GEORGIA M. MCGINTY A/K/A GEORGIA M. FRASER AND JOHN FRANCIS MCGINTY (w/h), Plaintiffs-Respondents, v. UBER TECHNOLOGIES, INC. AND RAISER, LLC, Defendants-Appellants, and JIA WEN ZHENG, JERINSON M. MEDRANO PERALTA, AND BRACHY FELIZDELAPAZ, Defendants.	Superior Court of New Jersey Appellate Division Docket No. A-001368-23 Civil Action On Appeal from an Order of the Superior Court of New Jersey, Law Division, Middlesex County Docket No. Mid-L-1085-23 Sat Below: Hon. Bruce J. Kaplan, J.S.C.

DEFENDANTS-APPELLANTS' BRIEF

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Preliminary Statement

The Defendants-Appellants in this case, Uber Technologies, Inc. and Rasier, LLC (collectively "Uber" or "Defendants"), offer valuable services to millions of users every day in New Jersey and throughout the country. Like many companies, Uber offers its services through a contract, and it limits access to its services to users who agree to those Terms of Use. Uber periodically updates its Terms of Use, and when it does it asks users to read and agree to the new terms. For several years now, those Terms have included (among other things) a clear, conspicuous, and unambiguous agreement between Uber and its users that most disputes arising between them will be resolved through binding arbitration rather than in court.

Plaintiff Georgia McGinty is a practicing attorney. She is also a regular user of Uber's services. She first registered for an Uber account in 2015, and since then she has used her account to enter dozens of transactions through Uber's Rides and Eats platforms. When she signed up for an Uber account, she agreed to arbitrate any disputes with Uber arising from her use of Uber's services. Since then, she has expressly agreed to Uber's Terms of Use—including the arbitration agreement—on at least two other occasions relevant here.

Most recently, in January 2022, Ms. McGinty agreed (either by herself or through her agent) to Uber's December 2021 Terms of Use (the "December

Terms"). That agreement unambiguously provides that personal injury claims against Uber "will be settled by binding individual arbitration between you and Uber, *and not in a court of law*." The December Terms provide detailed information about the arbitration process, including what private entity would administer the arbitration, the rules applicable to the arbitration, who the potential arbitrators would be, and how to initiate an arbitration proceeding. Included throughout are terms that distinguish an arbitration from a court proceeding.

Prior to agreeing to the December Terms, Ms. McGinty had also agreed to Uber's January 2021 Terms of Use (the "January Terms") in April 2021. The January Terms are similar to the December Terms, and they expressly stated that Ms. McGinty and Uber were "each waiving the right to a trial by jury." This Court has already held that the January Terms are an enforceable contract under New Jersey law, and multiple other courts around the country agree.

Not long after Ms. McGinty agreed to the December Terms, she and her husband were involved in a car accident while riding as passengers in a vehicle that they had requested through the Uber Rides platform. Plaintiffs sought to hold Uber responsible for their driver's alleged negligence, so they sued Uber (and some other defendants). Uber moved to compel arbitration in accord with Ms. McGinty's contractual agreement. But the trial court denied Uber's motion, finding that the December Terms were unenforceable because they did not

say specifically that the user was waiving her right to a jury trial—unlike the January Terms that Ms. McGinty had also signed.

That decision was wrong. New Jersey law requires only that an arbitration provision explain *generally* that a signatory is giving up her right to bring her claims in court; no "magic words" are required, as this Court has repeatedly held. The parties' agreement here provided adequate notice many times over. It explicitly states that disputes between them will be handled in binding arbitration "and not in a court of law," and it elaborates on the distinction between arbitration and a court proceeding. Ms. McGinty, an attorney, cannot plausibly contend that she did not understand what "arbitration" meant, especially in light of her earlier agreement to the January Terms where she expressly waived her right to "trial by jury." And in any event, the trial court should not even have reached the question of whether the contractual waiver of rights was sufficiently clear because the parties delegated all issues of arbitrability—including the enforceability of the arbitration agreement—exclusively to the arbitrator and not to a court. None of Plaintiffs' other objections to arbitration has merit.

In short, Plaintiffs unmistakably agreed in exchange for using Uber's services that they would arbitrate personal injury claims like those here. Ms. McGinty knew what she was agreeing to. This Court should reverse the trial court's denial of Uber's motion to compel and hold Plaintiffs to their bargain.

Procedural History

This is an appeal from an order denying Defendants' motion to compel arbitration. Plaintiffs filed their Complaint on February 23, 2023 against Uber, Rasier, and several other defendants. (Da1–21.) Defendants filed an Answer on April 3, 2023. (Da35–49.) Defendants' Answer asserted, among other affirmative defenses, that Plaintiffs had agreed to arbitrate this dispute. (Da47–48.)

On July 5, 2023, Defendants' counsel conferred with Plaintiffs' counsel regarding a stipulation to arbitration in accord with Ms. McGinty's agreement. (Da103 ¶ 5.) Plaintiffs refused to stipulate to arbitration, prompting Defendants to file their motion to compel arbitration on August 23, 2023. (Da63–64.) After hearing oral argument, Judge Kaplan issued a written order on November 22, 2023, denying Defendants' motion to compel. (Da298–304.) Defendants timely filed their notice of appeal on January 5, 2023. *See R.* 2:2-3(b)(8).

Statement of Facts

A. Plaintiffs used the Uber Rides platform.

Uber is a technology company that uses its proprietary technology to develop and maintain digital multi-sided marketplace platforms. (Da73 ¶ 4.) On one side of the marketplace, businesses and individuals wishing to offer services to the public use Uber's platforms to connect with users and obtain payment-processing services. On the other side of the platforms are users who can connect with and obtain various services from businesses and individuals. On the Uber

Rides platform, for example, Uber enables users seeking transportation to connect with drivers willing to offer rides for a fee. On the Uber Eats platform, users can connect with restaurants willing to provide meals and drivers willing to deliver meals to users. (Da73 ¶ 4.) Rasier, LLC is a wholly owned subsidiary of Uber, and is the registered transportation network company in New Jersey that sub-licenses Uber's technology to, among others, independent drivers.[1]

Plaintiffs allege that on March 31, 2022, they were riding as passengers in a car being driven by Defendant Jia Wen Zheng that collided with a car being driven by Defendant Jerinson Medrano Peralta. (Da1–5.) Plaintiffs had used Uber's Rides platform to connect with Zheng. (Da1–2; Da101.) Plaintiffs allege that Zheng was negligent in the operation of his vehicle, but they seek to hold Uber responsible for his actions. (Da15 ¶¶ 8–9; Da17 ¶¶ 7–8.)

B. Ms. McGinty confirmed that she had read and agreed to Uber's December Terms.

Ms. McGinty first signed up for an Uber account in June 2015. (Da75 ¶ 14; Da78.) Before a person can use Uber's platforms like Uber Rides or Uber Eats,

[1] Courts have recognized that independent drivers use the Uber App to provide transportation services to users as independent contractors, not employees of Uber. *See, e.g.*, *Edwards* v. *Mohammed*, No. MID-L-3906-19 (N.J. Super. Ct. Middlesex Cty. Jan. 7, 2022) (granting summary judgment to Uber); *Duncan* v. *Uber Techs., Inc*., No. 700606/2020, 2023 WL 7198189 (N.Y. Sup. Ct. Queens Cty. Sept. 27, 2023); *Shenouda* v. *Uber Techs., Inc.*, No. 601854/2020 (N.Y. Sup. Ct. Nassau Cty. Jan. 3, 2024) (NYSCEF Doc. No. 120).

she must agree to Uber's Terms of Use.

In December 2021, Uber revised its Terms of Use. On January 8, 2022, Plaintiff was presented with a pop-up blocking screen in her Uber app presenting those updated Terms of Use. A depiction of the pop-up screen appears on page Da77 of the record. Uber's app was designed so that Ms. McGinty could not continue using her account to access Uber's services unless and until she agreed to the updated Terms of Use. (Da74 ¶ 9; Da222 ¶ 10.)

The in-app pop-up screen had a header that said: "We've updated our terms." (Da77.) Below, in large, clear type, it stated: "We encourage you to read our updated Terms in full." (*Id*.) Immediately underneath were two conspicuous, clickable hyperlinks to Uber's Terms of Use and Privacy Notice. (*Id*.) The hyperlinks were underlined and in bright blue text. (*Id.*) When the user clicked on the hyperlinks, they would display, respectively, the then-operative Terms of Use and Privacy Notice for the user to review. (*Id.*) The screen also displayed an image of a blue pencil signing on a signature line marked by an "X." (*Id.*)

Underneath the hyperlinks was a checkbox. (*Id*.) The only other text on the screen appeared next to the checkbox and read, in bold text: "By checking this box, I have reviewed and agree to the Terms of Use and acknowledge the Privacy Notice." (*Id.*) It also stated, in less prominent text: "I am at least 18 years of age." (*Id.*) Below the checkbox was a button marked "Confirm." (*Id.*)

Uber's digital records show that on January 8, 2022, Ms. McGinty logged into her Uber account using her password, checked the box next to the statement "I have reviewed and agree to the Terms of Use," and pressed "Confirm." (Da73–74 ¶¶ 7–8, 12; *see* Da77–78.)

In the trial court, Plaintiffs asserted that it was not Ms. McGinty but rather her minor daughter who checked that box and clicked the "Confirm" button—even though it required attesting to Uber that she was at least 18. (Da198–99 ¶¶ 9–15, 19; Da210 ¶¶ 6–12; *see* Da77.) Plaintiffs claim that their daughter, while using Ms. McGinty's phone and with Ms. McGinty's permission, confirmed her agreement to the December Terms before ordering food for Plaintiffs to eat to be delivered to Plaintiffs through Uber Eats. (*See id*.)

C. The December Terms contain an unambiguous arbitration agreement that also covers third-party beneficiaries and delegates most issues to the arbitrator.

The December Terms to which Ms. McGinty agreed—either by herself or through her daughter using her Uber account with her consent and on her behalf—contain an arbitration provision. That agreement provides that most disputes that may arise between Ms. McGinty and Uber, including disputes concerning auto accidents or personal injuries, will be resolved through binding arbitration "and not in a court of law." (Da81–82.) Ms. McGinty also agreed that any disputes over arbitrability would be delegated to the arbitrator.

The first paragraph of the December Terms states in all caps: "PLEASE READ THESE TERMS CAREFULLY, AS THEY CONSTITUTE A LEGAL AGREEMENT BETWEEN YOU AND UBER." (Da80.) The first page of the agreement contains the following paragraph, in all caps:

> IMPORTANT: PLEASE BE ADVISED THAT THIS AGREEMENT CONTAINS PROVISIONS THAT GOVERN HOW CLAIMS BETWEEN YOU AND UBER CAN BE BROUGHT, INCLUDING THE ARBITRATION AGREEMENT (SEE SECTION 2 BELOW). PLEASE REVIEW THE ARBITRATION AGREEMENT BELOW CAREFULLY, AS IT REQUIRES YOU TO RESOLVE ALL DISPUTES WITH UBER ON AN INDIVIDUAL BASIS AND, WITH LIMITED EXCEPTIONS, THROUGH FINAL AND BINDING ARBITRATION (AS DESCRIBED IN SECTION 2 BELOW). BY ENTERING INTO THIS AGREEMENT, YOU EXPRESSLY ACKNOWLEDGE THAT YOU HAVE READ AND UNDERSTAND ALL OF THE TERMS OF THIS AGREEMENT AND HAVE TAKEN TIME TO CONSIDER THE CONSEQUENCES OF THIS IMPORTANT DECISION.

(Da80–81).

On page 2 of the December Terms is the bolded heading "Arbitration Agreement" in a font size substantially larger than the surrounding text. (Da81.) The first sentence describes, in plain language, the effects of the Arbitration Agreement: "By agreeing to the Terms, you agree that you are required to resolve any claim that you may have against Uber on an individual basis in arbitration as set forth in this Arbitration Agreement." (*Id.*)

Next, Section (2)(a), titled in large, bold font "Agreement to Binding Arbitration Between You and Uber," states in relevant part that:

> You and Uber agree that any dispute, claim or controversy in any way arising out of or relating to … (ii) your access to or use of the Services at any time, [or] (iii) incidents or accidents resulting in personal injury that you allege occurred in connection with your use of the Services … will be settled by binding arbitration between you and Uber, and not in a court of law.

(Da81–82.)

Section 2(b) is titled "Exceptions to Arbitration." (Da85.) It states that, "[n]otwithstanding the foregoing, this Arbitration Agreement shall not require arbitration" of certain narrow types of claims: specifically, claims brought in small-claims court; individual sexual-assault or sexual-harassment claims; and intellectual-property-right claims. (*Id*.) The agreement clarifies that only those specific types of claims "may be brought and litigated in a court of competent jurisdiction[.]" (*Id*.)

Section 2(c) provides significant detail about the rules and procedure of an arbitration proceeding under the agreement. (Da85–87.) It specifies what entity would administer the arbitration, what rules apply to an arbitration proceeding, who the arbitrator would be, and how the arbitrator would be picked. (*Id*.) Section 2(d) explains in detail the process of initiating an arbitration. (*Id.*)

The December Terms also delegate all threshold questions of arbitrability, including the enforceability of the arbitration agreement, to the arbitrator. That delegation clause (*see* Da84–85) provides in relevant part:

> **Delegation Clause:** Only an arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute arising out of or relating to the interpretation, applicability, enforceability, or formation of this Arbitration Agreement, including without limitation any claim that all or any part of this Arbitration Agreement is void or voidable. An arbitrator shall also have exclusive authority to resolve all threshold arbitrability issues, including issues relating to whether the Terms are applicable, unconscionable, or illusory and any defense to arbitration, including without limitation waiver, delay, laches, or estoppel.

The December Terms also contain an express third-party beneficiary provision (*see* Da85) titled in bold and in an underlined font:

> **Application to Third Parties.** This Arbitration Agreement shall be binding upon, and shall include any claims brought by or against any third parties, including but not limited to your spouses, heirs, third-party beneficiaries and assigns, where their underlying claims arise out of or relate to your use of the Services. To the extent that any third-party beneficiary to this agreement brings claims against the Parties, those claims shall also be subject to this Arbitration Agreement.

The remaining sections of the December Terms concern the services offered by Uber; rules for the rider's use of the services; the rider's agreement to pay for services and fees; disclaimers, limitations of liability, and indemnification; and miscellaneous provisions governing choice of law, notice, and assignment of rights. (Da89–98.)

D. Ms. McGinty had also agreed to Uber's January 2021 Terms.

January 8, 2022 was not the first time Ms. McGinty had agreed to Uber's Terms of Use, including its arbitration agreement. Months earlier, on April 1, 2021, she was presented with Uber's Terms via the same in-app blocking interface described above. (Da221–22 ¶¶ 9–10.) Like the December Terms, the Jan-

uary Terms amended Ms. McGinty's contract with Uber, including her agreement to arbitrate personal injury disputes. (Da228.) Uber's records show that Ms. McGinty placed a check in the box next to the statement "I have reviewed and agree to the Terms of Use" and clicked the "Confirm" button to confirm her assent to the January Terms. (Da222 ¶ 10.) Ms. McGinty does not dispute that she agreed to the January Terms in April 2021. (*See* Da199 ¶ 19.)

Uber's January Terms are materially similar to the December Terms. (Da227–38.) They contain a similar arbitration provision, a section on exceptions to arbitration, provisions explaining the rules and procedure of arbitration and how to initiate an arbitration, a delegation clause, and a third-party beneficiary clause. (Da228–30.) In addition, when Ms. McGinty reviewed and agreed to the January Terms, she expressly waived her right to a jury trial: Those Terms stated that "[y]ou acknowledge and agree that you and Uber are each waiving the right to a trial by jury." (Da228.)

E. The trial court denied Uber's motion to compel arbitration.

Plaintiffs filed this lawsuit against Uber (and others) in February 2023, and Uber moved to compel arbitration on August 23, 2023. (Da1; Da63–64.)

The trial court denied Uber's motion to compel, holding that the arbitration agreement in the December Terms was unenforceable under *Atalese* v. *U.S. Legal Services Group, L.P.*, 219 N.J. 430 (2014). (Da298–304.) The trial court

concluded that the agreement "fail[ed] to clearly and unambiguously inform a plaintiff of her waiver of the right to pursue her claims in a judicial forum." (Da303–04.) The court thought it unclear that "arbitration is a substitute for the right to seek relief in our court system" or that "by agreeing to this provision, the parties have waived their right to a court action." (Da304.) The court also stated that the agreement "lacks any specificity on what that resolution would look like or what the alternative to such resolution might be." (*Id.*) And last, the court found it significant that Uber's January Terms previously had an express jury waiver provision, whereas the December Terms did not. (Da302.)

Argument

The trial court erred in holding that Ms. McGinty's contractual agreement to arbitrate this personal-injury dispute is unenforceable. Uber's in-app interface ensured that Ms. McGinty had notice of the terms to which she was agreeing. Those terms stated in plain, easy-to-understand language that "*any* dispute, claim or controversy" like this one would be "settled" "*not in a court of law*" but instead by "binding arbitration." (Da81–82 (emphasis added).) Contrary to the trial court's opinion, that language made it "clear to the parties that 'arbitration is a substitute for the right to seek relief in our court system.'" (Da304 (quoting *Morgan* v. *Sanford Brown Inst.*, 225 N.J. 289, 307–308 (2016).) No reasonable user could have understood the December Terms any other way.

The December Terms' plain text describing both the right that Plaintiffs were giving up (to bring their personal-injury claims in a court of law) and the substitute procedure to be used (binding arbitration), provided all the notice that New Jersey law requires. The New Jersey Supreme Court in *Atalese* held that no magic words are required, 219 N.J. at 439, so the trial court erred by insisting that Uber's Terms of Use were unenforceable unless they referred specifically to "waiver" of the "jury trial" right. (*See* Da302.) What's more, this record demonstrates beyond dispute that the particular plaintiff here, Ms. McGinty, *knew* her agreement to arbitrate waived her jury-trial right, because she had previously agreed to the January Terms that stated that point expressly. And the trial court erred for an additional reason as well: the court should not have even considered Plaintiffs' challenge to the enforceability of the arbitration agreement because Ms. McGinty and Uber agreed that only the arbitrator would have exclusive authority to determine that threshold question. That delegation clause is another arbitration agreement that must be enforced pursuant to the Federal Arbitration Act, as interpreted by the Supreme Court of the United States.

Plaintiffs attempted below to evade Ms. McGinty's agreement to arbitrate on various other grounds that the trial court did not reach. But none of those arguments has merit. First, even accepting as true Ms. McGinty's self-serving assertion that her daughter was the person who agreed to the December

Terms while using Ms. McGinty's phone to order a meal, that fact would not relieve Ms. McGinty of her agreement. Plaintiffs' daughter agreed to the December Terms with both actual and apparent authority. Moreover, even if Ms. McGinty's consent to the December Terms were found invalid, the only result would be that Plaintiffs remain bound by Ms. McGinty's earlier agreement to the January Terms, which *also* required arbitration of this dispute. Next, Mr. McGinty's claim in this lawsuit is expressly covered by the arbitration agreement because he rode in a vehicle that his wife requested on their behalf through the Uber App, making him an unmistakable third-party beneficiary of his wife's contract with Uber. And last, contrary to Plaintiffs' contention, Uber never did anything to waive its right to enforce the arbitration agreement.

The Court should reverse the trial court and hold that Plaintiffs are required to arbitrate their personal-injury claims against Defendants in accord with Ms. McGinty's contractual promise.

