15-1407

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ADAM BERKSON *et al.*,
individually and on behalf of all others similarly situated,
Plaintiffs-Appellees,

v.

GOGO LLC *et al.*,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York,
No. 1:14-cv-01199-JBW-LB

BRIEF FOR PLAINTIFFS-APPELLEES ADAM BERKSON AND KERRY WELSH

Michael R. Reese
REESE LLP
100 West 93rd Street, 16th Floor
New York, New York 10025
Telephone: (212) 643-0500

Counsel for Plaintiffs-Appellees Adam Berkson and Kerry Welsh and the Proposed Class

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JURISDICTIONAL STATEMENT

The United States District Court for the Eastern District of New York has jurisdiction over the subject matter of the above-captioned action by virtue of diversity of citizenship because Plaintiffs-Appellants Adam Berkson and Kerry Welsh (together, "Plaintiffs") are citizens of states other than the State of Illinois, and Defendants-Appellants Gogo LLC and Gogo Inc. (together, "Gogo" or "Defendants") are citizens of the State of Illinois. (R. at A17–18.) Additionally, pursuant to the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (codified in scattered sections of Title 28 of the *United States Code*), the District Court has original subject matter jurisdiction over all class actions where any member of a class of plaintiffs is a citizen of a state different from the state of citizenship of any defendant and the aggregate amount in controversy exceeds $5,000,000, exclusive of interest and costs. 28 U.S.C. § 1332(d)(2). Because the class that Plaintiffs seek to represent includes residents from all fifty states, the class includes citizens from states other than the State of Illinois. (R. at A21–22.)

This Court has jurisdiction under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (the "FAA"), because on April 9, 2015, the District Court entered an Order denying Gogo's petition under 9 U.S.C. § 4 for arbitration to proceed. 9 U.S.C. § 16(a)(1)(B). (*See also* R. at A165–247.) Gogo filed a timely Notice of Appeal on April 28, 2015. (R. at A248.) *See also* Fed. R. App. P. 4.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Have Plaintiffs agreed to arbitrate the claims they raise in this action? In August 2011 and September 2012, did Plaintiffs Welsh and Berkson, respectively, agree to any arbitration clause in Gogo's Terms of Use?

2. Do the arbitration clauses, by their terms, cover Plaintiffs' claims? Do the arbitration clauses apply retroactively?

3. Are the arbitration clauses procedurally and substantively unconscionable?

4. Did Plaintiffs agree to any forum selection clauses in any of Gogo's Terms of Use?

5. Do the forum selection clauses, by their terms, cover Plaintiffs' claims?

6. Assuming the Terms of Use applied to Plaintiff Kerry Welsh, did he end the Terms' applicability pursuant to their plain language when he terminated his Gogo account in February 2013?

7. Are the forum selection clauses procedurally and substantively unconscionable?

8. Applying the 28 U.S.C. § 1404(a) factors, should the District Court have transferred Plaintiffs' action the United States District Court for the Northern District of Illinois?

STATEMENT OF THE CASE

This case pertains to Gogo's Internet service made available to consumers on airplanes. This action presents a classic bait-and-switch consumer deception scheme, whereby Gogo profited tremendously from its ability to mislead and overcharge consumers for this service.

Specifically, Gogo represented to consumers that they could buy a month-long pass of Gogo Internet service for a one-time fee. (R. at A19, ¶ 21.) This turned out, however, to be untrue because once Gogo had the consumer's credit or debit card information, Gogo continued to charge the consumer on a recurring basis each subsequent month. (*Id.* at A19–20.) At no time did Gogo inform the consumers it was siphoning this money from the consumers' accounts. (*Id.*) Rather, Gogo hid the charges from the consumers. (*Id.*) As a result, tens of thousands of consumers were overcharged by Gogo for service they did not use. Moreover, when consumers called to complain about this practice, Gogo typically refused to refund them their money. (*See id.* at A20, ¶ 31.) Gogo was able to rack up millions of dollars in unearned fees through this scheme.

Instead of addressing the alleged misconduct, however, Defendants have attempted to engage in another bait and switch, falsely claiming that the Plaintiffs agreed to have this matter proceed in arbitration or, alternatively, transferred to the

Northern District of Illinois, a forum that is generally considered as being hostile towards consumer protection claims.

As the District Court ruled below, however, Defendants' assertions are simply untrue. *Berkson v. Gogo LLC*, No. 1:14-CV-01199-JBW-LB, --- F.Supp. 3d ---, 2015 WL 1600755 (E.D.N.Y. Apr. 9, 2015). Specifically, no arbitration clause existed when Plaintiffs made their transactions with Gogo that are at issue here. (R. at A17, ¶ 14 (Mr. Berkson made his purchase on September 25, 2012); *id.* at A17, ¶ 15 (Mr. Welsh made his purchase in August 2011); *id.* at A45, ¶ 5 (declaration attaching December 13, 2012, Terms of Use); *id.* at A70–71 (arbitration clause in December 13, 2012, Terms of Use); *id.* at A45, ¶ 6 (declaration attaching May 20, 2013, Terms of Use); *id.* at A80–82 (arbitration clause in May 20, 2013, Terms of Use).) Rather, Gogo created the arbitration clause after the fact.

Extensive discovery—including production of documents from Gogo's internal files and deposition of its corporate representative—revealed that consumers did not have to agree to Gogo's Terms of Use to sign up for the service and be subjected to the scam. (*See* R. at A127–53, A176–84.)

The District Court examined this evidence and made findings of fact that neither Mr. Berkson nor Mr. Welsh had agreed to arbitration or to any forum selection clause. Judge Weinstein's decision was based upon sound principles of contract law as stated recently by this Court when it affirmed denial of a motion to

compel arbitration in a similar situation in the case of *Schnabel v. Triligiant Corp.*, 697 F.3d 110 (2d Cir. 2012). Accordingly, Gogo's Appeal here should be denied.

Finally, the Appeal should also be denied because it is moot. The parties have reached agreement on the material terms of a class action settlement which is expected to be presented to the District Court for its approval on October 13, 2015.

I. PROCEDURAL HISTORY

Plaintiff Adam Berkson filed the original class action complaint in this case on February 25, 2014. (R. at A171.) Gogo moved on April 4, 2014, to compel arbitration or transfer the action to the Northern District of Illinois or, alternatively, to dismiss the action for lack of jurisdiction or failure to state a claim. (*Id.*)

On April 24, 2014, Mr. Berkson filed an amended class action complaint along with Plaintiff Kerry Welsh. (*Id.* at A172.) Plaintiffs bring a claim on behalf of a New York sub-class for violation of New York General Business Law section 349, claims on behalf of a California sub-class for violation of California's Consumers Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.*, California's Unfair Competition Law, Cal. Civ. Code § 17200 *et seq.*, and California's False Advertising Law, Cal. Bus. & Prof. Code § 17500 *et seq.*, and claims on behalf of a nationwide class for breach of the implied covenant of good faith and fair dealing, violation of the consumer protection acts of various states, and, in the alternative, for restitution / unjust enrichment. (R. at A24–34.)

Gogo moved to compel arbitration, transfer venue to the Northern District of Illinois, or, alternatively, to dismiss the amended complaint for lack of jurisdiction or failure to state a claim on May 12, 2014. (*Id.* at A172.)

The District Court heard oral argument on October 15, 2014. (*Id.*) The District Court granted the parties leave to conduct discovery, and the parties did so for four months, until February 13, 2015. (*Id.*) The parties completed supplemental briefs based on the discovery on March 27, 2015. (*Id.*)

The District Court denied Gogo's motion to compel arbitration, to transfer venue, or to dismiss on April 9, 2015. *See generally Berkson*, 2015 WL 1600755. (R. at 165–247.)

SUMMARY OF ARGUMENT

The District Court correctly held that the parties did not agree to arbitrate their claims. This ruling was based, in part, on evidence presented as a result of extensive discovery the parties conducted. The discovery revealed, for one thing, that no arbitration clause existed in August 2011 and September 2012 when Plaintiffs engaged in the Gogo in-flight Internet purchases at issue. For another thing, discovery of the structure and operation of Gogo's website did not show that consumers had to agree to the Terms of Use to use Gogo's in-flight service. Gogo thus failed to meet its burden to show the parties agreed to arbitrate Plaintiffs' claims.

