and perhaps raise the specter of Federal Arbitration Act ("FAA") preemption by talking about heightened standards in the context of a case about arbitration. But the First Circuit did not apply a "heightened notice standard" in *Cullinane v. Uber Technologies*, 893 F.3d 53 (1st Cir. 2018), nor did that opinion break new ground by requiring a particular font color, size or attribute as Uber suggests. Uber Br. at

41. To the contrary, Massachusetts courts concerned with whether contract terms were reasonably communicated have long focused on the physical presentation of those terms, regardless of whether the terms are conveyed on a paper ticket, a website, or a smartphone screen. *Infra* pp. 12-15. *Cullinane* adhered to that state law tradition and was no outlier.

Nor should *Ajemian v. Yahoo!*, 83 Mass. App. Ct. 565 (2013), on which the First Circuit's opinion in *Cullinane* heavily relied, be cast aside because *Ajemian* was concerned with a forum selection clause that is subject to a "heightened 'reasonableness' standard." Uber Br. at 48 n.10. *Ajemian* was in fact concerned with two provisions in Yahoo!'s Terms of Use, a forum selection clause and a statute of limitations-shortening provision. And nothing about either term triggered a heightened standard for whether an agreement was formed.

In short, *Ajemian* was not a case about forum selection clauses. It was a case affirming that Massachusetts' already-existing test for establishing contract formation, whether the contract terms were reasonably communicated and accepted, would continue to apply, unchanged, when contract terms were communicated online. *Id.* at 574-75. And that two-part contract formation test, reaffirmed in *Ajemian* and cited by the First Circuit in *Cullinane*, has been applied in cases involving a wide variety of contract terms, from limitations on liability to terms granting intellectual property rights. *Infra* pp. 16-23.

This Court should confirm that Massachusetts has just one test for contract formation—whether that contract includes a forum selection clause, an arbitration clause, neither, or (as here) both, and whether the contract was purportedly formed on a computer, using a smartphone, or in the increasingly old-fashioned manner of a signed paper document. Neither *Cullinane* nor *Ajemian* applied a heightened notice or reasonableness standard. Rather, they both correctly applied the single unitary standard for forming a contract under Massachusetts law—a standard that Uber's rider registration interface fails to meet.

Finally, the parties dispute whether Uber's rider registration interface should be described as a "clickwrap" or "browsewrap" attempt at contract formation. Whether the interface is a browsewrap as the Kauders contend or whether it straddles an intermediate ground, it is certainly not a clickwrap under Massachusetts law, for the terms are not contained, even in part, on the page with the button that must be clicked. More fundamentally, the act of clicking a button labeled "DONE"—after entering credit card information—does not unambiguously manifest assent to terms as enforceable "clickwraps" do, especially where Uber does not clearly communicate that clicking the "DONE" button will have that result. Given the need for unambiguous manifestation of assent under Massachusetts law and the multiple defects in the language and design of the rider registration interface that would create ambiguity in the mind of a reasonable user,

Uber did not form a contract with either of the Kauders under Massachusetts law through their ambiguous act of clicking the "done" button. *Infra* pp. 23-40.

ARGUMENT

I. Courts applying Massachusetts law long before *Cullinane* have consistently focused on font and other attributes of text in assessing whether contract terms were reasonably communicated.

Uber dismisses as "hair-splitting" the First Circuit's concern with the design of the screen in the registration process on which the link to Uber's Terms and Conditions appears. Uber Br. at 42-44. Specifically, it rejects *Cullinane*'s exercise of comparing the relative conspicuousness of the contractually significant language "by creating an Uber account, you agree" with other elements on the same screen that the *Cullinane* court found to be equally or more conspicuous. *See Cullinane*, 893 F.3d at 63-64 ("the presence of other terms on the same screen with a similar or larger size, typeface, and with more noticeable attributes diminished the [Terms and Conditions and Privacy Policy] hyperlink's capability to grab the user's attention."); *id.* at 64 (noting that the text alerting users that they would be agreeing to the hyperlinked terms by creating an account "was even less conspicuous" than the hyperlink itself).

Uber suggests that this focus on font size and attribute in *Cullinane* created a "heightened reasonableness standard" by requiring "a specific type of font, text color, font size, or other font attribute." Uber Br. at 41. But for one thing, the First

Circuit in *Cullinane* did not "require" any particular font size, color or attributes; it simply concluded that the design of Uber's registration process did not reasonably communicate the terms to which it sought to bind new registrants. And more fundamentally, there was nothing novel, or heightened, in this approach to the reasonable communicativeness test.

Courts developed the "reasonable communicativeness" test long before the age of smartphone apps to determine when consumers would be deemed to have sufficient notice of standard, non-negotiated terms and conditions in order for those terms and conditions to constitute a valid offer to contract. Juliet Moringiello & William Reynolds, *From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting*, 72 Md. L. Rev. 452, 458 (2013) ("Lord Coke"). The test first emerged in the context of tickets for maritime voyages, which were delivered to passengers in paper form in advance of the cruise, and which often contained detailed terms and conditions affecting the passengers' legal rights. *See Shankles v. Costa Armatori*, 722 F.2d 861, 863-67 (1st Cir. 1983) (applying reasonable communicativeness test to provision on steamship ticket shortening statute of limitations); *O'Connell v. Paquet Cruises*, No. 88–1481–MC, 1989 WL 83205 (D. Mass. July 7, 1989 (same).

Massachusetts courts employing the reasonable communicativeness test look first to the "physical characteristics of the contract" and then to the "circumstances

surrounding the passengers' purchase and retention of the contract." *Keikian v. Norwegian Cruise Line*, No. 9865, 2004 WL 1293262, at *3 (Mass. App. Div. June 7, 2004) (quoting *Paredes v. Princess Cruises*, 1 F. Supp. 2d 87, 89 (D. Mass. 1998). The first prong of the test "concerns such physical characteristics as the location of the terms within the ticket, the size of the typeface in which they are printed, and the simplicity of the language they employ." *Keikian*, 2004 WL 1293262, at *3.

In *Keikian*, this aspect of the test was satisfied because the ticket contained "two conspicuous notices to the passenger to read carefully the terms and conditions that follow because they are important contract matters which affect his legal rights and are binding upon him." *Id.* Moreover, in describing what made those provisions conspicuous, the *Keikian* court used language strikingly similar to that the First Circuit would use 14 years later to reach the opposite conclusion in *Cullinane*, noting that the notices about binding contract terms "appear in eye-catching, thickly-bordered blocks with colored backgrounds and/or contrasting print which render them visually distinct from other ticket information." *Id.*

By contrast, in *Schachter v. Circuit City Stores*, 433 F. Supp. 2d 140, 142 (D. Mass. 2006), the court found that limitations to a phone warranty were not part of the terms and conditions that the purchaser received with the phone, where references to the limitations were included "in small print" on the bottom of two

pages of the warranty booklet while promises of a money-back guarantee, with no reference to limitations, appeared twice in the booklet "in large print" in more prominent locations. *See also Calimlim v. Foreign Car Ctr.*, 392 Mass. 228, 230 n.2 (1984) (provision that appeared in same type face as other contract terms was not "clear and conspicuous" within meaning of 940 Code Mass. Regs. 3.01(8)); *Casavant v. Norwegian Cruise Line*, 63 Mass. App. Ct. 785, 786-788 (2005) (holding that contract terms including forum selection clause were not reasonably communicated when they were conveyed in "two pages of fine print" mailed to passengers two months after purchase and just two weeks before the cruise was to set sail).