I. Ms. McGinty formed an enforceable arbitration agreement with Uber through the December Terms. (Da301–304.)

The New Jersey Supreme Court has held that "arbitration agreements may not be subjected to more burdensome contract formation requirements than that required for any other contractual topic." *Martindale* v. *Sandvik, Inc.*, 173 N.J. 76, 83 (2002). That rule is compelled by the Federal Arbitration Act, which preempts any state statute or judicial rule that would treat arbitration agreements

less favorably than other kinds of contracts. *See, e.g.*, *Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 581 U.S. 246, 248 (2017). Here, Ms. McGinty and Uber formed a valid contract through Uber's in-app pop-up blocking screen. And the December Terms contain a clear, unambiguous, and enforceable arbitration agreement that complies with all the requirements of New Jersey law.

A. Uber's digital interface gave Ms. McGinty reasonable notice of the contract's terms.

Ms. McGinty entered her agreement with Uber by affirmatively checking a box stating that she had reviewed and agreed to the Terms of Use. Plaintiffs have never disputed that the Uber App's clickwrap interface—which provided conspicuous notice of the new terms of use and required her to affirmatively assent to those terms by checking a box and clicking a button—provided reasonable notice of the contract terms and thus formed a valid agreement. *See Santana* v. *SmileDirectClub, LLC*, 475 N.J. Super. 279, 288 (App. Div. 2023) ("In the context of clickwrap agreements … 'the offeree will … be bound by the agreement if a reasonably prudent user would be on inquiry notice of the terms.'"). This Court has already held that an identical Uber clickwrap interface, whereby a user agreed to Uber's January 2021 Terms, provided reasonable notice of the Terms of Use and created a valid contract. *Williams* v. *Ysabel*, No. A-1391-22, 2023 WL 5768422, at *1, *4 (N.J. Super. Ct. App. Div. Sept. 7, 2023) (unpublished opinion). (*See* Da73–74 ¶ 8; Da77; Da222–223 ¶¶ 6–10.)

The *Williams* decision is supported by decades of New Jersey precedent that has "routinely enforced" clickwrap agreements similar to the one at issue here. *Skuse* v. *Pfizer, Inc*., 244 N.J. 30, 55 n.2 (2020); *see, e.g.*, *Caspi* v. *Microsoft Network, L.L.C.*, 323 N.J. Super. 118, 122, 125 (App. Div. 1999) (finding that plaintiffs had reasonable notice of forum-selection clause presented by clickwrap agreement because they "were free to scroll through the various computer screens that presented the terms of their contracts before clicking their agreement" and "ha[d] the option to click 'I Agree' or 'I Don't Agree'"); *Santana*, 475 N.J. Super. at 290; *cf. Wollen* v. *Gulf Stream Restoration & Cleaning, LLC*, 468 N.J. Super. 483, 502–503 (App. Div. 2021) (declining to enforce a different type of digital agreement because the "plaintiff was not required to … acknowledge the terms and conditions by 'clicking to accept' or checking a box that she viewed them before clicking the … submit button"). The clickwrap interface thus formed a valid agreement to the December 2021 Terms of Use.

B. The December Terms unambiguously apprised Ms. McGinty that she was waiving her right to sue Uber in court.

The arbitration agreement within the December Terms makes it abundantly clear that, by agreeing to arbitrate their claims, both Uber and the user are giving up their rights to bring a lawsuit in court. That is all that is required under New Jersey law for an enforceable arbitration agreement. And while this Court need go no further in the analysis, Ms. McGinty in particular had addi-

tional notice and knowledge that she was waiving her right to a jury trial because she had already agreed to that *express* provision in the January Terms. The trial court erred in holding the December Terms unenforceable.

1. The December Terms' arbitration agreement satisfies *Atalese*.

An arbitration agreement is enforceable in New Jersey if it is "sufficiently clear to place a consumer on notice that he or she is waiving a constitutional or statutory right." *Atalese*, 219 N.J. at 443. "No particular form of words" is required to convey that waiver. *Id*. at 444. Rather, an arbitration clause must explain "at least in some general and sufficiently broad way … that the plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute." *Id*. at 447 (emphasis added).

Other courts applying *Atalese* have correctly observed that the Supreme Court described that standard as disjunctive: an arbitration agreement must make clear *either* that the party is waiving her right to sue in court *or* that she is waiving her right to a jury trial. *See, e.g.*, *Columbus Circle NJ LLC* v. *Island Constr. Co*., LLC, No. A-1907-15T1, 2017 WL 958489, at *4 (N.J. Super. Ct. App. Div. Mar. 13, 2017) (unpublished opinion) (holding *Atalese* does not require an arbitration agreement to "explain a plaintiff is giving up the right to bring claims in court and have a jury resolve a dispute") (emphasis in original). *Atalese* "simply requires a contract 'to explain in some minimal way that arbitration is a substi-

tute for a consumer's right to pursue relief in a court of law.'" *Id.* (quoting *Morgan*, 225 N.J. at 294).

(a) This Court has repeatedly held that an arbitration agreement need not contain an express jury trial waiver.

New Jersey courts have repeatedly held that an arbitration agreement that informs a consumer that she is giving up the ability to bring a claim in court—without any reference to a waiver of the jury-trial right—satisfies *Atalese* and is enforceable. *See, e.g.*, *Stutheit* v. *Elmwood Park Auto Mall*, No. A-4915-17T2, 2018 WL 6757030, at *3–4 (N.J. Super. Ct. App. Div. Dec. 26, 2018) (unpublished opinion) (enforcing arbitration agreement that did not mention a jury trial but referred to the user giving up the right to "maintain a court action"); *Jaworski* v. *Ernst & Young U.S. LLP*, 441 N.J. Super. 464, 480–481 (App. Div. 2015) (enforcing arbitration agreement that said "neither [party] will be able to sue in court," and rejecting plaintiffs' argument that the agreement needed to address jury issues); *Griffin* v. *Burlington Volkswagen, Inc*., 411 N.J. Super. 515, 518 (App. Div. 2010) (enforcing arbitration clause stating that, by agreeing to arbitrate, the parties gave up "their rights to maintain other available resolution processes, such as a court action or administrative proceeding, to settle their disputes"). The federal court in *Collazo* v. *Prime Flight of Delaware, Inc*., No. 19-cv-21312, 2020 WL 3958498 (D.N.J. July 13, 2020), observed that it was unaware of any case that "strikes down an agreement to arbitrate under *Atalese*

because it waives a court trial, without mentioning a jury specifically." No. 19-cv-21312, 2020 WL 3958498, at *7 (D.N.J. July 13, 2020).

This Court's recent decision in *Drosos* v. *GMM Global Money Managers Ltd.*, No. A-3674-21, 2023 WL 7545067 (N.J. Super. Ct. App. Div. Nov. 14, 2023) (unpublished opinion) is directly on point. The *Drosos* Court reversed a trial court's denial of a motion to compel arbitration based on an arbitration agreement that was substantially similar to—though in several respects *less* informative than—the arbitration agreement between Uber and Ms. McGinty in the December Terms. *Id.* at *6. The agreement in *Drosos* provided that:

> All members agree that any controversy or claim arising out of or relating to this Agreement, or any dispute arising out of the interpretation of this Agreement, which the parties are unable to resolve, shall be finally resolved and settled exclusively by binding arbitration by a single arbitrator acting under the Rules of the American Arbitration Association ("AAA") then in effect *rather than the parties going into litigation in the Judicial Court system*.

Id. at *4 (emphasis added). The trial court in *Drosos* had erroneously held the arbitration clause unenforceable for the same reason as the trial court here: because it did not expressly state that "the signatory is waiving the critical right to a trial by jury" and because it "fails to explain the distinction between arbitration and civil litigation." *Id*. at *6.

This Court reversed. Arbitration agreements are enforceable when they explain in "simple ways that arbitration is a waiver of the right to bring suit in a

judicial forum." *Drosos*, 2023 WL 7545067, at *6 (cleaned up). The Court held that the *Drosos* arbitration provision "clearly" satisfied this requirement because the statement that disputes would not be resolved in "litigation in the Judicial Court system," but rather in arbitration, was "language meeting the standard of *Atalese*." *Id*. The Court continued: "That the [arbitration] clause does not mention specifically that the signatories were waiving a jury trial does not preclude its enforcement. As defendants rightly note, … *Atalese* … [does not] require[ ] specific 'jury trial' language to accomplish a waiver of rights." *Id.*

The arbitration agreement here is even more clear than the provision this Court held enforceable in *Drosos*. To start, the first page of the December Terms states conspicuously that the user must resolve disputes with Uber "through final and binding arbitration" when discussing "how claims between You and Uber can be brought." (Da80.) This paragraph also bears multiple warnings to the user to "review the arbitration agreement below carefully" and "take[ ] time to consider the consequences of this important decision." (Da80–81.) Those statements reinforced for users that the arbitration agreement will affect their rights specifically as they relate to resolving claims and disputes against Uber. *See Delgado* v. *BMW Fin. Servs. NA, LLC*, No. A-0933-22, 2023 WL 5538644, at *3–4 (N.J. Super. Ct. App. Div. Aug. 29, 2023) (unpublished opinion) (enforcing arbitration agreement in part based on similar warning language).

Moreover, the arbitration provision itself, which appears on the second page of the December Terms, expressly states that any disputes, claims, or controversies between the user and Uber "will be settled by binding arbitration between you and Uber, **and not in a court of law."** (Da81–82 (emphasis added).) Both the words themselves and the sentence structure make clear not only that the user will not be able to bring disputes or claims against Uber in court, but also that arbitration is not the same thing as a court. That satisfies *Atalese*. *See* 219 N.J. at 445 ("[T]he point can be made that by choosing arbitration one gives up the 'time-honored right to sue.'").

(b) The parties' agreement details the distinctions between arbitration and a judicial forum.

This Court need go no further to reverse the trial court's decision. The above provisions alone are "sufficiently clear to place a consumer on notice" that she is giving up her rights to bring claims in court and constitute an enforceable arbitration agreement under *Atalese*. *See* 219 N.J. at 442 (all that is required is "some explanatory comment … that arbitration is a substitute for the right to have one's claim adjudicated in a court of law"); *see Drosos*, 2023 WL 7545067, at *6; *Stutheit*, 2018 WL 6757030, at *3–4; *Griffin*, 411 N.J. Super. at 518.

Even if more were required, the arbitration agreement here is replete with additional terms that both reinforce the user's waiver and emphasize the difference between arbitration and court. Section 2(b) of the agreement, for example,

identifies as "Exceptions to Arbitration" certain categories of claims that the parties agree are "not require[ed]" to be brought in arbitration and can instead be brought in court. The agreement explains that those "limited" types of excepted claims "may be brought and litigated in a court of competent jurisdiction," (Da85), reiterating the distinction between arbitration and a court.

The arbitration agreement's delegation clause also makes clear that arbitration and court proceedings are mutually exclusive. The clause provides that "[o]nly an arbitrator, *and not* any federal, state, or local court," has authority to make various enumerated determinations. (Da84–85.) (emphasis added). That provision makes it even more clear that an arbitrator is not a federal, state, or local court. Nor is a court an arbitrator. (*See id.*)

Sections 2(c) and 2(d) of the December Terms provide still-more information about the arbitration process and further illustrate the distinction between arbitration and court. Like the enforceable *Drosos* agreement, the agreement here explains how and by whom an arbitration would be administered. *Frederick* v. *Law Office of Fox Kohler & Assocs. PLLC LLC*, 852 F. App'x 673, 677 (3d Cir. 2021) (arbitration provision was enforceable under *Atalese* where it "both clarif[ied] that arbitration is the singular way for the parties to resolve their disputes and establish[ed] the rules that will govern the arbitration").

The arbitration agreement also makes clear that the person overseeing a dispute between the parties will not be a judge or jury in a court of law, but rather a private individual chosen by the parties. For disputes arising outside of California, such as in New Jersey, the user and Uber "will … select[ ]" the Arbitrator "from the applicable arbitration provider's roster of arbitrators." (Da86.) An average person would understand from this context that the "Arbitrator" is not the same thing as a judge or a jury, and that the parties' ability to select the person who will hear their dispute is not how things happen in court. But if that were not enough, the agreement makes the Arbitrator's identity more explicit: "The Arbitrator will be either (1) a retired judge or (2) an attorney licensed to practice law." (*Id.*) Not a judge. Not a jury.

Finally, the arbitration agreement instructs a user on how to initiate arbitration: not by filing a complaint in a New Jersey court, but rather by sending a written demand for arbitration to Uber at Uber's offices in California and directly "to the Arbitration provider." (*See* Da86–87.) A party cannot follow the agreed-upon procedures and institute an action in court.

In short, the arbitration agreement in the December Terms provides clear and unambiguous notice to any reasonable user—through multiple different clauses—that by agreeing to arbitrate, they are giving up their rights to file a personal-injury lawsuit in court against Uber.

2. Ms. McGinty knew that she was waiving her right to a jury by agreeing to arbitration.

Even if this Court were unpersuaded by the overwhelming weight of authority holding that *Atalese* does not require an arbitration agreement to explicitly refer to "waiver" of a "jury trial," the December Terms would still be enforceable in this case because Ms. McGinty had notice through the January Terms that she had waived her right to a jury trial on any claims against Uber.

Ms. McGinty does not deny agreeing to the January Terms on April 1, 2021. (*See* Da197–200; Da221–22 ¶ 9.) Nor does she disclaim her digital representation to Uber (by checking the box) that she "reviewed" the January Terms of Use—including the arbitration agreement—before agreeing to them. (*See id*.) The January Terms too stated that most disputes, including personal injury disputes, "will be settled by binding arbitration between you and Uber, and not in a court of law." (Da228.) They also stated: "You acknowledge and agree that you and Uber are each waiving the right to a trial by jury." *Id.*

This Court already found in *Williams* that the January Terms satisfied *Atalese* and created an enforceable contract. 2023 WL 5768422 at *4. Ms. McGinty thus had adequate notice in April 2021 that her arbitration agreement with Uber waived her right to a jury trial on most disputes with Uber. And having received that notice several months prior, Ms. McGinty cannot claim not to understand the December Terms merely because Uber did not repeat precisely

the same explanatory language that it had already provided to her. Ms. McGinty's knowing and voluntary waiver of her jury trial right is not erased through a subsequent (and independently sufficient) amendment to the same arbitration agreement with the same counterparty. *Cf. Hamilton* v. *Uber Techs., Inc.*, No. 22-cv-6917, 2023 WL 5769500, at *5 (S.D.N.Y. Sept. 7, 2023) (even though plaintiff no longer had an Uber account, he was charged with understanding the provisions of the Terms of Use he had "previously entered" with Uber). Ms. McGinty—a practicing attorney—has never even claimed that she did not know that by agreeing to arbitrate she was giving up her right to a jury trial.

C. The arbitrator has sole authority to determine the enforceability of the arbitration agreement.

The trial court also erred by denying Uber's motion even though the parties' contract expressly delegated to the arbitrator, "and not any … court," the "exclusive authority to resolve any dispute arising out of or relating to the interpretation, applicability, enforceability, or formation of this Arbitration Agreement. (Da84.) Federal law required that Plaintiffs' challenge to the enforceability of the arbitration agreement under *Atalese* should have been resolved by the arbitrator alone, not the trial court.

1. Both the Supreme Court of the United States and this Court have held that, where a contract clearly and unmistakably "delegates the arbitrability question to an arbitrator"—as the December Terms did—"a court may not over-

ride the contract." *Henry Schein*, *Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019); *see Cottrell* v. *Holtzberg*, 468 N.J. Super. 59, 71 (App. Div. 2021); *Singh* v. *Uber Techs., Inc.*, 67 F.4th 550, 563 (3d Cir. 2023) ("In the presence of a delegation clause, we cannot reach the question of the arbitration agreement's enforceability.") (internal quotation marks omitted).

The sole exception to that rule is if a party challenges the enforceability of the "delegation provision *specifically*." *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 72 (2010) (emphasis added); *see MZM Constr. Co.* v. *N.J. Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386, 399 (3d. Cir. 2020) ("[U]nless the party opposing arbitration challenges 'the delegation provision specifically,' the district court 'must treat it as valid' and 'must enforce it' by sending 'any challenge to the validity' of the underlying *arbitration agreement* to the arbitrator.") (quoting *Rent-A-Center*). Thus, the failure to "lodge a specific challenge to the delegation clause" will "require that the issue of arbitrability be determined by the arbitrator." *Morgan*, 225 N.J. at 311.

Plaintiffs here never challenged the enforceability of the delegation clause—much less did so *specifically*. Thus, once the trial court found the *existence* of a contract between Ms. McGinty and Uber containing a delegation clause, it should have held Plaintiffs to their agreement and required Plaintiffs to present their arbitrability challenges to the arbitrator.

2. Plaintiffs may argue that the courts (not the arbitrator) must resolve their challenge to the arbitration agreement because *Atalese* is about contract formation, and contract-formation issues are reserved for courts. That argument would be wrong. *Atalese* is not about contract *formation*—Plaintiffs could not seriously contend that Ms. McGinty did not form a contract to, for example, pay for the rides that she requested through the Uber App. (*See* Da93–95.) *Atalese* is instead about whether one particular clause in the plaintiff's contract (the arbitration provision) is *enforceable* as a matter of public policy.

While *Atalese* referred to principles of mutual assent and meeting of the minds, in truth those concepts are objective and not subjective. "The phrase, 'meeting of the minds,' can properly mean only the agreement reached by the parties as expressed … . [It does not mean that] there is no contract unless both parties understood the terms alike, regardless of the expressions they manifested." *Leitner* v. *Braen*, 51 N.J. Super. 31, 38 (App. Div. 1958) (internal citation omitted). It is the parties' *objective* manifestations of intent that control when determining if there is a meeting of the minds, not whether an "average consumer" would understand the import of all terms. *See Brawer* v. *Brawer*, 329 N.J. Super. 273, 283 (App. Div. 2000) ("A contracting party is bound by the apparent intention he or she outwardly manifests to the other party."). That is why it has long been the law in New Jersey that a party is bound to a contract to

which she assented regardless of whether she even read the terms of the agreement, let alone understood the meaning and implication of every term. *See, e.g.*, *Gras* v. *Assocs. First Cap. Corp*., 346 N.J. Super. 42, 57 (App. Div. 2001) (enforcing arbitration agreement even though plaintiffs claimed that they "did not know what they were signing"); *see also Goffe* v. *Foulke Mgmt. Corp*., 238 N.J. 191, 212 (2019) ("[T]he argument that either plaintiff did not understand the import of the arbitration agreement and did not have it explained to her … is simply inadequate to avoid enforcement of these clear and conspicuous arbitration agreements that each signed."). When a party like Ms. McGinty has notice of the contract terms and gives her objective assent to them, any question about the enforceability of one term in the contract (aside from consideration) does not defeat the *formation* of the contract as a whole.

