In the
United States Court of Appeals
for the Second Circuit

AUGUST TERM 2023

Nos. 23-521-cv (L); 23-522-cv (Con)

MARIAM DAVITASHVILI and ADAM BENSIMON, individually and on behalf of all others similarly situated,
Plaintiffs-Appellees,

PHILIP ELIADES, JONATHAN SWABY, JOHN BOISI, NATHAN OBEY,
Consolidated Plaintiffs-Appellees,

v.

GRUBHUB INC., DBA Seamless, POSTMATES INC., UBER TECHNOLOGIES, INC., in its own right and as parent of wholly owned subsidiary Uber Eats,
Defendants-Appellants.[*]

[*] The Clerk of Court is directed to amend the caption as set forth above.

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On Appeal from the United States District Court for the Southern District of New York

ARGUED: DECEMBER 15, 2023
DECIDED: MARCH 13, 2025

Before: CABRANES, SULLIVAN, and PÉREZ, *Circuit Judges*.

Grubhub Inc., Postmates Inc., and Uber Technologies, Inc. (jointly, "Defendants") moved to compel arbitration of a putative antitrust class action. The question presented is whether the United States District Court for the Southern District of New York (Lewis A. Kaplan, *Judge*) erred in denying the motion of Defendants to compel arbitration. We consider (1) whether an agreement to arbitrate was made between Defendants and Plaintiffs; (2) whether, in the circumstances presented, arbitrability is an issue for the Court or the arbitrator to resolve; and (3) whether the relevant arbitration clauses are enforceable.

Defendants provide online "platforms"—websites or mobile applications—for ordering restaurant meals. Customers place restaurant orders on a platform for pickup or delivery, and restaurants use the platform to fill those orders. The restaurants agree not to sell meals at lower prices "off-platform"—that is, through channels other than Defendants' web and mobile applications. These agreements are known as no-price competition clauses, or "NPCCs."

This appeal arises from a putative class action against Defendants alleging violations of Section 1 of the Sherman Antitrust Act of 1890 and its state analogues. The case is brought by three classes of restaurant customers: customers who purchased "takeout" or delivery goods directly from a restaurant subject to a Defendant's NPCC; customers who purchased dine-in goods from a restaurant subject to a Defendant's NPCC; and customers who purchased goods through a non-defendant's platform from a restaurant subject to a Defendant's NPCC.

Defendants moved to compel arbitration for the customers who have used Defendants' platforms (jointly, "Plaintiffs"), on the basis of the arbitration clauses in Defendants' respective "Terms of Use." On March 16, 2023, the District Court denied Defendants' motion to compel arbitration, holding that the scope of the arbitration clauses presented issues for the Court, rather than the arbitrator, to resolve, and that they did not apply to Plaintiffs' claims because the claims lacked "any nexus" to Defendants' Terms of Use. This appeal followed.

We now **AFFIRM** the District Court's order in part insofar as it ruled that the threshold question of arbitrability for Plaintiffs' claims against Grubhub is for the court to decide and that Grubhub's arbitration clause does not apply to Plaintiffs' antitrust claims against Grubhub, **REVERSE** the District Court's order in part insofar as it ruled that Grubhub failed to establish that it formed an agreement to arbitrate with Plaintiffs and that the threshold question for Plaintiffs' claims against Uber and Postmates is for the court to decide, and **REMAND** the cause for further proceedings consistent with this opinion.

Judge Pérez concurs in full in the judgment of the Court and files a separate opinion. Judge Sullivan concurs in part and dissents in part, concurring with the judgment of the Court with respect to Parts II-A and II-B and dissenting with respect to Part II-C.

ZACHARY D. TRIPP, Washington, DC (David J. Lender, Eric S. Hochstadt, New York, NY, *on the brief*), Weil, Gotshal & Manges LLP, Washington, DC *for Defendant-Appellant Grubhub Inc*.

ADAM G. UNIKOWSKY, New York, NY (Elizabeth B. Deutsch, *on the brief*), Jenner & Block LLP, Washington, DC *for Defendants-Appellants Uber Technologies, Inc. and Postmates Inc.*

STEPHEN LAGOS, New York, NY (Edward Normand, Velvel (Devin) Freedman, *on the brief*), Freedman Normand Friedland LLP, New York, NY *for Plaintiffs-Appellees*.

