COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, SS.
APPEALS COURT NO. 2021-P-0418

LAUREN PRYOR,
on behalf of herself and
all others similarly situated,
Plaintiff-Appellee
v.
EASTERN BANK,
Defendant/Appellant.

APPLICATION OF DEFENDANT-APPELLANT EASTERN BANK FOR DIRECT APPELLATE REVIEW

I. REQUEST FOR DIRECT APPELLATE REVIEW

Pursuant to Rule 11 of the Massachusetts Rules of Appellate Procedure, Defendant-Appellant Eastern Bank (also referred to herein as "Eastern" and "the Bank") hereby requests direct appellate review of the order of the Superior Court dated March 3, 2021, denying Eastern's motion to compel individual arbitration of Plaintiff-Appellee Lauren Pryor's claims. Direct appellate review is appropriate because this putative class action raises a novel question of law concerning the scope of the recent decision of this Court in Kauders v. Uber Techs., Inc., 486 Mass. 557 (2021), and the trial court's interpretation of that decision, if not reversed, would impose significant burdens on

banks and other organizations seeking to amend their agreements with their customers.

More specifically, the appeal challenges the trial court's ruling that the second prong of the two-prong analysis this Court adopted in Kauders -- requiring (1) that the terms of an online agreement be reasonably communicated by the offeror to the offeree, and (2) that the offeree manifest its assent to the proposed terms -- applies not only to arbitration terms introduced at the time a contract is formed but also to arbitration terms introduced through an amendment to a pre-existing contract when the parties to that contract had expressly agreed to be bound by future amendments.

Unlike this case, Kauders arose in the context of contract formation, where the arbitration provision at issue was introduced as part of the parties' initial agreement, with no history to inform the required analysis of the totality of the circumstances. In contrast, the present case involves an arbitration provision adopted by amendment to a pre-existing contract, where the parties had more than a decade-long history of communications, contracts, and contract amendments, and the amendment at issue was

added and communicated in a manner consistent with that history and with the pre-existing contracts' terms.

The trial court's application of the manifestation-of-assent requirement in the context of a contract amendment, without regard to the pre-existing contract's terms or the history of the parties' dealings, incorrectly extends Kauders to a situation that was not presented to this Court in that case, and creates a precedent that threatens the efficient transaction of business between contracting parties. It also conflicts with the decision of the District of Massachusetts in Fawcett v. Citizens Bank, N.A., 297 F. Supp. 3d 213 (D. Mass. 2018), which had concluded based on Massachusetts law that manifestation of assent need not be shown to establish the enforceability of an arbitration provision added to an existing contract which contained the customer's express consent to be bound by future amendments. See Addendum ("Add.") 274, n.6 (declining to follow Fawcett). Direct appellate review would therefore serve the important interest of clarifying the scope of Kauders.

II. STATEMENT OF PRIOR PROCEEDINGS[1]

On November 5, 2019, Plaintiff-Appellee Lauren Pryor ("Plaintiff-Appellee" or "Pryor") filed her original putative class action complaint in the Business Litigation Session of Suffolk Superior Court. Add. 28. That complaint, which was amended on January 8, 2020, asserted claims for breach of contract and other theories based on Eastern Bank's assessment of overdraft fees in Pryor's and potential class members' consumer checking accounts. Add. 29.

On May 5, 2020, Eastern filed a Motion to Compel Arbitration or, in the Alternative, to Dismiss the Amended Complaint. Add. 30. The motion sought an order from the trial court enforcing an amendment that was added to the parties' account agreement in August 2019 requiring all disputes to be submitted to individual arbitration, and dismissing or staying the litigation pending the completion of the arbitration. In the alternative, the motion sought dismissal of the amended complaint pursuant to Mass. R. Civ. P. 12(b)(6) for failure to state a claim.

[1] A copy of the trial court docket and relevant entries are appended hereto. See Add. 28-276.

The trial court heard argument with respect to the motion to compel arbitration on November 17, 2020. Add. 30. It declined to hear argument on the motion to dismiss at that time, viewing a decision on the motion to compel arbitration as antecedent to the dismissal motion.

