BLANCA ANAELY VILLEDA GRANADOS; JAIRON PENA, individually as per quod claimant and as guardian ad litem for minor plaintiffs, BRIANNA PENA VILLEDA AND ANGELYN ROCIO PENA, Plaintiffs-Appellants v. UBER TECHNOLOGIES, INC./RAISER/PORTIER, LLC; HUMAIDI MASOUD; JOSE LEON; DUBLIN MAINTANANCE INC.; and JOHN DOES 1-10 (fictitious designations), Defendants-Respondents	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-03979-23 Civil Action On Appeal from the Superior Court of New Jersey Somerset County Law Division SOM-L-1019-23 SAT BELOW: HON. WENDY A. REEK, J.S.C.

PLAINTIFFS/APPELLANTS, BLANCA ANAELY VILLEDA GRANADOS; JAIRON PENA, individually as per quod claimant and as guardian ad litem for minor plaintiffs, BRIANNA PENA VILLEDA and ANGELYN ROCIO PENA'S BRIEF

STARK & STARK
A Professional Corporation
100 American Metro Boulevard
Hamilton, NJ 08619
(609) 896-9060

OF COUNSEL AND ON THE BRIEF:
BHAVEEN R. JANI, ESQUIRE (Attorney ID # 02721-2009)
Email: bjani@stark-stark.com

ON THE BRIEF:
AMANDA R. FREYER, ESQ. (Attorney ID # 410622022)
Email: afreyer@stark-stark.com
Date of Submission: October 9, 2024

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PRELIMINARY STATEMENT

Respondent Uber Technologies, Inc. ("Uber") has a market capitalization of $159.1 billion dollars. As of their latest quarterly financial filing with the SEC they boasted a revenue of $10.7 billion dollars and net income of $1.02 billion dollars which signified a year over year increase of 15.93% and 157.61% respectively. Despite their enormous resources, Uber knowingly provides their Spanish speaking and English illiterate consumers important legal documents, which waive fundamental rights, in English. They use their bargaining power and resources to the detriment of their consumers and take advantage of the most vulnerable in our New Jersey communities.

According to the American Community Survey, as part of the United States Census Bureau, New Jersey has a population of about 8,772,313, who are 5 years or older. Approximately 66.7% of the population speak English, while 33.3% speak a language other than English, which equates to about 2,920,819 individuals. Id. The largest segment that "speak a language other than English" is Spanish which signifies nearly 1.5 million people in New Jersey. Id.

This billion-dollar company preys on these 1.5 million people in New Jersey by thwarting their legal rights and constitutional protections under the 7th Amendment.

On April 21, 2021, Blanca Villeda-Granados (herein referred to as "Villeda" or "Appellant") had an appointment with her two young daughters, minors Brianna Pena and Angelyn Pena. Villeda does not have a driver's license, so she relies on car services such as Uber for transportation. The Uber that Villeda had ordered on April 21, 2021 was being driven by Respondent, Humaidi Masoud (herein referred to as "Masoud"). As Masoud was driving Villeda and her two young daughters to their appointment, he decided to pay more attention to his phone instead of the road. At the same time, Respondent, Dublin Maintenance, Inc.'s, truck, which was being operated by Respondent, Jose Leon, (herein referred to as "Leon") was negligently trying to park. Due to Masoud's inattention, the Uber vehicle rammed into the truck being operated by Leon causing the Masoud vehicle to flip over. As a result, Villeda and her two daughters, who were simply trying to get to a routine appointment, suffered severe and permanent injuries that have changed their lives forever.

On July 17, 2024, the trial court granted Respondent's, Uber Technologies, Inc. and Raiser, LLC (herein referred to collectively as "Uber"), Motion to Compel Arbitration and Stay the Case. Appellants contend that the trial court erred in its decision about: (1) whether Uber's Terms and Conditions, including the Arbitration Agreement, were unconscionable because they were given to Villeda in English, despite the Uber application being in Spanish; and (2) whether Villeda unequivocally

checked the box agreeing to Uber's Terms and Conditions, including the Arbitration Agreement.

PROCEDURAL HISTORY

This is an appeal from an Order granting Respondents Uber's Motion to Compel Arbitration and Stay the Case. Appellants filed their Complaint on April 7, 2023 against Uber, Masoud (Uber's driver), and the driver and company who owned and drove the other vehicle involved in this subject collision, namely, Jose Leon and Dublin Maintenance, Inc. Pa23-40. Uber filed their Answer on July 17, 2023. Pa41-55. Uber asserted as an affirmative defense in its Answer that there was an arbitration clause which should be enforced. Pa50. On August 25, 2023, an Order was granted, consolidating the matters between Leon and Uber, since he also had an affirmative claim against Uber due to this crash, along with Villeda and Uber. Pa56-57. Thereafter, on March 14, 2024, Respondents Uber filed a Motion to Compel Arbitration and Stay the Case. Pa78-401. After hearing oral argument on May 10, 2024, Judge Reek issued a written opinion on July 17, 2024 granting Respondents' motion. Pa1-21. Appellants now file the within appeal of the trial court's July 17, 2024 opinion.

STATEMENT OF FACTS

On April 21, 2021, Villeda and her two young daughters mistakenly entrusted an Uber driver, Masoud, to safely transport them to an appointment. Pa403. Instead,

they were put in the hands of an unsafe Uber driver, who caused the Uber vehicle to flip upside down after ramming into another vehicle owned by Dublin Maintenance, Inc. and being operated by Jose Leon. Pa403.

Villeda's native language is Spanish. She does not read or speak English. Pa431. Uber gives Spanish speaking users the option to set the Uber application to Spanish. Pa431. Due to her language barrier, Villeda's Uber application was set in Spanish. Pa431. Villeda has no recollection of seeing the Terms and Conditions nor checking off a box indicating that she read them. Pa431. Because Uber has refused to engage in the discovery process, Appellants' counsel did its own research and discovered when the application is set to Spanish, the Terms and Conditions, including any Arbitration Agreement of Uber are in English. 1T23:16-25; 24:1-24.

LEGAL ARGUMENT

The trial court erred in determining: (1) it was not unconscionable to bind Villeda, along with her two minor daughters, to arbitration, where the Terms and Conditions which included the Arbitration Agreement, were not given to her in Spanish; and (2) Villeda agreed to the Terms and Conditions of Uber binding herself and her family to Arbitration. Pa17-20.

I. STANDARD OF REVIEW (Pa03)

In New Jersey, the Appellate Court's *de novo* review applies to the validity and enforceability of arbitration agreements, as well as the applicability and scope of

such agreements. Hirsch v. Amper Financial Services, LLC, 215 N.J. 174 (2013). Essentially, the Appellate Court reviews the trial court's legal determinations with no special deference to the trial court's conclusions. Id. This standard is consistent across various cases, emphasizing that the Appellate Court does not defer to the trial court's interpretative analysis but instead conducts its own independent review. Id. For this appeal, the Order entered by the trial judge is a final order. See R. 2:2-3(a).

II. THE TRIAL COURT ERRED BY NOT FINDING THE ARBITRATION CLAUSE UNCONSCIONABLE. (Pa03)

Congress enacted the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, "to abrogate the then-existing common law rule disfavoring arbitration agreements 'and to place arbitration agreements upon the same footing as other contracts.'" Martindale v. Sandvik, Inc., 173 N.J. 76, 84 (2002). The FAA, however, does not prevent an examination into whether the arbitration agreement at issue is unconscionable under state law. Muhammad v. County Bank of Rehoboth Beach, Delaware, 189 N.J. 1, 12 (2006). Unconscionability may be applied to invalidate arbitration agreements. Id.

The New Jersey Supreme Court has consistently "refused to enforce contracts that violate the public policy of the State" or are "inconsistent with the public interest or detrimental to the common good." Achey v. Cellco Partnership, 475 N.J. Super. 446, 454 (App. Div. 2023) (citing Vasquez v. Glassboro Serv. Ass'n, Inc., 83 N.J. 86, 98 (1980)). "An arbitration clause may be invalidated . . . if there is

unconscionability." Id. (citing Morgan v. Sanford Brown Inst., 225 N.J. 289, 304 (2016); Rent-a-Ctr., W., Inc., v. Jackson, 561 U.S. 63, 68 (2010)).

The determination of unconscionability involves both procedural and substantive elements. Procedural unconscionability refers to issues in the formation of the contract, such as a significant disparity in bargaining power, hidden or complex terms, or the use of high-pressure tactics. Muhammad, 189 N.J. 1, 15. Substantive unconscionability, on the other hand, pertains to the fairness of the contract terms themselves. Id.

Here, Uber's Terms and Conditions, along with the Arbitration Agreement, are considered a "contract of adhesion" because it was presented on a take-it-or-leave-it basis and there was no opportunity to negotiate. See Rent-a-Ctr., W., Inc., v. Jackson, 561 U.S. 63, 68 (2010) (citing Rudbart v. N. Jersey Dist. Water Supply Comm'n, 127 N.J. 344, 353 (1992)). Adhesion agreements necessarily also involve indications of procedural unconscionability. Id.

Once it is settled that there is a "contract of adhesion" the Courts must undergo an analysis. See generally, Muhammad, 189 N.J. 1, 18-9. Aside from the "take-it-or-leave-it" nature present in Uber's Terms and Conditions, including the Arbitration Agreement, Courts must also look at "the subject matter of the contract, the parties' relative bargaining positions, the degree of economic compulsion motivating the

'adhering' party, and the public interests affected by the contract." Rudbart, 127 N.J. at 356.

"Factors relevant to unconscionability include the characteristics of the party presented with a contract of adhesion, 'such as age, **literacy, lack of sophistication,** hidden or **unduly complex contract terms**, bargaining tactics, and **the particular setting existing during the contract formation process**.'" Moore v. Woman to Woman Obstetrics& Gynecology, LLC, 416 N.J. Super. 30, 39 (App. Div. 2010)(citing Sitogum Holdings, Inc. v. Ropes, 352 N.J. Super. 555, 564 (Ch. Div. 2002)) (emphasis added).

