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## THE UBERIZATION OF ARBITRATION CLAUSES

Jill I. Gross

*Elisabeth Haub School of Law, Pace University*

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# THE UBERIZATION OF ARBITRATION CLAUSES

By  
Jill I. Gross\*

## I. INTRODUCTION

As the public policy debate over the propriety of mandatory arbitration<sup>1</sup> rages on,<sup>2</sup> many companies continue to insert pre-dispute arbitration agreements (PDAAs) into their adhesive consumer and employment contracts,<sup>3</sup> mandating arbitration of any dispute arising out of or relating to the contract. These clauses often strip the weaker party of its right to pursue claims as class or collective actions (class action waivers).<sup>4</sup> Companies justify their use of these PDAAs on the ground that arbitration is a cheaper and more efficient yet fair method of dispute resolution,<sup>5</sup> while consumers and employees argue that

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\* Professor of Law, Elisabeth Haub School of Law, Pace University. I am grateful for the research assistance of Emily Rawdon, Pace J.D. Candidate, May 2018.

<sup>1</sup> I define “mandatory” arbitration in this context as arbitration resulting from a predispute arbitration clause in an adhesive agreement between parties of unequal bargaining power.

<sup>2</sup> See, e.g., Jean R. Sternlight, *Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1310 (2015) (critiquing employers’ use of mandatory arbitration to decrease employees’ access to justice); Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 90 (2014) (“[R]ather than enhancing equality, mandatory arbitration exacerbates inequality in access to justice in the workplace.”); Thomas J. Stipanowich, *The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes*, 60 U. KAN. L. REV. 985, 988-91 (2012) (identifying fairness concerns surrounding the growth of mandatory arbitration clauses).

<sup>3</sup> See *Arbitration Study: Report to Congress pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, CONSUMER FINANCIAL PROTECTION BUREAU (Mar. 2015), [http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf) (reporting data on companies’ use of PDAAs and class action waivers in consumer financial agreements).

<sup>4</sup> See Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. L. REV. 87, 87-88 (2012); Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 704 (2012); David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 240 (2012); see also *Ross v. Am. Express Co.*, 35 F. Supp. 3d 407, 415-30 (S.D.N.Y. 2014) (detailing concerted actions, including twenty-eight group meetings of issuer banks across the credit card industry, to include PDAAs in customer agreements to suppress consumers’ ability to bring class action suits against the industry); see also Nancy A. Welsh & Stephen J. Ware, *Ross et al. v. American Express et al.: The Story Behind the Spread of Class Action-Barring Arbitration Clauses in Credit Card Agreements*, 21 DISP. RESOL. MAG. 18 (2014) (detailing findings of the *Ross* court).

<sup>5</sup> See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) (stating that “[p]arties generally favor arbitration precisely because of the economics of dispute resolution”). *But see* Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 7-8 (2014) (identifying at least 14 different reasons why parties choose to arbitrate).

they are forced into an unfair dispute resolution forum tilted in favor of repeat player corporations with superior bargaining power.<sup>6</sup>

Uber Technologies, Inc. (Uber), founded in March 2009 and headquartered in San Francisco, California,<sup>7</sup> finds itself a “gig economy”<sup>8</sup> company smack in the middle of this debate. To make transportation more efficient and reliable around the world,<sup>9</sup> Uber develops, markets and operates the Uber app, which allows individuals with smartphones to submit a transportation request. The app then sends the request to one of Uber’s subsidiaries, also known as “third party Transportation Companies,” which, in turn, forwards the request to the Uber driver nearest to the requester, alerting the driver to the location of the customer.<sup>10</sup> The driver can then accept the request and pick up the rider. The Uber app automatically calculates the fare, charges the rider’s credit card pre-linked to the account, and transfers payment to the driver.<sup>11</sup>

Since its official launch in San Francisco in July 2010, Uber has experienced rapid and explosive worldwide growth. By May 2011, it offered its service in New York City, started expanding internationally in December 2011, and by early 2017, operated in 545 cities in 66 countries around the world.<sup>12</sup> All during this operating expansion, the company

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<sup>6</sup> See Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Nov. 1, 2015, at A1; Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1650-51 (2005) (“Whereas a given company will tend to arbitrate many consumer disputes, a given consumer or employee will typically arbitrate, at most, one. Thus, the companies have far greater experience with and exposure to the arbitration process than do the consumers or employees. There is some limited empirical evidence that the repeat player does somewhat better in arbitration than the nonrepeat player.”); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL’Y J. 189, 190-91 (1997).

<sup>7</sup> See *Company Overview of Uber Technologies, Inc.*, BLOOMBERG, <http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapid=144524848> (last visited Feb. 9, 2017). Uber was launched in March 2009 as UberCab, but shortened its name to Uber in October 2010 a few days after local taxi regulators issued cease and desist notices to Uber for, *inter alia*, operating a taxi service without a license. See Ryan Graves, *Uber has been served*, NEWSROOM (Oct. 25, 2010), <https://newsroom.uber.com/uber-has-been-served/> (last visited Feb. 9, 2016).

<sup>8</sup> “The gig economy is the collection of markets that match providers to consumers on a gig (or job) basis in support of on-demand commerce.” Sarah A. Donovan, David H. Bradley, and Jon O. Shimabukuro, *What Does the Gig Economy Mean for Workers?*, CONG. RESEARCH SERV., R44365, at Summary (Feb. 5, 2016), <https://www.fas.org/sgp/crs/misc/R44365.pdf>. The gig economy is sometimes referred to as the “sharing economy.”

<sup>9</sup> See Maya Kosoff, *The vision Uber’s CEO has for his \$50 billion company suggests the startup is only beginning to scratch the surface*, BUSINESS INSIDER (June 4, 2015), <http://www.businessinsider.com/travis-kalanicks-vision-for-uber-2015-6>. In addition, the term “Uberize” has come to mean “to modify a market or economic model by the introduction of a cheap and efficient alternative.” See WIKTIONARY (June 17, 2016), <https://en.wiktionary.org/wiki/uberize> (last visited Feb. 26, 2017).

<sup>10</sup> See *Razak v. Uber Techs., Inc.*, Civ. No. 16-573, 2016 WL 3960556, at \*1 (E.D. Pa. July 21, 2016).

<sup>11</sup> *Id.*

<sup>12</sup> See Uber (company), WIKIPEDIA, [https://en.wikipedia.org/wiki/Uber\\_\(company\)](https://en.wikipedia.org/wiki/Uber_(company)).

raised hundreds of millions of dollars from private investors and in January 2017 was valued at \$68 billion.<sup>13</sup>

As a transportation industry “disrupter”<sup>14</sup> rapidly rolling out aggressive expansion plans, Uber also has been sued in court more than any other “gig economy” company.<sup>15</sup> Many of those lawsuits were filed as putative class actions. Uber drivers filed the first class action lawsuit against the company in 2012;<sup>16</sup> by early 2017, both Uber drivers and passengers had filed dozens of class actions against Uber. In these lawsuits, riders/passengers have alleged primarily three types of claims against Uber: (1) misrepresentations and omissions regarding safety measures, background checks, and other efforts it takes to provide safety for its customers;<sup>17</sup> (2) antitrust violations in the form of a price-fixing conspiracy through its pricing algorithms;<sup>18</sup> and (3) overcharging or charging fictitious fees.<sup>19</sup> Drivers have alleged primarily three types of claims against Uber: (1) classification of drivers as independent contractors rather than employees in violation of applicable labor laws;<sup>20</sup> (2) wrongfully depriving drivers of gratuities or other types of

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<sup>13</sup> See Madeline Johnson, *Will Uber be the hottest IPO of 2017?*, ZACKS (Jan. 9, 2017), <https://www.zacks.com/stock/news/244845/will-uber-be-the-hottest-ipo-of-2017> (last visited Feb. 26, 2017).

