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Survey of Enforceability of Consumer Electronic Acceptance: A Practitioner's Guide to Designing Online Arbitration Agreements and Defending Them in Court – Part IV

By Elie Salamon

As businesses continue to face unprecedented challenges navigating the global pandemic and depressed consumer spending and demand, companies are looking for cost-saving measures across the board to stay afloat and to maintain corporate profits. Many businesses have shifted to adding arbitration agreements with binding class action waivers to the sale of goods and use of services to consumers to flatten company annual litigation defense spending. These agreements require consumers to bring any claim arising out of their purchase or use of a product or service in arbitration rather than in court, and prevent consumers from bringing such claims as part of a class or consolidated action.

The first part of this article, published in the January issue of *The Computer & Internet Lawyer*, discussed why an arbitration clause can be a powerful tool in a company's litigation defense arsenal; the enforceability of arbitration agreements under the Federal Arbitration Act; the two most common types of web-based contracts (a "clickwrap" or "clickthrough" agreement and a "browsewrap" agreement); and best practices for drafting those web-based contracts; and elements that attorneys defending a company's arbitration agreement in court should incorporate into any motion to compel arbitration.

The second and third parts of this article (published in the February and March issues of *The Computer & Internet Lawyer*), surveyed recent decisions (in chronological order based on date of publication) over the past year or so across all jurisdictions involving the enforceability of consumer electronic acceptance of arbitration agreements. This part continues the survey.

The summaries below are focused principally on the question of contract formation, that is, whether the consumer had notice of the arbitration agreement and manifested their agreement to it, and the arguments

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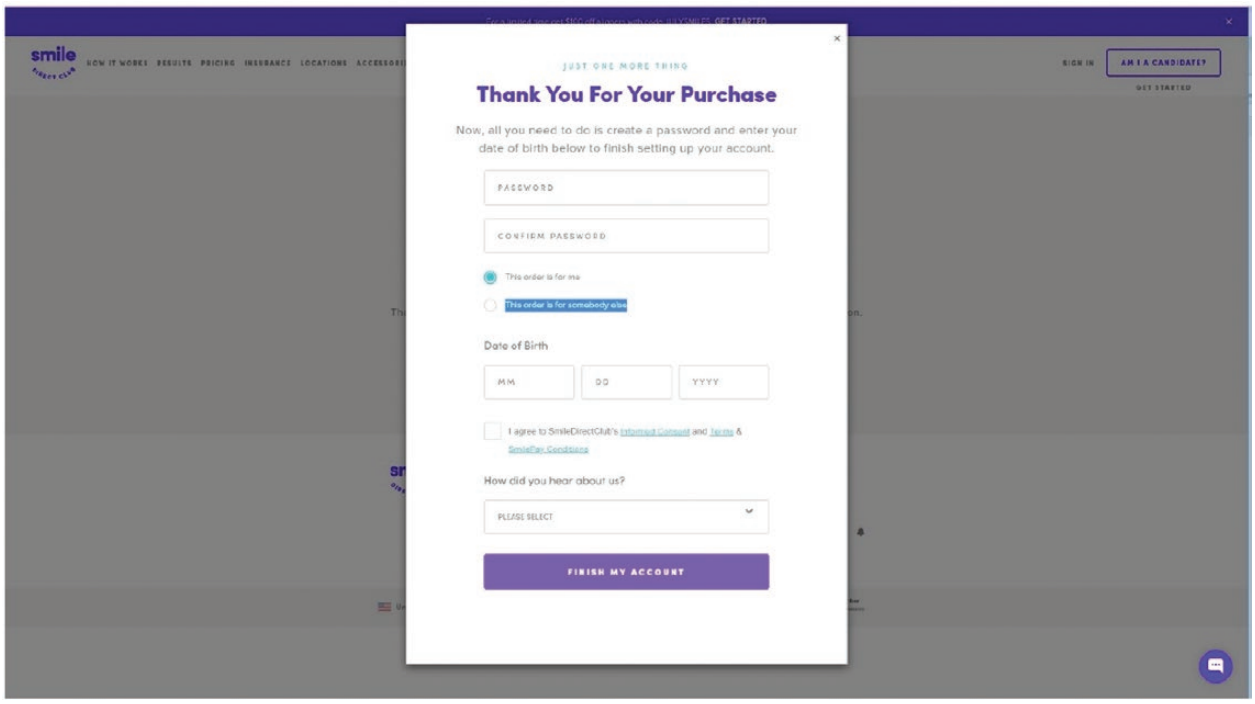
plaintiffs have invoked in an effort to evade a finding of mutual assent to arbitrate any disputes. The summaries include imagery of the corporate website and app presentations of the arbitration agreements at issue in each case, and explain how those agreements fared when tested in court. The case of *Sollinger v. SmileDirectClub, LLC* illustrates a strong clickwrap sign-up agreement that required users to affirmatively check a box next to text stating "I agree to SmileDirectClub's Informed Consent and Terms & SmilePay Conditions," with the phrases "Informed Consent," "Terms," and "SmilePay Conditions" all presented as turquoise, underlined hyperlinks. The "Informed Consent" hyperlink, when clicked on, would present users with the arbitration agreement. And a user could not complete the sign-up process without checking the box and then tapping on a large purple "FINISH MY ACCOUNT" button.

