No. 16-2023

In the United States Court of Appeals for the First Circuit

RACHEL CULLINANE, JACQUELINE NUNEZ, ELIZABETH SCHAUL, and ROSS MCDONAUGH, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

v.

UBER TECHNOLOGIES, INC.,
Defendant-Appellee.

On Appeal from the United States District Court for the District of Massachusetts

PLAINTIFFS-APPELLANTS' BRIEF

JOHN RODDY
ELIZABETH RYAN
BAILEY & GLASSER LLP
99 High Street, Suite 304
Boston, MA 02110
(617) 439-6730

MATTHEW W.H. WESSLER
MATTHEW SPURLOCK
GUPTA WESSLER PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741
matt@guptawessler.com

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Counsel for Plaintiffs-Appellants

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Each year, an ever-growing portion of consumer transactions—from online shopping to all manner of services provided through the "sharing economy"—take place through websites and mobile phones. This appeal presents a question of overriding importance: how do the standards governing the "touchstone" principle of contract law—mutual manifestation of assent—apply to these online contracts when a company seeks to bind users to an arbitration clause hidden behind a hyperlink? *See Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171, 1175-76 (9th Cir. 2014). Because this question is one of first impression in this Court, and because the district court here split with multiple federal circuits, as well as the Massachusetts Appeals Court, oral argument is warranted.

INTRODUCTION

Uber is a technology services company that aspires to provide "the easiest way to get around at the tap of the button" by connecting riders looking for drivers with drivers looking for riders through a mobile-phone platform. When a *prospective driver* first registers on Uber's mobile-phone application, she encounters (after entering some basic personal information) a screen titled "TERMS AND CONDITIONS" with the following all-caps statement: "TO GO ONLINE, YOU MUST REVIEW ALL THE DOCUMENTS AND AGREE TO THE CONTRACTS BELOW." Directly below that notice are links to the relevant contractual terms—including an arbitration clause that waives the driver's right to a jury trial and bans class actions. Then, at the bottom of the screen, a statement warns that, "By clicking below, you represent that you have reviewed all the documents and that you agree to all the contract above," followed by a large blue rectangle containing the words "YES, I AGREE." To continue the registration, the applicant *must* tap the blue "I AGREE" icon. Doing that calls up another screen containing a single pop-up window asking the user again (this time in bold and all caps) to "**PLEASE CONFIRM THAT YOU HAVE REVIEWED ALL THE DOCUMENTS AND AGREE TO ALL THE NEW CONTRACTS.**"

But a *prospective rider* downloading Uber's ride-sharing app will see none of this. Instead, after completing the first few pages, he will discover a screen titled

"LINK PAYMENT" that contains a large rectangular credit-card-information box and a numerical keypad covering half the screen. Sandwiched in between these two features is a link telling the rider to "scan your card," another saying "enter promo code," and, just below that, a statement telling users that "By creating an Uber account you agree to The Terms of Service." The first half of this phrase appears in light grey out against a black background. Only after the rider enters his credit card information is he allowed to complete the registration, by tapping a "DONE" button in the upper right corner of the same screen.

Departing from the view of other courts to consider the same question, the district court in this case held that the differences between Uber's two registration forms are legally irrelevant. It enforced Uber's rider-focused online contract and bound users to Uber's arbitration clause hidden behind a hyperlink despite the absence of clear evidence that (1) the contract terms were reasonably conspicuous to users and (2) users unambiguously manifested assent to those terms. In the district court's view, when it comes to online contracts, "teasing out distinctions" in the design and form of webpages or mobile-phone screens "truly make[s] no difference."

But settled principles of contract law require that courts carefully evaluate whether mutual manifestation of assent has been satisfied in cases involving website or mobile-phone contracts. Whether the webpages or mobile-phone screens

presented to the consumer adequately communicate all the terms and conditions of the agreement, and whether the circumstances support the assumption that the user receives reasonable notice of those terms is a fact-intensive inquiry. Contrary to the district court's understanding, deciding whether an online contract is enforceable "depends heavily" on "the design and content" of the relevant webpages or mobile-phone screen. *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 233 (2d Cir. 2016).

Applying these principles here demonstrates that Uber's rider-registration screen attempts to smuggle assent in through the back door. Unlike the form it provides to drivers, Uber's registration for prospective riders bears none of the hallmarks of clear and conspicuous notice and affords users no opportunity to affirmatively assent to contract terms. As Judge Rakoff recently explained in rejecting Uber's bid to bind New York riders to the terms in a similar interface, when "contractual terms as significant as the relinquishment of one's right to a jury trial" are accessible "only via a small and distant hyperlink titled 'Terms of Service & Privacy Policy,'" there is "a genuine risk that a fundamental principle of contract formation will be left in the dust: the requirement for a manifestation of mutual assent." *Meyer v. Kalanick*, __F. Supp. 3d__, 2016 WL 4073012, at *10 (S.D.N.Y. July 29, 2016). Enforcing Uber's arbitration clause—especially when done with so

little factual inquiry—undermines basic principles of contract law and jeopardizes the integrity and credibility of electronic bargaining.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. § 1332(d). Holding Uber's arbitration agreement enforceable, the court issued a final judgment granting Uber's motion to dismiss and to compel arbitration on July 11, 2016. Add. 28, Add. 1. The appellants timely appealed on August 5, 2016. JA7. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. The district court ruled that determining mutual assent for the purposes of an online contract does not require "a fact intensive analysis" and does not turn on the specific design and form choices of the particular online contract. Yet the federal and Massachusetts appellate courts that have considered the issue have held that, in deciding whether a contract was formed through mutual assent, a court must "use an objective approach" that requires "a fact-intensive inquiry," *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1034-35 (7th Cir. 2016), and "depends heavily" on "the design and content" of the relevant webpages or mobile-phone application, *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 233 (2d Cir. 2016); *see also Ajemian v. Yahoo!, Inc.*, 83 Mass. App. Ct. 565, 576, 987 N.E.2d 604, 613 (2013). Did the district court misapply the governing framework for analyzing mutual assent in online contracts?

2. Uber's mobile-phone contract for riders does not afford users conspicuous notice that registering for its ride-hailing service will ostensibly waive the user's constitutional right to a jury trial. Nor does it require users to affirmatively assent to signal their agreement. Did the district court err in concluding that Uber was nonetheless able to meet its burden in demonstrating that (1) ride-share users were given reasonably conspicuous notice of Uber's arbitration clause and (2) these users unambiguously manifested their assent to the waiver of their right to a jury trial?

STATEMENT OF THE CASE

A. Uber's mobile platform connects riders and drivers in the Boston area.

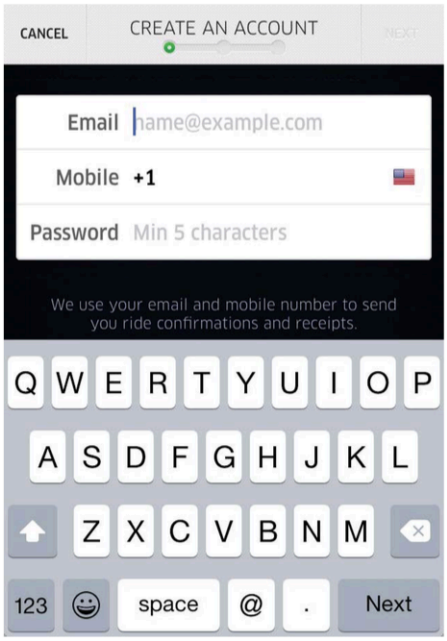
Uber Technologies, Inc. is a California-based technology company that connects users with on-demand driving services in more than 500 cities across the globe, including Boston. https://www.uber.com/media/. Riders, like the four plaintiffs in this case, generally access the Uber platform through a mobile-phone application, which allows them to request a ride with the simple "tap of a button." https://get.uber.com/. Uber promises to be the "easiest way around"—connecting users with drivers on the platform, providing drivers with directions, and offering a "completely seamless" payment system through its mobile application. https://www.uber.com/.

B. Uber's registration process does not provide clear notice of its Terms of Service, or require affirmative assent to those terms.

The plaintiffs are four Massachusetts residents who signed up for Uber's services between January 2013 and January 2014. JA11-JA12.[1] Before using the company's ride-sharing services, each plaintiff was required to sign up for an Uber account. Each accessed Uber's registration process through the company's mobile-phone app, and provided the company with his or her name, contact information, and payment information. JA12.

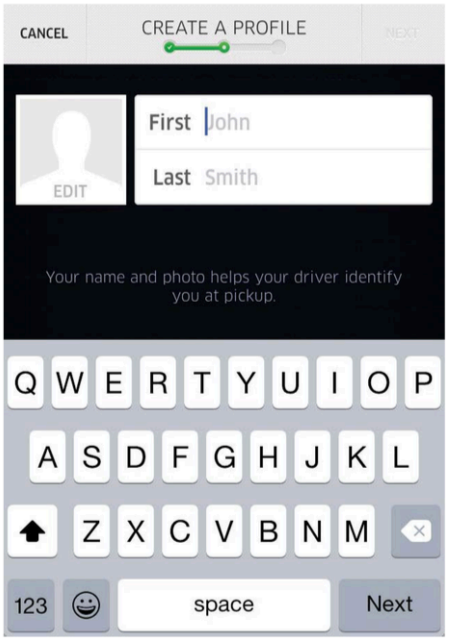
At the time the plaintiffs signed up for the service, Uber's account-registration process involved three separate steps. On the first screen, which featured a large white box on a black background, the app asked new users, like the plaintiffs here, to "create an account" by entering an email address, mobile phone number, and password. JA36, JA42, JA50, JA 56. Below this box, in small, light grey font on the black background, a message from Uber explained to prospective users that the company needed this information "to send you ride confirmations and receipts." JA36, JA42, JA50, JA 56.

[1] All references to the complaint are to the Second Amended Complaint.



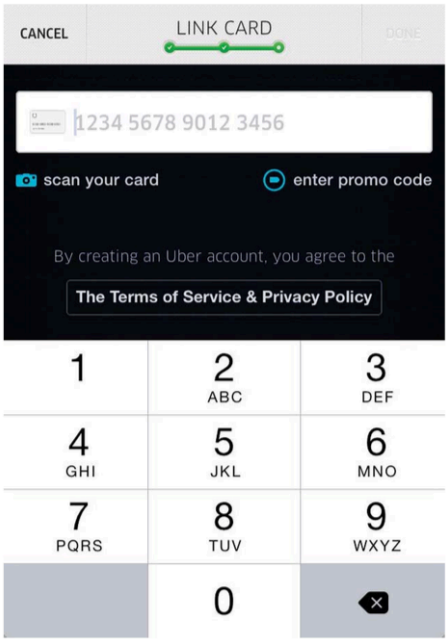
JA36.

On the next screen, registrants were then asked to "create a profile" by entering a first and last name, and uploading a photo. JA38, JA44, JA52, JA58. Small grey type at the bottom of the screen informed new users that providing a "name and photo helps your driver identify you at pickup." *Id.*



JA38.

In the final step, the app asked new users to link a form of payment to their Uber accounts. JA40, JA46, JA54, JA60.



JA40. *See also* JA46.

Uber has edited the exact title of this screen over time, reflecting the different modes of payment available (such as a credit card or PayPal account). In each version, these titles—"LINK CARD" and "LINK PAYMENT"—signaled a singular, clear purpose for this last step in the registration process: to give users the ability to easily pay for their Uber services. *Compare* JA40 and JA54 *with* JA46, JA60. [2]

[2] The screen pictured above was the operative version that Ms. Nunez and Ms. Schaul would have seen when they first signed up for accounts in December 2012 and September 2013, respectively. JA33. Ms. Cullinane and Mr. McDonagh,

Despite the clear message that payment was the focus, the final step in the registration process purported to do far more than merely link a form of payment. Below the boxes for entering credit-card information, the app again included a message in small, light grey font. In the first two stages of the registration process, Uber used this space to explain to prospective users why they needed to complete each step, and when and how their contact information and photos would be used. *See supra* at 7. But here, the message was unrelated to the ostensible purpose of this last step in the registration process—linking a payment method. Uber instead used this space to note that completing the registration process also bound users to Uber's terms of service, by including the small-font statement: "By creating an Uber account, you agree to the Terms of Service & Privacy Policy." The phrase "Terms of Service & Privacy Policy" was then enclosed in a box, and appeared in bolder, white type. But the crucial notice—that providing credit-card information would, from Uber's perspective, simultaneously serve as assent to the terms and conditions—was in light grey, and so more difficult to read. *See supra* at 8.

For new Uber users, it was possible to complete the entire registration process while the key Terms of Service document remained two clicks away. JA33-JA34. Had the plaintiffs pressed the "Terms of Service & Privacy Policy" button, the app would have taken them to a second screen, where they could then click on

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who signed up in December 2013 and January 2014, encountered a similar screen titled "LINK PAYMENT." JA33.

links to the separate Terms of Service or Privacy Policy documents. JA33-JA34. Only those who clicked again on the appropriate link would have reached the relevant Terms of Service. JA33-JA34.

To complete the registration process, Uber customers could press a "DONE" button on the top right-hand corner of the screen (which remained greyed out, and inoperative, until a valid payment method was entered). JA34. Users were not required to click on the "Terms of Service & Privacy Policy," access the terms document, or affirmatively indicate their assent in any way. JA14. The screen included no "I agree" check box, but asked users instead only to confirm that they were done entering the necessary payment information. None of the plaintiffs here clicked through to the Terms of Service. JA14. Each hit the "DONE" button, creating an Uber account.

C. Uber's Terms of Service contain a "dispute resolution" section that waives the user's right to trial by jury and class-action proceedings.