<sup>14</sup> A disrupter challenges and attempts to radically change the way an industry traditionally does business. See Charlotte Rogers, *What does it mean to be a disruptor?*, MARKETING WEEK (Sept. 28, 2016), <https://www.marketingweek.com/2016/09/28/what-does-it-mean-to-be-a-disruptor/> (last visited Feb. 26, 2017).

<sup>15</sup> See Kristen V. Brown, *Uber is facing a staggering number of lawsuits*, FUSION (Jan. 25, 2016), <http://fusion.net/story/257423/everyone-is-suing-uber/> (last visited Feb. 11, 2017) (reporting more than fifty lawsuits filed in federal court against Uber in 2015 alone). In fact, Uber has been sued more than any other United States start-up company valued at \$10 billion or more. See Kristen V. Brown, *Here's what's going on with all of those Uber lawsuits*, FUSION (June 16, 2016), <http://fusion.net/story/315350/uber-class-action-lawsuit-settlement/> (last visited Feb. 11, 2017).

<sup>16</sup> See *O'Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2014 WL 1760314, at \*1 (N.D. Cal. May 2, 2014) (citing to *Ehret v. Uber Technologies, Inc.*, 14-cv-0113-EMC (N.D. Cal.), a class action originally filed by Uber drivers in 2012 in Illinois state court which was dismissed and re-filed in federal district court, and which similarly alleged that Uber misrepresented to riders the amount of gratuity it paid its drivers).

<sup>17</sup> See *Philliben v. Uber Techs., Inc.*, No. 14-CV-05615-JST, 2016 WL 4537912 (N.D. Cal. Aug. 30, 2016).

<sup>18</sup> See *Meyer v. Kalanick*, 200 F. Supp. 3d 408 (S.D.N.Y. 2016).

<sup>19</sup> See *Cullinane v. Uber Techs., Inc.*, No. CV 14-14750-DPW, 2016 WL 3751652 (D. Mass. July 11, 2016) (alleging Uber overcharged a putative class of riders for travel in Boston area by imposing fictitious fees hidden in charges for legitimate local tolls); *Tadepalli v. Uber Techs., Inc.*, No. 15-CV-04348-MEJ, 2016 WL 1622881 (N.D. Cal. Apr. 25, 2016) (fictitious fees); *Ehret v. Uber Techs., Inc.*, 148 F. Supp. 3d 884, 889 (N.D. Cal. 2015) (certifying class in suit alleging false misrepresentations regarding gratuities).

<sup>20</sup> See, e.g., *Singh v. Uber Techs. Inc.*, No. CV 16-3044 (FLW), 2017 WL 396545 (D.N.J. Jan. 30, 2017); *Richmond v. Uber Techs., Inc.*, No. 16-CV-23267, 2017 WL 416123 (S.D. Fla. Jan. 27, 2017); *Gunn v. Uber Techs., Inc.*, No. 116CV01668SEBMJD, 2017 WL 386816 (S.D. Ind. Jan. 27, 2017); *Scroggins v. Uber Techs., Inc.*, No. 116CV01419SEBMJD, 2017 WL 373299 (S.D. Ind. Jan. 26, 2017); *Zawada v. Uber Techs., Inc.*, No. 16-CV-11334, 2016 WL 7439198 (E.D. Mich. Dec. 27, 2016) (appeal filed); *Razak v. Uber Techs., Inc.*, No. CV 16-573, 2016 WL 7241795 (E.D. Pa. Dec. 14, 2016); *Marc v. Uber Techs.*, No.

compensation;<sup>21</sup> and (3) improperly using background checks in its hiring and firing decisions.<sup>22</sup> Finally, both drivers and riders brought class actions alleging Uber sent unsolicited text messages in violation of the Federal Consumer Protection Act.<sup>23</sup>

Not long after the first few of those class actions were filed, and following a series of rulings by the United States Supreme Court strictly enforcing adhesive arbitration clauses with class action waivers,<sup>24</sup> in May 2013 Uber inserted a PDAA with a class and collective action waiver in agreements with its drivers and riders. Uber's legal maneuver generated dozens of challenges to its PDAA in oppositions to Uber's motions to compel arbitration it filed in the class action lawsuits across the country, and thus dozens of court decisions contributing to modern Federal Arbitration Act (FAA) jurisprudence.<sup>25</sup> Indeed, as of spring 2017, more than 140 federal and state court opinions in which Uber is a defendant have been reported on Westlaw. About half of those rule on an issue involving the application of the FAA stemming from Uber's motions to compel.<sup>26</sup>

This article explores those decisions, which offer a window into one company's use of a forced pre-dispute arbitration clause with a class action waiver. The article first briefly lays out current federal arbitration law, highlighting three critical and recent Supreme Court cases relevant to Uber's PDAA. Part III then describes Uber's use of a PDAA against this landscape and how that use differed for Uber drivers as compared to Uber passengers. Part IV explores a few of the more prominent class actions against Uber, and the arbitration-related opinions they generated. Part V extracts some lessons from how courts reacted to the multitude and variety of challenges to Uber's PDAA. The article concludes by noting that UBER's rapid and worldwide development of a cheaper and more efficient yet controversial mode of transportation parallels the growth in companies' "Uberization" of

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216CV579FTM99MRM, 2016 WL 7210886, (M.D. Fla. Dec. 13, 2016); O'Connor v. Uber Techs., Inc., No. 13-CV-032826-EMC, 2016 WL 4398271 (N.D. Cal. Aug. 18, 2016); Rimel v. Uber Techs., Inc., No. 615CV2191ORL41KRS, 2016 WL 6246812 (M.D. Fla. Aug. 4, 2016).

<sup>21</sup> See, e.g., Congdon v. Uber Techs., Inc., No. 16-CV-02499-YGR, 2016 WL 7157854 (N.D. Cal. Dec. 8, 2016); Micheletti v. Uber Techs., Inc., No. CV 15-1001, \_\_ F. Supp.3d \_\_, 2016 WL 5793799 (W.D. Tex. Oct. 3, 2016); Lee v. Uber Techs., No. 15 C 11756, 2016 WL 5417215 (N.D. Ill. Sept. 21, 2016).

<sup>22</sup> See Mohamed v. Uber Techs., Inc., 848 F.3d 1201 (9th Cir. 2016).

<sup>23</sup> See In re: Uber Techs., Inc., Tel. Consumer Prot. Act (Tcpa) Litig., No. MDL 2733, 2016 WL 5846034 (U.S. Jud. Pan. Mult. Lit. Oct. 3, 2016) (denying plaintiffs' motion to centralize litigation—eight actions pending in five districts—in the Northern District of Illinois all alleging that Uber violated the Telephone Consumer Protection Act by sending unsolicited text messages to plaintiffs' wireless telephones without their prior express consent or after they revoked consent, using an automatic telephone dialing system).

<sup>24</sup> See discussion *infra* Part II, notes 43-50 and accompanying text.

<sup>25</sup> See *infra* Parts III and IV.

<sup>26</sup> See discussion *infra* Parts III and IV (plaintiffs in these cases argued that, *inter alia*, a clause delegating to the arbitrator the power to decide questions of arbitrability was unconscionable and thus challenges to arbitrability should be heard by courts; the arbitration clause itself was unconscionable; or that the parties did not enter into a valid agreement to arbitrate due to lack of mutual assent).

arbitration clauses, designed to facilitate a cheaper and more efficient yet controversial mode of resolving disputes.