Assuming, *arguendo*, the parties agreed to the arbitration provisions in the

Terms of Use (which they did not), the plain language of the arbitration provisions shows Plaintiffs' claims do not fall within the scope of the provisions. The December 2012 arbitration clause applies to claims relating to, or arising out of, "these Terms and Conditions," and the May 2013 clause applies to claims relating to, or arising out of, "this Agreement." Plaintiffs' claims do not arise—and, indeed, could not have arisen—out of the December 2012 and May 2013 Terms of Use, as Plaintiffs claims concern recurring charges that began occurring well before December 2012.

Similarly, the arbitration provisions, by their plain terms, do not apply retroactively, either. Arbitration clauses do not apply retroactively to previously-existing contractual agreements unless the parties make intentions of retroactive application explicit. *See, e.g.*, *Carter v. Doll House II, Inc.*, 608 F. App'x 903, 904 (11th Cir. 2015) (unpublished). Here, neither the December 2012 arbitration clause (R. at A70–71) nor the May 2013 arbitration clause (*id.* at A80–82) indicates the clause is retroactively applicable.

The arbitration provisions are also unenforceable because they are both procedurally and substantively unconscionable. The clauses are procedurally unconscionable because, among other reasons, (i) the setting of the transaction unreasonably favored Gogo, as there were no other options for in-flight Internet service, *see Stewart v. Gogo, Inc.*, No. C-12-5164 EMC, 2014 WL 324570 (N.D. Cal. Jan. 29, 2014) (holding that the plaintiffs alleged plausible antitrust claims

related to in-flight Internet service), (ii) Plaintiffs are not attorneys and, as a result, do not have the educational experience that would significantly assisted them in evaluating the arbitration clauses, and (iii) there was a pronounced disparity in bargaining power between Gogo, a company that earns hundreds of millions of dollars in total revenue annually, and Plaintiffs, who are individual consumers. And, the clauses are substantively unconscionable because they allow Gogo to bring certain enumerated claims in court while simultaneously restricting Plaintiffs to arbitration or small claims court. Because the arbitration provisions are both procedurally and substantively unconscionable, they are unenforceable.

With respect to the forum selection clauses and Gogo's motion to transfer venue, the District Court correctly applied state law to decline to enforce the clauses, and it correctly denied Gogo's motion to transfer Plaintiffs' action to the Northern District of Illinois. The District Court appropriately held the parties had not agreed to the forum selection clauses in Gogo's Terms of Use because forum selection clauses are material terms, and Gogo did not meet its burden of showing that it had reasonably communicated the forum selection clauses to Plaintiffs.

Furthermore, the plain language of the forum selection clauses forecloses their application to Plaintiffs' claims. The forum selection clauses each address claims or disputes "arising under or relating to this Agreement," *i.e.*, the Terms of Use. Plaintiffs' claims, however, arise under state statutory consumer protection law, state

tort law, or implied contracts separate and apart from the Terms of Use. Consequently, the text of the forum selection clauses shows the clauses do not apply to Plaintiffs' action. Additionally, the Terms of Use state that the Terms remain in effect unless and until the Gogo user terminates his/her account. Mr. Welsh terminated his account in February 2013 and thereby terminated any possible applicability of the Terms of Use, including any forum selection clauses.

For reasons very similar to the reasons that the arbitration clauses are unconscionable, the forum selection clauses are also procedurally and substantively unconscionable.

Additionally, analysis under Section 1404(a) does not lead to the conclusion that the District Court should have transferred Plaintiffs' action to the Northern District of Illinois. First, Mr. Berkson's decision to file suit in his home forum of New York is afforded great deference. Further, there are significant contacts between Plaintiffs' case and the Eastern District of New York, since Mr. Berkson made his purchase at issue on a flight that began at LaGuardia Airport in New York, New York. Additionally, the disparity in financial means between Gogo and Plaintiffs favors retention of the case in the Eastern District of New York. The overwhelming weight of the public and private interest factors favors denial of Section 1404(a) transfer.

For all of the reasons set forth herein, the Court should deny Gogo's appeal

and affirm the District Court's thorough and well-reasoned decision, which is strongly grounded in both the facts and the law.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DENIED DEFENDANTS' MOTION TO COMPEL ARBITRATION BECAUSE DEFENDANTS UTTERLY FAILED TO SHOW THERE WAS AN AGREEMENT TO ARBITRATE

Gogo attacks the District Court, claiming it failed to follow basic, standard contract interpretation principles. (*See* Br. Defs.-Appellants 23, ECF No. 71 ("Despite paying lip service to at least some of these straightforward principles, the district court failed to apply them.").) Nothing could be farther from the truth, as the District Court's ruling denying arbitration is based upon sound principles of law as applied to the specific and unique facts of the case developed in discovery through interrogatories, document production, affidavits, and deposition testimony.

Significantly, the discovery upon which the District Court relied in rendering its ruling evidenced that: (1) no arbitration agreement existed at the time of the transactions at issue and (2) consumers, such as the Plaintiffs, did not have to agree to Gogo's Terms of Use to use the in-flight Internet service at issue. (*See* R. at A127–53, A176–84.)

Based upon these findings of fact, the District Court denied Gogo's motion to compel arbitration. Under either factual scenario described above, the District Court was correct in its denial of Gogo's motion to compel arbitration. Hence, the District

Court's Order falls squarely within the rule of law. Indeed, the FAA "places arbitration agreements upon the same footing as other contracts . . . [It] does not require parties to arbitrate when they have not agreed to do so." *Schnabel*, 697 F.3d at 118. As the United States Supreme Court made clear in *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986), "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute he has not agreed so to submit." *AT&T Technologies, Inc.*, 475 U.S. at 648 (internal quotation omitted).

Accordingly, Gogo's appeal must be denied.

A. Standard of Review

In deciding a motion to compel arbitration under the FAA, 29 U.S.C. §§ 3 and 4, the Court "applies a standard similar to that applicable for a motion for summary judgment." *Bensadoun v. Jobe–Riat*, 316 F.3d 171, 175 (2d Cir. 2003) (citations omitted). A motion to compel arbitration only may be granted "when the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that movant is entitled to judgment as a matter of law." *Thomas v. Pub. Storage, Inc.*, 957 F. Supp. 2d 496, 499 (S.D.N.Y. 2013) (citations and internal quotation marks omitted).

Moreover, in a motion to compel arbitration, the burden falls squarely on the party seeking arbitration. *Schnabel*, 697 F.3d at 116 (discussing denial of motion to

compel arbitration in which the district court had held that "the defendants had failed to raise a genuine issue of material fact as to whether the plaintiffs had assented to the arbitration provision").

Finally, while "the question of whether the parties have agreed to arbitrate is reviewed *de novo* to the extent that the district court's conclusion was based on a legal determination, ***findings of fact, if any, bearing on this question are reviewed under a "clearly erroneous" standard***." *Schnabel*, 697 F.3d at 119 (emphasis added).

Here, the District Court's ruling is based upon two findings of fact that were developed after extensive discovery, including document production, interrogatories, and a Federal Civil Procedure Rule 30(b)(6) deposition of Gogo' s corporate representative. (*See* R. at A127–53, A176–84.)

First, the discovery revealed that ***no arbitration clause existed at the time of the transactions at issue***. The transactions at issue occurred in August 2011 and September 2012. (R. at A17.) The arbitration clause, however, was not first created until a date later, specifically, December 13, 2012. (*Id.* at A45, ¶ 5; *id.* at A64–73.)

Second, the discovery revealed that a consumer did not have to agree to the Terms of Use to use Gogo's service. (*See* R. at A127–53, A176–84.)

Based upon these facts, the District Court denied Defendant's motion to compel arbitration. (R. at A165–247.) For Gogo to succeed on its appeal and have

the District Court reversed, it must show that the District Court was "clearly erroneous." As set forth herein, it has failed to do so.