Atalese is instead about the circumstances under which a waiver-of-rights provision *within* a contract can be enforced as a matter of public policy. The New Jersey Supreme Court described this concept in *Rudbart* v. *North Jersey District Water Supply Commission*, 127 N.J. 344 (1992). The Court noted the "traditional contract principle is that 'once the objective manifestations of assent are present, the author is bound,'" but also that contracts can nonetheless be *unenforceable* based on various policy considerations. *Id.* at 353; *see also Mortensen* v. *Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1159 (9th Cir. 2013)

(describing similar contractual waiver-of-rights rule as being about unconscionability and public policy, not assent). The New Jersey Supreme Court has held that the question of enforceability of an arbitration provision is distinct from the question of its formation. *See Leodori* v. *CIGNA Corp.*, 175 N.J. 293, 302 (2003) (asking two questions with respect to an arbitration provision: (1) whether the "waiver-of-rights provision reflect[s] an unambiguous intention to arbitrate a [statutory] claim," and separately, (2) whether the "plaintiff clearly had agreed to that provision"). The Court in *Atalese* stated that it was applying a general contract law principle that contractual waivers of constitutional or statutory rights are not enforceable unless the waiver is "clearly and unmistakably established." 219 N.J. at 444. To that end, *not one* of the cases that *Atalese* relied on for that principle held that a contract containing an inadequately clear waiver was not formed in the first place. *See id.* at 443.

Here, there can be no doubt that Ms. McGinty formed a contract with Uber. The December Terms, just like the January Terms, constitute a valid click-wrap agreement, *see Williams*, 2023 WL 5768422, at *4, and Ms. McGinty (or her agent, as discussed below) manifested her assent to be bound to them by affirmatively checking the box that stated "I have reviewed and agree to the Terms of Use." That is sufficient to form a contract. *See Brawer*, 329 N.J. Super. at 283. As a matter of federal law, the parties' agreement to delegate all thresh-

old issues of arbitrability—including challenges to the enforceability of the arbitration agreement as unconscionable or on other public policy grounds—must be enforced. Plaintiffs' *Atalese* challenge is for the arbitrator to decide.

D. If *Atalese* precluded enforcement of this arbitration agreement, then it is preempted by federal law as interpreted by the Supreme Court of the United States.

If this Court read *Atalese* to establish a prerequisite for the *formation* of arbitration agreements, rather than the enforceability of rights-waivers as a matter of public policy, then Uber respectfully submits that the rule is preempted by the FAA and binding precedent of the Supreme Court of the United States.

"The FAA constitutes the supreme law of the land regarding arbitration," and state laws that conflict with it are preempted. *Goffe*, 238 N.J. at 207. The FAA requires, among other things, that arbitration contracts be placed on "equal footing with all other contracts." *Kindred Nursing*, 581 U.S. at 248. State laws that "single[ ] out arbitration agreements for disfavored treatment" are preempted. *Id*. As the Supreme Court and other federal courts have made clear, that preemption principle includes "generally applicable state-law rules" that "in practice … have a 'disproportionate impact' on arbitration or 'interfere with fundamental attributes of arbitration and thus create a scheme inconsistent with the FAA.'" *Mortensen*, 722 F.3d at 1159 (quoting *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 342, 344 (2011)) (cleaned up).

1. To the extent that *Atalese* created a rule of heightened contract-formation that applies only to arbitration agreements, that rule "singles out arbitration agreements for disfavored treatment" and is preempted by the FAA. *Kindred Nursing*, 581 U.S. at 248. *Atalese* identified no "generally applicable" rule in New Jersey regarding contractual rights waivers. 219 N.J. at 441. While the *Atalese* Court stated that "*any* contractual waiver of rights provision must reflect that the party has agreed clearly and unambiguously to its terms," *id.* at 443 (cleaned up; emphasis added), the cases cited do not support the existence of such a generally applicable rule. Aside from the arbitration cases that *Atelese* cited, *see Garfinkel* v. *Morristown Obstetrics & Gynecology Assocs., P.A.*, 168 N.J. 124 (2001), and *Leodori*, 175 N.J. at 302, most of the cases relied on had nothing to do with the enforceability of contractual rights waivers:

- *West Jersey Title & Guar. Co.* v. *Industrial Trust Co*., 27 N.J. 144, 152–153 (1958) – Discussing whether a wife, *through her conduct*, waived her right to enforce a judicial decree that had conveyed property to her by failing to enforce it earlier.

- *Christ Hosp.* v. *Dep't of Health & Senior Servs.*, 330 N.J. Super. 55, 63–64 (App. Div. 2000) – Analyzing whether a license holder, *through its conduct*, waived its right to a hearing to challenge a licensing decision because it participated in a circumscribed licensing pilot program.

- *Amir* v. *D'Agostino*, 328 N.J. Super. 141, 160 (App. Div. 1998) – Holding that the defendants did not, *through inaction*, waive their rights to resist the plaintiffs' effort to enforce certain deed covenants.

Two other cases involved the unique area of collective bargaining agreements containing unapplied dicta regarding waiver in that context:

- *Red Bank Reg'l Educ. Ass'n* v. *Red Bank Reg'l High Sch. Bd. of Educ*, 78 N.J. 122, 140 (1978) – Noting in dicta that waiver in the grievance process is well-established in the private union sector and citing NLRB cases.

- *Dixon* v. *Rutgers, the State Univ. of N.J.*, 110 N.J. 432, 460–61 (1988) – Noting in dicta that waiver in a collective bargaining agreement of certain discovery under evidentiary rules must be "plainly expressed," and citing cases that discussed waiver of rights through conduct, not contract.

Only two cases cited in *Atalese* even arguably involved a disputed issue of contractual waiver of a constitutional or statutory right. In both, the court merely rejected an argument that waiver of a statutory right could be implied from contractual silence. In *Otis Elevator Co.* v. *Stafford*, 95 N.J.L. 79 (Sup. Ct. 1920), the Court refused to infer that plaintiff intended—silently—to waive its statutory right to a mechanic's lien. *Id.* at 83. And in *Franklin Township Board of Education* v. *Quakertown Education Association*, 274 N.J. Super. 47 (App. Div. 1994), the court found that a handwritten "return to work agreement" resolving a work stoppage that did not mention court-ordered strike-related expenses did not waive or release those expenses. *Id.* at 52–53. These cases concerning *implied* waiver have no bearing on contracts containing an *express* arbitration agreement that waives the right to sue in a court of law.

In short, the rule that the trial court derived from *Atalese* rests on a premise that was not a correct statement of New Jersey law: the assertion that New Jersey

requires that a "contractual … waiver of a constitutional or statutory right[ ] must state its purpose clearly and unambiguously." 219 N.J. at 435. Uber's counsel is not aware of any non-arbitration case that held as much before *Atalese*. The trial court's *Atalese*-derived rule of contract enforceability is preempted by the FAA as an arbitration-specific rule.

2. Any treatment of *Atalese* as a contract-formation rule is preempted for the additional reason that it invalidates arbitration agreements at a disproportionately high rate. *Mortensen* is instructive. That case involved whether Montana's "reasonable expectations" rule was preempted by the FAA. *Mortensen*, 722 F.3d at 1160. That state law provided that a contract that is contrary to the "reasonable expectations" of a party is invalid as a matter of public policy, and that adhesive waivers of constitutional rights are outside of a consumer's reasonable expectations. *Id*. Although the Ninth Circuit acknowledged that the "reasonable expectations" rule was one of general applicability to all contracts, it was nonetheless "contrary to the FAA as interpreted by *Concepcion* because it disproportionally applies to arbitration agreements, invalidating them at a higher rate than other contract provisions." *Id*. at 1161.

Just over eighteen months after *Atalese* was issued, this Court acknowledged the similarity between the rule in *Atalese* and the Montana rule in *Mortensen*. *Scamardella* v. *Legal Helpers Debt Resol., L.L.C.*, No. A-4170-14T3, 2016

WL 1562812, at *4 (N.J. Super. Ct. App. Div. Apr. 19, 2016) (unpublished opinion). But the Court declined at that time to find that the FAA had preempted *Atalese* because, unlike *Mortensen*, "[n]o evidential support is provided showing arbitration provisions have been invalidated at a higher rate than other contract provisions following *Atalese*." *Id*. Now, eight years after *Scamardella*, that support exists: The *Atalese* rule that any waiver of rights must be "clear and unambiguous" has been applied to invalidate hundreds (if not thousands) of arbitration agreements in New Jersey state and federal courts, but that decision has been applied to very few (if any) other types of contractual waivers of statutory or constitutional rights.

The trial court's reading of *Atalese* was incorrect for all of the reasons described above. But if this Court concludes that the *Atalese* rule concerns contract formation, then that rule is preempted both because it is arbitration-specific and because it has been applied in practice to disproportionately disadvantage arbitration agreements.

II. Ms. McGinty cannot escape her agreement with Uber by claiming that her daughter agreed to the December Terms on her behalf. (Da298–304.)

Moving beyond the trial court's reasoning, Plaintiffs asserted below that they are not bound by the December Terms because their minor daughter must have checked the box in the in-app blocking screen. Even if that is true, Plaintiffs would still be bound by the contract under ordinary agency principles.

A. Plaintiffs' daughter was acting as Ms. McGinty's agent when she agreed to the December Terms.

It is black-letter law that a person is bound by a contract executed on her behalf by her authorized agent. *Colloty* v. *Schuman*, 73 N.J.L. 92, 94 (Sup. Ct. 1905). An agency relationship exists "when one person (a principal) manifests assent to another person (an agent) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *N.J. Lawyers' Fund for Client Prot.* v. *Stewart Title Guar. Co.*, 203 N.J. 208, 220 (2010) (quoting Restatement (Third) of Agency § 1.01 (2006)). "Even if a person is not an "actual agent," he or she may be an agent by virtue of apparent authority based on manifestations of that authority by the principal." *Sears Mortg. Corp.* v. *Rose*, 134 N.J. 326, 338 (1993).

Even accepting Plaintiffs' version of the facts, Plaintiffs' daughter agreed to the December Terms cloaked with both actual and apparent authority.

Actual authority. Actual authority exists when, "at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." *New Jersey Lawyers' Fund*, 203 N.J. at 220 (quoting Third Restatement of Agency § 2.01). No actual agreement specifying the agency relationship is required; what matters is the principal's and

agent's "conduct[,]" "not … their intent or their words as between themselves but to their factual relation." *Sears Mortgage*, 134 N.J. at 337.

The facts readily establish an actual agency relationship here. Ms. McGinty certified in the trial court that on January 8, 2022, she gave her phone to her daughter specifically so that the daughter could use Uber's services to order dinner on behalf of and for Plaintiffs and the family, to be delivered to Ms. McGinty's home. (Da198 ¶¶ 5, 9-12; Da210 ¶¶ 6–7.) Plaintiffs' daughter was purportedly delegated this task because Plaintiffs were busy packing for a trip and because their daughter was "capable of and frequently did order food for delivery" and would have been impatient watching her parents order the food. (*See id.*) Plaintiffs and their daughter apparently decided from what restaurant the food would be ordered and Plaintiffs told their daughter to alert them "when the delivery driver arrived, rather than go to the door herself." (*Id*.)

In other words, Ms. McGinty asked her daughter to use Uber's service to order food for the family's dinner and gave her phone so that the daughter could do so. Her daughter thus contracted with Uber with express authority from Ms. McGinty. *See Landy* v. *Natural Power Source, LLC*, No. 21-cv-00425, 2021 WL 3634162 (D.N.J. Aug. 17, 2021) (not officially reported) ("A plaintiff sufficiently pleads actual authority when the allegations establish that the defendant consented to or directed the agent to act on its behalf."); Third Restatement of

Agency § 3.05 (2006), cmt. b & illus. 1 (providing example of actual authority where a parent consents to child using the parent's computer, which had parent's address and credit card info saved into a website, and the child purchases books through that website). Plaintiffs' daughter's actual authority here also encompassed the authority to agree to Uber's Terms of Use, a necessary precondition to accomplishing the purpose for which the agency relationship was established. *See Sylvan Learning Sys., Inc.* v. *Gordon*, 135 F. Supp. 2d 529, 542 (D.N.J. 2000) ("[A]n agent has implied authority to undertake all transactions necessary to fulfill the duties required of an agent in exercise of express authority."); *Heidbreder* v. *Epic Games, Inc.*, 438 F. Supp. 3d 591, 596–97 (E.D.N.C. 2020) (holding that minor son had actual authority to enter arbitration agreement on behalf of father when father consented to son using father's video game account, which had father's profile, login information, and credit card saved).

Apparent agency. Apparent authority "focuses on the reasonable expectations of third parties with whom an agent deals" and arises "when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." *New Jersey Lawyers' Fund*, 203 N.J. at 220 (citing Third Restatement of Agency §§ 2.03, 708). Apparent agency is created when (1) "the appearance of authority has been created by the conduct of the alleged principal;" (2) a third party "has relied on the

agent's apparent authority to act for a principal;" and (3) the third party's "reliance was reasonable under the circumstances." *AMB Prop., LP* v. *Penn Am. Ins. Co.*, 418 N.J. Super. 441, 454 (App. Div. 2011).

Apparent agency was plainly created by Ms. McGinty when she permitted her daughter to order food to be delivered to the home using her Uber account and payment mechanism on her phone. Uber relied on that apparent authority by allowing Ms. McGinty to obtain the benefits of Uber's services (services that are available to users only upon agreement to the Terms of Use), including by using its platforms for food delivery services and transportation services. And Uber's reliance was reasonable: the December Terms were agreed to under Ms. McGinty's name and using her Uber profile. Ms. McGinty had used Uber's services for nearly seven years, and she had undisputedly agreed to Uber's materially similar Terms of Use just eight months prior in April 2021.

Uber "was justified in believing that the user of plaintiff's … account possessed the authority to agree to the [December Terms]. [Uber] had no reason to believe that the user of plaintiff's account was anyone other than plaintiff—or someone to whom plaintiff gave authority over [her] account." *Heidbreder*, 438 F. Supp. 3d at 597 (finding that minor son had apparent authority to enter arbitration agreement on behalf of parent); *see Rodriguez* v. *Hudson Cty. Collision Co.*, 296 N.J. Super. 213, 220, (App. Div. 1997) (apparent authority exists when

principal places agent in "a situation that a person of ordinary prudence, conversant with business uses, [and the nature of the particular business,] is justified in presuming that such agent has the authority to perform the particular act in question"); *Shadel* v. *Shell Oil Co*., 195 N.J. Super. 311, 317 (Law Div. 1984) (reasonable jury could find apparent authority when principal represented through advertising that it operated agent's service station and plaintiff relied on those representations); *cf. Wilzig* v. *Sisselman*, 209 N.J. Super. 25, 35 (App. Div. 1986) (describing apparent authority as "closely related" to estoppel).

The daughter's age is immaterial. Plaintiffs argued below, with no citation to authority, that no contract was formed here because Ms. McGinty's minor daughter lacked capacity to enter a contract. But Plaintiffs' daughter did not enter the Terms of Use on her *own* behalf—she did so as an agent of and on behalf of Ms. McGinty. The infancy defense is inapplicable because no one is attempting to enforce a contract against Plaintiffs' daughter. *Cf. Matullo* v. *Sky Zone Trampoline Park*, 472 N.J. Super. 220, 227 (App. Div. 2022) ("[T]he infancy defense[ ] has its genesis in the concept that minors do not have the capacity *to bind themselves* to contractual obligations.") (emphasis added).[2]

[2] Accepting Plaintiffs' argument would create an enormous loophole, as the trial court apparently recognized during argument. (T25-6–15) Any time a parent needed to contract with another party, including by entering commonplace internet contracts, they could simply direct their child to click the "I have read

Courts thus recognize that minors, acting with actual or apparent authority of their parents, can bind their parents to agreements including the agreement to arbitrate. *See, e.g.*, *Heidbreder* 438 F. Supp. 3d at 596–597 (father was bound to arbitration agreement with video game company that his minor son purportedly agreed to while using father's account with father's permission); *Chung* v. *StudentCity.Com, Inc.*, No. 10-10943, 2013 WL 504757, at *4 & n.8 (D. Mass. Feb. 12, 2013) (minor daughter acted as agent for parents and within the scope of her authority with the ability to "assent on their behalf" to agreement containing an arbitration provision); *Wolfire Games, LLC* v. *Valve Corp.*, No. C21-0563, 2021 WL 4952220, at *2 (W.D. Wash. Oct. 25, 2021) (enforcing arbitration agreement against parents: "under an agency theory, [parents] effectively appointed their children as their agents when they purchased games on their parents' behalf using the parents' credit card information and their own Steam accounts"); Third Restatement of Agency § 3.05, cmt. B, illus. 1.

What's more, even if the infancy defense could apply to a situation like this, it does not apply here for the additional reason that an exception to the infancy defense exists "if the minor, when entering the contract, misrepresented that he or she was an adult." *Matullo*, 472 N.J. Super at 227. If Plaintiffs' daugh-

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and agree" button to complete the transaction, then later claim (when convenient) that the contract is unenforceable as to the parent.

ter signed the contract with Uber for Ms. McGinty, she did so by checking a box certifying "I am at least 18 years of age." (Da77.)

Regardless of whether Ms. McGinty agreed to the December Terms herself—or whether her daughter agreed to those Terms for her mother's benefit, on her mother's behalf, and using her mother's Uber account with her mother's permission—the December Terms are enforceable against Ms. McGinty.

III. If the December Terms are invalid, the January Terms would still require arbitration of this dispute. (Da304.)

The trial court's decision refusing to enforce arbitration was wrong for yet-another reason: Even if Plaintiffs were to prevail on their arguments invalidating the December Terms, either because there was no mutual assent to arbitrate under *Atalese* or because it was Plaintiffs' minor daughter who signed the December Terms, Plaintiffs would *still* be required to arbitrate their claims against Uber under the January Terms—which Plaintiffs agreed to and which this Court has already held are enforceable. (Da221–22 ¶¶ 8–10; Da228–30.) *See Williams*, 2023 WL 5768422, at *4

When parties attempt to amend an existing contract or to enter a superseding contract, but the formation of the subsequent agreement fails, the prior existing agreement controls. *See, e.g.*, *GEM Advisors, Inc.* v. *Corporacion Sidenor, S.A.*, 667 F. Supp. 2d 308, 328 (S.D.N.Y. 2009) ("Because the October 4, 2002 agreement is invalid, the July 4, 2002 agreement remained effective after

October 4, 2002"); *Danaher Corp.* v. *Lean Focus, LLC*, No. 19-cv-750, 2021 WL 3190389, at *18 (W.D. Wis. July 28, 2021) ("[T]he original contract remains enforceable if the substituted contract is invalid[.]"). That result is common-sense: the first agreement cannot be superseded if the parties do not actually form a superseding agreement. *E.g.*, *Zambrana* v. *Pressler & Pressler, LLP*, No. 16-CV-2907, 2016 WL 7046820, at *4 (S.D.N.Y. Dec. 2, 2016) (that plaintiff arguably did not consent to 2010 arbitration agreement "is of no moment" because "she continues to be bound by the arbitration provision in the 2003 Agreement … because it was never superseded").

Here, Plaintiffs have asserted that they did not assent to or sign the December Terms, and that no agreement was formed. Counsel confirmed this at oral argument, even when Judge Kaplan acknowledged that Plaintiffs' position may "open up the previous agreements," *i.e.*, the January Terms:

> **Court:** You're arguing it [the December Terms] was never signed. If I find that it was never signed, then arguably it does open up the previous agreements.
>
> …
>
> **Mr. Shapiro:** Yes, Your Honor.

(T50-1–6.)

Again, Plaintiffs do not dispute that Ms. McGinty agreed to the January 2021 Terms. And as explained above, this Court has already held that those

terms constitute a valid and enforceable agreement to arbitrate. *Williams*, 2023 WL 5768422, at *1, *4 (holding that the same Uber in-app clickwrap interface at issue here created an enforceable agreement to the January Terms; that the arbitration agreement was conspicuously placed within those Terms; and that the language of the arbitration agreement complies with *Atalese*).

