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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
The Honorable Dale E. Van Slambrook, Circuit Court Judge

Appellate Case No. 2026-001088
Civil Action No. 2025-CP-08-01735

Robin Lee Hatch, Respondent,

v.

Cynthia O. Robinson; Lyft, Inc.; Lyft Drives South
Carolina, Inc.,

Of which Lyft, Inc., d/b/a Lyft Drives South Carolina, Inc.
is the Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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INTRODUCTION

Respondent submits that a court cannot compel arbitration until it decides arbitrability issues that the parties ***expressly agreed to arbitrate***. That fallacy cannot withstand this Court’s scrutiny. The Arbitration Agreement—which Respondent indisputably accepted (four times)—contains a delegation clause. That delegation clause clearly and unmistakably commits: “[a]ll ***disputes*** concerning the arbitrability of a Claim (***including disputes about the scope, applicability, enforceability***, revocability or validity of the Arbitration Agreement)” to the arbitrator. (Mot. to Compel, Exs. A-3, ¶ 17(a), A-5, ¶ 17(a), A-7 ¶ 17(a); R. __ (emphasis added).) Respondent did not challenge that clause before the Circuit Court, and Respondent’s Brief does not claim otherwise. Respondent instead asks this Court, as she did the Circuit Court, to proceed with its review as though the parties’ delegation clause is of no import whatsoever. An unbroken line of U.S. Supreme Court and South Carolina precedent requires otherwise.

Indeed, what Respondent has repeatedly failed to recognize is that this unchallenged delegation clause ***is an agreement to arbitrate issues of arbitrability***. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010) (“[A]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the . . . court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.”). As with any other arbitration agreement, the FAA mandates these delegation clauses be placed “on an equal footing with other contracts,” and “enforce[d] . . . according to their terms.” *Id.* at 67. Importantly, absent a direct challenge to the delegation clause itself, the Circuit Court was required to treat it “as valid under § 2” and “enforce it under §§ 3 and 4, leaving any challenge to the . . . Agreement as a whole for the arbitrator.” *Doe v. TCSC, LLC*, 430 S.C. 602, 609, 846 S.E.2d 874, 877 (Ct. App. 2020).

Respondent attempts to avoid this well-established precedent by conflating two distinct inquiries under the Federal Arbitration Act (“FAA”): 1) contract formation and 2) contract enforceability. *See Simmons v. Benson Hyundai, LLC*, 438 S.C. 1, 5–6, 881 S.E.2d 646, 648 (Ct. App. 2022) (“In the FAA world, the issue of the formation of the arbitration agreement is quite different from the issue of the validity of a concluded agreement, i.e. whether an arbitration agreement that was formed is nevertheless invalid because of fraud, duress, unconscionability, or some other defense to the enforcement of a contract.”) (citing *Rent-A-Ctr.*, 561 U.S. at 70 n.2 (“The issue of the agreement’s validity is different from the issue whether any agreement between the parties ‘was ever concluded . . .’” (internal quotations omitted))).

Whether the parties formed a contract containing an arbitration provision is a question for the court. But Respondent does not dispute **formation** of a contract. Instead, every argument Respondent advances—adhesion, absence of meaningful choice, oppressive terms, unenforceability—goes to validity and enforceability of the Arbitration Agreement in a contract was indisputably formed. (*See* Resp. Br. at 13.) Pursuant to the delegation clause in that Arbitration Agreement, Respondent and Lyft agreed to arbitrate any such arbitrability disputes. Respondent thus remains free to raise these arguments, but they must be addressed by the arbitrator pursuant to the Terms, which Respondent accepted on multiple occasions.

Therefore, notwithstanding Respondent’s invitation, the Circuit Court had no occasion to reach gateway arbitrability issues such as unconscionability and committed reversible error by doing so. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 68 (2019) (“When the parties’ contract delegates the arbitrability question to an arbitrator,” a court “possesses **no power** to decide the arbitrability issue,” “even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless.” (emphasis added)); 315

Corley CW LLC v. Palmetto Bluff Dev., LLC, 448 S.C. 149, 155, 932 S.E.2d 335, 338 (2026) (noting that unconscionability and lack of enforceability are “gateway” issues that the parties may delegate). This Court should reverse and remand with instructions to compel the dispute to arbitration.