B. The District Court Was Not "Clearly Erroneous" to Determine That the Evidence Demonstrated There Was No Agreement to the Terms of Use

Documents produced from Gogo's internal files, the Plaintiffs' affidavits filed with the District Court, and the testimony of Gogo's corporate representative pursuant to Federal Civil Procedure Rule 30(b)(6) all undermined Defendants' assertion that Plaintiffs agreed to the Terms of Use. Instead, this evidence bolstered Plaintiffs' assertions ***that they never agreed to such terms***.

Specifically, the evidence showed that the sign-up process for Defendants' service did not require a consumer to agree to the Terms of Use to purchase the service as Defendants claim. Rather, prominently displayed in the right-hand corner of the sign-in page is simply a "Sign In" button that states:

(*See* R. at A127–35 (Plaintiffs' Supplemental Opposition to Defendants' Motion to Transfer Venue Based on New Discovery Filed March 6, 2015, and Exhibit A thereto).)

Notably, this "Sign In" button contains no language either above it or near it that requires a consumer to agree to any Terms of Use. Rather, this "Sign In" button

sits alone on the right-hand side of the page and does not require any commitment of the consumer who activates the services by clicking the "Sign In" button.

This evidence developed during discovery directly contradicted Gogo's assertion that a consumer must agree to the Terms of Use by clicking a "Sign In" button that was within close proximity to a statement about the Terms of Use. Notably, the Reply Declaration of Dennis Sladky filed with the District Court on July 3, 2014 (R. at A122–25 ("Sladky Declaration")), was the sole basis for Defendants' claim that consumers had to agree to the Terms of Use to use the Gogo service. The Sladky Declaration states: "By clicking 'Sign In' I agree to the terms of use . . .". (*Id.* at A123, ¶ 4.) However, as seen in the evidentiary record, that simply is not true, as consumers did not have to agree to the Terms of Use by clicking the right-hand "Sign In" button.

Moreover, cross-examination of Mr. Sladky during his deposition revealed that the documents upon which he relied (which serve as the sole basis of Defendants' claim that consumers must agree to the Terms of Use) are not the actual documents consumers saw when they signed in for Gogo's Internet service, but are, rather, mere specification documents used internally at Gogo. (*Compare* R. at A124 (Sladky Declaration, Ex. 1) *with id.* at A136–41 (transcript of November 11, 2014, deposition of Defendants' Rule 30(b)(6) corporate representative), at 36:2–6 ("Q: Exhibit 1 is not what the consumer would see, correct, because this is like a computer

[] spec? A: This is a specification.").

Moreover, even assuming that Exhibit 1 to the Sladky Declaration is what the consumers saw when they went through the sign-up process (which it is not), this document does not show (as Defendants wrongly claim) that consumers had to agree to the Terms of Use to proceed with paying for Gogo's service and activating it. Specifically, it appears the "I Agree to the Terms of Use" button is optional and is not required to be checked to pay for the service and use it. As Gogo's corporate representative witness, Mr. Sladky, explained during his deposition:

> Q: So it's correct that for a consumer to advance past document [which] is the screen on Document 30-1, they don't have to fill out all this information, is that correct?
>
> A: There are certain fields a customer has to fill out and there are certain fields that a customer doesn't have to fill out.

(R. at A139, at 47:5-11.)

Indeed, only fields in the sign-in process that have an asterisk are required to be filled out. (*Id.* at A140–41, at 49:11–50:23 ("Q: Is it correct that not all fields need to be filled out? A: That's correct. And it says here at the top of the page that an asterisk indicates required fields.").) Tellingly, the "I Agree to the Terms of Use" field relied upon by Defendants as the evidence in support of its motion ***does not have an asterisk by it***. (*See id.* at A124.)

Finally, Plaintiffs both submitted affidavits stating they did not agree to any

arbitration clause on the dates of their purchases at issue. (*Id.* at A110–17.) Gogo failed to offer any reliable proof to contradict this. Rather, as seen above, the discovery from Gogo's own files and witness supports the factual assertion that a consumer did not have to agree to the Terms of Use to pay for and use the Gogo product.

C. The Parties Did Not Agree to the Terms of Use, Let Alone to Arbitrate

"The threshold question facing any court considering a motion to compel arbitration is . . . whether the parties have indeed agreed to arbitrate." *Schnabel*, 697 F.3d at 118; *see also JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 169 (2d Cir. 2004). Arbitration "is a matter of consent, not coercion." *JLM Indus., Inc.*, 387 F.3d at 171 (quoting *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

The District Court was correct that Gogo failed to meet its burden of showing the parties agreed to arbitrate. Indeed, Gogo conceded there was ***no arbitration provision*** in the Terms of Use for its Internet service when Mr. Welsh made his purchase at issue in August 2011 and when Mr. Berkson made his purchase at issue on September 25, 2012. (Br. Defs.-Appellants 12, ECF No. 71 ("[T]he arbitration provision was incorporated into Gogo's Terms of Use in December 2012—after both Plaintiffs had initially subscribed to Gogo's service.").)

Gogo would have had the District Court (and now would have this Court)

contravene a central tenant of contract law—that to assent to contractual terms, a party must be on notice of them. *Schnabel*, 697 F.3d at 123 (denying motion to arbitrate, holding that the consumer plaintiff was "not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious").

The decision of the Second Circuit Court of Appeals of the United States in *Schnabel v. Trilegiant Corp.*, which dealt with an online subscription service similar to that at issue here, is directly on point and supports the District Court's ruling.

In *Schnabel*, the Second Circuit upheld the decision to deny a motion to compel arbitration. *Schnabel*, 697 F.3d at 120. In that case, as here, the arbitration provision did not appear on any web pages the plaintiffs would have encountered during their enrollment in the defendant's online services. Instead, the terms of use, which included an arbitration provision, were sent in an email to the plaintiffs following their purchase of the services. In determining the plaintiffs did not have sufficient notice of the arbitration provision, the Second Circuit found that "the arbitration provision here was both temporally and spatially decoupled from the plaintiffs' enrollment in and use of [the service] . . . ." *Id.* at 127. The Second Circuit thus concluded that neither the receipt of the email nor the continued enrollment in the online services constituted meaningful assent to arbitrate the plaintiffs' claims. The Court stated, "'[t]he conduct of a party is not effective as a manifestation of his

assent unless he intends to engage in the conduct and ***knows or has reason to know*** that the other party may infer from his conduct he assents." *Id.* at 120 (internal citation omitted) (emphasis added); *see also Hines v. Overstock.com, Inc.*, 380 Fed. App'x 22, 25 (2d Cir. 2010).

As in *Schnabel*, Mr. Berkson had no notice of any arbitration provision when he subscribed to the in-flight Internet services at issue on September 25, 2012, and, similarly, Mr. Welsh had no notice of any arbitration provision when he subscribed to Gogo's services in August 2011. (R. at A110–17.) According to Defendants, the first time that either Plaintiff Berkson or Plaintiff Welsh could possibly have had any notice of any arbitration provision was when he purchased new in-flight Internet services from Gogo in January 2013 (or thereafter).

By Defendants' own account, any notice of Terms of Use that included an arbitration clause was decoupled temporally from Mr. Berkson's September 25, 2012, purchase at issue by nearly four months or more. Similarly, any notice of Terms of Use that included an arbitration clause was decoupled temporally from Mr. Welsh's August 2011 purchase at issue by over a year and four months. Defendants provide no explanation as to how consent to the Terms of Use for a January 2013 subscription constituted assent to have the January 2013 Terms of Use retroactively applied to prior subscriptions, which were governed by prior, separate contracts. *Schnabel*, 697 F.3d at 128 ("There must be facts in the record to support a finding

that the counter-party intended to accept the terms. Such acceptance need not be express, but where it is not, there must be evidence that the offeree knew or should have known of the terms and understood that acceptance of the benefit would be construed by the offeror as an agreement to be bound." (internal citation omitted)).