JOSÉ A. CABRANES, *Circuit Judge*:

Grubhub Inc., Postmates Inc., and Uber Technologies, Inc. (jointly "Defendants") moved to compel arbitration of a putative antitrust class action. The question presented is whether the United States District Court for the Southern District of New York (Lewis A. Kaplan, *Judge*) erred in denying the motion of Defendants to compel arbitration. We consider (1) whether an agreement to arbitrate was made between Defendants and Plaintiffs; (2) whether, in the circumstances presented, arbitrability is an issue for the Court or the arbitrator to resolve; and (3) whether the relevant arbitration clauses are enforceable.

Defendants provide online "platforms"—websites or mobile applications—for ordering restaurant meals.[1] Customers place

[1] Grubhub defines a "Mobile Application" as a "software to access Grubhub's websites, technology platforms, and related online and mobile services via a mobile device." Appendix ("A") 134. While Uber and Postmates do not define the term "mobile application" in their Terms of Use, *see infra* note 5, we understand that the Uber and Postmates mobile applications have the same function and have similar characteristics as the Grubhub mobile application. "The term *online platform* is not defined in [any]

restaurant orders on a platform for pickup or delivery, and restaurants use the platform to fill those orders. The restaurants agree not to sell meals at lower prices "off-platform"—that is, through channels other than Defendants' web and mobile applications. These agreements are known as no-price competition clauses, or "NPCCs."[2]

This appeal arises from a putative class action against Defendants alleging violations of Section 1 of the Sherman Antitrust Act of 1890 and its state analogues.[3] The case is brought by three classes of restaurant customers: customers who purchased "takeout" or delivery goods directly from a restaurant subject to a Defendant's NPCC; customers who purchased dine-in goods from a restaurant subject to a Defendant's NPCC; and customers who purchased goods through a non-defendant's platform from a restaurant subject to a Defendant's NPCC.[4]

Defendants moved to compel arbitration for the customers who have used Defendants' platforms (jointly "Plaintiffs"), on the basis of

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federal statute. An online platform generally refers to any computer application or service that provides digital content and services on the internet." CONG. RSCH. SERV., R47662, DEFINING AND REGULATING ONLINE PLATFORMS (2023).

[2] A-20 (¶ 1).

[3] A-20 (¶ 1), 49-73 (¶¶ 188-214).

[4] A-65-66 (¶¶ 173-75).

the arbitration clauses in Defendants' respective "Terms of Use."[5] On March 16, 2023, the District Court denied Defendants' motion to compel arbitration, holding that the scope of the arbitration clauses presented issues for the Court, rather than the arbitrator, to resolve, and that they did not apply to Plaintiffs' claims because the claims lacked "any nexus" to Defendants' Terms of Use.[6] This appeal followed. We now **AFFIRM** the District Court's order in part insofar as it ruled that the threshold question of arbitrability for Plaintiffs' claims against Grubhub is for the court to decide and that Grubhub's arbitration clause does not apply to Plaintiffs' antitrust claims against Grubhub, **REVERSE** the District Court's order in part insofar as it ruled that Grubhub failed to establish that it formed an agreement to arbitrate with Plaintiffs and that the threshold question for Plaintiffs' claims against Uber and Postmates is for the court to decide, and **REMAND** the cause for further proceedings consistent with this opinion.

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[5] Defendants' Terms of Use refer to their relationships with customers. Thus, Grubhub defines its Terms of Use as "a contract between [the customer] and [Grubhub] that governs [the customer's] access and use of the Platform and Services." A-124**.** Uber states that its Terms of Use "govern [the customer's] access or use . . . of the multi-sided digital marketplace platform . . . and any related content or services . . . made available . . . by Uber." A-193. Because Postmates is an Uber subsidiary, Uber's Terms of Use apply equally to Postmates. *See* A-170-173.

[6] *Davitashvili v. Grubhub Inc.*, No. 20-cv-3000, 2023 WL 2537777, at *11-12 (S.D.N.Y. 2023) (Lewis A. Kaplan, *Judge*); *see supra* note 5.

I. BACKGROUND

Plaintiffs allege that Defendants fixed restaurant meal prices by entering into NPCCs with restaurants in which the restaurants agreed not to charge lower prices off-platform. Plaintiffs claim that these NPCCs have caused them to pay artificially high prices for restaurant meals. They seek injunctive relief and damages based on both their direct purchases from NPCC-bound restaurants through Defendant platforms and their indirect purchases from NPCC-bound restaurants through non-defendant platforms.