Thus, whether the physical characteristics of the contract supported a finding of reasonable communicativeness as in *Keikian*, or fell short as in *Schachter* and *Casavant*, considerations of font size, color and attributes all figured prominently in the analysis. The First Circuit in *Cullinane* did nothing unusual, or at odds with Massachusetts precedent, when it considered similar physical characteristics in applying the reasonable communicativeness test to Uber's rider registration interface.

II. *Ajemian* carried the reasonable communicativeness test forward into the era of online agreements and did not apply a heightened standard to contract formation.

Uber reprises its "heightened standard" rhetoric when it discusses *Ajemian*. Specifically, Uber suggests that *Ajemian* is inapposite to the current dispute because in *Ajemian*, Yahoo! was attempting to enforce a forum selection clause, to which courts apply a heightened "reasonableness" standard, whereas the arbitration clause Uber seeks to enforce here "is placed on an equal footing with other types of agreements." Uber Br. at 48 n.10 (citing *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1424, 1428 (2017)).

Even though Uber is ostensibly no longer discussing *Cullinane* in this part of its brief, its reference to a supposedly "heightened standard" at play in *Ajemian* does not occur in a vacuum. Given that the opinion in *Cullinane* relied heavily on the analysis in *Ajemian*, if that analysis was utilizing a heightened, forum selection clause-specific standard and the First Circuit imported that heightened standard into a case about arbitration, then, Uber seems to imply, the opinion in *Cullinane* might run afoul of the FAA's equal-footing principle enunciated by the U.S. Supreme Court in *Kindred Nursing*.

There are three problems with this narrative, all of which come down to the fact that it isn't true. First, *Ajemian* was not a case solely about whether to enforce a forum selection clause. Second, it did not apply a heightened reasonable

communicativeness standard because a forum selection clause was involved. And third, numerous court opinions besides *Cullinane* have relied on *Ajemian* in cases outside the forum selection clause context, including other cases involving arbitration clauses. And most of those post-*Ajemian* opinions, including the ones involving arbitration clauses, have found that the reasonable communicativeness test was satisfied. What sets *Cullinane* and this case apart is not the presence of an arbitration clause, but the unique defects of Uber's rider registration interface.

Ajemian v. Yahoo! was a protracted legal battle over whether John Ajemian's siblings, who administered his estate, had a right to access his emails after his death. The probate court had determined that the dispute should be litigated in California based on a forum selection clause in Yahoo!'s Terms of Service. 83 Mass. App. Ct. at 571. But the forum selection clause was not the only matter in dispute when the case reached the Massachusetts Court of Appeals in 2013. Also at issue was whether the action seeking a judicial declaration of who had a property right to John's emails was timely filed given a statute of limitations-shortening provision also found in the Terms of Service.[1] *Id.*

When the Court of Appeals turned to the forum selection and limitations clauses in Yahoo!'s Terms of Service, it analyzed both clauses together. It noted

[1] The Massachusetts probate court declined to reach the timeliness question, determining it should be decided by a California court. *Ajemian*, 83 Mass. App. Ct. at 571.

that no Massachusetts court had yet considered such clauses in the context of online contracts but had "considered the enforceability of such provisions in traditional paper contracts." *Id.* at 573. It then cited earlier Massachusetts cases involving both forum selection and limitations-shortening provisions. *Id.* at 573-74 (citing, among others, *Creative Playthings Franchising Corp. v. Reiser*, 463 Mass. 758, 759-760, 763 (2012), a case involving a limitations-shortening provision). It determined that the burden was on Yahoo! to prove that both the forum selection and limitations-shortening provision were "reasonably communicated and accepted," concluding that the legal principles should be no different "simply because a forum selection or limitations clause was contained in an online contract." *Id.* at 584 and n.12. And after discussing the ways in which a contract could be reasonably communicated and accepted online, such as through a clickwrap presentation where "the terms of the agreement were displayed, at least in part, on the user's computer screen and the user was required to signify his or her assent by 'clicking' 'I accept," the court held that "the record does not reflect that the terms of any agreement were reasonably communicated or that they were accepted." *Id.* at 576. Nothing about this holding, or the analysis leading to it, was limited to Yahoo!'s forum selection clause.

There is one sense, however, in which Uber's discussion of a forum selection-specific heightened standard does at least partially track what happened

in *Ajemian*. That discussion, however, is entirely inapplicable here. After describing the common, two-step contract formation test (reasonable communication and acceptance) that applied to both clauses, and for which Yahoo! had the burden of proof, the *Ajemian* court went on to describe a second, distinct reasonableness inquiry, where the standards did diverge for the two clauses at issue. *Id.* at 574. With respect to *enforcement* of the forum selection clause, the court observed that the plaintiffs bore the "substantial burden to demonstrate that enforcement of the forum selection clause is unreasonable in the circumstances," and noted that the plaintiffs did not "have the same burden with respect to the limitations provision. *Id.* (citing *Melia v. Zenhire*, 462 Mass. 164, 182 (2012)). Thus it was the *plaintiffs*, not Yahoo!, who bore a heightened burden with respect to the forum selection clause, and that burden had nothing to do with contract formation or the reasonable communicativeness test. It applied at a later stage of the analysis where the court was asked to consider, presuming a contract had been formed, whether it would nonetheless be unreasonable to enforce the forum selection clause in that contract under the specific facts at hand. *Id.* at 577-80 (finding that plaintiffs met their burden of showing that enforcing the forum selection clause against them would be unreasonable under the circumstances).

And in the years since the Court of Appeals stated in *Ajemian* that the reasonable communicativeness test applies to online as well as paper contracts, that

standard for contract formation has been employed by numerous Massachusetts courts assessing the formation of various types of online contracts, not just forum selection clauses. Most notable among these subsequent opinions is this Court's 2017 opinion in *Ajemian II*, in which it answered the question the Court of Appeals remanded in 2013 due to an inadequate record—whether John's estate had a right to access his emails, or whether Yahoo! could lawfully withhold them.[2] *Ajemian v. Yahoo!*, 478 Mass. 169, 173-84 (2017), *cert. denied*, *Oath Holdings v. Ajemian*, 139 S. Ct. 1328 (2018).

