No. 23-1727

In the United States Court of Appeals for the First Circuit

JOYCE TOTH,
Plaintiff-Appellant,

v.

EVERLY WELL, INC. and EVERLY HEALTH, INC.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Massachusetts - Boston
Case No. 1:23-cv-11043-RGS (The Hon. Richard G. Stearns)

RESPONSE BRIEF OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), Defendant-Appellee Everly Well, Inc. states that it is the wholly owned subsidiary of Defendant-Appellee Everly Health, Inc. Everly Health, Inc. does not have a parent corporation. No publicly held corporation owns 10% or more of stock in either of Defendants-Appellees.

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INTRODUCTION

When Plaintiff Joyce Toth registered her Everlywell Food Sensitivity Test kit, she checked a box stating: "I have read and accept the Terms and Conditions." The phrase "Terms and Conditions" was in green text and contained a hyperlink to Everlywell's standard terms, including an arbitration clause. All of this is undisputed. Indeed, Toth could not complete the transaction without checking this box—she could not possibly have missed the terms. Yet Toth now seeks to evade the agreement she expressly accepted. The district court rightly rejected her attempt to do so and compelled arbitration. Nothing in Toth's opening brief supports reversal.

The sole question before this Court is whether Toth must arbitrate her claims against Everlywell. One would not know this from the beginning of Toth's brief, which focuses at length on her spurious allegations regarding the advertising of Everlywell's food sensitivity tests and Everlywell's nonexistent sale of private medical information. Toth's claims are false, but they are also irrelevant to the question before this Court. When Toth does address the substance of her appeal, she must go as far afield as North Dakota and New Mexico to find authority for issues that all parties agree are governed by Massachusetts law.

That is because Massachusetts law squarely forecloses Toth's arguments. Toth received clear notice of the terms, she affirmatively accepted them, and they were supported by consideration, including mutual promises to arbitrate. That was enough

to form a contract under Massachusetts law. It makes no difference that Toth had already paid for her test kit—both because the mutual agreement to arbitrate was adequate consideration on its own, and because "money now, terms later" contracts are well-established in Massachusetts such that Everlywell's services also provide consideration.

As a result, Toth repackages her claim that she had already paid into various attacks on the contract's validity or enforceability. But challenges of this sort are meritless and for the arbitrator alone to decide, not this Court. And in any event, Toth had ample opportunity to reject Everlywell's terms and obtain a refund—even after she had opened the box containing her test. She did not. Instead, she assented to the contract freely and without objection and obtained the full benefit of Everlywell's side of the bargain.

Toth should be held to her side of the bargain, and this Court should affirm the district court's decision.

STATEMENT OF THE ISSUES

1. Did Toth establish that she had no arbitration agreement with Everlywell, even though Everlywell directed her to a hyperlink displaying the arbitration agreement, the agreement included consideration in the form of mutual promises, and Toth affirmatively checked a box stating that she had "read and accept[ed]" the agreement?

2. Did Toth establish that she had no arbitration agreement with Everlywell, even though the agreement was properly presented to her in the course of a "money now, terms later" transaction?

3. Can Toth raise, for the first time on appeal, new arguments based on warranty law, public policy, and equitable estoppel? If so, may a court decide them, rather than an arbitrator? If so, has Toth established all the elements of her purported defenses?

4. Did Toth raise any cognizable defense to arbitration based on Everlywell's and Target's refund policies? If so, may a court decide it, rather than an arbitrator? If so, did Toth establish her purported defense, even though Target's refund policy made clear she could have returned her test kit for a refund?

5. Can Toth raise, for the first time on appeal, an argument that the parties' agreement is "illusory" because it supposedly allows for unilateral modification? If so, may a court decide it, rather than an arbitrator? If so, has Toth established that all the consideration promised by Everlywell was illusory?

6. Can Toth raise unconscionability arguments that she never raised before the district court? If so, may a court decide them, rather than an arbitrator? If so, has Toth established both procedural and substantive unconscionability?

STATEMENT OF THE CASE

A. Everlywell's Home Health Tests

Everlywell[1] is a leading digital healthcare company that provides at-home tests for a variety of health-related issues. JA15. Customers purchase Everlywell's test kits directly from Everlywell or from third-party retailers, self-collect their test samples (such as saliva or blood), follow Everlywell's instructions to submit the samples to the laboratory for processing, and receive the test results from Everlywell. JA61, JA74, JA97, JA157-58. Everlywell offers, among other things, tests for cholesterol, allergies, sexually transmitted infections, and various hormones and biomarkers. JA97-100.[2]

The test at issue is Everlywell's Food Sensitivity Test. JA10. As prominently stated on its packaging and in other disclosures, this test measures a user's immunoglobulin G (IgG) response to various foods. JA16, JA61, JA98, JA130, JA136, JA138. Plaintiff makes various false claims about the value of IgG testing, none of which are relevant to this appeal. For example, Everlywell does not allow children to take its test. JA61; *contra* Appellant's Opening Brief ("Br.") 9. And Everlywell's

[1] This brief refers to both Defendants-Appellees, Everly Health, Inc. and its subsidiary Everly Well, Inc., collectively as "Everlywell."

[2] Unless otherwise noted, citations omit internal citations, quotation marks, footnotes, and previous alterations, and emphasis is added. "Dkt." refers to docket entries in the district court. "*Id.*" citations to state-court decisions include both reports' pagination separated by a slash. *See* Local Rule 32.2.

marketing makes explicit that the Food Sensitivity Test is not an allergy test. Dkt. 29 at 23; JA98, JA130. Indeed, Everlywell offers a separate test for allergies. JA99.

B. Everlywell's User Agreement

Everlywell conditions the receipt of its services upon customers agreeing to certain contractual terms, the "User Agreement." Customers who buy test kits directly from Everlywell's website are presented with the User Agreement at the time of purchase. JA119. The process is slightly different for customers who buy Everlywell test kits from third-party retailers, like Target, which sell products from an enormous variety of suppliers through the same website and maintain their own checkout pages. For such customers, Everlywell ensures they receive clear notice of the User Agreement both through a bolded URL on the packaging of the kit and through the kit registration process.

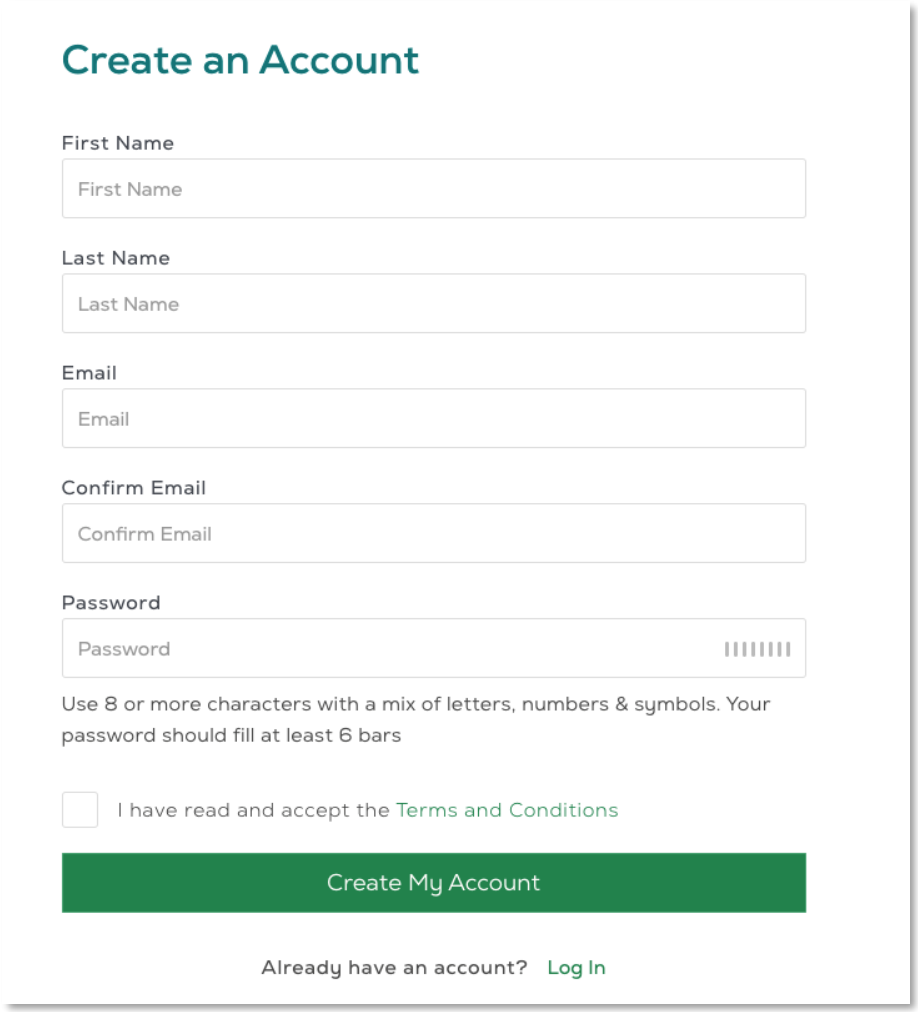
Toth alleges she purchased an Everlywell Food Sensitivity Test kit from Target's website in July 2022. JA13. The website told her that "[t]his item can be returned to any Target store or Target.com" within "90 days" of purchase. JA130.[3]

[3] Below, Toth didn't dispute she bought the test through this webpage. Dkt. 35 at 10. She now notes the screenshot is "from October 2022." Br. 41. She waived any dispute as to its accuracy by failing to object below, and regardless, the March 2022 version provides the same information in a "Shipping & Returns" tab. *See* JA136 (showing "Shipping & Returns" tab, the contents of which can be viewed by visiting https://web.archive.org/web/20220312162329/https://www.target.com/p/everlywell-food-sensitivity-test-lab-fee-included/-/A-76157573 (the URL for JA136)).