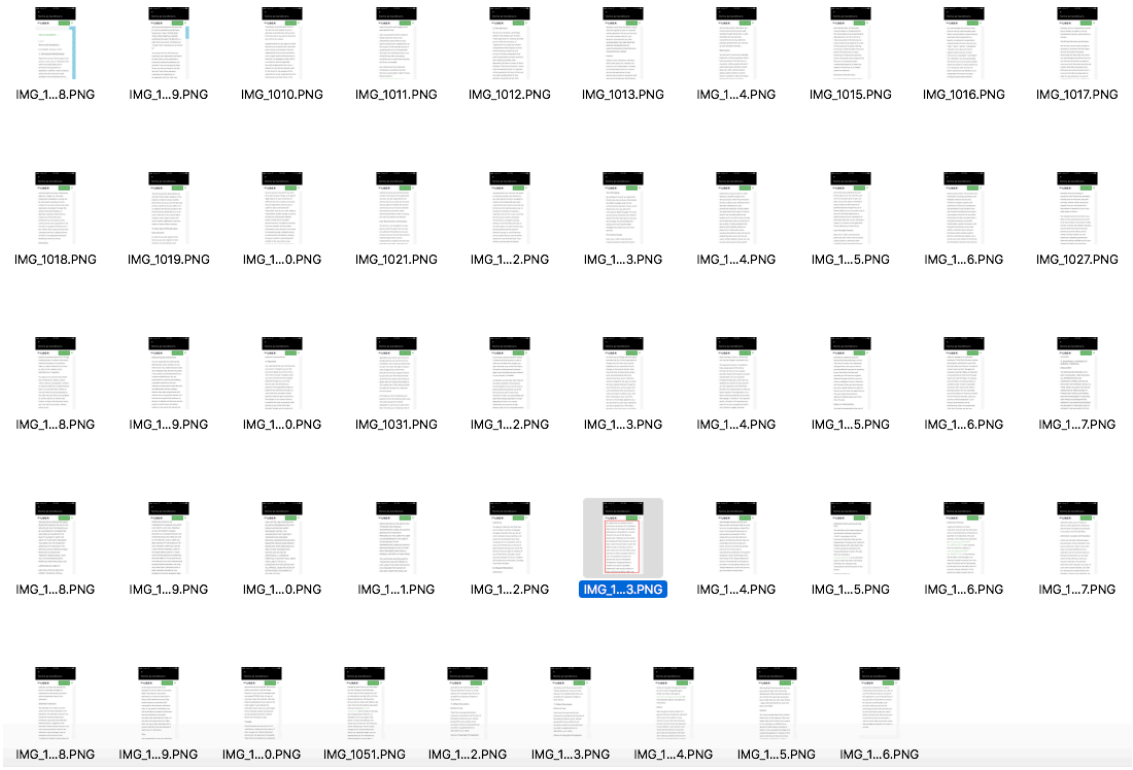
Though Uber did not require users to actually view or affirmatively assent to the Terms of Service, the document contained a number of provisions to which the company now seeks to hold the plaintiffs. Pages of text explained the company's strict "no refund policy," JA69, disclaimed all warranties for the "RELIABILITY, TIMELINESS, QUALITY, SUITABILITY, AVAILABILITY, ACCURACY OR COMPLETENESS," of Uber's services, JA70-JA71, and limited the

company's liability (in violation of Mass. Gen. L. c. 93 § 101) for "LOSS, DAMAGE, OR INJURY" arising out of the conduct of either Uber or its drivers, JA71-JA72.

In the second-to-last section of the Terms of Service, Uber included language describing its "Dispute Resolution" process. At the time that all the plaintiffs downloaded the app and began using Uber, this provision didn't appear until nearly the end of the company's long agreement—the equivalent of the ninth of ten pages printed on letter-sized paper in a readable-sized font. *See* JA73, JA82-JA83.[3] Most Uber users would have accessed this document on a mobile phone, and would have needed to scroll through dozens of paragraphs to reach the "dispute resolution" clause. The image below approximates how far users would have had to scroll using a later version of Uber's Terms-of-Service document (in effect from January until November 2016) to reach the arbitration agreement.[4] Here, the information before the arbitration agreement totaled more than 3,300 words—or 35 full pages of text on a 4.7-inch iPhone screen:

[3] The plaintiffs registered under slightly different versions of the agreement, depending on when they first began using Uber. JA64. Plaintiff Jacqueline Nunez saw a version in effect Sept. 21, 2012 through May 16, 2013. *See* JA65-JA74. Rachel Cullinane, Elizabeth Schaul, and Ross McDonagh signed up under an operative version in place after May 2013. *See* JA75-JA84. The only differences between these two documents are the sizes of the section headings. Add. 8.

[4] *See* https://www.uber.com/legal/other/US-terms-pre-Nov-2016/.



Had the plaintiffs clicked through to the Terms of Service, they would have needed to scroll even further than users encountering this later version of the terms. In versions of the document in effect when the plaintiffs signed up, nearly 4,400 words preceded the dispute-resolution provision.[5] And, because the plaintiffs signed up using iPhones with 3.5-inch screens, https://support.apple.com/kb/sp587, they would have needed to scroll even longer to reach this crucial section.

For those who managed to reach the arbitration provision, Uber asserted that users "agree[d] that any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or

[5] Calculated using the Terms of Service presented in JA75-JA84, which was in effect when Ms. Cullinane, Ms. Schaul, and Mr. McDonagh began using Uber. JA64.

validity thereof or the use of the Service or Application (collectively, **'Disputes'**) will be settled by binding arbitration," except for certain small claims or copyright and intellectual-property claims. JA73. The agreement continued: **"You acknowledge and agree that you and Company are each waiving the right to a trial by jury or to participate as a plaintiff or class User in any purported class action or representative proceeding."** JA73. Although this sentence was set out in bold type from the rest of the Dispute Resolution section, it was not the only highlighted sentence in the Terms of Service; entire sections, including the liability waivers mentioned above, appeared in all caps. *See* JA71-JA72.

The agreement provided that the binding arbitration would be administered by the American Arbitration Association ("AAA"). JA73. The arbitrator would be prohibited from "consolidat[ing] more than one person's claims," and could not "otherwise preside over any form of class or representative proceeding." *Id.*

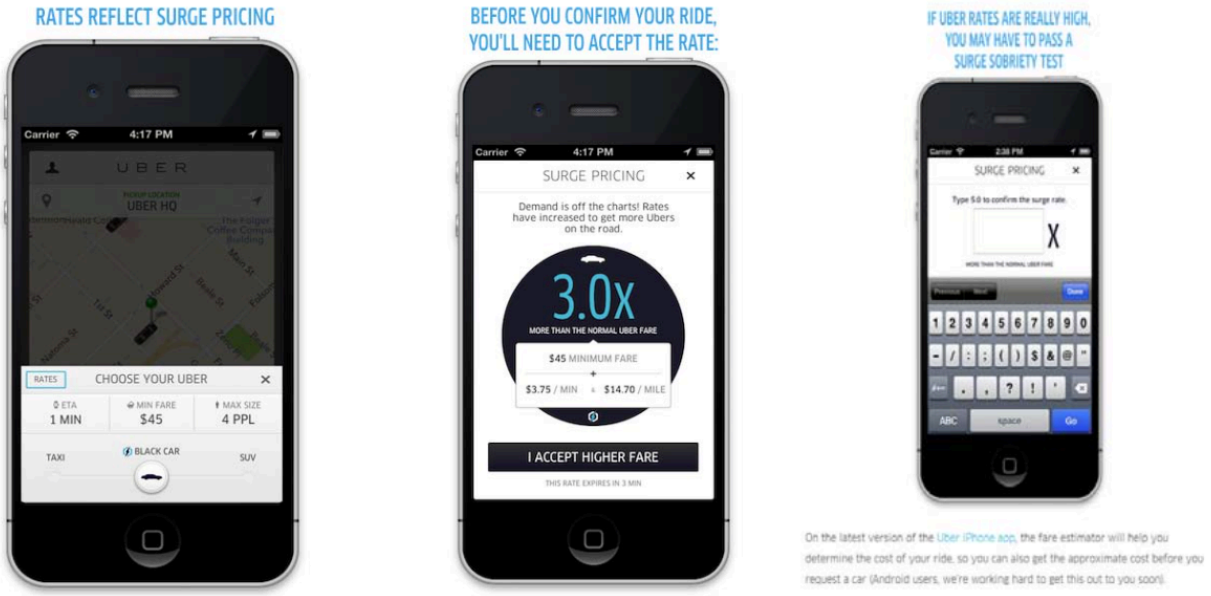
Although users were never required to affirmatively assent or even access these Terms of Service, the first section laid out Uber's view of its contracting power. The company's terms contended that "[b]y using or receiving any" Uber services, "and downloading, installing or using any associated application," users like the plaintiffs had "hereby expressly acknowledge[d] and agree[d] to be bound by the terms and conditions of the Agreement." JA66.

D. In contrast to its rider-registration process, Uber has created other contract interfaces that require users to affirmatively assent to key terms and conditions.

At the time the plaintiffs registered for Uber's rider app, the company was employing a very different framework for notice in other aspects of its business. The company's notifications about the dynamic "Surge Pricing" model it used for many years are particularly instructive. Under this system, Uber charged higher prices for rides requested in "high demand" areas, with the final price calculated by a predetermined multiplier based on supply and demand. http://ubr.to/2isklfs. During a "surge," Uber prominently disclosed the amount of the surcharge, telling users, for example, that their ride would be "1.5X" the baseline fare. *Id.* The company then required customers to affirmatively acknowledge that they agreed to this increased rate before the app processed the ride request. JA17.

Uber created this system because it wanted a "clear and straightforward" notice process for surge pricing. JA17. "When surge pricing [was] in effect," Uber notes on its website, "every user [was] notified of the price change," and was required to "confirm the pricing in order to request a ride." http://ubr.to/2i7HdDf. As the screenshots below illustrate, the company asked riders to click on a box noting their assent: "I ACCEPT HIGHER FARE." JA17. When prices were particularly high, Uber would even ask users to type in the

magnitude of the surcharge, to demonstrate that they fully understood the terms of the ride:



JA17. As Uber explained on its website in advance of New Year's Eve 2012, a night it expected particularly high demand, the company "worked hard to provide clear price notifications when surge pricing [was] in effect," to ensure "that there are no surprises." http://ubr.to/2i7HdDf/.

E. The plaintiffs use Uber to travel to Logan Airport, and are charged fictitious "Massport" fees.

In 2013 and 2014, the four plaintiffs in this case all entered their personal information, hit the "DONE" button, and used the service to travel to or from Logan. At the end of these rides, each received a receipt with a separate line item of $8.75, for what Uber called the "Logan Massport Surcharge & Toll." JA18-

JA21. As Uber explained on its Boston website at the time the plaintiffs took these rides, this surcharge was meant to "cover[] Massport fees"—those charged by the Massachusetts Port Authority—"and other costs related to airport trips." JA23. This "nominal fee" was meant "to compensate drivers for any airport fees they are charged as part of [a user's] trip." JA23.

But Uber had invented the fee. For riders getting dropped off at the airport using UberX, UberBLACK, and UberSUV, neither Massport nor Logan Airport charged any fee. JA9. And while there was a charge for pickups, this fee was far below what Uber charged the plaintiffs. (Only Massport-permitted providers, some of which are available via Uber, can pick up passengers at Logan. JA10.) At the time that the plaintiffs used the service to travel from the airport, the amount that Massport imposed on licensed livery vehicles—the only "airport fee" for which drivers could possibly be responsible—was just $3.25. JA10. Beyond its illegal imposition of the "Massport Surcharge" fee, Uber also on occasion charged the Massport Fee to riders who never visited the airport. Mr. McDonagh, for example, was charged the $8.75 fee on several trips between South Boston and East Boston in 2014 and 2015 that did not involve a pick up or drop off at Logan. JA21.

Imposing a nonexistent "Massport Surcharge" is not the only way that Uber overcharged riders traveling to and from Logan. Ms. Cullinane, Ms. Schaul, and Mr. McDonagh were all charged an inflated "East Boston Toll" on their trips to or

from the airport. JA19-JA21. Though Uber asked the plaintiffs to pay an additional $5.25 for these tolls, the actual East Boston toll for which UberX drivers would be responsible never exceeded $3.50. JA10. Uber reimbursed drivers for the actual amount paid, then "pocket[ed] the remainder." JA20-JA21.

While Uber represented to users that these charges were meant to cover fees imposed by Massport, the port authority itself unequivocally refuted this claim. Curt Woodward, *Uber, Massport Spar Over Airport Surcharge for Logan Travelers*, Boston Globe, Sept. 24, 2015, http://bit.ly/2jibixA. In a September 2015 letter to Uber's CEO Travis Kalanick, sent after the filing of this lawsuit, Massport lawyer Catherine McDonald explained, "Any representation to the traveling public that there is a 'Logan Massport Surcharge & Toll' of $8.75 is patently false." *Id.*

In response to this letter and other concerns raised by its passengers, Uber changed both the amount of the fee and how it was described in company materials since the filing of this lawsuit, opting to call it an "Airport Surcharge." *Id.* The company ultimately dropped its "patently false" surcharge and now charges a flat $3.25 "Airport Facility Charge" for pick-ups and drop-offs—"[p]er regulations at Boston Logan International Airport." https://www.uber.com/airports/bos/.

F. This litigation

In November 2014, Ms. Cullinane and Ms. Nunez filed this case in Massachusetts Superior Court, on behalf of themselves and a class of other Uber

riders in the Boston area.[6] Add. 9-10. The plaintiffs alleged that Uber had knowingly imposed "fictitious or inflated" fees—a form of unjust enrichment that violated state consumer-protection statutes. JA27-JA28.