## II. THE SUPREME COURT AND ARBITRATION

Since the 1980s, the Supreme Court has interpreted section two of the FAA<sup>27</sup>—which declares the validity, irrevocability, and enforceability of arbitration agreements—to reflect a “liberal federal policy favoring arbitration agreements.”<sup>28</sup> The Court has held that (1) lower courts must apply a presumption of arbitrability when deciding challenges to arbitrability;<sup>29</sup> (2) the FAA applies in state and federal court to arbitration clauses in all agreements “involving commerce”;<sup>30</sup> (3) the FAA preempts conflicting state law;<sup>31</sup> and (4) federal statutory claims are arbitrable as a matter of public policy unless Congress explicitly states they are not.<sup>32</sup>

In the early part of this decade, the Court continued this trend of strictly enforcing PDAAs. Three decisions in particular, all authored by Justice Scalia, removed legal obstacles to companies like Uber seeking to compel arbitration of all disputes arising between parties—including arbitrability disputes<sup>33</sup>—and seeking to enforce class action

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<sup>27</sup> Federal Arbitration Act, 9 U.S.C. § 2 (2012).

<sup>28</sup> *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

<sup>29</sup> *Id.* at 24-25.

<sup>30</sup> By its terms, the FAA governs agreements to arbitrate “transactions involving commerce.” 9 U.S.C. § 2 (2012). The Supreme Court has interpreted this phrase broadly to include any transaction that *in fact* involves interstate commerce, even if the parties did not anticipate an interstate impact. *See Allied-Bruce Terminix Cos., v. Dobson*, 513 U.S. 265, 273-74, 281 (1995).

<sup>31</sup> Under the FAA preemption doctrine, the FAA preempts any state law that “actually conflicts with federal law—that is, to the extent that it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *see also Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683 (1996) (preempting Montana statute requiring specific type of notice in contract containing arbitration clause); *Allied-Bruce Terminix*, 513 U.S. at 272-73 (preempting Alabama statute invalidating PDAAs in consumer contracts); *Perry v. Thomas*, 482 U.S. 483, 488-89 (1987) (preempting California statute requiring wage collection actions to be resolved in court).

<sup>32</sup> *See CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (federal statutory rights are arbitrable absent a “contrary Congressional command”).

<sup>33</sup> *See Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010). “Arbitrability” refers to whether a particular dispute can, as a legal matter, be resolved through arbitration.

waivers.<sup>34</sup> These decisions, discussed below, have had the cumulative effect of eliminating virtually all defenses to arbitrability and converting PDAs into “super contracts.”<sup>35</sup>

First, in 2010, the Court enforced a “delegation provision”<sup>36</sup> in a contract delegating arbitrability decisions to arbitrators.<sup>37</sup> In that case, in response to an employer’s motion to compel arbitration of an employment discrimination action, the employee challenged the arbitrability of the discrimination dispute (the merits dispute) on the grounds that the arbitration agreement was procedurally and substantively unconscionable.<sup>38</sup> At that time, it was well-settled that courts, not arbitrators, decide challenges to the substantive arbitrability of a dispute “unless the parties clearly and unmistakably provide otherwise.”<sup>39</sup>

Jackson conceded that the delegation provision was clear and unmistakable but claimed that his assent was not *valid* because it was the product of unconscionability.<sup>40</sup> However, the Court treated the delegation provision as an agreement to arbitrate arbitrability disputes separable<sup>41</sup> from the agreement to arbitrate merits disputes. Because

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<sup>34</sup> See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

<sup>35</sup> See Jill I. Gross, *Justice Scalia's Hat Trick and the Supreme Court's Flawed Understanding of Twenty-First Century Arbitration*, 81 *BROOK. L. REV.* 111, 124 (2015); Richard Frankel, *The Arbitration Clause as Super Contract*, 91 *WASH. U. L. REV.* 531, 533 (2014); Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 *U. ILL. L. REV.* 1, 9 (2010) (“In the twentieth century, pre-dispute (or ‘executory’) arbitration agreements evolved from disfavored status to judicially denominated ‘super-clauses.’”).

<sup>36</sup> The Court defined a “delegation provision” as “an agreement to arbitrate threshold issues concerning the arbitration agreement.” *Rent-A-Center*, 561 U.S. at 68.

<sup>37</sup> *Rent-A-Center*, 561 U.S. at 68 (the delegation provision stated that “[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.”).

<sup>38</sup> *Id.* at 65-66. Jackson did not argue that the delegation provision, standing alone, was unconscionable. *Id.* at 72-73.

<sup>39</sup> *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (citing *AT&T Techs., Inc. v. Commc’ns Workers*, 475 U.S. 643, 649 (1986)). Most federal courts considering the issue hold that the incorporation by reference of an arbitration forum’s rules that empower arbitrators to decide substantive arbitrability constitutes such “clear and unmistakable evidence.” See, e.g., *Eckert/Wordell Architects, Inc. v FJM Properties of Willmar LLC*, 756 F.3d 1098, 1100 (8th Cir. 2014) (AAA rules); *Brennan v. Opus Bank*, 796 F.3d 1125, 1131 (9th Cir. 2015) (same). *But see Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746 (3d Cir. 2016) (incorporation of AAA rules is not “clear and unmistakable” evidence parties intended to delegate issue of class arbitrability to arbitrators).

<sup>40</sup> *Jackson*, 561 U.S. at 69, n.1.

<sup>41</sup> Under the separability doctrine, valid agreements to arbitrate are separable from their underlying agreements and an arbitrator decides the enforceability of the underlying agreement absent “clear and unmistakable evidence” that the parties wanted a court to decide questions of arbitrability. See *First Options*

the employee challenged as unconscionable the underlying agreement to arbitrate merits disputes (as opposed to the delegation provision), the Court found that the delegation provision was valid and enforceable.<sup>42</sup> As a result, arbitrators would decide whether the arbitration clause itself was unconscionable.

The following year, the Court enforced a class action waiver in a PDAA, thus compelling individual arbitration of plaintiffs' claims of fraud arising out of their purchase of a cell phone.<sup>43</sup> The Court ruled that the FAA preempts California's *Discover Bank* rule, which "classif[ied] most collective-arbitration waivers in consumer contracts as unconscionable,"<sup>44</sup> because the rule treated adhesive arbitration clauses with a class action waiver differently than non-arbitration contracts.

Finally, in 2013, the Court ruled that arbitration clauses were enforceable even if one party could not, as a practical matter, vindicate its rights in arbitration.<sup>45</sup> In *Italian Colors*, a group of merchants accepting American Express charge cards sued American Express in federal court for federal antitrust violations. The parties' agreement contained a PDAA and a class action waiver.<sup>46</sup> Opposing defendant's motion to compel arbitration, the merchants challenged the enforceability of the class action waiver, arguing that, if they could not proceed as a class, they had no financially feasible means of pursuing their antitrust claims.<sup>47</sup> The Second Circuit refused to enforce the class action waiver, finding that the cost of individual arbitration precluded plaintiff merchants from vindicating their statutory rights.<sup>48</sup>

The Court reversed, finding that "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that

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of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402-03 (1967).

<sup>42</sup> *Rent-A-Center*, 561 U.S. at 71-72.

<sup>43</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). Plaintiffs Vincent and Liza Concepcion accepted an AT&T Mobility offer for a free cell phone. When they discovered they were charged \$30.22 in sales tax, the Concepcions sued AT&T Mobility in federal district court on behalf of a class of similarly situated consumers, alleging that AT&T Mobility's "practice of charging sales tax on a cell phone advertised as 'free' was fraudulent." *Id.* at 1746.

<sup>44</sup> *Id.* In *Discover Bank v. Superior Court of L.A.*, 113 P.3d 1100, 1103 (Cal. 2005), *overruled by* *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011), the California Supreme Court applied California's unconscionability law to void class action waivers in arbitration agreements.

<sup>45</sup> *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

<sup>46</sup> *Id.* at 2308.

<sup>47</sup> An expert estimated that if the allegations were proven, an individual plaintiff's maximum recovery would be \$12,850 (*see Italian Colors*, 133 S. Ct. at 2308), an amount that would have been dwarfed by extensive discovery and expert witness costs.

