No. 132066

In the Supreme Court of Illinois

GLORIA S. GELLER, as Independent Administrator of the Estate of Mark Geller, Deceased,

Plaintiff-Appellant,

v.

UBER TECHNOLOGIES, INC. and RASIER, LLC,

Defendants-Appellees,

and

ERIN MURPHY, as Special Representative of the Estate of Ejaz Rathore, Deceased,

Defendant.

On Appeal from the Appellate Court of Illinois,
First Judicial District, No. 1-24-1458.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, 2022 L 010057.
The Honorable **Patrick T. Stanton**, Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

It is not the function of a Reply Brief to reiterate the arguments made in the opening brief, and Plaintiff will endeavor to limit her Reply to answering the most significant arguments the Defendants raise. But the Court will understand that given the length of the Defendants' Brief and the limitations of her Reply, she must in some instances stand on her original brief.

Defendants avoid the real issue of procedural unconscionability

The Plaintiff, in her opening brief, had occasion to note a study conducted by University of Michigan law and psychology professor Dr. Roseanna Sommers, providing the Court with a link to the website referencing the study. As a footnote to page 42 of their Brief, Defendants stated that the Court should disregard this study (which had found that 99 per cent of consumers did not read the terms of use before accepting them, and likewise did not know what an arbitration agreement was) arguing that the Court could not take judicial notice of it and it was, in all events, irrelevant because consumers are charged with the knowledge of their contracts whether they have read them or not. In Plaintiff's view, neither of these arguments is meritorious.

With respect to whether the court could take judicial notice of the study, the Defendants are entirely mistaken. Since the days of Louis Brandeis courts of review have considered sociological and statistical studies. In the absence of such studies, such cases as *Brown v. Board of Education* could never have been decided.[1] The Defendants, however, have urged upon the Court the decision in *People v. Castillo*, 2022 IL 127894, ¶39, claiming

[1] See: *Brown v. Bd. of Education of Topeka, Shawnee County, Kansas*, 347 U.S. 483, 494, fn.11, listing numerous studies upon which the court relied in reaching its decision that separate was not equal.

that it stands for the proposition that the statistics in this report are neither generally known nor capable of accurate and ready determination. Def. Br. at 42. *Castillo*, however, made no such holding. The court in that case held that (1) courts of review could take judicial notice of matters even if the trial court had not done so, and (2) that Pontiac Correctional Center is public property. *Castillo*, 2022 IL 127894, ¶¶ 39-40. There was no discussion of what notice could be taken of academic or similar studies. In the case at bar, the existence of the study and its conclusions can easily be verified by visiting the website. Further, although Defendants ask that the study not be considered based on a technical reason, they do not dispute the correctness of its conclusion that the vast majority of consumers do not read TOUs before they accept them. Relatedly, Plaintiff submits that the vast majority of consumers never read such terms of use is a fact that is not subject to reasonable dispute but is common knowledge. For example, the Supreme Court of New Jersey noted that "[o]ne statistical study concluded 'that consumers have no idea what they are agreeing to when they enter into contracts containing arbitration clauses' and that many consumers believe that access to 'court will be available to them, if only as a last resort.'" *Morgan v. Sanford Brown Inst.*, 225 N.J. 289, 308, 137 A.3d 1168, 1180 (2016) fn 7, citing numerous statistical sources. Accordingly, the Court may consider, if it wishes, the findings of Dr. Sommers' study. Ill. R. Evid. 201(b).

The consequence of Defendants' TOU is that people are compelled to surrender fundamental rights as a precondition to having access to basic goods and services. The Defendants, evidently, have no problem with this situation, stating that they are entitled to offer their "terms of service on a take-it-or-leave-it basis." Def. Br. at 45. They cite *Tortoriello v. Gerald Nissan of North Aurora, Inc*., 379 Ill. App. 3d 214, 233 (2008), for the proposition

that some element of coercion or overreaching is necessary for an agreement to be regarded as unconscionable. But *Tortoriello* dealt with a different kind of contract—written and personally signed. What that plaintiff signed, he knew to be a contract defining his rights in his transaction with the auto dealer. While he may not have chosen to read the document to the bottom (which is where the arbitration language was) he knew he was entering into an agreement which affected his rights. The users of the Defendants' app could not be expected to have any such knowledge. That is a fact that the Defendants ignore—that they afford their users no meaningful notice or warning of the character of the document they are compelled to accept if they want goods or services.