The trial court refused to enforce the January Terms by stating that Uber "seemingly does not argue" that those terms "come into effect." (Da304.) But that is simply incorrect: Uber *did* argue that, if Ms. McGinty's agreement to the December Terms was somehow invalid, then her agreement to the January Terms remained active and that contract too required arbitration of this dispute. (Da212–18; T18-14–20.) If this Court were to accept Plaintiffs' argument that Ms. McGinty never agreed to the December Terms, then the January Terms govern the parties' relationship and Plaintiffs must arbitrate their claims.

IV. The agreement is enforceable against Mr. McGinty. (Da298–304.)

Plaintiffs also argued below that the arbitration agreement is unenforceable as to John McGinty—Ms. McGinty's husband who was also a passenger in Mr. Zheng's car at the time of the accident. But the parties delegated that threshold question of arbitrability to the arbitrator. And in any event, Mr. McGinty is required to arbitrate as a third-party beneficiary of Ms. McGinty's arbitration agreement.

First, this Court lacks authority to consider Mr. McGinty's challenge to the scope of the December Terms because the parties reserved that threshold question of arbitrability exclusively for the arbitrator. (Da84–85.) "Whether a particular arbitration provision may be used to compel arbitration between a signatory and a nonsignatory is a threshold question of arbitrability." *Eckert/Wordell Architects, Inc.* v. *FJM Props. of Willmar, LLC*, 756 F.3d 1098, 1100 (8th Cir. 2014); *see Blanton* v. *Domino's Pizza Franchising LLC*, 962 F.3d 842, 852 (6th Cir. 2020) (the "arbitrator should decide for itself" whether a non-signatory must arbitrate its claims when clear delegation clause exists); *Evangelical Lutheran Good Samaritan Soc'y* v. *Moreno*, 277 F. Supp. 3d 1191, 1228 (D.N.M. 2017) (whether a non-signatory is required to arbitrate his claims under third-party beneficiary theory is a threshold issue for the arbitrator).[3]

Even if the Court could consider this question, moreover, the arbitration agreement is plainly enforceable against Mr. McGinty as a third-party beneficiary. "Non-signatories of a contract may be subject to arbitration if the nonparty

[3] This Court's unpublished decision in *Hall* v. *Healthsouth Rehabilitation Hospital of Vineland*, No. A-2453-12T4, 2013 WL 3581263 (N.J. Super. Ct. App. Div. July 16, 2013) is not to the contrary. The plaintiff there, suing as executor of his wife's estate, claimed he had fraudulently signed a contract on his wife's behalf without authority to do so. *Id.* at *7. The Court held that it would be "unfair to require" a person who alleges the contract was fraudulently executed "to appear in a tribunal that he or she says was never agreed to in the first place." *Id.* Here, by contrast, there is no claim of fraud in the execution.

is an agent of a party or a third party beneficiary to the contract." *Hojnowski ex rel. Hojnowski* v. *Vans Skate Park*, 375 N.J. Super. 568, 576 (App. Div. 2005) (cleaned up); *see also Jansen* v. *Salomon Smith Barney, Inc.*, 342 N.J. Super. 254, 261 (App. Div. 2001). In determining whether someone is a third-party beneficiary, courts look to the "contractual intent" of the parties as objectively manifested in the plain language of the agreement. *Broadway Maint. Corp.* v. *Rutgers, the State Univ.*, 90 N.J. 253, 259 (1982) (the contracting parties "who agree upon the promises, the covenants, the guarantees … are the persons who create the rights and obligations which flow from the contract"). The intent of the contracting parties here could not be clearer. Under the heading "Application to Third Parties," the December Terms state that the "Arbitration Agreement shall be binding upon, and shall include any claims brought by or against any third parties, including but not limited to your spouses, heirs, third-party beneficiaries and assigns, where their underlying claims arise out of or relate to your use of the Services." (Da85.)[4]

Mr. McGinty is both a spouse of the contracting party and a third-party beneficiary, and his claims clearly "arise out of" and "relate to" Ms. McGinty's "use of the Services." *See id.* Specifically, Ms. McGinty used the Uber Rides platform to request transportation services for the benefit of both herself and

[4] The January Terms have a substantively identical provision. (*See* Da228.)

Mr. McGinty, and Mr. McGinty's claims arise out of Ms. McGinty's use of that service. *See Jansen,* 342 N.J. Super. at 256, 259 (unnamed putative beneficiaries of a retirement account were bound by the arbitration agreement signed by their father expressly providing that the agreement was "binding upon" his heirs and successors, where the plaintiffs' claims "arose out of" the contract).[5]

It is the intent of Ms. McGinty and Uber that controls; a third party beneficiary like Mr. McGinty need not even know about the terms of the contract "in order to be bound by the rights and liabilities created therein." *Allgor* v. *Travelers Ins. Co.*, 280 N.J. Super. 254, 264 (App. Div. 1995). But this case is even easier because Mr. McGinty *knowingly* benefitted from his wife's use of Uber's services on January 8, 2022—and likely other times before. He certified that he and his wife "decided" to request a ride through Uber on both of their behalf on March 31, 2022. (Da277.)

Based on the unequivocal language of the Third-Party provision in Uber's contract, courts across the country have enforced Uber's arbitration agreement against passengers like Mr. McGinty. *See, e.g.*, *Snow* v. *Uber*, No. 23-STCV-10027, (Cal. Super. Ct. L.A. Cty. Oct. 10, 2023) ("[E]ven if Plaintiff did not use

[5] This is a two-way street: the contract also confers on Mr. McGinty the right to enforce the arbitration agreement against Uber. (Da85 ("To the extent that any third-party beneficiary to this agreement brings claims against the Parties, those claims shall also be subject to this Arbitration Agreement.").)

his own Uber app to order the Uber, Plaintiff received Uber transportation to meet his needs and interest as a third-party beneficiary and co-rider … Thus, the contract containing the [arbitration] agreement was intended to benefit and cover both Ferguson, the application user, and Plaintiff, another passenger who also benefited from use of the Uber application."); *Kearns* v. *Sadat*, No. 22-CV-017881 (Cal. Super. Ct. Alameda Cty. June 14, 2023) (holding passenger was required to arbitrate claims because she "voluntarily entered a motor vehicle she knew had been summoned by [the Uber account holder] with the assistance of the Uber Services"); *Fathollah,* v. *Uber Techs*., *Inc*., No. 22-STCV-22014 (Cal. Super. Ct. L.A. Cty. Sept. 30, 2022) (holding plaintiffs' daughter was compelled to arbitrate as a third-party beneficiary because she "benefitted from the use of Uber's rideshare services" by being a passenger). Indeed, just recently a federal court in New York, applying the same third-party beneficiary principles that exist under New Jersey law, enforced the arbitration agreement in the December Terms against a guest rider whose friend had requested the ride via the Uber App for his use on the grounds that he "benefitted from [his friend's] agreement with Uber." *Hamilton*, 2023 WL 5769500, at *5.

If this Court were to reach Mr. McGinty's threshold challenge to arbitrability, it should enforce the plain terms of Ms. McGinty's contract and require Mr. McGinty to arbitrate his claims as a third-party beneficiary of that contract.

V. Uber did not waive its right to arbitrate with Plaintiffs. (Da298–304.)

Last, Plaintiffs argued below that Uber waived its contractual right to arbitrate by briefly communicating with Plaintiffs' counsel about the auto accident before this dispute was filed. Specifically, before Plaintiffs filed their complaint, their counsel reached out to counsel for Uber and co-Defendants to arrange a date and time for Plaintiffs' counsel to inspect Mr. Zheng's vehicle. (Da152–60.) Uber's counsel responded to three scheduling emails about that topic. (*See id.*).

The trial court did not reach Plaintiffs' argument that those emails waived Uber's arbitration right, and that argument is meritless. New Jersey has a presumption against waiver of arbitration that can be overcome only by *clear and convincing* evidence that the party seeking to enforce the arbitration agreement first chose to seek relief in a different forum. *Spaeth* v. *Srinivasan*, 403 N.J. Super. 508, 514 (App. Div. 2008). Courts consider various factors to determine whether a "party's litigation conduct" is "consistent with its reserved right to arbitrate the dispute": (1) the delay in making the arbitration request; (2) the filing of any motions, particularly dispositive motions; (3) whether the delay was part of the litigation strategy; (4) the extent of discovery conducted; (5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notice of its intent to seek arbitration;

(6) the proximity of the date on which the party sought arbitration to the date of trial; and (7) prejudice suffered by the other party, if any. *Cole* v. *Jersey City Med. Ctr.*, 215 N.J. 265, 280–281 (2013).

All of those factors weigh strongly in favor of finding no waiver here. Uber did not delay in moving to compel arbitration; it pleaded the affirmative defense of contractual arbitration in its first responsive pleading (its Answer). Uber's counsel then reached out to Plaintiffs' counsel in July 2023 to request that they agree to stay the action in favor of arbitration. When Plaintiffs refused to agree, Uber promptly filed its motion to compel. No other motions, save for Uber's motion to compel arbitration and Plaintiffs' premature motion to compel discovery, have been filed, let alone dispositive motions. And only very limited, *mandatory* discovery has been conducted: Plaintiffs have answered the Form A Uniform Interrogatories, as they were required to do without action from Uber. No trial date set was set when Uber filed its motion. And no party would suffer prejudice due to any delay because there has been no delay.

In short, there is no waiver here, as New Jersey case law makes plain. *See, e.g.*, *Spaeth*, 403 N.J. Super. at 514 (no waiver when arbitration was asserted six months after complaint but before any "meaningful exchange of discovery—much less the discovery end date—and well in advance of fixing a trial date"); *Hudik–Ross, Inc.* v. *1530 Palisade Ave. Corp.*, 131 N.J. Super. 159, 167 (App.

Div. 1974) (no waiver when arbitration was demanded four months after lawsuit was filed and the right to arbitrate was pleaded as an affirmative defense); *cf. Cole*, 215 N.J. at 281 (defendant waived right to arbitrate by waiting 21 months to move to compel and by failing to plead arbitration as a defense or otherwise provide notice of its intent to seek arbitration). Plaintiffs have not identified any authority supporting their argument that *pre-litigation* settlement communications waive a contractual arbitration right.

Conclusion

The trial court's order granting Defendants' motion to compel arbitration and stay proceedings should be reversed.

Respectfully submitted,

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Dated: March 6, 2024

GEORGIA M. MCGINTY a/k/a GEORGIA M. FRASER and JOHN FRANCIS MCGINTY (w/h), Plaintiffs-Respondents, v. UBER TECHNOLOGIES, INC. and RAISER, LLC, Defendants-Appellants, and JIA WEN ZHENG, JERINSON M. MEDRANO PERALTA, and BRACHY FELIZDELAPAZ, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-1368-23 **CIVIL ACTION** **On Appeal from:** an Order of the Superior Court Of New Jersey, Law Division, Middlesex County Docket No. Mid-L-1085-23 **Sat Below:** Hon. Bruce J. Kaplan, J.S.C.

BRIEF OF PLAINTIFFS-RESPONDENTS, GEORGIA AND JOHN MCGINTY

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PRELIMINARY STATEMENT

While enforcement of an arbitration agreement may not depend on "magic words," legibility is essential. Our case law demands a consumer arbitration agreement be stated in plain, clear, and understandable language. Accordingly, recent decisions have turned not on the presence of specific words or phrases such as "waiver" of "the right to trial by jury" but whether the underlying notions of what is at stake were conveyed.

To analyze that language, this Court has filtered agreements through a sieve, sifting through meaningful details like length, word choice, and consistency while scrutinizing for clear notice and mutual assent. This ground-level review best appreciates the risks of unknowing and involuntary waiver and is rightfully concerned with practicalities over formalities.

To be frank, the arbitration agreement presented by defendants, Uber Technologies, Inc. and Raiser, LLC (collectively, Uber) could not be less plain, clear, and understandable. First, by Uber's own allegation the agreement was presented to the McGintys after their UberEats order was made, and after the delivery driver was en route. Absent an opportunity to even review let alone reject the agreement before entering into the transaction and given the economic and other pressures involved in the purchase of perishable goods a stranger expecting to be tipped was in the act of driving to their home, the lack of true notice and assent is obvious. And it continues

from there. Uber's agreement and the sections it directly implicates are roughly 7600 words and swell noncontiguously across seventeen Letter-size pages. While the length alone is practically absurd, the sections and content within are confusing, contradictory, and difficult to connect.

Ultimately, viewing the agreement through the lens of Atalese, Morgan, and now Ogunyemi, its weak and confusing language is unable to allow for clear and unambiguous waiver of the constitutional rights at stake. For these reasons, the Order of November 22, 2023 denying Uber's motion should be affirmed.

Last, Uber raises several points not properly on appeal. Most of these issues were not addressed by the trial court by virtue of its determination the agreement was facially unenforceable: who, if anyone, clicked the consent box; whether it applies to Mr. McGinty; and whether Uber waived its right to arbitrate. This also includes whether the January 2021 terms become enforceable, never properly raised by Uber below. While some of these contentions can be addressed by the Court on the thin existing record or as a matter of law, at least in favor of plaintiffs as non-movants, this Court should decline to engage in the expansive exercise of original jurisdiction Uber calls for to resolve others.

CONCISE PROCEDURAL HISTORY

Plaintiffs do not dispute Uber's concise recitation of the procedural history. Minor additional points, such as certain pre-litigation activities or later motion filings, are mentioned in plaintiffs' brief where pertinent.

STATEMENT OF FACTS

On March 21, 2022, plaintiffs, Georgia M. McGinty and John F. McGinty, were rear passengers in a vehicle operated by defendant, Uber driver Jia Wen Zheng. (Da127-134). At the intersection of New Jersey State Highway 130 South and State Highway 522, Zheng ran a red light and T-boned a vehicle operated by Defendant, Jerinson M. Medrano Peralta, and owned by defendant, Brachy Felizdelapaz. (Da127-134). The damage to the vehicle and its occupants was catastrophic. (Da136) (photo of Zheng's vehicle).

Georgia and John suffered devasting physical, psychological, and financial injuries. Georgia sustained cervical and lumbar spine fractures, rib fractures, a protruding hernia, traumatic injuries to her abdominal wall and pelvic floor, and various other physical injuries. She has undergone numerous surgeries and other invasive procedures. (Da137-144). A respected matrimonial attorney (as Georgia Fraser), Georgia was unable to work between the date of the crash and April 1, 2023; she has been struggling to rebuild her once successful practice. (Da137-144). John sustained a fractured sternum and severe fractures to his left arm and wrist. (Da145-

147). He underwent open reduction and internal fixation with a bone graft to address the arm fractures, but still has diminished use and sensation in his left wrist. (Da145-147). Naturally, their injuries, difficult recovery, and the other traumas of the crash have caused the McGintys face significant periods of emotional difficulty. (Da137-147).

Because of the significance of plaintiffs' injuries and other losses, the relationship between the undersigned and Uber's prior attorneys in this litigation, and the frank discussions about the limitations of coverage, plaintiffs' counsel, Uber's prior counsel, and Zheng's counsel began a near-immediate exchange of information and collaboration. In June 2022, the undersigned sent an informal email to Uber's prior counsel as a "letter of rep," sharing a host of initial information about Plaintiffs' injuries and status and even photos. (Da148-150). From there, Zheng's counsel was looped in, and the parties began coordinating an inspection and shared digital download of Zheng's vehicle. (Da151-160). Through the filing of plaintiffs' complaint in February 2023 and beyond, the parties continued to engage in regular discussions. As example, in January 2023, Zheng's counsel called the undersigned and asked plaintiffs to attend early mediation. (Da161). Uber and Zheng also demanded and received voluminous and deeply personal interrogatory responses. (Da137-147). Plaintiffs' depositions were scheduled (and then cancelled) at their behest, and Plaintiffs retained multiple experts and produced two reports. (Da126).

Not once did Uber indicate an intention to demand arbitration until June 29, 2023. (Da162-168). In a letter of that date, Uber claimed Georgia agreed to arbitration on January 8, 2022, months prior to the crash, via "clickwrap" in an unspecified Uber application.[1] (Da163-164). Uber's evidence of that acceptance is unclear, and the agreement's terms are unenforceable under New Jersey law.

As to Uber's weak evidence the clickwrap agreement was accepted and the events of the night in question (briefly, as the Court did not reach either side's contentions), Uber's June 29, 2023 letter to the undersigned states in plain terms that at Exhibit C it encloses the Checkbox Consent that "your client checked[.]" (Da162-68). The exhibit is a phone screenshot with the checkbox activated and the time 9:41 PM visible. (Da168). However, this time differs from the Checkbox Consent History log also annexed to the June 29, 2023 letter and the affidavit of the Uber employee submitted in support of its motion. (Da74; Da77-78). That log depicts the checkbox as being clicked at 11:24 PM UTC, i.e., 7:24 PM EST. In other words, this couldn't possibly be the screenshot clicked by on Georgia's phone. Perhaps recognizing the impossibility, its motion produced the very same Checkbox Consent Image as a "representation." (Da73-74; Da77-78). Whether that initial

[1] Plaintiffs do not dispute Uber's characterization of the pop-up as "clickwrap" as described in Skuse, et al.

misrepresentation was mistake or further tactic, these contradictory representations cannot support Uber's demand to summarily compel arbitration.

Last, the McGintys have no recollection of ever seeing the purported clickbox that evening, and believe if it was clicked it was by their daughter as the parents packed for an upcoming trip. As both she and her husband explain, on Saturday, January 8, 2022 they were busily packing for a mid-week ski trip. (Da197-200; Da209-211). At roughly 6:15 PM, their daughter asked if they could order food from a particular restaurant. Neither recalls if their daughter ordered food independently or if Georgia assisted, but both recall their daughter hanging on to Georgia's phone after the order to monitor the progress of the delivery. In that period, when people (especially impatient pre-teens) incessantly refresh or exit-and-renter the application to get an update on the driver's progress, Uber alleges the Checkbox Consent was activated. (Da74; Da77-78; Da100-01). After they finished eating, Georgia got her phone back and, based on an updated receipt from Uber that was emailed to her, tipped the driver. (Da205-208). She never had opportunity to see the pop-up. John didn't either. Both say that if the checkbox was clicked, it would have been their daughter, intentionally or unintentionally, while keeping tabs on the delivery. (Da197-200; Da209-211).

To that end, Georgia asserts that to the best of her knowledge, the only Uber application she had on her phone on January 8, 2022 was Uber Eats. Throughout its

motion and appellant's brief, Uber refers only to the "Uber app." (Da72). However, in January 2022 and even today, Uber maintains multiple applications. On the consumer side, Uber maintained two applications, an Uber application and an Uber Eats application. See Uber.com, Introducing Uber One (Nov. 17, 2021), available at: https://www.uber.com/newsroom/introducing-uber-one/ ("open your Uber or Uber Eats app"). Even assuming Georgia or her daughter did click the checkbox, they almost certainly did so within the Uber Eats application. In that case, it would be difficult for any consumer to anticipate or discern from the terms that any arbitration agreement would cover not just the Uber Eats application, but also claims concerning other Uber applications and services not even on the phone.

LEGAL ARGUMENT

I. THE MCGINTYS DID NOT FORM AN ENFORCEABLE ARBITRATION AGREEMENT WITH UBER THROUGH THE DECEMBER TERMS

The trial court correctly held that Uber's arbitration agreement is insufficient to satisfy the requirements of Atalese. Among other flaws, the agreement failed to contain any adequate language informing a consumer of their waiver of the right to pursue their claims in a judicial forum, of arbitration precluding litigation, or the differences between those forums. However, as an initial step, plaintiffs request the court more deeply consider the circumstances in which the agreement was allegedly presented – after the Uber order and already been made, and paid, and was en route

to the McGintys' home. Last, Uber speculates that Mrs. McGinty had some actual knowledge of the agreement or its terms so as to render it enforceable. This is argument is not rooted in any record evidence and is in any event directly contrary to New Jersey law in several respects.