After placing her order from Target, Toth received a test kit in Everlywell's distinctive packaging. JA58. The exterior of the box stated in bolded text: "Purchase, registration, and use are subject to agreeing to the Everlywell User Agreement, which can be read at everlywell.com/terms." *Id.*; JA61. Typing that URL into a web browser would have taken Toth to Everlywell's User Agreement. JA70, JA141. A picture of the exterior of this box was also displayed to Toth on Target's website prior to purchase. Dkt. 39 at 2; JA129 (webpage with selectable image of back of box), JA115 (webpage URL).

Before submitting her test sample for processing, Toth was required to register her test kit on Everlywell's website. To register, Toth had to create an online account, link it to her kit's unique identification number, and provide contact information so that Everlywell could deliver her test results. Br. 10; JA66, JA156-58.

When creating her account, Toth checked a box stating: "I have read and accept the Terms and Conditions." JA66-67.



The website does not allow a customer to register a test kit unless the customer checks this box. *Id.* Toth concedes that she did so in July 2022, when she registered her test. JA35, JA39, JA65-66.

The text "Terms and Conditions" was hyperlinked in green, unlike the surrounding text. JA66-67. Clicking on the green hyperlink would open the User Agreement in a separate tab so that Toth could read it without navigating away from the account-creation page. JA67.

The first sentence of the User Agreement states: "By clicking on the box, you indicate that this User Agreement is a binding agreement between you as the person who has created your Account ... and Everly Well, Inc. ... and that you have read and understood the following terms...." JA73. These terms include procedures for resolving legal claims between Everlywell and its customers, which appear in a distinct paragraph under the bolded heading "Dispute Resolution." JA78.

That paragraph begins with mutual promises to negotiate: "In the event of any dispute, claim, question or disagreement arising from or relating to this User Agreement or the purchase, registration, or use of any Everlywell product or Services, we and you (collectively, the 'Parties') shall use their best efforts to settle the dispute, claim, question, or disagreement." *Id.*

The paragraph then sets forth mutual promises to arbitrate: "If the Parties do not reach such solution within a period of thirty (30) days, then all disputes shall be resolved by binding arbitration in Austin, Texas, in accordance with the Commercial Arbitration Rules of the American Arbitration Association (the 'AAA'), subject to the limitations of this section." *Id.*

A separate paragraph creates a mutual exception to the arbitration provision: "Either party to this User Agreement may bring a claim related to intellectual property rights, or seek temporary or preliminary specific performance or temporary or

preliminary injunctive relief, in any court of competent jurisdiction, without the posting of bond or other security." JA79.

The User Agreement sets forth other terms and provides additional information regarding Everlywell's services and website. For instance, it advises customers to "email us at contact@everlywell.com ... for assistance with refunds." JA75. It also "incorporate[s] by reference" three other documents: a "Privacy Policy," a "Consent for Services," and "Terms of Use." JA73. It makes clear, however, that the User Agreement "govern[s]" in "the event of a conflict." JA79. This brief refers to the User Agreement and other terms that Toth accepted collectively as the "Agreement."

C. Target's Refund Policy

As noted above, Toth knew from Target's website that her Everlywell test kit could be "returned to any Target store or Target.com" within "90 days" of purchase. JA130. During this litigation, Toth noted that Target's website contains a hyperlink to Target's return policy, and that the return policy says that "opened" items "*may* be denied a refund." JA146. The return policy, however, has its own hyperlink to click for more "information on return exceptions." *Id.* That hyperlink leads to a separate "return exceptions" page.[4]

[4] One can navigate there from URLs at JA133 (ultimately landing at the archived page https://web.archive.org/web/20220403155831/https://help.target.com/help/targetguesthelparticledetail?articleId=ka95d000000oOFyAAM&articleTitle=Are+there+any+return+exceptions%3F&clickSearchVar=Search+Results&searchQuery

The "return exceptions" page identifies certain "opened" items that "cannot be returned" (collectibles and breast pumps) or "are eligible only for an exchange" (airbeds and entertainment items). It does not impose any such restrictions on Everlywell tests or any other test kits.

Target's return policy also contains clickable tabs that specify "return exceptions" and address "opened" items. JA147. These tabs provide the same information as the "return exceptions" page.[5] Unlike collectibles and certain other specified items, there are no restrictions on obtaining refunds for opened Everlywell tests.

D. Proceedings Before the District Court

Toth filed a class action complaint against Everlywell, asserting claims under Chapter 93A of the Massachusetts General Laws and analogous statutes, as well as claims for unjust enrichment and misrepresentation. JA44-53. Everlywell advised that it planned to move to compel arbitration or, in the alternative, to dismiss Toth's

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=return+exceptions) or JA143 (ultimately landing at the current page https://help.target.com/help/targetguesthelparticledetail?articleId=ka95d000000wpexAAA&articleTitle=Are+there+any+return+exceptions%3F&clickSearchVar=Search+Results&searchQuery=return+exceptions).

[5] One can navigate there from URLs at JA133 (ultimately landing at the archived page https://web.archive.org/web/20220317223807/https://help.target.com/help/subcategoryarticle?childcat=Returns&parentcat=Returns+%26+Exchanges&searchQuery=search+help) or JA143 (ultimately landing at the current page https://help.target.com/help/subcategoryarticle?childcat=Returns&parentcat=Returns+%26+Exchanges&searchQuery=search+help).

claims. JA6. With Everlywell's consent, Toth obtained leave of court to file her own motion seeking any discovery she believed she needed to address any factual issues raised by Everlywell's motion. *Id.*

Once Everlywell filed its motion, Toth filed hers, identifying the alleged "factual issues that Plaintiff has not been able to test" and for which she sought discovery. Dkt. 30 at 1. The district court granted in part and denied in part the requested discovery. JA7-8. Toth does not challenge this discovery order on appeal or argue that any additional discovery was needed.

In its motion, Everlywell sought to enforce the Agreement and compel arbitration under the Federal Arbitration Act. Dkts. 29, 39. Toth opposed the motion, claiming that the Agreement did not satisfy the requirements for contract formation under Massachusetts law, was unconscionable, and did not cover her claims. Dkt. 35. She did not make many of the arguments she now makes on appeal.

The district court granted Everlywell's motion to compel arbitration and dismissed the case. JA8-9; Add. 1-2. The court observed that "Toth affirmatively checked a box accepting [Everlywell's] Terms and Conditions, which included an arbitration clause," and that the Massachusetts Supreme Judicial Court (SJC) had "found such acts of positive acceptance sufficient to establish the existence of a valid contract to arbitrate." Add. 1. "None of her argument[s] ... support[ed] a departure" from "that precedent." *Id.*

The district court rejected Toth's "consideration argument" because it wrongly presupposed that "Everlywell immediately bec[ame] obligated to provide her with test results" when she bought her test kit from Target. *Id.* The court rejected Toth's "notice argument" because it "conflict[ed] with the determination of the Massachusetts [SJC]" that "requiring a user to expressly and affirmatively assent to [contractual] terms ... puts the user on notice." Add. 2. The court rejected Toth's "acceptance argument" because she "had a reasonable and available alternative to simply accepting the terms," such as returning her kit for a refund. *Id.* The court found that Toth's "procedural unconscionability arguments merely recycle[d] under a new label her previously rejected arguments." *Id.* And it disposed of other issues, such as the scope and retroactivity of the arbitration clause, that Toth does not raise on appeal. *Id.*

STANDARD OF REVIEW

This Court is "free to affirm a district court's decision on any ground supported by the record *even if* the issue was not pleaded, tried or otherwise referred to in the proceedings below." *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 783 n.8 (1st Cir. 1990) (collecting cases); *accord, e.g.*, *In re Montreal, Maine & Atl. Ry., Ltd.*, 888 F.3d 1, 8 n.4 (1st Cir. 2018) (court can affirm "whether or not that particular ground was raised below") (collecting cases); *Persson v. Scotia Prince Cruises, Ltd.*, 330 F.3d 28, 31 (1st Cir. 2003) ("[e]ven [w]hen" a "trial court's findings" are clearly erroneous, this Court can affirm on "any" alternative ground). By contrast, "appellants cannot raise

an argument on appeal that was not squarely and timely raised in the trial court." *Carrozza v. CVS Pharmacy, Inc.*, 992 F.3d 44, 59 (1st Cir. 2021); *accord, e.g.*, *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 258 (1st Cir. 1999). As described below, this well-settled principle bars many of Toth's arguments on appeal.

Furthermore, Toth is wrong to suggest that this Court must "'resolve factual disputes' and make 'all reasonable inferences' in [her] favor." Br. 18. Rather, "[i]n reviewing the district court's resolution of a motion to compel arbitration," this Court "review[s] legal issues de novo and factual determinations for clear error." *Canales v. CK Sales Co., LLC*, 67 F.4th 38, 43 (1st Cir. 2023). The "clearly-erroneous standard" is "a hard-to-satisfy test, seeing how a challenger must show that the contested finding stinks like a 5 week old, unrefrigerated, dead fish." *United States v. Baptiste*, 8 F.4th 30, 42 (1st Cir. 2021). "This is so even when the district court's findings" are based "on physical or documentary evidence or inferences from other facts." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). Thus, in *Canales*, this Court deferred to findings made without a hearing. 67 F.4th at 45; *see Canales v. Lepage Bakeries Park St. LLC*, 596 F. Supp. 3d 261, 265 (D. Mass. 2022).