The teaching of *Kinkel v. Cingular Wireless LLC*, 223 Ill. 2d 1, 27 (2006) is that the totality of the circumstances is what must be considered, and while the circumstances in *Kinkel* are not the same as those in the case at bar, its guidance is compelling. Quoting *Frank's Maintenance & Engineering, Inc. v. C.A. Roberts Co*., 86 Ill. App. 3d 980, 989-90(1980), the *Kinkel* court wrote [223 Ill. 2d at 23-24, emphasis added]:

> Procedural unconscionability consists of some impropriety during the process of forming the contract depriving a party of a meaningful choice. [Citations.] Factors to be considered are all the circumstances surrounding the transaction including the manner in which the contract was entered into, whether each party had a reasonable opportunity to understand the terms of the contract…[The] requirement that the seller obtain the knowing assent of the buyer "does not detract from the freedom to contract, unless that phrase denotes the freedom to impose the onerous terms of one's carefully drawn printed document on an unsuspecting contractual partner. Rather, freedom to contract is enhanced by a requirement that both parties be aware of the burdens they are assuming. *The notion of free will has little meaning as applied to one who is ignorant of the consequences of his acts.*

If the facts of the case at bar are considered in the light of the foregoing language, Plaintiff maintains that there can be no reasonable doubt that Defendants' agreement was procedurally unconscionable. When one takes together the fact that the users had no prior

notice of the change in terms, were locked out of the app until they assented and were not given fair or meaningful notice that their fundamental rights were being surrendered, the totality of *those* circumstances do indeed cross the line. The facts of the case at bar demonstrate that the combination of a degree of coercion, misleading silence and overreaching in the manner that Defendants presented their TOU distinguish it from many of the cases the cases they have relied upon.

The vast majority of the cases cited which discuss the responsibility of parties to know the content of their contracts involve written agreements, which this was not. Plaintiff maintains that the solemnity that attends a written agreement is absent when the contract can be made by clicking a box on a smart phone. Defendants' argument ignores this reality.

For example, Defendants point to the fact that Illinois has adopted the Uniform Electronic Transactions Act (815 ILCS 333/1 et. seq.). But that statute doesn't impact this case since the Plaintiff's position is not that agreements can't be made via an app, but rather that it is unconscionable to present the TOU without fair notice about its contents and the consequences of accepting it. Accordingly, the Defendants' argument that the appellate court should be affirmed because Illinois has adopted this uniform act is meritless.

Next, objecting to Plaintiff's mention of Star Chamber, Defendants reference some U.S. Supreme Court cases which state that there are no grounds for having suspicion about the competence of arbitrators. Def. Br. at 37. However, Plaintiff never suggested that potential arbitrators were not competent or conscientious; her argument is that with respect to rights as important as those involved here, there needs to be some meaningful notice of the contents and the character of the contract being putting forth. Why is that so onerous? Defendants repeatedly suggest that accepting Plaintiff's position would somehow prevent

their use of arbitration agreements. But all the Plaintiff is saying is that in order for Defendants' TOU to be procedurally conscionable, users need to be told more than reading it is encouraged. Minimally, users need to be informed that the TOU contained an arbitration agreement; and to be further told what an arbitration agreement means—that they could lose their right to have disputes heard by a court of law.

Such simple and straightforward language would not be onerous and would alert users to the character of the terms they are being asked to approve. Given that notice, some might wish to proceed without further inspection, perhaps because they don't think they'll ever have a dispute. But doubtless others will wish to consider the terms they are asked to agree to. Why is such a requirement an imposition on the Defendants if they wish to deal fairly with their users? At this point, one grasps the significance of the language quoted in *Kinkel v. Cingular Wireless LLC*, 223 Ill. 2d 1, 24 (2006): "This requirement...'does not detract from the freedom to contract, unless that phrase denotes the freedom to impose the onerous terms …on an unsuspecting contractual partner.'"

