COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL

JILLIAN KEMENOSH *Plaintiff,* v. UBER TECHNOLOGIES, INC., et al. *Defendants.*	November Term, 2018 Case No. 181102703 Control No. 19042403

OPINION

This personal injury claim arises from a March 18, 2018 motor vehicle accident. Plaintiff Jillian Kemenosh alleges that she sustained serious injuries on a car ride she procured from defendant Uber Technologies, Inc. ("Uber") via its mobile phone application (the "Uber app"). Defendants Uber, Gegen LLC, Rasier-PA, LLC and Rasier, LLC[1] (the "Uber Defendants") have moved to compel arbitration, arguing that Ms. Kemenosh entered a binding arbitration agreement when she initially registered for the Uber app in 2013, or alternatively when Uber sent an email to Ms. Kemenosh in November 2016 updating its terms of use. For the reasons explained below, the Court finds that Ms. Kemenosh and Uber did not enter into a valid agreement to arbitrate in either 2013 or 2016, and therefore denies the defendants' motion.

[1] Gegen LLC, Rasier-PA, LLC and Rasier, LLC are wholly owned subsidiaries of Uber. (Amended Complaint, ¶¶4-11, Dkt. at 2/22/2019; Uber Answer to Amended Complaint, ¶¶ 4-11, Dkt. at 3/27/2019).

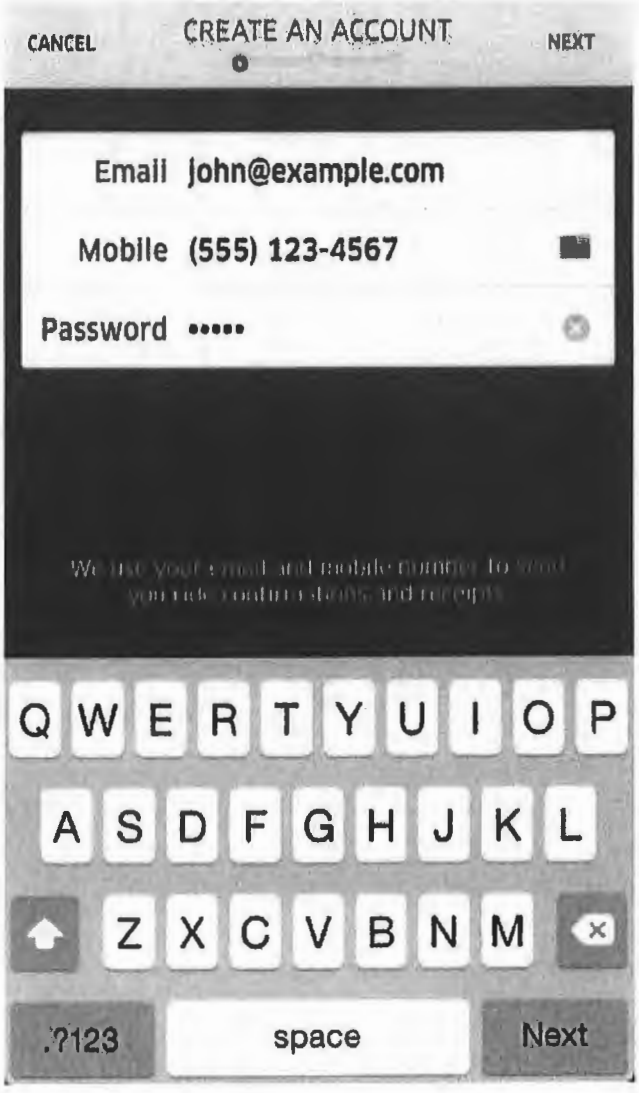
FACTS

A. Ms. Kemenosh's Registration on the Uber App

The Uber app provides users with a means of electronically procuring transportation from local drivers. (Paul Holden Affidavit ("Holden Aff."), ¶ 2, Dkt. at 10/30/2019). In October 2013, Ms. Kemenosh registered to use the Uber app on her mobile phone. (Jillian Kemenosh Affidavit ("Kemenosh Aff."), attached to Plaintiff's Supplemental Memorandum of Law in Opposition to Defendants Uber, Gegen LLC, Rasier-PA, LLC and Rasier, LLC's Petition to Compel Arbitration as Ex. A, ¶ 1, Dkt. at 11/26/2019). Ms. Kemenosh regularly used the Uber app between October 2013 and March 2018. (Alejandra Vasquez Affidavit ("Vasquez Aff."), ¶ 6, Dkt. at 10/30/2019).