Toth ignores *Canales*. She instead relies on *Rodríguez-Rivera v. Allscripts Healthcare Sols., Inc.*, 43 F.4th 150 (1st Cir. 2022), which says a "summary-judgment standard" applies to arbitration motions in the first instance, and if there is a "genuine issue of fact," the district court "shall proceed summarily to trial" to resolve it. *Id.* at

168. But Toth seeks no remand for trial and does not claim she needs additional discovery. *See Murphy v. Molino*, 45 F.3d 423, at *1 (1st Cir. 1995) (unpublished) ("we have no reason to consider" a "remand" the appellant "does not seek"). To the contrary, she moved for all the discovery she claimed to need, and she has not challenged the district court's discovery order. In similar situations, this Court has reviewed summary-judgment rulings for clear error. *See, e.g.*, *Berkshire Bank v. Town of Ludlow, Mass.*, 708 F.3d 249, 252 (1st Cir. 2013). In any event, here, as in *Canales*, the district court's factual conclusions should be treated like trial findings. The district court is the finder of fact, as Toth did not request a jury trial when she opposed Everlywell's motion. *See Burch v. P.J. Cheese, Inc.*, 861 F.3d 1338, 1348 (11th Cir. 2017) (demand for jury on issue of arbitrability must be specifically made). A formal trial is unnecessary, as the district court has already shown how it would rule. *See Avenoso v. Reliance Standard Life Ins. Co.*, 19 F.4th 1020, 1026-27 (8th Cir. 2021); *Patton v. MFS/Sun Life Fin. Distribs., Inc.*, 480 F.3d 478, 484-85 (7th Cir. 2007).

Regardless, Toth cannot obtain the sole remedy she seeks—a reversal, allowing her to avoid arbitration altogether (Br. 5, 54)—merely by showing Everlywell was not entitled to summary judgment. *See* 9 U.S.C. § 4; *Rodríguez-Rivera*, 43 F.4th at 171; *Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975, 978 (10th Cir. 2014) (under such circumstances, a "court [i]s in no position to *deny* a motion to arbitrate"). Instead, Toth must show *her* entitlement to summary judgment, with the record construed in

Everlywell's favor. *See Jin v. Parsons Corp.*, 966 F.3d 821, 827 (D.C. Cir. 2020) (court may "deny a motion to compel arbitration" without trial only if it "determines as a matter of law" that the parties "did not agree to arbitrate"); *Dahua Tech. USA Inc. v. Feng Zhang*, 988 F.3d 531, 539 (1st Cir. 2021) (record is construed against any party seeking "judgment as a matter of law"). Toth makes no such showing.

To be clear, however, Everlywell prevails under any standard of review—including the one Toth proposes. The facts are largely undisputed, and they demonstrate that Everlywell was entitled to judgment as a matter of law.

SUMMARY OF THE ARGUMENT

I. This case begins and ends with a simple truth: Toth affirmatively agreed to a contract with Everlywell. It makes no difference that Toth had already paid for an Everlywell test. Toth was presented with the Agreement, had an opportunity to read it, and checked a box expressly affirming that she accepted it. The Agreement included consideration for both sides, including mutual promises to arbitrate. This was a proper "clickwrap" contract of the sort routinely enforced in Massachusetts. The Agreement satisfies all the elements of contract formation: notice, consideration, and assent. Toth's claim that there is some unfairness in presenting her with the Agreement post-sale is, at most, a challenge to the validity (*i.e.*, enforceability) of the properly formed contract. But the only question before this Court is contract formation. Under the Federal Arbitration Act and the Agreement itself, all validity challenges are for the

arbitrator alone to decide. Thus, Toth's complaints about the timing of the Agreement provide no basis for her to avoid arbitration.

II. Not only is the Agreement a proper "clickwrap" contract, it is also a proper "money now, terms later" contract. This is another, independent basis for finding contract formation. Toth argues the Agreement lacked consideration because Everlywell had a preexisting duty to deliver testing services. But Everlywell did not commit to providing services the moment Toth bought her test kit. In Massachusetts, customers commonly receive contractual terms only after they have paid money for goods or services. Courts routinely enforce consumer agreements using this "money now, terms later" structure, reasoning that the parties' agreement is not final at the moment of sale. Everlywell had no preexisting duty at the time Toth received the Agreement, and there was no obstacle to contract formation.

III. Toth waived her theories asserting warranty law, public policy, and equitable estoppel by failing to raise them below. Even if not waived, these purported defenses are both meritless and for the arbitrator to decide, since they go to contract validity rather than formation.

IV. Toth argues her assent to the Agreement was invalid because, hypothetically, if she had tried to reject it, she would not have received a refund. Toth does not fully explain her argument, but it is plainly a validity challenge for the arbitrator to decide, such as coercion or duress. In any event, the record firmly

supports the district court's conclusion that Toth could have obtained a full refund from Target if she had chosen to reject the Agreement. There was no unfairness in asking Toth to accept the Agreement after she had bought her test.

V. Toth has waived her new argument that the Agreement is "illusory" because Everlywell could "unilaterally modify" it. It is also yet another meritless argument for the arbitrator to decide. A contract isn't illusory if there is adequate consideration, and Toth received the consideration she was promised. None of the purported "unilateral modification" clauses she points to could erase that consideration.

VI. Toth's "unconscionability" argument is a validity challenge for the arbitrator to decide. In any event, Toth had the burden of establishing both procedural and substantive unconscionability and failed on both counts. Toth simply recycles her prior meritless arguments under a new label, and the additional points she raises are waived and unfounded. For instance, the argument that she will spend exorbitant amounts in arbitration fees is wrong because the AAA caps her fees at $200. And to the extent any provisions are found unconscionable, they can be severed, and arbitration can proceed without them.

The Court should affirm the district court's order.

ARGUMENT

I. The Parties Properly Formed A "Clickwrap" Agreement

Toth's fundamental claim is that she cannot be compelled to arbitrate because she received the arbitration agreement *after* buying her test kit. She is wrong. It does not matter when Toth received the arbitration agreement. She checked a box expressly affirming that she accepted it (a process called "clickwrap"). The elements of contract formation in Massachusetts—notice, consideration, and assent—were all satisfied at that time. And, once this Court agrees that a contract was formed, its job is done. All other issues are for the arbitrator to decide, including Toth's variously repackaged claims that the contract was unenforceable because she had already paid.

A. The only issue before the Court is contract formation.

In arbitrability disputes, an important distinction exists between arguments challenging the *validity* of an agreement and those challenging an agreement's *formation*. *See, e.g., Rent-A-Ctr., W., Inc. v. Jackson,* 561 U.S. 63, 71, n.2, 130 S. Ct. 2772, 2778, 177 L. Ed. 2d 403 (2010). A court decides formation challenges—*i.e.*, "claims that the agreement to arbitrate was never concluded." *Biller v. S-H OpCo Greenwich Bay Manor, LLC*, 961 F.3d 502, 508 (1st Cir. 2020). If the "formation" requirements are met, that means the arbitration agreement "exists" as a matter of contract law. *Bossé v. N.Y. Life Ins. Co.*, 992 F.3d 20, 28 & n.10 (1st Cir. 2021).

The separate question of "validity" asks whether an agreement is "unenforceable" on some other ground (for instance, unconscionability). *Id.* In this context, the "arbitration provision is severable from the remainder of the contract." *Biller*, 961 F.3d at 512. The party opposing arbitration must "make a targeted, independent challenge" that is "directed specifically" to "the enforceability of the arbitration clause itself" if it wants a court to "decide that challenge." *Id.* at 512-13. An argument that the "arbitration clause is invalid or unenforceable only 'on a ground that directly affects the entire agreement'" is "ordinarily for the arbitrator to decide." *Id.* at 512.

Even a *specific* challenge to "the validity of an arbitration clause is itself a matter for the arbitrator where the agreement so provides"—*i.e.*, where it "delegate[s]" such questions to the arbitrator. *Biller*, 961 F.3d at 516 n.11. That is the case here. The arbitration provision states that "all disputes shall be resolved ... in accordance with the Commercial Arbitration Rules of the American Arbitration Association (the 'AAA')." JA78. Per those rules, "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement." AAA Commercial Rule 7(a); *accord* AAA Consumer Rule 14.[6] This Court has made clear that "incorporation of the AAA

[6] https://adr.org/sites/default/files/Commercial%20Rules.pdf; https://www.adr.org/sites/default/files/Consumer-Rules-Web.pdf.

arbitration rules" containing this very language "constitutes clear and unmistakable evidence of the parties' intent to delegate arbitrability issues to the arbitrator." *Bossé*, 992 F.3d at 29; *accord, e.g.*, *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989) (same conclusion for similar ICC rules).

Thus, Toth's validity challenges are for the arbitrator—including, as explained below, her warranty, public policy, equitable estoppel, coercion, illusoriness, and unconscionability arguments. These arguments are not specific to the arbitration provision. Indeed, Toth challenges the Agreement's class action waiver on the same grounds. Dkt. 35 at 18. Regardless, the parties delegated *all* validity claims to the arbitrator under the AAA rules. The only issue for this Court is contract formation, and Toth cannot seriously dispute that the parties formed a contract.

B. Everlywell gave reasonable notice.

"[O]nline contract formation" is "not ... different from ordinary contract formation": both require "reasonable notice of the terms and a reasonable manifestation of assent to those terms." *Archer v. Grubhub, Inc.*, 490 Mass. 352, 361, 190 N.E.3d 1024, 1033 (2022). Toth relies heavily on the Massachusetts SJC's decision in *Kauders v. Uber Technologies, Inc.*, 486 Mass. 557, 159 N.E.3d 1033 (2021), to argue that she lacked notice she was agreeing to "extensive contractual terms," including an arbitration clause. Br. 31-37. Toth is right that *Kauders* is a key

precedent, but not for the reason she thinks: *Kauders* and its progeny squarely foreclose Toth's arguments.