After the case was removed to federal court, Uber filed a motion to compel arbitration and stay or, in the alternative, dismiss the case. Add. 11. In support of this request, the company outlined its belief that the plaintiffs had formed binding arbitration agreements when they signed up for Uber accounts. Memo in Support of Mot. to Compel Arbitration, Dkt. 32 at 1. Calling the registration process "clear, simple and unequivocal," *id.* at 16, Uber contended that "[i]t was impossible for Plaintiffs to complete their registration without affirmatively consenting to the Terms & Conditions," *id.* at 9. In Uber's view, when "[p]laintiffs clicked on the icon" on the "link payment page"—which indicated they were "done" entering credit-card information—"[t]hat click was the electronic equivalent of affixing their signatures to the contract." *Id.* at 1, 7. Uber argued that the arbitration provision compelled the district court to dismiss the plaintiffs' complaint.

But, as the plaintiffs explained in their opposition, Uber's Terms of Service were neither "clear" nor "simple," and it was far from "unequivocal" that new users had given their "affirmative assent" to these terms. Memo in Opposition to

[6] Ms. Schaul and Mr. McDonagh were added as named plaintiffs in the First Amended Complaint. Add. 10. A second amended complaint—the operative version—was filed on August 4, 2015. *See* JA9-JA31.

Uber's Mot. to Compel Arbitration, Dkt. 38 at 1. That was because Uber had "opted to bury the agreement behind a difficult-to-see link to a generic 'Terms and Conditions' page that no user is required to click on when registering an account," *id.* at 2, then only required that they click on a button indicating that they were "done" entering payment information. The plaintiffs therefore asked the district court to reject "Uber's 'buyer beware' approach," and deny the motion to compel arbitration. *Id.* at 20.

In July 2016, the district court took on this "threshold question" in the case: "whether arbitration must be compelled." Add. 11. The court explained that Uber, as the movant, needed to "'demonstrate that a valid agreement to arbitrate exists, that the movant is entitled to invoke the arbitration clause, that the other party is bound by that clause, and that the claim asserted comes within the clause's scope.'" Add. 11 (quoting *Soto-Fonalledas v. Ritz-Carlton San Juan Hotel Spa & Casino*, 640 F.3d 471, 474 (1st Cir. 2011)).

The district court began its analysis of Uber's registration process by noting that Massachusetts courts "have not yet had much opportunity to analyze online wrap agreements," like the kind at issue here.[7] Add 17. So the court turned to the "taxonomy" of online adhesion contracts that courts across the country have

[7] The district court in this case applied Massachusetts contract law to evaluate the relationship between Uber and the plaintiffs, though it acknowledged that "the analysis in Massachusetts is the same as it is elsewhere in the jurisprudence of contract enforcement." Add. 17.

developed over the last decade. Add. 13-17. The framework began with two types of online agreements. The first consists of "browsewrap agreements"—in which a "website will contain a notice that merely by 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." Add. 15 (quoting *United States v. Drew*, 259 F.R.D. 449, 462 n. 22 (C.D. Cal. 2009)). At the other end of the spectrum are "clickwrap agreements"—online contracts "in which website users are required to click on an 'I agree' box after being presented with a list of terms and conditions of use." Add. 15 (quoting *Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171, 1175-76 (9th Cir. 2014)).

The registration process Uber offered to its riders, in the district court's view, fell somewhere in the middle. Adopting the framework developed by Judge Weinstein in *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 395 (E.D.N.Y. 2015), the district court labeled Uber's process most akin to a "sign-in-wrap" agreement—a hybrid format that "'couples assent to the terms of a website with signing up for use of the site's services,'" but generally does not require users to click an "I accept" box. Add. 16 (quoting *Berkson*, 97 F. Supp. 3d at 395). *Berkson* described this as a "questionable form of internet contracting," and warned that "Courts of Appeals have yet to rule on the validity and enforceability of the terms of such contracts." 97 F. Supp. 3d at 399.

But the district court rejected the idea that establishing mutual assent for online contracts required any "fact intensive analysis" or turned on the specific design and form choices of the particular online contract. Add. 21. Instead, in its view, "teasing out distinctions" between different types of web-based contracts "truly make[s] no difference" for the question of contract formation. Add. 3. Glossing over most of the specific details of Uber's registration interface, the district court concluded that Uber had "put [the plaintiffs] on reasonable notice that their affirmative act of signing up also bound them to Uber's Agreement." Add. 19. The court pointed to the "placement of the phrase 'By creating an Uber account, you agree to the Terms of Service & Privacy Policy'" as evidence that users were put on reasonable notice. Add. 20. And, for the district court, the presentation and content of the arbitration provision within the Terms of Service was also sufficient because "the heading is in bold and much larger than the non-heading text in the rest of the Agreement." Add. 20.

After determining whether Uber had adequately informed the plaintiffs of the terms, the district court turned to whether the plaintiffs had given manifest assent to the document when they clicked the "DONE" button to create their Uber accounts. Although Uber did not have a true "clickwrap" process (which would have required users to check a box or click a button noting agreement to the Terms document), Add. 22-23, in the court's view, "the word 'Done,' although perhaps

slightly less precise than 'I accept,' or 'I agree,' makes clear that by clicking the button the user has consummated account registration, the very process that the notification warns users will bind them to the Agreement." Add. 23.

The court thus granted Uber's motion to compel arbitration, "leav[ing] all other issues for the arbitrator to decide," and dismissed the case. Add. 27-29.

STANDARD OF REVIEW

This Court reviews de novo "an order compelling arbitration where the appeal involves solely legal issues as to the enforceability of an arbitration clause." *Pelletier v. Yellow Transp., Inc.*, 549 F.3d 578, 580 (1st Cir. 2008); *see also Unite Here Local 217 v. Sage Hospitality Res.*, 642 F.3d 255, 259 (1st Cir. 2011).

SUMMARY OF ARGUMENT

I. It has long been the law, in both Massachusetts and elsewhere, that a party seeking to bind a consumer to the terms of an online take-it-or-leave-it contract—including any provision waiving the consumer's right to a jury trial and requiring arbitration—"ha[s] the burden of establishing, on undisputed facts, that the provisions of the [contract] were reasonably communicated and accepted." *Ajemian*, 83 Mass. App. Ct. at 546, 987 N.E.2d at 612. Because "consumers cannot be expected to ferret out hyperlinks to terms and conditions to which they have no reason to suspect they will be bound," the "onus must be on website owners to put users on notice of the terms to which they wish to bind consumers." *Nguyen*, 763

F.3d at 1179. For companies that do not employ a "clickwrap" model of online contracting—which reflects the "easiest method of ensuring that terms are agreed to" because users are required to review contract terms in a scrollbox and click an "I agree" icon—"the contract-formation question" turns on the concept of "inquiry notice." *Nicosia*, 834 F.3d at 236, 238. And "[w]hether a user has inquiry notice" of an online contract is highly fact-intensive and "depends on the design and content of the website and the agreement's webpage." *Nguyen*, 763 F.3d at 1177.

The district court cast aside these bedrock principles. It rejected the application of a "fact intensive analysis" and held that "teasing out distinctions" between different types of web-based contracts "truly make[s] no difference" for the question of contract formation. Add. 3, 21. But, if "electronic bargaining is to have integrity and credibility," *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 35 (2d Cir. 2002) (Sotomayor, J.), online contracts that depart from the clarity and conspicuousness of clickwrap agreements require more—not less—judicial scrutiny before consumers are stripped of their right to access the courts. *See Ajemian*, 83 Mass. App. Ct. at 576, 987 N.E.2d at 613. The district court's flawed understanding of the standards governing online contracts infected its analysis of Uber's effort to bind consumers to an arbitration clause hidden behind a hyperlink.

II. Applying settled rules of contract law, Uber's ride-sharing registration form falls well short of the necessary requirements to establish manifestation of

mutual assent. In Massachusetts, as elsewhere, a company that seeks to bind a consumer to terms contained in an online contract bears the burden of establishing (1) that notice of the contract terms was "reasonably conspicuous" to users and (2) that users "unambiguous[ly] manifest[ed] . . . assent" to those terms. *Id.*; *see also Nicosia*, 834 F.3d at 232. Here, though, the only statement Uber afforded its users of the existence of contract terms was located on a screen clearly intended to elicit users' entry of credit card information and written in small, lowercase font, greyed-out against a black background. That is not enough. A statement purporting to provide notice of contract terms that "appears in smaller font" than other text on the screen and is "not bold, capitalized, or conspicuous in light of the whole webpage" cannot satisfy the inquiry notice requirements. *Nicosia*, 834 F.3d at 236-37; *see also Berkson*, 97 F. Supp. 3d at 404 (explaining that a "terms of use" hyperlink that "was not in large font, all caps, or in bold" is "insufficient to give adequate notice").

Nor can Uber satisfy its burden to establish unambiguous assent by pointing to a button on its credit-card payment screen labeled "DONE." For purposes of assent, the term "done" is not, as the district court thought, legally indistinguishable from the term "I agree." To the contrary, "done" "does not specifically manifest assent" to anything because the user "is not specifically asked whether she agrees or to say 'I agree.'" *Nicosia*, 834 F.3d at 236. That is all the

more true where the button is "not directly adjacent" to the hyperlinked terms to which the company seeks to bind its users. *Id.* Here, Uber placed its button in the top upper right corner of its screen—nearly as far from its "Terms of Service" hyperlink as it could be. So a consumer who clicked on Uber's "DONE" button cannot be said to have communicated assent to contractual terms because the company "did not make clear to the consumer that clicking on the . . . button would signify assent to those terms." *Specht*, 306 F.3d at 29-30. Uber's attempt to smuggle assent in through the back door must fail.

III. Finally, although the district court noted that "Massachusetts courts have not yet had much opportunity to analyze online agreements," it disregarded the fundamental lessons from the one decision that has—*Ajemian*. In that case, the court explained that "online contracts have been enforced . . . only where the record established that 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.'" *Ajemian*, 83 Mass. App. Ct. at 576, 987 N.E.2d at 613. And it refused to enforce an online contract after first focusing on the "record," including the specifics of the website at issue in the case. *Id.* To the extent that the standard for analyzing online contracts in Massachusetts remains unclear, certification to the Supreme Judicial Court is appropriate. S.J.C. Rule 1:03.

ARGUMENT

I. Uber's registration process did not create an enforceable contract.

A. The district court misapplied the contract-law principles governing mutual assent.

It has long been the rule that, in determining "whether a valid arbitration agreement exists," a court must carefully evaluate whether the "touchstone" principle of contract law—"[m]utual manifestation of assent"—has been satisfied. *Nguyen*, 763 F.3d at 1175. That is just as true for purported agreements to arbitrate. Because arbitration is a "matter of consent, not coercion," *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478-79 (1989), a "party may not be compelled under the FAA to submit to . . . arbitration unless there is a contractual basis for concluding that the party *agreed* to do so," *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 662, 684 (2010). A valid contract, in other words, requires a "meeting of the minds" on the essential terms. *Situation Mgmt. Sys., Inc. v. Malouf, Inc.*, 430 Mass. 875, 878, 724 N.E.2d 699, 702-03 (2000).

The emergence of online contracting has not changed this rule. "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); *see also Ajemian,* 83 Mass. App. Ct. at 574 n.12, 987 N.E.2d at 612 (explaining that "pertinent legal principles do not change simply

because a contract was entered into online"). Companies, like Uber, that seek to enforce the terms of an online take-it-or-leave-it contract still shoulder "the burden of establishing, on undisputed facts, that the provisions of the [contract] were reasonably communicated and accepted." *Ajemian,* 83 Mass. App. Ct. at 574, 987 N.E.2d at 612; *see also Nguyen*, 763 F.3d at 1179 (explaining that the "onus must be on website owners to put users on notice of the terms to which they wish to bind consumers"). This requirement is controlled by "ordinary state law principles that govern the formation of contracts," *Nguyen*, 763 F.3d at 1175. It prohibits a court from enforcing a contract in the absence of "clear evidence" showing that (1) the contract terms were "reasonably conspicuous" to users and (2) users "unambiguous[ly] manifest[ed] . . . assent" to those terms. *Ajemian,* 83 Mass. App. Ct. at 574, 576, 987 N.E.2d at 612-13.

The district court acknowledged this framework but fundamentally misapplied it. It held that ascertaining mutual assent for online contracts—determining whether contract terms were reasonably communicated to and accepted by users—does not require "a fact intensive analysis" and does not turn on the specific design and form choices of the particular online contract. Add. 21. Instead, it its view, "teasing out distinctions" between different types of web-based contracts "truly make[s] no difference" for the question of contract formation. Add. 3. That was error. As every circuit court to have considered the issue has explained,

"whether the web pages presented to the consumer adequately communicate all the terms and conditions of the agreement, and whether the circumstances support the assumption that the purchaser receives reasonable notice of those terms" is "a fact-intensive inquiry." *Sgouros*, 817 F.3d at 1034-35. And contrary to the district court's approach, determining mutual assent for online contracts "depends heavily" on "the design and content" of the relevant webpages or mobile-phone application. *Nicosia*, 834 F.3d at 233; *see also Nguyen*, 763 F.3d at 1177-78 (explaining that "the conspicuousness and placement of [a] 'Terms of Use' hyperlink, other notices given to users of the terms of use, and the website's general design all contribute to whether a reasonably prudent user would have inquiry notice"); *Ajemian,* 83 Mass. App. Ct. at 576, 987 N.E.2d at 613.

The reason is simple: "Whether parties manifested mutual assent is a question of fact" and must be "deduced from the circumstances." *Nicosia*, 834 F.3d at 232. That is why, in *Ajemian*, the court made clear that determining whether the provisions of a Terms of Service hyperlink "were reasonably communicated and accepted" requires a careful review of "whether the record established that the provisions . . . were accepted and, if so, the manner of acceptance." 83 Mass. App. Ct. at 575-76, 987 N.E.2d at 612-13. The mere fact that "prospective users are given an opportunity to review the Terms of Service and Privacy Policy prior to submitting their registration" is, "[s]tanding alone, . . . not enough" to satisfy the

standard necessary to bind a user to a website's contractual terms. *Id.* (explaining that, "[w]ithout clear evidence that Plaintiffs assented to an agreement that contained a forum selection clause," courts "cannot enforce any such clause").