ARGUMENT

I. The delegation clause controls and requires compelling this dispute to arbitration.

Respondent’s entire delegation argument rests on one premise: that “a court must determine whether an enforceable agreement exists before compelling a party to arbitrate.” (Resp. Br. at 10.)¹ This proposition ignores that arbitration is a matter of contract, and the FAA allows parties to resolve by their contract the question of “who has the primary power to decide” disputes regarding gateway arbitrability questions. *Coinbase, Inc. v. Suski*, 602 U.S. 143, 148–49 (2024). Once the distinction is drawn between the questions reserved to the court from those the parties assigned to the arbitrator, Respondent’s position fails for three independent reasons. First, Respondent does not contest that she affirmatively accepted the Terms, including the arbitration agreement with a delegation clause contained therein. Respondent’s challenges instead go to validity and enforceability of the arbitration agreement, which the parties delegated to the arbitrator. Second, Respondent never made a direct and discrete challenge to the delegation clause.

¹ Respondent did not raise this contract formation argument below, instead focusing solely on unconscionability. Other arguments advanced by Respondent that were not raised below include, *inter alia*, her contentions that: (1) the delegation clause fails because it was not separately negotiated and (2) Lyft cannot rely on the delegation clause because the entirety of the arbitration clause was found to be unconscionable. Although Respondent, as the prevailing party, may raise any reasons why this Court may affirm and the Court may review these “if it is convinced it is proper and fair to do so,” appellate courts are “less likely to rely” on such grounds. *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420-21, 526 S.E.2d 716, 723-24 (2000). “Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, **but the appellate court is likely to ignore it.**” *Id.* at 421, 526 S.E.2d at 724 (emphasis added).

Third, Respondent’s fallback unconscionability theory, relying on the purported adhesiveness of the Terms, would nullify the severability rule that makes delegation clauses enforceable at all. The Circuit Court erred by overriding the delegation clause and reaching unconscionability, and this Court should reverse.

A. Respondent’s challenges do not concern contract formation, but instead go to validity and enforceability, which the parties delegated.

Respondent has never contested that she created a Lyft account and affirmatively accepted the Lyft Terms of Service (“Terms” or “TOS”) on any one of four separate occasions, nor that the Terms include the Arbitration Agreement and delegation clause. There is not, nor has there ever been, a dispute on the issue of contract formation.²

Instead, each of Respondent’s arguments—adhesion, meaningful choice, oppressive terms, unenforceability—concern the separate and distinct matter of contract validity and enforceability. (See Resp. Br. at 13.) But the parties’ delegation clause expressly gives the arbitrator—not the court—the exclusive authority to resolve any disputes regarding the Arbitration Agreement’s “scope, applicability, enforceability, revocability or validity.” (Mot. to Compel, Exs. A-3, ¶ 17(a), A-5, ¶ 17(a), A-7 ¶ 17(a); R. __.) Lyft made this point to the lower court, arguing that unconscionability was a question of enforceability, not formation, but the Circuit Court erred by deciding to reach the issue anyway. See *315 Corley CW LLC v. Palmetto Bluff Dev., LLC*, 448 S.C. 149, 155, 932 S.E.2d 335, 338 (2026) (noting that unconscionability and lack of enforceability are “gateway” issues that the parties may delegate).

² Respondent purports to support her erroneous contract formation argument with citation to *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 742 S.E.2d 37 (Ct. App. 2013). *Smith* is wholly inapposite as it did not involve a delegation clause. Therefore, the *Smith* court decided issues of arbitrability because the parties did not, by their agreement, decide otherwise. The opposite is true here. Lyft and Respondent expressly delegated authority to resolve all arbitrability disputes, expressly including the enforceability and validity of the Arbitration Agreement **to the arbitrator**.