This Court also held that the probate court properly denied Yahoo!'s motion for summary judgment on the alternative ground that a termination-at-will provision in the Terms of Service bound John's estate and "trump[ed] the personal representative's asserted property interest," finding "no error" in the probate court's conclusion that factual disputes over the formation of the Terms of Service foreclosed summary judgment. *Id.* at 185. In articulating the contract formation standard the lower court had used, this Court embraced the formulation enunciated by the Court of Appeals four years earlier: "The judge observed that Yahoo had not established that a 'meeting of the minds' had occurred with respect to the terms of service, including whether they had been communicated to, and accepted by, the

[2] Yahoo! claimed it was required to deny the estate's request for the emails under the Stored Communications Act, 18 U.S.C. §§ 2701 *et seq*. *Ajemian II*, 478 Mass. at 170-71. This Court disagreed. *Id.* at 172-84.

decedent." *Id.* at 185-86. Thus, this Court's later opinion in *Ajemian* clarifies that the Court of Appeals' formulation was not forum selection clause-specific but rather carried forward the general contract formation standard into the internet age. *See also Ivymedia v. Ilikebus*, No. 15-11918-NMG, 2016 WL 2596014, at *2 (D. Mass. May 5, 2016) (holding in a copyright infringement case that "the contract claims fail to state a claim because IvyMedia does not allege that the terms of its User Agreement were reasonably communicated to, or accepted by, defendants, i.e., that there was a valid contract between the parties.").

Nor was *Ivymedia* the only intellectual property case to apply the reasonable communicativeness test to an online contract in the wake of *Ajemian*. In *Small Justice LLC v. Xcentric Ventures LLC*, 99 F. Supp. 3d 190, 196-98 (D. Mass. 2015), *aff'd* 870 F.3d 313 (1st Cir. 2017), the district court held that the owner of the ripoffreport.com website maintained the copyright to a report posted on that site, in accordance with its Terms and Conditions, where the full text of the terms appeared in a scrollable box above a check box the user had to check in order to continue, with text next to the check box indicating that "I am giving Rip–Off Report irrevocable rights to post [my report] on the website. I acknowledge that once I post my report, it will not be removed, even at my request." The court found notice of the terms to be sufficient where they were available in their entirety "placed prominently over the check box" and where the text accompanying the

check box also informed users that they were granting an irrevocable right to the content of the report. *Id.* at 198.

Similarly, the numerous Massachusetts courts that have relied on *Ajemian*'s contract formation framework to enforce arbitration agreements entered online puts the lie to any notion that *Ajemian* created a heightened standard incompatible with the FAA. To the contrary, because online terms are typically communicated together, through a single hyperlink or box of scrolling text, the same standard will necessarily apply to determine whether the arbitration clause, the forum selection clause, and any number of other clauses in those online terms were reasonably communicated and accepted.

Many merchants and service providers seeking to enter contracts online have met this burden when clauses in their online contracts were challenged, notably including Uber with respect to the contract it forms with its driver applicants. *See Capriole v. Uber Techs.*, No. 1:19-cv-11941, 2020 WL 1536648, at *5 (D. Mass. Mar. 31, 2020) (enforcing forum selection clause in Uber's online agreement with its drivers as consistent with *Ajemian*'s reasonable communicativeness standard, and noting "critical differences" between the driver registration interface and the rider registration interface at issue in *Cullinane*); *Okereke v. Uber Techs.*, No. 16-12487-PBS, 2017 WL 6336080, at *6 (D. Mass. June 13, 2017) (enforcing Uber's arbitration clause in online contract with drivers and citing *Ajemian*). *See also*

Wickberg v. Lyft, 356 F. Supp. 3d 179, 183-84 (D. Mass. 2018) ("Wickberg entered into a valid arbitration agreement with Lyft by affirmatively assenting to reasonably communicated terms" and observing that the Uber agreement at issue in *Cullinane* "was notably different from Lyft's"); *Pazol v. Tough Mudder*, 93 Mass. App. Ct. 1109 (2018) (table) (enforcing arbitration provision in online agreement presented in a scrolling box of text above a check box that stated, "I agree to the above waiver," citing *Ajemian*).

These opinions reveal that neither *Ajemian* nor its application by subsequent courts hold arbitration clauses to an inappropriate heightened standard. What caused *Cullinane* to come out differently was that the First Circuit was applying *Ajemian* to a uniquely uncommunicative online interface, the same interface at issue here.

III. Clicking on a button labeled "Done" does not unambiguously manifest assent to Terms of Use when clicking the button serves a primary purpose unrelated to the terms.

In Massachusetts, "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility." *Cullinane*, 893 F.3d at 61. While the "pertinent legal principles do not change simply because a contract was entered into online," online contracts raise novel challenges in identifying the particular form that notice and manifestations of

assent must take to create a valid contract. *Ajemian*, 83 Mass. App. Ct. at 587. To aid in that analysis, courts have articulated a rough taxonomy of online contracts: clickwraps, browsewraps, and hybrids. *Cullinane*, 893 F.3d at 61 n.10.

A clickwrap agreement requires that users "select a check box or radio button to indicate that they agree to the website's terms and conditions," *Small Justice LLC v. Xcentric Ventures LLC*, 873 F.3d 313, 319 (1st Cir. 2017); *see also Ajemian*, 83 Mass. App. Ct. at 576 (clickwrap agreements require that the user "signify his or her assent by 'clicking' 'I accept,'"). Because this approach "force[s] users to 'expressly and unambiguously'" manifest assent, *Nicosia v. Amazon.com*, 834 F.3d 220, 233 (2d Cir. 2016), clickwrap agreements are the "easiest method of ensuring that terms are agreed to"—the clickwrap interface provides notice of the terms and clearly communicates the contractual significance of the act of clicking (through an unambiguous statement of "I agree" or "I accept"). *Id.* at 238. *See also Small Justice*, 99 F. Supp. 3d at 196 ("Clickwrap agreements are generally upheld because they require affirmative action on the part of the user."). Such agreements have long been held enforceable in Massachusetts, whether they involve buttons "clicked" on a website or smartphone app or, in the earlier years of the doctrine, buttons clicked with a computer mouse in order for a software download to proceed. *Bagg v. HighBeam Research*, 862 F. Supp. 2d 41, 44-45 (D. Mass. 2012) (describing online interface where user must click an

"agree" button to proceed as a clickwrap agreement and stating that such agreements are enforceable in Massachusetts, but denying motion because of lack of evidence that the plaintiffs had actually clicked the button); *I.Lan Systems v. Netscout Serv. Level Corp*., 183 F. Supp. 2d 328, 338 (D. Mass. 2002) (enforcing clickwrap agreement in the context of a software license and holding that "i.LAN explicitly accepted the clickwrap license agreement when it clicked on the box stating 'I agree.'").

Browsewrap agreements, by contrast, "do not require the user to manifest assent to the terms and conditions expressly. A party instead gives his assent simply by using the website." *Small Justice LLC*, 873 F.3d at 319. *See also Ajemian*, 83 Mass. App. Ct. at 576 (defining browsewrap agreement as one "where website terms and conditions of use are posted on the website typically as a hyperlink at the bottom of the screen."); Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, 57 Rutgers L. Rev. 1307, 1318 (2005) ("[B]rowse-wrap encompasses all terms presented by a web site that do not solicit an explicit manifestation of assent."). Courts almost universally decline to enforce browsewrap agreements against individual consumers, because such "agreements" provide insufficient notice of the terms and provide no mechanism for users to manifestly assent. *See Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 396 (E.D.N.Y.