In reviewing procedural unconscionability regarding Uber and the Appellants, Villeda does not read, speak, or understand English and has a lack of sophistication about what rights she was giving up. Pa431. Villeda also had no bargaining power regarding the contract. Last, the circumstances surrounding the contract is against public interest, especially in New Jersey, where one-third of the population does not speak English.

The trial court also erred by relying on the holding in Morales v. Sun Constructors, Inc., 541 F.3d 218, 222 (3d Cir. 2008) (holding that a Spanish speaking employee was bound to an employment arbitration agreement in English). Pa19. First, the Morales decision is not binding on the state trial court. See Mid-State Securities Corp. v. Edwards, 309 N.J. Super. 73, 77 (App. Div. 1998) (citing Dewey

v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 79-80 (1990)). The Morales decision should not take precedent over binding authority from our Appellate Division which held that literacy and sophistication are features which ought to be considered when determining unconscionability when there is a contract of adhesion. See Moore, 416 N.J. Super. at 39 (citing Sitogum Holdings, Inc., 352 N.J. Super. at 564).

Villeda does not read, speak, or understand English. Pa431. Uber is aware of this since its user has the applications set in Spanish and is taking advantage of Villeda's lack of English literacy and sophistication. Pa431; Pa600. Uber will tout it is not a "rideshare" company but a technology company. Pa 598. Accordingly, this billion-dollar "technology company" has the capability of knowing when its users utilize the application in a language other than English.

Even more egregious, Uber has argued that Villeda could have gone on her web browser to translate the Terms and Conditions with the Arbitration Agreement into Spanish. Pa600; 1T18:21-25. If it were that simple, why would Uber even offer the Spanish version of its application? Uber certainly would not want Spanish speaking users to jump back and forth between the Uber application and a web browser to figure out how to order a ride, as Respondents suggested Villeda should have done. Pa600; 1T18:21-25. Having to do so would be frustrating for users and would probably deter Spanish speaking users from using the application. That is why Uber has happily given Spanish speaking users the ability to set their application to

Spanish to limit any barriers when ordering rides and generating more revenue for Uber's pockets. Pa431; Pa600.

Yet, Uber has made the conscious decision to maintain its Terms and Conditions, including its Arbitration Agreement, in English, even when the application is set to Spanish, knowing that the vital documents would require translation. Pa600; 1T18:21-25. These actions by Uber are akin to a "bait and switch" tactic. It would be unconscionable to hold the Terms and Conditions of Uber, which binds users to arbitration, enforceable, where Uber took advantage of Villeda's lack of English literacy and sophistication, instead of providing the Terms in her native language. Pa431; Pa600.

For argument's sake, if this Court found the trial court did not err in relying on a persuasive decision over a binding decision, the trial court also erred when it found Morales analogous to the present case. Pa19. In Morales, the plaintiff's lack of English literacy differed greatly from that of Villeda. Before employing the plaintiff, he had passed a written exam entirely in English. Morales, 541 F.3d at 220. To pass a written exam in English, the plaintiff in Morales had to understand the English language. However, here, Villeda was not required to prove that she could understand English prior to utilizing the Uber application, in fact, Villeda needed to rely on her Uber application settings to be in Spanish to be able to order a ride. Pa431.

The Morales case differs from this case because it applied to an employment setting as opposed to this "ride share" situation. Moreover, the arbitration provision in Morales was 8 out of 13 pages of the Employment Agreement. 541 F.3d 218, 220. In Morales, the plaintiff also attended a 2 ½ hour orientation conducted entirely in English. Id.

It is also important to note that in Morales, since the arbitration agreement were within an employment agreement, the plaintiff could have tried to negotiate the terms and did not do so. Here, Uber asserts Villeda would have had to either accept the terms or have no means of transportation. Pa599; 1T18:4-9. This is a contract of adhesion as opposed to the Morales matter.

Therefore, the trial court erred both when it relied on a non-binding opinion over binding opinions, and when it did not consider the distinguishable facts between Morales and the case before this Court. Pa19. An analysis into the unconscionability of this Agreement and the circumstances surrounding the same were never considered by the trial court. Pa17-20.

Additionally, it is expected counsel for Uber will again rely on Williams v. Ysabel, Docket No. A-001391-22 (App. Div. Sept. 7, 2023). However, the Williams case did not analyze whether the Terms and Conditions with the Arbitration Agreement were unconscionable. See Williams, Docket No. A-001391-22 at *9-10. The present case differs from Williams. Pa35. In Williams, each Plaintiff spoke and

understood English, and had their Uber Application set to English, and each Plaintiff had their own Uber accounts and agreed to the Terms and Conditions individually. See generally, Williams, Docket No. A-001391-22. The Plaintiffs in Williams did not dispute they agreed to the Uber Arbitration Agreement. They only appealed the language of the Arbitration Agreement and not the substantive and procedural unconscionability being raised in the instant matter.

This case differs in that Villeda had the Uber Application set to Spanish, and her minor children did not have their own Uber accounts, nor did they individually agree to the Terms and Conditions, including the Arbitration Agreement. 1T26:9-17. Therefore, the unpublished Williams case should not be relied on when determining the unconscionability of the Terms and Conditions with the Arbitration Agreement.

III. THE TRIAL COURT ERRED IN HOLDING VILLEDA UNEQUIVOCALLY AGREED TO UBER'S TERMS AND CONDITIONS ALONG WITH THE ARBITRATION AGREEMENT BECAUSE VILLEDA REFUTES THE AFFIDAVIT FROM UBER. (Pa03)

By its unequivocal determination that Villeda checked the box to indicate she "reviewed and agreed to the Terms and Conditions," the trial court incorrectly disregarded Appellant's various arguments, supported by evidence, that the Affidavit from Uber is false. Pa17-20.

The New Jersey Arbitration Act mandates that the Court determines whether an agreement to arbitrate exists and that the controversy is subject to an agreement

to arbitrate. N.J.S.A. 2A:23B-6(b). When the trial court faces this determination summarily, the trial court must view all facts and inferences in the light most favorable to the non-moving party. Kleine v. Emeritus at Emerson, 445 N.J. Super. 548, n.12 (App. Div. 2016)(citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)).

In Kleine, the brother of the plaintiff, Frank McMahon, was presented with stacks of paper to sign and initial to admit his sister to a new nursing home, after removing her from a different nursing home where she was caused to suffer trauma. 445 N.J. Super. at 548-549. He was left alone to sign the stacks of paper with no explanation or instructions. Id. at 549. McMahon made further assertions surrounding the context in which he received a waiver he allegedly signed containing an arbitration clause to waive his sister's right to a jury trial and right to appeal any adverse decision. Id.

The Kleine Court opined had the judge assumed the truth of the sworn statements of McMahon and considered the language of the agreement in the light most favorable to McMahon, "the one-sided waiver extracted by defendant, as well as an assumption of the truth of McMahon's assertions about the manner in which the contract was formed, would have required an evidentiary hearing related to unconscionability." Id. at 551.

Here, in the written briefs and oral argument heard in connection with Uber's motion to compel arbitration, the trial court erred by disregarding the statements made and evidence from Appellant disproving the assertions made by Uber. Pa17-20; 1T24:1-25; 25:1-21. The trial court would not allow limited discovery on the issue. Pa19.

Villeda certified that she does not recall checking off any box. Pa431. Uber refused to engage in any discovery before moving to compel arbitration. Pa405. Since discovery has not been exchanged, the only information the trial court was provided with to substantiate Uber's claim that Villeda checked that box, was an Affidavit of an Uber employee, Alejandra O'Connor. Pa597-601. O'Connor alleges she "personally searched Uber's database for plaintiff Blanca Villeda's account by entering [her] email address . . . Uber's records indicate that Plaintiff clicked the checkbox and tapped 'Confirm' on March 23, 2021." Pa599. O'Connor then attached a screen shot displaying a "Consent Timestamp" showing their records indicate Villeda allegedly acknowledged the Terms and Conditions on March 23, 2021, at 6:06:52 PM. Pa75. However, in a July 18, 2023 letter from counsel for Uber, Uber asserts they are attaching what is described as "an image showing the Checkbox Consent that ***your client*** checked." Pa58-59.

As it is shown, the screen shot which Uber has asserted specifically depicts Villeda's Checkbox Consent has a timestamp of 9:41 PM and fails to show the date.

Id. How could Villeda have accepted Uber's Terms and Conditions twice? Based on Uber's record keeping, did she check the consent box at 6:06 PM on March 23, 2021, or 9:41 PM on a different, unspecified date? These were questions posed to Uber and the court in Appellant's opposition to the motion to compel in the underlying action. Pa407. In response, Uber has back tracked, and now claims the screenshot was only a "representation." Pa587. Nowhere in Uber's July 18, 2023 letter to Appellant's counsel did it use the word "representation." Pa58-59. Instead, Uber made the conscious decision to indicate this was Villeda's acceptance of the Arbitration Agreement. Pa58-59. It is Villeda's position that this alone should create enough doubt as to the record keeping of Uber and this is only one example of Appellant disproving Uber's Affidavit.

Uber's Affidavit also certifies "[i]f an individual's iPhone language is set to Spanish in their personal phone settings, the Uber Application will also be in Spanish on that iPhone, ***including . . . the Terms of Use***." Pa622; 1T14:19-22. Villeda certified that despite her Uber Application being set to Spanish, the Terms and Conditions, including the Arbitration Agreement, were in English. Pa431. To further confirm, Villeda's counsel demonstrated through his own Uber application, when he changed his settings to Spanish, the entire application is in Spanish, **including the blue hyperlink directing the user to the Arbitration Agreement in dispute.** 1T23:19-25; 24:1-24. Once the user clicks on the blue hyperlink in Spanish,

directing them to the Terms of Use and Arbitration Agreement, they are provided the documents in English. Id.

Based on the assertions made by Uber which Villeda has not only disproven by her certified statements, but also physical evidence, it is respectfully submitted the trial court did not view all facts and inferences in the light most favorable to Appellant as it was required to under Kleine, 445 N.J. Super. at 551.

Therefore, the trial court erred in its unequivocal determination that Villeda checked off the box and agreed to Uber's Terms and Conditions, binding herself and her entire family to arbitration, despite many inconsistencies. Discovery should have moved forward since the validity of the Arbitration Agreement remains in dispute.