The Supreme Court’s framework confirms the error. Parties may have a “first-order” dispute over the merits, a “second-order dispute—whether they agreed to arbitrate the merits—as well as a third-order dispute—who should have the primary power to decide the second matter.” *Coinbase, Inc.*, 602 U.S. at 148–49 (cleaned up). This case presents a third-order dispute, and the answer “turns upon what the parties agreed about that matter.” *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (citations omitted). “As long as the parties’ agreement delegates the arbitrability question to an arbitrator ‘by clear and unmistakable evidence,’ a court may not override the contract and decide the arbitrability question.” *Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 700, 869 S.E.2d 859, 864 (Ct. App. 2022) (quoting *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 69 (2019)). Lyft supplied that evidence here, Respondent did not dispute it, and the Circuit Court was bound to honor it.

B. Respondent never made the direct and discrete challenge *Rent-A-Center* requires.

A court may reach the validity of a delegation clause only where the party resisting arbitration mounts “a direct and discrete challenge to the validity and enforceability of the delegation clause *specifically*, rather than the arbitration agreement as a whole.” *Doe*, 430 S.C. at 609, 846 S.E.2d at 877 (emphasis added); *Rent-A-Ctr.*, 561 U.S. at 70–72. Respondent made no such challenge, and the record on this point is undisputed. Lyft raised the issue with Respondent’s omission in its lower court briefing and at the hearing before the Circuit Court; Respondent failed to address the deficiency then, and her brief makes no attempt to do so now.

Respondent instead offers a waiver defense, insisting Respondent did not “waive [the] unconscionability argument by not specifically referring to the delegation clause” because Respondent argued adhesion, absence of meaningful choice, and unconscionability generally. (Resp. Br. at 11.) If anything, this argument further confirms the defect rather than rectifying it.

Respondent’s challenges are directed at the TOS and the arbitration agreement *as a whole*—the paradigmatic challenge that *Rent-A-Center* holds insufficient, whether it “directly affects the entire agreement” or rests “on the ground that the illegality of one of the contract’s provisions renders the whole contract invalid.” *Rent-A-Ctr.*, 561 U.S. at 70. For Respondent to now argue otherwise upon a record showing that she never even mentioned a single term of the delegation clause strains reason and should be flatly rejected.

As Respondent’s Brief acknowledges, the *Doe* court reached unconscionability because the delegation language there did not say who decides validity and enforceability, and absent a clear delegation, the court “must honor the parties’ choice to leave these to the court.” 430 S.C. at 609, 846 S.E.2d at 877. Lyft’s delegation clause, however, is crafted in precisely the manner that mattered to the *Doe* court—it expressly delegates the issues of “enforceability” and “validity” to the arbitrator, not the court. (Mot. to Compel, Exs. A-3, ¶ 17(a), A-5, ¶ 17(a), A-7 ¶ 17(a); R. __.) Applying *Doe* faithfully means sending unconscionability to the arbitrator where it has been clearly delegated. Respondent’s answer—that the problem is not the delegation language but that it “was imposed through the same adhesive consumer Terms” (Resp. Br. at 13)—abandons *Doe* rather than distinguishes it. *Doe* turned on what the clause said, not on how the contract was presented.

The Fourth Circuit has also plainly articulated the rule that “parties resisting arbitration cannot get out from under a delegation clause by attacking ‘the rest of the agreement to arbitrate’ and instead must challenge ‘the validity of the delegation provision in particular.’” *Mod. Perfection, LLC v. Bank of Am., N.A.*, 126 F.4th 235, 243 (4th Cir. 2025) (internal citations omitted). A party may rely on the same arguments it employs to contest other provisions of an arbitration agreement, but it “must assert—and ultimately prove—that there is some defect that

‘render[s] that provision’” illegal or otherwise unenforceable. *Id.* Because Respondent “failed to mount a specific challenge to the delegation clause,” this Court “must . . . treat that clause as controlling and may not decide the arbitrability issue” itself. *Id.* (quoting *Henry Schein*, 586 U.S. at 69).

