No. 16-2109

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

YILKAL BEKELE,

Plaintiff-Appellant,

v.

LYFT, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Massachusetts
No. 1:15-cv-11650, Hon. F. Dennis Saylor, IV

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 29 and 26.1(a), *amicus curiae* the Chamber of Commerce of the United States of America states that it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT ii
TABLE OF AUTHORITIES iv
INTEREST OF *AMICUS CURIAE* 1
INTRODUCTION AND SUMMARY OF THE ARGUMENT 3
ARGUMENT 5
I. Bekele's Procedural Unconscionability Argument Is Meritless 6
II. Bekele's Substantive Unconscionability Argument Is Meritless. 9
CONCLUSION 11
CERTIFICATE OF COMPLIANCE 12
CERTIFICATE OF SERVICE 13

TABLE OF AUTHORITIES

Page

Cases

AT&T Mobility LLC v. Concepcion,
563 U.S. 333 (2011) 7

Barrasso v. Macy's Retail Holdings, Inc.,
2016 WL 1449567 (D. Mass. Apr. 12, 2016) 7

Cullinane v. Uber Techs., Inc.,
No. 16-2023 (1st Cir. 2016) 1

Doctor's Associates, Inc. v. Casarotto,
517 U.S. 681 (1991) 9

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 8

Grabowski v. C.H. Robinson Co.,
817 F. Supp. 2d 1159 (S.D. Cal. 2011) 7

Large v. Conseco Fin. Servicing Corp.,
292 F.3d 49 (1st Cir. 2002) 11

Machado v. System4 LLC,
28 N.E.3d 401 (Mass. 2015) 6, 9, 10

McInnes v. LPL Fin., LLC,
466 Mass. 256 (2013) 7

Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
170 F.3d 1 (1st Cir. 1999) 6, 8, 9, 11

Ruhe v. Masimo Corp.,
2011 WL 4442790 (C.D. Cal. Sep. 16, 2011) 7

Storie vs. Household Int'l, Inc.,
2005 WL 3728718 (D. Mass. Sept. 22, 2005) 6

Zapatha v. Dairy Mart, Inc.,
381 Mass. 284 (1980) 7

Other Authorities

Aaron Smith, *Record Shares of Americans Now Own Smartphones, Have Home Broadband*, Pew Research Ctr. (Jan. 12, 2017) 8

The Rise of E-reading, Pew Research Ctr. (Apr. 4, 2012) 8

U.S. Dep't of Commerce, E-Stats 2016: Measuring the Electronic Economy (May 24, 2018) 3

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. It represents three hundred thousand direct members and indirectly represents the interests of more than three million U.S. businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community, including cases involving the enforceability of arbitration agreements. *See, e.g.*, *Cullinane v. Uber Techs., Inc.*, No. 16-2023 (1st Cir. 2016).

Many of the Chamber's members and affiliates conduct substantial business online. Indeed, hundreds of billions of dollars' worth of e-commerce transactions are conducted every year in the United States. The enforceability of online contracts is thus of critical importance to the Chamber and its members, as well as the Nation's economy more generally.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission. All parties have consented to the filing of this brief.

Moreover, many of the Chamber's members regularly employ arbitration agreements in their online contracts. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Based on the legislative policies reflected in the Federal Arbitration Act ("FAA") and the Supreme Court's consistent endorsement of arbitration, the Chamber's members have structured millions of contractual relationships—including enormous numbers of online contracts—around arbitration agreements.