2015) (noting that courts have generally refused to enforce browsewrap terms against individuals.").

Courts have also recognized the existence of a third category through which online terms are presented, a hybrid zone between clickwrap and browsewrap.[3] *See id.* These arrangements resemble clickwrap in that assenting to terms is linked to the affirmative act of clicking a button, but resemble browsewraps in that the user can click the same button in the course of navigating the website without being aware of, or intending to agree to, the Terms of Use. *See id.*

Unsurprisingly, Uber attempts to characterize the purported agreement at issue as a clickwrap agreement, and therefore a binding contract. Uber Reply Br. at 21. But no part of Uber's sign-up process bears the hallmarks of a true clickwrap agreement. Clickwrap agreements provide reasonably conspicuous notice of the terms at issue by displaying them on the page or in a scrolling window and require unambiguous consent in the form of a button that website users must click for the exclusive purpose of agreeing to the terms—in other words, the button to be

[3] Some courts refer to this hybrid category as sign-in-wraps, because the button the website user is clicking also accomplishes the act of signing into the service, as opposed to clickwraps that unambiguously indicate acceptance of contract terms by requiring the user to click a button labeled "I accept" or "I agree." *See Cullinane*, 893 F.3d at 61 n.10. Of course, hybrid interfaces can map the act of clicking a button onto other actions besides signing in, such as registering for an account or placing an order. What differentiates these hybrids from pure clickwraps is that the button click accomplishes something besides agreeing to the website terms.

clicked serves no other function beyond accepting the terms. *See Ajemian*, 83 Mass. App. Ct. at 576 (defining clickwrap agreement as one in which "the terms of the agreement were displayed, at least in part, on the user's computer screen and the user was required to signify his or her assent by 'clicking' 'I accept.'"). *See also Wickberg*, 356 F. Supp. 3d at 181 (enforcing arbitration provision in clickwrap agreement and noting that "[u]nlike Uber's screen [in *Cullinane*], Lyft's screen required Wickberg to click a box stating that he 'agree[d] to Lyft's terms of services' before he could continue with the registration process."); *In re Daily Fantasy Sports Litig.*, MDL No. 16-02677-GAO, 2019 WL 6337762, at *8 (D. Mass. Nov. 27, 2019) (enforcing arbitration provision where plaintiffs required to check a box next to text stating "I agree to the Terms of Use and Privacy Policy and confirm that I am at least 18 years of age" to register for contest); *Emmannuel v. Handy Techs.*, 442 F. Supp. 3d 385, 392 (D. Mass. 2020) (distinguishing the "clickwrap agreements at issue here," which "required plaintiff to check a box indicating her acknowledgement of and agreement with the hyperlinked Terms of Use," from the interface in *Cullinane*, which "merely notified users that, by creating an Uber account, the user was deemed to agree to Uber's Terms of Service."); *Covino v. Spirit Airlines*, 406 F. Supp. 3d 147, 152 (D. Mass. 2019) (enforcing clickwrap agreement where airplane passenger checked a box

acknowledging her agreement with the terms and conditions set forth in Spirit's Contract of Carriage).

The final screen of Uber's three-page registration process displays a visually inconspicuous hyperlink—which brings the user to another set of hyperlinks—that eventually leads to the Terms (within which the arbitration clause is buried), rather than displaying the text of the Terms itself. *See Okereke*, 2017 WL 6336080, at *6 ("Massachusetts courts have held that [clickwrap] contracts are enforceable 'only where the record established that the terms of the agreement were displayed, at least in part . . . .'") (citing *Ajemian*, 83 Mass. App. Ct. at 576). *See also Sgouros v. TransUnion*, 817 F.3d 1029, 1036 (7th Cir. 2016) ("[W]e cannot presume that a person who clicks on a box that appears on a computer screen has notice of all contents not only of that page but of other content that requires further action (scrolling, following a link, etc.)."

But, even more problematic, the design of Uber's rider registration interface provides no mechanism whereby a user could unambiguously manifest assent to the buried terms. As numerous courts have recognized, the mere presence of a clickable button on a page that mentions Terms of Use does not make an agreement clickwrap; a reasonable user must understand that clicking that specific button, at that time, signifies their assent to be bound. *See, e.g., Specht v. Netscape Comms.*, 306 F.3d 17, 29-30 (2d Cir. 2002) ("[C]licking on a . . . button does not

communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the . . . button would signify assent to those terms.").

That standard cannot be met where, as here, the button that purports to manifest assent to the Terms serves multiple, unrelated purposes, while failing to specify which purpose clicking accomplishes. *See Sgouros*, 817 F.3d at 1036 (invalidating arbitration provision where website did not indicate that clicking a button labeled "I Accept & Continue to Step 3" would constitute assent to two unrelated purposes). The "Done" button serves a far more obvious function than agreeing to the Terms—submitting a payment method to gain access to the Uber service. This makes the user's action of clicking on the button, at best, inherently ambiguous from the perspective of a reasonable user: is the button click intended merely to provide payment information, as the adjacent Link Payment heading indicates? Or does the click intend to do that and also agree to the Terms referenced at the bottom of the screen?

The existence of those ambiguities, standing alone, plainly puts the purported agreement outside the realm of clickwrap. Citing the superior court decision, Plaintiffs contend that the purported agreement is browsewrap, highlighting the lack of unambiguous indications of assent. Pl.'s Br. at 41-42. Other courts have reached the reasonable conclusion that comparable agreements are hybrid browsewrap/clickwrap. *See, e.g.*, *Colgate v. JUUL Labs*, 402 F. Supp.

3d 728, 764 (N.D. Cal. 2019). *See also* Kevin Conroy & John Shope, *Look Before You Click: The Enforceability of Website and Smartphone App Terms and Conditions*, 63 Bos. Bar. J. 23, 23-24 (Spring 2019) (characterizing the Uber registration interfaces at issue in *Cullinane* and *Meyer* as sign-in wrap). The distinction is immaterial for the Court's purposes. The same "fact-intensive" analysis, which applies equally whether the purported agreement is categorized as browsewrap or hybrid browsewrap/clickwrap, turns on the conspicuousness of the notice—of the terms themselves but also of the action on the user's part that will constitute assent to those terms.

The very structure of Uber's registration process renders the method for manifesting assent inconspicuous, by suggesting that the primary purpose of the button is to submit payment information to Uber and complete the registration process—not to accept the Terms. An Uber user cannot click on (and can barely see) the "Done" button if she has not entered payment information; but she can click the "Done" button without reviewing, or even being aware of, the Terms, suggesting a link between the two acts. The placement of the button, as well—in the same location as the "Next" buttons used to move through previous steps of the registration process,[4] and immediately adjacent to the Link Payment heading and

[4] As described in the parties' briefing, Uber's registration process requires three steps: creating an account, creating a profile, and linking a payment method. Each of those steps occurs on a different page of the registration interface, and

payment entry section (while physically separated from the Terms of Service link)—convey to a reasonable user that the button corresponds with entry of payment information and finalization of the registration process, rather than assent to the Terms of Service.