1. For starters, Toth is wrong to suggest that the "notice" element always requires a "fact-intensive" analysis of "consumer expectations." Br. 31, 36. *Kauders* makes clear that, by their very nature, "clickwrap" agreements like Everlywell's provide adequate notice under Massachusetts law. Crucially, in *Kauders*, the agreement was *not* clickwrap. During Uber's online registration process, the only notice to customers of additional terms was text at the bottom of one screen stating, "By creating an Uber account, you agree to the Terms & Conditions and Privacy Policy." 486 Mass. at 559-61, 576, 159 N.E.3d at 1039-40, 1052. There was no requirement that customers affirmatively acknowledge those terms. *Id.* Because a customer could easily advance to the next screen "without ever" seeing the notice, the SJC declined to enforce the agreement. *Id.* at 561/1040, 578-80/1053-54.

The SJC drew a sharp contrast with "clickwrap" agreements, which "requir[e] users to click a box stating that they agree to a set of terms, often provided by hyperlink, before continuing to the next screen." *Id.* at 574-75/1050-51. By its nature, clickwrap "*puts the user on notice* that the user is entering into a contractual arrangement" and "*conspicuously inform[s]* users of the existence and location of terms and conditions."

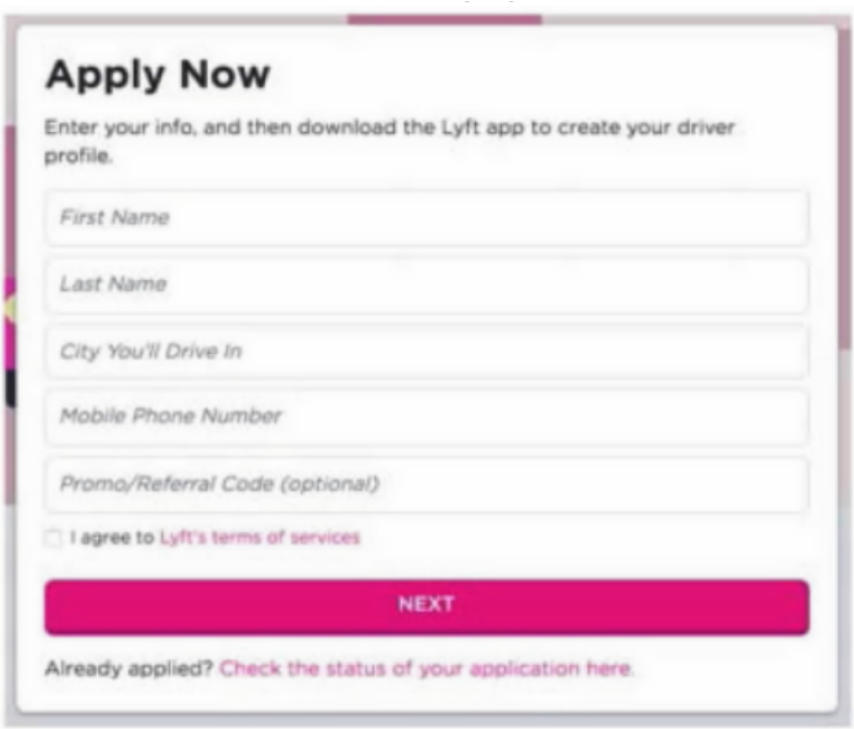
Id.[7] This goes beyond the requirements of Massachusetts law, under which "reasonable" (rather than "conspicuous") notice suffices. *Id.* at 572/1049 n.25. Thus, *Kauders* affirmed that clickwrap agreements "are regularly enforced" and are, indeed, "the easiest method of ensuring that terms are agreed to." *Id.* at 574/1050.

In *Archer*, the SJC again emphasized that "clickwrap" agreements are "generally held enforceable" because even if "the party chooses not to read the agreement," he or she "is required to make some indication of assent, such as selecting 'I agree' or 'I accept.'" 490 Mass. at 362, 190 N.E.3d at 1034. "Reasonable notice of a contract's terms exists even if the party did not actually view the agreement, so long as the party had an adequate opportunity to do so." *Id.* at 361/1033 (citing *Kauders*). Thus, the SJC upheld an online arbitration agreement where, instead of "view[ing] the text of the agreement," users could immediately "navigate" to a signature page via hyperlink and "click[]" again to show their assent. *Id.* at 354/1028, 362/1034. Toth completely ignores *Archer*, even though the district court relied on it. Add. 2. Indeed, she pretends as if the SJC has never written the word "clickwrap."

Toth cites *Applebaum v. Lyft, Inc.*, 263 F. Supp. 3d 454 (S.D.N.Y. 2017), to argue that "checking [a] box" is not always sufficient. Br. 35, 37. But the SJC has not endorsed *Applebaum*. Rather, in both *Kauders* and *Archer*, the SJC endorsed

[7] Toth claims these quotations relate to "assent" rather than "notice" (Br. 36), but the SJC's reasoning plainly relates to both (as *Archer* later confirmed).

Wickberg v. Lyft, Inc., 356 F. Supp. 3d 179 (D. Mass. 2018). *Wickberg* found *Applebaum* "unpersuasive" because it applied New York law, "not the law of Massachusetts." *Id.* at 183 n.2. In fact, *Wickberg* enforced a contract like Everlywell's and rejected notice arguments like Toth's. *Id.* at 183-84; *compare id.* at 181 (screen presented to users in *Wickberg*),



with p.7, *supra* (image of JA66, screen presented to Toth). Toth's reliance on *Applebaum*, rather than *Wickberg*, only confirms that her argument fails. In Massachusetts, a clickwrap process like Everlywell's provides adequate notice.

2. Toth's assertion that "a company must require that [customers] actually 'scroll through' the terms—or at least click on them"—is simply wrong. Br. 35. A company "must reasonably notify the user that *there are terms* ... and give the user the

opportunity to review th[em]." *Kauders*, 486 Mass. at 573, 159 N.E.3d at 1050. While companies should "make [the terms] readily *available*," as Everlywell undisputedly did here, they need not "require the user to open the[m]." *Id.* Indeed, this Court has already held that Massachusetts law does not require "that a user must be required to scroll through" the terms, and that merely "*'acknowledging'* the terms" is enough to show "reasonable notice." *Emmanuel v. Handy Techs., Inc.*, 992 F.3d 1, 9 (1st Cir. 2021); *accord Archer*, 490 Mass. at 354 & n.5, 190 N.E.3d at 1028 & n.5 (enforcing contract that did not require plaintiff "to view the document containing the text of the agreement"); *see Wickberg*, 356 F. Supp. 3d at 183-84 & nn.3-4 (Massachusetts law does not require the "scrollwrap" Toth demands).

3. Against this backdrop, Toth cannot possibly claim she received inadequate notice. When registering to receive services, Toth had to check a box stating, "I have read and accept the Terms and Conditions," with a conspicuous green hyperlink to those terms. JA66-67. Toth *could not* have completed the registration process without first checking the box, and thus, she *could not* have failed to see the text and hyperlink. She had the opportunity to consult the terms at her leisure, and she unequivocally indicated she had read and accepted them. This was a straightforward clickwrap agreement of the sort endorsed in *Archer* and *Kauders*.

The clickwrap process made clear to Toth that her acceptance of terms was "obviously contractual." Br. 32. And contrary to Toth's assertions, the "nature of [her]

transaction" with Everlywell could only have confirmed that understanding. *Id.* Toth was not just "'registering' on an app" (*id.*)—she was creating an account to submit a biological sample for laboratory processing as part of a physician-reviewed test. Given the sensitive nature of the transaction, one would expect (and hope) specific terms applied. Consumers are well aware that even far more mundane transactions come with lengthy terms. *See McLellan v. Fitbit, Inc.*, 2018 WL 1913832, at *2 (N.D. Cal. Jan. 24, 2018).

Everlywell's clickwrap process also adequately conveyed the "'type' and 'scope' of [the contractual] arrangement." Br. 36-37. Unlike the interface in *Kauders*, Everlywell's checkbox directs customers to the Agreement so they can read it in full and requires them to confirm that they have done so. Even if some customers "choose[] not to read the agreement," that "does not render it unenforceable." *Archer*, 490 Mass. at 362, 190 N.E.3d at 1034; *accord Emmanuel*, 992 F.3d at 9-10. And reasonable customers would understand that the terms do not relate solely to "using an account on Everlywell's site," Br. 34: Inside each test kit, customers receive "Important Reminder[s]" to "register [their] kit" online so the laboratory can "process [their] sample." JA158; *see also* JA149, JA155-56, Br. 10. When customers try to register their tests, they must accept the Agreement. A customer cannot reasonably assume the Agreement has nothing to do with the tests—particularly when, as explained *infra*, the Agreement's text itself makes clear that is not the case.

4. Toth cannot seriously claim the Agreement itself is misleading. Br. 34. The first sentence explains that by clicking the box, the customer is accepting a binding contract. JA67, JA73. Far from focusing on Everlywell's website, the first page says Everlywell "operates a service" for individuals to "receive the results of ... laboratory tests," and it refers customers to the "Consent for Services," which further discusses Everlywell tests. JA73, JA97. The second page of the Agreement expands upon "The Services," discussing how to use test kits and receive test results. JA74.