Another fact that underscores why the Terms of Use cannot be applied retroactively is that the Terms of Use in effect after December 13, 2012, which introduced the first arbitration provision, prohibited behavior that was allowed in the Terms of Use in existence prior to December 13, 2012. For example, the Terms of Use in effect in August 2011 allowed Gogo's service to be used for watching movies and televisions shows. The "Acceptable Use" section of the August 2011 Terms of Service allowed for:

> Content, file-sharing or multiplayer gaming requiring high bandwidth, such as VoIP, streaming audio and video, and file sharing.

(R. at A51.) These material terms changed, however, with the Terms of Service that went into effect on December 13, 2012. Now, the "Acceptable Use" section of the Terms of Services prohibited the watching of movies and television, as follows:

> Nor should the Service be used to download movies from peer-to-peer file sharing services, redirect television programs for viewing on personal computers, for web broadcasting, or to operate a server or telemetry devices.

(*Id.* at A68.) This additional reason shows why the Terms of Use cannot be applied retroactively.

This Court should deny Defendants' appeal and, instead, should affirm the District Court's following of the black letter law of contracts by holding that Plaintiffs had no valid notice of an arbitration provision and, consequently, have no obligation to arbitrate their claims.

II. THE COURT SHOULD NOT ENFORCE THE ARBITRATION CLAUSE

As detailed above, and as the District Court correctly decided, the parties never agreed to arbitrate Plaintiffs' claims in this action. However, even assuming the parties agreed to the arbitration provisions in the Terms of Use (which they did not), the arbitration provisions do not cover Plaintiffs' claims, both because the claims do not fall within the terms of the clauses and because the clauses do not apply retroactively. (*See infra* Part II.A.) Furthermore, the arbitration clauses are procedurally and substantively unconscionable. (*See infra* Part II.B.)

A. Plaintiffs' Claims Do Not Fall Within the Scope of the Arbitration Clauses

Plaintiffs' claims fall outside of the scope of both of the arbitration clauses in the record. (*See* R. at A70–71 (arbitration clause in Terms of Use in effect on or about December 13, 2012, according to Gogo employee Dennis Sladky (*id.* at A45, ¶ 5)); *id.* at A80–82 (arbitration clause in Terms of Use in effect on or about May 20, 2013, according to Mr. Sladky (*id.* at A45, ¶ 6)).)

The December 13, 2012, arbitration clause applies to "any and all disputes

and claims . . . that relate in any way to or arise out of the Site, the Service or ***these Terms and Conditions***[.]" (R. at A70 (emphasis added).) Similarly, the May 20, 2013, arbitration clause applies to "any and all disputes and claims . . . that relate in any way to or arise out of the Site, the Domain, the Service or ***this Agreement***[.] (*Id.* at A81 (emphasis added).) The December 2012 "Site" and "Service" did not exist in August 2011 or September 2012; nor did the May 2013 "Site", "Domain", and "Service" exist in August 2011 or September 2012.[1] Moreover, in August 2011 and September 2012, the December 2012 "Terms and Conditions" and the May 2013 "Agreement" did not exist, either. The Second Circuit has recognized that arbitration clauses do not have retroactive effect under circumstances such as this. *See TradeComet.com LLC v. Google, Inc.*, 435 F. App'x 31, 34 (2d Cir. 2011) ("Courts construing arbitration clauses have refused to subject claims to arbitration where the claims arise from or relate to conduct occurring prior to the effective date of the agreement, *and* where the clause is limited to claims under '*this* Agreement.'" (emphasis in original)).

Similarly, the various arbitration clauses in the record do not apply retroactively, and it would violate basic contract principles to hold otherwise. This

[1] While an Internet domain called "gogoair.com" technically did exist in August 2011 and September 2012, Gogo's website (*i.e.*, the content of the Internet domain, which is the material element here) on those dates was not the same as its website in either December 2012 or May 2013.

is underscored by the plain language of the arbitration clauses themselves, which allows for a consumer to opt out of the arbitration agreement within 30 days after the transaction occurred. (R. at A71, A81.) The design and operation of the opt-out provision show that the arbitration clause only applies to transactions that occurred while the arbitration clause was in existence, as it would be illogical (absent the ability to time travel, which does not exist) to say that a 30-day opt-out period applies, retroactively, to transactions that occurred more than 30 days (or 60 days, 90 days, or even a year) prior to the existence of the arbitration clause.

Furthermore, the federal courts have refused to apply arbitration clauses retroactively where, as here, the clause does not make explicit that it is retroactive. *Carter*, 608 F. App'x at 904 (unpublished) ("Because there is nothing in the October Agreement regarding retroactivity, we conclude the district court correctly refused to apply the arbitration provision to any claims that arose before October 2013."); *Thomas v. Carnival Corp.*, 573 F.3d 1113, 1119 (11th Cir. 2009) ("In contract interpretation, we can glean intent not only from what is said but what is not said. The New Agreement, which was quite thorough, notably did *not* specify that 'disputes arising out of or in connection with this *or any previous* Agreement, including . . . Seafarer's service on this vessel shall be referred to, and finally resolved by arbitration.' ***We think if the parties had intended retroactivity, they***

would have explicitly said so." (initial emphasis original, final emphasis added)).[2] This reason alone provides sufficient justification for this Court to affirm the District Court's holding that the parties did not agree to arbitrate Plaintiffs' claims.

B. The Arbitration Clauses Are Unenforceable Because They Are Unconscionable

The District Court did not address whether the arbitration clauses are unconscionable because it correctly decided that the parties did not enter into an agreement that included the clauses. However, even assuming the parties agreed to arbitrate Plaintiffs' claims (which they did not) and that Plaintiffs' claims fall within the scope of the clauses (which they do not), the arbitration clauses are nevertheless unenforceable because they are unconscionable.

The Supreme Court has stated that arbitration is a matter of contract, and arbitration agreements are on equal footing with other contracts. *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010). "Like other contracts . . . they may be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *Id.* (quoting *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

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[2] *See also Wachovia Bank, Nat. Ass'n v. Schmidt*, 445 F.3d 762, 769 (4th Cir. 2006) ("Moreover, the events giving rise to these claims occurred before the [arbitration clause] was even executed. In these circumstances, the [defendants'] state-court claims are not significantly related to the [arbitration clause].").

An arbitration agreement is unenforceable if it is both procedurally and substantively unconscionable. *NML Capital v. Republic of Argentina*, 621 F.3d 230, 237 (2d Cir. 2010) (citation omitted). "Procedural and substantive unconscionability operate on a sliding scale; the more questionable the meaningfulness of choice, the less imbalance in a contract's terms should be tolerated and vice versa." *Hojnowski v. Buffalo Bills, Inc.*, No. 13-CV-388S, 2014 WL 408717, at *4 (W.D.N.Y. Feb. 3, 2014) (internal citation and quotation marks omitted).

1. The arbitration clauses are procedurally unconscionable

Under New York law, "[p]rocedural unconscionability is analyzed by considering a number of factors, including: (1) the size and setting of the transaction; (2) whether deceptive or high pressured tactics were used; (3) the use of fine print; (4) the experience and education of the party claiming unconscionability, and (5) whether there was a disparity in bargaining power." *Metro. Prop. & Cas. Ins. Co. v. Budd Morgan Cent. Station Alarm Co.*, 95 F. Supp. 2d 118, 121 (E.D.N.Y. 2000) (citation omitted).

First, the setting of the transaction unreasonably favored Gogo. Plaintiffs had no option but to use Gogo's service if they wanted to access the Internet while in flight. The Northern District of California's recent decision in *Stewart v. Gogo, Inc.*, 2014 WL 324570, is worth noting in this connection. In *Stewart*, the plaintiffs alleged that Gogo Inc. "has violated, *inter alia*, federal antitrust law because it has

an unlawful monopoly in the 'market for inflight internet access services on domestic commercial airline flights within the continental United States.'" *Stewart*, 2014 WL 324570, at *1. Gogo Inc. moved to dismiss the plaintiffs' complaint, and the court denied the motion, concluding that the plaintiffs had "alleged plausible antitrust claims for purposes of Rule 12(b)(6)." *Id.* at *3.