The language used by Uber compounds this confusion for a reasonable user. Contrary to Uber's suggestion, the label chosen by Uber for the button – "Done" – is of utmost importance here. While it is true that "'I Agree' is not a required magic word," Uber Reply Br. at 22, the wording and surrounding context must communicate that by clicking, the user intends to be bound by an agreement. The word "Done," surrounded by content other than the Terms of Use, cannot communicate that intent. *See, e.g.*, *Berkson*, 97 F. Supp. 3d at 404 (Use of "NEXT" button insufficient to show adequate notice of assent to terms of use); *Nicosia*, 834 F.3d at 236 ("clicking 'Place your order' does not specifically manifest assent to the additional terms"); *Specht*, 306 F.3d at 22-23, 32 (finding no contract was formed by a user clicking on a "Download" button above a link to terms).

To cure this deficiency, Uber could have explicitly stated that users agreed to be bound by Uber's Terms of Service by clicking the "Done" button, as other

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advancing to the next step in the process is accomplished by pressing a button in the same location of the upper right-hand corner of the page: "NEXT" to proceed from creating an account and creating a profile, and "DONE" to proceed to using the service. *See* Uber Br. at 17.

companies have. *See Fteja v. Facebook*, 841 F. Supp. 2d 829, 838 (S.D.N.Y. 2012) (finding user assented by clicking "Sign Up" after being presented with notice stating: "By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service.").[5] Instead, Uber compounded the likelihood of confusion by prominently labeling the first screen of the interface "Create An Account," then, *after* the user had clicked through two additional pages, warning that "By creating an Uber account," the user had agreed to the Terms & Conditions and Privacy Policy. Uber Br. at 17. Given the use of nearly identical language, reviewed within minutes of each other, a reasonable user would expect that entering account details on the "Create an Account" screen, then saving those details by clicking the "Next" button, would create an account (and, subsequently, bind them to the Terms). It is also perfectly reasonable that a user would distinguish the creation of

[5] Notably, each of the cases cited by Uber for the proposition that users had an effective opportunity to access the terms also took this approach. Uber Br. at 37 (citing *Crawford v. Beachbody, LLC*, No. 14CV1583-GPC (KSC), 2014 WL 6606563, at *3 (S.D. Cal. Nov. 5, 2014) (upholding forum selection clause where consumer clicked "Place Order" underneath statement informing user that by clicking the button user was subject to the website's "terms and conditions," made accessible in the same screen via hyperlink); *Starke v. Gilt Groupe, Inc.*, No. 13 Civ. 5497 (LLS), 2014 WL 1652225, at *1, 3 (S.D.N.Y. Apr. 24, 2014) (upholding arbitration agreement where consumer clicked "Shop Now" next to statement informing user that "the consumer will become a Gilt member and agrees to be bound by the 'Terms of Membership,'" which were available next to the button as a hyperlink); *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 911-12 (N.D. Cal. 2011) (upholding arbitration agreement where user clicked "accept" above statement in small grey font indicating that clicking button meant accepting the hyperlinked "terms of service").).

an account—completed in the first step—from additional actions required to access the Uber service, such as entering payment information.[6] This interpretation would be particularly justified given the importance of data collection—like the email address, password, and phone number provided on the "Create An Account" page—to technology start-ups, like Uber. *See* Sam Frizell, *What Is Uber Really Doing With Your Data*, Time Magazine (Nov. 19, 2014), https://time.com/3595025/uber-data/.

Appellant's Brief relies heavily on the Second Circuit's decision in *Meyer v. Techs.*, 868 F.3d 66 (2d Cir. 2017). Uber Br. at 35-40; Uber Reply Br. at 21. Specifically, Uber contends that it provided users with a "nearly identical" registration prompt "no less clear than in *Meyer*," warranting the same conclusion as the Second Circuit reached there. Uber Br. at 38.

The court's analysis in *Meyer*, far from supporting Uber's position, provides a compelling illustration of why no contract formed here. A subtle but critical difference between the Terms & Conditions notice in *Meyer* and the one at issue here—namely, the placement of the button immediately below the Terms & Conditions notice (compared to the opposite side of the screen)—anchored the

[6] It appears that Uber—perhaps recognizing the deficiencies of its prior approach—has since changed the text of the button from "Done" to "Create Account." *See Theodore v. Uber Techs.*, 442 F. Supp. 3d 433, 441 (D. Mass. 2020) (displaying image of Uber registration screen).

court's reasoning and explicitly distinguished that case from the facts before the Court here. *See Meyer*, 868 F.3d at 78-80. Specifically, the court cited the "spatial coupling" of the Terms & Conditions notice and the "mechanism for manifesting assent—i.e., the register button" as a basis for finding reasonably conspicuous notice and an unambiguous manifestation of assent. *Id.* ("coupling of the terms with the registration button 'indicate[d] to the consumer that he or she is ... employing such services subject to additional terms and conditions that may one day affect him or her.'"). Moreover, the Second Circuit reasoned that the label and conspicuous placement of the button in *Meyer*—"Register," placed in the middle of the screen—further supported its conclusion. *Id.*

By contrast, here, the confirmation button was marked "Done," with no further indication of what, specifically, was being "Done" by clicking. The location of the button provided no additional context. To the contrary, the button's placement on the screen—immediately next to the Link Payment heading, above the payment information screen, and as far from the Terms & Conditions notice as physically possible—would signal to even a sophisticated user that the "Done" button referred to the payment process, not acceptance of the Terms. *Id.* at 80 (reasoning that, although the warning notice used the word "creat[e] instead of the button's "register," "the physical proximity of the notice to the register button and the placement of the language in the registration flow make clear to the user that

the linked terms pertain to the action the user is about to take."). The *Meyer* court's discussion of the significance of physical proximity thus counsels against enforcement here. *See id.* at 78 (distinguishing *Nicosia* because "the notice of the terms and conditions in *Nicosia* was 'not directly adjacent' to the button intended to manifest assent to the terms, unlike the text and button at issue here.").