Respondent’s arguments cannot withstand this scrutiny. Adhesion, non-negotiability, and the absence of counsel speak only to the fairness of the bargaining process, and procedural unfairness alone does not establish unconscionability. The relevant question is instead whether the delegation clause “is geared towards achieving an unbiased decision by a neutral decision-maker.” *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007). Respondent has not identified a single unfair term in the parties’ **mutual** delegation clause, nor explained how committing arbitrability questions to a neutral arbitrator could be oppressive. That alone is fatal to any argument that Respondent specifically challenged that clause, let alone could have conceivably shown it to be unconscionable.

Respondent’s fallback adhesion argument fares no better and collapses the very severability rule that makes delegation clauses enforceable. Respondent contends that because the Circuit Court found Section 17 of the Terms (the arbitration agreement) as a whole unconscionable, Lyft “cannot now rely on a part of Section 17 – the delegation clause – to force arbitration.” (Resp. Br. at 12.) However, this argument assumes its own conclusion and again ignores that the parties’ delegation clause **is an agreement to arbitrate these very arbitrability issues**, and must be enforced under the FAA just as any other. *Rent-A-Ctr.*, 561 U.S. at 70. Presenting the Circuit Court’s answer as the retroactive reason why the arbitrator never reaches the question in the first place is circular, and it is the precise maneuver the *Prima Paint* severability doctrine, as extended by *Rent-A-Center*, forecloses.

The premise is also overstated. Like Respondent, the Circuit Court’s Order does not even acknowledge the existence of the delegation clause, let alone its import, before erroneously finding that “the arbitration clause contained in section 17 of the TOS agreement is unconscionable, and thus unenforceable.” (Order at ¶ 12; R. __.) Respondent attempts to broadly convert this finding into an assertion that “the whole of Lyft’s Terms of Service were unconscionable.” (Resp. Br. at 12.) However, the Order says nothing to this effect.

Respondent additionally posits that the delegation clause “was not separately negotiated, separately presented, or separately accepted,” as though those are prerequisites to enforcement. (Resp. Br. at 11.) They are not. Application of the *Rent-A-Center* rule is clear. In that case, the delegation clause sat within the very arbitration agreement the employee attacked as unconscionable, and the Supreme Court held it must still be treated as valid and enforced because the clause itself was not challenged.

The Circuit Court erred by failing to follow this precedent and compel the action to an arbitrator to determine these issues in accordance with the terms of the Arbitration Agreement, and this Court should reverse.

II. The Arbitration Agreement is not unconscionable.

Although the Circuit Court erred by even reaching this issue, the arbitration agreement is not unconscionable in any event, and the Circuit Court further erred by holding otherwise. “A finding of unconscionability requires ‘a ‘procedural’ and a ‘substantive’ element, the former focusing on ‘oppression’ or ‘surprise’ due to unequal bargaining power, the latter on ‘overly harsh’ or ‘one-sided’ results.’” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 340 (2011). As addressed above, the Circuit Court erred by reaching the question of unconscionability despite the express delegation clause in the Arbitration Agreement. It then further erred by finding

unconscionability where Respondent focused solely on the adhesive nature of the Terms, which does not render a contract *per se* unconscionable. Finally, the Circuit Court compounded these errors by looking outside the Arbitration Agreement (which is found in Section 17 of the Terms) to language in Section 15, treating the ordinary incidents of arbitration as oppressive terms, and making unsupported factual findings about how the Terms were presented that the record contradicts. When examined standing alone, as the law requires, Lyft's Arbitration Agreement is mutual, conspicuous, and enforceable. Accordingly, this Court should reverse.

A. Respondent's unconscionability case rests on argument of counsel, not evidence.

The party resisting arbitration bears the burden of proving the claims unsuitable for arbitration. Every proposition on which the Circuit Court's unconscionability findings rests—that Respondent lacked the business judgment to understand the arbitration clause and had no counsel at sign-up—came from the argument of Respondent's counsel, which is not evidence. *See S.C. Dep't of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) ("Arguments made by counsel are not evidence."); *see also McManus v. Bank of Greenwood*, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."). Respondent's Brief does not cure this error; it reproduces it. Asked to identify record support for the Circuit Court's findings, Respondent's Brief cites Respondent's own Memorandum in Opposition, at paragraphs 7 through 10. (Resp. Br. at 11.) But, again, a memorandum is not a record of facts and arguments of counsel are not evidence. Lyft, by contrast, submitted the sworn declaration of Colton Carr, together with the consent history and the operative Terms. (Mot. to Compel Ex. A – Aff. of Colton Carr & Exhibits 1-7; R. __.)