On March 3, 2021, Judge Brian A. Davis entered an order denying Eastern Bank's motion to compel arbitration. Add. 30, 258. On March 30, 2021, pursuant to the Massachusetts Arbitration Act, G.L. c. 251, § 18(a)(1), Eastern Bank filed a Notice of Appeal with respect to the trial court's denial of the motion to compel arbitration. Add. 30.

III. STATEMENT OF FACTS RELEVANT TO THE APPEAL

Plaintiff-Appellee Lauren Pryor has maintained a checking account at Eastern Bank since 2008 (the "Checking Account" or "Account"). Add. 63, 67-68. The Checking Account comes with a debit card that allows Pryor to make electronic purchases, payments, withdrawals, and other electronic debit transactions. Id. The crux of Pryor's claim is that the Bank allegedly assessed her and other bank customers' accounts with overdraft fees on transactions that did not, in fact, result in an "overdraft," allegedly in

violation of the terms of their agreements with the Bank.[2]

The terms and conditions of Pryor's Checking Account are governed by a Personal Deposit Account Agreement ("PDAA"). Add. 63, 69-107. Like all Eastern Bank checking customers, Pryor received a copy of the PDAA when she opened her Account. The PDAA outlined the Bank's overdraft policy and fee schedules and explained the process by which the agreement could be amended. Id. When she opened the Account in April 2008, Pryor signed an account signature card. The signature card that she signed provides: "By signing this signature card, I . . . signify my (our) agreement and assent to be bound by the terms and conditions of this account as stated in the 'Deposit Account Agreement and Disclosure' and the appropriate schedule of fees as such documents may be in effect now or hereafter and acknowledge receipt of same." Add. 63, 67-68 (emphasis added).

[2] More specifically, Pryor challenges Eastern Bank's use of an account's "available balance," rather than its "ledger balance," to determine when an overdraft occurs. The use of the available balance is common in the banking industry and, the Bank submits, is permitted by the agreements and disclosures governing Pryor's account.

The PDAA in effect at the time Pryor opened the Account provided that Eastern Bank could amend the terms of its agreement "at any time." Add. 63, 80-81. The PDAA also required Pryor "to examine all statements and accompanying items promptly upon receipt . . . ." Add. 63, 75. Since Pryor opened her Account, Eastern Bank has amended the terms of the PDAA, as well as the other account documents, from time to time. Add. 63-64, 214-17. When it has done so, the Bank has provided notice of material changes to its customers through mailings or, for customers who so choose, through electronic communications. Id.

In 2012, Pryor elected to receive her monthly account statements and other materials from Eastern Bank only in electronic form, and has never withdrawn that election. Add. 142, 147, 156-57. Specifically, she assented "to receive all communications relating to [her] accounts, products, and services electronically . . . ," including "[t]he deposit account agreements applicable to [her] deposit accounts . . . and updates to the agreements." Add. 146, 161-62. She also acknowledged that any electronic communication Eastern Bank sends her "will be treated

as 'writing' and will bind [Pryor and Eastern Bank] in the same way as any other written communication." Id.

In August 2019, the Bank notified Pryor and other customers of an amendment to the PDAA. Add. 64, 137-139. The two-page document containing the amendment was titled "Addendum to the Personal Deposit Account Agreement," bore the subtitle "Dispute Resolution (including Arbitration, Class Action Waiver, and Jury Trial Waiver)," and specified an effective date of September 1, 2019. Id.

As its title indicated, the Addendum included an arbitration provision and a jury trial and class action waiver. Id. Under the heading "Arbitration," it explained that if a "Claim" is not resolved by agreement or pursued in small claims court, "either party may refer the Claim to arbitration before a single arbitrator. . ." that "will be governed by the Consumer Arbitration Rules of the American Arbitration Association in effect at the time of the arbitration." Add. 64, 138. (emphasis in original). "Claims" subject to arbitration is broadly defined as "all disputes, claims, and other controversies arising out of or relating to this Agreement [the PDAA], your accounts or account services, or any other aspect of the

relationship between us." Id. The Addendum further provides that "[a]ny question whether this Arbitration provision is enforceable or a Claim is subject to arbitration will be decided by the arbitrator." Id.