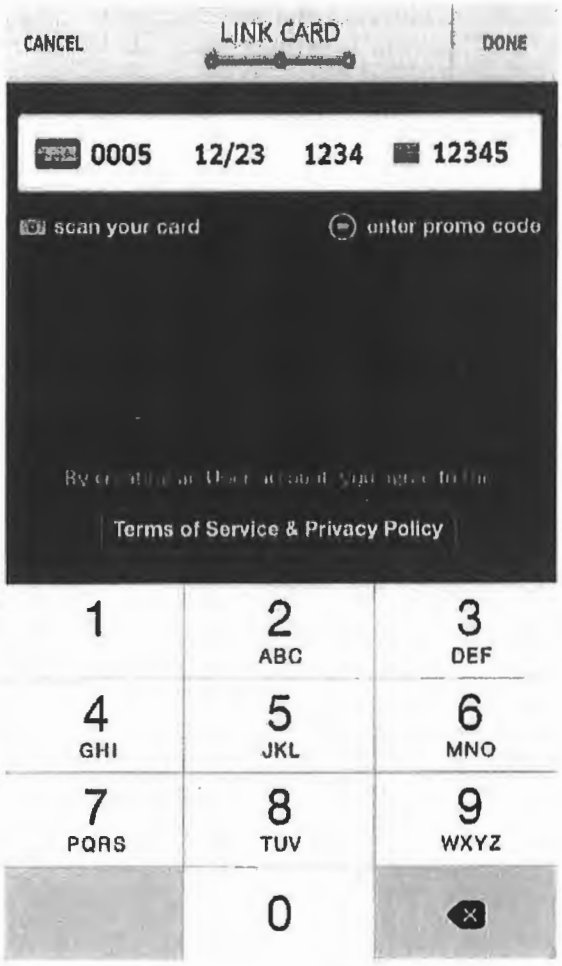
Paul Holden, an Uber software engineer from 2012 to 2018, submitted an affidavit declaring that he reviewed Uber's business records, which Uber keeps in the regular course of business and with which he is familiar. (Holden Aff., ¶ 3). According to Mr. Holden's affidavit, Uber's records corroborated that Ms. Kemenosh used an iPhone to register for the Uber app on October 12, 2013. (*Id.* at ¶¶ 3-5). Furthermore, Mr. Holden states that he accessed screenshots that represent what Ms. Kemenosh would have seen on her iPhone during her October 2013 registration process. (*Id.* at ¶ 6). The screenshots are attached to his affidavit (*Id.* at Ex. B).

According to Mr. Holden, to register for the Uber app in October 2013, Ms. Kemenosh had to enter her information in the following "Create an Account" screen:



Next, Ms. Kemenosh would have been prompted to enter her information in the "Create a Profile" screen:

(*Id.* at Ex. B1-B5). After entering the appropriate information, Ms. Kemenosh would have been prompted to enter her payment information in the following screen:



(*Id.* at Ex. B1-B5). This screen reads, "By creating an Uber account you agree to the Terms of Service and Privacy Policy." (*Id.*) According to Mr. Holden, the box that reads "Terms of Service and Privacy Policy" was a hyperlink that would have displayed the terms of service then in effect if the user clicked through to them. (*Id.* at ¶ 6(c)). Mr. Holden's affidavit states that once Ms. Kemenosh entered her credit card information, a "Done" button would have appeared in the upper right hand corner, which when clicked served to complete the registration process. (*Id.* at ¶ 6(d)). Mr. Holden's also states that Ms. Kemenosh would not have been able to register

for the Uber app in October 2013 without going through this process. (*Id.* at ¶ 7). Ms. Kemenosh asserts that while she did register for Uber in 2013, she did not see the terms of service hyperlink, did not click on any hyperlinks, and did not review the terms of service. (Kemenosh Aff., ¶¶ 2-5).