The Order's unconscionability findings had nothing to stand on when considering this limited record, and under *de novo* review this Court owes them no deference.

B. Adhesion is not unconscionability, and Respondent has shown nothing more than adhesion.

Respondent's Brief treats the adhesive character of the TOS as though it resolved the question, asserting that "the bargaining process was not fair in any meaningful sense" because the Terms were non-negotiable and required for use of the app. (Resp. Br. at 7.) If that were the law, no business could set the terms on which the public accesses its product, because every standardized consumer contract is offered on the same basis. South Carolina rejects the premise. Our Supreme Court has held that "adhesive contracts are not unconscionable in and of themselves so long as the terms are even-handed," and that "the mere fact a contract is one of adhesion does not doom the contract-drafter's case." *See Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 614, 879 S.E.2d 746, 756 (2022). Standardization is instead "a rational and economically efficient response to the rapidity of market transactions and the high costs of negotiations." *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 396, 498 S.E.2d 898, 902 (Ct. App. 1998).

Adhesion is therefore only half of the showing. Unconscionability requires both an absence of meaningful choice **and** terms so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Damico*, 437 S.C. at 614, 879 S.E.2d at 755. Respondent addresses only the first element and supplies it largely by self-serving assertion. Nor can Respondent square her approach with *Damico's* instruction that unconscionability "depends upon all the facts and circumstances of the case." *Id.* at 596, 879 S.E.2d at 755 (citing *S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 398 S.C. 604, 614, 730 S.E.2d 862, 867 (2012)). Here the Circuit Court performed no such inquiry; it summarily found adhesion and treated the analysis as complete. (*See Order*; R. __.) But courts often decline to find substantive unconscionability where, as here, the arbitration provision applied mutually to both parties, placed no limits on statutory rights, and was clearly labeled.

Respondent’s remaining procedural arguments—that Respondent “did not have the business judgment to understand the effect of the arbitration clause,” that Respondent “did not have counsel present” at account creation, and that a consumer who “clicked ‘I agree’” to an agreement should not be bound by it—identifies no required element for a binding contract. (Resp. Br. at 5, 8.) A party who agrees to a contract is presumed to have read and understood it. *Sanders v. Savannah Highway Auto. Co.*, 440 S.C. 377, 892 S.E.2d 112 (2023) (enforcing the duty-to-read doctrine in the arbitration context). Moreover, courts in this State have consistently rejected the argument that an arbitration agreement is unenforceable because no one explained it, and this point carries particular force for routine digital agreements which pervade everyday commerce.

As this Court recognized in *Doe*, “commercial transactions in the modern age differ from traditional face-to-face negotiation,” and online agreements presented in clickwrap form are enforceable. 430 S.C. at 617, 846 S.E.2d at 881. If a consumer’s lack of sophistication or the absence of a lawyer at a mobile sign-up was enough to void an arbitration clause, entering contracts in the digital age would be impossible. Respondent accepted Lyft’s Terms on four separate occasions over more than two years and used the Platform 55 times. There is no evidence of fraud or overreaching in the record that would excuse Respondent from terms she repeatedly accepted.

Finally, conditioning account access on acceptance of standard terms is lawful and does not render the contract impermissibly adhesive. Respondent treats Lyft’s requirement that a user accept the Terms before creating an account as itself a mark of unconscionability, relying on Lyft’s acknowledgment that a rider “cannot complete the account creation process or purchase rideshare services through the Lyft app unless the person affirmatively accepts” the Terms. (Resp. Br. at 7, 14.) But requiring assent to standard terms as a condition of access is the ordinary and lawful architecture of consumer commerce, not evidence of oppression.