CONCLUSION

For these reasons, Appellants respectfully request that this Court reverse the trial court's Order granting Uber's Motion to Compel Arbitration and Stay the Case.

Respectfully submitted,

Bhaveen R. Jani, Esq.

Dated: October 17, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003979-23 T1

BLANCA ANAELY VILLEDA GRANADOS; JAIRON PENA, individually and as per quod claimant and as guardian ad litem for minor plaintiffs, BRIANNA PENA VILLEDA AND ANGELYN ROCIO PENA Plaintiffs/Appellants, v. UBER TECHNOLOGIES, INC.; RAISER/PORTIER, LLC; HUMAIDI MASOUD; JOSE LEON; DUBLIN MAINTENANCE INC.; and JOHN DOES 1-10 (fictitious designations), Defendants/Respondents	ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY LAW DIVISION SOMERSET COUNTY Docket No. SOM-L-001019-23 Honorable Wendy Allyson Reek, J.S.C. CIVIL ACTION

BRIEF ON BEHALF OF RESPONDENTS UBER TECHNOLOGIES, INC. AND RASIER/PORTIER LLC

Of Counsel and On the Brief:

WEBER GALLAGHER SIMPSON STAPLETON FIRES & NEWBY LLP

Madeline S. Baio, Esq.
(NJ ID 011891988)
2000 Market Street, Suite 1300
Philadelphia, PA 19103
T: 215-825-2650 F: 215-564-7699
madeline.baio@wglaw.com

MORGAN, LEWIS & BOCKIUS LLP

Michael L. Kichline, Esq.
(NJ ID 029761991)
Matthew D. Klayman, Esq.
(NJ ID 130832014)
2222 Market Street
Philadelphia, PA 19103
(215) 963-5000
michael.kichline@morganlewis.com
matthew.klayman@morganlewis.com

Date: November 7, 2024

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STATUTES

PRELIMINARY STATEMENT

Plaintiffs Blanca Anaely Villeda-Granados, her husband, and their children (together, "Plaintiffs") have asserted personal injury claims against Defendants Uber Technologies, Inc. and Rasier/Portier, LLC (together, "Uber") after Ms. Villeda-Granados and her children allegedly sustained injuries during a ride they requested using the Uber App. Uber moved to enforce the "Arbitration Agreement" in its terms of service, which requires Plaintiffs and the millions of others that use Uber's Rides platform to resolve disputes in arbitration. The trial court granted the motion and compelled arbitration. On appeal, Plaintiffs raise two challenges to the trial court's decision. Each fails.

Plaintiffs first argue that the trial court should not have compelled arbitration because Uber's terms, which require them to arbitrate, are supposedly unconscionable. But Plaintiffs' unconscionability argument is in the wrong forum; Uber's terms expressly delegate the question of unconscionability to the arbitrator. Under binding precedents from both the Supreme Court of the United States and the Supreme Court of New Jersey, it was not error for the trial court to compel arbitration notwithstanding Plaintiffs' unconscionability argument.

Even if the question of unconscionability were not delegated to the arbitrator, Plaintiffs' challenge would still fail because—as the trial court

correctly held—Plaintiffs have not met their burden to show that Uber's terms are unconscionable. Under New Jersey law, unconscionability has both substantive and procedural elements. Plaintiffs cannot show that Uber's terms are substantively unconscionable because the agreement to arbitrate is mutual and New Jersey's public policy unquestionably favors arbitration. Moreover, Plaintiffs' procedural unconscionability arguments are both factually and legally deficient. Plaintiffs observe that Ms. Villeda-Granados purportedly lacked bargaining power because she could not negotiate Uber's terms, but they ignore that she had ample power to secure transportation through alternative means and had ample time and opportunity to review and consider whether to assent to Uber's terms, which as a matter of law defeats their unconscionability challenge.

Plaintiffs further observe that Ms. Villeda-Granados understands only Spanish and, therefore, could not have understood Uber's terms in English, but they ignore that Ms. Villeda-Granados assented to Uber's terms through an interface that appeared to Ms. Villeda-Granados in Spanish. Thus, as the trial court correctly noted, Ms. Villeda-Granados should have understood from the Spanish-language interface that she was agreeing to Uber's terms, and she could have sought assistance with translating Uber's terms before agreeing. Claims of unconscionability do not allow Ms. Villeda-Granados to avoid the contract she formed under well-established principles of New Jersey contract law.

Second, Plaintiffs contend that it is not clear from the record whether Ms. Villeda-Granados manifested assent to Uber's terms. But the record is clear that Ms. Villeda-Granados was presented with an in-App pop-up screen—in Spanish—advising her that Uber's services were offered pursuant to certain terms of service and encouraging her to review those terms. It is further clear that the pop-up screen blocked her from using the Uber App until she first checked a box representing that she acknowledged and agreed to Uber's terms, and then also clicked another button further confirming her assent to Uber's terms. Uber's records show that Ms. Villeda-Granados both checked the box and clicked the button before the alleged incident. Plaintiffs have identified no conflicting evidence or anything else that would undermine the trial court's conclusion that Ms. Villeda-Granados manifested assent to Uber's terms.

Plaintiffs' inflammatory rhetoric and attempts to smear Uber do not change basic principles of New Jersey contract law. Nor do they change the facts of this case, which show that Ms. Villeda-Granados manifested assent to Uber's terms and that Uber's terms require arbitration and delegate the question of unconscionability to the arbitrator. Because Plaintiffs cannot avoid Uber's terms of service based on their unconscionability arguments or their misreading of the record, the trial court's decision granting Uber's motion to compel arbitration should be affirmed.

PROCEDURAL HISTORY

Plaintiffs sued Uber and other defendants on April 7, 2023. (Pa024–031). Uber answered Plaintiffs' complaint, see (Pa041–053), and promptly requested that Plaintiffs agree to transfer their case against Uber to arbitration, see (Pa058–059). Plaintiffs did not respond to Uber's request, so Uber moved to compel arbitration and stay the pending litigation. (Pa078–112).

The trial court heard oral argument on Uber's motion on May 10, 2024. (Pa015). The trial court granted Uber's motion on July 17, 2024. (Pa001–021). Plaintiffs appealed and filed their opening brief on October 17, 2024. See generally (Pb).

STATEMENT OF FACTS

I. Uber offers its services pursuant to terms containing an arbitration agreement.

Uber is a technology company that uses its proprietary technology to operate digital, multisided platforms. (Pa0598). One is the Rides platform, which connects individuals who need a ride with drivers who are willing to give a ride. Ibid. Users generally access the Rides platform through the Uber App. Ibid.

Uber offers access to its Apps and the Rides platform subject to terms of service. Ibid. At all times relevant to this case, Uber's terms of service contained an arbitration provision requiring disputes like Plaintiffs' to be settled through binding arbitration. (Pa062–073).

In Section 1 of Uber's terms (entitled "Contractual Relationship"), the terms provide notice of the arbitration provisions in clear, capitalized, bold text:

> **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.**
>
> [Pa062.]

Section 2 of Uber's terms is entitled "Arbitration Agreement." (Pa063). It provides that by agreeing to Uber's 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." Ibid. Except for certain types of claims not relevant here, the Arbitration Agreement provides that "any dispute, claim or controversy in any way arising out of or relating to" Uber's terms or the use of Uber's services "will be settled by binding arbitration between you and Uber, and not in a court of law." Ibid. (emphasis added). It specifically provides, "You acknowledge and agree that you and Uber are each waiving the right to a trial by jury." Ibid. (emphasis added). It also specifically provides 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 the underlying claims are in relation to your use of [Uber's] Services"; "[t]o the

extent that any third-party beneficiary" brings claims against Uber, "those claims shall also be subject to this Arbitration Agreement." Ibid.

In a subsection of the Arbitration Agreement entitled "Rules and Governing Law," Uber's terms provide that "[n]otwithstanding any choice of law or other provision in the Terms, the parties agree and acknowledge" that "the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ('FAA'), will govern" the "interpretation and enforcement and proceedings" pursuant to the Arbitration Agreement, and the parties are "bound by the provisions of the FAA for all purposes, including, but not limited to, interpretation, implementation, enforcement, and administration of this Arbitration Agreement." (Pa064).

Within the Arbitration Agreement is a clear delegation provision in which "[t]he parties agree that the arbitrator ('Arbitrator'), and not any federal, state, or local court or agency, shall have exclusive authority to resolve any disputes relating to the interpretation, applicability, enforceability or formation of this Arbitration Agreement, including any claim that all or any part of this Arbitration Agreement is void or voidable." Ibid. (emphasis added). The delegation provision expressly tasks the arbitrator with responsibility for "determining all threshold arbitrability issues, including issues relating to whether" Uber's terms are "unconscionable." Ibid. (emphasis added). In sum, "[i]f there is a dispute about whether this Arbitration Agreement can be enforced

or applies to a dispute, you and Uber agree that the arbitrator will decide that issue." Ibid.

II. Ms. Villeda-Granados agreed to Uber's terms of service.

Ms. Villeda-Granados signed up for Uber in November 2016. (Pa075). In opposition to Uber's motion to compel arbitration, Ms. Villeda-Granados certified that her native language is Spanish and that she does not understand English, so she elected to download the Uber App on her cellphone in Spanish. (Pa0431; Pa0600).

In March 2021, Uber notified Ms. Villeda-Granados of updates to Uber's terms through an in-App pop-up screen that blocked her from using the App unless and until she manifested assent to Uber's updated terms. (Pa0598–0599). Like the rest of Ms. Villeda-Granados's Uber App, the in-App pop-up screen appeared in Spanish. (Pa0600).

The top of the in-App pop-up screen included, in bold lettering, "**We've updated our terms**." (Pa077); see (Pa0604) ("**Actualizamos nuestros términos**."). Below this phrase, the pop-up screen stated, in even larger bold lettering, "**We encourage you to read our updated Terms in full**." (Pa077); see (Pa0604) ("**Te recomendamos leer los Términos actualizados en su totalidad**."). Bulleted directly beneath this bolded sentence were two hyperlinked phrases in bright blue and underlined text (typical of hyperlinks)

that read "Terms of Use" and "Privacy Notice." (Pa077); see (Pa0604) ("Términos de uso" and "Aviso de privacidad"). By clicking the bright-blue-colored hyperlinks, users are redirected to either the terms of use or privacy notice. (Pa0598). According to Plaintiffs, even though the in-App pop-up screen appeared in Spanish on Ms. Villeda-Granados's Uber App, clicking the link to Uber's terms caused the terms to appear in English. See (Pa0431); see also 1T23:16–25; 24:1–24 (claiming that Uber's terms appear in English).