Finally, making online Terms of Use more prominent, and requiring users to agree to those terms as a distinct step in the process, as in actual clickwrap agreements, would not be difficult for a large technology company like Uber. Uber has made a choice to be less communicative, and to require actions from its potential riders that are something less than unambiguous manifestations of assent. *See Wilson v. Huuuge*, 351 F. Supp. 3d 1308, 1317 (W.D. Wash. 2018) ("provid[ing] reasonable notice and easy access" is "not a difficult thing to do when designing an app ... The fact is, Huuuge chose to make its Terms non-invasive so that users could charge ahead to play their game. Now, they must live with the consequences of that decision."). Uber must now "live with the consequences of that decision." *Id.*

When a website is set up to guide users through a process, such as signing up for a service in the case of Uber, users will focus on the information they must input and the buttons they must click to complete that activity rather than ancillary text on the page. Sophisticated web designers for corporations like Uber no doubt

understand how de-emphasizing contract terms this way will affect users' notice of them. A wide body of empirical research demonstrates that people who are focused on a task will fail to notice unexpected objects or events that are unrelated to that task—even those right before their eyes. *See, e.g.*, Siri Carpenter, American Psychological Association, *Sights Unseen*, Monitor on Psych. (Apr. 2001), *available at* http://www.apa.org/monitor/apr01/blindness.aspx (summarizing research). For example, in one study, participants told to count the number of passes in a basketball game—and focused on that task—entirely missed the fact that a person dressed as a giant gorilla walked right through the game. *See id.* In a more mundane example, participants told to focus on a shape on a screen are likely to miss the presence of a different shape, even if it's directly in their field of view. *See id.*

Uber has proven that it knows how to provide conspicuous notice and obtain express and unambiguous manifestation of online users' affirmative assent, when it wants to. In its own clickwrap agreement for drivers, Uber requires that, "[t]o advance past the screen with the hyperlink to the agreement, drivers must confirm that they reviewed and accepted the []agreement by clicking 'YES, I AGREE,'" and then confirm agreement again. *Singh v. Uber. Techs.*, No. 16-3044, 2017 WL 396545, at *1 (D.N.J. Jan. 30, 2017). By requiring drivers "to agree to the terms of the agreement twice on [a] mobile device before permitting [them] to begin"

driving for Uber, Uber afforded them the opportunity to unambiguously manifest their assent to the terms of the contract. *Richemond v. Uber Techs*., 263 F. Supp. 3d 1312, 1317 (S.D. Fla. 2017).

The practices of other online companies, including Uber's largest direct competitor, further confirm that the burden on Uber would not be onerous. To sign up for peer-to-peer ride share company Lyft, for example, "users are required to click on an 'I agree' box after being presented with a list of terms and conditions of use." *Bekele v. Lyft*, 199 F. Supp. 3d 284, 295 (D. Mass. 2016), *aff'd*, 918 F.3d 181 (1st Cir. 2019). Alternative design modifications—for example, a "clear prompt directing users to read" the Terms, *see Sgouros*, 817 F.3d at 1035, or a statement explicitly stating that clicking "Done" indicates review of and assent to the Terms, *see Fteja*, 841 F. Supp. 2d at 838—could also suffice to provide the conspicuous notice required by law.

But instead of implementing such minor changes, and despite extensive litigation across the country prompted by its ambiguous user interface, Uber still "***chose*** not to use [any] common method of conspicuously informing users of the existence and location of terms and conditions" or the means of accepting them. *Cullinane*, 893 F.3d at 61 (emphasis added). Like many corporations, it continues to try to graft the acceptance of contract terms onto other elements of the transaction, like registration or purchase, instead of letting contractual acceptance

stand alone and guaranteeing an unambiguous manifestation of assent that would leave a reasonable observer with no doubt that a contract was clearly and unmistakably formed. Uber's deliberate decision to hide its terms of service, presumably to keep users from discovering the onerous nature of those terms, should be rejected.

IV. Terms of Use are riddled with exculpatory provisions that limit corporations' liability and make it difficult or impossible for website users to redress discriminatory policies and enforce their statutory rights.

Given the ease with which multi-page contracts can be tucked away in the bowels of websites and apps like Uber's, "we [now] make more legal agreements in a year than our grandparents made in a lifetime." Lord Coke, *supra* at 456. And these ubiquitous online agreements often contain significant restrictions on consumers' legal rights, like disclaimers of liability, caps on damages, class action waivers, and provisions shortening otherwise applicable statutes of limitations. They also frequently grant the website owner permission to collect and share users' data, including through installation of spyware, an invasive practice that has come under heightened scrutiny as consumers and regulators alike worry about the powerful tools corporations such as Facebook and Google can deploy to track their users' online activities. *See* Woodrow Hartzog, *Website Design as Contract*, 60 Am. U. L. Rev. 1635, 1642 (2011) (summarizing common features of Terms of Use).

Enforcing these one-sided, adhesive agreements raises questions of fairness even when website users have reasonable notice of their existence and manifest their assent unambiguously. But the unfairness is magnified when the terms are inconspicuous and agreement is signified by a neutral action like continuing to navigate the site that an ordinary person would not expect to be imbued with contractual significance.

The right to pursue claims for damages when one's civil rights have been violated, and to bring allegations of discrimination forward in a public court—as the Kauders want to do here—should not be waivable by a single ambiguous, unknowing click. When these hard-fought constitutional and statutory rights can be stripped away so unceremoniously and with so little notice, the rights themselves are cheapened, as are the contract law principles through which the usurpation is justified.

This court should establish guidelines for the level of notice that must be provided, and the indication of assent that must be shown, to agree to online contract terms. This will ensure the integrity and credibility of online transactions as they take on an increasingly important role in our society, and will eliminate the incentives for corporations to hide nasty rights-limiting surprises in their electronic fine print.

CONCLUSION

For the foregoing reasons and the reasons stated in Plaintiffs' Brief, this Court should affirm the trial court's order and conclude, consistent with *Cullinane* and *Ajemian*, that Uber did not enter into a valid arbitration agreement with either of the plaintiffs through its customer registration interface.

Dated: August 21, 2020

Respectfully submitted,

/s/ Stuart Rossman

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ADDENDUM

ADDENDUM
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93 Mass.App.Ct. 1109
Unpublished Disposition

Appeals Court of Massachusetts.

Lisa C. PAZOL & others[1]

v.

TOUGH MUDDER INCORPORATED.

17–P–653
|
Entered: May 7, 2018

By the Court (Vuono, Agnes & McDonough, JJ.[2])

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** The plaintiffs appeal from the Superior Court judgment dismissing their complaint against Tough Mudder Incorporated (Tough Mudder),[3] alleging that the judge erred in allowing Tough Mudder's motion to dismiss and to compel arbitration. The plaintiffs claim that the arbitration provision contained in the parties' agreement is unenforceable and that the agreement itself is an unenforceable contract. We affirm.

Background. The record reflects the following facts. Tough Mudder is a company that organizes athletic endurance events consisting of mud-filled obstacle courses designed to test participants' physical and mental strength. In 2014, Tough Mudder advertised a "Mudderella Boston" event scheduled to take place in Haverhill on September 6. The plaintiffs are all Massachusetts residents who used Tough Mudder's online Web site to sign up for the event and to pay the registration fee. When registering for the event, Tough Mudder presented each plaintiff with a "participant assumption of risk, waiver of liability, and indemnification agreement" (agreement) on the Web site in a scroll box displaying a portion of its text; scrolling through the box allowed registrants to read the full text of the agreement. A check box beneath the scroll box declared "I agree to the above waiver." In order to register for the event, the plaintiffs needed to check this box.