B. The Terms and Conditions in Effect in October 2013

Alejandra Vasquez, an Uber senior paralegal, submitted an affidavit declaring that she reviewed Uber's business records, which were maintained in the regular course of business, and with which she is familiar. (Vasquez Aff., ¶ 4). Ms. Vasquez states that she located the terms and conditions in effect in October 2013 ("2013 Terms"), which Mr. Holden references in his affidavit. (Terms and Conditions ("2013 Terms"), attached to Vasquez Aff. as Ex. C). The 2013 Terms contain a "Dispute Resolution" clause that states:

> You and [Uber] agree that any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof or the use of the Service or Application (collectively, "Disputes") will be settled by binding arbitration [...] **You acknowledge and agree that you and Company are each waiving the right to a trial by jury or to participate as a plaintiff or class User in any purported class action or representative proceeding.**

(*Id.*)(emphasis in original). In her affidavit, Ms. Kemenosh declared that she did not review and was not required to review these provisions when she registered to use Uber in October 2013. (Kemenosh Aff., ¶¶ 2-6).

C. The November 2016 Email

According to Ms. Vasquez's affidavit, Uber's business records show that Uber sent Ms. Kemenosh an email on November 14, 2016, with the subject, "We've updated our Terms of Use." (Vasquez Aff., ¶ 7). The email reads in part, "We revised our arbitration agreement which

explains how legal disputes are handled." (Email, attached to Vasquez Aff. as Ex. F). It also states:

> Our updated Terms are effective as of November 21, 2016, so please make sure to read them fully (you can access them **here**). If you use our app or other services on or after that date, you're confirming you've read and agree to the updated Terms.

(*Id.*)(emphasis in original). According to Ms. Vasquez, the word "here" in the email was displayed in a "bright green hyperlinked text" which, when clicked, led to the updated terms and conditions ("2016 Terms"). (Vasquez Aff., ¶ 7). Ms. Vasquez declared that, according to Uber's records, Ms. Kemenosh continued using the Uber app regularly after November 14, 2016. (Vasquez Aff., ¶ 9; Kemenosh Uber Records, attached to Vasquez Aff. as Ex. D).

The 2016 Terms contained an arbitration clause, which states:

> You and Uber agree that any dispute, claim or controversy arising out of or relating to (a) these Terms or the existence, breach, termination, enforcement, interpretation or validity thereof, or (b) your access to or use of the Services at any time, whether before or after the date you agreed to the Terms, will be settled by binding arbitration between you and Uber, and not in a court of law.

(Vasquez Aff., ¶ 8; Terms and Conditions ("2016 Terms"), attached to Vasquez Aff. as Ex. G, § 2).

Ms. Kemenosh's affidavit states that she neither received nor read the November 14, 2016 email or the 2016 Terms and Conditions. (Kemenosh Aff., ¶¶ 7-13). Brian Kubiak, an Uber senior paralegal, submitted an affidavit declaring that Uber's records show that the email was sent to the email address associated with Ms. Kemenosh's account, and that it did not "bounce back." (Brian Kubiak Affidavit ("Kubiak Aff."), attached to Supplemental Memorandum of Law in Further Support of the Petition to Compel Arbitration of Defendants, Uber Technologies, Inc., Gegen LLC, Rasier-PA, LLC and Rasier, LLC, ¶ 5 , Dkt. 11/26/2019)