And, because not all internet contracts are the same, there is no one-size-fits-all approach for "determining [their] validity." *Nicosia*, 834 F.3d at 233. For example, one category of online contract—clickwrap contracts—requires users to "click an 'I agree' box after being presented with a list of terms and conditions of use." *Id.* This approach "force[s] users to 'expressly and unambiguously'" manifest assent before "being given access to the product." *Id.* (quoting *Register.com*, 356 F.3d at 429). As a result, it offers the "easiest method of ensuring that terms are agreed to"—a user who completes a clickwrap contract can be said both to have actual notice of the terms and to have affirmatively assented to those terms (through an unambiguous statement of "I agree"). *Id.* at 238.

But determining whether the requirements of mutual assent have been met for online contracts, like Uber's, that do not employ a clickwrap agreement is nowhere near as "simple[]." *Id.* That is because, in the absence of a scrollbox and an "I agree" button, "actual notice" is often impossible and any "purported assent is largely passive." *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 120 (2d. Cir. 2012). In these contexts, "the contract-formation question" turns on the concept of "inquiry notice"—whether a "reasonably prudent" user "would know that the [contract

terms] governed." *Nicosia*, 834 F.3d at 236. And this standard is *unavoidably* fact specific: Because it requires "[c]larity and conspicuousness" of the key terms, *Specht*, 306 F.3d at 30, "[w]hether a user has inquiry notice" of an online contract "depends on the design and content of the website and the agreement's webpage." *Nguyen*, 763 F.3d at 1177.

Taking these requirements seriously is "essential if electronic bargaining is to have integrity and credibility." *Specht*, 306 F.3d at 35. As Judge Rakoff explained in nearly identical circumstances, because "electronic agreements fall along a spectrum in the degree to which they provide notice, [] it is difficult to draw bright-line rules," and "courts must embark on a 'fact-intensive inquiry' [] in order to make determinations about the existence of '[r]easonably conspicuous notice' in any given case." *Meyer v. Kalanick*, 2016 WL 4073012, at *8 (S.D.N.Y. July 29, 2016) (internal citation omitted). In dismissing this framework, the district court reached a flawed conclusion about the enforceability of Uber's online contract. A careful focus on the key design features of Uber's mobile-phone interface makes clear that it cannot satisfy its burden of demonstrating that it (1) afforded reasonably conspicuous notice of crucial contract terms, and (2) provided for unambiguous manifestation of assent to those terms.

B. Uber did not afford reasonably conspicuous notice of its arbitration agreement to users.

Although the district court did not meaningfully engage with the design and form of Uber's online interface, it is "hard to escape the inference" that it was intended to draw the user's "eye" away from the "formalities" of its arbitration clause. *Meyer*, 2016 WL 4073012, at *9.

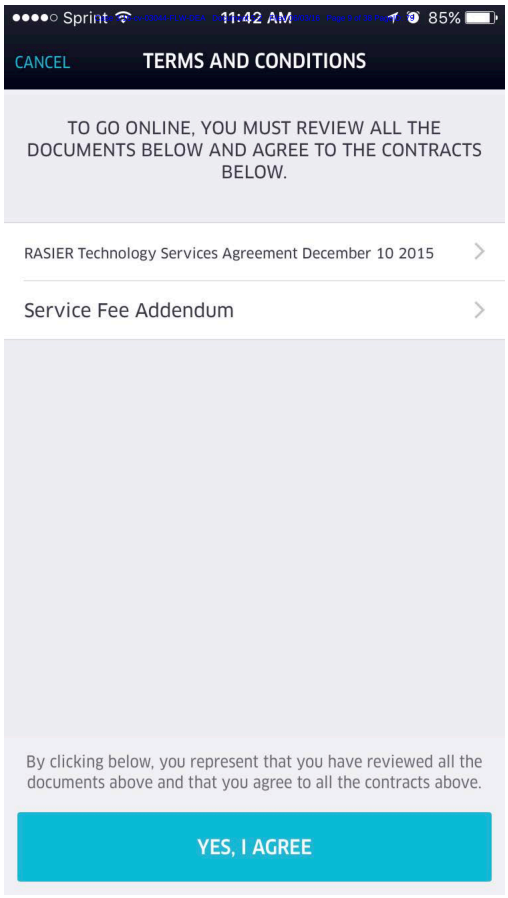
1. *Inquiry notice must be clear and conspicuous.* A company seeking to bind users to the terms of its online contract under an "inquiry notice" theory must demonstrate that those terms—including any arbitration clause—were clear and conspicuous. *Specht*, 306 F.3d at 30. In cases "[w]here the terms are not displayed but must be brought up by using a hyperlink," a "*clear prompt* directing the user to read them" is required. *Sgouros*, 817 F.3d at 1035 (emphasis added). One simple way to do this is to provide a statement—typically in bold and all caps—alerting the user that acceptance of the online contract must include agreeing to a set of terms and conditions that are, in turn, easily and conspicuously accessible. For example, a page stating that all users "must agree to the Booking Terms and Conditions," proximately followed by "a capitalized, bolded heading '**TERMS AND CONDITIONS**'" that, if clicked, will take the user to the actual terms and conditions may be "sufficient[]" to establish inquiry notice for a reasonably prudent online user. *See Starkey v. G Adventures, Inc.*, 796 F.3d 193, 197 (2d Cir. 2015).

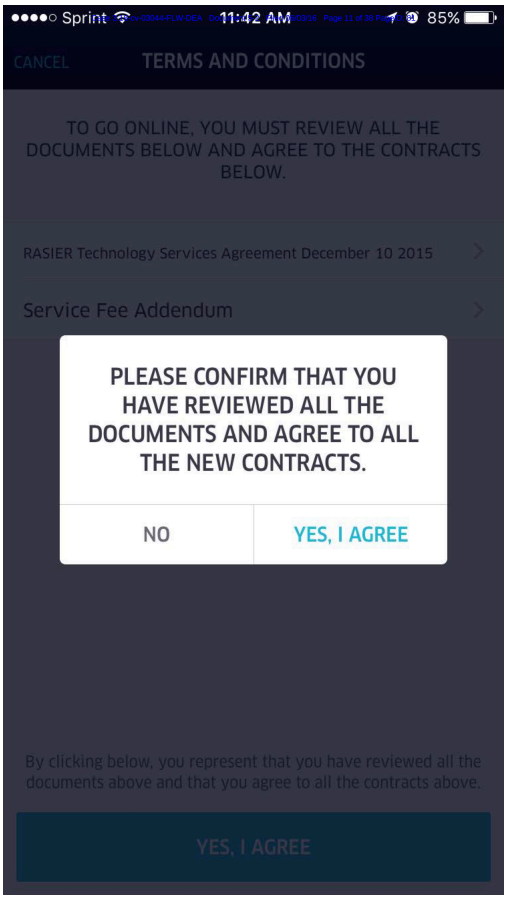
Uber itself employs this form of clear and conspicuous notice for the online contract it requires its drivers to complete. That mobile-phone design includes a separate page—titled "TERMS AND CONDITIONS"—that contains one all-caps statement advising a user that, "TO GO ONLINE, YOU MUST REVIEW ALL THE DOCUMENTS AND AGREE TO THE CONTRACTS BELOW." *See* Exs. A and B to Decl. of Michael Colman, Dkt. 5-2, *Singh v. Uber Techs., Inc.*, __F. Supp. 3d__, 2017 WL 396545, (D.N.J. Jan. 30, 2017). Directly below that statement are links to the relevant contractual terms. *Id.* That page is then immediately followed by a pop-up window that repeats the notice, this time in bold and all caps, requesting the user to "**PLEASE CONFIRM THAT YOU HAVE REVIEWED ALL THE DOCUMENTS AND AGREE TO ALL THE NEW CONTRACTS**." *Id.*

As numerous courts have explained, Uber's notice of, and link to, the contractual terms and conditions that will bind its drivers are "prominently displayed and conspicuously located" and so, taken together, afford "reasonable notice as to the existence of the terms and conditions" of a driver's online contract. *Singh*, 2017 WL 396545, at *5; *see also Richemond v. Uber Techs., Inc.*, __F. Supp. 3d__, 2017 WL 416123, at *3 (S.D. Fla. Jan. 27, 2017) (concluding that this design "provide[s] prominent markers to emphasize" to drivers the importance of reviewing the crucial contractual terms, including Uber's arbitration clause).

But the approach that Uber employed in its mobile-phone agreement for riders pales in comparison. To see why, here are the screenshots of the two different designs:

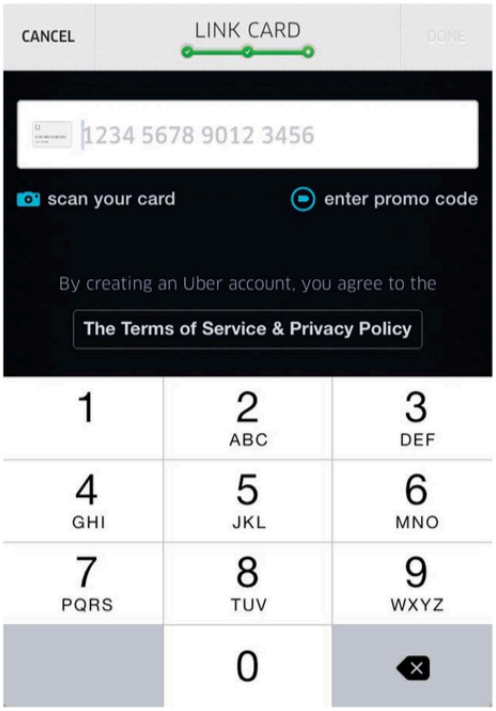
Uber's mobile-phone notice page for drivers:





Exs. A and B to Decl. of Michael Colman, Dkt. 5-2, *Singh*, 2017 WL 396545, No. 16-cv-3044 (D.N.J. Jan. 30, 2017).

Uber's mobile-phone notice page for riders:



JA40.

The differences are stark. For starters, unlike the notice screen for drivers, the final screen for riders is titled either "LINK PAYMENT" or "LINK CARD." The ostensible purpose of the screen, as evidenced by the numerical keypad that covers half of the screen and the prominently displayed rectangular credit-card-information box, is to allow the user to enter credit card information—not to afford clear notice that doing so will bind the user to a set of contractual terms that includes waiving the constitutional right to a jury trial. Beyond that, the actual notice statement is written in small font, not capitalized, and—far from bolded—is actually greyed out (against a black background), making it exceedingly difficult to

see, let alone read. (The screen's heading, in comparison, is written in all caps black font and set against a light background). Unlike Uber's notice screen for drivers, almost every design feature of Uber's rider "notice" screen obscured the fact that completing the registration process will bind users to important terms that include the waiver of constitutional rights.

That is why, in refusing to enforce Uber's arbitration clause against its riders, Judge Rakoff recently held that Uber's notice to riders "is by no means prominently displayed on Uber's registration screen." *Meyer*, 2016 WL 4073012, at *8. Quite the opposite: While the payment information is "very user-friendly and obvious," the "design and content of Uber's registration screen did not make the 'terms of use' (i.e., the contract details) readily and obviously available to the user." *Id.* (internal citations and quotations omitted). In reaching this result, Judge Rakoff explained that the screen for riders "involved a considerably more obscure presentation of the relevant contractual terms" than the one for drivers, and concluded that the notice and hyperlink's "placement, color, size, and other qualities relative to" the registration screen's "overall design is simply too inconspicuous to meet" the inquiry notice standard. *Id.* at *8-9.[8]

[8] Judge Rakoff drew some minor distinctions between the design of Uber's registration page here and the one before him. *See Meyer*, 2016 WL 4073012, at *7 & n.8. For example, he observed that, here, the phrase "Terms of Use & Privacy Policy" was located "between the field in which the user's credit card number would appear and the numbers that users would tap in order to enter their credit

2. *Uber's deliberately obscure notice is insufficient to put riders on inquiry notice.* The district court offered two reasons why Uber's approach here nonetheless afforded users "reasonably conspicuous" notice of the arbitration clause. It reasoned that the "placement" of the notice on "the final screen of the account registration" was "prominent enough." Add. 20. Then, it concluded that, because the "heading" of the "Dispute Resolution" clause (which required scrolling through at least 35 screen-pages to access) was "in bold and much larger than the non-heading text," a user "would have inquiry notice of the terms." Add. 20. Neither of these reasons is sufficient to put a reasonably prudent user on inquiry notice of the terms of the contract.

First, the placement of Uber's statement providing notice cannot, standing alone, overcome other features of its flawed design. *See Nguyen*, 763 F.3d at 1178 (rejecting argument that the "placement" alone of a "Terms of Use" hyperlink is "enough to give rise to constructive notice"). As the Second Circuit recently explained in *Nicosia*, the key factor for inquiry notice is not the location of the

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card information." *Id.* at *7 n.8. But sandwiching the notice and hyperlink *between* the credit card information and the keypad is no less distracting than placing it beneath them (if anything it is *more* likely to be missed because the eye will naturally toggle between the keypad and the rectangular credit card box. Judge Rakoff was also mistaken that, here, the notice was "clearly delineated" with the words appearing "in bold white lettering on a black background." *Id.* at *7. As explained above, the crucial phrase explaining the significance of the hyperlink (and purporting to bind users to its terms) is even less visible here that it was in the version of the app that Judge Rakoff considered. *Compare id.* at *10 *with* JA40.

notice, but instead the specific characteristics—font size, color, prominence, proximity, and wording—of the "critical sentence." 834 F.3d at 236. A statement regarding notice that "appears in smaller font" than other text on the screen and is "not bold, capitalized, or conspicuous in light of the whole webpage" cannot satisfy the inquiry notice requirements regardless of its location on the page. *Id.* at 236-37; *see also Berkson*, 97 F.Supp.3d at 404 (explaining that a "terms of use" hyperlink that "was not in large font, all caps, or in bold" statement was "insufficient to give adequate notice"). Uber's "critical sentence"—that "By creating an Uber account, you agree to the Terms of Service"—clearly fails this test. It is neither bold nor capitalized; the first eight words are inconspicuously greyed out compared to the rest of the page; and the entire phrase appears in smaller font than other text on the screen. *See supra* at 8.