<sup>48</sup> *See In re Am. Express Merch. Litig.*, 667 F.3d 204 (2d Cir. 2012), *rev'd sub nom. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).



remedy.”<sup>49</sup> Though the Court recognized *in dicta* the effective vindication exception,<sup>50</sup> it concluded that the exception did not apply to that case. Because the class action waiver in the merchants’ charge card service agreements with American Express did not eliminate plaintiffs’ *right to pursue* (only their ability to pursue) their claims under the antitrust laws, the waiver was enforceable.

By limiting the vindicating rights doctrine to the narrow situation where an arbitration clause strips a party of the right to prove its case, or where forum fees are “so high as to make access to the forum impracticable,”<sup>51</sup> the Court sharply narrowed that defense to arbitrability—even though other costs might make it unfeasible for the party to pursue the case. Combined with *Rent-A-Center* and *Concepcion, Italian Colors* sends a strong message to companies that PDAs with class action waivers in adhesive contracts as well as delegation clauses were enforceable against virtually all challenges.<sup>52</sup>

### III. CLASS ACTIONS BY RIDERS

Against this landscape of Supreme Court FAA jurisprudence, Uber, not surprisingly, first utilized a PDA in May 2013, when it inserted one in a revised agreement with passengers.<sup>53</sup> Uber’s PDA included an agreement broad in scope to resolve “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.”<sup>54</sup> The PDA further provided that the arbitration would be

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<sup>49</sup> *Italian Colors*, 133 S. Ct. at 2311.

<sup>50</sup> *Id.* at 2310-11. Under the then-existing “effective vindication” doctrine, an arbitration agreement is unenforceable if an unfair aspect of the arbitration process precludes the party from vindicating its federal statutory rights. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) (“[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the [federal] statute [providing that cause of action] will continue to serve both its remedial and deterrent function”); *see also Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000) (implying, *in dicta*, that if a party showed that pursuing its statutory claims through arbitration would be prohibitively expensive, and thus it could not vindicate its statutory rights, a court could validly refuse to enforce a PDA).

<sup>51</sup> *Italian Colors*, 133 S. Ct. at 2311.

<sup>52</sup> *See Gross, supra* note 35, at 132.

<sup>53</sup> Perhaps it did so in response to one of the first class actions it faced: a lawsuit filed by riders in state court in Illinois alleging that Uber misrepresented to riders the amount of gratuity it paid its drivers. *See Ehret v. Uber Techs., Inc.*, C.A. No. 12CH36714 (Cir. Ct. Cook Co.); *see also O’Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2014 WL 1760314, at \*1 (N.D. Cal. May 2, 2014) (reporting that the Illinois court dismissed the *Ehret* lawsuit based on a choice of forum clause and that the class of riders refiled the case in U.S. district court for the Northern District of California styled as *Ehret v. Uber, Technologies, Inc.*, 14-cv-0113-EMC).

<sup>54</sup> The clause provided:

**Dispute Resolution.** You and Company 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,

administered by the American Arbitration Association (AAA) in accordance with its Commercial Arbitration Rules and its Supplementary Procedures for Consumer Disputes. The arbitration clause also included a waiver of the right to bring class, collective and representative actions, and carved out from its scope any individual claim that could be brought in a small claims court. Uber also agreed to pay “arbitration-related fees” for any rider’s claim under \$75,000.<sup>55</sup> No ability to opt out of the PDAA was offered;<sup>56</sup> if a passenger wanted to download the Uber app after that date or continue to use a pre-existing account, the passenger had to agree to the PDAA.

Riders seeking to pursue their claims as class actions have resisted Uber’s motions to compel individual arbitration on one primary ground: they did not agree to arbitrate any claim with Uber because they did not manifest assent to the agreement containing the clause—Uber’s Terms and Conditions (“TAC”).<sup>57</sup> Thus far, most courts considering this argument have rejected it, concluding that Uber’s TAC is a valid “sign-in wrap” agreement. For example, in *Cullinane v. Uber Technologies*, plaintiffs filed a putative class action in federal district court in the District of Massachusetts, alleging 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” in violation of Massachusetts law.<sup>58</sup>

Uber moved to compel arbitration, invoking the rider PDAA.<sup>59</sup> Plaintiffs opposed on the ground that they did not enter into a valid agreement to arbitrate disputes with Uber,

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“**Disputes**”) will be settled by binding arbitration, except that each party retains the right to bring an individual action in small claims court and the right to seek injunctive or other equitable relief in a court of competent jurisdiction to prevent the actual or threatened infringement, misappropriation or violation of a party’s copyrights, trademarks, trade secrets, patents or other intellectual property rights. **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 member 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. If this specific paragraph is held unenforceable, then the entirety of this “Dispute Resolution” section will be deemed void. Except as provided in the preceding sentence, this “Dispute Resolution” section will survive any termination of this Agreement.

Meyer v. Kalanick, 200 F. Supp. 3d 408, 415 (S.D.N.Y. 2016) (emphasis in original).

<sup>55</sup> *Cullinane v. Uber Techs., Inc.*, No. CV 14-14750-DPW, 2016 WL 3751652, at \*3 (D. Mass. July 11, 2016).

<sup>56</sup> *Id.* at \*6.

<sup>57</sup> It is well-settled that parties seeking to enforce a PDAA must first establish that a valid agreement to arbitrate exists. *See Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010) (explaining that, on a motion to compel arbitration, the court “shall” order arbitration “upon being satisfied that the making of the agreement for arbitration...is not in issue”) (quoting from FAA § 4).

<sup>58</sup> *Cullinane*, 2016 WL 3751652, at \*1.

<sup>59</sup> *Id.*

as they could open an account without ever reading the arbitration clause contained in the TAC.<sup>60</sup>

Interestingly, Judge Douglas Woodlock’s opinion ruling on the motion started by announcing his general disagreement with FAA jurisprudence:

The practice of avoiding consumer class action litigation through the use of arbitration agreements is the subject of current scholarly disapproval and skeptical investigative journalism. ... Nevertheless, the legal foundation provided in Supreme Court jurisprudence regarding the Federal Arbitration Act 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.

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 replot the contours of arbitration law when the metes and bounds have been set clearly, unambiguously and recently by the Supreme Court.<sup>61</sup>

After its philosophical pronouncement, the *Cullinane* court described in detail the process for a passenger to sign up for an Uber account through an Apple iPhone app.<sup>62</sup> On the app, passengers navigated through a three-step process, each with its own screen.<sup>63</sup> The first two screens required the rider to enter personal information, create a password, and create a profile including an uploaded photograph to enable the driver to identify the rider at pickup.<sup>64</sup> The third screen required the user to enter credit card information so as to allow Uber to automatically charge the rider for completed Uber rides. As described by one court,

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<sup>60</sup> *Cullinane*, 2016 WL 3751652, at \*7. Under applicable Massachusetts law, a so-called “clickwrap” agreement is enforceable only if plaintiffs had “reasonable notice” of the arbitration clause. *Id.*

<sup>61</sup> *Id.* at \*1 (internal citations omitted).

<sup>62</sup> According to the Complaint, the named plaintiffs created their Uber accounts via an iPhone. Complaint at ¶¶ 11-12, *Cullinane v. Uber Techs., Inc.*, No. CV 14-14750-DPW (D. Mass. July 11, 2016), 2016 WL 3751652.

<sup>63</sup> *Cullinane*, 2016 WL 3751652, at \*2-3.

<sup>64</sup> *Id.*

“[i]mmediately below the credit card information input box, and above the keyboard, appear the [key phrase], ‘By creating an Uber account, you agree to the Terms of Service & Privacy Policy.’”<sup>65</sup> Those words “appear in bold white lettering on a black background, and are surrounded by a gray box, indicating a button. The other words are in gray lettering. 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.”<sup>66</sup> Those Terms of Service included an arbitration clause (on page 9), as described above, under the heading “Dispute Resolution.”