Amicus thus has a strong interest in the proper resolution of this appeal.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The ramifications of accepting Plaintiff Yilkal Bekele's arguments here would be felt far beyond this case: Preventing parties from forming valid agreements using processes like Lyft's would frustrate their settled expectations, make it harder for them to do business, and be a drag on the information economy—which is only continuing to grow in importance to the U.S. economy as a whole. In 2016, the U.S. economy included nearly $609 billion in e-commerce transactions in the service industry. *See* U.S. Dep't of Commerce, E-Stats 2016: Measuring the Electronic Economy 1, bit.ly/2QZZZvi (May 24, 2018). And e-commerce transactions in the retail industry added over $389 billion to the economy. *Id.* Together, that amounts to nearly one trillion dollars in e-commerce transactions in 2016 from the service and retail industries alone. And those e-commerce transactions are growing, as they account for an increasingly large share of the value of transactions in the overall service and retail industries. *Id.* at 2. With the ubiquity of smartphones and tablets, these transactions are taking place on mobile devices rather than desktop computers. The enormous and rapidly expanding e-commerce sector naturally relies more and more on online contracts. And many of those contracts contain arbitration clauses, such as the one that the district court enforced below. Parties expect—and fairness demands—that these provisions be enforced.

This appeal concerns the enforcement of an arbitration clause contained in the Terms of Service Agreement that Lyft, Inc.—a mobile-based ridesharing platform—requires users to accept. As Lyft explains, it "requires all users (riders and drivers alike) to download the Lyft app to their mobile phones and complete a signup process to gain access to the Lyft platform." Br. for Defendant-Appellee Lyft, Inc. ("Lyft Br.") 5 (citing JA 17). During that process, a user is presented with a screen that displays "Lyft's Terms of Service Agreement, which describes the terms and conditions on which Lyft offers access to its platform." *Id.* (citing JA 17). The user "has the opportunity to scroll all the way through the text on this screen" and "must press the button labeled 'I accept' in order to proceed." *Id.* at 6 (citing JA 110).

The Terms of Service Agreement contains numerous provisions, among them one providing that drivers on the Lyft platform "are independent contractors" and that no "employee-employer ... relationship is intended or created" by the agreement. *Id.* at 6-7 (quoting JA 90). The Terms of Service Agreement also contains an arbitration clause, which is set off by "a large heading, in bold capital letters and on its own line, that reads: 'AGREEMENT TO ARBITRATE ALL DISPUTES AND LEGAL CLAIMS.'" *Id.* at 7 (quoting JA 88). The user "must read, agree with and accept all of the terms and conditions" in the Terms of Service Agreement before using the Lyft platform and app. *Id.* at 6 (quoting JA 18).

Plaintiff-Appellant Yilkal Bekele is a driver using the Lyft platform. After driving with Lyft for nearly a year, Bekele brought the present action, alleging that Lyft wrongfully classified drivers as independent contractors, rather than employees, in violation of the Massachusetts Wage Act. Bekele Br. Addendum ("Add.") 1.

In this appeal, Bekele seeks to evade the arbitration clause contained in the Terms of Service Agreement, notwithstanding the fact that he clicked the "I accept" button and indicated his assent to the entirety of that agreement no less than three separate times. Lyft Br. 8 (citing JA 19). Bekele argues that he did not have reasonable notice of the arbitration clause and thus never agreed to arbitration, *see* Supplemental Br. of Plaintiff-Appellant 6-15, and that the arbitration clause is unconscionable, *see* Opening Br. of Plaintiff-Appellant ("Bekele Br.") 41-50.

Amicus agrees with Lyft that Bekele's arguments are without merit. Lyft Br. 1-3, 17-52. *Amicus* writes separately to explain why Bekele's unconscionability arguments are particularly unpersuasive.

ARGUMENT

To prove that a contract is unconscionable under Massachusetts law, "a plaintiff must show both substantive unconscionability (that the terms are oppressive to one party) and procedural unconscionability (that the circumstances

surrounding the formation of the contract show that the aggrieved party had no meaningful choice and was subject to unfair surprise)." *Machado v. System4 LLC*, 28 N.E.3d 401, 414 (Mass. 2015) (quoting *Storie vs. Household Int'l, Inc.*, 2005 WL 3728718, at *9 (D. Mass. Sept. 22, 2005)). As the district court emphasized, this test is "conjunctive." Add. 18. Accordingly, Bekele must demonstrate that the arbitration clause in Lyft's Terms of Service Agreement is *both* procedurally and substantively unconscionable. Bekele bears a "heavy burden" in this regard. *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 17 (1st Cir. 1999). As explained below, Bekele has failed to meet this burden. Simply put, Bekele's unconscionability arguments are "meritless." Lyft Br. 3.