Defendants jointly moved to compel arbitration, arguing that their platforms' Terms of Use contained arbitration clauses. On March 16, 2023, the District Court denied the motion to compel.[7] The Court first determined that Plaintiffs agreed to Uber's and Postmates's Terms of Use, but not Grubhub's. Next, the Court held that the enforceability of the arbitration clauses was a question for the Court, rather than the arbitrator, to resolve. The Court concluded that the arbitration clauses in Defendants' Terms of Use did not apply to Plaintiffs' claims because the claims "lacked any nexus to the agreement containing the clause."[8]

Defendants appealed the District Court's order denying the motions to compel arbitration under 9 U.S.C. § 16, which allows interlocutory appeals from orders denying motions to compel arbitration.

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[7] *Davitashvili*, 2023 WL 2537777.

[8] *Id.* at *10.

II. DISCUSSION

The Federal Arbitration Act ("FAA") reflects "both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract."[9] Specifically, Section 2 of the FAA, in relevant part, guarantees that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[10] Because Sections 3 and 4 of the FAA require courts to "respect and enforce the parties' chosen arbitration procedures," the courts must "place[] arbitration agreements on an equal footing with other contracts."[11] The Supreme Court has explained that courts must "rigorously enforce arbitration agreements according to their terms."[12] Under Section 4, a party may move to compel arbitration in accordance with an arbitration agreement.[13] We review *de novo* a district court's denial of a motion to compel arbitration.[14]

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[9] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (internal quotation marks and citations omitted).

[10] 9 U.S.C. § 2.

[11] *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 506 (2018); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010) (citations omitted).

[12] *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 232 (2013) (internal quotation marks and citation omitted).

[13] *See* 9 U.S.C. § 4.

[14] *Lloyd v. J.P. Morgan Chase & Co.*, 791 F.3d 265, 269 (2d Cir. 2015).

We hold, first, that Plaintiffs agreed to arbitrate with Defendants. Next, we hold that in the circumstances presented here, the Court should resolve questions of "arbitrability"— that is, whether the instant disputes are subject to arbitration—with respect to Grubhub, while the arbitrator should resolve questions of arbitrability with respect to Uber and Postmates. We conclude that Grubhub's arbitration agreement does not apply to Plaintiffs' antitrust claims.

A. Plaintiffs Agreed to Arbitrate with Defendants

To determine whether parties agreed to arbitrate, courts apply a "standard similar to that applicable for a motion for summary judgment," that is, courts must "consider all relevant, admissible evidence submitted by the parties" and must "draw all reasonable inferences in favor of the non-moving party."[15] In doing so, the court applies "ordinary state-law principles that govern the formation of contracts"—here, the state-law principles of New York.[16] The party seeking arbitration bears the initial burden of demonstrating that an agreement to arbitrate exists.[17]

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[15] *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 229 (2d Cir. 2016) (quotation marks and citations omitted).

[16] *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). The parties do not dispute that New York state law applies. *See* Pls. Br. at 14-15; Grubhub Br. at 24 ("It is undisputed that New York law governs contract formation and contract interpretation in this case.").

[17] *Zachman v. Hudson Valley Fed. Credit Union*, 49 F.4th 95, 101-02 (2d Cir. 2022).

Before we address whether the putative agreements require arbitration of the disputes at issue, we first need to inquire whether an agreement to arbitrate between the parties exists, and whether questions of "arbitrability" are for the court or the arbitrator to decide.[18] We address these questions in turn.

Defendants' Terms of Use contain arbitration clauses. No party disputes that Plaintiffs assented to the Terms of Use of Uber and Postmates.[19] Plaintiffs argue, however, that they did not affirmatively assent to Grubhub's Terms of Use. We disagree.

Under New York law, when "an offeree does not have *actual* notice of certain contract terms, he is nevertheless bound by such terms if he is on *inquiry* notice of them and assents to them through conduct that a reasonable person would understand to constitute assent."[20] In determining whether an offeree has inquiry notice of a contract's terms, New York courts evaluate "whether the term was obvious and whether it was called to the offeree's attention"—an analysis that

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[18] *See Coinbase, Inc. v. Suski*, 602 U.S. 143, 148-149 (2024) (laying out this framework).

[19] *See Davitashvili*, 2023 WL 2537777, at *6.

In the proceedings below, the District Court held that, with respect to Plaintiff-Appellee Bensimon, Uber had not satisfied its initial burden that Bensimon had agreed to an arbitration clause. We do not address this question with respect to Bensimon because Uber does not appeal the District Court's Order as to Bensimon.

[20] *Starke v. SquareTrade, Inc.*, 913 F.3d 279, 289 (2d Cir. 2019).