A. Reasonable notice was not provided of the arbitration agreement

Uber's allegation is that on the night in question, a McGinty finger touched down on the Uber App click-box sometime after the food was ordered, payment was made, the food was collected, and the delivery driver was en route but before the food's arrival. In other words, and in our homes, among about 1000 other finger clicks and swipes and scrolls following the course of the delivery order like a police chopper tails a getaway car. Fortunately, lived experience and the law align here in recognizing that notice only after the transaction in consummated is unreasonable and insufficient notice. The issue is not whether Uber's clickwrap was technically sufficient in isolation. The issue is that Uber violated the universal holding that clickwrap and similar agreements are only valid if a consumer is given prior notice of additional terms and the opportunity to review and reject them if unacceptable.

In accord with "customary principles of contract law[,]" see Atalese v. U.S. Legal Services Group, 219 N.J. 430, 442 (2014), "[a]n arbitration provision is not enforceable unless the consumer has reasonable notice of its existence." Wollen v. Gulf Stream Restoration and Cleaning, LLC, 468 N.J. Super. 483, 498 (citing

Hoffman v. Supplements Togo Mgmt., 419 N.J. Super. 596, 609 (App. Div. 2011)). Under the requisite "fact-intensive inquiry[,]" the post-transaction notice provided by Uber was unreasonable and ineffective. Id. at 500 (citing Waskevich v. Herold Law, P.A., 431 N.J. Super. 293, 298 (App. Div. 2013) (internal quotation marks omitted) (stating "courts examine arbitration provisions on a case-by-case basis")).

First, as our Supreme Court "has repeatedly recognized in arbitration disputes: 'The consumer context of the contract matter[s].'" Id. at 502 (quoting Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 320 (2019)). Uber's agreement is contained within a contract of adhesion. Muhammad v. Cnty. Bank of Rehoboth Beach, Del., 189 N.J. 1, 15 (2006). As such contracts are presented on a take-it-or-leave-it basis, the only meaningful negotiating power consumers such as the McGintys have is to walk away and not participate in the deal. That power is neutralized when the consumer is forced to review the proposed terms without "the option of rejecting the contract with impunity." Carnival Cruise Lines v. Shute, 499 U.S. 585, 595 (1991). In Carnival Cruise Lines, the consumer was bound to the forum selection clause because the terms were available for review and to be accepted or rejected prior to purchase of the ticket. Id. at 590.

Grappling with this principle in the Internet Age, in Caspi v. Microsoft Network this Court likewise enforced a forum selection clause because the terms could have been reviewed before the prospective subscriber created an account. 323

N.J. Super. 118, 122, 125 (App. Div. 1999). The plaintiffs "were free to scroll through the various computer screens that presented the terms of their contracts before clicking their agreement." Id. at 125.

Conversely, in Hoffman v. Supplements Togo Management, this Court reversed the dismissal of a consumer's complaint, determining that reasonable notice was not provided of the at-issue forum selection clause contained within a disclaimer on the defendant's website. 419 N.J. Super. at 595. "Reasonable notice" of the clause was not provided because the disclaimer was "submerged" at the bottom of the webpage and "the website was designed in a manner that makes it unlikely that consumers would ever see it at all on their computer screen." Id. at 611.

Hoffman relied upon then-Circuit Judge Sotomayor's "apt[]" acknowledgement in Specht v. Netscape Communications that "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility." Id. at 609 (second alteration in original) (quoting Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 35 (2d Cir. 2002)). In Specht, a link to an arbitration clause was provided below a link to download the software program at issue. 306 F.3d at 23. Instead of clicking the download icon, subscribers could have scrolled further down the webpage and encountered language requesting them to review and agree to the terms of the

licensing agreement before downloading and using the software. Ibid. However, once the download was activated, the licensing agreement containing the terms was not displayed again while the software was running or at any other time. Ibid.

Under these circumstances, the Second Circuit held the arbitration clause was unenforceable. The Court was not convinced that "a reasonably prudent [person] in these circumstances would have known of the existence of [the] license terms." Id. at 31; 32 ("reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms"). Instead, the plaintiffs "were responding to an offer that did not carry an immediately visible notice of the existence of license terms or require unambiguous manifestation of assent to those terms." Id. at 31; see Wollen, 468 N.J. Super. at 499 (reaffirming Specht as "instructive").

Here, even more egregiously than the clauses at issue in Hoffman and Specht, Uber's arbitration agreement was not just "submerged" but hidden entirely until being sprung on the McGintys after their order had been placed and paid. (Da168). The McGintys had no opportunity to review and no "option" to "reject[] the contract with impunity." Carnival Cruise Lines, 499 U.S. at 595. Rather, the McGintys were placed under economic and other pressures compelling their acceptance.

That compulsion directly bears on the enforceability of a consumer contract, particularly contracts of adhesion. In this context, only "[a] party who enters into a

contract in writing, without any fraud ***or imposition*** being practiced upon him, is conclusively presumed to understand and assent to its terms and legal effect." Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 321 (2019) (alteration in original) (emphasis added) (quoting Rudbart v. N. Jersey Dist. Water Supply Comm'n, 127 N.J. 344, 353 (1992)). Economic pressure (or the threats of an angry driver and/or hungry family) are exactly the sort of impositions that vitiate the mutual assent necessary for contract formation. Rudbart, 127 N.J. at 355-56. As example, in Vasquez v. Glassboro Service Association, our Supreme Court compared the inequity in "a consumer who must accept a standardized form contract to purchase needed goods and services" to a lease provision in a migrant worker contract requiring immediate eviction upon termination. 83 N.J. 86, 103 (1980). While there are certainly different "degree[s] of compulsion motivating" the consumer, Rudbart, 127 N.J. at 356, these cases recognize that consent is not truly voluntary where it is the product of economic constraints like sunk costs or need for essentials and the consumer cannot "reject[] the contract with impunity." Carnival Cruise Lines, 499 U.S. at 595.

Here, a reasonable person in the McGintys' position would face innumerable pressures to click the box and accept the order, such as the expenditure of money, the desire to monitor the progress of the delivery, the stranger coming to their door expecting to be tipped, the labyrinth of automated chat functions and phone

answering services to cancel or seek a refund, the perishability of the food, and even their own hunger. Under these pressures, any acceptance of the arbitration agreement was not the product of knowing and voluntary decision making but influenced by unfair imposition.

As a final note, plaintiffs respectfully urge the Court to approach the text of the arbitration under this same light. To review and attempt to understand it, standing in the shoes of the reasonable consumer, mid-order, startled by a pop-up when expecting to see the location of their order. That "first-person" consumer perspective is taken in Hoffman, Carnival Cruise Lines, and Caspi, in which the respective courts "follow along" with the ordering process. And it is the context in which the McGintys were confronted with a massive, incomprehensible arbitration agreement.

B. Uber's agreement is confusing, ambiguous, and fails to meaningfully convey waiver of the right to sue per Atalese

Uber's agreement does not clearly and unambiguously communicate that the consumer is waiving their right to jury trial. Contrary to Uber's belief, the trial court's recognition of that reality did not hinge on the absence of any one word or phrase, but the absence of all of the usual language that has been held to adequately convey the nature of the rights at stake and waiver of them. The agreement's insufficient, unenforceable waiver of rights is a direct product of its unclear and confusing format. The structure is overly long and filled with cross-referencing and

conflicting sections, and the language relies upon anesthetizing terms that blur the requisite clarity.

Here, plaintiffs first examine those semantic and linguistic flaws and how they undermine enforceability. Second and third, plaintiffs address the insufficiency of the agreement's waiver of rights, and its failure to adequately delineate the distinction between arbitration and a judicial forum. These flaws, which must be viewed in totality, are fatal to any finding of assent to arbitrate.

1. The structure of the Agreement is not plain, clear, and understandable

Given the waiver of constitutional (and often statutory) rights at stake, NAACP of Camden Cnty. E. v. Foulke Mgmt., 421 N.J. Super. 404, 424 (App. Div. 2011), mutual assent to arbitrate requires the parties "have full knowledge of [their] legal rights and intent to surrender those rights." Knorr v. Smeal, 178 N.J. 169, 177 (2003) (citing W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 153 (1958)). Thus, waiver "must be clearly and unmistakably established." Atalese, 219 N.J. at 444 (quoting Garfinkel v. Morristown Obstetrics & Gynecology Assocs., 168 N.J. 124, 132 (2001)). Clarity depends in no small part on the format of the agreement, which must be "written in plain language that would be clear and understandable to the average consumer[.]" Atalese, 219 N.J. at 446.

This baseline assessment of legibility and clarity was recently reaffirmed by this Court in Ogunyemi v. Garden State Medical Center, No. A-1703-22, __ N.J.

Super. __ (App. Div. Mar. 25, 2024) (slip op., at *11) (Pa1-24), which rejected an arbitration clause within an employment agreement "not written in plain, clear, and understandable language." In particular, the provision flip-flopped between remedies without explanation, and was overly long and "confusing and poorly drafted[.]" Ibid. As to its length, this Court noted it was contained in a single paragraph of 887 words across thirty-six lines. Id. (slip op., at *9) (Pa9). Under these circumstances, even the agreement's clear proclamation the "arbitration provision waives your right to a jury trial for any and all claims, including statutory employment claims" was insufficient to save it, and that is much more protective language than at issue here. Id. (slip op., at *11, *12) (Pa11-12).

Ogunyemi drew "insight into ambiguity within arbitration clauses" from Morgan v. Sanford Brown Institute, where our Supreme Court also rejected an arbitration provision because the unclear and ambiguous language did not adequately secure waiver. 225 N.J. 289, 310-11 (2016). The Morgan Court expressly recognized that arbitration and its implications are not self-evident to the average consumer. Id. at 309 n.7 (citing two studies). Thus, notwithstanding its recognition "[n]o magical language is required to accomplish a waiver of rights" and "broadly worded language" is sufficient, the Court emphasized that arbitration agreements must be "'written in plain language that would be clear and

understandable to the average consumer that she is' giving up the right to pursue relief in a judicial forum." Id. at 310 (quoting Atalese, 219 N.J. at 446).

As a point of reference, Morgan cited to the New Jersey Plain Language Review Act, N.J.S.A. 56:12-1 to -13, which requires consumer contracts to be written "in a simple, clear, understandable and easily readable way as a whole[.]" N.J.S.A. 56:12-2; see Kernahan, 236 N.J. at 321 (endorsing same). One subsection, N.J.S.A. 56:12-10, lists several "guidelines" also implicated here, "[c]ross references that are confusing[,]" "[s]entences that are of greater length than necessary[,]" "[s]entences that contain double negatives and exceptions to exceptions[,]" "[s]entences and sections that are in a confusing or illogical order[,]" "the use of words with obsolete meanings or words that differ in their legal meaning from their common ordinary meaning[,]" and "[a] table of contents or alphabetical index shall be used for all contracts with more than 3,000 words[,]" among others. Morgan, 225 N.J. at 310 n.8 (quoting N.J.S.A. 56:12-10).

With Atalese and these general principles in mind, Morgan rejected the arbitration provision at issue. The Court noted the length and format of the agreement, one paragraph of 750 words across thirty-five lines, slightly less than Ogunyemi. Id. at 310. As for its content, "[t]he best that can be said about the arbitration provision is that it is as difficult to read as other parts of the enrollment agreement." Ibid. In that regard, the agreement lacked all of the words highlighted

as absent from Uber's agreement by the trial court – "waiver, jury, trial, statutory, constitutional and rights" – and did not by "any other manner" adequately secure the plaintiff's waiver. (Da303). Under those circumstances, the provision was plainly unenforceable. Id. at 310-11.

Here, Plaintiffs wish to draw the Court's attention to several particular areas of concern in Uber's agreement: its length, overuse of confusing cross-references, and contradictory clauses and sections.

Uber's agreement is roughly 7600 words, more than ten times longer than both Morgan and Ogunyemi. (Da80-97). The arbitration provision itself and the other sections that are cross-referenced make up roughly fourteen 8.5" x 11" pages in Uber's appendix. (Da80-97). One can only imagine that length in terms of iPhone-sized scrolls.

The length of Uber's agreement is drastically exacerbated as an issue by its format, which contains dozens of confusing and contradictory cross-references and exceptions. To piece together what other agreements manage to do in a sentence or two, an Uber user would first need to read a large, unbroken paragraph of 202 words, which contains no less than three references to the same subsection yet to come, and which is dominated by lengthy and repeated lists and language related to class action and mass action waiver. (Da81).

The user then needs to read Section 2(a)(1), which begins with an exception referencing Section 2(b) – which must now be read too – and identifies certain types of claims emanating out of the use of "the Services." (Da82). To understand what "the Services" might be, the user would have had to recall that term being defined in the very first paragraph of the agreement. (Da80). Scrolling back there one finds a partial definition, in a sentence with three other defined terms, and the notation the Services are more fully defined in Section 3. (Da80).

To get to Section 3, the user has to scroll past the rest of the arbitration agreement (ten pages worth) the user hasn't actually seen yet. (Da89). Section 3, not actually part of the arbitration agreement itself, again defines Services while simultaneously using the word "service(s)" both in the definition itself and throughout the section not as defined. (Da89-90). When the user gets to the end of the section, which has its own license, restrictions, all-caps print, and the like, the user sees Section 4, which has not yet been referenced but which appears more related as it is entitled "Access and Use of the Services[.]" (Da91-93).

Plaintiffs will stop there, but the point is obvious. No matter what arbitration is – we are not even at whatever passes for that – the user is a few thousand words in and a few scrolls back and forth across the agreement and doesn't even know if theirs is a claim subject to it. It is entirely unclear what "the Services" are – the Terms never come out and say "transportation" or "delivery of food" in plain, simple

terms. And the user's not even at the exceptions in Section 2(b) that were added to their plate moments ago, and which might make all of this irrelevant.

Yet even beyond that, the agreement is not just confusing but contradictory. As one example, Section 7 contains Choice of Law and Choice of Forum clauses that are just as internally inconsistent as the provision in Ogunyemi. The whiplash between the second and third sentences of Choice of Forum is particularly egregious. (Da97). In the second sentence, the Terms set forth the statement that "any dispute, claim, or controversy arising out of or relating to incidents or accidents resulting in personal injury . . . shall be brought exclusively in the state or federal courts in the State in which the incident or accident occurred. . . except as may be otherwise provided in the Arbitration Agreement above or in supplemental terms applicable to your region, to the extent permitted by law." (Da97). This appears to endorse the filing of litigation in these circumstances, qualified by the arbitration agreement in Section 2, "supplemental terms" (that are never provided or identified), and "to the extent permitted by law" which is never elaborated on. (Da97).

However, the third sentence then continues, "[t]he foregoing Choice of Law and Choice of Forum provisions do not apply to the Arbitration Agreement in Section 2, and we refer you to Section 2 for the applicable provisions for such disputes." (Da97). This sentence, which repudiates applicability of the Choice of Forum clause just a sentence after indicating both worked in concert is contradictory

and leaves the user with unreconcilable questions of what impact the Choice of Forum clause then has to personal injury claims. The average user, with no real knowledge of arbitration or their rights, would have no ability to discern which contradictory clause controlled. And this is all the more true where in Section 6 above, Uber actually disclaims all liability for "personal injury" and the user even agrees to indemnify Uber for such claims! (Da95-96).

Those anti-consumer clauses, preying on ignorance to stifle claims, compound the contradictory nature of Section 7's clauses, the confusing cross-references between innumerable sections, and the overall ambiguity of the agreement.

2. The unclear and ambiguous language of the Agreement does not secure valid waiver of the right to jury trial

In this instance, the user could address the substance of the agreement only after contending with its late arrival, post-purchase in a moment of pressure and imposition, and after hacking through an entangling web of confusing, contradictory, cross-referencing sections. Cases like Ogunyemi instruct that even a clear, explicit waiver might not be enough to save an arbitration provision at this stage, never mind one that relies upon vague, unclear, and ambiguous language like Uber's.

Distilled to its essence, Uber's defense here is that other agreements were deemed enforceable that lacked the language its agreement lacks. It thus points to the recent (unpublished, not precedential or binding) Drosos v. GMM Global Money Managers Ltd., No. A-3674-21 (App. Div. Nov. 14, 2023) (slip op., at *4) (Da360-

361), where an agreement that did not specifically mention "waiver" of the "right to a trial by jury" was upheld.

However, in pointing to this flaw in the Drosos agreement, Uber ignores that its own contains none of the prophylactic language that court pointed to in order to justify its enforcement. Specifically, the Court found solace in the explicit contrast between direct reference to the Rules of the American Arbitration Association on the one hand, and "litigation in the Judicial Court System" on the other. Id. (slip op., at *4). As will be expounded upon more below, this distinction between arbitration and litigation is one of the essential factors considered by our courts. The Drosos Court analogized this contrast of the AAA Rules and "litigation in the Judicial Court System" with the agreement in Griffin v. Burlington Volkswagen, Inc., 411 N.J. Super. 515, 518 (App. Div. 2010), that stated "[b]y agreeing to arbitration, the parties understand and agree that they are waiving their rights to maintain other available resolution processes, such as a court action or administrative proceeding, to settle their disputes."[2] Uber's agreement never provides that clear contrast where the anesthetized language used by Uber such as "settle," "resolve," and "bring" does not fairly mark "arbitration" and "litigation" as mutually exclusive – none suggest

[2] While not quoted in Drosos (or by Uber), Griffin's agreement also lists three types of statutory claims as examples of those now subject to it. 411 N.J. Super. at 518.

adversarial proceedings. Nor does Uber allow users to draw this conclusion, at least for this dispute, where no arbitration provider or rules are identified.

While Uber is certainly correct that no magic formulation is required, New Jersey law still requires arbitration agreements to clearly convey "that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue." Garfinkel v. Morristown Obstetrics & Gynecology Assocs., 168 N.J. 124, 132 (2001) (quoting Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993)). Our jurisprudence recognizes there is a particular gravity inherent in referring to someone's constitutional rights and the risk of their waiver. It's a mercy we're bestowed at our lowest. See Miranda v. Arizona, 384 U.S. 436 (1966). Yet, Uber deliberately deleted all language referencing "the right to trial by jury" and "waiver" from an earlier version of its terms and conditions, intentionally weakening the consumer protection they offer and undercutting the gravity of the December agreement.

As credited by the trial court, the December 2021 Uber Terms and Conditions at issue in this litigation contain a more deficient arbitration agreement than the January 2021 Terms and Conditions at issue in the recently decided Williams v. Ysabel, No. A-001391-22 (App. Div. Sept. 7, 2023) (Da170-181). Below, Uber argued that the trial court should accept this Court's conclusion that its arbitration agreement was "clear and unambiguous," without mention it removed the language

Williams actually relied upon. The January 2021 agreement there had explicitly included the proviso "[y]ou acknowledge and agree that you and Uber are each waiving the right to a trial by jury." Id. (slip op., at 10) (Da179). This language was obviously crucial to the Court's finding the agreement was "sufficiently clear to place a consumer on notice that he or she is waiving a constitutional or statutory right" as it was the only constitutional or statutory right mentioned in the agreement at all. Ibid. (quoting Atalese, 219 N.J. at 443; citing Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 137-38 (2020)) (Da179-80).