D. Procedural History

Ms. Kemenosh commenced this personal injury action on November 27, 2018, alleging that on March 18, 2018 she procured a car ride through the Uber app and sustained injuries after the driver ran a red light and hit another vehicle. (Complaint, Dkt. at 11/27/2019). On December 19, 2019, defense counsel entered its appearance on behalf of the Uber Defendants and requested a jury trial. (Dkt. at 12/19/2019). On the same date, the Uber Defendants filed preliminary objections to Ms. Kemenosh's complaint, seeking to strike her recklessness claims. (Preliminary Objections of Uber Technologies, Inc., Gegen LLC, Raiser-PA, LLC and Raiser, LLC to Plaintiff's Complaint, Dkt. 12/19/2019). After Ms. Kemenosh answered the objections, they were sustained on February 4, 2019 without prejudice to refile recklessness claims. (Order, Dkt. at 2/4/2019). On February 22, 2019, Ms. Kemenosh filed an amended complaint. (Amended Complaint, Dkt. at 2/22/2019). On March 27, 2019, Uber Defendants answered the amended complaint, raising for the first time as new matter that Ms. Kemenosh had waived her right to file a complaint in this Court by agreeing to Uber's arbitration terms. (Answer with New Matter of defendants Uber Technologies, Inc., Gegen LLC, Raiser-PA, LLC and Raiser, LLC, ¶ 12 of New Matter, Dkt. at 3/27/2019). Ms. Kemenosh filed a reply to the new matter, denying Uber's contentions. (Reply to New Matter, ¶ 12, Dkt. at 4/15/2019). On April 18 2019, Uber filed the petition to compel arbitration before this Court. (Petition to Compel Arbitration of Uber Technologies, Inc., Gegen LLC, Rasier-PA, LLC and Rasier, LLC, Dkt. ("Uber Petition") at 4/18/2019).

DISCUSSION

The Uber Defendants seek to compel Ms. Kemenosh to arbitrate her claims under the Federal Arbitration Act, which provides that arbitration agreements must be enforced if they are valid under contract law, stating:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C.A. § 2 (West, Westlaw through P.L. 116-91). The Uber Defendants also rely on Pennsylvania's Uniform Arbitration Act, which also requires courts to compel arbitration where a valid agreement to arbitrate exists. It provides:

> On application to a court to compel arbitration made by a party showing an agreement described in section 7303 (relating to validity of agreement to arbitrate) and a showing that an opposing party refused to arbitrate, the court shall order the parties to proceed with arbitration. If the opposing party denies the existence of an agreement to arbitrate, the court shall proceed summarily to determine the issue so raised and shall order the parties to proceed with arbitration if it finds for the moving party. Otherwise, the application shall be denied.

42 Pa. Stat. and Cons. Stat. Ann. § 7304 (West, Westlaw through 2019 Regular Session Act 91). Ms. Kemenosh contends that the Court cannot compel arbitration because she did not enter into a valid arbitration agreement with Uber. (Memorandum of Law in Support of Plaintiff's Answer in Opposition to Defendants Uber Technologies, Inc., Gegen LLC, Raiser-PA, LLC and Raiser, LLC's Petition to Compel Arbitration ("Kemenosh Memorandum of Law"), at 5, Dkt. at 5/8/2019).

A. Scope of Review Under the Federal Arbitration Act

As a preliminary matter, the Court must determine whether, under the Federal Arbitration Act, it can review Ms. Kemenosh's challenge to Uber's arbitration clause, or whether it must delegate that decision to an arbitrator.

The parties to an arbitration agreement may explicitly agree to delegate questions of arbitrability to an arbitrator through a "delegation clause," and courts must abide by these provisions. *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524, 528 (2019). The delegable questions of arbitrability include "whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Ctr., Inc. v. Jackson,* 561 U.S. 63, 69 (2010). Nevertheless, "[t]he issue of the agreement's 'validity' is different from the issue whether any agreement between the parties 'was ever concluded.'" *Id.* at 71 n. 2. When parties have not agreed to arbitrate, the FAA does not require parties to do so. *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior U.*, 489 U.S. 468, 478 (1989). As such, "before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists." *Schein*, 139 S. Ct. at 530.