Plaintiffs' lack of options for in-flight Internet service meant that Plaintiffs had no choice but to accept the terms of the arbitration clauses.[3] Plaintiffs were not allowed to negotiate the arbitration provision, and they did not have the opportunity to take their business elsewhere. The arbitration provision appeared in a take-it-or-leave-it format.

Gogo argues that the Terms of Use permitted consumers to opt out of arbitration and concludes Plaintiffs had a choice whether to accept the arbitration clauses. (Br. Defs.-Appellants 47–48, ECF No. 71.) The language of the opt-out provision, however, states that the Gogo user must opt out "WITHIN THIRTY (30) DAYS FROM THE DATE OF" the "PARTICULAR INTERACTION WITH THE SITE OR THE SERVICE." (R. at A71; *id.* at A81 (employing similar language with non-material variation).) Gogo's argument incorrectly presumes Plaintiffs could

[3] For sake of clarity, Plaintiffs note that the entirety of the argument in this Part II.B assumes, *arguendo*, both that the parties agreed to arbitrate Plaintiffs' claims (which they did not) and that Plaintiffs' claims fall within the scope of the arbitration clauses (which they do not).

have traveled back in time to opt out of the August 2011 and September 2012 transactions at issue. Because Plaintiffs could not have done so, they had no choice but to accept the arbitration clause.

For these reasons, the first two factors listed above weigh against Defendants.

Second, Gogo's Terms of Use from December 2012 and May 2013, the two Terms of Use in the record that contain arbitration provisions, are generally in fine print and continue on for ten pages. (R. at A64–73, A74–83.) Gogo correctly points out that the first page of the Terms of Use states that the agreement includes an arbitration clause and an opt-out provision. (Br. Defs.-Appellants 48, ECF No. 71.) The "fine print" factor either favors Gogo or is neutral.

Third, Plaintiffs are not attorneys and did not engage attorneys to assist them with signing up for Gogo's in-flight Internet service. Since they do not have legal educational backgrounds, Plaintiffs do not have the educational experience that would greatly assist them in interpreting, analyzing, and evaluating dense, complicated contractual provisions that were drafted by attorneys, such as the arbitration clauses Gogo submitted here.

Gogo argues that "if a party's lack of a law degree rendered a contract unconscionable, only 0.4% of the U.S. population could enter into valid contracts." (Br. Defs.-Appellants 48, ECF No. 71.) This argument misstates the legal standard and thereby arrives at an exaggerated conclusion. Under New York law, "the

experience and education of the party claiming unconscionability" is only one of five factors for courts to weigh when assessing whether a contract is procedurally unconscionable, *Metro. Prop. & Cas. Ins. Co.*, 95 F. Supp. 2d at 121, and courts evaluating whether a contract is unconscionable consider both procedural and substantive unconscionability, *NML Capital*, 621 F.3d at 237. Defendants have pointed to no authority indicating the "experience and education" factor alone is dispositive as to both procedural and substantive unconscionability or even carries any greater weight than the other four above-listed factors with respect to ascertaining whether the contract is procedurally unconscionable.

Thus, the "experience and education" factor weighs against Gogo.

Finally, there was an overwhelming disparity in bargaining power. Plaintiffs are individual natural persons. Gogo is a major corporation, with its stock traded on the NASDAQ. In 2013, Gogo made approximately $328 million in total revenue.[4] Further, as discussed above, Plaintiffs had no opportunity to negotiate the terms of the arbitration provision or to take their business elsewhere.

Gogo again argues that Plaintiffs had the option to opt out of the arbitration clause. (Br. Defs.-Appellants 48, ECF No. 71.) As Plaintiffs set out above, however,

[4] Gogo Inc., Annual Report (Form 10-K), at 54 (Mar. 14, 2014), *available at* http://www.sec.gov/Archives/edgar/data/1537054/000119312514100126/d659569d10k.htm.

Gogo is wrong, since Plaintiffs had no way to opt out of the transactions at issue. (*See supra* pp. 25–26.)

Thus, Gogo had far greater bargaining power than Plaintiffs.

In sum, four of the factors weigh against Gogo, and one factor either favors it or is neutral. The factors weigh heavily toward the conclusion that the contract is procedurally unconscionable.

2. The arbitration clauses are substantively unconscionable

"Because . . . the arbitration provision is suffused with a high degree of procedural unconscionability, only a moderate finding of substantive unconscionability is required to render the arbitration provision unconscionable." *Merkin v. Vonage Am. Inc.*, No. 2:13-CV-08026-CAS, 2014 WL 457942, at *9 (C.D. Cal. Feb. 3, 2014); *accord Armendariz v. Found. Health Psychcare Serv., Inc.*, 24 Cal. 4th 83, 99 (Cal. 2000). "Substantive unconscionability requires looking at the substance of the bargain and deciding whether the 'terms were unreasonably favorable to the party against whom unconscionability is urged.'" *Metro. Prop.*, 95 F. Supp. at 121; *see Ting v. AT&T*, 319 F.3d 1126, 1149 (9th Cir. 2003) ("Substantive unconscionability focuses on the one-sidedness of the contract terms."); *Armendariz*, 24 Cal. 4th at 115. Here, the delegation of arbitration is substantively unconscionable because Gogo carves out from the arbitration clauses those cases that only it would likely initiate, which unreasonably favors Gogo.

Courts in various jurisdictions have found that arbitration clauses that create the appearance of mutuality of obligation to arbitrate but, in truth, only require the weaker party to arbitrate are substantively unconscionable. *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 169–71 (5th Cir. 2004) (upholding district court's ruling that an arbitration agreement was unconscionable where claims consumers were likely to make had to be arbitrated while cellular provider's claims could go to court); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1173-74 (9th Cir. 2003) ("By essentially only covering claims that employees would likely bring against Circuit City, this arbitration agreement's coverage would be substantively one-sided[.]"); *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 785 (9th Cir. 2002).[5]

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[5] *Steele v. Am. Mortgage Mgmt. Servs.*, No. 2:12-CV-00085 WBS, 2012 WL 5349511, at *5 (E.D. Cal. Oct. 26, 2012); *Macias v. Excel Bldg. Serv., LLC*, 767 F. Supp. 2d 1002, 1009–10 (N.D. Cal. 2011) (finding the arbitration clause to be substantively unconscionable because the practical effect of the agreement was to limit only claims brought by weaker party against the stronger); *Independence Cnty. V. City of Clarksville*, 386 S.W.3d 395, 399–400 (Ark. 2012) ("[T]his court has consistently held that, where one party retains to itself the right to seek judicial relief, while the other party is strictly limited to arbitration, there is no mutuality of obligation."); *E-Z Cash Advance, Inc. v. Harris*, 60 S.W. 3d 436, 441 (Ark. 2001); *Palm Beach Motor Cars Ltd. v. Jeffries*, 885 So.2d 990, 992 (Fla. Dist. Ct. App. 2004) ("Where one party is bound to arbitration of its claims but the other is not, there can be substantive unconscionability."); *Iwen v. U.S. W. Direct, a Div. of U.S. W. Mktg. Res. Grp., Inc.*, 293 Mont. 512, 521–22 (Mont. 1999) (finding unconscionable an agreement where "the weaker bargaining party has no choice but to settle all claims arising out of the contract through final and binding arbitration, whereas the more powerful bargaining party and drafter has the unilateral right to settle a dispute for collection of fees pursuant to the agreement in a court of law");

The case of *Merkin v. Vonage America Inc.* is on point. In that case, the defendant exempted from arbitration, *inter alia*, collection disputes, intellectual property disputes, and unauthorized use, theft, or piracy of service disputes. *Merkin*, 2014 WL 457942, at *10. The Central District of California found that "[a]lthough these exceptions purport to be bilateral, these are in fact precisely the disputes that are most likely to be brought by Vonage, and least likely to be brought by the subscriber." *Id.* Noting that "California courts routinely find such one-sided arbitration agreements to be substantively unconscionable," the court held that the arbitration provision lacked "the requisite 'modicum of bilaterality'" and held the provision to be both substantively and procedurally unconscionable. *Id.* at *10–11.