At the bottom of the pop-up screen, Uber included—again, in bold lettering—the phrase, "**By checking the box, I have reviewed and agree to the Terms of Use and acknowledge the Privacy Notice**." (Pa077); see (Pa0604) ("**Al marcar la casila, confirm que revise y acepto los Términos de uso, y reconozco que leí la Política de privacidad.**"). To the immediate left of that phrase was a checkbox. See (Pa077; Pa0604). Beneath that phrase and checkbox, the phrase "I am at least 18 years of age" appeared in grey font. (Pa077); see (Pa0604) ("Soy mayor de 18 años."). And at the bottom of the pop-up screen was a prominent black button with white, contrasting font reading "Confirm." (Pa077); see (Pa0604) ("Confirmar").

Uber's records confirm that on March 23, 2021, Ms. Villeda-Granados followed this two-step process—checking the box to indicate that she "reviewed and agree[d] to the Terms of Use" and then clicking "Confirm"—to manifest

assent to Uber's terms. See (Pa075). She could not have used the Uber App to access the Rides platform until she completed that process. (Pa0599).

III. The trial court enforced Uber's terms and compelled arbitration.

In April 2021—one month after the date Uber's records show Ms. Villeda-Granados assented to Uber's terms—Ms. Villeda-Granados and her children were allegedly injured in a motor vehicle accident while taking a ride they requested using the Uber App. (Pa027–029). Nearly two years later, Plaintiffs sued Uber in the Superior Court of New Jersey, Union County, Law Division. (Pa026). Ms. Villeda-Granados and her children asserted personal injury claims, and Ms. Villeda-Granados's husband asserted a per quod derivative claim for loss of consortium. (Pa029).

Uber moved to compel arbitration of Plaintiffs' claims in accordance with the Arbitration Agreement. See (Pa078–0112). After full briefing and oral argument, the trial court granted Uber's motion. (Pa001–021). It held that Plaintiffs and Uber formed "an enforceable clickwrap agreement" with a "clear" and "enforceable" arbitration provision. (Pa017–019). Citing Uber's records, the trial court found that Uber presented Ms. Villeda-Granados "with an in-[A]pp blocking pop up screen" that put her "on notice of a change in [Uber's] terms" to which she consented. (Pa018–019). The trial court also ruled that Ms. Villeda-Granados's children and husband were bound to arbitrate their claims,

as "[a] parent's agreement to arbitrate is valid and enforceable against any tort claims asserted on a minor's behalf" (Pa019–20 (quoting Hojnowski v. Vans Skate Park, 187 N.J. 323 (2006))), and a per quod claim is derivative of and thus subject to the same limitations as an underlying personal injury claim (Pa020).

The trial court rejected Plaintiffs' argument that an agreement was not formed because clicking the hyperlink in the in-App pop-up screen directed Ms. Villeda-Granados to a copy of Uber's terms in English instead of Spanish. (Pa019). The trial court reasoned that if Ms. Villeda-Granados's phone setting were set to Spanish, "the Uber App would be in Spanish including the app blocking pop up screen and the hyperlinked Terms of Use and Privacy Policy." (Pa018). The trial court had "no indication" that Ms. Villeda-Granados (1) "did not understand any part of the app blocking pop up screen/click box" that appeared in Spanish, or (2) could not "use a translator app" to read Uber's terms even if they appeared in a different language. (Pa019).

The trial court also disagreed with Plaintiffs' contention that Uber's terms are unconscionable because Plaintiffs were "not compelled to use the Uber app" and "could have sought alternative methods of travel with other ride share companies or taxi companies" if they had objections to Uber's terms. (Pa020).

LEGAL ARGUMENT

Plaintiffs argue that the trial court erred in two ways when it enforced the Arbitration Agreement in Uber's terms. First, they say the trial court should have refused to enforce the Arbitration Agreement because Uber's terms are unconscionable. See (Pb5–11). Second, they say the trial court should have refused to enforce the Arbitration Agreement because the record does not show that Ms. Villeda-Granados manifested assent to Uber's terms. Id. at 11–13. For the reasons set forth below, each argument fails, and the trial court's order granting Uber's motion to compel arbitration should be affirmed.

This court "review[s] a trial court's order granting or denying a motion to compel arbitration de novo because the validity of an arbitration agreement presents a question of law." Santana v. SmileDirectClub, LLC, 475 N.J. Super. 279, 285 (App. Div. 2023); see also McGinty v. Zheng, No. A-1368-23, 2024 WL 4248446, at *5 (N.J. Super. Ct. App. Div. Sept. 20, 2024) (not reported) (same); Williams v. Ysabel, No. A-1391-22, 2023 WL 5768422, at *3 (N.J. Super. App. Div. Sept. 7, 2023) (not reported) (same).

I. The trial court correctly granted Uber's motion to compel arbitration notwithstanding Plaintiffs' claims of unconscionability (Pa003).

Plaintiffs' contention that the trial court should have held Uber's terms are unconscionable is untenable for two independent reasons. First, the question

of unconscionability was not for the trial court to decide, as Uber's terms—specifically, the Arbitration Agreement—clearly delegate that question to the arbitrator. Second, even if the question of unconscionability were properly before the trial court, Plaintiffs have not met their burden to demonstrate that Uber's terms are unconscionable.

A. Uber's terms expressly delegate the question of unconscionability to the arbitrator, not the trial court.

It was not error for the trial court to compel arbitration notwithstanding Plaintiffs' unconscionability argument because the trial court was not the proper forum for raising the question of unconscionability. "[P]arties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 68–69 (2010). "Thus, a delegation clause in an arbitration agreement can provide that an arbitrator, rather than a judge, will decide such 'threshold issues' as whether the parties agreed to arbitrate a legal claim brought by a plaintiff." Morgan v. Sanford Brown Inst., 225 N.J. 289, 303 (2016).

Under the FAA, courts are bound to enforce a delegation clause in an arbitration agreement unless the party opposing arbitration "challenged the delegation provision specifically." Rent-A-Center, 561 U.S. at 72; see also

Singh v. Uber Techs., Inc., 67 F.4th 550, 563 (3d Cir. 2023) (holding that a party must "challenge the delegation provision specifically" for the delegation provision to be held unenforceable (quoting MacDonald v. CashCall, Inc., 883 F.3d 220, 226 (3d Cir. 2018))). Put another way, "[i]n order to be decided by a court, an arbitrability challenge—a challenge as to whether a particular matter is subject to arbitration or can be decided by a court—must be directed at the delegation clause itself (which itself constitutes an arbitration agreement subject to enforcement); a general challenge to the validity of the agreement as a whole will not suffice to permit arbitration to be avoided." Goffe v. Foulke Mgmt. Corp., 238 N.J. 191, 195 (2019).

In Rent-A-Center, for example, an employee brought a discrimination claim against his former employer, and the employer moved to compel arbitration. 561 U.S. at 71. The employee challenged the arbitration agreement between the parties as unconscionable, but he did not specifically challenge the arbitration agreement's delegation provision. See ibid. The U.S. Supreme Court held that the trial court could not decide the employee's unconscionability challenge because the question of unconscionability had been delegated to the arbitrator. Unless the employee "challenged the delegation provision specifically," the court was bound to treat the delegation provision as "valid"

and "enforce it [under the FAA], leaving any challenge to the validity of the Agreement as a whole for the arbitrator." Id. at 72.

The Supreme Court of New Jersey has "acknowledged the legitimacy and applicability of the Rent-A-Center holding to delegation provisions in New Jersey arbitration agreements." Goffe, 238 N.J. at 211. The plaintiffs in Goffe signed contracts that "contained straightforward and conspicuous language about arbitration and broadly delegated arbitrability issues to an arbitrator." Id. at 194. Though the plaintiffs did not "dispute the validity of the arbitration agreement itself" or "dispute the delegation provision within it that delegate[d] the question of arbitrability to the arbitrator," they sought to avoid arbitration based on arguments that their contracts "as a whole" were invalid. Id. at 212. The Supreme Court of New Jersey rejected those arguments under Rent-A-Center, holding that the plaintiffs "must arbitrate their claims as to the enforceability of the overall sales contract" because they did not raise "a specific claim attacking the formation of the arbitration agreement that each signed." Id. at 212–13.

Just recently, this court affirmed a trial court order compelling arbitration under Uber's terms and held that various threshold questions of arbitrability had been properly delegated to the arbitrator. See McGinty, 2024 WL 4248446, at *9. In McGinty, this court recognized that Uber's terms delegated "all

threshold questions of arbitrability, including the enforceability of the Arbitration Agreement, to the arbitrator." Id. at *1, *3. Though the plaintiffs attempted to avoid arbitration by raising a number of defenses, each defense had to be determined by the arbitrator pursuant to the delegation provision in the Arbitration Agreement in Uber's terms. See id. at *9–10.

Like the arbitration agreements in Rent-A-Center, Goffe, and McGinty, the Arbitration Agreement here unmistakably delegates the question of unconscionability to the arbitrator. The Arbitration Agreement reflects the parties' express agreement that "the arbitrator … and not any federal, state, or local court or agency, shall have exclusive authority to resolve any disputes relating to the interpretation, applicability, enforceability or formation of this Arbitration Agreement, including any claim that all or any part of this Arbitration Agreement is void or voidable." (Pa064) (emphasis added). This language is virtually indistinguishable from the delegation provisions approved by the U.S. Supreme Court in Rent-A-Center and by this court in McGinty. See Rent-A-Center, 561 U.S. at 68 ("The Arbitrator … shall have exclusive authority to resolve any dispute relating to the … enforceability … of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable."); McGinty, 2024 WL 4248446, at *3 ("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.").