The Uber Defendants argue that the language in the arbitration provisions of the 2013 and 2016 Terms stating that the "interpretation and validity" of its terms is subject to arbitration requires this Court to delegate to an arbitrator the issue of whether a valid arbitration agreement exists. (Memorandum of Law, attached to Petition to Compel Arbitration of Uber Technologies, Inc., Gegen LLC, Rasier-PA, LLC, and Rasier, LLC, IV.B, Dkt. at 4/18/2019). This argument fails because the issue of whether an arbitration agreement was formed at all is not delegable. This Court cannot compel Ms. Kemenosh to arbitrate ***any*** issue under the 2013 and 2016 terms unless she agreed to arbitrate. *Volt Info. Scis., Inc.*, 489 U.S. at 478 (1989). The Court therefore

must determine whether an arbitration agreement exists between Ms. Kemenosh and the Uber Defendants.

B. Arbitration Agreement Formation

1. Pennsylvania Law on Arbitration Agreement Formation

Under the Federal Arbitration Act, courts apply the ordinary state-law principles governing contract formation in the relevant state when determining whether a valid arbitration agreement exists. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).[2] Pennsylvania courts "generally apply ordinary state law contract principles, but in doing so, must give due regard to the federal policy favoring arbitration." *Bair v. Manor Care of Elizabethtown, PA, LLC*, 108 A.3d 94, 96 (Pa. Super. 2015).

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[2] The Uber Defendants argue that under a choice-of-law provision in the 2016 Terms, California law should apply. (2016 Terms, § 7). "[T]he first step in a choice of law analysis under Pennsylvania law is to determine whether a conflict exists between the laws of the competing states." *Budtel Associates, LP v. Contl. Cas. Co.*, 915 A.2d 640, 643 (Pa. Super. 2006). "If no conflict exists, further analysis is unnecessary. If a conflict is found, it must be determined which state has the greater interest in the application of its law." *Id.* An actual conflict exists if "there are relevant differences between the laws." *McDonald v. Whitewater Challengers, Inc.*, 116 A.3d 99, 106 (Pa. Super. 2015). There is a material difference between California law, which requires arbitration clauses to be conspicuous, and Pennsylvania law, which does not require that material contract terms be conspicuous to be enforceable. *Compare Windsor Mills, Inc. v. Collins & Aikman Corp.*, 101 Cal. Rptr. 347, 351 (Cal. App. 2d Dist. 1972) ("an offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious") *with Fellerman v. PECO Energy Co.*, 159 A.3d 22, 27 (Pa. Super. 2017)("As a general principle, minimum conspicuity standards are not a requirement to establish the formation of a contract.") Pennsylvania law applies in this case because Pennsylvania has a greater interest in the application of its law. It is undisputed that Ms. Kemenosh is a Pennsylvania resident and all of the services that give rise to her claim occurred in Pennsylvania. (Amended Complaint, ¶¶ 4-11). Moreover, while the choice of law provision in the 2016 Terms states that California law governs, it also states "[t]he foregoing choice of law and forum selection provisions do not apply to the arbitration clause in Section 2 or to any arbitrable disputes as defined therein." (2016 Terms, §7). Even if Ms. Kemenosh had assented to this choice-of-law provision, by its own terms, it would be inapplicable to the interpretation of the arbitration provision.

Under Pennsylvania law, "[t]he touchstone of any valid contract is mutual assent and consideration." *Id.* Mutual assent consists of a "meeting of the minds," whereby "both parties mutually assent to the same thing, as evidenced by an offer and its acceptance." *Prieto Corp. v. Gambone Const. Co.*, 100 A.3d 602, 609 (Pa. Super. 2014). An offer is "a manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *O'Brien v. Nationwide Mut. Ins. Co.*, 689 A.2d 254, 258 (Pa. Super. 1997)(citing Restatement (Second) of Contracts § 24). Moreover, an offer must be "intentional, definite, in its terms and communicated; otherwise, no meeting of the minds can occur." *Stumpp v. Stroudsburg Mun. Auth.*, 658 A.2d 333, 335 (Pa. 1995). Finally, the parties must agree to "the material and necessary details of their bargain." *Peck v. Delaware Cty. Bd. of Prison Inspectors,* 814 A.2d 185, 191 (Pa. 2002) (*citing Lombardo v. Gasparini Excavating Co.,* 123 A.2d 663, 666 (Pa. 1956)).