"often turns on whether the contract terms were presented to the offeree in a clear and conspicuous way."[21]

The same principles apply to online contracts, where "we look to the design and content of the relevant interface[22] to determine if the contract terms were presented to the offeree in way that would put her on inquiry notice of such terms."[23] Factors include whether the terms of use are "spatially coupled" with the checkout button, whether the entire screen is visible at once without scrolling, whether the checkout button is "temporally coupled" with the hyperlink[24] to the terms of use, and whether the language is clear.[25]

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[21] *Id.*

[22] The term "interface" includes websites and smartphone applications. *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 75 (2d Cir. 2017).

[23] *Id.*

[24] "An electronic link providing direct access from one distinctively marked place in a hypertext or hypermedia document to another in the same or a different document." *Merriam-Webster Online, https://www.merriam-webster.com/dictionary/hyperlink*.

[25] *Id.* at 292 (citing *Meyer*, 868 F.3d at 78); *see also id*. at 291 n.8 ("The *Meyer* Court applied California law to the contract formation question, but noted that New York and California apply substantially similar rules for determining whether the parties have mutually assented to a contract term." (quotation marks omitted)).

Here, we conclude that Grubhub's web and mobile application interfaces—screenshots of which were included in the amended complaint—gave reasonable notice of the arbitration provision.[26]

The mobile application checkout page of Grubhub is akin to the one we found, in 2017, to provide inquiry notice in *Meyer v. Uber Technologies, Inc.* As in *Meyer*, the hyperlink to the Terms and Conditions "appears directly below" the checkout button.[27] In addition to being spatially coupled with the checkout button, the notice is temporally coupled because it is presented on the same screen "at a place and time that the consumer will associate with the initial purchase or enrollment"—that is, on the purchase screen itself.[28] Finally, the phrase "By placing your order, you agree," is substantially identical to the "By creating an Uber account, you agree" language in *Meyer* that we held to be "a clear prompt directing users to read the Terms and Conditions and signaling that their acceptance of the benefit of registration would be subject to contractual terms."[29] In short, we conclude that "a reasonably prudent smartphone user" would have notice of Grubhub's Terms of Use for its mobile app.[30]

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[26] *See* A-120 (Grubhub mobile interface); 122 (Grubhub web interface).

[27] *Meyer*, 868 F.3d at 78.

[28] *Id.* (quoting *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 127 (2d Cir. 2012)).

[29] *Id.* at 79.

[30] *Id.*

Grubhub's web interface also puts users on inquiry notice. Plaintiffs argue that Grubhub's web interface is akin to the one we found wanting in *Nicosia v. Amazon.com, Inc.* While the Grubhub web interface is not as streamlined as its mobile app, the page is less cluttered than the webpage in *Nicosia*.[31] Additionally, the Grubhub web interface has hyperlinks to Grubhub's Terms of Use that are both spatially and temporally coupled with the checkout button. And the relevant language ("By placing your order, you agree") is the same as the mobile application's.[32] These features, taken together, are enough to provide inquiry notice to a reasonably prudent web user.[33]

Thus, we hold that there is a valid agreement to arbitrate between Plaintiffs and Grubhub.

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[31] *Compare* A-122 *with Nicosia*, 834 F.3d at 241.

[32] A-122.

[33] We also reject Plaintiffs' argument that Grubhub failed to establish what its mobile and web interfaces looked like at the time Plaintiffs placed their respective orders. Although Grubhub's declaration did not specify the exact date on which the screenshots were taken, the only plausible reading of the declaration is that the screenshots depict the mobile application and website as they appeared at all times relevant to the complaint.

B. For Grubhub, Arbitrability Is for the Court to Decide. For Uber and Postmates, Arbitrability Is for the Arbitrator to Decide.

When a party moves to compel arbitration under Section 4, the gateway question of "arbitrability" arises.[34] Thus, our next inquiry is related to the question of arbitrability, or, in other words, whether an arbitration agreement covers a specific issue. *First*, we need to determine whether the court or the arbitrator should be the decision-maker on the question of arbitrability. *Second*, if it is for the court to make that determination, we inquire whether the issues are within the scope of the arbitration agreement and if the agreement is enforceable.

We review *de novo* a district court's determination "whether the issue of arbitrability is for the court or for the arbitrator."[35] The Supreme Court has instructed us that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so."[36] The FAA provides that the issue of arbitrability should presumptively be resolved by the courts.[37]

Parties can include in the arbitration agreement a provision delegating the question of arbitrability to the arbitrator. This is usually

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[34] *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 126 (2d Cir. 2019) (quoting *Rent-A-Center, W., Inc.*, 561 U.S. at 68–69).