Here, the December 2012 arbitration clause requires Plaintiffs to submit "any and all disputes and claims" to arbitration (or to small claims court), but if Plaintiffs "have in any manner infringed upon or violated or threatened to infringe upon or violate Gogo's or any third party patent, copyright, trademark, trade secret, privacy

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Rivera v. Am. Gen. Fin. Serv., Inc., 259 P.3d 803, 819 (N.M. 2011) ("American General's ability under the arbitration clause to seek judicial redress of its likeliest claims while forcing Rivera to arbitrate any claim she may have is unreasonably one-sided."); *Taylor v. Butler*, 142 S.W.3d 277, 286 (Tenn. 2004) (finding unconscionable an arbitration agreement where the claims the dealer would bring were carved out but the claims the buyer would bring had to go to arbitration); *Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 172–74 (Wis. 2006) (finding an arbitration agreement that allowed the drafter to take certain claims to court, but forced all the claims of the consumer to arbitration was one-sided and thus unconscionable).

or publicity rights," then Gogo or the third party may seek a remedy at law (and not in arbitration). (R. at A70.) The May 2013 arbitration clause contains virtually identical language. (*Id.* at A81.) Gogo's arbitration clauses do not even pretend to afford Plaintiffs the same rights as they afford Gogo, explicitly limiting the ability to sue in court to Gogo and not Plaintiffs. By the plain language of the arbitration clauses, Gogo has forced Plaintiffs to delegate actions they are likely to bring against it to arbitration, but carved out actions it is likely to bring against Plaintiffs, making the arbitration delegation unreasonably favorable to Gogo. *Merkin*, 2014 WL 457942, at *10.

Gogo argues Plaintiffs cannot establish substantive unconscionability because Plaintiffs retained the option to opt out of arbitration. (Br. Defs.-Appellants 49, ECF No. 71.) As Plaintiffs discussed above, however, the opt-out provision is ineffective with respect to Plaintiffs' claims in this case because Plaintiffs could not have traveled back in time to invoke the provision. (*See supra* pp. 25–26.)

Gogo also argues that under the clause, Plaintiffs can bring claims in small claims court, that Gogo generally will pay filing, administration, and arbitrator fees, and that Plaintiffs may collect attorneys' fees but Gogo generally may not. (Br. Defs.-Appellants 49, ECF No. 71.) Plaintiffs, however, cannot bring a class action in small claims court, which significantly undermines their ability to obtain effective relief, given the relatively low dollar value of their claims. Indeed, "[t]he policy at

the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1202 (2013) (citations and quotation marks omitted). Without the ability to aggregate their claims with the claims of other similarly situated persons, Plaintiffs' ability to obtain relief is impaired, and their incentive to pursue their claims is diminished. Furthermore, as Plaintiffs set forth above, they need only show a "moderate" degree of substantive unconscionability, since the clause exhibits a high degree of procedural unconscionability. *Merkin*, 2014 WL 457942, at *9.

Because the delegation of arbitration unreasonably favors Gogo, it is substantively unconscionable. *Id.* (finding provision substantively unconscionable because it "purports to mutually bind both parties to arbitration, but instead acts to systematically grant [defendants] the forum of their choice").

As shown above, the delegation of arbitration is both substantively and procedurally unconscionable, meaning it is unenforceable. Consequently, any agreement to arbitrate was not valid, and the Court should affirm the District Court's holding denying Gogo's motion to compel arbitration.

III. THE COURT SHOULD AFFIRM THE DISTRICT COURT'S DECISION NOT TO ENFORCE THE FORUM SELECTION CLAUSE

The District Court concluded that neither Plaintiff could, "at this stage of the litigation, be considered to have knowingly bound themselves to the purported terms

of an agreement adverse to them" (R. at A231), including the forum selection clause, and that each Plaintiff could bring claims in the Eastern District of New York (*id.* at A228–31). The District Court's decision that the parties did not form a binding contract that included the Terms of Use was correct. As the parties did not form a binding contract that included the Terms of Use, the parties necessarily did not agree to any forum selection clause. (*See infra* Part III.A.) Applying the 28 U.S.C. § 1404(a) factors on the current (incomplete) record and in light of the absence of agreement to any forum selection clause, transfer is unwarranted. (*See infra* Part III.B.) This Court should affirm the District Court's holding.

A. The District Court's Decision to Deny Transfer of Plaintiffs' Action under 28 U.S.C. § 1404(a) Was Correct Because the Forum Selection Clauses Are Invalid and Unenforceable

As a preliminary matter, Gogo presumes applicability of the wrong law. Gogo assumes the test set forth in *Martinez v. Bloomberg LP*, 740 F.3d 211 (2d Cir. 2014) governs the transfer inquiry here. Gogo is wrong. The test in *Martinez* deals with "whether the district court properly ***dismissed*** a claim based on a forum selection clause," *id.* at 217 (emphasis added), not with a transfer under 28 U.S.C. § 1404(a). The Supreme Court's decision in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988) ("*Stewart*"), and not *Martinez*, governs how the court should handle the forum selection provision here. *Stewart*, 487 U.S. at 28–29 (holding enforceability of a forum selection clause pursuant to Section 1404(a) motion should

not have been analyzed under the test from *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), which is similar to the test in *Martinez*, but rather decided under the Section 1404(a) balancing test).[6] Under *Stewart*, Section 1404(a) only "governs the District Court's decision whether to give effect to the parties' forum-selection clause" and transfer. *Stewart*, 487 U.S. at 23. The entirety of the analysis that should precede that question (*i.e.*, concerning whether the parties formed an agreement containing a forum selection provision in the first place) is a matter of state substantive law. *See Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1076–77 (11th Cir. 1987) (*en banc*) (Godbold, J., dissenting) ("The fallacy in characterizing the problem as 'just a dispute over venue' is that it leads [one] to conclude that because there is a federal venue statute the dispute is a procedural matter and

[6] *See also Martinez*, 740 F.3d at 221 (stating that Section 1404(a), "which represents 'merely a codification of the doctrine of *forum non conveniens*,' governs 'the subset of cases in which the transferee forum is within the federal system'; meanwhile, the 'residual doctrine of *forum non conveniens*,' which 'has continuing application in federal courts,' governs where the forum selection clause 'call [s] for a nonfederal forum'"); *TradeComet.com LLC v. Google, Inc.*, 647 F.3d 472, 478 (2d Cir. 2011) (holding that "*Stewart* deals with motions to transfer pursuant to § 1404(a), while *Bremen* . . . [addresses] the grant of dismissal or summary judgment based on a forum selection clause"); *Red Bull Assoc. v. Best W. Int'l, Inc.*, 862 F.2d 963 (2d Cir. 1988) (applying Section 1404(a) analysis and denying motion to transfer based on forum selection clause); *Weiss v. Columbia Pictures Television, Inc.*, 801 F. Supp. 1276, 1278 (S.D.N.Y. 1992) ("The proper methodology for addressing a motion to transfer under section 1404(a) was set out by the Second Circuit in *Red Bull* . . . This Court must determine whether the forum selection clause is valid with reference to the factors specified in section 1404(a)[.]").

therefore a federal matter. . . . *This case is not about what court is suitable. It is about an agreement to choose between suitable courts*." (emphasis in original)), *aff'd* 487 U.S. 22.

