UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MARIAM DAVITASHVILI, *et al.*,

Plaintiffs,

v.

GRUBHUB INC., *et al.*,

Defendants.

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20-cv-3000 (LAK)
and consolidated case

MEMORANDUM OPINION

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LEWIS A. KAPLAN, *District Judge.*

This matter is before the Court on the motions of Grubhub, Inc. ("Grubhub"), Uber Technologies, Inc. ("Uber" or "Uber Eats"), and Postmates Inc. ("Postmates") to compel plaintiffs Mariam Davitashvili, Adam Bensimon, Philip Eliades, Jonathan Swaby, John Boisi, and Nathan Obey (the "Platform Plaintiffs") to arbitrate their claims, based on arbitration provisions in defendants' respective terms of use. (Dkt 72; Dkt 76) For the reasons set forth below, defendants' motions are denied.

Facts

This matter arises from a putative class action involving the contractual relationships between restaurants and online ordering platforms for restaurant meals. The amended complaint alleges that the defendants each unlawfully has fixed prices for restaurant meals by entering into restrictive agreements with restaurants that preclude those restaurants from charging lower prices off-platform. The no-price-competition clauses ("NPCCs") contained in these agreements prohibit restaurants that sell through Grubhub or Uber from selling meals at lower prices either directly to

consumers or through a competing platform, like Doordash.[1] Postmates requires a narrower version of an NPCC, which prohibits restaurants from selling meals at lower prices directly to consumers, but not through other channels.[2] Plaintiffs claim that defendants thus have caused them to pay artificially high prices for restaurant meals.[3] They seek damages and injunctive relief under Section 1 of the Sherman Act and its state analogues on behalf of themselves and three putative nationwide classes. Plaintiffs seek damages for (i) their direct purchases from restaurants bound by defendants' NPCCs and (ii) their purchases from such restaurants through non-defendant platforms.[4]

On March 30, 2022, the Court denied defendants' joint motion to dismiss these claims. (Dkt 46) Approximately two months later, defendants served interrogatories on plaintiffs, requesting that they "identify the Meal Order Platforms through which" they ordered "at any point during the Class Period."[5] In response, the Platform Plaintiffs disclosed that they each had used at least one of the defendants' platforms, whereas plaintiff Malik Drewey disclosed that he never had used those platforms.[6] Defendants move to compel arbitration against the Platform Plaintiffs on the basis of their use of the defendants' platforms and the arbitration clauses contained within the defendants' respective "Terms of Use."

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1 Dkt 28, ¶¶ 55-56, 59-61. All docket citations are to No. 20-cv-3000 (LAK).

2 *Id.* ¶¶ 57-58.

3 *Id.* ¶¶ 1, 188-216.

4 *Id.* ¶¶ 173-75.

5 Hochstadt Decl. Ex. B, at 4-5.

6 *Id.*

The Arbitration Clauses in Defendants' Terms of Use

A. Grubhub's Terms of Use

Grubhub merged with Seamless North America LLC ("Seamless"), another meal-delivery platform, in August 2013.[7] It is undisputed that each Platform Plaintiff opened an account with either Grubhub or its predecessor in interest, Seamless, prior to the filing of this action in April 2020. Grubhub asserts that its terms of use were published on its website "[b]efore this case was filed and during the pendency of the litigation."[8] However, Grubhub submitted no evidence demonstrating how those terms appeared or could be accessed.[9]

Grubhub claims that it requires customers to agree to its terms of use each time a customer places a pick-up or delivery order.[10] It is undisputed that the Platform Plaintiffs each have placed orders on Grubhub during the pendency of this action and since Grubhub updated its terms of use on December 14, 2021.

Grubhub argues that the Platform Plaintiffs are bound by the updated terms, which govern consumers "use" of Grubhub's platform.

First, the Terms of Use provide:

"Grubhub Holdings Inc. and its subsidiaries and affiliates ('Grubhub,' 'we,' 'our,' or 'us') own and operate certain websites, including related subdomains; our mobile,

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7 Koreis Decl. ¶ 4.

8 *Id.* ¶ 8.

9 *See* Dkt 87, at 13.

10 *See* Koreis Decl. ¶ 10.

> tablet and other smart device applications; application program interfaces; in-store kiosks or other online services; other tools, technology and programs (collectively, the 'Platform') and all associated services (collectively, the 'Services'); in each case, that reference and incorporate this Agreement. . . . *This Agreement constitutes a contract between you and us that governs your access and use of the Platform and Services*."[11]

They also contain a provision entitled "Mutual Arbitration Provision," which states that Grubhub users are required to submit "any" dispute with Grubhub to arbitration:

> "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 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."[12] The Grubhub arbitration clause states also that "issues related

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11 Koreis Decl. Ex. D, at 2 (emphasis added).

12 *Id.* at 21 (emphasis added).

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