Pennsylvania courts have not directly addressed the issue of contract formation in the context of online user agreements. However, recent Superior Court precedent illustrates the criteria Pennsylvania courts consider in examining the formation of agreements to arbitrate. For example, *Fellerman v. PECO Energy Co.* involved a paper agreement between a home inspector and its customer. 159 A.3d 22, 27 (Pa. Super. 2017). The customer signed the agreement, which contained a bold statement in capital letters that read, "PLEASE READ CAREFULLY BEFORE SIGNING." *Id.* It also contained an arbitration provision. *Id.* at 24. After the plaintiff filed suit, the defendant moved to compel arbitration, and the plaintiff challenged the arbitration provision as "smudged, blurry, in small print, and incomplete, and not providing proper notice of the rights being waived by the plaintiff." *Id.* The Superior Court rejected the plaintiff's argument on the basis that, under Pennsylvania law, "minimum conspicuity standards are not a requirement to

establish the formation of a contract" and "conspicuity per se is not an essential element of contract formation." *Id.* (*citing Hinkal v. Pardoe*, 133 A.3d 738 (Pa. Super. 2016)).

Bair v. Manor Care of Elizabethtown, PA, LLC provides an example of what criteria may render an arbitration agreement invalid under Pennsylvania law. *Bair* involved a form with "blanks on the first page for the insertion of the names of the contracting parties and the date," none of which were completed. 108 A.3d 94, 96 (Pa. Super. 2015). Moreover, the form stated that "arbitration is described in the voluntary arbitration program brochure," a copy of which is "attached and made part of this agreement." *Id.* The brochure, however, was not attached to the agreement. *Id.* Finally, while the plaintiff signed the form, the signature line for the defendant was blank. *Id.* The defendant moved for arbitration, contending that "its presentation of the form agreement to Ms. Bair constituted an offer to arbitrate; by signing the agreement, Ms. Bair accepted the offer." *Id.* at 97. The Superior Court rejected the defendant's argument, holding that there was no meeting of the minds, because the form "lacked essential terms such as the names of the contracting parties, the date of the agreement, and the brochure describing the arbitration process, which was expressly made part of the agreement." *Id.* at 98. As the *Bair* court noted, "[A]n offer to contract must be intentional and sufficiently definite in its terms, and no offer will be found to exist where its essential terms are unclear." *Id.*

2. The 2013 Terms

The Uber Defendants contend that Ms. Kemenosh entered a valid arbitration agreement because she could not have registered for the Uber App in October 2013 without clicking on the "Done" button on the "Link Card" screen below:

(Uber Petition, ¶¶ 1-15; Holden Aff., Ex. B-7). Uber further argues that Ms. Kemenosh received reasonable notice of the arbitration agreement by completing the registration process through the screen above. (Uber Petition, ¶ 55). Ms. Kemenosh responds that she did not enter into an arbitration agreement because the 2013 registration process did not give reasonable notice of an

offer to enter into an agreement to arbitrate. (Kemenosh Memorandum of Law, attached to Plaintiff's Answer to Uber Petition, 5-9, Dkt. at 5/8/2019).[3]

During Ms. Kemenosh's October 2013 registration process, the words "by creating an Uber account you are agreeing to the Terms of Service and Privacy Policy" were the sole means by which Uber communicated its purported offer to arbitrate to Ms. Kemenosh. According to the affidavit of Paul Holden, the box that reads "Terms of Service and Privacy Policy" was a clickable hyperlink that would have displayed the terms of service then in effect if Ms. Kemenosh had clicked through to read them. (Holden Aff., ¶ 6(c)). According to Ms. Vasquez, these terms included the arbitration clause. (Vasquez Aff., ¶ 4). It is undisputed that Ms. Kemenosh was not required to click on the hyperlink to complete her October 2013 registration. (Kemenosh Aff., ¶ 6; Holden Aff., ¶ 6(c)). It is further undisputed that Uber did not suggest to Ms. Kemenosh that she should read the Terms and Conditions before clicking "Done." (Holden Aff., ¶ 6(c)).