Prior to the date of the event, officials in Haverhill declined Tough Mudder's request for a permit. Tough Mudder immediately moved the event to nearby Amesbury. However, just a few days before the event, Tough Mudder learned that Amesbury could no longer serve as host. Tough Mudder then secured a third, out-of-State location for the event in Westbrook, Maine, approximately eighty miles from the original Haverhill location. Due to this increased distance, the plaintiffs were unable to attend the event.[4]

Subsequently, the plaintiffs filed a complaint in the Superior Court, alleging breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. They also claimed that Tough Mudder's policy of refusing refunds for any reason violated the Massachusetts Consumer Protection Act, G. L. c. 93A. The plaintiffs also presented class action allegations.

After removing the case to Federal court, where it was later remanded back to the Superior Court, Tough Mudder moved to dismiss or to stay and to compel arbitration. Following a hearing, the judge allowed the motion. In dismissing the plaintiffs' complaint, the judge adopted Tough Mudder's arguments and ruled that the plaintiffs' allegations "are plainly subject to the [a]rbitration agreement provisions of the parties' contracts and must be mediated first, and then, if unsuccessful, arbitrated."

***2** Discussion. In assessing Tough Mudder's motion to compel arbitration, which is properly treated as one for summary judgment, we must determine whether the parties agreed to submit the dispute to arbitration. Miller v. Cotter, 448 Mass. 671, 676 (2007). See G. L. c. 251, § 2(a). As such, we review a grant of summary judgment de novo, construing all facts in favor of the nonmoving party. Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991).

1. Statutory framework. The Uniform Arbitration Act, set forth in G. L. c. 251, §§ 1 et seq. (the act), "express[es] a strong public policy favoring arbitration as an expeditious alternative to litigation for settling commercial disputes." Home Gas Corp. of Mass., Inc. v. Walter's of Hadley, Inc., 403 Mass. 772, 774 (1989), quoting from Danvers v. Wexler Constr. Co., 12 Mass. App. Ct. 160, 163 (1981). The act provides in part:

> "A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."

G. L. c. 251, § 1, inserted by St. 1960, c. 374, § 1.[5] The act also allows for proceedings in the Superior Court to compel arbitration in accordance with the terms of an arbitration agreement, and permits an interlocutory appeal from an order denying an application to compel arbitration. See G. L. c. 251, §§ 2, 18.

Under both State and Federal law, it is clear that parties to an agreement can agree to arbitrate claims and disputes that might arise between them. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26–27 (1991); Warfield v. Beth Israel Deaconess Med. Center, Inc., 454 Mass. 390, 395–396 (2009). As noted supra, § 2 of the act provides that a party aggrieved by another's refusal to arbitrate a dispute where a written agreement between the parties requires arbitration may apply to the Superior Court for an order directing that such a procedure take place. G. L. c. 251, § 2. The act also provides an opposing party who questions the existence of a valid agreement to arbitrate to have the issue addressed by a judge, with the proviso that such a determination as to the agreement's validity be decided summarily. G. L. c. 251, § 2(a). See St. Fleur v. WPI Cable Sys./Mutron, 450 Mass. 345, 353 (2008).

2. Scope of our review. Courts have a very limited role in matters involving arbitration. When a motion to compel arbitration is met with the argument that the entire agreement is unenforceable, our only task is to determine whether the arbitration provision itself is enforceable. See Quirk v. Data Terminal Sys., Inc., 379 Mass. 762, 766 (1980) ("We think it is clear that the Legislature intended, by the language of § 1 [of the act], that the arbitration provision be unenforceable only when the arbitration provision itself [and not the contract as a whole] is revoked 'upon such grounds as exist ... for the revocation of any contract' "). If we determine that the arbitration provision is enforceable, then questions surrounding the formation of the agreement itself, such as whether the consideration offered was illusory, or questions about other specific provisions, are left to the arbitrator. Id. at 766–768. See Barnstead v. Ridder, 39 Mass. App. Ct. 934, 936 (1996) (once judge determines matter should be arbitrated, questions regarding interpretation of agreement left for arbitrator).

***3** Thus, to determine whether the arbitration provision is enforceable, we must examine its language independent of the rest of the agreement. Notwithstanding the strong public policy favoring arbitration that underlies the act, see Home Gas Corp. of Mass., Inc., 403 Mass. at 774, it remains available to the party opposing arbitration to assert traditional grounds that would permit the voiding of a contract, such as fraud, duress, and unconscionability, in arguing that the motion to compel arbitration should be denied. See St. Fleur, supra at 350, citing Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996). Here, the plaintiffs allege that the arbitration provision is unconscionable.[5]

a. Unconscionability. The plaintiffs allege that the arbitration provision is unconscionable for a number of reasons. They claim that the arbitration clause is not conspicuous, as it is "not highlighted and is obscurely embedded deep in the [a]greement" such that it creates "unfair surprise" to registrants. The plaintiffs also argue that certain terms within the provision are vague or undefined, which they again claim constitute "unfair surprise."

Historically, courts considered a contract unconscionable if it was "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." Hume v. United States, 132 U.S. 406, 411 (1889), quoting from Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82, 100 (Ch. 1750). Later, "a contract was determined unenforceable because unconscionable when 'the sum total of its provisions drives too hard a bargain for a court of conscience to assist.' " Waters v. Min Ltd., 412 Mass. 64, 66 (1992), quoting from Covich v. Chambers, 8 Mass. App. Ct. 740, 750 n.13 (1979). "The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect." Miller, 448 Mass. at 679, citing Restatement (Second) of Contracts § 208 comment a (1981). "Because there is no clear, all-purpose definition of 'unconscionable,' nor could there be, unconscionability must be determined on a case by case basis ..., giving particular attention to whether, at the time of the execution of the agreement, the contract provision could result in unfair surprise and was oppressive to the allegedly disadvantaged party." Zapatha v. Dairy Mart, Inc., 381 Mass. 284, 292–293 (1980). Considering the setting, purpose, and effect of the arbitration provision here, we conclude that it was not unconscionable.

***4** Nothing in the setting of its execution suggests that the arbitration provision was procedurally unconscionable. The entire agreement is preceded by a conspicuous, clearly-worded, all-caps header stating: "PARTICIPANTS: READ THIS DOCUMENT CAREFULLY BEFORE SIGNING. THIS DOCUMENT HAS LEGAL CONSEQUENCES AND WILL AFFECT YOUR LEGAL RIGHTS AND WILL ELIMINATE YOUR ABILITY TO BRING FUTURE LEGAL ACTIONS." The arbitration provision is titled "Mediation and Arbitration," appears on the fourth page of the seven-page agreement, and is written in what appears to be the same size and font as the rest of the agreement. The provision itself is only one paragraph long and uses fairly clear language. There is nothing in the record suggesting that the plaintiffs were under pressure to read the agreement quickly or to not read it at all. The agreement also required an affirmative response from the plaintiffs by clicking the "I accept" button. See Ajemian v. Yahoo!, Inc., 83 Mass. App. Ct. 565, 576 (2013). These factors all weigh against a finding of unfair surprise or oppressive formation. See Swift v. Zynga Game Network, Inc., 805 F. Supp. 2d 904, 911–912 (N.D. Cal. 2011) (granting motion to compel arbitration where plaintiff had opportunity to review terms of service via hyperlink and clicked "I accept" button).