[35] *Bell v. Cendant Corp.*, 293 F.3d 563, 565 (2d Cir. 2002).

[36] *First Options*, 514 U.S. at 944 (alterations adopted) (quotation marks and citation omitted).

[37] *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 34 (2014); *see also* 9 U.S.C. § 2.

called a "delegation clause" or a "delegation provision." When parties "explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator."[38]

With respect to Grubhub, the District Court correctly found that the question of arbitrability remains with the Court. Grubhub's arbitration clause clearly and unmistakably states that "issues related to the scope, validity, and enforceability of this Arbitration Agreement are for a court to decide."

As for Uber and Postmates, the District Court denied their motion to compel arbitration, concluding that the dispute belonged in federal court because Plaintiffs had mounted a convincing challenge to the delegation clause contained in the agreements.[39] We disagree.

"When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract" pursuant to §§ 2, 3, and 4 of the FAA, "unless [Plaintiffs] challenged the delegation provision *specifically*."[40] The District Court found that Plaintiffs had challenged the delegation clause by mentioning it in a footnote that reads: "For the avoidance of doubt, the Platform Plaintiffs challenge the validity of the Delegation

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[38] *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 208 (2d Cir. 2005).

[39] *Davitashvili*, 2023 WL 2537777, at *9.

[40] *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 65 (2019); *Rent-A-Center, W., Inc.*, 561 U.S. at 72 (emphasis added).

Clause itself, on the grounds that it would be unconscionable to permit Postmates to enforce that clause."[41]

But this brief aside does not allow Plaintiffs to evade the agreement's delegation clause. "An argument mentioned only in a footnote" is not "adequately raised or preserved for appellate review."[42] All the more so here, where Plaintiffs did not append any argument to their conclusory assertion of the clause's unconscionability.[43]

In any event, Plaintiffs fail to challenge the clause with sufficient specificity. Plaintiffs argue that arbitration *in general* would be unconscionable. Our precedents require something more: Plaintiffs must show why allowing an arbitrator—as opposed to a court—to decide the question of arbitrability would be unconscionable.[44] In

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[41] *Davitashvili*, 2023 WL 2537777, at *9; *see* A-221.

[42] *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 137 (2d Cir. 2011).

[43] *See Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84, 107 (2d Cir. 2012) ("Merely mentioning or simply stating an issue in an appellate brief is insufficient to preserve it for our review: an appellant must advance an argument, and we generally will decline to consider issues that are not sufficiently argued.") (alterations adopted and quotation marks omitted).

[44] *Compare Rent-A-Center*, 561 U.S. 63 (declining to consider plaintiff's unconscionability challenges because none were specific to the delegation provision), *with Gingras v. Think Fin., Inc.*, 922 F.3d 112 (2d Cir. 2019) (plaintiffs alleged that the delegation provision was fraudulent).

Gingras, for instance, the plaintiffs alleged that a tribe-affiliated payday lender had set up an arbitration scheme governed by tribal law where the lender itself could influence the contents of tribal law and where tribal courts had "broad authority" to set aside any arbitral award.[45] According to the plaintiffs, the entire process, including the delegation clause, was designed to funnel arbitration into a "sham" tribunal and "shield" any award from federal court review.[46] Because this was a "specific attack" on the delegation clause itself, we concluded that arbitrability was an issue for the courts.[47] Here, by contrast, Plaintiffs have not shown that it would be unfair to defer to an arbitrator on that question.

Because Plaintiffs have not specifically challenged the delegation clause, we hold that their claims against Uber and Postmates should be sent to an arbitrator to determine whether those claims are arbitrable.

C. Grubhub's Arbitration Clause Does Not Apply to Plaintiffs' Claims

Plaintiffs argue that even if they can be said to have agreed to arbitrate with Grubhub, their antitrust claims do not fall within the scope of the arbitration clause. We agree.

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[45] *See Gingras*, 922 F.3d at 118, 126; *see also* Joint Appendix at 55 (¶ 131), *Gingras*, 922 F.3d 112 (No. 16-2019), ECF No. 102.

[46] Joint Appendix at 55 (¶ 131), *Gingras*, 922 F.3d 112 (No. 16-2019), ECF No. 102.

[47] *Gingras*, 922 F.3d at 126.