That a consumer cannot rewrite a provider's terms establishes only that the contract is adhesive—and adhesion “with fair terms is certainly not unconscionable[.]” *Damico*, 437 S.C. at 614, 879 S.E.2d at 756.

Moreover, Respondent did not lack meaningful choice here. Acceptance of Lyft's Terms was never compelled, Respondent was free to decline them and choose another means of transportation if she did not wish to agree to the Terms, and the availability of alternative service options defeats a claim of procedural unconscionability. The record in this case reflects a consumer who was offered a contract, accepted the terms four times, took the benefit of the bargain 55 times, and now asks to be relieved of the contract provisions they do not like. South Carolina law does not permit a party to accept the benefits of a contract while disavowing its terms, and therefore this Court should reverse and compel the parties to arbitration.

C. The unconscionability inquiry is confined to the Arbitration Agreement, and Section 15 is not part of it.

The Circuit Court's unconscionability findings also erroneously reached a provision of Lyft's TOS that was never properly before the court. In denying arbitration, the Circuit Court quoted Section 15's limitation of liability to conclude that Lyft's Terms are “impermissibly onerous.” (Order at 4; R. __.) Section 15 is a general contract provision and does not form a part of the Arbitration Agreement in Section 17. The Circuit Court's consideration of this language for its unconscionability finding was a clear error under *Prima Paint* and South Carolina precedent.

Similar to *Damico*, in *Mart* this Court held that “controlling case law does not permit us to consider the language of the separate limited Warranty . . . in analyzing the standalone arbitration language of the Sales Contract,” and emphasized that “[e]ven if the overall contract is unenforceable, the arbitration provision is not unenforceable unless the reason the overall contract is unenforceable specifically relates to the arbitration provision.” *Mart v. Great Southern Homes*,

Inc., 441 S.C. 304, 313, 893 S.E.2d 360, 364 (Ct. App. 2023) (quoting *Huskins v. Mungo Homes, LLC*, 439 S.C. 356, 366, 887 S.E.2d 534, 539–40 (Ct. App. 2023)).

Respondent’s response to this error alleges that Lyft’s position “elevates contract labeling over reality” because the arbitration clause “was part of the same Terms of Service that Lyft required Respondent to accept as a package.” (Resp. Br. at 8.) But this argument conflicts with the premise outlined in *Prima Paint*, *Damico*, and *Mart*, rather than applies it. Every arbitration provision to which the severability doctrine has ever been applied was part of some larger contract. If shared packaging defeated severability, the doctrine would have no field of operation.

Respondent’s reliance on *Doris Lewis* is the clearest illustration of this problem. (Resp. Br. at 13–14). As an initial matter, the court’s order in that case granted Lyft’s motion to compel arbitration, enforcing Section 17 and leaving “[t]he validity, scope, enforceability, and arbitrability of the agreement” to the arbitrator. *Doris Lewis v. Lyft, Inc., et al.*, No. 2023-CP-10-03260 (Ct. Com. Pl. Charleston Cnty., SC, Nov. 26, 2024). On the issue of Section 15, the court observed that the limitation of liability “is not in section 17 of the arbitration agreement” and expressly “issue[d] no formal ruling concerning the enforceability of section 15.” *Id.* Respondent thus refers to an order that adopted Lyft’s structural position, declined to rule on the provision Respondent targets, and compelled arbitration notwithstanding it.

D. The inherent features of arbitration are not oppressive terms.

The terms the Circuit Court’s Order singled out as oppressive are, in fact, the defining features of arbitration itself. The Order identified the jury-trial waiver, the inability to appeal an arbitration decision, and the inability to participate in a class action as “oppressive and one-sided terms.” (Order at 5; R. __.) Respondent defends this finding on the ground that “South Carolina courts routinely analyze arbitration clauses for fairness.” (Resp. Br. at 9.) This statement entirely misses the point. Lyft has not disputed that arbitration clauses are reviewed for fairness. The

question is whether the inherent characteristics of arbitration can themselves constitute evidence of unconscionability—and they cannot. These features are the trade-off for the efficiency and finality of the arbitral process, and they bind Lyft just as they bind Respondent.