Similarly, nothing in the terms of the arbitration provision—its purpose and effect—suggests that it was substantively unconscionable. The purpose of submitting disputes to binding arbitration is heavily favored by statute and by case law. See G. L. c. 251, § 1; Home Gas Corp. of Mass., Inc., 403 Mass. at 774. The agreement was bilateral in that either party could invoke its provisions. All rights and remedies available in the courts were preserved for the arbitrator. On this record, there is no viable claim of unconscionability in the arbitration provision.[7]

b. Scope of provision. Finally, the plaintiffs argue that even if the arbitration provision is enforceable, their claims against Tough Mudder do not require arbitration because they do not fall within the scope of that provision. Specifically, they argue that the language in the agreement requiring that "all disputes, controversies, or claims arising out of my participation in the Mudderella event shall be submitted to binding arbitration" does not apply to them, because the plaintiffs never participated in the event.

Under the terms of the arbitration provision, the plaintiffs agreed that "[i]n the event of a legal issue, [they] agree to engage in good faith efforts to mediate any dispute that might arise" and that should mediation fail, "all disputes, controversies, or claims arising out of [their] participation" in the event should be submitted to arbitration. This language is somewhat unclear, because it first requires the parties to mediate "any dispute that might arise," but if mediation fails, to submit to arbitration all "disputes, controversies, or claims arising out of [their] participation" in the event. However, the Commonwealth's policy in favor of arbitration generally instructs us that where, as here, a contract has an arbitration provision that is broad in its reach, there is a rebuttable presumption that a contract dispute is covered by the provision, and doubts whether a particular dispute comes within the scope of the provision should be resolved in favor of arbitration. See Drywall Sys., Inc. v. ZVI Constr. Co., 435 Mass. 664, 666 (2002). See also Commonwealth v. Philip Morris Inc., 448 Mass. 836, 843–844 (2007). "In a number of

contexts, we have construed the phrase 'arising out of' and similar phrases (e.g., 'connected to' or 'relating to') in an arbitration clause as constituting 'broad' language that invokes the FAA's [and the act's] presumption in favor of arbitration." Warfield, 454 Mass. at 396–397.[8] As such, we are persuaded that the claims raised in the plaintiffs' complaint fall within the scope of the arbitration provision. See Massachusetts Coalition of Police, Local 165, AFL–CIO v. Northborough, 416 Mass. 252, 256 (1993) ([A]bsent "positive assurance" that arbitration provision does not cover instant dispute, motion to compel arbitration should not be denied [citation omitted]).

***5** Conclusion. Because we conclude that the agreement contains an enforceable provision requiring the parties to submit legal disputes to arbitration, and that this case falls within the scope of that provision, the judge properly dismissed the plaintiffs' complaint. As to the plaintiffs' remaining claims, they are for the arbitrator to decide.[9]

Judgment affirmed.

All Citations

93 Mass.App.Ct. 1109, 103 N.E.3d 1237 (Table), 2018 WL 2090277

Footnotes

1 Maria C. Newman, Lisa Russ, and Audrey J. Bennett. The plaintiffs sued on behalf of themselves and others similarly situated.

2 The panelists are listed in order of seniority.

3 The first amended complaint also named Tough Mudder, LLC, and BK Bridge Events, LLC, as defendants. These two entities have since merged into Tough Mudder and are no longer in existence.

4 According to the affidavit of Tough Mudder's vice-president of event production, approximately 11,300 individuals registered for the Mudderella Boston event, paying a total of $1,065,040.35 in nonrefundable registration fees. Of those 11,300 individuals, 6,960, representing $617,574.86 in registration fees retained by Tough Mudder, did not attend the event in Maine.

5 Congress adopted a similar statute, the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. Its language is remarkably similar to that of the Massachusetts act: "[A]n agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, 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.

6 The plaintiffs raise a number of colorable claims, most notably the question whether the contract as a whole may be both illusory and unconscionable, given Tough Mudder's assertion that the language of the agreement purports to give it the unilateral right to cancel the event for any reason and to keep the registration fees by virtue of its "no refunds" policy. Such an interpretation arguably implicates the implied covenant of good faith and fair dealing. See Druker v. Roland Wm. Jutras Assocs., Inc., 370 Mass. 383, 385 (1976), quoting from Uproar Co. v. National Bdcst. Co., 81 F.2d 373, 377 (1st Cir.), cert. denied, 298 U.S. 670 (1936), where it is said that "in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing." These questions, however, are for the arbitrator to resolve, because they go to the formation of the agreement itself, not to the arbitration provision. St. Fleur, supra at 356 ("A claim of fraud in the inducement of the arbitration provision in a contract must be resolved by a court, but a claim of fraud in the inducement of the contract itself must be arbitrated" [citation omitted]).

7 We also reject the plaintiffs' claim that the arbitration provision lacks mutual consideration. This is clearly not so. Each party waived its right to judicial process and gained the right to invoke arbitration. This reciprocal exchange of benefit and detriment constitutes consideration. Marine Contractors Co. v. Hurley, 365 Mass. 280, 286 (1974), citing Williston, Contracts § 102 (3d ed. 1957) ("The requirement of consideration is satisfied if there is either a benefit to the promisor or a detriment to the promisee").

8 See, e.g., Drywall Sys., Inc., supra at 666–667 (construction subcontracts between general contractor and subcontractor providing for arbitration of claims "arising out of or relative to" subcontracts required arbitration of all parties' construction project claims, including claim under G. L. c. 93A); Philip Morris Inc., supra at 844 (settlement agreement between Commonwealth and tobacco companies providing for arbitration of disputes "arising out of" or "relating to" calculation of companies' annual payments required arbitration of claim).

9 In light of our decision, we deny the plaintiffs' request pursuant to c. 93A for appellate attorney's fees.

End of Document

CERTIFICATE OF COMPLIANCE

I, Stuart Rossman, hereby certify that the foregoing brief complies with the requirements of Mass. R. App. P. 17 (Brief of an amicus curiae) and Mass. R. App. P. 20 (Form and length of briefs, appendices, and other documents).

I further certify, pursuant to Mass. R. App. P. 17 that the forgoing brief complies with the length limitation in Mass. R. App. P. 20 because it is printed in a proportional spaced font, Times New Roman, at size 14 point in Microsoft Word 2010, and contains 7,498 words not excluded by Mass. R. App. P. 20 (2)(D).

Dated: August 21, 2020

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21st day of August, 2020, a true and correct copy of the foregoing Brief for *Amici Curiae* Public Justice, P.C. and National Consumer Law Center in Support of Plaintiffs-Appellees and Affirmance was electronically filed with the Clerk of the Court and electronically served on all parties of record.

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