Based on these undisputed facts, the Court finds that the screens presented to Ms. Kemenosh in the 2013 registration process did not properly communicate an offer to arbitrate under Pennsylvania law. It is well settled that, to be valid, an offer must be "intentional, definite, in its terms and communicated; otherwise, no meeting of the minds can occur." *Stumpp*, 658

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[3] In making these arguments, both parties rely on cases from other jurisdictions. Ms. Kemenosh relies on *Cullinane v. Uber Techs., Inc.*, in which the First Circuit, applying Massachusetts law, examined a registration process with nearly identical screens as the case at bar. 893 F.3d 53 (1st Cir. 2018). In that case, the First Circuit held that there was not a valid arbitration agreement because the terms of service were not conspicuous and Uber therefore did not give reasonable notice of the arbitration clause. *Id.* at 62-64. Uber largely relies on *Meyer v. Uber Techs., Inc.*, in which the Second Circuit, applying California law, examined a different registration interface and found that it "provided reasonably conspicuous notice of the Terms of Service." 868 F.3d 66, 79 (2d Cir. 2017). In *Fellerman,* the Superior Court expressly rejected the conspicuousness analysis the *Meyer* and *Cullinane* courts employ. 159 A.3d at 27. Therefore, these cases are unpersuasive under Pennsylvania law.

A.2d at 335. Uber presents no authority for the proposition that, under Pennsylvania law, its hyperlinked message constitutes an offer to arbitrate. This case is distinguishable from *Fellerman*, in which the plaintiff signed a physical copy of a contract containing an arbitration agreement and the words "PLEASE READ CAREFULLY BEFORE SIGNING" printed in bold. 159 A.3d at 27. In *Fellerman*, the Superior Court based its holding on the fact that the plaintiff's challenge of the arbitration provision's conspicuousness lacked any foundation in Pennsylvania law. *Id. Fellerman* does not control because the deficiency in Uber's registration process is not its inconspicuousness but rather its failure to adequately communicate an offer to arbitrate in a definite manner, so as to create a meeting of the minds.

It is generally understood that Uber offers transportation in exchange for money. (Holden Aff., ¶ 2; Kemenosh Aff., ¶ 12). Therefore, the words "by creating an Uber account you are agreeing to the Terms of Service and Privacy Policy" convey that by creating an Uber account one is agreeing to pay money in exchange for transportation, and to the terms of a privacy policy. They do not convey an offer to arbitrate, or notify the user in any way that the offered Terms of Service contain a waiver of jury trial and an arbitration clause. Had Ms. Kemenosh been required to open the hyperlink and scroll through the Terms of Service and Privacy Policy, which contained the arbitration agreement, there may have been an effective offer to arbitrate. Alternatively, if Ms. Kemenosh had been required to check a box certifying that she had read and agreed to the Terms of Service and Privacy Policy, perhaps an offer to arbitrate would have been made. Or even if Uber had somewhere conveyed that Ms. Kemenosh should read the Terms of Service (as it did in its 2016 email), an offer to arbitrate may have been properly conveyed. In this matter, however, Uber took none of these steps. While Uber's arbitration terms were accessible if the user clicked through the "Terms of Service and Privacy Policy" link, the

hyperlink contained no indication that it contained further essential terms other than the implicit agreement of offering transportation in exchange for money and a privacy policy.

Moreover, the hyperlink in this case did not have the typical appearance of a hyperlink, i.e., blue underlined text.[4] Even assuming that a reasonably prudent cell phone user would have known that placing the words "Terms of Service and Privacy Policy" in a box conveyed that it constituted a hyperlink, as Uber argues, this Court cannot accept that a reasonably prudent cell phone user would know that the terms accessible by the hyperlink contained a jury trial waiver and an arbitration agreement. Under these circumstances, the terms of the offer that Uber was purportedly making to Ms. Kemenosh remained indefinite.