The Defendants argue that the appellate court should be affirmed because "[i]n enacting the FAA, Congress rejected concerns like Plaintiff's in favor of "a liberal federal policy *favoring* arbitration agreements." Def. Br. at 44, emphasis in original. Does federal policy favor non-disclosure? Overreaching? There is nothing about the FAA that requires that its character be concealed from the offeree.

A thousand years of the development of common law—the right to a jury, the right to a public hearing, the right to proceed under a known body of precedent—is in danger of being swept away by the unfettered use of arbitration language that their authors can reasonably be assured that consumers will never even look at. The Defendants' argument

is that they are *free to look at it*, and the appellate court's position was that they have the opportunity to look at it, but the truth of the matter is that this TOU was presented in a way calculated to maximize the likelihood that it would *not* be looked at. It was presented without prior notice; the user was locked out until it was agreed to; and it gave no meaningful or fair warning that it significantly compromised the user's rights. The appellate court missed the point when it limited its analysis to the appearance of the terms once they were viewed. The difficulties of viewing a legal agreement on a smartphone screen was only part of the problem raised by the Plaintiff. The other thing that made Defendants' procedure improper was that it was calculated to induce the user not to look at the document. Defendants' own affiant testified that she didn't look at terms of use before she agreed to them. V1SR 140 at 65. Call it what you will—material omission, lulling, *de facto* fraud—whatever you want to call it, it is not fair, it is not equitable and it is not just.

There comes a point where the law and reality must converge. The truth of the matter is that the vast majority of consumers rely on the good faith of the folks they do business with. They neither know nor suspect that these terms of use adversely affect their basic rights as citizens. And Defendants, who control the transaction, know that consumers do not know what rights are involved and orchestrate their presentations so that they will not find out. Plaintiff respectfully submits that Defendants' pop-up that they "encourage" the user to read the terms is to suggest that there is nothing really worth reading. Certainly, it did not give a hint that the terms would bar the user from redress in a court of law forever.

Throughout their brief, the Defendants repeatedly assert that by accepting the Plaintiff's argument, this Court would be fashioning a decision that ran afoul of *Henry Schein*, would effectively nullify all click agreements, and would virtually make arbitration

agreements impossible. Plaintiff's argument is not, however, that Defendants could not have an arbitration clauses but rather that they must give notice of its presence because people generally do not suspect them. Yes, users are free to read the "terms," but in reality, they do not feel a need to do so. Plaintiff is not contending that there can be no click agreements, but rather that users need to be given fair notice of what they are clicking.

Ultimately the question now before this Court is addressed to the Court's conscience. It cannot just be a matter of precedent, but of principles. Defendants never dispute that a vast number (if not the vast majority) of their users do not know what an arbitration agreement is, what delegation language entails, and what rights they are called to forfeit in order to use the Defendants' app. But Defendants say: "That is how terms of use work." Def. Br. at 50. The Plaintiff's point is that, considering the totality of the circumstances *in this case*—the lockout, no prior notice, no adequate warning of the contents—the arbitration agreement (including its delegation language) is unconscionable, and the appellate court's decision that there was no procedural unconscionability was incorrect.

Defendants have no meaningful argument with respect to substantive unconscionability

With respect to the issue of substantive unconscionability, very little need be said because the Defendants have made no meaningful argument with respect to it. In her opening Brief, the Plaintiff pointed out the total one-sidedness of the benefits and obligations contained in the arbitration agreement [Pl. Br. at 47-48] and there is no need to repeat them now. The Defendants' answer is that there is no problem because none of the oppressive terms have yet to happen. See: Def.Br. at 52-54. But the Defendants offer no compelling authority that they can excuse themselves in that manner. A one-sided agreement does not cease to be one-sided merely because all of the oppressive terms have

not yet come to pass. That is not a factor in the analysis. On the contrary, following this Court's decision in *Kinkel*, the appellate court recently wrote in *Hwang v. Pathway LaGrange Property Owner, LLC*, 2024 IL App (1st) 240534 ¶16 that substantive unconscionability concerns the actual terms of the contract and examines the relative fairness of the obligations assumed, and that a contract will be found substantively unconscionable where its "terms are so one-sided that they oppress or unfairly surprise an innocent party," when there is "an overall imbalance in the obligations and rights imposed by the bargain," or when a "significant cost-price disparity" exists. Quoting *Turner v. Concord Nursing & Rehabilitation Center, LLC*, 2023 IL App (1st) 221721, ¶ 20. Finally, the court noted that unequal bargaining power and other "circumstances surrounding the transaction" are to be considered when deciding whether an agreement is enforceable. *Hwang* at ¶¶ 16, 25. The Defendants' TOU is clearly substantively unconscionable.