I. Bekele's Procedural Unconscionability Argument Is Meritless.

As noted above, in order to demonstrate procedural unconscionability, Bekele must show that "the circumstances surrounding the formation of the contract show that [he] had no meaningful choice and was subject to unfair surprise." *Machado*, 28 N.E.3d at 414 (quoting *Storie*, 2005 WL 3728718, at *9); *see* Bekele Br. 43-44. To advance his misclassification claim, Bekele argues that the arbitration clause contained in Lyft's Terms of Service Agreement is procedurally unconscionable because that agreement is "an adhesion contract" imposed upon him "as a condition of employment" and because he lacked equal

bargaining power with Lyft. Bekele Br. 44-45.[2] Bekele also argues that the Terms of Service Agreement was presented to him in "fine print … on a tiny iPhone screen." *Id.* at 45. Both points fail.

That Lyft's arbitration clause was contained in a standard-form agreement as a condition of his use of the Lyft platform does not render it procedurally unconscionable. Indeed, this argument is nothing more than a blanket attack on standardized contracts that, as the district court correctly recognized, is routinely rejected by Massachusetts courts. Add. 23 (citing *McInnes v. LPL Fin., LLC*, 466 Mass. 256, 266 (2013) (contract for account with financial advisor); *Zapatha v. Dairy Mart, Inc.*, 381 Mass. 284, 293 n.12 (1980) (credit card application); *Barrasso v. Macy's Retail Holdings, Inc.*, 2016 WL 1449567, at *6 (D. Mass. Apr. 12, 2016) (employment agreement); *Storie*, 2005 WL 3728718, at *9 (mortgage loan agreement)).[3] In a related vein, this Court and the Supreme Court (among many others) have held that "inequality in bargaining power 'is not a sufficient

[2] Lyft of course disputes that it has any employment relationship with Bekele. Lyft Br. 38 n.12.

[3] And for good reason. "[T]he times in which consumer contracts were anything other than adhesive are long past," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346-47 (2011), and numerous courts since *Concepcion* have concluded that the same is true of contracts involving employees or independent contractors. *See, e.g.*, *Grabowski v. C.H. Robinson Co.*, 817 F. Supp. 2d 1159, 1172 (S.D. Cal. 2011); *Ruhe v. Masimo Corp.*, 2011 WL 4442790, at *3 (C.D. Cal. Sep. 16, 2011).

reason to hold that arbitration agreements are never enforceable in the employment context.'" *Rosenberg*, 170 F.3d at 17; *accord Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) ("Mere inequality in bargaining power ... is not a sufficient reason to hold that arbitration agreements are never enforceable."); *see also* Lyft Br. 39-40 n.13.

Bekele's complaint that the Lyft Terms of Service Agreement was hidden in small print on his smartphone fares no better. As an initial matter, this argument is an attack on contracting by smartphone altogether, which is out of step with the ubiquity of smartphones[4] and the ease and frequency with which people now read documents (including entire books) via smartphones[5]—not to mention the growing segment of service and retail contracting done via smartphones, *see supra* at 3. Moreover, the district court found that the arbitration clause was prominently identified with a "clearly-worded, bolded, all-caps header in a font size that is larger than the text of the provision itself." Add. 22. To the extent that Bekele insists that Lyft should have set off the arbitration clause further or presented it in

[4] The Pew Research Center reports that "[r]oughly three quarters of Americans (77%) now own a smartphone." Aaron Smith, *Record Shares of Americans Now Own Smartphones, Have Home Broadband*, Pew Research Ctr. (Jan. 12, 2017), pewrsr.ch/2igZgbJ.