Nothing is "buried" or hidden, and Toth does not explain how Everlywell should rearrange its terms. Why is the arbitration clause more important than "Restrictions on Use" or "Fees and Payment"? *See* JA73, 75. A consumer whose litigation concerns those provisions would claim *they* should be listed first. And the FAA forbids any rule requiring that arbitration clauses be more "prominent" than other terms. *See Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246, 251–52 (2017)("The FAA ... preempts any state rule discriminating on its face against arbitration."); *Sec. Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1120 (1st Cir. 1989).

For all of these reasons, the Court should reject Toth's notice arguments.

C. Everlywell gave adequate consideration.

Toth argues she received "no consideration" for her promise to arbitrate because Everlywell had "already" agreed to perform testing services when Toth bought her kit from Target. Br. 23-25. But Everlywell hadn't agreed yet. *See* Part II, *infra*. In

any event, the Court "need not [reach] this issue." *Soto-Fonalledas v. Ritz-Carlton San Juan Hotel Spa & Casino*, 640 F.3d 471, 475 (1st Cir. 2011).

That is because *even if* Toth were entitled to services before she accepted the Agreement, the Agreement contains "bilateral obligations that independently constitute valid consideration." *Id.* At the time Toth agreed to arbitrate, Everlywell made several promises in exchange. Everlywell promised to "use [its] best efforts to settle" any dispute with Toth, to "negotiate ... in good faith," and to wait at least "thirty (30) days" before commencing any arbitration. JA78. Like Toth, Everlywell promised to arbitrate claims under the AAA rules, rather than filing a court case (except in certain scenarios applicable to both sides). JA78-79.

This satisfies the consideration requirement. As the Massachusetts SJC made clear long ago, "mutual promises of the parties in an agreement for arbitration are sufficient consideration each for the other." *Pond v. Harris*, 113 Mass. 114, 118 (1873); *accord Miller v. Cotter*, 448 Mass. 671, 684 n.16, 863 N.E.2d 537, 547 n.16 (2007); *see also Soto v. State Indus. Prods., Inc.*, 642 F.3d 67, 76 (1st Cir. 2011); *Soto-Fonalledas*, 640 F.3d at 475. Toth's unsupported claim that arbitration is more valuable to Everlywell than to her is of no moment, as "the parties' obligations need not be of equal value." *Crellin Techs., Inc. v. Equipmentlease Corp.*, 18 F.3d 1, 9 n.12 (1st Cir. 1994); *accord Graphic Arts Finishers, Inc. v. Bos. Redevelopment Auth.*, 357

Mass. 40, 43, 255 N.E.2d 793, 796 (1970) ("The law does not concern itself with the adequacy of consideration....").

The Court can easily reject Toth's consideration argument on this ground. "[T]he simplest way to decide a case is often the best." *Britto v. Prospect Chartercare SJHSRI, LLC*, 909 F.3d 506, 513 (1st Cir. 2018).

D. Toth gave effective assent.

Toth does not dispute that she assented to the Agreement. Instead, she claims her assent was "meaningless" because the Agreement did not "make clear" that she could "reject [it] and receive a refund." Br. 37-38. Toth's misguided attempt to interpose a "clear-statement rule" has no support in law or fact and should be rejected.

1. Toth does not anchor her "meaningful assent" argument in Massachusetts law. Contract formation requires only a "manifestation of assent"—and one of "the *clearest* manifestations of assent" is "clicking or checking a box that states that the user agrees to the terms and conditions." *Kauders*, 486 Mass. at 572-74, 159 N.E.3d at 1049-50; *accord Archer*, 490 Mass. at 361-62, 190 N.E.3d at 1033-34. Toth manifested her assent in precisely this manner. Nothing more was required.

2. The "clear statement" cases Toth cites differ from this case in a critical respect: they concerned "shrinkwrap" agreements under which merely keeping and using a purchased product was deemed "acceptance" of new terms placed inside the package, without any explicit acknowledgement from the purchaser that they accepted

the terms. *DeFontes v. Dell, Inc.*, 984 A.2d 1061, 1068, 1071-72 (R.I. 2009); *Kaufman v. Am. Exp. Travel Related Servs.*, Co., 2008 WL 687224, at *6 (N.D. Ill. Mar. 7, 2008). According to these courts, where the customer's silence is treated as acceptance, and rejection requires additional steps, customers need clear instructions before their conduct can be interpreted as assent. That reasoning has no application here. Toth *expressly* indicated her acceptance of the Agreement. Tellingly, Toth does not cite a single *clickwrap* case requiring companies to spell out how to reject their terms. That is because the answer is obvious: do not click the button stating that you agree. Toth cannot avoid her express, unambiguous assent.

3. Moreover, no court in Massachusetts has adopted Toth's proposed clear-statement rule. Toth relies on two cases from Rhode Island (*DeFontes*) and Illinois (*Kaufman*), but in the 14-plus years since they were decided, no Massachusetts court has followed them. Moreover, both decisions rely on a misunderstanding of two Seventh Circuit cases, which say only that if a company asks for additional terms after purchase, the customer should have "an *opportunity* to read the terms and to reject them by returning the product." *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997) (citing *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996)). These cases do *not* say that customers are so helpless they cannot figure out how to request a refund without explicit instructions. *See id.* at 1150 (emphasizing that "[s]hoppers"

can "ask the vendor" for information about applicable terms or "consult" vendors' "Web sites").

In fact, a Massachusetts court has squarely rejected Toth's argument. In *Feeney v. Dell Inc.*, 87 Mass. App. Ct. 1137, 34 N.E.3d 780 (2015) (unpublished),[8] a shrinkwrap case, "the plaintiffs argue[d] that the right to return the computers for a full refund within thirty days did not *make clear* that the customer could do so if it rejected the terms and conditions." *Id.* at *4 n.17. The Appeals Court found this irrelevant. The "return policy placed no limits on the reasons for a return," and was "sufficiently broad to allow for the return of the product if the customer [wa]s not satisfied with the terms and conditions." *Id.* Having failed to do so, the plaintiffs were bound by the company's terms. Other courts have reached the same conclusion. *See Taxes of Puerto Rico, Inc. v. TaxWorks, Inc.*, 5 F. Supp. 3d 185, 189 (D.P.R. 2014) (agreement need not "expressly provide that [customers] could return the software for a refund if they did not agree to [the] terms").

4. Finally, while not required for "clickwrap" contract formation, Everlywell and Target *do* give purchasers clear guidance on how to obtain refunds. Toth purchased her test kit through Target's website, which plainly told her that "[t]his item

[8] Even unpublished decisions are guideposts for state law. *See, e.g.*, *Flores v. OneWest Bank, F.S.B.*, 886 F.3d 160, 164 (1st Cir. 2018). While *Feeney* applied Texas law, it accepted that "Massachusetts and Texas do not differ on the issue at hand," *Feeney* at *3 n.14, and cited cases from other jurisdictions as well.

can be returned to any Target store or Target.com" within "90 days" of purchase. JA130. Similarly, Everlywell's terms state that customers may request refunds. JA75. And the refund policy on Everlywell's website tells customers to "speak with a representative from the original place of purchase" if they bought a test through a third-party retailer. JA114. Yet Toth made no effort to obtain a refund or otherwise to object to Everlywell's terms. Instead, she accepted the terms and used her test.[9]

* * *

The Court need go no further. Under Massachusetts law, Toth formed a contract with Everlywell. Whether the contract is valid or enforceable is for the arbitrator to decide. The district court's order compelling arbitration should therefore be affirmed.

II. The Parties Properly Formed A "Money Now, Terms Later" Contract

The Court can also affirm on the alternative ground that the Agreement was properly formed as a "money now, terms later" contract. The district court invoked this doctrine to reject Toth's "consideration" argument and was entirely correct to do so. Add. 1-2.[10]

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[9] Toth's hypothetical claim that *had she tried* to reject the terms, she would have been denied a refund, is not an issue of contract formation. As explained below, it is both an argument for the arbitrator and false.

[10] The Agreement also satisfies Massachusetts' "notice" and "assent" requirements for the reasons discussed above. *See* Part I, *supra*. None of the "money now, terms later" cases that Toth cites addresses those requirements, let alone

1. Under the "money now, terms later" theory of contract formation, the Agreement would not lack consideration even if it contained no promises from Everlywell (such as Everlywell's reciprocal promise to arbitrate). Everlywell's testing services supplied consideration for *both* Toth's payment *and* her acceptance of the Agreement. Toth's argument mistakenly asserts that once she bought her kit from Target, her contract with Everlywell was fully concluded, so Everlywell could not impose further terms before delivering its testing services.

To the contrary, Massachusetts courts recognize that "[t]ransactions in which the exchange of money precedes the communication of detailed terms are common." *1-A Equip. Co. v. Icode, Inc.*, 2003 Mass. App. Div. 30, at *2 (Dist. Ct. 2003) (quoting *ProCD*, 86 F.3d at 1452); *accord Feeney*, 87 Mass. App. Ct. 1137, 34 N.E.3d 780, at *4-5 ("[P]ayment preceding the revelation of full terms is common for air transportation, insurance, and many other endeavors," including the "sale of consumer goods.") (quoting *Hill*, 105 F.3d at 1149). The contract is not deemed complete at purchase because customers can cancel and obtain a refund. In recent decades, these agreements have been dubbed "money now, terms later" contracts. *ProCD*, 86 F.3d at 1452; *see 1-A Equip. Co.*, 2003 Mass. App. Div. 30, at *2 ("cash

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establishes that "consumers [must] have the opportunity to review the terms that govern the purchase of a product before they choose to buy it." Br. 30.

now, terms later"). But contracts like this have been enforced in Massachusetts for far longer.