There is no merit to the claim that there is no jurisdiction to determine unconscionability

Defendants argue that the lower courts did not have authority to determine the issue of whether the arbitration agreement was unconscionable. The basis for their argument is that the language of the arbitration agreement requires those issues to go to the arbitrator. They assert that the arbitration agreement covers "any claim that you may have against Uber" [Def. Br. at 49], but actually that is not true. That portion of the agreement specifically relates to participation in class actions, as is evident from looking at the entire sentence. Specifically, it states [1VSR.88, emphasis added]:

> 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. *This will preclude you from bringing any class, collective, or representative action against Uber*, and also preclude you from participating in or recovering relief under any

> current or future class, collective, consolidated, or representative action brought against Uber by someone else.

The intendment of this language is to bar the user from participating in a class action with respect to any claim, and is different from the language in the paragraph which follows defining the contract as one in which users agree to arbitrate any dispute arising from their use of Uber's services. *Id*. Hence, to the extent that Defendants are endeavoring to contend that their arbitration agreement extends to every possible controversy, its language doesn't support that conclusion. The accepted rule is that in order for it to be enforceable, arbitration language must be clear and unmistakable. *Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287, 301 (2010). The language of Sheridan's agreement does not clearly and unmistakably extend to every possible claim.

One of the issues raised in Plaintiff's opening brief involved the appellate court's holding that the claim belonged to her. Plaintiff was frankly confused as to whether the panel believed that the claim belonged to Sheridan by reason of her being administrator or because she was a beneficiary of the wrongful death estate. Defendants have now clarified that matter by asking that the appellate court's order be affirmed because the claim belonged to Sheridan by reason of her being the Independent Administrator of Mark's estate. Def. Br. at 8. They argue that in the absence of Sheridan owning the claim, Illinois law would have effectively placed wrongful death actions outside the ambit of the FAA, which is impermissible, and that further wrongful death actions have specifically been held to be subject to arbitration. Def. Br. at 28. The Defendants conclude, therefore, that there is nothing improper about binding Sheridan to this arbitration agreement for a claim arising from, not her own, but her husband's use of the app. Accordingly, they argue that any

question as to unconscionability must go to the arbitrator pursuant to the delegation language of the arbitration agreement.

The problem with the Defendant's contention is that an arbitration agreement is to be adjudicated like any other contract, according to its terms, and there is nothing in the terms of Defendants' agreement with Sheridan suggesting anything other than her relationship with them in an individual capacity, not in the capacity as a representative for another's estate. Presumably there *could have been* such a provision—Uber had a free hand in drafting its non-negotiable, take it or leave it "terms of use." But it failed to do so. Accordingly, there is no clear and unmistakable evidence of the parties' intent to submit that question to arbitration. Defendants' failure to provide that the disputes to be arbitrated were not only her individual claims, but the claims that she might make in a representative capacity, cannot now be cured by argument. Clearly, it is outside of the agreement and therefore cannot be governed by the delegation language of the arbitration clause.

The U.S. Supreme Court "has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence." *Henry Schein* at 69. There is absolutely no indication that there was a meeting of the minds with respect to Sheridan's actions as a representative of another's estate. As the court wrote in *First Options v. Kaplan*, 514 U.S. 938, 945 (1995):

> "[G]iven the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide."

Manifestly, there is no merit in the Defendants' position that the appellate court (and, impliedly, this Court), has no authority to determine the issues of unconscionability, but is required to leave it to an arbitrator.

Defendants seek to misapply the decision in Rent-A-Center v. Jackson

The Defendants misread and misapply the Supreme Court's decision in *Rent-A-Center., West, Inc. v. Jackson*, 561 U.S. 63 (2010). They have used it misleadingly by not giving consideration to the fact that the opinion turned upon particular facts—facts that are not present in the case at bar.