Once the rider entered payment information, the rider clicked the button “Done” in the top-right-hand corner of the screen to complete account creation.<sup>67</sup> A rider did not have to click on the hyperlink or read the language of the TAC in order to create or continue using the account.

The court then turned to the legal issue of whether, under those circumstances, an agreement to arbitrate had been formed. Ultimately, applying Massachusetts law, the court ruled that the parties had mutually assented to the arbitration clause because 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.”<sup>68</sup> Judge Woodlock noted that the key phrase of the agreement on the final registration screen “is prominent enough to put a reasonable user on notice of the terms of the [account agreement].”<sup>69</sup> Because the final screen mentioned that terms and conditions existed, the passenger agreed to be bound by the hyperlinked terms by proceeding further even without clicking on the hyperlink.<sup>70</sup> Other federal district courts have similarly concluded that passengers opening an Uber account have entered into a valid agreement with Uber by clicking on the on-line “Done” button.<sup>71</sup>

In contrast, in *Meyer v. Kalanick*, Judge Jed Rakoff in the Southern District of New York addressed the same issue and reached the opposite conclusion.<sup>72</sup> Spencer Meyer, on behalf of a class of plaintiffs, sued Uber and its CEO, Travis Kalanick, alleging that

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<sup>65</sup> *Cullinane*, 2016 WL 3751652, at \*2.

<sup>66</sup> *Id.* (internal and factual citations omitted).

<sup>67</sup> *Id.*

<sup>68</sup> *Cullinane*, 2016 WL 3751652, at \*7.

<sup>69</sup> *Id.*

<sup>70</sup> The *Cullinane* court then dismissed plaintiffs’ remaining challenges to the arbitration clause itself. The court reasoned that, because the TAC incorporated by reference the AAA Commercial Arbitration Rules, and those rules empower the arbitrator to decide questions of arbitrability, the arbitrator must decide plaintiffs’ remaining contentions. *Id.* at \*8-9.

<sup>71</sup> *E.g.*, *Cubria v. Uber Techs., Inc.*, No. A-16-CA-544-SS, 2017 WL 1034731, at \*5 (W.D. Tex. Mar. 16, 2017) (“The process through which Plaintiff established her account with Uber put her on reasonable notice that the act of signing up for Uber’s services bound her to the 2013 [Terms and Conditions]”); *Cordas v. Uber Techs., Inc.*, No. 16-CV-04065-RS, 2017 WL 658847, at \*4 (N.D. Cal. Jan. 5, 2017).

<sup>72</sup> *Meyer v. Kalanick*, 200 F. Supp. 3d 408 (S.D.N.Y. 2016).

Kalanick had “orchestrated and participated in an antitrust conspiracy arising from the algorithm that co-defendant Uber [] uses to set ride prices.”<sup>73</sup> In response to Uber’s motion to compel arbitration of the lawsuit, plaintiffs argued that they did not enter into a valid arbitration agreement for lack of mutual assent.

Perhaps as a direct rebuttal to Judge Woodlock’s opening paragraphs in *Cullinane*, Judge Rakoff similarly began his opinion in a broad, philosophical manner:

Since the late eighteenth century, the Constitution of the United States and the constitutions or laws of the several states have guaranteed U.S. citizens the right to a jury trial. This most precious and fundamental right can be waived only if the waiver is knowing and voluntary, with the courts “indulg[ing] every reasonable presumption against waiver.”<sup>74</sup>

Following this bold reminder of the fundamental right to a jury trial, Judge Rakoff first decided that California law applied, and outlined the law on the enforceability of clickwrap agreements.

The district court then evaluated the October 2014 version of Uber’s passenger TAC, and concluded that the parties did not enter into a valid agreement. As described by Judge Rakoff, the process for signing up for an Uber account was virtually identical to the process described by Judge Woodlock in *Cullinane*,<sup>75</sup> absent one critical distinction: the named plaintiffs in *Meyer* created their accounts on a Samsung Galaxy smartphone which used an Android operating system, unlike the named plaintiffs in *Cullinane* who created their accounts on an iPhone which uses the iOS operating system.<sup>76</sup>

Apparently, as a result of the use of different operating systems, the critical language on the final screen differed in appearance from the language and design seen by the *Cullinane* plaintiffs.<sup>77</sup> As described by Judge Rakoff, the words, “[b]y creating an Uber account, you agree to the Terms of Service & Privacy Policy,” was “in considerably smaller font” than the language above it, was not in all-caps or otherwise emphasized or highlighted, and, “indeed, are barely legible.”<sup>78</sup>

Judge Rakoff expressly distinguished *Cullinane* on the grounds that the key phrase of agreement in that case was more prominent than the one Judge Rakoff examined, as it was “clearly delineated, and the words appeared in bold white lettering on a black

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<sup>73</sup> *Meyer*, 200 F. Supp. 3d at 411.

<sup>74</sup> *Id.* at 410.

<sup>75</sup> One noncritical difference was that the process described by Judge Rakoff involved two steps, not three. However, the final screen in both *Meyer* and *Cullinane* is the screen at issue in both cases.

<sup>76</sup> *Meyer*, 200 F. Supp. 3d at 414; *see also* Complaint at ¶¶ 11-12, *Cullinane v. Uber Techs., Inc.*, No. CV 14-14750-DPW (D. Mass. July 11, 2016), 2016 WL 3751652.

<sup>77</sup> *Meyer*, 200 F. Supp. 3d at 418.

<sup>78</sup> *Id.* at 414. The language was hyperlinked, blue and underlined. *Id.*

background.”<sup>79</sup> In contrast, the key phrase Judge Rakoff examined was in a smaller font and “more obscure.”<sup>80</sup> Accordingly, the district court concluded that “plaintiff Meyer did not have ‘[r]easonably conspicuous notice’ of Uber’s User Agreement, including its arbitration clause, or evince ‘unambiguous manifestation of assent to those terms.’”<sup>81</sup>

After the *Meyer* decision, in November of 2016, Uber revised its agreement with riders to add a delegation clause delegating substantive arbitrability decisions to an arbitrator, and to move the bold warning and entire PDAA up to the top of the “Terms and Conditions.”<sup>82</sup> This move is designed to foreclose future arbitrability challenges from being heard in court. It also appears that Uber updated its passenger app so that the critical language (“[b]y continuing, I confirm that I have read and agree to the Terms and Conditions and Privacy Policy”) appears exactly the same on an iPhone and an Android phone.<sup>83</sup> Thus, it seems that Uber has learned from its losses before Judge Rakoff and strengthened the enforceability of the PDAA so that courts will dismiss future rider class actions and send individual plaintiffs to arbitration.

#### IV. CLASS ACTIONS BY DRIVERS

Uber’s use of a PDAA in its agreements with drivers differs in several respects from its use of one with riders. In July 2013, and just after the Supreme Court’s *Italian Colors* ruling, Uber inserted a PDAA in its agreements with drivers that was similar but not identical to the rider PDAA Uber first utilized a few months earlier.<sup>84</sup> The driver PDAA required all disputes “to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial.”<sup>85</sup> Unlike the rider PDAA, the driver PDAA contained a delegation provision and a waiver under California’s Private Attorney General Act (PAGA).<sup>86</sup> Like the rider PDAA, the driver PDAA contained class and collective

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<sup>79</sup> *Meyer*, 200 F. Supp. 3d at 418.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 420. Uber has appealed the *Meyer* decision. At the time of publication of this article, that appeal was pending. This author joined an amicus brief filed by a group of Law Professors in that appeal arguing for affirmance.

<sup>82</sup> Uber’s clause effective Nov. 21, 2016 is available at <https://www.uber.com/legal/terms/us/>. The clause it replaced (Jan. 2, 2016 version) is available at <https://www.uber.com/legal/other/US-terms-pre-Nov-2016/>.

<sup>83</sup> Screenshots from both phones on file with author.