The findings are also inaccurate. This case is not a class action, so the class-action waiver has no operative effect here. Regardless, class-action waivers in arbitration agreements are regularly upheld under the FAA. *See, e.g., York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 91–94, 749 S.E.2d 139, 151–53 (Ct. App. 2013) (upholding a class action waiver in an arbitration agreement under the FAA). Nor is anything in the Agreement one-sided. It requires both Respondent and Lyft to arbitrate and mutually waives each party’s right to proceed in court. Mutuality “is a paramount consideration when assessing the substantive unconscionability of a contract term.” 17A Am. Jur. 2d Contracts § 272. Examined alone, Lyft’s Arbitration Agreement provides for neutral arbitration, applies equally to both parties, does not limit Respondent’s remedies in the arbitral forum, does not shorten the statute of limitations, and does not reserve to Lyft any unilateral right to litigate. Respondent has failed to identify a provision of the Arbitration Agreement that is unfair, and this Court should reverse.

E. The Circuit Court’s presentation findings conflict with the record evidence.

Lastly, the Circuit Court’s findings about how the Terms were presented fare no better because they track counsel’s argument rather than the record evidence. Respondent defends the Circuit Court’s findings that the arbitration provision was “buried within a 43-page document” and “inconspicuous . . . particularly when viewed on a mobile device” on the ground that the Circuit Court “adopted” Respondent’s argument to that effect. (Resp. Br. at 14.) However, adoption is the issue, not the answer.

First, it bears repeating that there has never been a dispute regarding contract formation here. The Circuit Court noted this purported finding in discussing the enforceability—not

formation—of the Arbitration Agreement, and as part of its determination that “the TOS agreement between the Plaintiff and Defendant is clearly an adhesion contract.”

Second, the only evidence concerning presentation of the Agreement was Lyft’s, and it establishes the opposite. The first page of the TOS carries an all-caps notice advising of the agreement:

PLEASE BE ADVISED: THIS AGREEMENT CONTAINS PROVISIONS THAT GOVERN HOW CLAIMS BETWEEN YOU AND LYFT CAN BE BROUGHT ([SEE SECTION 17 BELOW](#)). THESE PROVISIONS WILL, WITH LIMITED EXCEPTION, REQUIRE YOU TO SUBMIT CLAIMS YOU HAVE AGAINST LYFT TO BINDING AND FINAL ARBITRATION . . .

(Mot. to Compel, Exs. A-3, A-5, A-7; R. __.) “SEE SECTION 17 BELOW” is an internal jump link that takes the reader directly to the full Arbitration Agreement. Respondent was also notified by email of the updated Terms, including revisions to the “Dispute Resolution and Arbitration Agreement,” before Respondent’s final acceptance on April 7, 2021. (See Mot. to Compel, Ex. A, ¶ 17; R. __.)

Respondent contends the Circuit Court “was not required to treat a jump link inside lengthy mobile terms as sufficient to create meaningful notice.” (Resp. Br. at 14.) A court is, however, required to ground its findings in evidence and weigh conspicuousness as one factor rather than ignore the notices, emails, and jump link altogether. *Doe* instructs that “commercial transactions in the modern age differ from traditional face-to-face negotiation” and reliance on adhesion alone fails to accommodate the realities of much modern commercial practice. 430 S.C. 602, 617, 846 S.E.2d 874, 881. The same defect infects the finding that Respondent did not have the business judgment to understand the effect of the arbitration clause and did not have counsel present during account creation. These findings rest on counsel’s assertion alone, not on testimony or evidence from Respondent across the two-and-a-half-year period in which Respondent accepted the Terms

multiple times. Respondent has not carried the burden of showing unconscionability of the Arbitration Agreement, and the Order denying arbitration on that basis cannot stand. This Court should reverse.

CONCLUSION

For the foregoing reasons, Appellant Lyft, Inc., d/b/a Lyft Drives South Carolina, Inc., respectfully requests that this Court reverse the Circuit Court's order denying Lyft's motion to compel arbitration and remand with instructions to compel arbitration of Respondent's claims and to stay this action pending completion of the arbitration.

Respectfully submitted,

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