The general rule is that where an *entire agreement* is challenged as being unconscionable, the issue goes to the arbitrator, but where only the arbitration clause is challenged, the challenge is for the court. In *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), the United States Supreme Court explained the rule:

> In Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), we addressed the question of who—court or arbitrator—decides these two types of challenges. The issue in the case was "whether a claim of fraud in the inducement of the entire contract is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators." Id., at 402, 87 S.Ct. 1801. Guided by § 4 of the FAA, we held that "if the claim is fraud in the inducement *of the arbitration clause itself*—an issue which goes to the making of the agreement to arbitrate—the federal court may proceed to adjudicate it.

546 U.S.at 444-45, emphasis added.

In the case at bar, the Plaintiff did not attack the unconscionability of the entire agreement, but only the arbitration section. 1VSR 116-119. Manifestly, the rule in *Prima Paint [Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395 (1967)] and *Buckeye* requires that the issue of state law contract defenses stay with the court where such is asserted against the arbitration clause only, and not the agreement as a whole. The Defendants have included in the Record both Mark's and Sheridan's Agreements. 1VR 87-98. Her entire

agreement is about 4900 words long. It begins with a section entitled "Contractual Relationship" 1VSR 87-88. That is followed by the "Arbitration Agreement" [1VSR 88-90], which contains numerous subdivisions. Next comes a section called "Marketplace Platform and Services" [1VSR 90-92], followed by "Access and Use of Services" [1VSR 92-94]; and finally, "Payment." 1VSR 94. The record is clear that neither below, nor in the proceedings here, has Plaintiff challenged any of these other sections, much less the agreement as a whole—the challenge has always been with the arbitration section and the manner in which it was secured.

Defendants, however, have now argued that to make the challenge to the arbitration language is not sufficient; that in order to keep the issue of unconscionability from going to the arbitrator, Plaintiff must have complained about the delegation language specifically, relying on *Rent-A-Center v. Jackson*, 561 U.S. 63 (2010). But actually, close examination of that decision does not support the Defendants' position *in a case such as this*.

As noted above, the decision in *Jackson* turned on its unusual facts. The court itself declared that it was factually distinguishable from prior precedents such as the decisions in *Buckeye* and *Prima Paint*. *Jackson*, 561 U.S. at 71-72. The reason was that those cases involved an agreement in which arbitration was just one of many terms; or in the court's own words: "the arbitration provisions sought to be enforced in those cases were contained in contracts unrelated to arbitration." *Id*. Therefore, it was possible to challenge the arbitration language without challenging the whole agreement. But the *Jackson* court was presented with a document where arbitration was the only subject and constituted the entire agreement, and, therefore, under those facts, the rule in *Buckeye* and *Prima Paint* (that courts maintained jurisdiction over a challenge to the arbitration agreement itself, but not

the whole agreement) did not apply—because the arbitration agreement *was* the whole agreement. Accordingly, the court held that, under those facts, in order to have unconscionability determined by the court and not the arbitrator, it was necessary for Jackson to have challenged the delegation provision specifically, not the arbitration language as a whole, since the arbitration language constituted the whole agreement. The court found that Jackson had not done so but had challenged the whole agreement. *Jackson,* 561 U.S. at 75. Accordingly, it is clear that *Jackson* had not overturned the general rule but followed it: the threshold issues go to the arbitrator only if the entire agreement is challenged. This rule was stated more recently and very clearly in *New Prime Inc. v. Oliveira*, 586 U.S. 105, 111 (2019), where the SCOTUS wrote [citations omitted, emphasis added]:

> "under the severability principle, we treat a challenge to *the validity of an arbitration agreement (or a delegation clause) separately from a challenge to the validity of the entire contract* in which it appears. Unless a party specifically challenges the validity of the agreement to *arbitrate*, both sides may be required to take all their disputes—including disputes about the validity of their broader contract—to arbitration."

In the case at bar, Plaintiff has specifically challenged the validity of the arbitration agreement, and her unconscionability challenge to the arbitration agreement is properly for the courts of Illinois.