In sum, Uber has proven only that there was a meeting of the minds on an agreement for Ms. Kemenosh to pay money in exchange for transportation. Uber has failed to prove that the October 2013 registration process resulted in a meeting of the minds on an agreement to arbitrate.

3. The 2016 Email

Uber alternatively contends that Ms. Kemenosh agreed arbitrate all claims when she continued to use the Uber app after receiving an email from Uber on November 14, 2016. (Email, Vasquez Aff. at Ex. F; Uber Petition, ¶¶ 19-24). The email was linked to new "U.S. Terms of Use," which included an arbitration clause. (Email, Vasquez Aff. at Ex. F). The email stated that Uber had "revised [its] arbitration agreement which explains how legal disputes are handled," and "[i]f you use our app or other services on or after that date, you're confirming you've read and agree to the updated terms." (*Id.*)

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[4] The parties agreed that the typical appearance of a hyperlink is subject to judicial notice, and this Court therefore takes judicial notice that a hyperlink's typical appearance is blue underlined text.

The Court finds that Uber has failed to meet its burden of proving that Ms. Kemenosh entered an arbitration agreement through purported receipt of this email. In a petition to compel arbitration, it is the petitioner's burden to prove that a valid agreement to arbitrate exists. *Goldstein v. Depository Tr. Co.*, 717 A.2d 1063, 1067 (Pa. Super. 1998).

There is a significant factual dispute about whether Ms. Kemenosh ever received the November 2016 email containing the 2016 Terms. Brian Kubiak, an Uber senior paralegal, stated in his affidavit that Uber's business records show that the email was sent to the email address associated with Ms. Kemenosh's account, and that it did not "bounce back." (Kubiak Aff., ¶ 5). According to Mr. Kubiak, this means that Ms. Kemenosh should have received the email. (*Id.*) As support for this assertion, Mr. Kubiak attached a sheet of paper with an email address apparently associated with Ms. Kemenosh's Uber account, the word "sent," and the date and time "11/14/2016, 4:01 PM." (*Id.* at Ex. H). Ms. Kemenosh's affidavit states that she neither received nor read the November 14, 2016 email or the 2016 Terms. (Kemenosh Aff., ¶¶ 7-13). At the hearing on this matter, neither party presented any live testimony. The Court accordingly had no opportunity to assess the witnesses and their credibility. Since Uber bears the burden of proving that Ms. Kemenosh received the November 2016 email, and that fact is contested, the Court finds that Uber has failed to meet its burden of proving that Ms. Kemenosh received the email. *Cf. Penn Center House, Inc. v. Hoffman,* 553 A.2d 900, 902–03 (Pa. 1989) ("Testimonial affidavits of the moving party or his witnesses, not documentary, even if uncontradicted, will not afford sufficient basis for the entry of summary judgment, since the credibility of the testimony is still a matter for the [factfinder]."); *see also Nanty–Glo v. American Sur. Co,* 163 A. 523, 524 (Pa. 1932).

As explained above, an offer must be communicated to be valid. *Stumpp*, 658 A.2d at 335. Moreover, "[i]t is recognized that an offer is not considered communicated until actually received. . . ." *Com. v. Prep*, 142 A.2d 460, 464 (Pa. Super. 1958) (*citing Linn v. Employers Reinsurance Corp.*, 139 A.2d 638 (Pa. 1958)). Because Uber has failed to prove that Ms. Kemenosh received the November 2016 email, the email did not constitute an offer to arbitrate. Therefore, no agreement to arbitrate between Ms. Kemenosh and Uber arose from the November 2016 email.

CONCLUSION

For the foregoing reasons, the Court denies the petition to compel arbitration of defendants Uber Technologies, Inc., Gegen LLC, Rasier-PA, LLC and Rasier, LLC.[5]

BY THE COURT:

Asse F.

Fletman, J.

[5] Because Court finds that there was no agreement to arbitrate between Uber and Ms. Kemenosh, it does not reach the issue of whether the Uber Defendants waived arbitration or whether either the 2013 or 2016 Terms were unconscionable.