In *Secoulsky v. Oceanic Steam Navigation Company*, 223 Mass. 465, 112 N.E. 151 (1916), the plaintiff's son bought a "prepaid certificate for a third class passage" on a steamship, which the plaintiff later "exchanged ... for a third class ticket" that contained terms limiting "the defendant's liability for the loss of baggage." *Id.* at 465-66. The SJC held that the "contract was made" when the plaintiff obtained the ticket with terms—not when the money was paid—and the "limitation [of liability] therefore was binding on the plaintiff." *Id.* at 466.

In *Polonsky v. Union Federal Savings & Loan Association*, 334 Mass. 697, 138 N.E.2d 115 (1956), the plaintiff and her husband opened a joint account with the defendant bank, made a deposit of money, and "signed a temporary signature card" with certain terms. *Id.* at 697/115. "Thereafter the teller handed to the plaintiff's husband a bank book" containing additional terms, including a limitation of liability. *Id.* at 697-98/115-16. When the plaintiff later sued the bank, the bank invoked this limitation. The trial court adopted Toth's position here, "rul[ing] that the rights of the parties were governed by the terms of the contract when the account was opened." *Id.* at 699/116. The SJC reversed, holding that the bank book "constitutes part of the contract" and that a depositor is thus bound by its additional terms "whether or not he reads them." *Id.* at 701/117-18.

More recently, in both *1-A Equipment Co.* and *Feeney*, the plaintiffs bought software from the defendants, and the defendants enclosed additional terms. The plaintiffs argued the contracts were complete upon sale, and the later terms were therefore ineffective (including, in *Feeney*, because they lacked consideration). In both cases, Massachusetts appellate courts enforced the later terms, holding that these terms were part of the overall sales contracts even if they were delivered after the plaintiffs paid. The contracts were not complete until the plaintiffs received the additional terms and manifested their assent. *See Feeney*, 87 Mass. App. Ct. 1137, 34 N.E.3d 780, at *2-5; *1-A Equip. Co.*, 2003 Mass. App. Div. 30, at *1-2.

Likewise in *i.Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328 (D. Mass. 2002), the federal district court applied Massachusetts law to enforce a "money now, terms later" clickwrap agreement. *Id.* at 336-39 (stating "'[m]oney now, terms later' is a practical way to form contracts," and noting that clickwrap agreements, "where the assent is explicit," are even more clearly enforceable than shrinkwrap agreements).

2. Toth dislikes "money now, terms later" because, in her view, all terms presented after the point of sale seek to modify an existing contract and therefore require additional, independent consideration. But as explained above, under Massachusetts law, the payment of money does not conclude the contract. Toth cites no Massachusetts cases suggesting otherwise. The "consideration" cases she cites (Br.

23) involved settlement agreements and complex deals—not consumer sales or other high-volume transactions in which later-delivered terms are routine. *See Feeney*, 87 Mass. App. Ct. 1137, 34 N.E.3d 780, at *3 (distinguishing "cases [that] did not involve consumer sales contracts").

Nor does Toth provide any reason to believe the Massachusetts SJC would abrogate decades of precedent and invalidate countless consumer transactions based on her arguments. The money-now-terms-later approach is the "majority view" and "better reasoned," as one of Toth's own cases acknowledges. *DeFontes*, 984 A.2d at 1069-71; *accord M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 140 Wash. 2d 568, 998 P.2d 305, 313 n.10 (2000) ("the overwhelming majority view"); Restatement of the Law, Consumer Contracts § 2 TD (2019) ("enforcement of PNTLs [Pay Now, Terms Later] is the dominant approach").

Toth cites cases that supposedly reject this approach (Br. 29-30), but they do not apply Massachusetts law and are otherwise inapposite. Most of them analyze state codifications of the Uniform Commercial Code, which do not apply here.[11] Regardless, even under the UCC, a party's "express assent" to later terms renders them enforceable—which is precisely what Toth did when she checked the box

[11] For good reason, Toth has never argued that the UCC applies: it does not apply where the sale's predominant purpose is services, not goods. *Cumberland Farms, Inc. v. Drehmann Paving & Flooring Co.*, 25 Mass. App. Ct. 530, 534, 520 N.E.2d 1321, 1324 (1988). Toth concedes that the goal of her purchase was to receive Everlywell's test services, not the physical collection kit. *E.g.*, Br. 24; Dkt. 35 at 7 n.4.

indicating her agreement. *E.g.*, *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 99 (3d Cir. 1991). This is a key distinction, because Toth's cases generally concern "shrinkwrap" agreements where a company claims the customer's failure to return the goods constitutes assent to terms placed in the box. While even shrinkwrap agreements are widely enforced, some courts and commentators hesitate to infer assent from silence or inaction in this manner. There is no such problem here, however, since Toth expressly accepted Everlywell's terms. *See, e.g., i.Lan Sys., Inc.*, 183 F. Supp. 2d at 338 (in clickwrap agreements, "the assent is explicit").

In sum, Toth cannot claim her contract with Everlywell was complete the moment she bought a test from Target's website. The Agreement was properly part of the parties' contract, and accordingly, the district court was correct to compel arbitration pursuant to its terms. Any challenges to the Agreement's validity are meritless and for the arbitrator to decide.

III. Toth Cannot Invoke Warranty Law, Public Policy, Or Equitable Estoppel

1. Toth argues that the Massachusetts law of "express warranties" imposed obligations on Everlywell the moment she bought her test kit. Br. 24 & n.3. But she waived this new theory by failing to raise it below. *See supra* at pp.12-13. In any case, Toth misunderstands the law. The cited statute and cases say that goods must conform to a manufacturer's representations. They do *not* say that, having advertised goods,

the seller must deliver them immediately without requesting additional contractual terms.

Furthermore, Toth does not claim that Everlywell's test kit failed to conform to any warranty, nor does she explain how this would affect her agreement to arbitrate. While her description of warranty law emphasizes obligations created by "labels" and "description[s] on [the] box" (Br. 24 & n.3), she ignores that the exterior of Everlywell's test box expressly stated in bold text: "Purchase, registration, and use are subject to agreeing to the Everlywell User Agreement, which can be read at everlywell.com/terms." JA61. Everlywell's representations about the steps to use its product were entirely accurate. And any alleged breach of warranty is, in any event, for the arbitrator alone to decide. *See Middlesex Cnty. v. Gevyn Constr. Corp.*, 450 F.2d 53, 55–56 (1st Cir. 1971).

2. Toth has likewise waived any argument under Massachusetts' "unfair trade practices statute" (Br. 25) by failing to raise it below.[12] Even if the argument were preserved, the Court could not decide it. Toth claims the Agreement is not "enforce[able]" because it "violate[s]" Massachusetts law. *Id.* This is yet another *validity* challenge reserved for the arbitrator. *See Soto-Fonalledas*, 640 F.3d at 475 n.2; *Sleeper Farms v. Agway, Inc.*, 506 F.3d 98, 102-03 (1st Cir. 2007); Part I.A, *supra*.

[12] As an "equitable" balancing-test defense, *Paul Arpin Van Lines, Inc. v. Universal Transp. Servs., Inc.*, 988 F.2d 288, 290 (1st Cir. 1993) (cited at Br. 25), it is particularly unsuitable for appellate resolution.

Toth's contention also fails on the merits. She cites no case in which a contract like Everlywell's (or any "money now, terms later" contract) was found unfair. Her cases merely state that threatening to breach "known contractual" obligations to extort undue benefits violates the statute. Br. 25. But Everlywell did not threaten any breach, let alone do so knowingly. Toth's argument presupposes that the contract was formed at the moment of sale—but as explained above, she is wrong. *See* Part II, *supra*.

3. Toth's "equitable estoppel" argument is also (i) brand new, and thus waived, (ii) a validity question for the arbitrator, and (iii) meritless. *See, e.g.*, *Greene v. Ablon*, 794 F.3d 133, 143 (1st Cir. 2015) ("equitable estoppel" is a validity "defense" alleging the contract is unenforceable—not a challenge to contract formation). On the merits, Toth carries a "heavy burden" to "prove that all three elements" of estoppel "are present" *and* that "failure to apply estoppel would result in injustice." *Id.* She cannot satisfy a single element.

First, neither Everlywell nor Target made any "representation" that Toth would obtain test results without further terms. *Id.* On the contrary, Everlywell's test kit packaging clearly stated, on the exterior of the box, that Toth's purchase and use of kit was subject to additional terms. JA61. Toth could see that packaging both on Target's webpage and once she received the test kit in the mail. *See* JA61, JA129. For the same reasons, Toth could not "reasonabl[y] rel[y]" on her purported assumption that Everlywell would not ask for additional terms. *Greene*, 794 F.3d at 143.

Toth also suffered no "detriment." *Id.* She could have rejected the terms and received a refund, but instead chose to accept the terms and take the test. *See* Part IV, *infra*. Nor is there any "injustice;" Toth was neither misled nor harmed, and she is free to proceed with her claim in arbitration. *Greene*, 794 F.3d at 143; *see 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 266 (2009) ("We are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.").

Consequently, Toth's new theories provide no basis to disturb the district court's decision.

IV. Toth Cannot Claim She Was Coerced

Toth accepted the Agreement without objection. As explained above, she never sought a refund or complained to Everlywell. She argues, however, that if she *had* chosen to reject the Agreement, she wouldn't have received a refund, and that this hypothetical possibility somehow invalidates the assent she freely gave. Br. 40-41. She is wrong, and regardless, her ability to obtain a refund is not an issue of contract formation. At most, it is a validity issue for the arbitrator to decide.