Uber's terms don't stop there. They go on to specify that the arbitrator is responsible "for determining all threshold arbitrability issues, including issues relating to whether" Uber's terms are "unconscionable." (Pa064) (emphases added). Plaintiffs' unconscionability argument thus falls squarely within the scope of what the Arbitration Agreement has delegated to the arbitrator. The argument that Uber's terms are "unconscionable" is a quintessential "threshold arbitrability issue[]" that presents an apparent "dispute about whether [Uber's] Arbitration Agreement can be enforced," so the arbitrator has the "exclusive authority" to decide the issue and the trial court was not the proper forum for that challenge. Ibid.

Plaintiffs' unconscionability challenge is not specific to the delegation provision in Uber's terms. Instead, it generally discusses Ms. Villeda-Granados's inability to understand English and the supposed unequal bargaining power between Ms. Villeda-Granados and Uber when she agreed to Uber's terms. See (Pb5–11). Under Rent-A-Center and Goffe, Plaintiffs' general challenge to the enforceability of Uber's terms is not a specific challenge to the

enforceability of the delegation provision contained in those terms. Therefore, the delegation provision must be enforced, and the question of unconscionability must be decided by the arbitrator.

B. Plaintiffs have not met their burden to show that Uber's terms are unconscionable.

Even if the issue of unconscionability were properly before the trial court and had not been delegated to the arbitrator, Plaintiffs' unconscionability challenge would fail. Plaintiffs, as the parties asserting unconscionability, bear the burden of proving unconscionability. See Vector Foiltec LLC v. Becker, No. A-3293-22, 2024 WL 3153194, at *13 (N.J. Super. Ct. App. Div. June 25, 2024) (not reported); see also Harrington v. Atl. Sounding Co., Inc., 602 F.3d 113, 124 (2d Cir. 2010). To determine whether Plaintiffs have met their burden, the court must "conduct a fact-sensitive analysis and assess both procedural and substantive unconscionability." Pace v. Hamilton Cove, 258 N.J. 82, 103 (2024).

"Courts generally have applied a sliding-scale approach to determine overall unconscionability, considering the relative levels of both procedural and substantive unconscionability." Delta Funding Corp. v. Harris, 189 N.J. 28, 40 (2006). Under that approach, even "a high level of procedural unconscionability" in which one party possesses "greater sophistication and

bargaining power" may not be enough to "render an entire agreement unenforceable." Stelluti v. Casapenn Enters., LLC, 203 N.J. 286, 301 n.10 (2010).

Here, Plaintiffs cannot show that Uber's terms are so substantively or procedurally unconscionable that they should be regarded as unconscionable and therefore unenforceable.

1. Uber's terms are not substantively unconscionable.

Plaintiffs do not meaningfully contend that Uber's terms are substantively unconscionable. Plaintiffs note that substantive unconscionability "pertains to the fairness of the contract terms themselves," (Pb6), but they do not argue that Uber's terms are "so one-sided as to shock the court's conscience," D.M.C. v. K.H.G., 471 N.J. Super. 10, 27–28 (App. Div. 2022) (quoting Est. of Cohen ex rel. Perelman v. Booth Comput., 421 N.J. Super. 10, 27–28 (App. Div. 2011)).

Nor could they. Substantive unconscionability "generally involves harsh or unfair one-sided terms." Muhammad v. Cnty. Bank of Rehoboth Beach, 189 N.J. 1, 15 (2006). The Arbitration Agreement in Uber's terms is mutual; both Plaintiffs and Uber agree to arbitrate claims within the scope of the Arbitration Agreement and to waive their jury trial rights with respect to those claims subject to arbitration. See (Pa063) ("You acknowledge and agree that you and Uber are each waiving the right to a trial by jury" (emphasis added)). Moreover,

Plaintiffs have not identified anything "harsh or unfair" about the Arbitration Agreement in Uber's terms, and New Jersey's public policy favors arbitration. See, e.g., Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 311–312 (2014) ("The FAA and the nearly identical New Jersey Arbitration Act enunciate federal and state policies favoring arbitration." (emphasis added) (citations omitted)); Hojnowski, 187 N.J. at 342 ("[A]rbitration … is a favored means of dispute resolution."). Plaintiffs have not shown that Uber's terms are substantively unconscionable.

2. Uber's terms are not procedurally unconscionable.

Plaintiffs begin their discussion of procedural unconscionability by framing Uber's terms as a "contract of adhesion" since they were "presented on a take-it-or-leave-it basis." (Pb6). But the observation that Uber's terms may "fit the definition of contracts of adhesion is the beginning, not the end, of the inquiry." Rudbart v. N. Jersey Dist. Water Supply Comm'n, 127 N.J. 344, 354 (1992). The court must still "focus on procedural and substantive aspects" of Uber's terms to "determine whether [they are] so oppressive, or inconsistent with the vindication of public policy, that it would be unconscionable to permit [their] enforcement." Vitale v. Schering-Plough Corp., 231 N.J. 234, 247 (2017) (quoting Rodriguez v. Raymours Furniture Co., Inc., 225 N.J. 343, 367 (2016)). To do so, the court must consider "(1) the subject matter of the contract, (2) the

parties' relative bargaining positions, (3) the degree of economic compulsion motivating the adhering party, and (4) the public interests affected by the contract." Pace, 258 N.J. at 103. "The first three factors speak to procedural unconscionability, and the last factor speaks to substantive unconscionability." Fazio v. Altice USA, No. A-2102-22, 2024 WL 3354563, at *4 (N.J. Super. Ct. App. Div. July 10, 2024) (not reported).

Plaintiffs do not meaningfully address the subject matter of Uber's terms or the degree of economic compulsion motivating adherence to Uber's terms, and as explained above, New Jersey's public policy favors arbitration. Plaintiffs mainly argue that Ms. Villeda-Granados lacked bargaining power relative to Uber, both because Uber is a sophisticated company and because Ms. Villeda-Granados claims she does not understand English. As explained below, neither point suffices to show that Uber's terms are procedurally unconscionable.

a. Ms. Villeda-Granados's purported lack of bargaining power does not make Uber's terms procedurally unconscionable.

Parties do not lack bargaining power if they can take their business elsewhere and easily find another means of engaging in the same conduct. In Stelluti, a new fitness club member tried to avoid the exculpatory provision in her membership agreement with a fitness club by arguing that the agreement was an unconscionable contract of adhesion. See 203 N.J. at 300. The Supreme

Court of New Jersey ruled that the membership agreement was a contract of adhesion because it was presented on a "take-it-or-leave-it basis," but it was not unconscionable and unenforceable under New Jersey law. Id. at 301 (internal quotation marks omitted). The Stelluti Court concluded that the agreement was not procedurally unconscionable because the parties were not in a "position of unequal bargaining power," as the member "could have taken her business to another fitness club, could have found another means of exercise aside from joining a private gym, or could have thought about it and even sought advice before signing up and using the facility's equipment." Id. at 302.

Stelluti is not an outlier. Time and again, the Supreme Court of New Jersey has held that a party's ability to take its business elsewhere foreclosed the argument that even a contract of adhesion would qualify as procedurally unconscionable. See Pace, 258 N.J. at 107–08 (rejecting tenants' claim that standard-form lease agreements were procedurally unconscionable where the tenants "were free to seek out alternative housing arrangements if they did not agree with the lease's terms" and thus did not lack bargaining power); Rudbart, 127 N.J. at 356 (rejecting investors' claim that notes were procedurally unconscionable where the investors "were not driven to accept the … notes because of a monopolistic market or any other economic constraint"). The Supreme Court of New Jersey has also held that a party's ability to take time to

review the terms of an agreement is incompatible with claims of procedural unconscionability. See Pace, 258 N.J. at 107 ("Here, defendants generally presented the lease on a take-it-or-leave-it basis, but plaintiffs had time to consult with an attorney and were free to seek out alternative housing arrangements if they did not agree with the lease's terms."). Situations in which consumers can take their business elsewhere or take time to review proposed terms "stand[] in stark contrast to" situations presenting real indicia of procedural unconscionability, such as when "a consumer is in such financial straits" that they seek out a small loan with a massive interest rate based on a "high degree of economic compulsion." Ibid. (quoting Muhammad, 189 N.J. at 19 n.4).

Here, Plaintiffs baldly assert that Ms. Villeda-Granados "had no bargaining power" and that her only choices were "to either accept [Uber's] terms or have no means of transportation." (Pb7; 10). But they ignore that she had numerous other viable transportation options. Instead of using the Uber App, Ms. Villeda-Granados could have chosen to use another rideshare platform (e.g., Lyft) or to take advantage of other means of transportation (e.g., train, bus, or taxi). That Ms. Villeda-Granados claims to rely on Uber for transportation and claims not to have a driver's license does not negate the multiple, alternative modes of transportation she could have used.

Similarly, there is nothing in the record to suggest that Ms. Villeda-Granados was under any duress or economic compulsion when she assented to Uber's terms. Like the plaintiff in Stelluti, nothing stopped Ms. Villeda-Granados from consulting a third party about Uber's terms (especially in light of her alleged inability to understand English) before confirming that she reviewed and agreed to them. Uber neither imposed a deadline for Ms. Villeda-Granados to assent to its terms nor prevented Ms. Villeda-Granados from taking her time to review Uber's terms; it was Ms. Villeda-Granados who controlled the time at which she reviewed and agreed to Uber's terms. Under these circumstances, to the extent Uber's terms qualify as a contract of adhesion, they are "a fairly typical adhesion contract in its procedural aspects" and are "not void based on any notion of procedural unconscionability." Stelluti, 203 N.J. at 302.

b. Ms. Villeda-Granados's purported inability to understand English does not make Uber's terms procedurally unconscionable.

Plaintiffs also argue that Uber's terms are procedurally unconscionable because Ms. Villeda-Granados can understand only Spanish, and Uber made its terms available to her only in English. See (Pb7–8). There are two problems with Plaintiffs' argument.