Additionally, it must be noted that although the Defendants repeatedly refer to a "delegation clause," there is, in fact, no separate delegation clause. Sheridan's TOU has a single Arbitration Agreement among many other sections. But unlike Mark's TOU [SR 66-67] which does have a separate "delegation clause," such delegation language as there is, will be found in a subsection dealing with choice of law, application of AAA's Consumer Arbitration Rules, and an agreement that the FAA will apply regardless of other

considerations, as well as language discussing delegation in a subsection entitled "Rules and Governing Law." 1VSR 89. In the case at bar, the delegation language, along with numerous other considerations, is part of a single, comprehensive arbitration agreement. There is no separate or independent delegation agreement—any reference to delegation is part of the arbitration agreement itself, and reachable by Plaintiff's state-law challenge.

Arbitration agreements are subject to state contract defenses such as unconscionability, and state courts have jurisdiction to adjudicate those challenges to arbitration agreements as long as it is the arbitration agreement, and not the entire agreement that is being challenged. In the case at bar, Plaintiff's challenge to the Arbitration Agreement related to all language alike—all of which were one-sided, surprising, and secured without adequate notice or opportunity to fairly consider the terms. There is no merit to Defendants' argument that the Plaintiff's challenge to the Arbitration Agreement was not for the courts of Illinois to consider and determine. The opinion in *Rent-A-Center v. Jackson* does not alter this conclusion.

Finally, the Defendants' assertion that Plaintiff does not challenge the delegation language is incorrect. Delegation was specifically targeted in Plaintiff's opening brief. See. Pl. Br. at 22, 28-29, 35-36. 45. 50. It cannot be held against Plaintiff that when she first made her unconscionability argument in the trial court she did not focus on the language of Sheridan's agreement, because at that time that agreement was not an issue. Uber's motion merely stated that to the extent it was relevant she also had her own app. 1VSR 23.

The appellate court, in passing over this argument essentially forgot, as the Defendants continue to forget, that what is being reviewed is the trial court's denial of Uber's motion to stay—a motion in which all inferences are to be drawn against the movant. *Benton v.*

Little League Baseball, Inc., 2020 IL App (1st) 190549, ¶ 28. Defendants correctly note, however, that Plaintiff has not raised the issue of the appellate court's error in ruling on this issue in her Petition for Leave to Appeal. That is because this Court seeks important questions for review under Rule 315, not every error in a case. Accordingly, Plaintiff did not seek to reverse the appellate court's order based on how it treated Uber's forsaking its original position and prejudicially raising entirely new grounds in its reply. And she does not seek reversal on that basis now. But that does not mean that the Court should ignore the record in this case, and affirm, as Defendants seem to suggest, based on any alleged deficiency in the position she took in the trial court.

Defendants misunderstand the holding in Henry Schein

The Defendants' misunderstanding of *Henry Schein* [*v. Archer & White Sales, Inc*., 586 U.S. 63 (2019)] is at the heart of their case before this Court. As has been judicially recognized, *Henry Schein* dealt with a narrow issue. *Metropolitan Life Ins. Co. v. Bucsek*, 919 F.3d 184, 190–91 (2d Cir. 2019); *Breadeaux's Pisa, LLC v. Beckman Bros*., 83 F.4th 1113, 1118 (8th Cir. 2023). *Henry Schein* arose from a commercial contract between two companies which had unquestionably agreed to arbitrate a question involving injunctions. The court found that there was a delegation agreement with respect to that issue, and that the lower court could not take the issue away from the arbitrator because there could be only one possible outcome with respect to it. Up until that point, this had been the practice in many district courts, pursuant to what was referred to as the "wholly groundless" exception. The *Schein* court held that the statute provided for no such exception. But the court did not hold that if there was a delegation clause the case must go to the arbitrator no matter what. Rather, *Henry Schein* respected the intention of the parties and required "clear

and unmistakable evidence" of an intent to arbitrate as well as requiring that "*before* referring a dispute to an arbitrator, the court determines whether a *valid* arbitration agreement exists." *Henry Schein*, 586 U.S. at 69, emphasis added.