In addition, the Addendum includes a class action waiver that states:

> Waiver of Trial by Jury and Participation in Class Actions
> With respect to all Claims between you and the Bank, regardless of whether the Claims are litigated in court or subject to arbitration: (1) **WE BOTH WAIVE OUR RIGHT TO A JURY TRIAL** and agree that the judge or arbitrator, sitting without a jury, will determine the rights and remedies of the parties with respect to all disputes, claims, or controversies between us; and (2) **YOU WAIVE YOUR RIGHTS:** (i) **TO PARTICIPATE IN A CLASS ACTION IN COURT OR IN ARBITRATION**, either as a class representative, class member, or class opponent, (ii) **TO ACT AS A PRIVATE ATTORNEY GENERAL IN COURT OR IN ARBITRATION**, and (iii) **TO JOIN OR CONSOLIDATE CLAIM(S) INVOLVING US WITH CLAIMS INVOLVING ANY OTHER PERSON**.

Add. 64-65, 139 (emphasis in original).

Eastern Bank provided Pryor and other existing customers with the opportunity to opt out of the arbitration agreement by notifying the Bank in writing within 30 days of the September 1, 2019 effective date. The Addendum stated, under the heading "Right to Opt Out of Arbitration":

> You have the right to opt-out of this Arbitration Clause and it will not affect any

> other terms and conditions of your Agreement [the PDAA] or your relationship with us. **TO OPT OUT, YOU MUST NOTIFY US IN WRITING OF YOUR INTENT TO DO SO WITHIN 30 DAYS AFTER OPENING YOUR DEPOSIT ACCOUNT** (or, if this Clause is added to the Personal Deposit Account Agreement after your Account was opened, within 30 days after this Clause becomes effective).

Add. 65, 139 (emphasis in original). Thus, the deadline for existing customers to opt out of the arbitration agreement was October 1, 2019. The Addendum explained: "The Arbitration Clause will apply to any Claims between us relating to any account(s) for which we do not receive an opt-out notice as described in this paragraph." Id.

Eastern Bank delivered the Addendum to Pryor with her electronic account statement dated August 15, 2019 (the "August Statement"). Add. 141, 148-49. The Bank's records indicate that the statement was viewed on August 30, 2019 by someone using Pryor's electronic banking credentials, and Pryor does not dispute that she opened the statement at that time. Add. 141, 150-51.[3] The August Statement screen presented to Pryor

[3] Eastern Bank also posted the new version of the PDAA with the arbitration agreement on its website (easternbank.com) starting on August 30, 2019. Add. 64, n.3.

contained a hyperlink titled "Personal Deposit Account Agreement Addendum." Add. 141, 152-55. The hyperlink appeared under a banner displayed at the top left of the screen labeled "Additional Documents." Id. Clicking on the hyperlink would bring up a printable or downloadable copy of the Addendum, as well as instructions for how to exercise the customer opt-out right. Id.

There is no dispute that the Addendum was adopted in compliance with the amendment terms of the PDAA or that Pryor's underlying agreements with Eastern Bank are enforceable. It is also undisputed that Pryor failed to exercise her 30-day opt-out right before the October 1, 2019 deadline and continued using her Checking Account after the Addendum became effective. Add. 65. Instead, her sole challenge to the enforceability of the arbitration provision is that the two-pronged test for contract formation was not satisfied.[4]

[4] Eastern Bank believes that Pryor waived any argument that the Bank's amendment of the PDAA did not satisfy the second prong of the Kauders test (manifestation of assent) by not adequately raising it in the trial court, and reserves its right to argue waiver when it submits its appellant's brief.

IV. ISSUES OF LAW RAISED BY THE APPEAL

The issues raised by the appeal, all of which are governed by Massachusetts law, include:

a. Whether Eastern Bank reasonably communicated to Plaintiff-Appellee Pryor the amendment to the PDAA that added the arbitration provision;

b. Whether this Court's ruling in Kauders required the Bank to obtain Pryor's manifestation of assent to the amendment adding the arbitration provision even though she had expressly agreed to be bound by future PDAA terms when she opened her account and the PDAA provided that the Bank could amend the PDAA "at any time";

c. If manifestation of assent to the arbitration amendment was required, whether Pryor manifested her assent by failing to exercise her opt-out right and continuing to use her Account after the Bank provided notice of the amended terms.