1. Before the district court, Toth framed the issue as "coerced assent," described Everlywell's conduct as "coercion" and "pressure," and cited authority concerning the defense of duress. Dkt. 35 at 9. If present, coercion or duress "would

make the contract invalid, but it would not mean that no contract was ever formed." *Farnsworth v. Towboat Nantucket Sound, Inc.*, 790 F.3d 90, 97 (1st Cir. 2015). Any such validity defense is "for the arbitrator," not this Court. *Farnsworth*, 790 F.3d at 93, 97; *see also* Part I.A, *supra*.

Toth has now abandoned this (failed) "duress" framing, and does not advance any other legal theory under which the availability of a refund would matter. Regardless, courts have made clear that to the extent refund policies are relevant, they go to contract validity, not contract formation. For example, in *Tompkins v. 23andMe, Inc.*, 2014 WL 2903752 (N.D. Cal. June 25, 2014), *aff'd*, 840 F.3d 1016 (9th Cir. 2016), the plaintiffs purchased DNA test kits from the defendant. Before receiving their test results, the plaintiffs had to register their kits online and "affirmatively indicate assent" to the defendant's terms, including an arbitration clause, by "click[ing] a box or button." *Id.* at *7-8. They argued they hadn't truly assented because the defendant's "refund policy was too restrictive"; they wouldn't have received "a full refund" if they had rejected the terms. *Id.* at *8-9.

The court disagreed, holding that any defect in the "refund policy ... d[id] not negate [plaintiffs'] affirmative assent to the [terms]." *Id.* at *8. The court rejected the plaintiffs' argument as a "misplaced" "analogy to a typical shrinkwrap agreement," in which "the customer tacitly accepts contractual terms by not returning the product within a specified time." *Id.* The plaintiffs had affirmed their assent expressly, not

tacitly, so there was no issue of "contract formation." *Id.* at *5, *9; *accord Felter v. Dell Techs., Inc.*, 2022 WL 3010173, at *1-2 (N.D. Cal. July 29, 2022) (holding that a "return policy permit[ing] [the defendant] to charge a 15% restocking fee and return shipping fees" raised only "issues ... for the arbitrator to decide."). Here, too, Toth's "refund" arguments are, at most, validity questions for the arbitrator.

2. Furthermore, as the district court correctly concluded, Toth could have rejected Everlywell's terms and obtained a refund. Add. 2. Toth failed to carry her burden to prove the opposite. *See U.S. Liab. Ins. Co. v. Selman*, 70 F.3d 684, 691 (1st Cir. 1995); *Cabot Corp. v. AVX Corp.*, 448 Mass. 629, 638, 863 N.E.2d 503, 512 (2007). She cannot show error on appeal, let alone clear error.

Despite the bolded URL for the Agreement on the box (and the photo of the box on Target's website), Toth claims she opened the box before seeing Everlywell's terms. Br. 40. That is irrelevant. As the district court found, Target's website plainly states that the test kit Toth bought "can be returned to any Target store or Target.com" within "90 days" of purchase. JA130. Toth presented no evidence that Target would have denied her a refund. Target's return policy is not strict: it says only that "opened" items "*may* be denied a refund." JA146. This does not mean customers "cannot return their opened tests." Br. 40. To the contrary, Target's return policy specifies the "return exceptions," explaining that certain opened items like "collectibles" will not receive a

refund. *See supra* at pp.9-10. By contrast, there are *no* restrictions on returning opened Everlywell tests. *See id.*

Given the total absence of evidence in Toth's favor, the district court properly found, as a matter of law, that Toth had no defense. At minimum, the district court's conclusion that Toth could have obtained a refund was not clear error, which similarly forecloses Toth's argument.

V. Toth Cannot Claim the Agreement Is Illusory

1. Toth has waived her new argument that "unilateral modification clauses" in the Agreement render it "illusory." Br. 41-42. Previously, Toth argued only that any such clause was one factor, among others, showing "unconscionability." Dkt. 35 at 16. She never claimed the agreement was "illusory." And she cited only two of the three contractual provisions that she attacks now. *Compare id.* (citing JA82, JA105), *with* Br. 42 (newly citing purported "unilateral modification" clause at JA79). Toth cannot raise new legal theories or challenge new provisions for the first time on appeal. *See, e.g.*, *Higgins*, 194 F.3d at 258, 261.

2. Even if not waived, Toth's argument that the Agreement is "illusory" is again "for the arbitrator to resolve." *Pazol v. Tough Mudder Inc.*, 93 Mass. App. Ct. 1109, 103 N.E.3d 1237, at n.6 (2018) (unpublished);[13] *accord Damato v. Time*

[13] Although *Pazol* loosely refers to "formation," it places illusoriness in the same category as unconscionability and fraud, which are validity defenses. 93 Mass. App. Ct. 1109, 103 N.E.3d, at n.6.

Warner Cable, Inc., 2013 WL 3968765, at *6 (E.D.N.Y. July 31, 2013) (courts "overwhelmingly reach the conclusion that the issue of illusoriness of the whole contract must be resolved by the arbitrator"). Indeed, this Court sent to arbitration a similar challenge to a "unilateral modification clause" under Massachusetts law, albeit in the context of unconscionability. *Emmanuel*, 992 F.3d at 10-11.

3. Toth's argument also fails on the merits. A contract is illusory if one side "bound themselves to nothing," so the other side "received no consideration." *Gill v. Richmond Co-op. Ass'n*, 309 Mass. 73, 80, 34 N.E.2d 509, 514 (1941). "That a *part* of the consideration offered by the plaintiff, standing alone ... might have been illusory is no objection," so long as the other part was valid. *V. & F.W. Filoon Co. v. Whittaker Corp.*, 12 Mass. App. Ct. 932, 932, 425 N.E.2d 399, 400 (1981); *accord Conduragis v. Prospect Chartercare, LLC*, 909 F.3d 516, 517-18 (1st Cir. 2018).

Toth cannot claim a total lack of consideration. She *received* the test results she paid for. JA39. *See Feeney*, 87 Mass. App. Ct. 1137, 34 N.E.3d 780, at *3-5 (arbitration agreement was supported by the sales contract's consideration; thus, "unilateral" modification clause did not negate the fact plaintiffs "recei[ved] ... the computers" they had bought).

Everlywell's promise to arbitrate is also valid consideration. JA78. Plainly, Everlywell is honoring that promise.

None of the clauses Toth cites suggest it is illusory. Two clauses say Everlywell may modify the "Privacy Notice" and "Terms of Use," but the arbitration provision appears in the "User Agreement." JA82, 105. The User Agreement "govern[s]" and "control[s]" over the other documents. JA79, JA105.

Toth cites only one clause in the User Agreement (for the first time on appeal): "You agree that we may provide you with notices, including those regarding changes to this User Agreement, by email to the address you provide ...." JA79. This does not help her. *First*, providing notices by email does not "unilaterally modify [contract] terms." Br. 42.[14] New terms cannot bind Toth unless she accepts them. *Iberia Credit Bur., Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 173 (5th Cir. 2004) (endorsed by *Bekele v. Lyft, Inc.*, 918 F.3d 181, 190 (1st Cir. 2019)). *Second*, it would be absurd to interpret this clause as allowing Everlywell to modify the Agreement retroactively, rather than only prospectively. *Feeney*, 87 Mass. App. Ct. 1137, 34 N.E.3d 780, at *5-6. After all, the Agreement contemplates "a *binding* agreement between [Toth] ... and Everly Well." JA73. The "illusory" construction that Toth proposes must "be avoided." *Berger v. Victory Realty Tr.*, 329 Mass. 74, 77, 106 N.E.2d 429, 431 (1952).

In short, the Agreement is not illusory.

[14] *Contrast Wasilauskas v. Brookline Sav. Bank*, 259 Mass. 215, 217, 156 N.E. 34, 35 (1927), which enforced a contract stating: "I hereby agree to the by-laws ... and any amendments or additions thereto hereafter made without further notice."

VI. Toth Cannot Claim the Agreement Is Unconscionable

Toth has waived many of her unconscionability arguments by not raising them below. What's left of Toth's unconscionability challenge is for the arbitrator to decide. Even if it were for the Court, Toth cannot meet her burden to "prove *both* substantive unconscionability ... and procedural unconscionability." *Bekele*, 918 F.3d at 187-88.

A. Unconscionability is delegated to the arbitrator.

1. Despite purporting to attack the arbitration provision itself (Br. 43), Toth's unconscionability challenge concerns the Agreement as a whole. She raises, for instance, the timing of her acceptance, the absence of negotiation, the supposed unfairness of clauses outside the arbitration provision (such as indemnification, limitations on liability, and the statute of limitations), and Everlywell's purported ability to unilaterally modify the Agreement. These factors go to the validity of the Agreement, which is an issue the arbitrator alone must decide. *See* Part I.A, *supra*; *Emmanuel*, 992 F.3d at 10-11 ("unconscionability challenge" based on "unilateral modification clause" was "not directed specifically to the agreement to arbitrate"); *see also Bekele*, 918 F.3d at 187 (unconscionability goes to validity, not formation).

2. Even if Toth challenges the arbitration provision specifically, the parties have delegated all such validity challenges to the arbitrator. *See* Part I.A, *supra*. In this circumstance, the only "unconscionability challenge[]" the Court could consider is one "specific to the *delegation* provision" within the arbitration agreement, *Rent-A-Ctr.*,

561 U.S. at 73-74—*i.e.*, a challenge to the AAA rule, incorporated into the Agreement, providing that the arbitrator must decide all validity issues. But "[n]owhere" does Toth "even mention the delegation provision." *Id.* at 72. Her attacks on the arbitration provision—including its "fee-splitting" and supposed "one-sided-coverage"—either "clearly d[o] not go to the validity of the delegation provision" or are not specifically "*applied* to the delegation provision." *Id.* at 73-74.