In any event, the statement's "placement" here actually undermines the district court's conclusion. Courts have frequently rejected the sufficiency of notice in online contracts where "whatever notice [a company] might have been furnishing" was obscured by other features on the same page. *See Sgouros*, 817 F.3d at 1036. Unlike Uber's other online contracts—which set off the notice terms on entirely separate pages *and* in a separate pop-up window—Uber's decision to sandwich its "notice" terms between a credit-card information box and the keypad ensured that the user would be focused on the credit-card information and register

buttons instead of the contract terms. That design "distract[ed] . . . [from] whatever effect the notification ha[d]," *Nicosia,* 834 F.3d at 237, so that a "reasonably prudent" user would be less likely to "have known or learned" about the contract terms, *Specht*, 306 F.3d at 35.

Second, the district court's focus on font characteristics of the hidden "Dispute Resolution" heading was misplaced. The presentation of the terms contained in a hyperlink is irrelevant if the user is not given adequate notice of their existence, but is left instead to "ferret out hyperlinks to terms and conditions to which they have no reason to suspect they will be bound." *Nguyen*, 763 F.3d at 1178. A user "would have had to reach this part of the agreement," in other words, "to discover the bolded text at all." *Meyer*, 2016 WL 4073012, at *9. But Uber's light grey notice warning users that registering for an account would bind them to the terms contained in a hyperlink created a "barrier to reasonable notice" that could not be overcome by bolding the heading of a "Dispute Resolution" paragraph, 35 or so screens into the Terms of Service. *Id.*; *cf. Ajemian*, 83 Mass. App. Ct. at 575 & n.12, 987 N.E.2d at 612 (declining to enforce the terms of an online agreement where, without more, "the user was expected to follow a link to see the terms of the agreement" because the mere "opportunity to review the terms of service . . . is not enough to establish" that they were "reasonably communicated and accepted").

Enforcing terms that are not immediately displayed requires a clear statement alerting a user to those terms and their significance. So the Supreme Court enforcement of a forum selection clause printed on a paper cruise ticket in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) doesn't help Uber here. On its face, the ticket there *twice* used the word "contract," included the words "IMPORTANT!" and "PLEASE READ," and directed the customer to the relevant pages. *Id.* at 587, 595. "There are significant differences between a hyperlink available near a sign-in button . . . and a hardcopy cruise ticket saying in all caps, "SUBJECT TO CONDITIONS OF CONTRACT ON LAST PAGES IMPORTANT! PLEASE READ CONTRACT ON LAST PAGES 1, 2, 3." *Berkson*, 97 F. Supp. 3d at 403. These features (alone or in combination) are a far cry from the notice provided in Uber's ride-sharing registration form.

At bottom, a consumer cannot be "bound by inconspicuous contractual provisions . . . contained in a document whose contractual nature is not obvious." *Specht*, 360 F.3d at 30. So "when terms are linked in obscure sections of a webpage that users are unlikely to see"—as they are here—"courts will refuse to find constructive notice" without a reasonably clear and conspicuous notice informing users of the importance of those terms. *Nicosia*, 834 F.3d at 233. The district court was wrong to do otherwise.

C. Uber cannot carry its burden of showing unambiguous assent.

Not only does Uber's ride-sharing design fail to afford users "reasonable notice" of the crucial contract terms, it also fails to provide users with any opportunity to manifest their assent—the second necessary condition before a contract will be enforced. *Ajemian*, 83 Mass. App. Ct. at 574-75, 987 N.E.2d at 612 (citing *Specht*, 306 F.3d at 35).

To begin, Uber designed its "LINK PAYMENT" screen so that users could complete the registration process "without explicitly indicating [their] assent to the terms and conditions that included the arbitration provision." *Meyer*, 2016 WL 4073012, at *6. After entering credit-card information, a user need only tap an icon labeled "DONE" to convey that the consumer has finished inputting payment information. *See supra* at 9-10. By opting for this approach, Uber discarded the clearest "method of ensuring that terms are agreed to," *Nicosia*, 834 F.3d at 238—an affirmative click on an "I agree" icon after being presented with a list of terms and conditions—in favor of a design in which any purported assent is "largely passive." *Schnabel*, 697 F.3d at 120. As a result, the only way Uber could meet its burden in establishing that users unambiguously agreed to the arbitration clause was to demonstrate that the "circumstances" surrounding the design of its page "support the assumption" that "a reasonable person in [the user's] shoes would

have realized that he was assenting to" the contract terms. *Sgouros*, 817 F.3d at 1035. As before, that inquiry is necessarily "fact-intensive." *Id.* at 1034-35.

But the district court declined to conduct the requisite inquiry here. It held that Uber's use of a "DONE" icon was legally indistinguishable from an "I agree" or "I accept" button. Add. 23. And it refused to consider any other details of Uber's payment screen to ascertain whether its design was sufficient to imply manifest assent—including the proximity of the icon to the terms and conditions hyperlink or the words used in Uber's hyperlink to the contract terms. *See Nicosia*, 834 F.3d at 235-36. That was error. Because Uber's ride-sharing app is not a clickwrap agreement, the approach for determining assent is different. *See id.* (drawing this distinction).

To secure informed assent, the "[c]larity" of the words used matters. *Id.* at 233. Terms like "Done," or "Place your order," "do[] not specifically manifest assent" to anything because the user "is not specifically asked whether she agrees or to say 'I agree.'" *Id.* To the contrary, nothing about the word "Done" suggests that the user is agreeing to any terms whatsoever. *See Nicosia*, 834 F.3d at 236. "[A] consumer's clicking 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" *Specht*, 306 F.3d at 29-30. So courts have consistently "decline[d] to hold that an electronic agreement was formed" where

no affirmative assent to specific contract terms exists. *Meyer*, 2016 WL 4073012, at *8 (citing *Nguyen*, 763 F.3d at 1176; *Specht*, 306 F.3d at 22-23; *Savetsky v. Pre–Paid Legal Servs., Inc.*, 2015 WL 604767, at *4 (N.D. Cal. Feb. 12, 2015)). Given that Uber chose not to specifically inform consumers that tapping the "DONE" button would signify assent to the Terms of Service, it cannot now rely on that button to establish assent. *Compare* JA40 (telling users that "By creating an Uber account you agree to The Terms of Service") *with Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 835 (S.D.N.Y. 2012) (telling users that "By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service"). Without more, a court "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.)." *Sgouros*, 817 F.3d at 1035.

And, although the district court failed at all to consider it, the interface of Uber's payment screen reinforces the conclusion that assent is entirely lacking. Recall that, in *Nicosia*, the Second Circuit explained that in online contracts based on passive assent (where the agreement is something less than a clickwrap), a button's close "proximity" to the contract terms (or a hyperlink to them) was a necessary—though not sufficient—requirement for establishing implied assent. 834 F.3d at 236. For example, a hyperlink leading to the terms that is "immediately below" a button stating "Sign Up" may be enough when the user was "informed of

the consequences of his assenting click and [] was shown . . . where to click to understand those consequences." *Fteja*, 841 F. Supp. 2d at 835, 840; *see also Swift v. Zynga Game Network*, 805 F. Supp. 2d 904, 911 (N.D. Cal. 2011) (finding assent where hyperlink was "directly above" the button). But the placement of a hyperlinked "terms and conditions" that is "not directly adjacent" to the button—as here—will fail to "indicate that a user should construe clicking as acceptance." *Nicosia*, F.3d at 236-37.

In this way, Uber's approach here is no different from the many other failed attempts to smuggle assent in through unclear means. *See, e.g.*, *Specht,* 306 F.3d at 32 (rejecting use of a "download" button to stand-in for unambiguous assent); *Nicosia*, 834 F.3d at 236 (rejecting the use of a "Place your order" button); *Nguyen,* 736 F.3d at 1178 & n.1 (rejecting use of a "proceed with checkout" button); *Berkson*, 97 F. Supp. 3d at 404 (rejecting use of both "SIGN IN" and "NEXT" buttons). As the Seventh Circuit explained in *Sgouros*, "where a website specifically states that clicking means one thing, that click does not bind the users to something else." 817 F.3d at 1035.

And securing clear and unambiguous assent "is not hard to accomplish," especially for a technology company like Uber. *Id.* at 1036. In its online 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." *Singh*, 2017 WL 396545, at *1. By requiring drivers "to agree to the terms of the agreement twice on [a] mobile device before permitting [them] to begin the terms of [the] contract," Uber afforded them the opportunity to unambiguously manifest their assent to the terms of the contract. *Richemond*, 2017 WL 416123, at *3; *see also Ajemian*, 83 Mass. App. Ct. at 576, 987 N.E.2d at 613 (agreeing that a user may "signify his or her assent by 'clicking' I accept" next to the terms of the contract "displayed, at least in part, on the user's computer screen" because doing so requires users to affirmatively acknowledge the agreement before proceeding with use of the website); *Specht*, 306 F.3d at 21-22 (endorsing a design that would not allow users to complete installation unless they "clicked on a 'Yes' button to indicate that they accepted all the license terms").

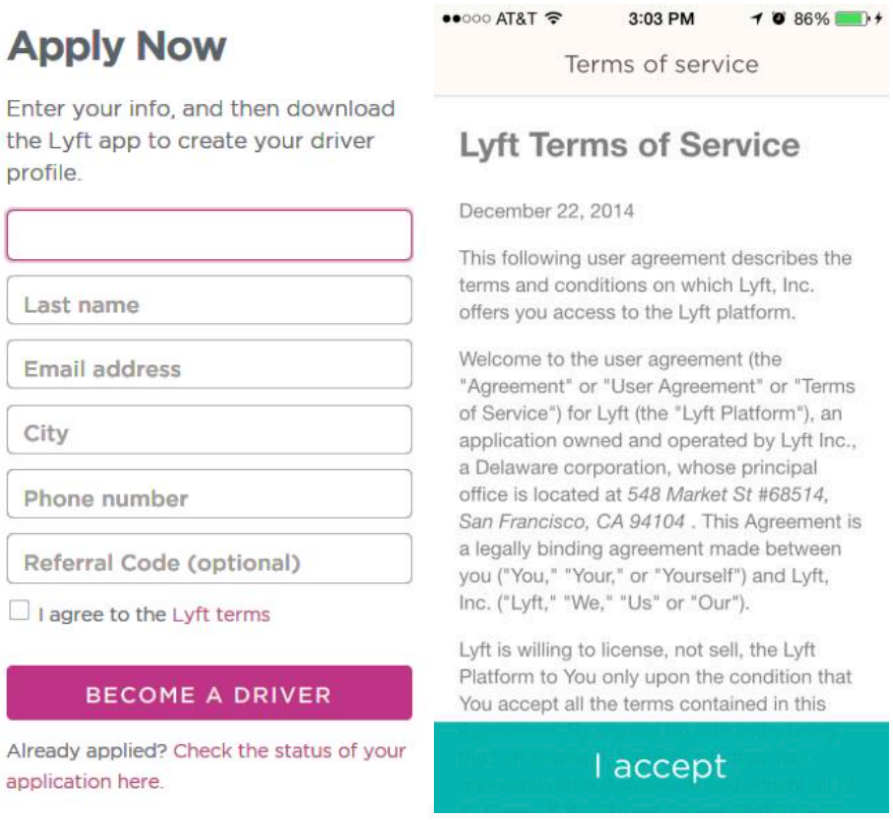
Uber's approach to surge pricing accomplishes the same thing. In an effort to establish a "clear and straightforward" notice process for surge pricing, Uber required riders to expressly "confirm the pricing in order to request a ride." *See* http://ubr.to/2i7HdDf. That requirement took the form of a box that a rider must click noting that "I ACCEPT HIGHER FARE." JA17. And Uber went even further when prices reached a particularly high level, insisting that users actually type in the magnitude of the surcharge to demonstrate that they fully accepted and assented to the terms of the ride. *See supra* at 14-15. When Uber wants users to

know and assent to something important, in other words, it makes sure they do. It should be held to that standard here.

D. Enforcing Uber's hidden arbitration clause will invite a race to the bottom.

Given the availability of clear alternatives, "there is no policy rationale supporting" Uber's approach here. *Schnabel*, 697 F.3d at 128. Over the last two decades, as American life has increasingly moved online, courts have struggled to provide clear and predictable guidelines for confronting "the many new situations" that online and mobile-phone contracts present. *Register.com*, 356 F.3d at 403. But it is not difficult for companies to design a registration process that meaningfully informs potential users of the existence and content of an online contract. *See Sgouros*, 817 F.3d at 1036.

The experiences of other online companies—including Uber's direct competitors—demonstrate that the burden on Uber is not onerous. Take the example of Lyft, a company that similarly "facilitates peer-to-peer ride-sharing through a mobile-phone application." *Bekele v. Lyft, Inc.*, __F. Supp. 3d__, 2016 WL 4203412, at *1 (D. Mass. Aug. 9, 2016). To sign up for Lyft, "both prospective passengers and prospective drivers" must go through the same registration process. *Id.* After downloading the app and entering basic personal information to create an account, the full text of the terms of service "appears on the user's screen; the user can scroll through the entire agreement on the screen." *Id.* Here is the screenshot:



Decl. of Sebastian Brannstrom at 2, 4, Dkt. 15, *Loewen v. Lyft, Inc.*, 129 F. Supp. 3d 945 (N.D. Cal. 2015).