V. ARGUMENT[5]

In its Order denying Eastern Bank's motion to compel arbitration, the trial court committed

[5] The arguments set forth herein focus on the issues that are most pertinent to the Application for Direct

reversible error. The court's ruling was based on its determination that an enforceable agreement to arbitrate had not been formed because, under Massachusetts law, Eastern Bank did not provide reasonable notice of the agreement's terms or adequately secure Plaintiff-Appellee Pryor's assent. Add. 268-76. These determinations rested on a misapplication of controlling law and, as questions of law, are subject to de novo review on appeal. See, e.g., Seaco Ins. Co. v. Barbosa, 435 Mass. 772, 779 (2002); Basis Technology Corp. v. Amazon.com, Inc., 71 Mass. App. Ct. 29, 36 (2008).

a. The trial court erred by finding that the arbitration agreement was not reasonably communicated.

In attempting to apply the first prong of Kauders and finding that Eastern Bank did not reasonably communicate the arbitration provision to Pryor, the trial court determined that the Bank's email notifying Pryor of the August Statement, the August Statement screen, and the Addendum hyperlink did not contain design features that would render it sufficiently conspicuous. Add. 272. The court failed to account for

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Appellate Review in order to comply with the 10-page limit in Mass. R. App. P. 11(b).

key differences between the hyperlink at issue in Kauders and the Addendum hyperlink that made Eastern Bank's notice reasonable on its face. The court also erred in its application of this Court's totality-of-the-circumstances test by disregarding the terms of the pre-existing agreements and the parties' course of dealings, and instead examining the August Statement screen and Addendum hyperlink in a vacuum.

Kauders involved a hyperlink on a small, crowded, mobile app screen which did not appear until the customer clicked through two other screens, and was obscured by the screen's more prominent words and links. See 486 Mass. at 559-61. In contrast, the "Personal Deposit Account Agreement Addendum" link in Eastern Bank's online banking screen was clearly set out in a separate but very visible section of the screen, and clearly placed under the heading "Additional Documents," which filled a large portion of the overall screen.[6] There were no adjacent words or links that obscured it and the font color was black on a white background, further contributing to the link's

[6] Screenshots of the Addendum hyperlink and August Statement screen as they appeared in Eastern's online banking system are available at Add. 153, 155.

visibility. Any reasonable consumer would have to conclude that the language represented a link to an additional document, as there is no other reasonable explanation of why it was there. It only took one click to open the Addendum, which then filled the vast majority of the screen. Once consumers clicked the hyperlink, they would immediately arrive at a screen that prominently stated in the very first sentence "Dispute Resolution (including Arbitration, Class Action Waiver, and Jury Trial Waiver)." These features all made the design of the Addendum sufficiently clear and accessible as to constitute reasonable notice. See In re Daily Fantasy Sports Litig., MDL No. 16-02677-GAO, 2019 WL 6337762, at *10 (D. Mass. Nov 27, 2019) (upholding arbitration terms accessible by hyperlink and finding that "following a hyperlink is like turning a page in a printed document. Any reasonable viewer would realize that access to the text of the terms would be simple and immediate"); Page v. Alliant Credit Union, No. 1:19-cv-5965, 2020 WL 2526488 (N.D. Ill. May 18, 2020) (amendment to credit union's membership agreement, which added an arbitration provision, was binding on plaintiffs where the

amendment was communicated to them through a hyperlink sent by email).