By contrast, Toth expressly argued before the district court (albeit without support) that "the delegation clause is unconscionable." Dkt. 35 at 10 n.7; *accord id.* at 14 n.9, 15-16. Her failure to make this argument on appeal means it is "abandoned," and she cannot resurrect it on reply. *United States v. Vanvliet*, 542 F.3d 259, 265 & n.3 (1st Cir. 2008).

Accordingly, this Court should not consider Toth's unconscionability argument.

B. Toth's procedural unconscionability argument fails.

Toth argued to the district court that the arbitration agreement "is procedurally unconscionable for all of the reasons discussed above," referring to her notice, consideration, and assent arguments. Dkt. 35 at 15. The district court thus correctly held that her attempt to repackage these same arguments as "unconscionability" failed for the same reasons they did the first time around. Add. 2. Toth's expanded argument on appeal fares no better.

1. Toth's "timing" arguments simply repeat her failed claim that she had no "meaningful ability" to reject the Agreement. Br. 45. Toth identifies no case finding unconscionability under similar circumstances—let alone under Massachusetts law.

2. Toth waived her new argument that the Agreement was a non-negotiable "adhesion" contract. *Compare* Br. 46, *with* Dkt. 35 at 14-15. And adhesion contracts are not inherently unconscionable. *Miller*, 448 Mass. at 684 n.16, 863 N.E.2d at 547 n.16. Even "[p]resenting a patient with a 'stack of multiple forms' to review and sign before a medical procedure" is acceptable. *Rivera v. Stetson*, 103 Mass. App. Ct. 187, 192, 218 N.E.3d 55, 60 (2023), *review denied*, 493 Mass. 1103, 222 N.E.3d 4 (2023).

3. Toth's argument regarding the "presentation of Everlywell's ... terms" recycles her failed "notice" argument. Br. 46-47. Her specific points about the terms' form and structure are waived and meritless. Everlywell does not "bur[y]" the arbitration provision "behind multiple hyperlinks" or in "fine print." Br. 46. The hyperlink on the registration page takes customers *directly* to the User Agreement containing the arbitration provision, which appears under the bolded heading "Dispute Resolution" in normal-sized font (and which a user can enlarge as much as they like on their screen). JA66, JA78. The other dispute-related terms are clearly and consecutively listed in the User Agreement. JA77-79.

4. Toth's new claim that a customer wouldn't "know for certain which arbitral rules would govern" is waived and incorrect. Br. 47. The AAA has well-

established written rules, unlike the forum in *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 778 (7th Cir. 2014). Those rules make crystal clear the AAA Consumer Rules apply to *all* consumer disputes *even if* the arbitration agreement adopts other rules.[15]

5. The Massachusetts-law cases Toth cites do not help her, and their extreme facts illustrate the high bar for unconscionability. "[N]o broader implications should be taken" from *Skirchak v. Dynamics Research Corp.*, in which an employer buried a class-action waiver in an attachment to a pre-Thanksgiving email that "did not require any sort of affirmative response" and "misrepresent[ed]" the employees' "legal rights." 508 F.3d 49, 60-61 (1st Cir. 2007). Even more egregious was *Waters v. Min Ltd.*, in which the plaintiff's lover "introduced the plaintiff to drugs, exhausted her credit card accounts to the sum of $6,000, unduly influenced her, suggested that [she] sell her annuity contract, initiated the contract negotiations, was the agent of the defendants, and benefited from the contract." 412 Mass. 64, 68-69, 587 N.E.2d 231, 234 (1992). In *Vaks v. Ryan*, the court was understandably hostile to a contract that required the plaintiff to "pay [the defendant's] attorney's fees," "no matter who brings an action" and "no matter who wins." 2014 Mass. App. Div. 37 (Dist. Ct. 2014). And

[15] AAA, Commercial Arbitration Rules, R-1 n.*, https://adr.org/sites/default/files/Commercial%20Rules.pdf ("A dispute arising out of a consumer arbitration agreement will be administered under the AAA's Consumer Arbitration Rules."); AAA, Consumer Arbitration Rules, R-1(a)(4), https://www.adr.org/sites/default/files/Consumer-Rules-Web.pdf (Consumer Rules govern whenever a "consumer agreement" provides for AAA arbitration and "specifies a particular set of rules other than the Consumer [Rules]").

in *Zapatha v. Dairy Mart, Inc.*, the SJC *rejected* the unconscionability argument. 381 Mass. 284, 293-94, 408 N.E.2d 1370, 1376-77 (1980).

In sum, Toth has fallen far short of proving procedural unconscionability.

C. The Agreement is not substantively unconscionable.

Toth does no better with substantive unconscionability. Below, Toth based her argument on only four contract provisions: the "unilateral modification clause," the "[a]pplication of the AAA Commercial Rules and cost-splitting," the shortened "statute of limitations," and the Texas "forum selection clause." Dkt. 35 at 16. The new grounds that Toth raises are waived and, regardless, fail.

1. Toth argues that because the Agreement only allows a consumer to recover the price of her test, the cost of arbitration exceeds any potential damages. Br. 49-51. Toth did not raise the Agreement's damages limitation below, so she has waived this argument. Toth also makes no effort to show that, *without* the damages limitation, her "costs of arbitration" would necessarily exceed her "potential recovery," so she "cannot show substantive unconscionability." *Bekele*, 918 F.3d at 188.

Toth's argument also mistakenly assumes the Agreement requires cost-splitting. Below, Toth claimed she would have to share costs equally because the Agreement incorporates "the AAA Commercial Rules." Dkt. 35 at 16. But the Consumer Rules

apply (*see* Part VI.B.4, *supra*), and they cap the consumer's fees at $200 (Br. 50), which is less than half of the federal filing fee in the District of Massachusetts.[16]

Toth now relies on a *separate* cost-splitting provision in the Agreement. Br. 50-51. She waived this unpreserved argument. Furthermore, Everlywell expressly represented to the district court that it would arbitrate under the Consumer Rules and limit Toth's share of AAA fees to $200. Dkt. 39 at 6 & n.2. This moots her concern entirely. *See Bekele*, 918 F.3d at 188-89 (crediting similar "offer before the district court"). If necessary, Everlywell could even cover Toth's $200 fee. *See Soto*, 642 F.3d at 79 (crediting similar "representations to this court").

2. The Agreement's "shortened statute of limitations" is irrelevant. Br. 52. It doesn't apply if "prohibited by applicable law," so it cannot unfairly curtail any rights. JA79. For instance, the four-year period for Chapter 93A claims is "not waivable" and would apply in arbitration. *Anderson*, 500 F.3d at 77. Thus, this contractual provision "is no basis for finding the arbitration agreement unconscionable." *Id.* at 78.

3. Everlywell's "selection of its home state as the forum does not render the arbitration clause unconscionable." *Bragel v. Gen. Steel Corp.*, 2006 WL 2623931, at *5 (Mass. Super. Aug. 2, 2006). "[E]conomic hardship or geographical inconvenience ... are not generally a reason to disregard a forum selection clause." *Leasecomm Corp.*

[16] *See* D. Mass. Fee Schedule, *available at* https://www.mad.uscourts.gov/finance/pdf/feesched.pdf (listing fee for a new civil complaint as $405.00).

v. Crawford, 2003 Mass. App. Div. 58 (Dist. Ct. 2003). Regardless, Toth has not shown that arbitrating in Texas poses any particular hardship. If necessary, Everlywell could defray expenses or accept a different location. *See Soto*, 642 F.3d at 79.

4. Toth's "unilateral modification" argument fails for reasons already explained. The provisions at issue do not permit changes to the arbitration clause (or other parts of the User Agreement) without customer assent. *See* Part V, *supra*.

5. Toth waived her indemnification, damages, and intellectual property arguments (Br. 52-53) by failing to raise them below. She cites no caselaw to develop them. And they are far-fetched in the extreme. For instance, an indemnification clause like Everlywell's does *not* "indemnify Everlywell from [consumers'] own claims." Br. 52. *See Rathbun v. W. Mass. Elec. Co.*, 395 Mass. 361, 363, 479 N.E.2d 1383, 1384 (1985) (requiring "express language ... to indemnify one against his own negligence"); *Pecoy v. Hanson*, 96 Mass. App. Ct. 1103, 134 N.E.3d 1151 (2019) (unpublished) (contrasting "third-party indemnification" with "fee-shifting provisions").[17] Nor does the carve-out for intellectual property rights *only* benefit Everlywell. Br. 53. *See Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1031 (9th Cir. 2016).

[17] Although Toth cannot rely on *contra proferentem* on appeal (having never raised it below), that doctrine undermines her unconscionability argument, since ambiguous provisions would be construed in the customer's favor rather than in the draconian fashion Toth posits. Br. 18. To the extent there are "questions" as to "how the arbitrator w[ould] construe" the provisions Toth raises on appeal, "[t]he proper course is to compel arbitration" rather than guess. *Anderson*, 500 F.3d at 72.

6. Toth has failed to establish substantive unconscionability. Regardless, the Agreement provides that any "unenforceable" provisions can be modified to ensure the others "continue in full force and effect." JA79. A "severance provision" of this sort permits "arbitration [to] go forward without [any] offending term," so "there is no basis for finding the arbitration agreement unconscionable." *Anderson*, 500 F.3d at 77-78; *accord Kristian v. Comcast Corp.*, 446 F.3d 25, 64 (1st Cir. 2006).

CONCLUSION

The Court should affirm the district court's order compelling arbitration.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,039 words excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Baskerville font.

February 28, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the First Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

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