<sup>84</sup> By the end of 2012, like for riders, Uber faced a driver class action in Massachusetts state court over Uber’s gratuity policy. *See* Lavitman v. Uber Techs., Inc., C.A. No. 12–4490, 32 Mass. L. Rptr. 476 (Mass. Super. Ct. (Suffolk) Jan. 26, 2015).

<sup>85</sup> *O’Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2014 WL 2215860, at \*1 (N.D. Cal. May 29, 2014).

<sup>86</sup> PAGA authorizes an “aggrieved employee” to “bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations.” *Iskanian v. CLS Transp. Los*

action waivers. Interestingly, the driver PDAA carved out from the general delegation provision challenges to those waivers. The PDAA also provided drivers with thirty days to opt out of the arbitration provision. However, opting out required drivers to deliver by hand or via “a nationally recognized overnight delivery service” to Uber’s general counsel, a letter clearly indicating an intent to opt out.<sup>87</sup> If drivers did not opt out and continued to use the Uber app, they were deemed to have accepted the arbitration agreement.<sup>88</sup>

New drivers downloading the app had to click “I agree to the terms and conditions” at least twice before the download could complete. The words “terms and conditions” were hyperlinked to a separate page containing the full, multi-page terms and conditions of the agreement between Uber and drivers, which contained a warning that it included an arbitration provision in bold language at the beginning.<sup>89</sup> Similar to riders, a driver had to click on a hyperlink to see the actual language of the “[t]erms and [c]onditions” and could click on the “I agree” button and become an Uber driver without ever actually viewing the language.

When drivers filed federal class actions against Uber all over the country raising various claims,<sup>90</sup> Uber quickly moved to compel arbitration in these actions. Virtually all district courts that have ruled on Uber’s motion have granted that motion. These courts have ruled consistently that drivers assented to the clickwrap agreement containing the arbitration clause, the parties clearly and unmistakably delegated gateway arbitrability issues to the arbitrator, the delegation clause was not unconscionable, the class action waiver did not render the arbitration clause unconscionable, and/or the class action waiver did not prevent plaintiffs from effectively vindicating their statutory rights.<sup>91</sup> These

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Angeles, LLC, 327 P.3d 129, 146 (Cal. 2014) (holding that PAGA waivers violate California public policy and FAA does not preempt this California rule).

<sup>87</sup> Lee v. Uber Techs., Inc., No. 15 C 11756, 2016 WL 5417215, at \*2 (N.D. Ill. Sept. 21, 2016).

<sup>88</sup> *Id.*

<sup>89</sup> The warning read:

PLEASE REVIEW THE ARBITRATION PROVISION SET FORTH BELOW CAREFULLY, AS IT WILL REQUIRE YOU TO RESOLVE DISPUTES WITH THE COMPANY ON AN INDIVIDUAL BASIS THROUGH FINAL AND BINDING ARBITRATION UNLESS YOU CHOOSE TO OPT OUT OF THE ARBITRATION PROVISION.... IF YOU DO NOT WISH TO BE SUBJECT TO ARBITRATION, YOU MAY OPT OUT OF THE ARBITRATION PROVISION BY FOLLOWING THE INSTRUCTIONS PROVIDED IN THE ARBITRATION PROVISION BELOW.

Zawada v. Uber Techs., Inc., No. 16-CV-11334, 2016 WL 7439198, at \*6-7 (E.D. Mich. Dec. 27, 2016).

<sup>90</sup> See discussion *supra* Part I, notes 17-23 and accompanying text.

<sup>91</sup> See, e.g., Mohamed v. Uber Techs., Inc., 848 F.3d 1201 (9th Cir. 2016); Peng v. Uber Techs., Inc., No. 16CV545PKCRER, 2017 WL 722007 (E.D.N.Y. Feb. 23, 2017); Guan v. Uber Techs., Inc., No. 16CV598PKCCLP, 2017 WL 744564, at \*12 (E.D.N.Y. Feb. 23, 2017); Gunn v. Uber Techs., Inc., No. 116CV01668SEBMJD, 2017 WL 386816, at \*2 (S.D. Ind. Jan. 27, 2017); Richemond v. Uber Techs., Inc., No. 16-CV-23267, 2017 WL 416123, at \*4 (S.D. Fla. Jan. 27, 2017); Cordas v. Uber Techs., Inc., No. 16-CV-04065-RS, 2017 WL 658847, at \*2 (N.D. Cal. Jan. 5, 2017); Zawada v. Uber Techs., Inc., No. 16-CV-11334, 2016 WL 7439198, at \*1 (E.D. Mich. Dec. 27, 2016); Marc v. Uber Techs., Inc., No. 216CV579FTM99MRM, 2016 WL 7210886, (M.D. Fla. Dec. 13, 2016); Congdon v. Uber Techs., Inc., No.

decisions effectively ended the driver class actions and sent drivers across the country to arbitration to pursue their claims individually.

Of these arbitration rulings, only one—*Mohamed*—issued from a Court of Appeals. In November 2014, a putative class of California drivers sued Uber in the Northern District of California, alleging violations of the Fair Credit Reporting Act stemming from Uber’s use of background checks in its hiring and firing decisions.<sup>92</sup> After Uber filed motions to compel arbitration, Judge Edward Chen rejected plaintiffs’ challenge to the enforceability of the PDAA for lack of mutual assent, but ruled that the delegation clause was not clear and unmistakable evidence of the parties’ intent to delegate arbitrability decisions to the arbitration, and the delegation clause was unconscionable.<sup>93</sup> Judge Chen also ruled that the PDAA itself was unconscionable.<sup>94</sup>

In late 2016, the Ninth Circuit reversed Judge Chen and ruled that the delegation clause within Uber’s agreement with drivers was valid and enforceable.<sup>95</sup> The Court of Appeals found that the delegation clause was unambiguous and that it was a clear and unmistakable manifestation of the parties’ intent to delegate arbitrability questions to the arbitrator.<sup>96</sup> The Court also ruled that the delegation clause was not unconscionable. Thus, the Court of Appeals ordered the parties “to arbitrate their dispute over arbitrability.”<sup>97</sup> One factor that supported the court’s rejection of plaintiffs’ claim that the delegation clause was unconscionable was Uber’s commitment to the court that it had agreed to pay all arbitration costs of individual claimants.<sup>98</sup>

One driver case (improper classification) filed in the Northern District of California and also assigned to Judge Chen proceeded along a very different track than most other driver class actions.<sup>99</sup> Early on in the life of the *O’Connor* case, instead of focusing on the validity of the PDAA, Judge Edward Chen invoked Rule 23(d) of the Federal Rules of

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16-CV-02499-YGR, 2016 WL 7157854 (N.D. Cal. Dec. 8, 2016); *Micheletti v. Uber Techs, Inc.*, No. CV 15-1001, \_\_\_ F. Supp. 3d \_\_\_, 2016 WL 5793799 (W.D. Tex. Oct. 3, 2016). At least seven other courts have ruled similarly.

<sup>92</sup> See *Mohamed v. Uber Techs., Inc.*, 109 F. Supp. 3d 1185 (N.D. Cal. 2015), *aff’d in part, rev’d in part and remanded*, 836 F.3d 1102 (9th Cir. 2016), *aff’d in part, rev’d in part and remanded*, 848 F.3d 1201 (9th Cir. 2016).

<sup>93</sup> *Id.* at 1210, 1216.

<sup>94</sup> *Id.* at 1217-18.

<sup>95</sup> *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201 (9th Cir. 2016).

<sup>96</sup> *Id.* at 1208-09.

<sup>97</sup> *Id.* at 1210-11. The Court did uphold the district court’s ruling that the PAGA waiver was unenforceable, but disagreed with the district court that it was severable from the PDAA. *Id.* at 1212-14.

<sup>98</sup> *Mohamed*, 848 F.3d at 1212.