The advertisement at issue in *Soliman v. Subway Franchise Advertising Fund Trust Ltd.*, on the other hand, was found to be infected with numerous deficiencies. There, the court found that a user lacked reasonably conspicuous notice of the arbitration agreement because Subway's notice of additional terms and conditions was neither underlined nor hyperlinked and "was sandwiched (so to speak) between roughly 100 words of small black text compared to which it was unimpressive, was tucked away at the bottom corner of the advertisement relatively distant from the offer, and contained no express language explaining that by accepting the offer, a consumer was agreeing to be bound by the terms." And the cases of *Theodore v. Uber Technologies, Inc.* and *Arena v. Intuit Inc.*, for instance, illustrate the perils of designing agreements without adhering to certain key features credited by courts as strengthening inquiry notice, such as failing to underline the hyperlinked terms on the screen, presenting too many hyperlinked phrases on the same page, and not requiring an affirmative acknowledgment to be bound with a check box. While the defendant in *Arena* ultimately prevailed on appeal in the U.S. Court of Appeals for the Ninth Circuit, that additional expense and risk to the company could have been avoided had it incorporated some of those features into its agreement.

* * *

***Sollinger v. SmileDirectClub, LLC*, 2020 WL 774135 (S.D.N.Y. Feb. 18, 2020) (Oetken, J.) (applying New York law), *appeal dismissed per stipulation*, Appeal No. 20-0965 (2nd Cir.) –** Plaintiff brought a putative class action against SmileDirectClub, a company that sells custom aligners to straighten teeth, claiming that the company's aligners caused him tooth damage. SmileDirectClub moved to compel arbitration.

In order to begin treatment, users were required to register as customers on SmileDirectClub's website. During the online registration process, users were required to affirmatively check a box next to a phrase in



black typeface, "I agree to SmileDirectClub's Informed Consent and Terms & SmilePay Conditions." The phrases "Informed Consent," "Terms," and "SmilePay Conditions" were presented as underlined hyperlinks colored in turquoise, which, when clicked, took users to the text of the relevant agreements. The Informed Consent agreement contained an arbitration clause. Below the checkbox was a large purple button that read "FINISH MY ACCOUNT," which could not be tapped without the user checking the box that they agreed to the three policies. SmileDirectClub submitted internal data that showed that plaintiff accepted the Informed Consent document on October 5, 2017 at 2:08 p.m.