First, as a matter of New Jersey law, "limited knowledge of the English language, standing alone, is insufficient to constitute procedural unconscionability." Maity v. Tata Consultancy Servs., Ltd., No. 19-cv-19861 (KSH) (CLW), 2021 WL 6135939, at *6 (D.N.J. Dec. 29, 2021); see Baymont Franchise Sys. v. SB Hosp. Palm Springs, LLC, No. 19-06954 (KM) (MAH), 2022 WL 2063623, at *4 (D.N.J. June 8, 2022) ("New Jersey courts have held that the mere inability to speak English is not sufficient to void a contract" for procedural unconscionability). As a result, Plaintiffs cannot rely on Ms. Villeda-Granados's inability to understand English as the basis for demonstrating procedural unconscionability.

Second, the record is clear that Ms. Villeda-Granados received notice of Uber's terms and assented to them through an interface that appeared in Spanish. It is undisputed that Uber's in-App pop-up screen was presented to Ms. Villeda-Granados in Spanish, see (Pa0598–0599), and she used that interface to confirm in Spanish that she reviewed and agreed to Uber's terms, see (Pa075). Thus, Ms. Villeda-Granados appreciated (or, at minimum, reasonably should have appreciated) from the pop-up screen that by checking the box and clicking the button, she was manifesting assent to Uber's terms.

Plaintiffs cannot avoid their agreement to arbitrate simply because Ms. Villeda-Granados made no effort to secure a translation of Uber's terms. As the

trial court observed, translation services are readily available online. See (Pa019). Far from it being unconscionable for Uber's terms to appear in English, it is well settled that it was Ms. Villeda-Granados's obligation to ensure that she understood Uber's terms before agreeing to them.

Plaintiffs' argument conflicts with the well-established principle of contract law that "[i]n the absence of fraud, the fact that an offeree cannot read, write, speak, or understand the English language is immaterial to whether an English-language agreement the offeree executes is enforceable." Morales v. Sun Constructors, Inc., 541 F.3d 218, 222 (3d Cir. 2008). In Morales, an employer sought to enforce an arbitration agreement that was written in English against a former employee who could not understand English. Id. at 219. The trial court refused to enforce the arbitration agreement, and the U.S. Court of Appeals for the Third Circuit reversed. It held that as a matter of law, it was the former employee's "obligation to ensure he understood the [a]greement before signing," and the former employee could not avoid his English-language agreement to arbitrate when he could have—but did not—ask to have the agreement translated from English to Spanish. Id. at 223.

Plaintiffs devote much of their brief to trying to distinguish Morales because the former employee in that case supposedly had greater abilities in English than Ms. Villeda-Granados. See (Pb7–9). But Plaintiffs' argument

ignores that their unconscionability argument is incompatible with Morales's categorical holding that an English-language agreement "is enforceable" against a party that manifests assent to it, even if that party "cannot read, write, speak, or understand the English language." Morales, 541 F.3d at 222. It cannot be that Uber's terms are procedurally unconscionable when Uber unquestionably made clear to Ms. Villeda-Granados in Spanish that checking the box and clicking "Confirm" would manifest assent to Uber's terms, and it was Ms. Villeda-Granados's "obligation to ensure [s]he understood the [a]greement before signing." Id. at 223.

Indeed, Plaintiffs' position that it is unconscionable to present contractual terms in English to a non-English speaker would undermine fundamental aspects of New Jersey contract law. New Jersey, like other common law jurisdictions, applies an objective theory of contract, whereby "[a] party who enters 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." Rudbart, 127 N.J. at 353 (quoting Fivey v. Pa. R.R. Co., 67 N.J.L. 627, 632 (1902)). "[C]ourts have generally found clickwrap agreements" like Uber's "enforceable because '[b]y requiring a physical manifestation of assent, a user is said to be put on inquiry notice of the terms assented to.'" Santana, 475 N.J. Super. at 288–29 (alterations in original) (quoting Applebaum v. Lyft, Inc., 263

F. Supp. 3d 454, 465 (S.D.N.Y. 2017)); see also Wollen v. Gulf Stream Restoration & Cleaning, LLC, 468 N.J. Super. 483, 495 (App. Div. 2021) ("Consumer web-based contracts are no longer a novel concept. Indeed, New Jersey courts have recognized the validity of such contracts for decades."). These principles would be reduced to a nullity if the court were to embrace Plaintiffs' view and hold that Ms. Villeda-Granados's objective and knowing manifestations of assent were not enough to form an enforceable contract.

II. The trial court correctly found that Ms. Villeda-Granados manifested her assent to Uber's terms (Pa003).

Plaintiffs' second argument on appeal is that the trial court supposedly erred in finding that Ms. Villeda-Granados manifested assent to Uber's terms by checking the box and clicking "Confirm" in the in-App pop-up screen. See (Pb11–13). According to Plaintiffs, the record before the trial court presented a genuine dispute as to whether Ms. Villeda-Granados took those actions, and discovery on the issue was necessary. Plaintiffs are wrong on both counts.

Plaintiffs have failed to show any genuine dispute that Ms. Villeda-Granados manifested assent to Uber's terms. Uber's records confirm that on March 23, 2021, Ms. Villeda-Granados followed the two-step process—checking the box to indicate that she "reviewed and agree[d] to the Terms of Use" and then clicking "Confirm"—to manifest assent to Uber's terms. See

(Pa075; Pa0598–0599; Pa0604). The record is clear that she could not have used the Uber App to access the Rides platform until she completed that process. (Pa0599). Indeed, had Ms. Villeda-Granados not completed that process and assented to Uber's terms, she would not have been able to request the ride giving rise to her personal injury claims one month later.

Plaintiffs note that Ms. Villeda-Granados "certified that she does not recall checking off any box" in Uber's in-App pop-up screen, (Pb13), but that does not contradict the record evidence that she manifested assent. That Ms. Villeda-Granados does not recall that she manifested assent to Uber's terms in no way undermines Uber's records showing that she in fact manifested assent to Uber's terms.

Plaintiffs also suggest there is some uncertainty surrounding the screen shot of the in-App pop-up screen. See (Pb13–14). There is not. Uber filed with the trial court "a true and correct copy of a representation of the in-[A]pp blocking pop-up screen" in both English and Spanish, as it would have appeared to Ms. Villeda-Granados on the date she encountered it. (Pa0599) (emphasis added). Plaintiffs point to a letter from Uber's counsel referring to that representation as "the Checkbox Consent that your client checked," but the omission of the word "representation" from that letter does not call into question the evidence before the trial court.

Nor have Plaintiffs explained how discovery would have changed the trial court's analysis. On this, the court's recent decision in Williams v. Ysabel is instructive. The plaintiffs in Williams registered for Uber accounts and followed the same two-step process as Ms. Villeda-Granados to manifest assent to Uber's terms. 2023 WL 5768422, at *1. After they asserted personal injury claims against Uber in the trial court and the trial court compelled arbitration, the plaintiffs appealed, arguing that the trial court should have permitted discovery on the question of arbitration. Id. at *2. This court rejected that argument because the plaintiffs "fail[ed] to demonstrate how discovery would alter [the] analysis or conclusion" that they "registered for Uber accounts and followed the related procedure, including clicking in a pop-up box" to manifest assent to Uber's terms. Id. at *4.

So too here. The record establishes that Ms. Villeda-Granados "registered for [an] Uber account[] and followed the related procedure, including clicking in a pop-up box," to manifest assent to Uber's terms. Ibid. Plaintiffs have not identified—because they cannot—any discovery that would change that conclusion, so none is warranted.

Plaintiffs cite Kleine v. Emeritus at Emerson to argue that the "trial court did not view all facts and inferences in the light most favorable to the Appellant[s]." (Pb15) (citing 445 N.J. Super. 545, 548 (App. Div. 2016)). But

Kleine is inapposite because it involved a "one-sided waiver" of the right to a jury trial and a genuine dispute of fact with respect to "the manner in which the contract was formed." 445 N.J. Super. at 551. Here, the waiver at issue was mutual—Plaintiffs and Uber each waived their jury trial right—and as explained above, there is no genuine dispute that Ms. Villeda-Granados manifested assent to Uber's terms and could not have used the Uber App without doing so.

CONCLUSION

For the reasons explained above, the order granting Uber's motion to compel arbitration should be affirmed.

Respectfully submitted,

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MORGAN LEWIS & BOCKIUS LLP
Attorneys for Respondents Uber Technologies, Inc. and Rasier/Portier, LLC

By: */s/ Michael L. Kichline*
Michael L. Kichline, Esq.
Matthew D. Klayman, Esq.

WEBER GALLAGHER SIMPSON STAPLETON FIRES & NEWBY LLP
Attorneys for Respondents Uber Technologies, Inc. and Rasier/Portier, LLC

By: */s/ Madeline S. Baio*
Madeline S. Baio, Esq.

BLANCA ANAELY VILLEDA-GRANADES; JAIRON PENA, INDIVIDUALLY AS PER QUOD CLAIMANT AND AS GUARDIAN AD LITEM FOR MINOR PLAITNIFFS BRIANNA PENA VILLEDA AND ANGELYN ROCIO PENA, Plaintiffs-Appellants, vs. UBER TECHNOLOGIES, INC.; RASIER/PORTIER, LLC; HUMAIDI MASOUD; JOSE LEON; DUBLIN MAINTENANCE, INC.; and JOHN DOES 1-10 (fictitious designations), Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-03979-23 CIVIL ACTION On Appeal from the Superior Court of New Jersey Somerset County Law Division SOM-L-1019-23 SAT BELOW: HON. WENDY A. REEK, J.S.C.

