

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| MICHELI & SHEL, LLC, | : | |
| | : | |
| Plaintiff, | : | |
| | : | 21-CV-4995 (JMF) |
| -v- | : | |
| | : | <u>OPINION AND ORDER</u> |
| GRUBHUB INC. et al., | : | |
| | : | |
| Defendants. | : | |
| | : | |
| -----X | | |

JESSE M. FURMAN, United States District Judge:

In this putative class action, Plaintiff Micheli & Shel, LLC, a bakery located in New York City, sues Grubhub, Inc., Postmates LLC, Uber Eats, and DoorDash Inc., four national food delivery services, alleging violations of a New York City local law enacted during the COVID-19 pandemic that limits the fees that food delivery services can charge restaurants for their services.¹ The question presented here is not whether Plaintiff’s claims have merit, but whether they can even be brought in this forum. Defendants argue that Plaintiff agreed to arbitrate its claims on an individual basis and, thus, move to compel arbitration and to stay this litigation. The Court agrees with respect to Plaintiffs’ claims against Grubhub, Uber Eats, and DoorDash because, in each instance, Plaintiff did, in fact, agree to arbitration. In Postmates’s case, however, the Court concludes that Plaintiff did not actually agree to arbitrate its claims.

¹ Although the Complaint names as Defendants Grubhub Inc.; Grubhub Inc. d/b/a Seamless; and Seamless North America, LLC., *see* ECF No. 1, Grubhub represents, and Plaintiff does not dispute, that it acquired Seamless on December 31, 2014, and that Seamless North America, LLC, no longer exists as a separate corporate entity, *see* ECF No. 53 (“Wilson Decl.”), ¶ 11. Accordingly, the Court refers to all three Defendants here as Grubhub.

Accordingly, and for the reasons that follow, the motions of Grubhub, Uber Eats, and DoorDash to compel arbitration and stay are GRANTED, but Postmates's motions are DENIED.

BACKGROUND

The relevant facts — taken from the Complaint and sworn declarations submitted in connection with Defendants' motions — are undisputed. Most relevant to Defendants' motions are the terms of their respective contracts with Plaintiff. The Court will summarize each in turn.

A. Plaintiff's Contract with Grubhub

On October 30, 2019, Plaintiff signed up to work with Grubhub. ECF No. 53 ("Wilson Decl."), ¶ 5. Adir Michaeli, as "owner," completed the sign-up process, which included signing the Grubhub Restaurants and Services Form. *Id.* ¶¶ 6-7. In doing so, Michaeli checked a box affirming the following:

I certify that I am the duly authorized representative of Restaurant, and that I have carefully reviewed and agree to the Grubhub Restaurant Terms set forth at <https://get.grubhub.com/legal/restaurant-terms> ("Terms"), which are incorporated herein and made a part of this Agreement. [Grubhub] may modify the Terms at any time at its sole discretion, provided that such modifications will be applied only prospectively. You agree that [Grubhub] has the right to notify you of updated Terms by posting them on the Systems. You should review the Terms before using the Services. **The Terms contain a mandatory arbitration provision that affects your legal rights. Please read it.**

ECF No. 53-1 ("Grubhub Form"), at 2 (emphasis in original). The first paragraph of the Grubhub Terms, available at the hyperlink in the Form, emphasizes in bold, all-caps text that **"THE SECTION ENTITLED 'DISPUTE RESOLUTION' HAS A MANDATORY ARBITRATION PROVISION. IT AFFECTS RESTAURANT'S LEGAL RIGHTS. PLEASE READ IT."** ECF No. 53-2 ("Grubhub Terms"), at 1 (emphasis in original).

In turn, the arbitration provision provides:

Restaurant and [Grubhub] agree that all claims or disputes arising out of the Agreement will be decided by an arbitrator through arbitration and not by a judge or jury ("Arbitration Agreement"). This Arbitration Agreement is governed by

the Federal Arbitration Act (“FAA”) and evidences a transaction involving commerce. This arbitration will be conducted before a single arbitrator under the Commercial Arbitration Rules of the American Arbitration Association (“AAA”)

...

Grubhub Terms 5. The arbitration provision also includes the following class action waiver:

The parties agree to bring any claim or dispute in arbitration on an individual basis only, and not as a class or collective action, and there will be no right or authority for any claim or dispute to be brought, heard, or arbitrated as a class or collective action (“Class Action Waiver”). Regardless of anything herein and/or the applicable AAA Rules, the interpretation, applicability or enforceability of the Class Action Waiver may only be determined by a court and not an arbitrator.

Id. The terms were last updated October 15, 2018. Wilson Decl. ¶ 9.

B. Plaintiff’s Contract with Uber Eats

Michaeli signed Plaintiff up with Uber Eats on November 13, 2019. ECF No. 66 (“Pelham Decl.”), ¶ 5. Uber Eats is operated by Portier, LLC, a subsidiary of Uber Technologies. *Id.* ¶ 3. When Michaeli registered Plaintiff with Uber Eats, he signed the Uber Eats Order Form. ECF No. 66-1 (“Uber Eats Form”). The first section, “General Terms,” stated that the agreement was “subject to the terms and conditions, including an arbitration provision, currently available at [link], as may be updated from time to time.” *Id.* Clicking on the link brought up the “Uber Eats U.S. Merchant Terms and Conditions,” ECF No. 66-2 (“Uber Eats Terms”), which included the following arbitration provision:

Any dispute, whether contractual or otherwise, arising out of or in connection with this Agreement or these dispute resolution procedures, including any question regarding its existence, performance, validity, or termination, will be referred to and finally resolved by arbitration administered by JAMS in accordance with its Comprehensive Arbitration Rules and Procedures (the “JAMS Rules”), which are deemed to be incorporated by reference into this clause. The parties agree that the arbitrator (“Arbitrator”), and not any federal, state, or local court or agency, shall have exclusive authority to resolve any disputes relating to the interpretation, applicability, enforceability or formation of this Agreement, including any claim that all or any part of this Agreement is void or voidable. The Arbitrator shall also be responsible for determining all threshold arbitrability issues, including issues relating to whether this Agreement is unconscionable or

illusory and any defense to arbitration, including waiver, delay, laches, or estoppel.