Defendants have assumed that if Sheridan clicked the box, a valid agreement necessarily exists—but the defendants have assumed too much. The FAA is limited to disputes that *arise out of the contract*, which is to say, for which a valid contract was formed. Merely executing the contract is no assurance of its validity. And whether or not a valid agreement has been formed is a question of state law for state courts to decide. "It is well settled that where a dispute concerns the formation of a contract, the dispute is generally for the court to decide." *Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287, 296 (2010). State law principles of contract formation determine whether a contract exists between the parties. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). What the Defendants fail to understand or do not wish to acknowledge, is that merely clicking the box does not reach the entire universe of potential controversies. Rather, as the statute itself provides: "A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter *arising out of such contract* ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2, emphasis added. Therefore, courts have refused to enforce arbitration agreements in which the dispute is unrelated to the contract from which it arose. As pointed out in Plaintiff's opening Brief, numerous courts have applied the rule that an arbitration agreement is tied to the underlying contract containing it and is enforced "only where a dispute has its real source in the contract. The object of an arbitration clause is to implement

a contract, not transcend it." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 205 (1991). Moreover, courts do not send a matter to arbitration merely because the same parties agreed to arbitrate a different matter. Rather, an arbitration provision should apply only when the claims arise from a plaintiff's use of the…platform and not on the fortuity of a plaintiff having created an account...A contract—and not fate—dictates arbitrability.". *Matthew-Ajayi v. Airbnb, Inc.*, 2024 WL 1769186, at *2 (D. Md. Apr. 24, 2024), quoting *Peterson v. Devita*, No. 1-23-0356, 2023 IL App (1st) 230356 ¶ 35.

The Defendants have no answer to *Peterson*. They make weak attempts to distinguish the cases upon which *Peterson* relied. They incorrectly assert that *Peterson* violates *Henry Schein* and the FAA, when in reality it is entirely consistent with *Schein's* requirement that before a matter can be sent to arbitration a valid contract to arbitrate must be found. They meritlessly present a string of cases which they claim reject *Peterson* [Def. Br. at 34] but in fact those cases never even mention *Peterson*, much less criticize it. They quarrel with references in Plaintiff's opening brief to an "absurd result" [Def. Br. at 36], even though what was being referred to was the "absurd results canon," a doctrine recognized in Illinois [See: Justice Rochford's special concurrence in *People v. Watkins-Romaine,* 2025 IL 130618, ¶ 71] which holds that courts will not read contracts in such a manner as to reach absurd results. *Jackson v. South Holland Dodge, Inc*., 197 Ill. 2d 39, 54 (2001). As the court noted in *Foxfield Realty, Inc. v. Kubala*, 287 Ill. App. 3d 519, 524 (1997) (internal citations omitted, emphasis added)"

> Finally, to the extent that a contract is susceptible of two interpretations, one of which makes it fair, customary, and such as prudent persons would naturally execute, while the other *makes it inequitable, unusual, or such as reasonable persons would not be likely to enter into*, the interpretation which makes a rational and probable agreement must be preferred.. Courts will construe a contract reasonably to avoid absurd results.

As pointed out in Plaintiff's opening brief, *Peterson* is a case that has never been overruled or even criticized, but often followed, including for its holding regarding remoteness. The most recent of these, decided in December, after the Plaintiff had filed her opening brief, is *Tao v. Murphy*, 2025 WL 3564808.

In that case, the court was confronted with a factual situation not very different from the facts in *Peterson* and the case at bar. There a homeowner filed an action for damages against a tenant and an online short-term rental platform for renting the property without his consent. The platform moved to compel arbitration based on an arbitration provision and delegation clause in the homeowner's separate, unrelated platform account terms. The court held that, despite a delegation clause, it was not authorized to compel arbitration because the dispute did not arise out of the plaintiff's use of the platform and there was accordingly no nexus between the dispute and the arbitration agreement.

In reaching its opinion, the *Tao* court relied principally on the Supreme Court's decision in *New Prime Inc. v. Oliveira,* 586 U.S. 105 (2019), which held that "a court should decide for itself" whether the FAA applies because "to invoke its statutory powers under §§ 3 and 4 to stay litigation and compel arbitration according to a contract's terms, a court must first know whether the contract itself falls within or beyond the boundaries of §§ 1 and 2." *Tao* at *2. The court noted that the FAA prohibits courts from compelling arbitration if no arbitration agreement was formed and that the Supreme Court has characterized Section 2 of the Act as requiring a court to decide the issue of contract formation before it can order arbitration, relying on the language from *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296, (2010), which held that: "It is similarly well settled that where the dispute at issue concerns contract formation, the dispute is generally

for courts to decide." Accordingly, the court concluded that both contract formation and FAA coverage are questions for the court under the FAA's text, following the Supreme Court's decision in *New Prime*, 586 U.S. at 112 and the case of *Caremark, LLC v. Chickasaw Nation*, 43 F.4th 1021, 1030 (9th Cir. 2022).