Uber never replaced that protective language with any other identification that an Uber user's right to jury trial were at stake. This is despite leaving in the acknowledgment that other rights are implicated by the arbitration agreement and Terms, such as the right to participate in class or mass actions, magnifying the importance of those provisions as compared to the waiver. (Da82). Again, while the mere absence of any one word or phrase is not in and of itself reason to condemn the agreement, the trial court correctly noted no published New Jersey opinion has "upheld a consumer arbitration clause where neither the words waiver, jury, trial, statutory, constitutional, and rights were not included" and "clarity is required." (Da303) (quoting Moore v. Woman to Woman Obstetrics & Gynecology, L.L.C., 416 N.J. Super. 30, 37 (App. Div. 2010)).

That clarity is not provided by the unclear and ambiguous language of Uber's agreement, a flaw only deepened by the agreement's failure to distinguish between arbitration and a judicial forum.

3. The Agreement does not adequately distinguish between arbitration and a judicial forum

As mentioned above, the drawing of a distinction between arbitration and a judicial forum is one of the central components of valid waivers of the right to jury trial. Our case law is replete with strong examples, like Curtis v. Cellco Partnership, 413 N.J. Super. 26, 33-37 (App. Div. 2010), that walked the reader through certain key differences. And others, like Drosos, that provided a contrasting set of rules from which these differences could at least be user-assembled. Uber's December 2021 agreement does not do either.

Importantly, the agreement never actually fairly posits arbitration as precluding litigation, rather than a distinct process. While there is a thin description that claims "will be settled by binding individual arbitration between you and Uber, and not in a court of law[,]" the agreement only ever uses verbs "settle" and "resolve" to describe what occurs at arbitration. (Da81-82). These words do not implicate the adversarial nature of litigation, particularly where arbitration is described as emanating out of mutually agreeable, "good-faith informal efforts to resolve disputes[.]" (Da86). Thus, "court of law" does not signify "litigation" any more than it does a mere physical location. (Da82).

While words such as "final" and "binding" are used, absent any identification that arbitration is a replacement for litigation, there is nothing to suggest the finality of arbitration will extend beyond that forum, whatever it may be. (Da80). In other words, a user could reasonably conclude that any findings or rulings in arbitration would govern the parties' attempt at "settlement" or "resolution," without any understanding litigation was precluded or that review of the arbitrator's decisions by a court is very limited. In contrast, the upheld agreements in our case law have conveyed by multiple, overlapping means that arbitration is an exclusive and preclusive forum for any dispute (two more common "buzzwords" meaningfully absent from the arbitration agreement).

In Curtis, the agreement explained that "[i]nstead of suing in court, we each agree to settle disputes (except certain small claims) only by arbitration." 413 N.J. Super. at 31. Likewise, the acknowledgment in Martindale v. Sandvik, Inc., that "all disputes relating to [the plaintiff's] employment . . . shall be decided by an arbitrator[,]" is described as a direct consequence of the plaintiff's agreement "to waive [her] right to a jury trial[.]" 173 N.J. 76, 81-82 (2002). In Griffin, it was "[b]y agreeing to arbitration, the parties understand and agree that they are waiving their rights to maintain other available resolution processes, such as a court action or administrative proceeding, to settle their disputes." 411 N.J. Super. at 518. While

the weak "settle" was used there, it is fortified by the clear explanation that arbitration and litigation are exclusive. Ibid.

There is no redeeming language in Uber's agreement, or even redeeming reference, such as to the AAA Rules in Drosos. On that point, Plaintiffs would be remiss to not mention the agreement does not actually "explain[] how and by whom an arbitration would be administered" as Uber claims. (Db22). Turning to this portion of the agreement, Section 2(c) only designates an arbitration provider and arbitration rules for disputes arising in California. (Da85). For disputes like this one arising elsewhere, users are confronted with a near-indecipherable paragraph requiring collaboration between the parties from the start, invoking Federal statute, apparently assigning some powers to courts of law, and which is in any event contradicted two paragraphs down by the statement that "[a]ny dispute, claim, or controversy arising out of or relating to incidents or accidents resulting in personal injury . . . shall be governed by and construed in accordance with the laws of the state in which the incident or accident occurred" without any limitation. (Da86).

That the factfinder and rules of arbitration might be different, and that it might be initiated by mail, is not curative as Uber suggests. (Da84-86); (Db22-23). First, it must be highlighted that the argument itself is a step beyond even Drosos. If providing the arbitration provider's rules is requiring the user to self-assemble the pieces of what arbitration is, Uber's agreement requires them to undertake the initial

step of carving those pieces out of wood. It is just as likely the user determines these facets make arbitration either similar enough to or distinct from litigation, not mutually exclusive with it, such as the involvement of a judge. And, please keep in mind, this is all apparently taking place on an iPhone, in a food delivery app, by surprise pop-up after the purchase of perishable goods, already en route via stranger. Or in other situations just like that. It's absurd to expect a member of the public to draw these connections.

And, even if they did, these are secondary considerations that are not even made relevant in the mind of Uber's users because Uber fails to posit arbitration as exclusive. That arbitration might be governed by another set of rules, or by a retired judge or lawyer not an active judge or jury, or is initiated by mail, only grow to constitutional or statutory magnitude when one understands arbitration is not just a forum, but the only forum. In that respect, "nothing better illustrates that arbitration is not a self-defining term than our court rules." Kernahan, 236 N.J. at 333 (Albin, J., concurring). Rule 4:21A-1 requires parties to arbitrate automobile negligence actions like this one. R. 4:21A-1(a)(1) to (3). However, although this arbitration is mandatory, and the award can be binding, there are also circumstances under which the award may be rejected and returned to the court "for disposition." As Justice Albin acknowledged, this scheme illustrates the "average consumer" has no basis to "understand that the term arbitration—without some explanation—means that court

review or relief is unavailable." Ibid.; see Aguirre v. CDL Last Mile Solutions, LLC, Nos. A-3346-22/A-3372-22 (App. Div. Feb. 26, 2024) (slip op., at *25) (emphasis added) (while subject to R. 1:36-3, this recent decision rejected agreements that did "not define arbitration **and lack the crucial disclosure that it will replace litigation or a jury trial**. An average consumer . . . is not likely to understand, absent further explanation, what arbitration is, how it differs from litigation in court or that it involves no judge or jury, nor are they likely able to distinguish which claims fall within the 'jurisdictional maximum for small claims' to be litigated in court.") (Pa25-56). Uber's agreement suffers from this same fatal flaw.

In this regard, the weak plaster Uber mixes from various disjointed, contradicted, and confusing portions of the agreement can never fill the foundational cracks in the operative clause of Uber's agreement, Section 2(a)(1). This was true last month, in Ogunyemi, where a clear and understandable waiver could not cure the contradictory clauses that came before it in the Section. __ N.J. Super. at __ (slip op., at *12) (citing Roach v. BM Motoring, LLC, 228 N.J. 163, 174 (2017)) ("The express waiver language at the end of Section 27 does not resolve the ambiguity preceding it, which must be construed against defendants."). And it must also be true here for an even more deeply and widely flawed agreement.

4. Uber's unsupported presumptions regarding Mrs. McGinty's subjective knowledge are irrelevant

Uber's argument that Mrs. McGinty had subjective knowledge and understanding of the December 2021 Agreement via the January 2021 Agreement contradicts New Jersey law and relies on speculation.

Mutual assent to arbitrate depends not on the parties' "real intent but the intent expressed or apparent in the writing[.]" Leodori v. CIGNA Corp., 175 N.J. 293, 300 (2003) (quoting Garfinkel, 168 N.J. at 135). This is consistent with long-standing precedent governing contract interpretation in general. See Friedman v. Tappan Dev. Corp., 22 N.J. 523, 531 (1956); Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997) (stating that the meaning of a contract's terms is determined by looking to "the objective manifestations of the parties' intent"). Thus, in Leodori it was irrelevant that the plaintiff was an attorney who had received numerous documents containing the arbitration policy during his employment. 175 N.J. at 306. And in Garfinkle, where the plaintiff was a doctor that negotiated the complex employment agreement with the assistance of counsel. 168 N.J. at 135-36. Rather, "[i]rrespective of plaintiff's status or the quality of counsel, the Court must be convinced that [they] actually intended to waive [their] statutory rights. An unambiguous writing is essential to that determination[,]" and yet it is absent here. Id. at 136.

Further, Uber's presumption that Mrs. McGinty's prior receipt of January 2021 Agreement or status as a lawyer conveyed some supplemental knowledge is

entirely speculative. Uber cannot seriously attempt to glean anything at all from Mrs. McGinty's failure to "deny agreeing to" the January 2021 Agreement in her certification, which was "expressly supersede[d]" by the December 2021 Terms and Conditions, and not even mentioned by Uber until its reply brief. (Da80).

Hamilton v. Uber Technologies, Inc., which concerned whether the self-represented plaintiff could be required to arbitrate as a third-party beneficiary, is inapposite. No. 22-cv-6917, 2023 WL 5769500, at *5 (S.D.N.Y. Sept. 7, 2023) (Da266-271). Prior agreements were raised in relation to the fairness of extending third-party beneficiary status to the plaintiff, who it was shown had his own account before it was suspended and he continued to use the third-party's, not to somehow immunize a subsequent, ambiguous arbitration provision. Ibid. (Da270).

C. Federal and New Jersey law plainly permit courts to determine arbitrability

The delegation clause in Uber's unclear and ambiguous arbitration agreement is equally unenforceable. Both the Supreme Court of the United States and the Supreme Court of New Jersey are in alignment that in the absence of "clear and unmistakable evidence" the parties agreed to arbitrate arbitrability, "the parties have not waived a court resolution of that issue." Kernahan, 236 N.J. at 331 n.3 (quoting Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. 524, 530 (2019)). In that respect, "[a]n agreement to delegate arbitrability to an arbitrator, like an arbitration agreement itself, must satisfy the elements necessary for the formation of a contract

under state law." Morgan, 225 N.J. at 295 (citing First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995)). In Morgan, our Supreme Court held that where the underlying arbitration agreement does not satisfy Atalese, and the delegation clause does not otherwise "explain that arbitration is a substitute for the right to seek relief in court—information necessary for the formation of a valid contract"—both "the arbitration provision and its putative delegation clause are not enforceable." Id. at 295-96 (citing First Options, 514 U.S. at 944).

That is the precise situation at hand, and this Court unquestionably has the authority to reach that same conclusion. Morgan directly tracks the Federal Arbitration Act, 9 U.S.C. §§ 1 to 16, see MZM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds, 974 F.3d 386, 402 (3d. Cir. 2020) ("[U]nder Section 4 of the FAA, courts retain the primary power to decide questions of whether the parties mutually assented to a contract containing or incorporating a delegation provision."), and New Jersey's Arbitration Act, specifically N.J.S.A. 2A:23B-6(b), which provides that a "court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." The New Jersey Supreme Court has held this language expressly delegates the determination of enforceability of an arbitration provision to the courts. Hirsch v. Amper Fin. Servs., 215 N.J. 174, 187-88 (2013); see Muhammad, 189 N.J. at 12 ("'whether the parties have a valid arbitration agreement at all' is a 'gateway' question" to be determined by a court of

law). Moreover, the FAA and United States Supreme Court both recognize that the enforceability of arbitration agreements may hinge on "state contract principles." Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1415 (2019); see 9 U.S.C. § 2 (arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

Taking both of these reins, Atalese and its progeny have validly held that in measuring the enforceability of an arbitration agreement the "initial inquiry must be . . . whether the agreement to arbitrate all, or any portion, of a dispute is 'the product of mutual assent, as determined under customary principles of contract law.'" Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 137 (2020) (quoting Kernahan, 236 N.J. at 319). In line with these principles, the totality of the circumstances analysis as to mutual assent performed by the trial court and discussed above in Points I(A) and (B) was eminently permitted (and correct). While Plaintiffs appreciate Uber's admission the standard is objective (notwithstanding the arguments in its Point I(B)(2)), that does not mean Uber gets to vault past the threshold inquiries merely because there is perhaps *one* objective manifestation of mutual assent. Under the full totality, the trial court validly held mutual assent could not be reached on the back of the ambiguous agreement and its insufficient waiver provision. For practically these same reasons, the delegation clause too fails. It does not "explain that arbitration is a substitute for the right to seek relief in court—information

necessary for the formation of a valid contract"—and thus there can be no mutuality of assent to arbitrate arbitrability. (Da84); Morgan, 225 N.J. at 295-96 (citing First Options, 514 U.S. at 944).

Last, as will be discussed immediately below, because this analysis is "just as it is for any other contract[,]" it does not run afoul on the prohibition on placing arbitration agreements and other contracts on unequal footing. Flanzman, 244 N.J. at 137 (quoting Kernahan, 236 N.J. at 319).

D. Uber's facial and "as applied" challenges to Atalese fail at the start

Atalese and its requirement that "[a]n arbitration clause, like any contractual clause providing for the waiver of a constitutional or statutory right, must state its purpose clearly and unambiguously[,]" does not run afoul of the FAA. 219 N.J. at 425. The facial challenge brought by Uber, essentially arguing Atalese misstated New Jersey law, is constrained and falls apart under close review. The "as applied" challenge is simply Uber's unsupported invention, and Plaintiffs will handle it first.

Uber argues that, at a minimum, Atalese runs afoul of the FAA because it (allegedly) affects arbitration agreements more than other contract provisions. Setting aside the easy explanation that most other contract provisions do not necessarily implicate the waiver of one's constitutional and/or statutory rights, Uber has no actual support for its position beyond speculation. Perhaps a product of this argument not being raised below (though it's a reasonable expansion and plaintiffs

do not knock it on that basis), Uber has not provided any actual statistical or other evidence that actually suggest Atalese "has been applied in practice to disproportionately disadvantage arbitration agreements." (Db34). Absent material in the record by way of adduced proof (deposition testimony, interrogatory answers, certifications, etc.), judicially noticeable facts, stipulations, or other lawful admission, there is no basis to even consider the argument. N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 278 (2007); Gross v. Borough of Neptune City, 378 N.J. Super. 155, 159 (App. Div. 2005).

Uber's facial challenge has the opposite problem, it has already been addressed and rejected by our courts on a number of occasions. Most pointedly, Justice Albin addressed the "equal footing" issue in his concurrence in Kernahan, where the Court had originally granted certification to specifically address Uber's present contention that Atalese "runs afoul" of Kindred Nursing Centers Ltd. Partnership v. Clark, 581 U.S. 246 (2017), and the FAA. Kernahan, 236 N.J. at 327 (Albin, J., concurring). Though the defendants conceded their facial challenge at oral argument, Justice Albin chose not to "sidestep" the certified issue and went out of his way to demonstrate the tensile strength of the "two interconnected strands of our state-law jurisprudence" Atalese "wove together . . . in assessing the validity of an arbitration agreement[.]" Id. at 330-31. In particular, that both strands stem from "neutral principles of state contract law" and Atalese does not violate the FAA. Ibid.

The first is the strong thread wrapping "contracts in which individuals waive their statutory or constitutional rights." Id. at 331. As recognized by Judge Albin, Atalese relied on a host of both arbitration cases and non-arbitration cases "involving a party's waiver of statutory rights in which our courts have required that the waiver be clear and unmistakable." Id. at 332 (citing Atalese, 219 N.J. at 443-44). In doing so, Atalese acknowledged "[a]rbitration clauses are not singled out for more burdensome treatment than other waiver-of-rights clauses under state law." Ibid. (quoting Atalese, 219 N.J. at 444) (recognizing Atalese applied "neutral principles of state contract law").

Uber's challenges to some of the cited non-arbitration cases could best be described as "uncharitable." As one example, the focus of West Jersey Title & Guarantee Co. v. Industrial Trust Co. was not truly the spouse's conduct; rather, because of the nature of the property rights at stake and the clarity of the document's language, even particularly egregious conduct like imposing costs on others would not lead to waiver. 27 N.J. 144, 153 (1958). Likewise, Uber magnifies a minor point in Christ Hospital v. New Jersey Department of Health and Senior Services, 330 N.J. Super. 55, 63-64 (App. Div. 2000). If there is any mention of conduct (plaintiffs presume Uber refers to "[t]he Department never notified Christ Hospital . . .") it is dwarfed by the discussion of contractual waiver. Id. at 63. The decision specifically provides that "[a]lthough there are some circumstances under which statutory rights

may be waived . . . even in those circumstances, 'any such waiver must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively.'" Ibid. (citing Alamo Rent A Car, Inc. v. Galarza, 306 N.J. Super. 384, 391 (App. Div. 1997); then quoting Red Bank Regional Educ. Ass'n v. Red Bank Regional High Sch. Bd. of Educ., 78 N.J. 122, 140 (2000)). Because "Christ Hospital certainly did not agree to any such condition . . . the Department did not show a clear and unmistakable waiver of the right to a hearing." Id. at 63-64. Simply put, these and the other cases cited by Atalese and re-endorsed by Justice Albin do concern contractual waiver and do subject non-arbitration clauses to the same rigors. And there are other cases that rise to Uber's challenge, (Db33), such as Aron v. Rialto Realty Co., 100 N.J. Eq. 513, 518 (Ch. 1927), aff'd o.b. 102 N.J. Eq. 331 (E. & A. 1928), where the Chancellor applied the general requirement of "a clear, unequivocal, and decisive act of the party showing such a purpose" to provisions in a property deed waiving zoning restrictions, and Country Chevrolet, Inc. v. North Brunswick Planning Board, 190 N.J. Super. 376, 379 (App. Div. 1983), which held a stipulation of dismissal "without prejudice" did not waive a planning board's right to enforce Rule 4:69-6's time bar against a late-refiled prerogative writs complaint. If anything, application of the standard is actually wider than Atalese suggests. See, e.g., Merchs. Indem. Corp. of N.Y. v. Eggleston, 68 N.J. Super. 235, 254 (App. Div. 1961) (applying "clear" and "unequivocal"

standard to carrier's waiver of contractual rights under insurance policy); and Mattia v. N. Ins. Co. of New York, 35 N.J. Super. 503, 511 (App. Div. 1955) (same).

Back to the point (and briefly as it's been touched on throughout), the other "strand of our jurisprudence" validly relied upon in Atalese is the "modest acknowledgement that the term arbitration is not self-defining." Kernahan, 236 N.J. at 332 (Albin, J., concurring) (citing Atalese, 219 N.J. at 442). Whether sourced in statistical study, as in Morgan, 225 N.J. at 308; Rule 4:21A's contradictions; the public policy underlying the Plain Language Act, N.J.S.A. 56:12-2; or some other source, the Court's concern was and is well-grounded. Under these circumstances, "[t]his sensible, neutral, nondiscriminatory application of our state law" requiring arbitration clauses to "comply with the exceedingly low bar set by Atalese and inform consumers of what they need to know" is not unreasonable treatment or treatment unequal to that for other rights and waivers. Kernahan, 236 N.J. at 334.

While this concurrence is not strictly binding, Uber's facial challenge to Atalese provides no grounds to disrupt its strongly supported and directly applicable conclusions. Neither challenge provides grounds for reversal of the Court's Order of November 22, 2023.