Uber Eats Terms § 17.1. The Uber Eats Terms also included the following class action waiver:

“Neither party may bring any class, collective, or representative action against the other party, and will preclude a party from participating in or recovering relief under any current or future class, collective, consolidated, or representative action brought against the other party by someone else.” Uber Eats Terms § 17.1(vii).

C. Plaintiff’s Contract with DoorDash

Michaeli signed up to create an account for Plaintiff with DoorDash on January 21, 2020. ECF No. 60 (“Sommers Decl.”), at ¶ 6. To do so, he completed the DoorDash Sign-Up Sheet, ECF No. 60-1 (“DoorDash Form”), and signed the DoorDash Merchant Terms of Use, ECF No. 60-2 (“DoorDash Terms”).² The first section of the Merchant Terms of Use calls attention to Section 17, governing arbitration of claims, as follows:

SECTION 17 OF THIS AGREEMENT CONTAINS PROVISIONS THAT GOVERN HOW CLAIMS THAT YOU AND WE HAVE AGAINST EACH OTHER ARE RESOLVED, INCLUDING, WITHOUT LIMITATION, ANY CLAIMS THAT AROSE OR WERE ASSERTED BEFORE THE EFFECTIVE DATE OF THIS AGREEMENT. IN PARTICULAR, SECTION 17 SETS FORTH OUR ARBITRATION AGREEMENT WHICH WILL, WITH LIMITED EXCEPTIONS, REQUIRE DISPUTES BETWEEN US TO BE SUBMITTED TO BINDING AND FINAL ARBITRATION. UNLESS YOU OPT OUT OF THE ARBITRATION AGREEMENT: (1) YOU WILL ONLY BE PERMITTED TO PURSUE CLAIMS AND SEEK RELIEF AGAINST US ON AN INDIVIDUAL BASIS, NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY CLASS OR REPRESENTATIVE ACTION OR PROCEEDING; AND (2) YOU ARE WAIVING YOUR RIGHT TO SEEK RELIEF IN A COURT OF LAW AND TO HAVE A JURY TRIAL ON YOUR CLAIMS. THE ARBITRATION AGREEMENT COULD AFFECT YOUR RIGHT TO PARTICIPATE IN PENDING PROPOSED CLASS ACTION LITIGATION. PLEASE SEE SECTION 17 FOR MORE INFORMATION REGARDING THIS ARBITRATION AGREEMENT, THE POSSIBLE EFFECTS OF THIS

² References to page numbers in the DoorDash Terms are to the page numbers automatically generated by the Court’s Electronic Case Filing (“ECF”) system.

ARBITRATION AGREEMENT, AND HOW TO OPT OUT OF THE
ARBITRATION AGREEMENT.

DoorDash Terms 4. Section 17, in turn, states that, subject to two exceptions not relevant here, “[a]ny dispute, controversy or claim arising out of, relating to or in connection with this contract, including the breach, termination or validity thereof, shall be finally resolved by binding arbitration, rather than in court.” *Id.* § 17.1. It further specifies that arbitration will be “governed by the Federal Arbitration Act in all respects,” *id.* § 17.2, conducted by JAMS, *id.*, and that

[t]he arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Arbitration Agreement, including, but not limited to any claims that all or any part of this Arbitration Agreement is void or voidable.

Id. § 17.3. The agreement also includes a class action waiver, *id.* § 17.5, and a provision that allows a merchant to “opt out of this Arbitration Agreement.” *id.* § 17.6. The latter provision further states that “[i]f you do [opt out], neither you nor the Company can force the other to arbitrate as a result of this Agreement. To opt out, you must notify the Company in writing no later than 30 days after first becoming subject to this Arbitration Agreement.” *Id.* DoorDash represents, and Plaintiff does not dispute, that Plaintiff did not exercise its right to opt out of the arbitration provision. Sommers Decl. ¶ 11.

DoorDash updated its Merchant Terms of Use on May 12, 2020, *id.* ¶ 12, *see* ECF No. 60-4, on June 17, 2020, Sommers Decl. ¶ 14, *see* ECF No. 60-5, on December 2, 2020, Sommers Decl. ¶ 17, *see* ECF No. 60-6, on February 1, 2021, Sommers Decl. ¶ 20, *see* ECF No. 60-7, and on June 1, 2021, Sommers Decl. ¶ 22, *see* ECF No. 60-8. Each time, DoorDash sent an email to Plaintiff advising it of the changes. Sommers Decl. ¶ 16. DoorDash submitted two such emails, which each appear to have a clear header or subject line — “Updated Online Merchant Terms” and “We’ve Updated our Online Merchant Terms” — and include a link to the revised terms

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