The trial court's conclusion that Eastern Bank had not reasonably communicated the Addendum to Pryor also failed to account for the totality of the circumstances, including the terms of the PDAA that allowed the Bank to amend the agreement "at any time," Pryor's affirmative election to receive notice of PDAA amendments electronically, Pryor's agreement to review all statements and accompanying documents upon receipt, and the Bank's previous communications of PDAA amendments and notices to Pryor in the same manner that it communicated the Addendum on at least 15 different occasions in the same manner that it communicated the Addendum. Add. 62-66, 140-47, 214-17, 218-33. These facts support the reasonableness of Eastern Bank's notice of the Addendum, and further distinguish this case from Kauders, which involved the very different situation of initial contract formation with no relevant prior transactional or contracting history. See, e.g. Cullinane v. Uber Techs., Inc., 893 F.3d 53, 62 (1st Cir. 2018) (under Massachusetts law, courts examine reasonableness of notice of contract terms made available by hyperlink based on "'the

language that was used to notify users that the terms of their [agreement] could be found by following the link, how prominently displayed the link was, and any other information that would bear on the reasonableness of communicating [the terms]'") (citations omitted) (emphasis added). The trial court erroneously overlooked this critical context.

b. The trial court erred in applying the standard adopted in a contract formation case to this case involving contract amendment.

In denying Eastern Bank's motion to compel arbitration, the trial court misplaced reliance on this Court's recent decision in Kauders, erroneously applying both prongs of its two-pronged analysis to the amendment of a pre-existing contract, regardless of the terms of the parties' underlying agreements. This construction ignored the underlying context of the analysis in Kauders that is distinguishable from the present case in two critical respects.

First, Kauders involved an arbitration agreement introduced at the time of contract formation. In contrast, this case involves an arbitration agreement introduced by amendment to the parties' pre-existing contract. The distinction is critical in understanding

how the holding in Kauders should logically apply to the facts presented here.

Under Massachusetts law, to establish the enforceability of an online agreement, a party generally must show both that the terms of the agreement were reasonably communicated to the other party and that the other party manifested its assent to those terms. However, where, as here, the parties have a pre-existing contract which includes one party's express agreement to be bound by future terms and that the other party may amend the agreement at any time, at least one court applying Massachusetts law has held that specific manifestation of assent to the amended terms need not be shown for the amendment to be enforceable. Fawcett, 297 F. Supp. 3d at 220.

In Fawcett, plaintiff had signed a signature card with Citizens Bank "which provided that she agreed to be bound by [the] PDAA, as amended and in effect from time to time," language strikingly similar to the language of the Eastern Bank signature card Pryor had signed. The court held that "Ms. Fawcett's suggestion that despite her having expressly agreed to be bound by subsequent amendments to the PDAA, Massachusetts law requires that she somehow 'manifest' her assent to

the Arbitration Agreement in order to be bound thereby is meritless." Id. The only issue, the court ruled, was whether Fawcett had received notice of the amendment Id.

Pryor opened her account with Eastern Bank in 2008. Like the plaintiff in Fawcett, she signed a signature card when she did so, by which she expressly agreed to be bound by the terms of the PDAA that may be in effect at that time and thereafter. Add. 63, 67-68. The PDAA in effect when Pryor opened her account expressly provided that Eastern Bank could amend the terms of its agreement. Add. 63, 80-81. The PDAA also required Pryor "to examine all statements and accompanying items promptly upon receipt . . . ." Add. 63, 75.

The PDAA has been amended from time to time since 2008, but these provisions continued unchanged through subsequent versions of the PDAA and remain in place today. Based on these facts and on this issue, this case is indistinguishable from Fawcett and requires a different application of the law to the facts from the Court's analysis in Kauders. Applying the Fawcett court's reasoning, Pryor's express agreement to be bound by future terms and that the Bank could amend

the agreement eliminated the need for Eastern to establish that she expressly manifested her assent each time an amendment was adopted. The trial court thus erred by misapplying the analysis in Kauders that is specific to the issue of contract formation, and by rejecting Fawcett, a contract amendment case with indistinguishable facts.

c. The trial court erred because, even if manifestation of assent were required, Plaintiff-Appellee manifested her assent by failing to exercise her opt-out right and continuing to use her account after notice.

Even if the trial court had applied the appropriate standard and manifestation of assent were required for the arbitration provision at issue to be enforceable -- and Eastern Bank maintains it is not -- Plaintiff-Appellee Pryor manifested her assent based on the undisputed record. For this reason, and because Eastern Bank provided Pryor with reasonable notice based on the totality of the circumstances, the arbitration provision is enforceable.