<sup>99</sup> See *O’Connor v. Uber Techs., Inc.*, No. 13-032826-KAW, 2016 WL 6407583 (N.D. Cal. Dec. 6, 2013).



Civil Procedure<sup>100</sup> to control communications with class members.<sup>101</sup> He concluded that Uber's attempt to send drivers a revised licensing agreement with a PDAA and an opt-out clause violated Rule 23(d) because it did not inform drivers of already existing class actions, including *O'Connor*, and the impact any opt-out could have on drivers' rights to participate in those actions.<sup>102</sup>

As a result, Judge Chen ordered Uber to revise its arbitration clause with drivers.<sup>103</sup> Specifically, the court required Uber to give clearer notice of the arbitration provision, notice of the effect of agreeing to arbitrate on their participation in the *O'Connor* lawsuit, and reasonable means of opting out of the arbitration provision within thirty days of the notice. The court also expressly ordered Uber to apply the revised PDAA to past, current and future drivers (retrospectively).<sup>104</sup>

After a series of efforts by Uber to secure approval from the district court for its revised driver PDAA, Judge Chen approved the amended clause in May 2014 with a few more important revisions.<sup>105</sup> Specifically, Judge Chen ordered: "Uber shall provide in the notices and in its Revised Licensing Agreement an email address to which opt out notices may be sent and contact information for Plaintiffs' counsel. The paragraph in the Revised Licensing Agreement describing the opt-out procedure should be in bold."<sup>106</sup> The following month, Uber distributed the revised PDAA to its drivers nationwide (even to drivers who were not part of the *O'Connor* class action) pursuant to the court's order.<sup>107</sup>

Additional motion practice directed at the PDAA ensued. On December 9, 2015, Judge Chen held that the PAGA waiver was unenforceable and nonseverable from the arbitration provision; thus, the PDAA was unenforceable.<sup>108</sup> The very next day, Uber distributed yet another revised PDAA with new opt out language.<sup>109</sup> Two weeks later, on

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<sup>100</sup> FED. R. CIV. P. 23(D).

<sup>101</sup> See *O'Connor*, 2016 WL 6407583, at \*7 ("the promulgation of the Licensing Agreement and its arbitration provision, runs a substantial risk of interfering with the rights of Uber drivers under Rule 23").

<sup>102</sup> *Id.* at \*6-7. The judge seemed particularly perturbed that the opt out did not warn drivers that opting out would preclude those drivers from participating in already-pending class actions.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at \*7.

<sup>105</sup> See *O'Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2014 WL 2215860 (N.D. Cal. May 29, 2014).

<sup>106</sup> *Id.* at \*4.

<sup>107</sup> In September 2015, the *O'Connor* court certified a subclass of drivers, but excluded any driver who accepted the Uber contract after June 2014 and did not opt out.

<sup>108</sup> *O'Connor v. Uber Techs., Inc.*, 311 F.R.D. 547, 555-56 (N.D. Cal. 2015). This decision preceded the Ninth Circuit's later reversal of Judge Chen's decision in *Mohamed*.

<sup>109</sup> *O'Connor v. Uber Techs., Inc.*, No. 13-CV-03826-EMC, 2016 WL 6997166, at \*1 (N.D. Cal. May 2, 2016). Numerous drivers did indeed opt out of this revision, and pursued a class action on behalf of all similarly situated opt-out drivers. See *Razak v. Uber Techs., Inc.*, No. CV 16-573, 2016 WL 3960556, at \*3

December 23, 2015, Judge Chen enjoined the distribution of that revised PDAA.<sup>110</sup> In May 2016, Judge Chen finally vacated that injunction on the grounds that the parties had tentatively settled the lawsuits.<sup>111</sup>

In August 2016, Judge Chen rejected the parties' proposed settlement of the class action, and settlement efforts are ongoing.<sup>112</sup> However, today, Uber's nationwide PDAA still incorporates Judge Chen's virtually unprecedented rewriting.

## V. LESSONS

What lessons can be drawn from Uber's use of its rider and driver PDAAs and the voluminous litigation it generated? Of course, there is the obvious: arbitration clauses generate a lot of litigation about arbitration.<sup>113</sup> Beyond that, below I share numerous observations from my review of Uber's nationwide attempt to enforce its PDAAs.

First, good legal advice matters. Assuming Uber inserted arbitration clauses into its rider agreements back in 2013 on the advice of lawyers, those lawyers could have given better advice. It is well-established law that contracting parties must be on reasonable notice of the terms of the contract for a valid contract to be formed. Uber could have prevented legal losses, such as those seen in *Meyer*, if its lawyers had better advised Uber how to set up its account creation screens so as to provide users with reasonable notice of the terms and conditions governing their contractual relationship. If Uber had designed the sign-up screen with the key phrase featured more prominently, in either a larger font or highlighted in some manner, the existence of the Terms and Conditions would have been more obvious to users and its PDAA would have been more immune to legal challenge. In addition, the Uber lawyers could have advised Uber to put the rider PDAA towards the very top of the Terms and Conditions as opposed to "burying" it on later pages. Finally, no good explanation exists as to why the driver PDAA included a delegation clause but the rider PDAA did not. While these revisions might not have stopped users from opposing a motion to compel arbitration, they might have led to a court granting Uber's motion more easily and quickly.

On the other hand, Uber's inclusion of a delegation clause in its driver PDAA protected its preference for arbitration as a dispute resolution method. By inserting a delegation provision within a PDAA, companies can ensure that threshold questions of

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(E.D. Pa. July 21, 2016) (denying motion to compel arbitration of Philadelphia-based UberBLACK drivers' claims because plaintiffs had opted out of Uber's arbitration agreement).

<sup>110</sup> *O'Connor*, 2016 WL 6997166, at \*1.

<sup>111</sup> *Id.*

<sup>112</sup> See *O'Connor v. Uber Techs., Inc.*, No. 13-CV-03826-EMC, 2016 WL 4398271 (N.D. Cal. Aug. 18, 2016). At the time of publication, *O'Connor* was still pending.

<sup>113</sup> See Thomas E. Carbonneau, *The Assault on Judicial Deference*, 23 AM. REV. INT'L ARB. 417, 418 (2012) (lamenting that "the litigious spirit [has] invaded the arbitration process").

arbitrability will be heard by an arbitration panel, not a court.<sup>114</sup> Unless a reluctant party directly challenges the enforceability of the delegation provision itself, arbitrability questions will be routed directly to court, effectively cutting off the reluctant party from even a threshold review by a court of the validity of the underlying contracts, including the arbitration agreement.

Similarly, Uber's use of an opt-out provision when it first distributed its PDAA to drivers almost single-handedly ensured that a court could not find the PDAA unconscionable, again preserving arbitration as Uber's preferred dispute resolution mechanism. Since unconscionability requires both procedural and substantive unfairness,<sup>115</sup> offering users the opportunity to opt out of the arbitration requirement, assuming it is a meaningful opportunity and the terms are not hidden, removes any hint of procedural unfairness.<sup>116</sup> It is not a "take it or leave it" adhesive contract; it is a "take it or opt out" contract. Uber's lawyers wisely advised it to provide an opt-out.

Second, despite concerns that the Supreme Court has eliminated the ability of the weaker party to a bargain to void forced arbitration clauses through its twenty-first century FAA jurisprudence,<sup>117</sup> parties reluctant to arbitrate still might be able to successfully challenge their enforceability. Both Uber drivers and riders have been able to avoid arbitration of their disputes with Uber in certain factual circumstances on grounds such as lack of mutual assent and unconscionability. Thus, the savings clause is doing what Congress designed it to do nearly a hundred years ago: preserving state law grounds for the revocation of any contract as valid grounds to challenge arbitration contracts.<sup>118</sup> This ensures that any party reluctant to arbitrate can have a court hear a good-faith argument that it never entered into an agreement of any kind with the party seeking arbitration.