At the bottom of the terms document, the app asks users: "Please agree to the Terms of Service to continue." *Bekele*, 2016 WL 4203412, at *1. Because all users "must click the 'I accept' button" to use the app, it is clear that Lyft users "cannot complete the registration process or use the App without accepting the [Terms of Service]." *Id.* at *2. That is why courts have generally found Lyft's registration process "provided [users] with reasonable notice of its arbitration provision." *Id.* at *7; *see also Loewen*, 129 F. Supp. at 957 ("[N]either Plaintiff can claim surprise with respect to the delegation clause, or the arbitration clause

generally, where they both assented to the terms of the [contract] by clicking 'I agree' on the Lyft App.").

Acquiescing to Uber's contract-formation approach here would lower the bar for securing informed assent to one of the "most precious and fundamental right[s]"—"the right to a jury trial." *Meyer*, 2016 WL 4073071, at *1. That makes no sense. "User interfaces designed to encourage users to overlook contractual terms in the process of gaining access to a product or service"—like the one Uber employs here—"are hardly a suitable way to fulfill" the "legal mandate" of reasonable notice. *Id.* at *10. Companies doing business online, including Uber, know how to design systems that provide reasonable notice and require meaningful assent. Online and mobile-phone customers should instead be "encouraged by the design and content of the website and the agreement's webpage to examine the terms clearly available through hyperlinkage." *Berkson*, 97 F. Supp. 3d at 401. In such cases, terms of use (and other contracts) generally "will be enforced." *Id.* The easy options Uber had available underscore why this Court should not allow the company to free itself from the settled standards governing contract formation.

When companies conducting business online fail to meet the minimum threshold of clear, affirmative assent to a contract and its terms, there is a far greater burden placed on courts tasked with analyzing these contracts. And, given the necessarily fact-intensive inquiry, there is a real risk that courts might

reasonably disagree about the adequacy of the very *same* contracting process. As the Second Circuit recently noted, when companies lower the bar for purposes of mutual assent, courts are forced to consider a wide range of factors—including font color, the number of links on the page, and proximity of the contract notification to the top of the webpage—to determine whether a contract has been validly formed. *Nicosia*, 834 F.3d at 236. Often, that inquiry will lead (as it did in *Nicosia*) into indeterminacy. *Id.* at 237 (concluding that "reasonable minds could disagree" whether "reasonably conspicuous notice" had truly been given). That uncertainty benefits nobody.

"One might be tempted to argue"—as the district court did here—"that the nature of electronic contracts is such that consumers do not read them, however conspicuous these contracts are, and that consumers have resigned themselves simply to clicking away their rights." *Meyer*, 2016 WL 4073012, at *10. "But that would be too cynical and hasty a view, and certainly not the law." *Id.*

II. Any uncertainty over whether, under Massachusetts law, Uber failed to meet its burden should be resolved in the first instance by the Massachusetts courts.

In reaching its conclusion that no fact-based inquiry was required to determine whether Uber's online contract was enforceable, the district court acknowledged that "Massachusetts courts have not yet had much opportunity to analyze online agreements." Add. 17. True enough. But the leading case—

Ajemian—reinforces that the district's court's analysis here was flawed. There, the court held that "online contracts have been enforced . . . only where the record established that 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.'" *Ajemian*, 83 Mass. App. Ct. at 576, 987 N.E.2d at 613. And it refused to enforce an online contract after first focusing on the "record," including the specifics of the website at issue in the case. *Id.* Ultimately, it concluded that the record did "not reflect that the terms of any agreement were reasonably communicated or that they were accepted" and held that no contract had been formed. *Id.*

Here, the district court observed that *Ajemian* "remains instructive generally" but concluded that it did not control analysis of the contract "found in Uber's sign up process" because it was a "sign in wrap agreement." Add. 17-18. As a result, the court struggled to reconcile the "modern rule of reasonableness," *Ajemian*, 83 Mass. App. Ct. at 573, 987 N.E.2d at 611, with its view that courts should refrain from "fact intensive analysis" for online contract formation. Add. 21.

To the extent that *Ajemian* leaves any doubt about the analytical framework for non-clickwrap agreements in Massachusetts, this Court should certify the question to the Massachusetts Supreme Judicial Court. *See In re Hundley*, 603 F.3d 95, 98 (1st Cir. 2010) (citing *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)). That

approach is warranted where, as here, a case "has the potential to impact numerous . . . transactions," and "implicates competing policy interests" that involve "an area of traditional state authority." *LimoLiner, Inc. v. Dattco, Inc.*, 809 F.3d 33, 38 (1st Cir. 1015); *see also In re Engage, Inc.*, 544 F.3d 50, 53 (1st Cir. 2008) (explaining that "certification is particularly appropriate" where the issue "may hinge on policy judgments best left to the Massachusetts court and will certainly have implications beyond the[] parties"). Because the question of whether Uber may enforce its arbitration clause in these circumstances is clearly "determinative" to this case, and the Supreme Judicial Court has thus far issued "no controlling precedent" on the issue, certification is available. S.J.C. Rule 1:03.

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

/s/ Matthew W.H. Wessler

MATTHEW W.H. WESSLER
MATTHEW SPURLOCK
GUPTA WESSLER PLLC
1735 20th Street, NW
Washington, DC 20036
(202) 888-1741
matt@guptawessler.com

JOHN RODDY
ELIZABETH RYAN
BAILEY & GLASSER LLP
99 High Street, Suite 304
Boston, MA 02110
(617) 439-6730

Counsel for Plaintiffs-Appellants

February 9, 2017

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 11,186 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Baskerville font.

/s/ Matthew W.H. Wessler
Matthew W.H. Wessler
Counsel for Plaintiffs-Appellants

February 9, 2017

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the First Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system:

S. ELAINE MCCHESNEY
elaine.mcchesney@morganlewis.com
LAWRENCE T. STANLEY, JR.
lawrence.stanley@morganlewis.com
MORGAN LEWIS & BOCKIUS LLP
One Federal Street
Boston, MA 02110
(617) 951-8000

/s/ Matthew W.H. Wessler
Matthew W.H. Wessler

ADDENDUM

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RACHEL CULLINANE, JACQUELINE NUNEZ, ELIZABETH SCHAUL, AND ROSS McDONAGH, on behalf of themselves and all others similarly situated,
Plaintiffs,

v.

UBER TECHNOLOGIES, INC.,
Defendant.

CIVIL ACTION NO. 14-14750-DPW

ORDER OF DISMISSAL

WOODLOCK, District Judge

In accordance with this Court's Memorandum and Order issued on July 8, 2016, granting the Defendant's Motion to Compel Arbitration, it is hereby ORDERED that the above-entitled action be, and hereby is, DISMISSED.

BY THE COURT,

/s/ Barbara I Beatty
Deputy Clerk

DATED: July 8, 2016

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RACHEL CULLINANE, JACQUELINE NUNEZ, ELIZABETH SCHAUL, AND ROSS McDONAGH, on behalf of themselves and all others similarly situated,	)	CIVIL ACTION NO. 14-14750-DPW
Plaintiffs,	)	
v.	)	
UBER TECHNOLOGIES, INC.,	)	
Defendant.	)	

MEMORANDUM AND ORDER
July 11, 2016

The practice of avoiding consumer class action litigation through the use of arbitration agreements is the subject of current scholarly disapproval[1] and skeptical investigative journalism.[2] It appears that at least one agency of the federal government is considering regulating the use of such agreements in so far as the subject matter is within its jurisdiction.[3] Nevertheless, the legal foundation provided in Supreme Court

[1] *See generally*, Judith Resnik, *Diffusing Disputes, The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 Yale L.J. 2804 (2015).
[2] *See* Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y Times, Nov. 1, 2015, at A1.
[3] Bureau of Consumer Financial Protection Proposed Rules, Arbitration Agreements, 81 Fed. Reg. 32830-01, 2016 WL 2958777(F.R.) (May 24, 2016) (to be codified at 12 C.F.R. pt. 1040) (agreements regarding certain financial products and services).

jurisprudence regarding the Federal Arbitration Act[4] for construction of arbitration agreements that bar consumer class actions is firmly embedded. Even Justices who question the practice find themselves bound to adhere to the blueprint opinions the Court has provided.[5]

The plaintiff in this case extends an invitation to disassemble the judicial construct permitting a bar to class action litigation for consumer arbitration agreements. The invitation suggests teasing out distinctions that truly make no difference. This is not an institutionally authorized nor intellectually honest way to change practice and legal policy regarding the permissible scope of arbitration. Change, if it is to come, must be effected by a refinement through legislation and/or regulation that imposes restrictions on arbitration agreements, or by a reversal of direction on the part of the Supreme Court. It is not within the writ of the lower courts to

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[4] *See generally AT&T Mobility LLC* v. *Concepcion,* 563 U.S. 333 (2013).

[5] *See DirecTV, Inc.* v. *Imburgia*, 136 S.Ct. 463 (2015). Justice Breyer, the author of *DirectTV* also wrote the principal dissent in *Concepcion*, where he was joined by Justices Ginsburg, Sotomayor and Kagan. In *DirectTV*, he observed that "[n]o one denies that lower courts must follow this Court's holding in *Concepcion*. The fact that *Concepcion* was a closely divided case, resulting in a decision from which four Justices dissented, has no bearing on that undisputed obligation." *Id.* at 468. Justice Breyer was again joined by Justice Kagan in his majority opinion in *DirectTV*; Justices Ginsburg and Sotomayor, however, remained in dissent. *Id.* at 471.

replot the contours of arbitration law when the metes and bounds have been set clearly, unambiguously and recently by the Supreme Court.

The plaintiffs in this putative class action are a group of users of the ride-sharing phone application designed and managed by defendant Uber Technologies. They allege that Uber overcharged them for travel to and from Boston Logan Airport and East Boston by imposing fictitious fees hidden in charges for legitimate local tolls. The plaintiffs seek class action relief pursuant to MASS. GEN. LAWS ch. 93A, § 9, and accuse Uber of unjust enrichment. In response, Uber has filed the motion before me, seeking to compel arbitration of the dispute pursuant to 9 U.S.C. § 1 *et seq*, also known as the Federal Arbitration Act ("FAA"). I will allow that motion and dismiss this case.

I. BACKGROUND

A. Factual Background

1. The Parties

Uber Technologies ("Uber") is a ride-sharing service that transports customers throughout Boston for a fee. [2d Am. Compl., Doc. 54 ¶ 1] Uber's customers call for Uber vehicles, and pay for the requested ride, through use of Uber's smartphone app. [*Id.* ¶ 1]

The named plaintiffs seek to represent a class of customers of Uber residing in Suffolk and Middlesex Counties,

Massachusetts. [*Id.* ¶¶ 9-13] Each downloaded the Uber application and created an account at some point from 2012 to 2014. [*Id.* ¶¶ 16-19; Doc. 34 ¶¶ 7-10] Plaintiff Jacqueline Nunez used the app to hail a ride from Logan Airport on September 13, 2013, and was charged an $8.75 "Massport Surcharge and Toll" ("Surcharge"). [*Id.* ¶¶ 41-42] Plaintiff Rachel Cullinane used the Uber app to call a ride from Logan Airport on June 29, 2014, and was charged a $5.25 toll and the $8.75 Surcharge. [*Id.* ¶¶ 44-46]. Plaintiff Elizabeth Schaul used Uber to obtain transportation to and from Logan airport on numerous occasions between December 20, 2013 and December 1, 2014, and alleges that, each time, she was charged for an inflated toll and the Surcharge. [*Id.* ¶¶ 47-54] Plaintiff Ross McDonagh has used Uber to hail taxis to and from East Boston and Logan Airport, and alleges that he was charged the Surcharge and other fees multiple times between May 21, 2014 and March 27, 2015. [*Id.* ¶¶ 55-65]. The named plaintiffs purport to represent a putative class of plaintiffs composed of all Massachusetts residents who, since October 18, 2011, have been charged either the allegedly inflated toll fees or the Surcharge. [*Id.* ¶ 78]

2. Account Creation Process

In order to use the Uber application to call for transportation, users must first create an account, either

through Uber's website, or through its smartphone app. [Doc. 32-1 ¶ 4] Each plaintiff created his or her account through the smartphone app. [Doc. 54 ¶¶ 16-19; Doc. 32-1 ¶¶ 7-10]

In order to create an account, a user must proceed through three steps, each with its own screen inside the smartphone app. [Doc. 32-1 Ex. A-D] The first screen, entitled "Create an Account", prompts the user to input an e-mail address and mobile phone number, and to create a password for the account she is attempting to create. [Doc. 32-1 Ex. A-1, B-1, C-1, D-1] This screen also contains gray text on a black background immediately below the blank white input boxes and above the phone keyboard that says, "We use your email and mobile number to send you ride confirmations and receipts." [*Id.*]

A second screen, entitled "Create a Profile", prompts users to enter their first and last names and to submit a photograph. [Doc. 32-1 Ex. A-2, B-2, C-2, D-2] This screen contains gray text on a black background that says, "Your name and photo helps [sic] your driver to identify you at pickup". [*Id.*] This text is in the same location as the gray text from the previous screen.

The third and final screen in the account creation process, entitled "Link Payment", prompts the user to enter a credit card number to link a card to ride requests for payment. [Doc. 32-1 Ex. A-3, B-3, C-3, D-3, D-4]. In the most recent version of the

screen, a version only used by Mr. McDonagh, this screen also provides an option to link a Paypal account in lieu of a credit card. [Doc. 32-1 Ex. D-3]. Immediately below the credit card information input box, and above the keyboard, appear the words "By creating an Uber account, you agree to the Terms of Service & Privacy Policy". [Doc. 32-1 Ex. A-3, B-3, C-3, D-3, D-4] The words "Terms of Service & Privacy Policy" appear in bold white lettering on a black background, and are surrounded by a gray box, indicating a button. [*Id.*; Doc. 32-1 ¶ 15] The other words are in gray lettering. [*Id.*] If a user clicks the button that says "Terms of Service & Privacy Policy", the Terms of Service then in effect are displayed on the phone. [Doc. 32-1 ¶ 15].