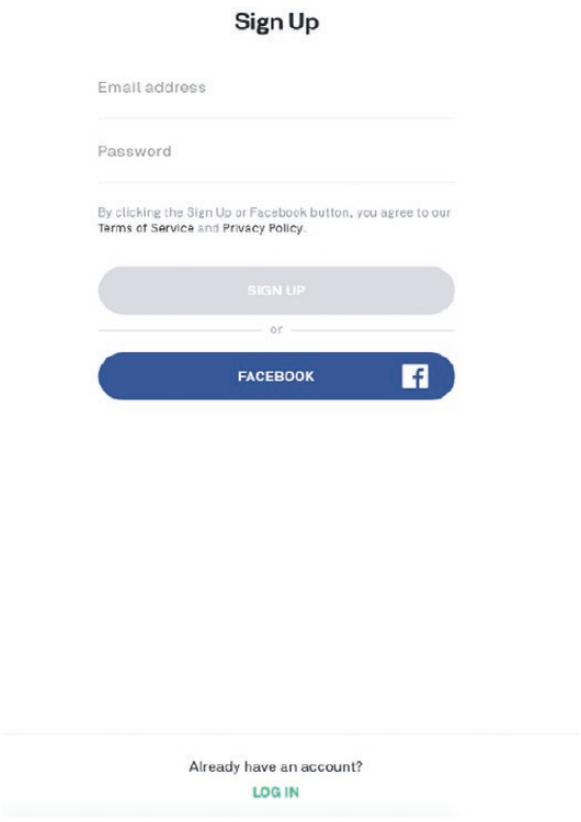
The district court observed that "[a]s a general matter, [i]n New York, clickwrap agreement are valid and enforceable contracts," and that SmileDirectClub's website provided the requisite inquiry notice. *Id.* at *2 (second alteration in original) (internal quotation marks omitted). Citing *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66 (2d Cir. 2017), the court found that the registration screen was "relatively uncluttered," and that the "I agree" checkbox and language included a hyperlink to the arbitration clause and was "directly adjacent to the button intended to manifest assent to the terms." *Sollinger*, 2020 WL 774135, at *2 (internal quotation marks omitted). The court further noted that "[t]he hyperlinks contrast[ed] with the . . . background and [were] in blue and underlined," and "the registration screen [was] designed so that the entire screen [was] visible at once, and the user d[id] not need to scroll . . . to find notice of the Terms." *Id.* (third and eighth alterations in original) (internal quotation marks omitted). Accordingly, the court concluded that a reasonable user would be on inquiry notice of the Informed Consent agreement and the arbitration agreement. Plaintiff argued that the placement of the arbitration agreement in the Informed Consent agreement rather than in the Terms agreement or the SmilePay Conditions was unreasonable. But the court disagreed and observed that the Informed Consent agreement was a logical location for an arbitration provision governing the resolution of disputes that would arise out of the use of SmileDirectClub's aligners. The court thus granted SmileDirectClub's motion, dismissed and closed the case, and entered final judgment.

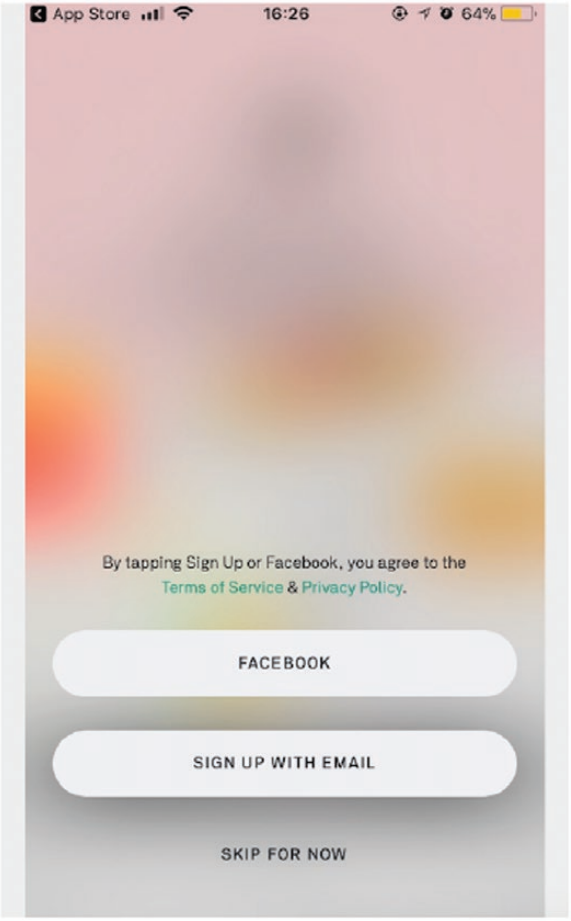
Plaintiff filed a notice of appeal from the district court's order granting SmileDirectClub's motion to compel arbitration. But before briefing commenced on plaintiff's appeal, the parties agreed to dismissal of the appeal.