The *Tao* court followed *Peterson* in coming to its conclusion about the consequence of the dispute being unrelated to the terms of use. The court held that the rule against absurd construction of contracts prevented it from "finding that Tao and Airbnb formed an arbitration agreement for this dispute." *Tao* at *5. The court continued: "The instant dispute similarly did not arise out of a contract between the plaintiff and Airbnb because the facts of this case *have no relation* to Tao's use of Airbnb's services or platform. The fact that Tao has any agreement with Airbnb is purely fortuitous." *Tao* at *8, emphasis added. Accordingly, the court concluded that because the agreement falls outside the reach of the FAA, it need not enforce the delegation clause. *Tao* at *5. The same is true here, where the dispute arises out of Mark's use of the Uber app, and thus his contract, not Sheridan's. Sheridan did not use the Uber app, and this controversy has nothing to do with her remote agreement with Uber, as argued in Plaintiff's opening brief.

Notably, the Defendants have argued that any amendment to *Henry Schein* cannot be made by this Court but must be made by the Supreme Court itself. Def. Br. at 31. This Court, however, is certainly able to *interpret* the meaning of *Henry Schein*, as many other courts have done, including *Peterson*. *Tao* points out that a correct understanding of the scope and meaning of *Henry Schein* will be made easier by the Supreme Court's subsequent decision in *New Prime Inc. v. Oliveira*, 586 U.S. 105 (2019), which held that the question of whether a dispute or contract falls within the coverage of the FAA cannot be delegated

to an arbitrator. 586 U.S. at 112. In consequence, the FAA does not require the court to enforce a delegation provision in a contract unrelated to the dispute. *Tao* at *10. Hence the court concluded [*Tao* at *9]:

> Using logic similar to that in New Prime, numerous courts and scholars have concluded that Henry Schein does not—and cannot—require delegating to an arbitrator the determination of whether a controversy is causally related to the arbitration-clause-containing contract. Like the statutory exemptions of Section 1 at issue in New Prime, Section 2 qualifies that the controversy must "aris[e] out of" that contract for the FAA to empower an arbitration provision. For this reason, several courts have refused to enforce delegation clauses when the controversy "lacks what [Henry] Schein presupposes," that the controversy arises out of the contract and has some sort of nexus or causal relationship to it.

Plaintiff believes that Defendants misunderstand *Henry Schein* by giving it an expansive reading that neither its language nor its facts warrant. This Court should endorse the sound reasoning of *Peterson* that a dispute arising out Mark's use of his own app does not bind Sheridan under the FAA.

Conclusion

For the foregoing reasons and the reasons set forth in her opening brief, Plaintiff asks that the Order of the Appellate Court be reversed, and that the Order of the Circuit Court of Cook County be affirmed and the case be remanded for further proceedings consistent with this Court's order or opinion.

Dated : March 25, 2026

Respectfully Submitted,

/s/ Bradley M. Cosgrove
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CERTIFICATION OF COMPLIANCE

I certify that this Reply Brief conforms to the requirements of Rules 341 (a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 20 pages.

/s/ Bradley M. Cosgrove

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

GLORIA S. GELLER, as Independent Administrator of the Estate of Mark Geller, Deceased, *Plaintiff-Appellant,* v. UBER TECHNOLOGIES, et al., *Defendants-Appellees,* and ERIN MURPHY, as Special Representative of the Estate of Ejaz Rathore, Deceased, *Defendant.*	)	No. 132066

The undersigned, being first duly sworn, deposes and states that on March 25, 2026, the Reply Brief of Plaintiff-Appellant was electronically filed and served upon the Clerk of the above court. On March 25, 2026, service of the Reply Brief will be accomplished electronically through the filing manager, Odyssey EfileIL to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Bradley M. Cosgrove
Bradley M. Cosgrove

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Bradley M. Cosgrove
Bradley M. Cosgrove