After entering payment information, the user must then click a button with the word "Done" in the top-right-hand corner of the screen in order to create an account. [Doc. 32-1 Ex. A-3, B-3, C-3, D-3, D-4; Doc. 32-1 ¶ 15] This button is grayed out and unclickable until the user enters her payment information. [Doc. 32-1 Ex. A-3, B-3, C-3, D-3, D-4] Users must complete all of the information requested in the input boxes on each screen and click the "Done" button on the last screen in order to create an account. [Doc. 32-1 ¶ 15].

3. Uber Terms and Conditions

The Uber Terms & Conditions ("Agreement") are contained in

a 10-page document available to users who click on the box containing the phrase "Terms of Service & Privacy Policy" on the final screen of the account creation process. [Doc. 32-6 Ex. A-B, 32-1 ¶ 15] The Agreement contains many headings, each of which lays out certain terms of use for users of Uber's app. [Doc. 32-6 Ex. A-B] Uber changed its Agreement on May 17, 2013. [Doc. 32-6 Ex. B] As a result, the Agreement that Ms. Nunez would have seen had she clicked on the button on the last screen (nothing in the complaint indicates than any of the plaintiffs did click through) would have taken her to a different document than that available to the other plaintiffs. [Doc. 32-6 ¶¶ 4-5] However, the only relevant difference between the two documents is that the earlier Agreement had slightly larger headings for each section. [Doc. 32-6 Ex. A-B]

The Agreement states that it "constitute[s] a legal agreement between [user] and Uber. . . . In order to use the Service [] and the associated Application [], you must agree to the terms and conditions that are set out below." [Doc. 32-6 Ex. A-B at 1] The contract also states that, by using any of Uber's services, the user "expressly acknowledge[s] and agree[s] to be bound by the terms and conditions of the Agreement." [*Id.*]

The Agreement contains a section starting on page 9 (page 8 of the newer agreement) under the heading "Dispute Resolution."

[Doc. 32-6 Ex. A at 9-10; Doc. 32-6 Ex. B at 8-10]. This section provides that the user and Uber

> agree that any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof or the use of the Service or Application (collectively, "Disputes") will be settled by binding arbitration, except that each party retains the right to bring an individual action in small claims court. . . . **You acknowledge and agree that you and Company are each waiving the right to a trial by jury or to participate as a plaintiff or class User in any purported class action or representative proceeding.** Further, unless both you and Company otherwise agree in writing, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of any class or representative proceeding.

[Doc. 32-6 Ex. A-B at 9] (emphasis in original). Under a sub-heading entitled "Arbitration Rules and Governing Law", the Agreement states, "The arbitration will be administered by the American Arbitration Association ("AAA") in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (the "AAA Rules") then in effect. . . . The Federal Arbitration Act will govern the interpretation and enforcement of this section." [*Id.*] The Agreement also provides that, should a user's claim be for an amount under $75,000, Uber will pay any arbitration-related fees. [*Id.*]

B. Procedural History

Plaintiffs Cullinane and Nunez, on behalf of themselves and

a putative class, filed this case in Massachusetts Superior Court. [Doc. 1-1, Original Complaint] The Original Complaint alleged five causes of action, four of which contained contract-related claims that have since been dropped by plaintiffs. [*Id* ¶¶ 52-63] The fifth claim was the remaining claim of unjust enrichment. [*Id.* ¶¶ 60-63]

Uber removed the case to this Court pursuant to the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d). Plaintiffs responded with a motion to remand to State Court for lack of subject matter jurisdiction, claiming that Uber had not shown that this dispute would meet CAFA's amount in controversy requirement of $5 million. I denied that motion.

Plaintiffs have successively filed two amended complaints. The first amended complaint added Schaul and McDonagh as named plaintiffs, and added the East Boston toll (experienced by Mr. McDonagh) claim to the claims based on the Surcharge. The plaintiffs also added a sixth count to their complaint, alleging that the hidden charges constitute unfair and deceptive acts in violation of Chapter 93A of the Massachusetts General Laws. The plaintiffs thereafter filed a Second Amended Class Action Complaint, which is currently the operative complaint, dropping the counts based on breach of contract, leaving only a Chapter

93A claim (Count I)[6] and a common law unjust enrichment claim (Count II). [Doc. 54, ¶¶ 85-91].

For its part, Uber filed a motion to compel arbitration and stay or, in the alternative, to dismiss. The threshold question whether arbitration must be compelled will be addressed in this Memorandum. Because I conclude the answer to that question is "yes," it is for the arbitration tribunal to determine the merits of the claim. Since arbitration must be compelled and nothing else remains for resolution in this court at this time, I will dismiss the case upon the order to compel arbitration.

II. STANDARD OF REVIEW

A party seeking to compel arbitration "must demonstrate that a valid agreement to arbitrate exists, that the movant is entitled to invoke the arbitration clause, that the other party is bound by that clause, and that the claim asserted comes within the clause's scope." *Soto-Fonalledas* v. *Ritz-Carlton San Juan Hotel Spa & Casino*, 640 F.3d 471, 474 (1st Cir. 2011). Section 2 of the FAA provides that an arbitration clause in a written contract "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] Specifically, plaintiffs allege that Uber's actions violate MASS. GEN. LAWS ANN. Ch. 93A (West 2015), 940 MASS. CODE REGS. 3.04 (2015), 940 MASS. CODE REGS. 3.05 *et seq.* (2015), 940 MASS. CODE REGS. 3.13 *et seq.* (2015), and 940 MASS. CODE REGS. 3.16 (2015).

III. ANALYSIS

A. Validity of the Agreement

1. Contract Formation

In order to assess whether or not the claims raised by plaintiffs should be resolved by arbitration, I must first address the question "whether . . . there exists a written agreement to arbitrate." *Lenfest* v. *Verizon Enter. Solutions, LLC*, 52 F. Supp. 3d 259, 262-63 (D. Mass. 2014). This is the first step of the analysis because, if the contract containing the arbitration agreement was never binding on the plaintiffs, the arbitration clause cannot be enforced against them.

It is fundamental in addressing challenges to arbitration agreements to recognize that "arbitration is a matter of contract." *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 67 (2010). "The FAA thereby places arbitration agreements on an equal footing with other contracts . . . and requires courts to enforce them according to their terms." *Id.* at 67-68 (internal citations omitted). However, it is similarly bed rock that the savings clause of § 2 of the FAA preserves "generally applicable contract defenses," as long as those defenses do not "stand as an obstacle to the accomplishment of the FAA's objectives." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 1748 (2011).

In analyzing any possible contractual defenses to the formation of the agreement, "[t]he interpretation of an arbitration agreement is [] generally a matter of state law." *Tompkins* v. *23andMe, Inc.*, No. 5:13-cv-05682-LHK, 2014 WL 2903752, at *4 (N.D. Cal. June 25, 2014). In Massachusetts, "courts may apply generally applicable State-law contract defenses . . . to determine the validity of an arbitration agreement." *St. Fleur* v. *WPI Cable Systems/Mutron*, 450 Mass. 345, 349-350, 879 N.E.2d 27, 31 (2008).

In online adhesion contracts, the analysis under Massachusetts law is the same as in most courts around the country that have analyzed issues similar to this one. When it comes to specific clauses in adhesion contracts, under Massachusetts law, courts "have held that such clauses will be enforced provided they have been reasonably communicated and accepted and if, considering all the circumstances, it is reasonable to enforce the provision at issue." *Ajemian* v. *Yahoo!, Inc.*, 83 Mass. App. Ct. 565, 573-74, 987 N.E.2d 604, 611 (2013). While *Ajemian* analyzed the enforcement of forum selection and limitations clauses, the analysis is the same here. The basic inquiry as to enforceability boils down to basic contract theory of notice and informed assent with respect to the terms in question.

2. Types of Online Adhesion Agreements

In this case, the defense to contract formation asserted by the plaintiffs is lack of notice of or assent to the terms of the Agreement. Plaintiffs argue that the Agreement is an online "browsewrap" adhesion contract. The defendants maintain that the Agreement and its place in the account creation process is more akin to a "clickwrap" agreement, and call it a "hybrid" agreement. I do not find such summary descriptions of detailed agreements particularly helpful to meaningful analysis. Rather, in order better to explain the differences between various types of online "wrap" agreements, I will provide a few pages of history.

The "wrap" contract terminology began with the advent of the "shrinkwrap" agreement. "The 'shrinkwrap license' gets its name from the fact that retail software packages are covered in plastic or cellophane 'shrinkwrap', and some vendors . . . have written licenses that become effective as soon as the customer tears the wrapping from the package." *ProCD, Inc.* v. *Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996). Although it was not always the case, courts now generally enforce shrinkwrap agreements "on the theory that people agree to the terms by using the [product] they have already purchased." Mark A. Lemley, *Terms of Use*, 91 Minn. L. Rev. 459, 459-60. While shrinkwrap agreements, as the name suggests, formally apply only

to tangible goods, agreements entered into online for both tangible goods and intangible goods and services have developed a body of terminology that borrows the word's suffix.

"Browsewrap" agreements or licenses are those in which "the user does not see the contract at all but in which the license terms provide that using a Web site constitutes agreement to a contract whether the user knows it or not." *Lemley*, 91 Minn. L. Rev. at 460. Browsewrap agreements have been characterized as those "[w]here the link to a website's terms of use is buried at the bottom of the page or tucked away in obscure corners of the website where users are unlikely to see it." *Nguyen* v. *Barnes & Noble, Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014). Normally, in a browsewrap agreement, "the website will contain a notice that — merely by 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." *United States* v. *Drew*, 259 F.R.D. 449, 462 n. 22 (C.D. Cal. 2009).

By contrast, a "clickwrap" agreement is an online contract "in which website users are required to click on an 'I agree' box after being presented with a list of terms and conditions of use." *Nguyen*, 763 F.3d at 1175-76. Courts view the clicking of an "I agree" or "I accept" box (or similar mechanism) as a requirement that "the user manifest assent to the terms and

conditions expressly" before she uses the website or services covered by the agreement. *Id.* (citing *Hines* v. *Overstock.com, Inc.*, 668 F. Supp. 2d 362, 366-67 (E.D.N.Y. 2009). Clickwraps differ from browsewraps with respect to their enforceability under contract principles because, "[b]y requiring a physical manifestation of assent, a [clickwrap] user is said to be put in inquiry notice of the terms assented to." *Berkson* v. *Gogo LLC*, No. 14-CV-1199, 2015 WL 1600755, *28 (E.D.N.Y. 2015). Clickwrap agreements permit courts to infer that the user was at least on inquiry notice of the terms of the agreement, and has outwardly manifested consent by clicking a box. As a result, "[b]ecause the user has 'signed' the contract by clicking 'I agree,' every court to consider the issue has held clickwrap licenses enforceable." *Lemley*, 91 Minn. L. Rev. at 466.

In *Berkson*, Judge Weinstein coined a new phrase, "sign-in-wrap", to describe certain online agreements that fall between a browsewrap and a clickwrap. "*Sign-in-wrap* couples assent to the terms of a website with signing up for use of the site's services." *Berkson*, 2015 WL 1600755 at *25. In a sign-in wrap, a user is presented with a button or link to view terms of use. It is usually not necessary to view the terms of use in order to use the web service, and sign-in-wrap agreements do not have an "I accept" box typical of clickwrap agreements. Instead, sign-in-wrap agreements usually contain language to the effect that,

by registering for an account, or signing into an account, the user agrees to the terms of service to which she could navigate from the sign-in screen.

3. Uber's Agreement

For purposes of analyzing the Agreement found in the Uber sign-up process, I will adopt Judge Weinstein's taxonomy and refer to the Uber Agreement as a sign-in-wrap agreement. Nevertheless, analysis of the Agreement's validity and enforceability turns more on customary and established principles of contract law than on newly-minted terms of classification. "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). "Mutual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract." *Specht* v. *Netscape Commc'ns Corp.*, 306 F.3d 17, 29 (2d Cir. 2002).

Massachusetts courts have not yet had much opportunity to analyze online wrap agreements. However, in *Ajemian*, the Appeals Court made clear that the analysis in Massachusetts is the same as it is elsewhere in the jurisprudence of contract enforcement. Although the clauses sought to be enforced in *Ajemian* were a forum selection clause and a limitations clause, the essential question presented was the same: what level of

notice and assent is required in order for a court to enforce an online adhesion contract? The *Ajemian* court turned to "the modern rule of reasonableness," and observed that clauses in online consumer agreements "will be enforced provided they have been reasonably communicated and accepted and if, considering all the circumstances, it is reasonable to enforce the provision at issue." *Ajemian*, 83 Mass. App. Ct. at 573. The party seeking to enforce the contract has "the burden of establishing, on undisputed facts, that the provisions of the TOS ["Terms of Service"] were reasonably communicated and accepted." *Id.* at 574. This requires "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers." *Specht*, 306 F.3d at 35. The *Ajemian* court specifically concluded that the agreement before it was essentially a browsewrap agreement, and that the notice provided to the users was insufficient to justify enforcement of the clauses in question. Nevertheless, the *Ajemian* analysis of contract formation in the online adhesion contract context remains instructive generally regarding the Massachusetts approach to such agreements.