In determining whether the parties' arbitration agreement covers a particular claim—a question we review *de novo*—we "focus[] on the factual allegations in the complaint rather than the legal causes of action asserted."[48] The FAA's scope is limited to "agreements to arbitrate controversies that 'arise out of' the parties' contractual relationship"—that is, controversies that were "cause[d]" by the relationship.[49]

Grubhub's arbitration provision states:

> You and Grubhub agree that all claims, disputes, or disagreements that may arise out of the interpretation or performance of this Agreement or payments by or to Grubhub, or that in any way relate to your use of the Platform, the Materials, the Services, and/or other content on the Platform, your relationship with Grubhub, or any other dispute with Grubhub, (whether based in contract, tort, statute, fraud, misrepresentation, or any other legal theory) (each, a 'Dispute') shall be submitted exclusively to binding arbitration. Dispute shall have the broadest possible meaning. This includes claims that arose, were asserted, or involve facts

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[48] *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 36 (2d Cir. 2002) (quoting *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987)).

[49] *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 652 n.4 (2022) (noting that the "'arising out of' language normally refers to a causal relationship"); *see also* 9 U.S.C. § 2 (referring to controversies "arising out of" arbitration contracts or transactions).

> occurring before the existence of this or any prior Agreement as well as claims that may arise after the termination of this Agreement. This Mutual Arbitration Agreement is intended to be broadly interpreted.[50]

Grubhub argues that Plaintiffs' claims are related to Plaintiffs' "access and use of Grubhub" and thus fall within the scope of the arbitration provision.[51] Not so. Plaintiffs' claims—that Defendants violated federal and state antitrust law by inducing restaurants to agree to NPCCs—have nothing to do with Plaintiffs' individualized use of Grubhub's website or mobile application. Rather, their claims concern their access and use of *other* platforms and restaurants; they allege that they pay higher prices when ordering from these entities because of Grubhub's anticompetitive practices.[52] And to the extent Plaintiffs' use of Grubhub helped improve Grubhub's market share, thereby enabling Grubhub to act anticompetitively, this alleged relation is both too speculative and too attenuated to qualify as a "cause" of Plaintiffs' antitrust claims. For example, in rejecting the applicability of an employment arbitration agreement to a plaintiff's ERISA claims, we noted in *Cooper v. Ruane Cunnif & Goldfarb Inc.* that "others who were never [defendant's] employees could have brought

[50] A-143.

[51] Grubhub Br. at 60.

[52] *See* A-21-22 (¶¶ 7-8), 65-67 (¶¶ 170-75, 180(b)).

claims identical to those stated by [plaintiff]."[53] So too here. Plaintiffs who never used Grubhub are just as much class members as those who have. Indeed, Grubhub does not dispute that at least some plaintiffs have "well-plead claims despite never having used any of the [D]efendants' platforms."[54] As the District Court put it, the fact that any members of the three classes of plaintiffs used Grubhub's platform is "purely coincidental."[55]

Because Grubhub's arbitration provision does not apply to Plaintiffs' claims, the District Court—not an arbitrator—should adjudicate the merits of the complaint.

CONCLUSION

To summarize:

1. Plaintiffs assented to Uber's, Postmates's, and Grubhub's Terms of Use. Therefore, agreements to arbitrate were formed between Plaintiffs and Defendants.

2. Grubhub's Terms of Use clearly and unmistakably delegates arbitrability questions to the court.

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[53] 990 F.3d 173, 183 (2d Cir. 2021).

[54] *Davitashvili*, 2023 WL 2537777, at *10; *see* Grubhub Br. at 58.

[55] *Davitashvili*, 2023 WL 2537777, at *10. Because we hold that Grubhub's arbitration provision does not apply to Plaintiffs' claims, we do not reach whether the provision is unconscionable or otherwise unenforceable.

3. Uber's and Postmates's Terms of Use delegate arbitrability questions to the arbitrator, and Plaintiffs failed to challenge the delegation provision specifically. Thus, Plaintiffs' claims against Uber and Postmates should be sent to an arbitrator to determine, *inter alia*, whether those claims are arbitrable.

4. Grubhub's arbitration clause does not apply to Plaintiffs' antitrust claims against Grubhub because Plaintiffs' antitrust claims do not arise out of the Terms of Use.

For the foregoing reasons, we **AFFIRM** in part and **REVERSE** in part the District Court's judgment, and we **REMAND** the cause to the District Court to adjudicate the merits of the complaint with respect to Grubhub and for further proceedings consistent with this opinion.