II. THE PURPORTED AGENCY OF THE MCGINTYS' MINOR DAUGHTER IS NOT ON APPEAL AND CANNOT BE DECIDED ON THIS MEAGER RECORD

Uber cannot be permitted vault over the unexplored minefield of factual issues presented by its questionable evidence of the clickwrap agreement, the post-transaction presentation, and the likelihood it was executed, if at all, by the McGinty's minor daughter, by presenting issues this Court has no appellate jurisdiction to hear. By virtue of its determination the agreement was ambiguous and unenforceable, the trial court did not go any further. But had it, the trial court would have confronted plaintiffs' argument that before this issue could ever be adjudicated, discovery was needed. Plaintiffs take that same position here, and do not consent to resolution of this issue on the meager record or, respectfully, under any exercise of original jurisdiction. See State v. Santos, 210 N.J. 129, 142 (2012) ("original jurisdiction under Rule 2:10-5 is "discouraged . . . if factfinding is involved").

First, there is no question this issue is outside the lines of the Order under appeal. Uber's argument expressly acknowledges that it is "[m]oving beyond the trial court's reasoning[.]" (Db34); (Da304) ("As the Court has found the arbitration clause with the Agreement unenforceable, the Court finds it unnecessary to address the additional issues raised in the opposition and reply."). Uber had the opportunity to ask the trial court to amplify its opinion and address this or other untouched issues.

R. 2:5-1(d). Uber's two case information statements indicate that Uber did not. (Pa57-62; Pa63-68).

Second, the issue cannot even be reached on the basis of the non-existent record. Despite demanding and certainly accepting plaintiffs' responses to written discovery, Uber never provided its own. Uber opposed plaintiff's stance that discovery needed to be taken as to the validity of the agreement and related issues before Uber's motion to compel arbitration could be decided. Now, to get over this hump, Uber simply construes every single factual dispute or issue in its own favor. Cf. Kleine v. Emeritus at Emerson, 445 N.J. Super. 545, 548 (App. Div. 2016) (holding that on motion to compel arbitration, facts and inferences must be drawn in favor of non-movant, citing Brill).

While some of its argument touches on the McGintys' certifications, others it simply invents from whole cloth, such as Mrs. McGinty "undisputedly agreed to Uber's materially similar Terms of Use just eight months prior in April 2021." (Db38). In reality, Mrs. McGinty never even had an opportunity to state a position on a separate writing Uber only called to attention in its reply papers.

Uber also never addresses the unique circumstances at issue here. For example, it presumes that any "agency agreement" extends past the ordering of food to the execution of an acknowledgment of terms and conditions. (Db36). It does not address the irregularity that the terms and conditions checkbox was not presented

until after the user made their purchase. Given that Uber's website is apparently one that minors can and frequently do access and utilize to make internet purchases, under the auspices of parents or otherwise, Uber has not addressed the potential applicability of other consumer protection schemes that may be implicated and offer plaintiffs shelter here. See, e.g., Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501–6505 (1998).

Further, any exercise of original jurisdiction would be an improper expansion of the power of Rule 2:10-5, which can be exercised "only with great frugality[.]" Tomaino v. Burman, 364 N.J. Super. 224, 234-35 (citation omitted). First, this is not "perpetual or lengthy litigation" that could be ended or even needs to be. State v. Micelli, 215 N.J. 284, 293 (2013) (quoting Allstate Ins. Co. v. Fisher, 408 N.J. Super. 289, 301 (App. Div. 2009)). Second, the Court would be required to "weigh[] evidence anew" and "mak[e] independent factual findings" beyond the scope of the record below. Ibid. (quoting Cannuscio v. Claridge Hotel & Casino, 319 N.J. Super. 342, 347 (App. Div. 1999)); see Santos, 210 N.J. at 142. The Court would be left to merely speculate.

The importance of the constitutional right at stake and the nature of the disputed factual issues also turn against original jurisdiction. Our Supreme Court has shied away from authorizing or exercising original jurisdiction when constitutional rights are implicated. See Micelli, 215 N.J. at 294 (in Sixth

Amendment case, reversing "exercise of original jurisdiction in order to engage in factfinding and consideration of the" applicable test and remanding for evidentiary hearing); State v. Henderson, 208 N.J. 208 (2011) (even though evidence as to all factors was in the record, remanding for trial judge's assessment of testimony presented at evidentiary hearing). Here, given the constitutional rights at stake, and the trial court's ability to assess testimony and other evidence at an evidentiary hearing, if this argument need be addressed, it must be below.

III. THE JANUARY 2021 TERMS ARE SUPERSEDED

Uber's argument that the January 2021 Terms must be enforced fails to account for the language in its December 2021 Terms which precludes this result.

The second paragraph of Uber's December 2021 Terms provides that this version of the terms "expressly supersede prior agreements or arrangements with you regarding the use of the Services." (Da80). Both the December 2021 and January 2021 Terms provide Uber the right to make changes to the terms from time to time, to make these changes unilaterally, and that amended terms will become effective immediately. (Da80). The terms continue that use of the Uber platform will be considered as consent to any changes in the terms, and that to reject any amended terms, a user must stop using Uber's services. (Da80). Under these conditions, the December 2021 Terms were undoubtedly the operative terms at the

time of the McGinty's crash, even if she was not aware of them for one reason or another (and the implications on waiver, et al. aside).

Most importantly, Uber's December 2021 Agreement contains an express severability provision that does not mandate return to the January 2021 Terms because any portion is invalidated. (Da88). Section 2(i) of the December 2021 Terms provides that "[i]f any portion of this Arbitration Agreement is found to be unenforceable or unlawful for any reason, . . . the unenforceable or unlawful provision shall be severed from these Terms[.]" (Da88). Curiously, Uber does not cite its own Terms. Moreover, the case law cited by Uber universally concern circumstances in which the entire subsequent contract was invalidated or was not severable. (Db41-42). As one, GEM Advisors, Inc. v. Corporacion Sidenor, S.A. explains, [w]here a provision of a contract is unenforceable because of an indefinite term, the whole contract is unenforceable unless the contract is severable." 667 F. Supp. 2d 308, 327 (S.D.N.Y. 2009). Uber's December 2021 agreement expressly is.

Given the clear severability, there is no reason to invalidate the entire December 2021 Terms, the invalidated provisions must simply be excised. There is simply no basis to go backward as Uber suggests.

Here, irrespective of whether the issue was properly raised,[3] there is no basis under New Jersey law or the December 2021 Terms to ignore the clear severability provision and resurrect the January 2021 Terms.

IV. THE ENFORCIBILITY OF THE AGREEMENT AGAINST MR. MCGINTY IS NOT PROPERLY ON APPEAL AND CANNOT BE DECIDED ON THIS MEAGER RECORD

New Jersey law does not permit one spouse to waive the other's right to trial and bind them to arbitration absent agency or consent. On the one hand, those are in part factual questions unaddressed by discovery or discussed in the trial court's opinion. For these reasons and those discussed above, in Point II, this issue is outside the scope of appellate jurisdiction here.

On the other hand, given the complete absence of any proof or even speculation of any such interspousal-agency relationship or consent on the part of the McGintys, and the absolutely clarity of the law on this issue, the Court could nevertheless address this question on the merits and validly hold that as a matter of law, Mr. McGinty cannot be compelled to arbitrate even if the agreement is deemed generally enforceable.

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[3] If raised at all, it was one line in Uber's reply brief, as compared to pages arguing the January 2021 Terms imprinted Mrs. McGinty with knowledge sufficient to override the December 2021 Terms' deficiencies, hence the written decision's remark: "The Court rejects, and Defendant seemingly does not argue, that the January 18, 2021, Agreement does not come into effect, but instead relied on the January Agreement as part and parcel for their "notice" they have provided to [Mrs. McGinty]." (Da304).

In Moore v. Woman to Woman Obstetrics & Gynecology, L.L.C., 416 N.J. Super. 30, 45 (App. Div. 2010), this Court specifically noted it was not "aware of any legal theory that would permit one spouse to bind another to an agreement waiving the right to trial on his or her claim without securing his consent to the agreement." There, a medical facility attempted to bind a mother's child and husband to arbitration, based upon an agreement she had executed. Id. at 45-46. While this Court recognized a parent may "bind a minor child to arbitrate future tort claims," it did not find any analogous theory in our jurisprudence as to spouses. Id. at 45 (quoting Hojnowski v. Vans Skate Park, 187 N.J. 323, 343 (2006)).

Addressing the question again, after remand, this Court reaffirmed its determination. Moore v. Woman to Woman Obstetrics & Gynecology, L.L.C., No. A-683-11 (App. Div. Aug. 14, 2013) (slip op., at *18-20) (Moore II) (Pa69-88). In recognition of several factors, such as the importance of clear waiver of a right to civil litigation, the husband's claim being direct and not purely derivative of his wife's (like Mr. McGinty's individual claims being predominate over those for loss of consortium), and the law's rejection of some presumption of agency between spouses. See Moore II (slip op., at *16-20) (quoting Hirsch, 215 N.J. at 194; and Restatement (Second) of Agency § 22 comment b (1958) ("Neither husband nor wife by virtue of the relation has power to act as agent for the other.")).

More recently, in Gayles v. Sky Zone Trampoline Park, this Court relied on this principle from Moore, in recognizing that absent guardianship or another like legal relationship, there was no basis to permit one to person to bind another to arbitration. 468 N.J. Super. 17, 26 (App. Div. 2021) (rejecting non-guardian's execution of waiver on behalf of child).

Here, there is no actual or implied agency relationship between the McGintys that would permit Georgia to bind John to arbitration. John does not consent. And John's claims are not predominantly derivative. Under these circumstances, there is no basis to depart from New Jersey law and permit a third-party to waive his right to trial.

V. UBER WAIVED ITS AGREEMENT TO ARBITRATE

Uber's waiver provides alternative ground in which this Court could stake affirmance of the Order dated November 22, 2023. For this reason, and because the record on this point is fully developed and without disputed issues of material fact, this issue is different in kind than the others not reached by the trial court. As our case law notes, a respondent may argue "any point on appeal to sustain the trial court's judgment" because "appeals are taken from judgments, not opinions." State Fireman's Mut. Benev. Ass'n v. N. Hudson Reg'l Fire & Rescue, 340 N.J. Super. 577, 590 (App. Div. 2001). This argument is captured within that wide net, but plaintiffs will endeavor not to belabor the point.

Below, plaintiffs argued that Uber waived any purported right to arbitrate as a result of its conduct from the near-inception of the claim. Waiver here is a fact-sensitive inquiry and in Cole v. Jersey City Medical Center, our Supreme Court adopted factors from a Third Circuit decision, Hoxworth v. Blinder, Robinson & Co., as guideposts. 215 N.J. 265, 278-79 (2013) (citing 980 F.2d 912, 926-27 (3d Cir. 1992)).

These factors are:

> not only the timeliness or lack thereof of a motion to arbitrate but also the degree to which the party seeking to compel arbitration has contested the merits of its opponent's claims; whether that party has informed its adversary of the intention to seek arbitration even if it has not yet filed a motion to stay the district court proceedings; the extent of its non-merits motion practice; its assent to the district court's pretrial orders; and the extent to which both parties have engaged in discovery.
>
> [Hoxworth, 980 F.2d at 926-27 (citations omitted).]

In Hoxworth, the Third Circuit ultimately held the defendants waived their right to arbitrate because, as summarized in Cole, "the litigation had been ongoing for eleven months prior to the defendants' motion to compel arbitration, the parties had engaged in extensive motion practice, and the parties had engaged in comprehensive discovery." 215 N.J. at 279 (citing Hoxworth, 980 F.2d at 925-27). "As a result, the plaintiffs suffered prejudice, and the defendants waived their right to arbitrate." Ibid. (citing Hoxworth, 980 F.2d at 927).

Here, these same factors bend toward waiver. First, Uber's motion to compel arbitration was untimely. While made roughly six months after plaintiffs' complaint was filed, it came fourteen months after the undersigned firm, Uber's prior counsel, and Zheng's counsel began working collaboratively without any mention (until June 2023, roughly a year later) of arbitration.

That arbitration was mentioned amongst boilerplate defenses in Uber's answer is unavailing. (Da42-48, #38). Rather, "[a] court will consider an agreement to arbitrate waived. . . if arbitration is simply asserted in the answer and no other measures are taken to preserve the affirmative defense." Cole, 215 N.J. at 281. In that vein, Uber's arbitration defense was listed amongst thirty-seven other, largely irrelevant or inapplicable defenses such as service of process, statute of limitations, *forum non conveniens*, and the Workers' Compensation Act. Id. at 8-14. Further, despite being an affirmative defense, Uber did not support it with the requisite statement of facts required by Rule 4:5-4. Under these same circumstances, albeit with respect to a statute of limitations defense, this Court has found "[i]t is difficult to take such a pleading seriously" and absent efforts to assert the defense a plaintiff would not be fairly apprised a defendant intended to rely upon it. White v. Karlsson, 354 N.J. Super. 284, 290 (App. Div. 2002). On the whole, Uber's answer did not apprise of any intention to rely on the defense; in fact, Uber submitted a (not actually complete) certification under Rule 4:5-1, which requires a party to certify, *inter alia*,

there are no pending, related arbitrations and that no arbitrations are contemplated. (Da49). Zheng's answer (relevant as his defense is also effectively controlled by Uber) contains a complete Rule 4:5-1 certification to that same effect. (Da61); see also Zaccardi v. Becker, 88 N.J. 245, 256-60 (1982) (defendant estopped from asserting statute of limitations where its conduct was inconsistent with intention to raise defense and led plaintiffs to reasonably believe it would not).

Uber and Zheng have demanded and received extensive written discovery hundreds of pages of medical records, and expert reports from the McGintys as demanded in their respective answers. Uber and Zheng have scheduled (and cancelled) the McGintys' depositions. Yet, Uber and Zheng have refused to produce their own discovery responses despite multiple letters and motions alerting them their responses are overdue. (Da188-192). On multiple occasions, Zheng's counsel insisted on going to mediation without any mention of arbitration. (Da161). And, perhaps most puzzling of all, Zheng's counsel moved to consolidate the companion action brought by the occupant of the second vehicle with this action, further signifying the validity of this action and plaintiffs' choice of forum. (Da193-95). The Order, as proposed, specifically consolidated these actions "for purposes of discovery and trial," also suggesting no intention for arbitration. (Da193-95).

Plaintiffs were forced to conclude that Uber's and Zheng's inaccurate Rule 4:5-1 certifications, refusal to engage in mutual discovery, repeat insistence on early

mediation, motion to consolidate, and Uber's late demand for arbitration were tactics, not coincidence. This dovetails with the additional factor adopted by Cole: "whether the delay in seeking arbitration was part of the party's litigation strategy[.]" Cole, 215 N.J. at 281. Uber extracted a host of material and information it would not otherwise have been entitled to or received if it mentioned at the outset of the parties' collaboration or even the outset of this litigation that it intended to compel arbitration. Instead, after utilizing local counsel with whom the undersigned had a professional relationship with to pull what it could from plaintiffs, Uber substituted its attorneys and slowly started to maneuver.

Uber's motivations are obvious. Throughout the country, in an increasingly losing war, Uber battles to classify its drivers as independent contractors. It has already lost on this issue in New Jersey in the wage and benefits context. See State Dep't of Labor & Workforce Dev., "Uber Pays $100M in Driver Misclassification Case with NJ Department of Labor and Workforce Development and Attorney General's Office" (Sept. 13, 2022) (Da196). And it is seeking to avoid the disaster, here and nationwide, that would stem from a similar result in the vicarious liability context. Uber's intentional effort to avoid full responsibility for the motor vehicle crashes of its drivers is squarely at odds with the public policy of the State of New Jersey, as expressed in the Transportation Network Company Safety and Regulatory Act, N.J.S.A. 39:5H-1 to -27. This legislation has obviously sought to expand the

duties of companies like Uber, requiring greater evaluation and supervision of drivers, and enhancing their responsibility to the public. N.J.S.A. 39:5H-2 to -25.

Last, Uber's tactics have prejudiced the McGintys, with prejudice defined in this context as "the inherent unfairness – in terms of delay, expense, or damage to a party's legal position[.]" Id. at 282 (quoting PPG Indus. v. Webster Auto Parts, 128 F.3d 103, 107 (2d Cir. 1997)). As explained throughout, Uber has inflicted delay and unnecessary expense on Plaintiffs as a result of its shifting position. It has played on the relationship between its prior counsel and the undersigned. It has thrown up smokescreens by insisting on mediation and submitting certifications and demanding discovery.

For these reasons, setting aside the validity of Uber's arbitration agreement, Uber has waived any right to arbitrate and its motion was properly denied.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request the Court affirm the Order of November 22, 2023.

Respectfully submitted,

STARK & STARK,
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/s/ Evan J. Lide

EVAN J. LIDE, ESQ.
MICHAEL C. SHAPIRO, ESQ.

Dated: April 22, 2024

GEORGIA M. MCGINTY A/K/A GEORGIA M. FRASER AND JOHN FRANCIS MCGINTY (w/h), Plaintiffs-Respondents, v. UBER TECHNOLOGIES, INC. AND RAISER, LLC, Defendants-Appellants, and JIA WEN ZHENG, JERINSON M. MEDRANO PERALTA, AND BRACHY FELIZDELAPAZ, Defendants.	Superior Court of New Jersey Appellate Division Docket No. A-001368-23 Civil Action On Appeal from an Order of the Superior Court of New Jersey, Law Division, Middlesex County Docket No. Mid-L-1085-23 Sat Below: Hon. Bruce J. Kaplan, J.S.C.

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Dated: May 15, 2024

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Preliminary Statement

Plaintiffs cannot defend the trial court's reasoning because it is manifestly incorrect about New Jersey contract law: *Atalese* does not require express jury-trial-waiver language in every arbitration agreement. Plaintiffs instead improperly raise a host of new arguments for the first time on appeal, some of which mischaracterize the record. There was no duress: The record clearly shows that Ms. McGinty (or her agent) confirmed her agreement to the December Terms *before* she ordered her food, not after, so there was no "pressure" to preserve her order.[1] Nor did Uber waive arbitration: Uber never requested any discovery from Plaintiffs or noticed any depositions. Application of settled New Jersey law to the record before this Court requires that the trial court be reversed.

Argument

I. The Arbitration Agreement is valid and enforceable. (Da301–304.)

A. Plaintiffs' attempt to contest their notice rests on a factual mistake.

Plaintiffs do not dispute that the digital interface that appeared in Ms. McGinty's Uber app on January 8, 2022, is *identical* to the one this Court found enforceable in *Williams* v. *Ysabel*, No. A-1391-22, 2023 WL 5768422, at *1, *4 (N.J. Super. Ct. App. Div. Sept. 7, 2023), because it provides reasonable notice of the arbitration agreement. Instead, Plaintiffs' brief argues for the first time in

[1] Unless otherwise noted, capitalized terms have the same meaning as in Uber's opening brief.

this case (Pb1, 6, 7–13, 20, 27, 39–40) that they lacked reasonable notice because Ms. McGinty was supposedly compelled to agree to the December Terms after the family had ordered their food but before it was delivered.