DEFENDANTS-RESPONDENTS JOSE LEON AND DUBLIN MAINTENANCE, INC.'S BRIEF

Garrity, Graham, Murphy, Garofalo & Flinn, PC
425 Eagle Rock Avenue, Suite 202
Roseland, N.J. 07068
(973) 509-7500

OF COUNSEL AND ON THE BRIEF:
FRANK H. REIMERS, ESQ. (Attorney ID#00182-1973)
Email: fhr@garritygraham.com

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PROCEDURAL HISTORY

Complaint filed against Uber, Raiser, Masoud, Jose Leon, and Dublin Maintenance on April 7, 2023. [Pa 024-031]. Answer filed for defendants Leon and Dublin Maintenance on May 18, 2023. [LDa 1-11]. Answer filed for defendant Masoud on June 23, 2023. [LDa 12-21]. Answer filed for defendants Uber and Raiser on July 17, 2023. [Pa 41-53]. Motion to compel arbitration claims of plaintiffs against Uber/Raiser filed on March 14, 2024. [Pa 078-112]. On April 5, 2024 defendants Leon and Dublin set forth their position with respect to discovery obligations of the parties, discovery of insurance information, and for staying the case until completion of the Uber arbitration. [LDa 22-24].[1] Refusing to provide discovery, on May 7, 2024 Uber/Raiser filed a motion for a protective Order shielding it from discovery obligations [LDa 25-26] which motion was granted on May 29, 2024. [LDa 27-28]. An Order compelling arbitration of plaintiffs' claims against Uber/Raiser and staying case until completion of arbitration was entered July 17, 2024. [Pa 001]. Plaintiffs opposed and filed their opening Brief on October 17, 2024. See general Pb.

[1] The letter brief on behalf of defendants Leon and Dublin is included in the Appendix because it is germane to the issues on appeal and demonstrative of the consistency of the position and arguments by these defendants.

STATEMENT OF FACTS

On April 21, 2021 Blanca Villeda Granados and her two young daughters entrusted an Uber driver, Humaidi Masoud, to transport them to an appointment with the children's pediatrician. [Pa 425]. Instead, the Uber driver decided to pay more attention to his cell phone rather than the road, and rammed the Uber vehicle into a truck belonging to Dublin Maintenance, Inc. operated by Jose Leon, causing the Uber vehicle to flip upside down. Mother and children were injured in the accident. [Pa 425].

LEGAL ARGUMENT

POINT I

IF THIS COURT AFFIRMS THE DECISION OF THE COURT BELOW COMPELLING PLAINTIFFS TO ARBITRATE THEIR CLAIMS AGAINST UBER/RAISER THIS COURT SHOULD CONTINUE THE STAY OF THE CASE GRANTED BY THE COURT BELOW

As the arbitration of the claims between plaintiffs and Uber/Raiser does not involve the defendants Leon and Dublin Maintenance, these defendants took no position as to that portion of the motion to compel arbitration between those parties as long as the case were stayed as to the non-Uber defendants and Uber provided information about insurance coverage for its driver. [LDa 22-24]. These defendants continue to adhere to that position here. It was and remains the position of the defendants Leon and Dublin Maintenance that the case between plaintiff and

defendants Masoud, Leon, and Dublin, should be stayed until the arbitration between plaintiffs and Uber/Raiser is completed. Upon completion of the arbitration the case should then be restored to the active trial list. Staying of the lawsuit until completion of the arbitration was the position taken by both Uber/Raiser [Pa 78-110] as well as plaintiffs [Pa 414-416] in the Court below. Staying of the litigation until completion of the arbitration is the course taken by the courts throughout New Jersey and throughout the United States. It avoids piecemeal litigation of common issues of law and fact. *Cavallo v. Uber Techs, Inc*., U.S.D.C.N.J. May 31, 2017 Pa 130-148; *Lanier v. Uber Technologies, Inc.,* U.S.D.C.Ca. May 11, 2016, Pa 150-156; *Holdbrook Pediatric Dental, LLC v. Pro Computer Serv*., *LLC*, U.S.D.C.N.J. July 21, 2015 Pa 158-169; *Taylor v. Jimenez*, UNN-L2025-23 Law Div. July 27, 2022 Pa 191-192; *Bell v. Uber*, ESX-L-1603-23 Law Div. Oct. 19, 2023 Pa 194-195; *Annum v. Santana*, MID-L-6170-22 Law Div. Nov. 3, 2023 Pa 197; *Ronceros v Segura-Diaz*, ESX-L-1701-23 Law Div. Nov. 8, 2023 Pa 199-192; *Dukes v. Weiss*, ESX-L-7297-23 Law Div. undated Pa 205-206; *Siperavage v. Uber Technologies, Inc.,* U.S.D.C.N.J. June 20, 2021 Pa 208-223; *Williamson v. Alexander*, S.C.N.Y. Kings County July 27, 2022 Pa 227-241; *Smith v. Khosrowshahi*, U.S.D.C.Pa. Dec 7, 2020 Pa 258-260].

The case of *Williams v. Ysabel*, et al. Superior Court, App.Div. A-1391-22, December 7, 2023 [Pa 172-183] is directly in point. In *Williams* plaintiffs were

passengers in an Uber automobile which collided with the Ysabel vehicle. The Appellate Division directed the trial court to proceed as follows:

> "**Under the FAA and [New Jersey Arbitration Act], a court must stay an arbitrable action pending the arbitration** (citing 9 U.S.C. Section 3, N.J.S.A.
>
> 2A:23B-7(g). Accordingly, we remand the case with an instruction that the judge enter a new order compelling plaintiffs to arbitrate their claims against the Uber defendants and staying the Law Division action, including the claims against the other defendants…**claims against parties who have not agreed to arbitrate should be stayed pending the arbitration."** Opinion *Williams v. Ysabel*, et al., Docket No. A-1391-22 September 7, 2023 p 11-12. (bold added). [Pa 182-183].

CONCLUSION

For the reasons aforesaid it is respectfully urged that the Appellate Court continue the stay of the litigation ordered by the court below until the conclusion of the arbitration between Uber/Raiser and plaintiffs.

Respectively submitted,

*Frank H. Reimers*____

Frank H. Reimers, Esq. (001821973)

Dated: November 22, 2024

Print Clear

New Jersey Judiciary

Certification that Submission Contains No Confidential Information or Confidential Personal Identifiers

This form shall be completed by any party who files a document in a public court matter in the Supreme Court or in the Appellate Division of the Superior Court.

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I certify that I have reviewed Rules 1:38-3, 1:38-5, and 1:38-7 and:

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I understand that the presence of confidential information or confidential personal identifiers in a document that has been posted on the Judiciary's public website will be grounds for the removal of such online posting, pending correction by the filing party, on an expedited timeline. The court in its discretion could postpone further proceedings pending the resubmission of the document.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

11/20/2024
Date

s/ John H. Reimers
Signature

BLANCA ANAELY VILLEDA GRANADOS; JAIRON PENA, individually as per quod claimant and as guardian ad litem for minor plaintiffs, BRIANNA PENA VILLEDA AND ANGELYN ROCIO PENA, Plaintiffs-Appellants v. UBER TECHNOLOGIES, INC./RAISER/PORTIER, LLC; HUMAIDI MASOUD; JOSE LEON; DUBLIN MAINTANANCE INC.; and JOHN DOES 1-10 (fictitious designations), Defendants-Respondents	SUPERIOR COURT OF NEW ERSEY APPELLATE DIVISION DOCKET NO. A-03979-23 Civil Action On Appeal from the Superior Court of New Jersey Somerset County Law Division SOM-L-1019-23 SAT BELOW: HON. WENDY A. REEK, J.S.C.

PLAINTIFFS/APPELLANTS, BLANCA ANAELY VILLEDA GRANADOS; JAIRON PENA, individually as per quod claimant and as guardian ad litem for minor plaintiffs, BRIANNA PENA VILLEDA and ANGELYN ROCIO PENA'S REPLY BRIEF

STARK & STARK
PO Box 5315
Princeton, NJ 08543-5315
P: (609) 896-9060
Attorney for Plaintiffs/Appellants

OF COUNSEL AND ON THE BRIEF:
BHAVEEN R. JANI, ESQUIRE (Attorney ID # 02721-2009)
Email: bjani@stark-stark.com

ON THE BRIEF:
AMANDA R. FREYER, ESQ. (Attorney ID # 410622022)
Email: afreyer@stark-stark.com
Date of Submission: November 26, 2024

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RULES:

LEGAL ARGUMENT

Uber's opposition to this motion, at its essence, tries to rehash the same arguments it made in their trial court brief and oral argument, while ignoring the crux of Appellants' argument on appeal. Where a fundamental right to a jury trial is being stripped away, the record should not leave room for a single ounce of doubt that Ms. Villeda-Granados agreed to be bound to an arbitration provision. Appellants' brief on appeal illustrated false statements made by Uber and discrepancies in its "proofs" on which Uber relies on to argue Ms. Villeda-Granados unequivocally agreed to be bound to arbitration. Uber fails to address these issues in its opposition brief-their silence is telling.

Instead, Uber now argues for the first time that unconscionability must be decided by the arbitrator based on the delegation clause within the arbitration agreement and Appellants' alleged failure to dispute the delegation clause. This new argument is flawed both procedurally and substantively. This argument is procedurally deficient because Uber cannot raise a new argument in their opposition which was not raised at trial level. This argument is also substantively deficient for multiple reasons: (1) it goes against New Jersey law, and (2) Appellants disputed the delegation clause in its opposition to the trial court motion to compel arbitration.

Uber further argues even if the Court determined unconscionability, the terms are not unconscionable because Ms. Villeda-Granados had other choices regarding

transportation. In support of its arguments, Uber cites to various cases purportedly distinguishable from the present case.

The Court should respectfully reverse the trial court's decision to compel arbitration because without discovery, it is not clear that Ms. Villeda-Granados unequivocally checked the confirmation box and agreed to be bound to arbitration, and if she did, the terms are unconscionable and in English. Nothing Uber has tried to argue in its opposition has changed these facts.

I. THE TRIAL COURT ERRED WHEN IT DETERMINED MS. VILLEDA-GRANADOS CHECKED THE CONFIRMATION BOX AND AGREED TO BE BOUND TO ARBITRATION WITHOUT DISCOVERY BECAUSE THE EVIDENCE PROVIDED BY UBER IS INCONSISTENT.

There is great uncertainty that Ms. Villeda-Granados checked the box confirming she read, understood, and agreed to Uber's Terms and Conditions, including the arbitration provision. Uber argues that its records confirm Ms. Villeda-Granados checked the box on March 23, 2021, and the prior letter from Uber's counsel showing a different screen shot was only a "representation." (Db28-29). This gamesmanship by prior counsel is misleading. Appellants' argument is that the two different timestamps, ***in addition*** to the fact that Appellant has proven the statements made in Uber's affidavit are false. It is disingenuous for Uber to claim there is no genuine issue of material fact given these false statements and contradicting timestamps. Appellants have proven by example with their own Uber application

that Uber's affidavit claiming if the application is set to Spanish, the Terms and Conditions display in Spanish is false. Given this, how can we blindly believe any of the other statements within Uber's affidavit are correct without further discovery? Clearly there was one glaring misstatement which Uber cannot deny-the Terms of Use and Arbitration Provision are clearly in English.