Applying, correctly, state law, the District Court appropriately decided that the parties had not entered into an agreement containing a forum selection clause and, consequently, declined to transfer Plaintiffs' case. As the District Court correctly stated, "[a] forum selection clause in an electronic contract of adhesion is a material term." (R. at A211.) "A material alteration is one that would result in *surprise* or *hardship* if incorporated without express awareness by the other party." (*Id.* (citing *Bayway Ref. Co. v. Oxygenated Mktg. & Trading A.G.*, 215 F.3d 219, 224 (2d Cir. 2000) (emphasis in original)).) The District Court also correctly stated that "[t]he burden of showing agreement to details of a contract on a website's contract of adhesion is on the vendors," since "[i]t is the vendor who designs the website and puts into it terms favoring itself." (*Id.* at A227.) *See also Steven v. Fid. & Cas. Co. of New York*, 377 P.2d 284, 294–95 (Cal. 1962); *Lachs v. Fid. & Cas. Co. of New York*, 118 N.E.2d 555, 558–59 (N.Y. 1954). "The burden should include the duty to explain the relevance of the critical terms governing the offeree's substantive rights contained in the contract," including forum selection clauses. (*See* R. at A193.) *See also Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 31–32, 35 (2d Cir. 2002).

As detailed herein and as the District Court correctly held, Gogo did not carry its burden to demonstrate that Plaintiffs specifically agreed to forum selection provisions in connection with the August 2011 and September 2012 transactions at issue. That is, Gogo did not show that Mr. Welsh specifically agreed to any forum selection clause when he purchased in-flight Internet service for one month in August 2011, and Gogo did not show that Mr. Berkson specifically agreed to any forum selection clause when he purchased in-flight Internet service for one month in September 2012.

Furthermore, even assuming Plaintiffs agreed to any forum selection clause (which they did not), by their plain language, none of the forum selection clauses in the record (R. at A54, A62, A72, A82) applies to Plaintiffs' action. Additionally, the forum selection clauses are procedurally and substantively unconscionable. Finally, Gogo's argument that Plaintiffs have supposedly failed to satisfy their burden to overcome a presumption of enforcement of the forum selection clause is misguided because it relies on applicability of the wrong law.

1. Gogo did not carry its burden to show that Plaintiffs specifically agreed to forum selection clauses in connection with their purchases at issue

"While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract." *Edme v. Internet Brands, Inc.*, 968 F. Supp. 2d 519, 525 (E.D.N.Y. 2013) (internal citation

and quotation marks omitted). "Mutual manifestation of assent, whether by written or spoken word or by conduct is one such principle." *Id.* (internal citation and quotation marks omitted). As Gogo does not dispute, "reasonable communication" is an alternate characterization of the mutual assent inquiry. (Br. Defs.-Appellants 55, ECF No. 71.)

Here, Gogo failed to meet its burden to demonstrate that the parties mutually assented to the forum selection clause or, characterized alternatively, of showing that Gogo reasonably communicated the forum selection clause to Plaintiffs. Indeed, the record, far from favoring Gogo on this point, shows that Mr. Berkson submitted a sworn declaration stating that he did not specifically assent to any forum selection provision at the point of sale in his September 25, 2012, transaction at issue. (R. at A112.) Similarly, Mr. Welsh submitted a sworn declaration stating that he did not specifically assent to any forum selection provision at the point of sale in his August 2011 transaction at issue. (*Id.* at A116.) Tellingly, neither Plaintiff provided Gogo with a signature or other form of affirmative authorization acknowledging assent to any forum selection provision in connection with their respective transactions at issue (*id.* at A112, A116), and Gogo has not shown otherwise. Consequently, neither Plaintiff agreed to litigate the claims at issue in the Northern District of Illinois, a forum to which they have no contacts.

2. By their plain language, none of the forum selection clauses applies to Plaintiffs' action

The forum selection clause Gogo claims was included in its Terms of Use as of August 2011 states that "any claim or dispute one party has against the other party ***arising under or relating to this Agreement*** . . . must be resolved exclusively by a court . . . located in Chicago, Illinois, and no other court." (R. at A54 (emphasis added); *see also id.* at A44, ¶ 3.) The forum selection clause Gogo claims was included in its Terms of Use as of September 25, 2012, includes an identical statement (*id.* at A62; *see also id.* at A44–45, ¶ 4), as do the forum selection clauses Gogo claims were included in its Terms of Use as of December 13, 2012 (*id.* at A72; *see also id.* at A45, ¶ 5) and May 20, 2013 (R. at A82; *see also id.* at A45, ¶ 6).

Plaintiffs' claims, however, do not "arise under or relate to" any version of the Terms of Use, and Plaintiffs do not seek to enforce any of the Terms of Use. Rather, Plaintiffs bring, among other things, tort claims and statutory consumer fraud claims asserting that Gogo engaged in fraud and false advertising separate and apart from the Terms of Use. (*E.g.*, *id.* at A29, ¶¶ 67–70 (alleging Gogo engaged in false advertising in violation of California's False Advertising Law, Cal. Bus. & Prof. Code § 17500 *et seq.*).) Under well-established consumer fraud principles, Gogo cannot remedy the deceptive nature of its prominent representations with hidden disclaimers. *See Williams v. Gerber Products Co.*, 552 F.3d 934, 939–40 (9th Cir. 2008) ("We do not think that the [United States Food and Drug Administration]

requires an ingredient list so that manufacturers can mislead consumers and then rely on the ingredient list to correct those misinterpretations and provide a shield for liability for the deception. Instead, reasonable consumers expect that the ingredient list contains more detailed information about the product that confirms other representations on the packaging."). Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing (R. at A30) also arises not from Gogo's Terms of Use, but instead from an implied contract based on a one month purchase of in-flight Internet access, which Gogo did not perform in good faith. Because Plaintiffs' claims do not "arise under or relate to" any Terms of Use, none of the forum selection clauses Gogo submitted applies to Plaintiffs' claims, by the plain language of each clause.[7]

Moreover, each of the Terms of Use provides that the Terms "will remain in full force and effect ***unless and until*** . . . your Account is terminated as provided herein. . . . You may terminate your Account at any time, for any reason[.]" (A49 (emphasis added); *accord* A57–58; A66; A76.) As Gogo concedes, Mr. Welsh canceled his service in February 2013. (R. at A39–40, ¶ 9 ("Gogo's records indicate

[7] Gogo offers circular reasoning in support of its argument that the language of the forum selection clauses covers Plaintiffs' case, which this Court should reject. Specifically, Gogo contends that the forum selection clause governs Plaintiffs' conduct "because that agreement governed the conduct of Gogo and Plaintiffs." (Br. Defs.-Appellants 57, ECF No. 71.) This Court should not overturn the sound decision of the District Court based on such a conclusory analysis.

that Mr. Welsh called to cancel his monthly service subscription in February of 2013, and Gogo complied.").) Thus, even assuming one or more incarnations of Gogo's Terms of Use applied to Mr. Welsh at some point (which they did not), Mr. Welsh affirmatively ended their applicability when he terminated his use of Gogo's services in February 2013; this is in accordance with the plain language of each set of the Terms of Use.

3. The forum selection clauses are unconscionable

The forum selection clauses are also procedurally and substantively unconscionable.

First, the forum selection clauses are procedurally unconscionable. The setting of the transaction unreasonably favors Gogo due to Plaintiffs' lack of in-flight Wi-Fi options and inability to negotiate. *See Stewart*, 2014 WL 324570 (denying Gogo Inc.'s motion to dismiss claims that Gogo Inc. "has violated, *inter alia*, federal antitrust law because it has an unlawful monopoly in the 'market for inflight internet access services on domestic commercial airline flights within the continental United States'"). Further, the forum selection clauses are generally in fine print, buried in the midst of around ten pages of legal provisions. Plaintiffs are not attorneys, and there was an overwhelming disparity in bargaining power between Plaintiffs, individuals, and Gogo, which brings in hundreds of millions of dollars in revenue a year. In sum, the weight of the applicable factors indicates the forum

selection clauses are procedurally unconscionable.

Second, because the forum selection clauses were suffused with a high degree of procedural unconscionability, only a moderate finding of substantive unconscionability is required to render the forum selection provisions unconscionable. *Hojnowski*, 2014 WL 408717, at *4. Here, Gogo chose the courts in Chicago, Illinois, because it is headquartered in Itasca, Illinois (*see* A17–18), which is virtually in Chicago. Plaintiffs, who are residents of New York and California, would incur significant expense to litigate in Chicago. Thus, the forum selection provision unreasonably favor Gogo's interests to the detriment of Plaintiffs.