Setting aside Plaintiffs' waiver of this new argument, *North Haledon Fire Co. No. 1* v. *Borough of North Haledon*, 425 N.J. Super. 615, 631 (App. Div. 2012), the argument depends entirely on a factual mistake: Plaintiffs misunderstand the timestamp in Uber's records showing when Ms. McGinty agreed to the December Terms. Plaintiffs say Uber's records "depict[ ] the checkbox as being clicked at 11:24 PM UTC, *i.e.*, 7:24 PM EST." (Pb5.) But Plaintiffs fail to account for the difference between Standard Time and Daylight Savings Time. During Standard Time, Coordinated Universal Time (UTC) is *five* hours ahead of Eastern Time, not four. *See* Nat'l Oceanic & Atmospheric Admin., *What is UTC or GMT Time?*[2] During the month of January, Standard Time is in effect. *See* 15 U.S.C. § 260a(a). It was therefore **6:24 PM EST**, not 7:24 PM, when Ms. McGinty agreed to the December Terms. That is one minute *before* Ms. McGinty (or her daughter) placed the order. (*See* Da101, Da198.) So Plaintiffs had every

[2] https://www.nhc.noaa.gov/aboututc.shtml (last visited May 14, 2014). The Court can take judicial notice of this fact because it "cannot seriously be disputed." *State* v. *Silva*, 394 N.J. Super. 270, 275 (App. Div. 2007). Courts routinely take judicial notice of time zones in this context. *E.g.*, *United States* v. *De Armas Diaz*, No. 13-cr-000148, 2014 U.S. Dist. LEXIS 56572 (D. Nev. Apr. 23, 2014); *Selwyn* v. *Bruck L. Offs., S.C.*, No. 19-cv-135, 2020 WL 13598626, at *3 n.5 (M.D. Fla. July 1, 2020) (collecting cases).

opportunity to review (and reject) the January Terms before ordering food.

When Plaintiffs' time zone mistake is corrected, their "coercion" argument falls away entirely. Plaintiffs do not and cannot seriously advance any other argument contesting reasonable notice. Consistent with *Williams*, this Court should hold that Ms. McGinty had reasonable notice of the December Terms, including the Arbitration Agreement ("Agreement").

B. The Arbitration Agreement satisfies *Atalese* and New Jersey law.

1. Plaintiffs do not even attempt to defend the trial court's conclusion that the Arbitration Agreement needed to include express jury-trial-waiver language. That's because the court's reasoning is indefensible under this Court's precedents. Instead, Plaintiffs now argue—for the first time in this litigation—that the Agreement is unenforceable because of its "structure": they say it is too long and confusing. (Pb14–20.) This Court should not consider this argument because it was not raised below. *See North Haledon Fire*, 425 N.J. Super. at 631.

Regardless, the argument lacks merit. For one thing, Plaintiffs ignore that this Court has already approved of Uber Terms of Use that are essentially the same as the December Terms. *See Williams*, 2023 WL 5768422, at *1. Like the January Terms held enforceable in *Williams*, the first page of the December Terms contains a disclaimer—in all caps and starting with IMPORTANT—alerting the user to the Agreement in "Section 2 below." (Da80–81, 227.) Sec-

tion 2 starts on page 2, with a significantly larger heading titled "Arbitration Agreement." (Da81, 228.) The first section of both the January and December arbitration agreements, Section 2(a), is titled "Agreement to Binding Arbitration Between You and Uber" in large bold font. (Da81–82, 228.) It states:

> Except as expressly provided below in Section 2(b), you and Uber agree that any dispute, claim, or controversy in any way arising out of or relating to … accidents resulting in personal injury to you or anyone else that you allege occurred in connection with your use of the Services … will be settled by binding individual arbitration between you and Uber, *and not in a court of law.*

(*Id.* (emphasis added).) The cross-reference to Section 2(b) refers the user to the next section, titled "Exceptions to Arbitration" in large, bold font. (Da85, 228.) That section, as in the January Terms, sets forth just three specific, narrow types of claims that are "not require[d]" to be arbitrated and instead "may be brought and litigated in a court of competent jurisdiction." Da85. They are (1) "individual claims brought in small claims court," (2) "individual claims of sexual assault or sexual harassment," and (3) "injunctive or other equitable relief [relating to] intellectual property rights." (Da85, 228–229.) As in the January Terms, "Services" as used in Section 2(a) is defined on the first page of the December Terms and in more detail in Section 3. (Da80, 89–90, 227, 230–232.)

Try as Plaintiffs might to make it seem otherwise, there is nothing confusing about these provisions—structurally, syntactically, or linguistically. Ms. McGinty agreed that *any personal injury claim* she had against Uber would

be "settled by binding individual arbitration between [her] and Uber, and not in a court of law." (Da81–82.) This lawsuit is a personal injury claim, so it must be arbitrated. Simple as that. Plaintiffs invoke the "guidelines" in the Plain Language Review Act (Pb16), but they cannot point to a single deviation from them. There are no "confusing" cross-references. *See* N.J.S.A. § 56:12-10(a)(1). The cross-reference to Section 2(b) (Exceptions to Arbitration) is easy to follow and logically structured; attempting to cram in the actual exceptions would make Section 2(a) much longer and more complicated. And the use of a previously defined term ("Services") is not only standard practice but also makes the contract *more* streamlined; inserting a full definition every time would be far more confusing and cumbersome. The Arbitration Agreement is written in plain English with no obsolete or foreign-language words. *See* N.J.S.A. §§ 56:12-10(a)(5)-(6). Plaintiffs identify no double negatives or exceptions to exceptions. *See id.* § 10(a)(3). The sections and sentences are logically ordered and captioned. *See id.* §§ 10(a)(4), (b)(1).

Plaintiffs also assert that the choice-of-forum provision in Section 7 is "contradictory." (Pb19.) But there is no conflict between the choice-of-forum clause and the Arbitration Agreement. Ordinary rules of construction apply to consumer contracts. *See, e.g.*, *Boddy* v. *Cigna Prop. & Casualty Cos.*, 334 N.J. Super. 649, 654 (App. Div. 2000) (noting in context of Plain Language Review

Act that, "[i]n construing a contract a court … should read the contract as a whole"). The choice-of-forum provision expressly references the "Arbitration Agreement" multiple times, meaning it must be read in conjunction with the Arbitration Agreement. It states that "*except as may be otherwise provided for in the Arbitration Agreement above*," any claims against Uber "shall be brought exclusively in [a court] of the state in which the dispute" arose. (Da97.) As Plaintiffs point out (Pb18), the Arbitration Agreement includes exceptions—a few enumerated types of claims that can be brought in court of law. The forum-selection clause explains in which court those claims must be brought. All other claims must be brought in "arbitration," and "not in court of law." (Da82.)

This case is thus nothing like *Ogunyemi* v. *Garden State Medical Center*, No. A-1703-22, 2024 WL 1243552 (N.J. Super. Ct. App. Div. Mar. 25, 2024) (cited at Pb14–15). There, the arbitration agreement and forum-selection clause were combined in the same provision (all the way down in Section 27). *Id*. at *4. The first sentence said "**any** legal action or proceedings with respect to this Agreement shall **only** be brought in the courts of the State of New Jersey." *Id.* at *1 (emphasis added). The second sentence immediately switched course, saying that except as set forth in Section 11 (which apparently did not even mention arbitration), "any claim, controversy or dispute … shall be submitted to and settled by arbitration." *Id*. The court found these to be mutually irreconcilable "[ap-

parently standalone provisions which, by happenstance, inhabit the same section of the same contract." *Id*. at *5. By contrast, the forum-selection clause in the December Terms references and is expressly subject to the Arbitration Agreement, and the two sections make sense when read together.

Morgan v. *Sanford Brown Institute*, 225 N.J. 289 (2016) (cited at Pb15–17) does not remotely support Plaintiffs' argument. The arbitration agreement in *Morgan* was "thirty-five unbroken lines of nine-point Times New Roman font." *Id.* at 297–298. The Agreement here is visually palatable and neatly broken up into digestible subsections with appropriate titles. More importantly, the *Morgan* Court made only passing reference to the agreement's structure: the Court declined to enforce that agreement because it (unlike the one here) did not explain that "arbitration is a substitute for the right to have one's claims adjudicated in a court of law." *Id.* at 307–312.

2. New Jersey law requires that an arbitration agreement make clear that by agreeing to arbitration, the parties are "giv[ing] up the time-honored right to sue." *Atalese* v. *U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 445 (2014). The agreement must say "in some general and sufficiently broad way" that the plaintiff "is giving up her right to bring her claims in court **or** have a jury resolve the dispute." *Id*. at 447 (emphasis added). That is exactly what the Uber Agreement says: Plaintiffs must resolve personal injury claims (and most other claims)

through "binding individual arbitration between you and Uber, **and not in a court of law.**" (Da81–82 (emphasis added).)

Plaintiffs strain to argue why "not in a court of law" means something other than what it plainly says: that arbitrating means giving up the right to sue in court. (Pb20–28.) This Court recently held in *Drosos* v. *GMM Global Money Managers Ltd.* that "rather than the parties going into litigation in the Judicial Court system" was clear enough. No. A-3674-21, 2023 WL 7545067, at *6 (N.J. Super. Ct. App. Div. Nov. 14, 2023). And in *Griffin* v. *Burlington Volkswagen, Inc.*, 411 N.J. Super. 515 (App. Div. 2010) (cited at Pb21, 25), this Court approved of language substantially more opaque than "not in a court of law": "By agreeing to arbitration, the parties understand and agree that they are waiving their rights to maintain other available resolution processes, such as a court action or administrative proceeding, to settle their disputes." *Id.* at 518. If "maintain other available resolution processes, such as a court action or administrative proceeding" suffices under New Jersey law to tell a consumer that she is waiving the right to sue, then "will be settled by binding individual arbitration between you and Uber, and not in a court of law" obviously does too. (Da82.)

Plaintiffs also ignore the numerous examples in Uber's brief of *other* provisions in the Agreement that explain the differences between arbitration and "the judicial forum." (Pb24–28.) Those examples include the Exceptions to

Arbitration section, which says that certain "limited" types of claims are "not require[d]" to be arbitrated, but by contrast "may be brought and litigated in a court" (Da85); and the delegation clause, which provides that "*only* an arbitrator, *and not any … court*" has the authority to decide certain issues. (Da84 (emphasis added).) Plaintiffs do not even try to explain why these provisions emphasizing the mutual exclusivity of arbitration and court are insufficient.

Plaintiffs next criticize the Agreement's use of the verbs "settle" and "resolve" as "anesthetized" and "weak." (Pb21, 26.) But those same verbs were used in the agreements this Court found enforceable in *Drosos*, 2023 WL 7545067, at *6 ("finally resolved and settled"), *Griffin*, 411 N.J. Super. at 518 ("to settle their disputes"), and *Stutheit* v. *Elmwood Park Auto Mall*, No. A-4915-17T2, 2018 WL 6757030, at *1 (N.J. Super. Ct. App. Div. Dec. 26, 2018) ("to resolve their disputes"). Among other cases.

Like the agreements this Court has previously upheld, Uber's Agreement informed the McGintys in plainly stated terms that their personal injury claims would be decided in arbitration "and not in a court of law." That is all *Atalese* requires. *See* 219 N.J. at 445.

3. Plaintiffs misunderstand Uber's argument regarding the effect of the January Terms on the *Atalese* analysis. The point is simple: when this Court reviews an amendment to a preexisting and valid arbitration agreement, it should

consider the notice that the earlier agreement *already* provided to an individual user like Ms. McGinty informing her that arbitration encompasses a jury waiver. The December amendment cannot be construed in a vacuum.

4. Finally, Plaintiffs' *Atalese* objection was delegated to the arbitrator and so is not properly brought to this Court. An arbitrator must resolve arbitrability questions, at a minimum, when they are "clearly delegated to an arbitrator" by the contract and the delegation clause "explain[s] that arbitration is a substitute for the right to seek relief in court." *Morgan*, 225 N.J. at 295. This contract has an unambiguous delegation clause. But Plaintiffs never specifically challenged the delegation clause below, and they cannot do so now. *See Rent-A-Center, West, Inc*. v. *Jackson*, 561 U.S. 63, 73–74 (2010). Even if they had, such challenge would fail because the delegation clause itself (in addition to other terms in the Agreement) makes clear that courts and arbitration are mutually exclusive. (*See* Da84 ("*Only* an arbitrator, *and not* any federal, state, or local court … " can resolve threshold issues of arbitrability.) (emphasis added).) It is therefore the arbitrator, not the court, who must determine any threshold questions such as the enforceability of the Agreement under *Atalese* and Mr. McGinty's third-party-beneficiary status.[3]

[3] Uber has devoted its limited space principally to Plaintiffs' several new arguments that were not raised below. Uber respectfully refers the Court to its opening brief on the issues of enforceability versus formation, which Plaintiffs do not address in their answering brief, and federal preemption. (*See* Db27–34.)

II. This Court can and should hold as a matter of law that Ms. McGinty's daughter acted as her agent. (Da298–304.)

Plaintiffs argued below that the Arbitration Agreement was unenforceable because their minor daughter was the one who agreed to Uber's terms of use while using Ms. McGinty's phone to order food for Ms. McGinty's benefit. The trial court did not reach this argument because of its (erroneous) conclusion that the Terms were insufficient under *Atalese*. (Da299–304.) The great weight of authority shows that Plaintiffs were wrong about *Atalese*. But instead of pressing their argument about their daughter, Plaintiffs instead now ask for remand on an issue that *they* raised and briefed below. (Pb38–41.) This Court can and should decide that an agreement was formed even if the McGintys' daughter is the one who manifested assent, for all the reasons explained in Uber's opening brief.

This Court "may exercise such original jurisdiction as is necessary to the complete determination of any matter on review." *Price* v. *Himeji, LLC*, 214 N.J. 263, 294 (2013) (citing R. 2:10–5). Original jurisdiction is "particularly appropriate" here "to avoid unnecessary further litigation," where no "further fact-finding" is necessary to reject Plaintiffs' argument based on their daughter. *Id.* Uber's brief made clear that an agency relationship existed on the facts as *Plaintiffs* certified them to be. (Db34–37.) The issue of the daughter's agency is thus a pure question of law that is well-suited for resolution now without remand. *Luchejko* v. *City of Hoboken*, 207 N.J. 191, 211 (2011) (appellate courts

may resolve agency as "a question of law" when the facts are undisputed); *Still* v. *Ohio Cas. Ins. Co.*, 189 N.J. Super. 231, 233 (App. Div. 1983) (exercising original jurisdiction where there was "no dispute" regarding material facts).

III. If the Court accepted Plaintiffs' arguments and the December Terms were not formed, then the January Terms would control. (Da304.)

Even if this Court were to accept any of Plaintiffs' arguments that the December Terms are unenforceable, the result would be only that the agreement to the December Terms *was never formed*. In that case, the earlier January Terms—which this Court found enforceable in *Williams*—would not be superseded and would remain in effect for Plaintiffs. Incredibly, Plaintiffs now say that the December Terms "were undoubtedly the operative terms at the time of the McGinty's (sic) crash, even if she was not aware of them for one reason or another." (Pb41–42.) Plaintiffs cannot have it both ways: the December Terms cannot be "operative" if, as Plaintiffs contend, they were never agreed to.

Other courts have rejected this "sort of 'heads I win, tails you lose' argument" crafted to evade a party's arbitration agreement. *Zambrana* v. *Pressler & Pressler, LLP*, No. 16-cv-2907, 2016 WL 7046820, at *2 (S.D.N.Y. Dec. 2, 2016) (enforcing earlier arbitration agreement where plaintiff claimed the later agreement was unenforceable because she supposedly never received it, but also claimed the earlier agreement was superseded; explaining that "Plaintiff cannot have it both ways"). Under Plaintiffs' own arguments, Ms. McGinty is either

bound to the December Terms—including the Arbitration Agreement—or she is not. If not, then the January Terms—and its arbitration agreement—govern here. Plaintiffs conceded as much during the hearing below. (Tr. 50-1–6.) The trial court rejected that point only because it misread Uber's argument. (*See* Db43.)[4]

IV. The terms of use apply to Mr. McGinty. (Da298–304.)

Plaintiffs assert (Pb43) that the enforceability of the Agreement as to Mr. McGinty depends on "factual questions" that prevent this Court's "jurisdiction." That is wrong. Mr. McGinty is a third-party beneficiary taking all the facts as Plaintiffs allege them to be. And Plaintiffs do not even attempt to address Uber's arguments that (a) the arbitrator alone must determine enforceability as to Mr. McGinty and (b) he is bound to the Agreement as a third-party beneficiary.

Plaintiffs say only that a person cannot bind her spouse to an agreement, *solely by virtue of their spousal relationship*, without evidence of an agency arrangement. (Pb43–45.) That is irrelevant because Uber has not argued that Mr. McGinty is bound based on Ms. McGinty being his agent. "Non-signatories of a contract may be subject to arbitration if the nonparty is an agent of the party

[4] Plaintiffs' severability argument (Pb42) is factually and legally unmoored from the rest of their brief. Severability would come into play only if this Court rejected all of Plaintiffs' challenges to the formation of the December Terms and yet concluded that *Atalese* goes to enforceability (not formation) of the contract. But in that case, Plaintiffs' *Atalese* challenge (like all other threshold issues of arbitrability that do not go to contract formation) would be delegated to the arbitrator and this Court cannot reach it. *See Rent-A-Center*, 561 U.S. at 73–74.

or a third party beneficiary to the contract." *Hojnowski ex rel. Hojnowski* v. *Vans Skate Park*, 375 N.J. Super. 568 (App. Div. 2005) (emphasis added).

Plaintiffs' case law citations are misplaced because they do not address Mr. McGinty's third-party beneficiary status. The husband in *Moore* v. *Woman to Woman Obstetrics & Gynecology, LLC*, 416 N.J. Super. 30, 34, 40–41 (App. Div. 2010), sued his wife's obstetrician over medical care provided *to her*, not to him. But Mr. McGinty *himself* received services from Uber under Ms. McGinty's Agreement: he received a ride by a driver with whom Ms. McGinty had connected using the Uber app for *both* of their benefit. The Agreement here expressly applies to third parties like Mr. McGinty who benefit from using Uber's services. (Da85.) This Court should follow the numerous other courts that have enforced this exact contractual provision against third-party beneficiary passengers like Mr. McGinty. (*See* Db46–47 (citing cases).)

V. Uber did not waive its right to enforce the Arbitration Agreement. (Da298–304.)

Plaintiffs do not and cannot provide "clear and convincing evidence" of Uber "ch[oosing] to seek relief in a different forum," as would be required to show a waiver. *Spaeth* v. *Srinivasan*, 403 N.J. Super. 508, 514 (App. Div. 2008). Instead, Plaintiffs bizarrely try to hold Uber responsible for the litigation actions of co-defendant Zheng, who is not seeking to compel arbitration. (Pb47–49.) But *Uber* has consistently asserted its right to arbitrate Plaintiffs' claims.

Uber asserted arbitration as an affirmative defense at the outset in its Answer. (Da47–48.) When Plaintiffs refused Uber's request to arbitrate (Da103 ¶ 5), Uber moved to compel. (Da63.) There was no extensive motion practice or comprehensive discovery. (Pb46 (citing *Hoxworth* v. *Blinder, Robinson & Co.*, 980 F.2d 912, 925 (3d Cir. 1992), where the defendants "actively litigat[ed]" "for almost a year").) Uber's motion to compel was timely.

Plaintiffs' repeated claims (Pb4, 39, 48–50) that Uber "demanded … extensive written discovery" are brazenly false—and accordingly, unaccompanied by any citation to the record. Uber has never served discovery requests or deposition notices on Plaintiffs, and it never moved to consolidate. Uber's passive receipt of uniform interrogatory responses that Plaintiffs were *required by court rule* to provide automatically was not a waiver, and Plaintiffs cite no case holding otherwise. Finally, *Rule* 4:5-1 requires the disclosure only of "other" proceedings that relate to or could impact the issues in the instant case. Plaintiffs cite no case holding that a party must state its intention to move to compel arbitration *of the very same case* in its *Rule* 4:5-1 certification. And in any event Uber made that intention clear in its Answer and subsequent communications with Plaintiffs' counsel. There was no waiver.

Conclusion

This Court should reverse the trial's court's denial of the motion to compel.

Respectfully submitted,

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