Uber also relies on Williams v. Ysabel, No. A-1391-22, 2023 WL 5768422 at *1 to argue further discovery would not change the trial court's conclusion that Ms. Villeda-Granados checked off the box which manifested her assent to Uber's terms. (Db30). This is false. Again, because the affidavit of Uber's employee is false and unreliable, discovery would further determine how reliable Uber's record keeping is, and when and if Ms. Villeda-Granados actually checked off the box. Despite its refusal to engage in formal discovery, Uber has shown it does not have reliable record keeping based on the contradictory timestamps of when Ms. Villeda-Granados allegedly checked the box binding herself and her family to arbitration. Uber has also shown it cannot be trusted to make accurate statements under oath. Uber's own employee made a false representation in her affidavit when she stated the entirety of Uber's application, including the Terms and Conditions display in English. (Pa0622). Thus, discovery could prove Ms. Villeda-Granados did not check off the box.

II. THE QUESTON OF UNCONSCIONABILITY IS WITHIN THE TRIAL COURT'S DISCRETION, NOT THE ARBITRATOR.

In response to this appeal, Uber has argued for the first time that unconscionability must be decided by the arbitrator, not the Court under a delegation provision within Uber's arbitration agreement. (Db7, 12-13). It is not only improper to raise a new argument for the first time in an opposition to an appeal, but this argument is also flawed because it goes against New Jersey law and despite Uber's belief, Appellants disputed the delegation language in its opposition to the motion to compel.

A. It is improper for Uber to argue it is not the court's decision to determine unconscionability for the first time in response to this appeal.

This Court should not consider the new argument in response to this appeal raised by Uber regarding the Court's discretion in determining unconscionability because Uber missed its opportunity to raise this issue with the trial court. Although an Appellate Court may consider allegations of errors or omissions not brought to the trial judge's attention, if it meets the plain error standard under R. 2:10-2, the Court often declines to consider issues that were not raised below or not properly presented on appeal when the opportunity for presentation was available. Generally, unless an issue goes to the jurisdiction of the trial court or concerns matters of substantial public interest, the Appellate Court will rarely consider it. J.K. v. N.J. State Parole Bd., 247 N.J. 120, 138 n.6 (2021); State v. Jones, 232 N.J. 308, 321 (2018); State v. Lawless, 214 N.J. 594, 605 n.2 (2013); State v. Robinson, 200 N.J.

1, 20-22 (2009); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973); Pressler & Verniero, Current N.J. Court Rules, cmt. 3 on R. 2:6-2 (2022). See also State v. Cabbell, 207 N.J. 311, 327 n.10 (2011) (Court declined to consider an argument first raised in a supplemental brief to the Court); Hirsch v. State Bd. of Med. Exam'rs, 128 N.J. 160, 161 (1992) (Court declined to address a claim presented after the Court granted a petition for certification). Uber now argues whether the arbitration clause is unconscionable is a question for the arbitrator to decide under the delegation provision within Uber's arbitration agreement. (Db7, 12). This argument was never made in Uber's motion to compel arbitration and should not be considered by this Court. The lower court's Order did not address this issue as well because Uber never raised it. However, if this Court is inclined to consider the delegation provision language, this argument fails because the language is contradictory to New Jersey law, which Appellants did argue in their opposition to the motion to compel arbitration to dispute the delegation provision.

B. Appellants already disputed the delegation provision in their opposition to the motion to compel because it goes against New Jersey law.

Uber contends unconscionability is a question for the arbitrator under the delegation provision within its arbitration agreement. (Db7, 12). Specifically, the delegation provision tries to put "any threshold arbitrability issues including interpretation, applicability, enforceability or formation of the arbitration agreement

. . . including issues relation to whether 'Uber's terms are' unconscionable" in the control of the arbitrator. (Db7, 12). Uber is asking for this Court to selectively invoke a specific part of this delegation provision for their advantage, while simultaneously asking this Court to disregard other relevant parts that do not support its position. Uber is urging this Court to hold unconscionability is for the arbitrator to decide because the delegation provision says so. Yet, by its own language, the delegation provision would also represent that the trial court did not have the authority to determine this arbitration agreement is enforceable or applicable against the Appellants. Thus, if this Court is inclined to find the delegation provision enforceable, it must also reverse the trial court's opinion as to the enforceability and formation of this arbitration agreement.

Uber also mistakenly claims Appellants did not "challenge the delegation provision specifically," and under the FAA, this Court is bound to enforce the delegation clause. Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 72 (2010). (Db 13-15). However, Appellants challenged the enforceability of the delegation provision in its opposition to the motion to compel arbitration. (Pa0439-0440). Appellants previously argued the issue:

> Additionally, the arbitration agreement puts 'issues relating to whether the Terms are applicable, unconscionable or illusory and any defense to arbitration . . .' in the hands of the arbitrator to determine. The agreement further states '[i]f there is a dispute about whether this Arbitration Agreement can be enforced . . . you and Uber agree that the arbitrator will decide that issue.' This goes against New Jersey law.

(Pa0439-0440).

Appellants relied on Knight v. Vivint Solar Developer, LLC, 465 N.J. Super. 416, 428 (App. Div. 2020) in support of this argument. (Pa0439-0440). Appellants further argued in their opposition:

> If the Court upheld this Arbitration Agreement, it would allow Defendant, Uber, to hold every Uber user, who most likely do not know or understand the law, to terms that go against what the law actually says.

(Pa0440).

So, despite Uber's misstatement, Appellants challenged the delegation provision, and this Court is not bound to find, nor should it find, the delegation provision enforceable.

III. THE ARBITRATION AGREEMENT IS BOTH PROCEDURALLY AND SUBSTANTIVELY UNCONSCIONABLE.

Appellants have met their burden to show Uber's arbitration agreement is both procedurally and substantially unconscionable. The trial court erred when it found the arbitration agreement enforceable.

Much of Uber's arguments denying unconscionability in response to this appeal are repeated arguments from their original motion and do not change the arguments as to unconscionability Appellants have made in their moving appellate brief, or the need for discovery discussed above. However, Uber's misstatements that (1) Ms. Villeda-Granados had other realistic options for transportation, and (2) this was not a one-sided waiver must be addressed.

A. Uber's arbitration agreement is procedurally unconscionable because Appellants had no other meaningful choice but to rely on Uber for transportation.

Uber's argument that Ms. Villeda-Granados' lack of bargaining power does not make Uber's terms procedurally unconscionable because she could have taken her business elsewhere is a flawed argument. (Db21-23). The examples of other means of transportation Uber suggests are Lyft, train, bus, or taxi. (Db23). If Ms. Villeda-Granados had chosen a Lyft, she would have been forced to agree to arbitration as well. Uber is also well aware of its success in essentially running taxi services out of business in New Jersey. Given the lack of transportation, Ms. Villeda-Granados would probably need to rely on a rideshare service to get to a bus or train station. So the only realistic choice Ms. Villeda-Granados had was to rely on Uber for transportation to make it to her children's doctor's appointments. Transportation is a necessity and is distinguishable from the case Stelluti v. Casapenn Enters., LLC, 203 N.J. 286, 300-302 (2010), which Uber relies on. (Db 21-22). In Stelluti, the Court did not find a gym membership agreement unconscionable because members have other options for working out and there was time for the member to seek advice before signing up to be a gym member. Id. at 302. (Db22). You do not need a gym membership to be healthy or understake a workout. It is realistic for many people to do at home workouts and there are many gyms to choose from. A gym membership is a want, not a necessity. Here, Ms. Villeda-Granados does not have a driver's

license and must rely on rideshare services for transportation. It is difficult to accomplish anything without a reliable source of transportation and it is much more of a necessity than a gym membership.

Similarly, Uber's reliance on Pace v. Hamilton Cove, 258 N.J. 82, 107-108 (2024) is also misplaced. (Db 22-23). In Pace, the plaintiff was looking to lease a home. Id. Deciding where to live for an extended period is a big decision that requires a lot of thought and consideration before locking yourself into an agreement. It is also very rare for someone to sign a leasing agreement and move into the agreed upon housing right away. So, by its very nature, selecting housing requires careful time to consider the decision. Ordering a ride does not. Here, Ms. Villeda-Granados simply needed quick transportation so she could accomplish things such as taking her children to routine doctor's appointments. This situation before this Court cannot in good faith be comparable to selecting housing or a gym membership.

Similarly, Uber's asserting there was not a deadline imposed in which Ms. Villeda-Granados had to agree to the Terms and Conditions is just unreasonable nor realistic given the facts. Presumably, whenever Ms. Villeda-Granados uses her Uber application, her focus, just as it would be for any user, is to quickly secure a ride so she could get to wherever she needed to be. Whether Uber actually imposes a

deadline or not, Uber's services create a deadline when its users are using its services to quickly obtain a ride to get to wherever they need to be at a certain time.

B. Uber's arbitration agreement is one-sided when considering the benefits to Uber.

In support of its argument that the arbitration agreement is not unconscionable, Uber asserts to this Court that the arbitration agreement between the parties is not a "one-sided waiver" similar to the one in Kleine v. Emeritus at Emerson, 445 N.J. Super. 545, 551 (App. Div. 2016) because both Appellants and Uber waived their rights to a jury trial. (Db30-31). What Uber fails to mention, however, is that Uber is reaping the benefits of this waiver. Uber would not be compelling arbitration if it were not to their benefit and the detriment to its users. With arbitration, Uber may thwart their responsibility of having to provide important discovery and it is less likely for the public to know about the details of a case through arbitration compared to a jury trial.

CONCLUSION

For these reasons, Appellants ask for this Court to reverse the trial court's Order granting Uber's motion to compel arbitration and stay the case.

Respectfully submitted,

Bhaveen R. Jani, Esq.

Dated: November 26, 2024