Due to the high degree of procedural unconscionability and the significant degree of substantive unconscionability, the forum selection clauses as a whole are unconscionable and, consequently, unenforceable. As a result, the Court should evaluate the Section 1404(a) factors using a traditional analysis, as discussed below.

4. As the District Court correctly held, it is Gogo's burden to show that Plaintiffs specifically agreed to forum selection clauses in connection with their purchases at issue

Gogo argues that "Plaintiffs cannot make a sufficiently strong showing that enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching to overcome this presumption." (Br. Defs.-Appellants 57, ECF No. 71 (citing and quoting *Martinez*, 740 F.3d at 217) (internal

quotation marks and brackets omitted).) Gogo's argument is misplaced. As discussed above (*see supra* Part III.A), state law, and not the test set out in *Bremen*, governs whether the parties formed an agreement including a forum selection clause. Under state law, the burden is on Gogo to show that it brought material terms such as forum selection clauses to Plaintiffs' attention, and it has not met that burden. (*See supra* Part III.A, Part III.A.1.) For this additional reason, the Court should affirm the District Court's holding that the parties never agreed to the forum selection clause.

B. Under 28 U.S.C. § 1404(a), the District Court Should Have Retained Jurisdiction

The burden is on the moving party to show that transfer under Section 1404(a) is warranted. *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 106 (2d Cir. 2006). The decision of whether to transfer the case under Section 1404(a) involves an "individualized, case-by-case consideration." *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964); *New York Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc.*, 599 F.3d 102, 112 (2d Cir. 2010). In the Second Circuit, the factors the court may consider in determining whether to grant a motion to transfer venue under Section 1404(a) include but are not limited to:

> (1) the plaintiff's choice of forum, (2) the convenience of witnesses, (3) the location of relevant documents and relative ease of access to sources of proof, (4) the convenience of parties, (5) the locus of operative facts, (6) the availability of process to compel the attendance of unwilling witnesses, and (7) the relative means of the parties.

New York Marine & Gen. Ins. Co., 599 F.3d at 112 (internal citation and quotation marks omitted). "Some courts have identified additional factors, including (1) 'the forum's familiarity with governing law,' and (2) 'trial efficiency and the interest of justice, based on the totality of the circumstances.'" *EasyWeb Innovations, LLC v. Facebook, Inc.*, 888 F. Supp. 2d 342, 348 (E.D.N.Y. 2012).[8]

Because there is no valid agreement requiring Plaintiffs to litigate their claims in a different forum, the Court should evaluate transfer under a traditional Section 1404(a) analysis, not under the modified analysis set forth in *Atlantic Marine*. *Atlantic Marine*, 134 S. Ct. at 581 n.5 ("Our analysis presupposes a contractually valid forum-selection clause.").

Significantly, many of these factors (such as the location of witnesses and relevant documents) are an evidentiary issue that requires discovery to evaluate, and the parties did not conduct discovery on these issues.

Based on the incomplete record before the Court, the factors demonstrate that the District Court should have retained the action in Plaintiffs' choice of forum—the

[8] In *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*, 134 S. Ct. 568 (2013) ("*Atlantic Marine*"), the Supreme Court unequivocally held that a valid and otherwise enforceable forum selection clause is but one factor in determining whether to compel transfer under the balancing test set forth in Section 1404(a). *Atlantic Marine*, 134 S. Ct. at 581–83 (discussing adjustments courts must make to Section 1404(a) analysis in the event a forum selection clause is valid).

place where the first named plaintiff Mr. Berkson lives and where he purchased the services at issue. Moreover, since Gogo usually is offered on long haul—*i.e.*, transcontinental—flights, a substantial number of flights that involve Gogo are connected to New York-based airports. (*Cf.* R. at A109 ("United now offers Gogo® service on all p.s.® premium service transcontinental flights, which are available between New York (JFK) and both Los Angeles (LAX) and San Francisco (SFO).").)

First, Plaintiffs' choice of forum is "a decision that is given great weight." *D.H. Blair & Co., Inc.*, 462 F.3d at 107. "Thus, a plaintiff's choice of venue is entitled to significant consideration and will not be disturbed unless other factors weigh strongly in favor of transfer." *EasyWeb Innovations, LLC*, 888 F. Supp. 2d at 348 (internal citation and quotation marks omitted). The defendant must make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum. *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986). Moreover, "a plaintiff's choice of forum is entitled to [even] greater deference when the plaintiff has chosen the home forum." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981).

Here, Plaintiffs chose to sue in the Eastern District of New York. Furthermore, Mr. Berkson is a resident of New York, New York, and he was a resident of New York, New York, when he made his purchase at issue at LaGuardia Airport in New

York. (R. at A17, ¶ 14; *id.* at A19, ¶ 20.) Consequently, the Court should afford Mr. Berkson's forum choice great deference, which Gogo must make a very strong showing to overcome. *D.H. Blair & Co., Inc.*, 462 F.3d at 107; *Piper Aircraft Co.*, 454 U.S. at 255. Plaintiffs have also chosen counsel who are based in New York.

Second, the locus of a substantial number of the operative facts is within the Eastern District of New York. Mr. Berkson was living in New York, New York, when he made his purchase at issue at LaGuardia Airport in reliance on the false and misleading representations Gogo communicated to him there. (R. at A17, ¶ 14.) Mr. Berkson's economic injuries occurred within the Eastern District of New York. Thus, there are significant contacts relating Mr. Berkson's cause of action to New York. Similarly, the parties have numerous contacts with New York, as Gogo sells its services throughout the State and Mr. Berkson's purchase occurred in New York while he was living in New York.

Third, "[w]here a disparity exists between the means of the parties, such as in the case of an individual suing a large corporation, the court may consider the relative means of the parties in determining where a case should proceed." *EasyWeb Innovations, LLC*, 888 F. Supp. 2d at 354–55 (internal citations and quotation marks omitted). Here, Defendants are large corporations with vastly superior financial resources to Plaintiffs, who are individuals. Thus, this factor favors retention of Plaintiffs' action in New York.

Finally, several of the remaining factors are either neutral or favor keeping the case in this Court. First, both forums are able to compel the attendance of unwilling witnesses, so "the availability of process to compel" such attendance is a neutral factor. Second, the Eastern District of New York is more familiar with the governing law. Plaintiffs bring claims under New York and California law. (*E.g.*, A24–29.) As a result, a court in Illinois will be less familiar than this Court with the governing law. Third, the interests of justice favor litigation in New York because the State of New York has a strong interest in protecting persons injured within its borders by unfair and deceptive trade practices.

In sum, Plaintiffs' forum choice (a heavily-weighted factor), the locus of the injury, and the relative means of the parties all strongly favor keeping the action within the Eastern District of New York, and many of the remaining factors are neutral or suggest transfer would be inappropriate. The few factors that may arguably favor Defendants do not overcome the overwhelming weight of factors favoring denial of transfer under Section 1404. *See Whitney Lane Holdings, LLC v. Sgambettera & Associates, P.C.*, No. 08-cv-2966 JS, 2010 WL 4259797, at *3 (E.D.N.Y. Sept. 8, 2010) (argument that "virtually all non-party witnesses" were located in the proposed transferee district was unpersuasive because plaintiff's choice of forum was "presumptively entitled to substantial deference" and because the movant had not demonstrated that most witnesses existed in the transferee district

or would have difficulty testifying if forced to litigate in the original district).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court to deny Gogo's arguments in their entirety and to affirm the District Court.

Date: September 8, 2015

Respectfully submitted,

By: */s/ Michael R. Reese*

Michael R. Reese
REESE LLP
100 West 93rd Street, 16th Floor
New York, New York 10025
Telephone: (212) 643-0500

Counsel for Plaintiffs-Appellees Adam Berkson and Kerry Welsh and the Proposed Class

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), I hereby state as follows:

1. The foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 11,512 words, excluding the parts of the brief exempted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. The foregoing brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

Date: September 8, 2015

/s/ Michael R. Reese
Michael R. Reese

Counsel for Plaintiffs-Appellees and the Proposed Class