First, Pryor manifested her assent by failing to exercise her opt-out right after receiving notice of the Addendum containing the arbitration provision. She did not opt-out of the arbitration provision by the October 1, 2019 deadline, despite the Addendum's clear

explanation that it would "apply to any Claims between us relating to any account(s) for which we do not receive an opt-out notice as described in this paragraph." Add. 65, 139. She therefore is bound by the arbitration provision. See Hoefs v. CACV of Colo., LLC, 365 F. Supp. 2d 69, 72, 76 (D. Mass. 2005) (compelling arbitration based on arbitration amendment with 30-day opt-out period where plaintiff did not opt out within 30 days of receiving amendment included with monthly account statement); In re H & R Block IRS Form 8863 Litig., No. 4:13-MD-02474-FJG, 2014 WL 3401010, at *2 n.2, *3 (W.D. Mo. July 11, 2014) (applying Massachusetts law, holding arbitration opt-out was not valid when submitted after contractually specified deadline, because recognizing the opt-out as valid would "defeat[] the goal of the [Federal Arbitration Act] that agreements to arbitrate are enforced according to their terms").

In addition, Pryor continued to use and benefit from her Checking Account after she received notice of the arbitration provision. Her conduct in doing so constitutes sufficient manifestation of assent to satisfy the second prong of Kauders. See Lenfest v. Verizon Enter. Sols., 52 F. Supp. 3d 259, 264 (D.

Mass. 2014) (enforcing agreement to arbitrate where plaintiff's "continued use" of Verizon's services "manifested his assent to Verizon's terms and conditions, including the ADR clause"). These undisputed facts compel the conclusion that, when Eastern Bank delivered the Addendum to Plaintiff-Appellee with her August Statement and she failed to timely exercise her opt-out right, an agreement to arbitrate was formed.

VI. REASONS WHY DIRECT APPELLATE REVIEW IS APPROPRIATE.

Direct appellate review is warranted because (1) the case presents one or more novel questions of law concerning the application of a recent decision of this Court to a set of facts the Court has not yet had an opportunity to address; (2) the trial court's decision conflicts with a recent federal court decision addressing the same issues of Massachusetts law, and resolving the conflict will provide important guidance to contracting parties; and (3) clarification of the law concerning the enforceability of contract amendments, including but not limited to amendments adding arbitration agreements to pre-existing

contracts, is important to Massachusetts businesses that enter into agreements with their customers.

The first two reasons for direct appellate review have been addressed at length above and will not be repeated here. With respect to the third reason, the issues raised by this case are of significant interest to contracting parties in Massachusetts who intend to adopt enforceable arbitration agreements. The ability to contract for arbitration is an important interest recognized by Massachusetts law, and the public interest would benefit from guidance so that contracting parties may confidently draft their commercial agreements. See Kauders, 486 Mass. at 567 (Massachusetts law "expresses a strong public policy favoring arbitration as an expeditious alternative to litigation for settling commercial disputes"). Eastern Bank expects there will be requests to submit *amicus curiae* briefs from interested organizations.

VII. CONCLUSION

For all the foregoing reasons, Eastern Bank respectfully requests that this Honorable Court grant direct appellate review of their appeal of the March 3, 2021 order of the Superior Court denying the Bank's motion to compel arbitration.

Respectfully submitted,

Defendant Eastern Bank

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Dated: June 2, 2021

CERTIFICATE OF SERVICE

Pursuant to Mass. R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on this date of June 2, 2021 I have made service of a copy of the foregoing document upon the following attorneys of record for Plaintiff by electronic mail:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure

I, Melanie A. Conroy, hereby certify that the foregoing memorandum of law complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16 (a)(13) (addendum); Mass. R. A. P. 16 (e) (references to the record); Mass. R. A. P. 18 (appendix to the briefs); Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 11(b) and 20(a) because it is produced in the monospaced font Courier New at size 12, 10 characters per inch, and the argument section contains not more than either 10 total non-excluded pages.

ADDENDUM

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