Third, judges' framing matters. Judge Rakoff framed his opinion in *Meyer* around the Seventh Amendment to support the outcome and in sharp distinction to Judge Woodlock's framing of his decision in *Cullinane* around the Supreme Court's FAA decisions. This difference in framing can be attributed, at least in part, to Judge Rakoff's well-documented history of judicial activism.<sup>119</sup> While it remains to be seen if the Second Circuit will overturn Judge Rakoff's opinion in *Meyer*, for now at least, Uber passengers are not bound by the arbitration clause for the same reason that legions of consumers have not been bound by print clauses: they could not have agreed to the clause if they did not have, at a minimum, reasonable notice of the existence of those terms.

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<sup>114</sup> *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 69 (2010).

<sup>115</sup> *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1210 (9th Cir. 2016).

<sup>116</sup> See Brian A. Berkley, *Can Opt-Out Provisions Save Arbitration Clauses?*, LAW360 (June 8, 2016, 12:49 PM EDT), <https://www.law360.com/articles/804659/can-opt-out-provisions-save-arbitration-clauses>.

<sup>117</sup> See Gross, *supra* note 35.

<sup>118</sup> See Federal Arbitration Act, 9 U.S.C. § 2 (2012).

<sup>119</sup> See Sasha Abramsky, *Jed Rakoff and the Lonely Fight for Wall Street Justice*, THE NATION (June 18, 2014), <https://www.thenation.com/article/jed-rakoff-and-lonely-fight-wall-street-justice/> (last visited Feb. 26, 2017).

Fourth, Uber successfully used a class action waiver to avoid dozens of costly rider and driver class actions nationwide. Since *Concepcion*, courts routinely reject unconscionability challenges to class action waivers. Including a class action waiver kept many consumer and employee claims that have no meaningful value absent numerosity from ever being brought. Thus, because some claims will never be brought as economically unfeasible, the class action waiver validly immunized Uber from liability on millions of dollars of otherwise viable claims.<sup>120</sup>

Fifth, in invoking Rule 23(d), Judge Chen in *O'Connor* found an underutilized tool in his judicial toolbox to regulate the content of Uber's arbitration clause; indeed, to rewrite it. Generally, neither courts nor regulators have the power to order a company to use particular words or phrases in its arbitration contracts.<sup>121</sup> However, the *O'Connor* decisions provide significant precedent supporting a federal district court's use of FRCP 23(d) powers to mandate that companies inserting or revising a PDAA in agreements with putative class members include certain phrases and language to ensure they have been notified of the impact of an arbitration clause on their legal rights and remedies.<sup>122</sup> This unusual use of Rule 23(d)—though not unprecedented<sup>123</sup>—remains unexplored in the arbitration literature to my knowledge. Though beyond the scope of this article, further analysis of Rule 23(d)'s impact on the content of arbitration clauses is needed.

Sixth, several federal court Uber decisions illustrate the dialogue that judges often have with each other regarding their interpretation and use of precedent. Numerous federal judges explicitly referenced the results of Uber cases in other federal districts when ruling on the Uber case before them.<sup>124</sup> Since so many district court judges have had occasion to

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<sup>120</sup> See *supra* note 4.

<sup>121</sup> One exception is in the securities industry, where the Securities and Exchange Commission has approved a securities self-regulatory organization's rule requiring very specific language in its member brokerage firms' PDAA's. See Fin. Indus. Regulatory Auth. R. 2268.

<sup>122</sup> See, e.g., *O'Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2014 WL 1760314 (N.D. Cal. May 2, 2014) (denying motion for reconsideration of Rule 23(d) order); *O'Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2013 WL 6407583, at \*7 (N.D. Cal. Dec. 6, 2013) (“the promulgation of the Licensing Agreement and its arbitration provision, runs a substantial risk of interfering with the rights of Uber drivers under Rule 23”).

<sup>123</sup> E.g., *Balasanyan v. Nordstrom, Inc.*, No. 10-CV-2671-JM-WMC, 2012 WL 760566, at \*4 (S.D. Cal. Mar. 8, 2012) (“Nordstrom's attempt to impose an arbitration agreement upon putative class members during the pendency of litigation cannot be allowed”).

<sup>124</sup> E.g., *Peng v. Uber Techs., Inc.*, No. 16CV545PKCRER, 2017 WL 722007, at \*14 (E.D.N.Y. Feb. 23, 2017) (“Most, if not all, of the other courts to have addressed the same issue similarly have concluded that the 30-day opt-out provision in Uber's service agreements precludes a finding of procedural unconscionability”); *Guan v. Uber Techs., Inc.*, No. 16CV598PKCCLP, 2017 WL 744564, at \*12 (E.D.N.Y. Feb. 23, 2017) (“Other courts interpreting Uber Services Agreements containing identical or nearly identical Class Action Waiver or PAGA carve-out provisions have uniformly upheld delegation of arbitrability questions”); *Zawada v. Uber Techs., Inc.*, No. 16-CV-11334, 2016 WL 7439198, at \*4 (E.D. Mich. Dec. 27, 2016) (“The Ninth Circuit's conclusion—that the delegation provision properly delegated questions of arbitrability to an arbitrator—is consistent with every other district court to reach the issue when examining the same or substantially similar Raiser agreements since *Mohamed*”).

interpret the same Uber PDAA, if one finds unenforceable what another judge found enforceable, that judge might take particular care in justifying the different outcome without criticizing it. This might explain Judge Rakoff's careful distinction in *Meyer* of Judge Woodlock's opinion in *Cullinane*, since they both evaluated whether plaintiffs had formed a valid contract with Uber through the exact same account creation process. Also, when Judge Woodlock stated "[i]t is not within the writ of the lower courts to replot the contours of arbitration law when the metes and bounds have been set clearly, unambiguously and recently by the Supreme Court,"<sup>125</sup> he spoke directly to other federal judges who agree that the lower courts are hamstrung by the Supreme Court's broad interpretation of the FAA.<sup>126</sup>

Finally, Uber's rapid and worldwide development of a cheaper and more efficient yet controversial mode of transportation parallels the growth in companies' use of "forced" arbitration clauses to facilitate a cheaper and more efficient yet controversial mode of resolving disputes. Uberization is emblematic of society's move towards more efficient and less expensive methods of solving problems. Uber solves the transportation problem by efficiently and cheaply matching riders and drivers. Taxis, often given a monopoly in some cities through regulation of taxi licenses, sometimes charge exorbitant prices and rely on outmoded technology (telephone calls or email requests) to locate passengers.

Similarly, Uber solved its dispute resolution problem by opting out of the inefficient and expensive litigation system in this country and selecting a more efficient and cheaper dispute resolution mechanism that best suited its needs. Values of process pluralism<sup>127</sup> and contracting autonomy outweighed those of the right to a jury trial and governmental limitation on parties' freedom of contract. Through its own dispute resolution choices, Uber symbolizes the drive to cheaper and more efficient methods of conducting all types of business.

The plethora of federal court decisions generated by challenges to Uber's PDAA provided Uber with a road map to drafting a bulletproof PDAA. Each iteration of Uber's PDAA – revised in response to Judge Chen's Rule 23(d) orders or revised as Uber learned what courts required to send the dispute to arbitration – reflected Uber's trial and error approach to PDAAs. Yet, with each trial, Uber's PDAA came closer to achieving Uber's goal of avoiding litigation and ensuring arbitration of disputes with individual riders and drivers. The resulting clause is a legally effective algorithm to solve the problem of economic inefficiencies and high costs stemming from class action litigation.

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<sup>125</sup> *Cullinane*, 2016 WL 3751652, at \*1 (internal citations omitted).

<sup>126</sup> See *supra* note 61 and accompanying text.

<sup>127</sup> See Gross, *supra* note 35, at 112.