[5] As of 2012, more than one-fifth of American adults had read an e-book within the previous year, and 29% of them "consume their books on their cell phones." *The Rise of E-reading*, Pew Research Ctr. (Apr. 4, 2012), pewrsr.ch/2Q7V52g.

an entirely "separate document," Bekele Br. 45-47, this argument is preempted by the FAA. *See Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1991) (holding that the FAA preempts state-law rules that impose special-notice requirements for arbitration provisions).

On a more practical level, the idea that Bekele was unfairly surprised or subjected to an oppressive contracting process is nonsensical, given that he first assented to the Lyft Terms of Service Agreement by clicking the "I accept" button at his leisure and then did so twice more. As the district court put it, Bekele "had every incentive to read the document, and an unlimited amount of time in which to do so…. [His] acceptance of the [Terms of Service] on three separate occasions … weighs against a finding of unfair surprise or oppressive formation." Add. 23. Bekele thus failed to meet the "heavy burden" of proving procedural unconscionability. *Rosenberg*, 170 F.3d at 17.

II. Bekele's Substantive Unconscionability Argument Is Meritless.

As noted above, in order to demonstrate substantive unconscionability, Bekele must show that the terms of the arbitration clause "are oppressive to [him]." *Machado*, 28 N.E.3d at 414. Bekele argues that two provisions of the Terms and Services Agreement render the arbitration clause substantively unconscionable. Neither argument has any merit.

First, Bekele argues that the modification provision contained in the Terms of Service Agreement is substantively unconscionable. Bekele Br. 50. But the modification provision is not even part of the arbitration clause; it is found elsewhere in the Terms of Service Agreement. As the district court recognized, it is thus "not part of the Court's substantive-unconscionability analysis." Add. 24 n.17. Moreover, courts regularly uphold modification provisions like this one against unconscionability challenges. *See* Lyft Br. 51 (collecting cases).

Bekele next argues that the arbitration agreement is substantively unconscionable because it invokes the AAA's Commercial Arbitration Rules, which Bekele contends require splitting arbitration fees. Bekele Br. 48-49. While this argument is directed to the arbitration agreement, it too fails. Leaving aside whether Bekele is correct about what AAA's rules would actually require, the Massachusetts Supreme Judicial Court has held that the Massachusetts Wage Act overrides any cost-splitting agreement and affords fees to prevailing plaintiffs. *See Machado*, 28 N.E.3d at 414 ("As for cost-splitting, we made clear in *Machado* [*v. System4 LLC*, 989 N.E.2d 464 (Mass. 2013)] that the mandates of the Wage Act would override this provision if the plaintiffs were successful in arbitration."). On top of that, Lyft offered to waive any fee-splitting provisions and pay for all arbitration fees so that Bekele would not have to incur any costs in arbitration. Numerous courts have held that such an offer defeats any claim of

unconscionability based on fee-splitting. *See Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49, 56-57 (1st Cir. 2002); Lyft Br. 48-49 n.15.

* * *

It is worth emphasizing—just as the district court did—that Bekele bears a "heavy burden" of demonstrating that the arbitration clause is both procedurally and substantively unconscionable. Add. 17 (quoting *Rosenberg*, 170 F.3d at 17); *id.* at 19 (same); *id.* at 24 (same). Because "Bekele has shown neither," Lyft Br. at 37, the district court was correct to reject his challenge to the arbitration agreement.

CONCLUSION

The Court should affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Rules 29(a)(5) and 32(a)(7) because it contains 2,310 words, excluding the items that may be excluded; and complies with the typeface and type-style requirements of Rule 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s/ Bryan K. Weir
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CERTIFICATE OF SERVICE

I certify that on November 20, 2018, I electronically filed this brief with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

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