In analyzing online agreements, the Second Circuit has used the analogy of a roadside fruit stand displaying bins of apples; these apples have a sign above them displaying the price of the apples for potential consumers. *See Register.com*, 356 F.3d at

401. Judge Holwell, analyzing a sign-in-wrap-style agreement in *Fteja* v. *Facebook, Inc.*, 841 F. Supp. 2d 829, 840 (S.D.N.Y. 2012), refined this analogy further. "For purposes of this case, suppose that above the bins of apples are signs that say, 'By picking up this apple, you consent to the terms of sales by this fruit stand. For those terms, turn over this sign.'" *Fteja*, 841 F. Supp. 2d at 839. Judge Holwell observed that courts around the country, supported by established Supreme Court reasoning in *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 111 S.Ct. 1522 (1991), would not hesitate to enforce such a contract. In holding that the online sign-in-wrap agreement was enforceable, Judge Holwell wrote, "[T]here is no reason why that outcome should be different because Facebook's Terms of Use appear on another screen rather than another sheet of paper." *Fteja*, 841 F. Supp. 2d at 839. I agree.

a. Reasonable Notice of Binding Contract

The process through which the plaintiffs established their accounts put them on reasonable notice that their affirmative act of signing up also bound them to Uber's Agreement. Whether or not plaintiffs had *actual* notice of the terms of the Agreement, all that matters is that plaintiffs had *reasonable* notice of the terms. "In Massachusetts courts, it has long been the rule that '[t]ypically, one who signs a written agreement is bound by its terms whether he reads and understands them or

not.'" *Awuah* v. *Coverall N. Am., Inc.*, 703 F.3d 36, 44 (1st Cir. 2012) ("*Awuah II*") (quoting *St. Fleur* v. *WPI Cable Systems/Mutron*, 450 Mass. 345, 355, 879 N.E.2d 27, 35 (2008)). The placement of the phrase "By creating an Uber account, you agree to the Terms of Service & Privacy Policy" on the final screen of the account registration process is prominent enough to put a reasonable user on notice of the terms of the Agreement. Although the paragraph under the heading of "Dispute Resolution" does not appear until the 8th or 9th page (depending on when a user accessed it), the heading is in bold and much larger than the non-heading text in the rest of the Agreement. A reasonable user who cared to pursue the issue would have inquiry notice of the terms of the Agreement challenged by the plaintiffs.

The plaintiffs rely heavily on Judge Weinstein's decision in *Berkson*, where he ultimately found the notice provided to the plaintiffs in a sign-in-wrap situation to be insufficient. The first step of Judge Weinstein's four-part analysis of such adhesion contracts suggests that actual notice must be found on the basis of "substantial evidence from the website that the user was aware that she was binding herself to more than an offer of services or goods in exchange for money." *Berkson*, 2015 WL 1600755 at *33. That step, however, obliquely disregards the customary contract analysis applied by the vast

majority of courts.[7] More pertinently, it runs contrary to the test in Massachusetts, articulated in *Ajemian*. A test requiring a showing by the offeror of actual notice of the offeree virtually insures a fact intensive analysis in every case and — as a practical matter — would, through the imposition of such transactions costs for the contract validation process, make otherwise legally compliant arbitration agreements for online

[7] *See, e.g. Defillipis* v. *Dell Fin. Servs.*, No. 3:14-CV-00115, 2016 WL 394003 (M.D. Pa. Jan. 29, 2016) (finding that a blue hyperlink leading to terms and conditions available next to a box a customer had to click in order to sign up for an account was sufficient to provide notice to the customer), *Whitt* v. *Prosper Funding, LLC*, No. 1:15-cv-136-GHW, 2015 WL 4254062 at *5 (S.D.N.Y. July 14, 2015) (pointing out that the plaintiff was not able to cite "authority indicating that a reasonably prudent website user lacks sufficient notice of terms of an agreement that are viewable through a conspicuous hyperlink," and noting that there is "an abundance of persuisavie authority . . . supporting a proposition to the contrary.").

The plaintiff suggests that the holding in *Sgouros* v. *TransUnion Corp.*, 817 F.3d 1029 (7th Cir. 2016), embodies a different and more demanding approach. There, the Seventh Circuit found that a credit score agency's website did not provide notice to its customers sufficient to enforce the arbitration clause found in its terms of service. But in that case, "TransUnion's site actively misleads the customer" because the "Accept" box that users are required to click only mentions collection of personal data, not consent to the "Terms and Conditions" that include the arbitration clause. *Sgouros*, 817 F.3d at 1035. The Court observed that companies could provide sufficient notice by "placing the agreement . . . or a clearly labeled hyperlink to the agreement, next to an 'I Accept' button that unambiguously pertains to that agreement" in the sign-up process. *Id.* at 136. That is what Uber provided to the plaintiffs and thus *Sgouros* does not advance the plaintiffs' claims.

contracts all but impossible to enforce.[8] Erosion of the substance of current arbitration rules, by contortion of means for their enforcement, makes those substantive rules illusory. That is not the rule in the majority of jurisdictions; and, in particular, it is not the rule in Massachusetts. The test to be applied in Massachusetts is reasonable notice. The documents properly before me on this motion[9] establish that Uber has demonstrated that plaintiffs were given such notice.

b. Manifested Agreements

Although the plaintiffs were given reasonable notice, in order to enforce the Agreement, Uber must also show that the plaintiffs necessarily manifested agreement to the terms. To return to the apple analogy, in the Uber sign-up process, clicking "Done" and ordering the app is akin to the apple eater taking a bite of the apple. Although an even more "unambiguous manifestation of consent," *Specht*, 306 F.3d at 35, might be for the apple eater also to check a box on a piece of paper next to

[8] One estimate is that only "one in a thousand" consumers actually reads such contracts, and, thus, can be said to have actual notice of their terms. Alina Tugend, *Those Wordy Contracts We All So Quickly Accept*, N.Y. Times, July 12, 2013, at B6.

[9] In this connection, I may consider documents such as the operative agreement incorporated by reference in the complaint. *Carter's of New Bedford, Inc.* v. *Nike, Inc.* 2014 WL 1311750 at *2 (D. Mass. Mar. 31, 2014).

the words, "I accept the terms on the other side of the sign above the apple basket," one bite of the apple is enough.[10]

The language surrounding the button leading to the Agreement is unambiguous in alerting the user that creating an account will bind her to the Agreement. And the word "Done," although perhaps slightly less precise than "I accept," or "I agree," makes clear that by clicking the button the user has consummated account registration, the very process that the notification warns users will bind them to the Agreement.

c. Conclusion

I conclude that the Agreement is a valid contract that is enforceable against the plaintiffs.

B. Enforceability of the Arbitration Clause

Having decided that the Agreement is generally valid and enforceable against the plaintiffs, I must now determine whether the specific arbitration clause is valid. The question is "whether the parties agreed to arbitrate [this] dispute. The

[10] In making use of this appetizing metaphor, rooted in case law generated by judges from New York, *Register.com, Inc.* v. *Verio, Inc.*, 356 F.3d 393, 401 (2d Cir. 2004); *Fteja* v. *Facebook, Inc.*, 841 F. Supp. 2d 829, 840 (S.D.N.Y. 2012), I remain mindful of then Judge Cardozo's warning to New York lawyers that "[m]etaphors in the law are to be narrowly watched, for starting as ways to liberate thought, they end often by enslaving it." *Berkey* v. *Third Ave. Ry. Co.*, 244 N.Y. 84, 94 (1926). That acknowledged, however, I am satisfied the metaphor retains nutritional value as food for thinking about how conduct may manifest acceptance of an offer.

court is to make this determination by applying the 'federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [Federal Arbitration] Act." *Mitsubishi Motors Corp* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 3353 (1985) (citations omitted). "[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Memorial Hospital*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 941 (1983). With respect to the sometimes thorny gateway issue of arbitration jurisdiction, "where the parties have themselves clearly and unmistakably agreed that the arbitrator should decide whether an issue is arbitrable, the Supreme Court has held that this issue is to be decided by the arbitrator. . . . [T]he validity of an arbitration clause is itself a matter for the arbitrator where the agreement so provides." *Awuah* v. *Coverall North America, Inc.*, 554 F.3d 7, 10-11 (1st Cir. 2009) ("*Awuah I*").

In *Awuah I*, the First Circuit considered whether or not arbitration was an appropriate remedy for a dispute between multiple franchisees and Coverall, the franchisor. The arbitration agreement in question was as broad as the one at issue in this case:

> all controversies, disputes or claims between Coverall . . . and Franchisee . . . arising out of or related to the relationship of the parties, this Agreement,

> any related agreement between the parties, and/or any specification, standard or operating procedure of Coverall . . . shall be submitted promptly for arbitration. . . . Unless otherwise provided or the parties agree otherwise, arbitration shall be in accordance with the then current Rules of the American Arbitration Association.

Awuah I, 554 F.3d at 9.

As Judge Boudin observed for the court, the Rules of the AAA include Rule 7(a), which provides, in relevant part, "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." American Arbitration Association Commercial Arbitration Rules and Mediation Procedures Rule 7(a) (American Arbitration Association 2013). The First Circuit concluded that, where arbitration agreements unmistakably incorporate AAA rules (in particular Rule 7(a)), it is left to the arbitrator to decide what issues are arbitrable, and, further, to decide such defenses to arbitration clauses as unconscionability.

Once a court decides that the arbitration clause is broad enough to encompass the issues in dispute and that the parties agreed to have the contract governed by the AAA Rules, it must compel arbitration. To be sure, an exception was recognized by the *Awuah I* court. That exception applies to cases in which the arbitration itself may "be an illusory remedy.

In principle, having the arbitrator decide questions of validity is required if the parties so agreed; but if the terms for getting an arbitrator to decide the issue are impossibly burdensome, that outcome would indeed raise public policy concerns." *Awuah I*, 554 F.3d 7 at 12. In such cases, it is up to the court to determine if arbitration would be an illusory remedy under the circumstances. The First Circuit in *Awuah I* ultimately remanded the case for the district court to determine whether or not arbitration was an illusory remedy in that case. In doing so, it gave guidance for analysis of whether or not arbitration is an illusory remedy. The inquiry focuses on

> whether the arbitration regime here is structured so as to *prevent* a litigant from having access to the arbitrator to resolve claims, including unconscionability defenses. The standard for such a showing of illusoriness would also be high — all formal dispute resolution involves costs and inconvenience. But if the remedy is truly illusory, a court should not order arbitration at all but decide the entire dispute itself."

Id. at 13 (emphasis in original).

In defining what makes arbitration an "illusory" remedy, the First Circuit in *Awuah I* noted that "excessive arbitration costs" are a significant concern. *Id.* at 13. *Awuah I* does not define precisely what "excessive" costs may be, but, with respect to Uber's Agreement before me, this is not necessary. Uber explicitly states in the Agreement that it will bear the costs of any arbitration claim under $75,000, thereby relieving

any potential plaintiff of bearing the cost of arbitration unless her claim is substantial.

It might be argued that waiver of the right to bring a class action also renders dispute resolution terms illusory. But Supreme Court precedent is clear that "[c]lass arbitration waivers are enforceable even where the cost of individual arbitration effectively prevents the pursuit of low-value claims" that would only be financially viable in a class context. *Pazol* v. *Tough Modder, Inc.*, 100 F. Supp. 3d 74, 76 (D. Mass. 2015), *rev'd on other grounds*, 819 F.3d 548 (1st Cir. 2016), (*citing Am. Express Co.* v. *Italian Colors Rest.*, 133 S.Ct. 2304 (2013)). Thus, so-called forced "single-file" arbitration is not a bar to arbitration agreements generally. It follows that objection to "single-file" arbitration is no basis for a contention that arbitration is an illusory remedy.[11]

Having concluded that arbitration is not an illusory remedy for the plaintiffs, I must leave all other issues to the

[11] I must, however, register my agreement with Justice Breyer's characteristically practical assessment that "nonclass arbitration over [small sums] will [] sometimes have the effect of depriving claimants of their claims." *Concepcion*, 563 U.S. at 365 (Breyer, J., dissenting). This is because, as Judge Posner has observed with characteristic pungency, "the *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30". *Id.* (quoting *Carnegie* v. *Household Int'l Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (emphasis in original)).

arbitrator to decide, including the claim of unconscionability. The language of the Agreement and the case law are clear: when, as I found, the parties agreed to arbitrate; when, as I have concluded, the dispute falls within the scope of the arbitration provision; and when, as here, arbitration is not an illusory remedy, the court must compel arbitration, and leave all other matters for the arbitrator to decide.

C. Stay or Dismiss

The remaining question is whether to stay this case or to dismiss it.

> Section 3 of the FAA requires that where issues brought before a court are arbitrable, the court shall stay the trial of the action until such arbitration has been had in accordance with the terms of the [arbitration] agreement. However, a court may dismiss, rather than stay, a case when all of the issues before the court are arbitrable.

Bercovitch v. *Baldwin School, Inc.*, 133 F.3d 141, 156 n. 21 (1st Cir. 1998) (citations omitted). Having determined in resolving the instant motion that all further issues shall be decided by the arbitrator, nothing remains for me to decide. A stay is unnecessary to await further developments. Consequently, I will dismiss the case, with recognition that as a collateral aspect of that disposition, this decision is immediately appealable to

permit plaintiffs a timely opportunity to challenge it if they so choose.[12]

IV. CONCLUSION

For the reasons set forth above, I GRANT the defendant's Motion to Compel Arbitration [Dkt. No. 31] and direct the Clerk to dismiss the case.

/s/ Douglas P. Woodlock
DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE

[12] *See Green Tree Financial Corp.-Alabama* v. *Randolph*, 531 U.S. 79, 87, 121 S.Ct. 513, 520 n. 2 (2000) (noting that a district court's decision to dismiss a case was a "final decision within the meaning of § 16(a)(3) [of the FAA], and an appeal may be taken," and that, "Had the District Court entered a stay instead of a dismissal in this case, that order would not be appealable" under § 16(b)(1).)