***Feld v. Postmates, Inc.*, 442 F. Supp. 3d 825 (S.D.N.Y. 2020) (Castel, J.) (applying California and New York law) –** Plaintiff filed a putative class action against Postmates, an online marketplace where consumers can place orders from restaurants and other retailers, claiming that the company misled consumers by representing to them that it could deliver them food from any restaurant when it could not, and because it charged customers a hidden service fee on each order. Postmates moved to compel plaintiff's claims to arbitration.

In order for customers to place orders on Postmates' platform, they were required to first create a Postmates account on Postmates' website or using the company's app. Users were required to sign up using their email address or Facebook account. On the Postmates website sign-up screen, below the email and password fields was a large gray button that said "SIGN UP," followed by a large blue "FACEBOOK" button. Immediately above the "SIGN UP" button was a notice in gray text that said "By clicking the Sign Up or Facebook button, you agree to our Terms of Service and Privacy Policy." The phrases "Terms of Service" and "Privacy Policy" were in black typeface and hyperlinked to the relevant terms. The Terms of Service included an arbitration provision.

The app's configuration display was similar to the Postmates website. The screen included large white





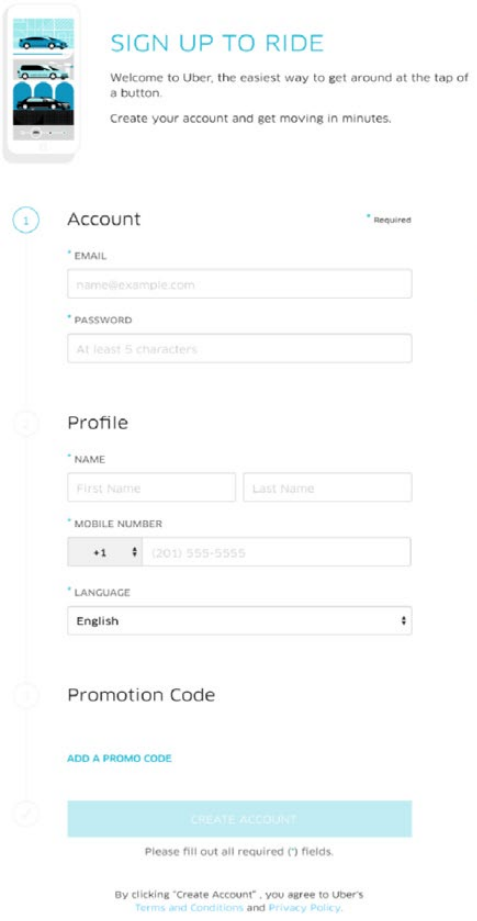
"FACEBOOK" and "SIGN UP WITH EMAIL" buttons immediately following a notice that stated in black font that, "By tapping Sign Up or Facebook, you agree to the Terms of Service & Privacy Policy." The phrases "Terms of Service" and "Privacy Policy" were colored turquoise and hyperlinked to the relevant policies. A user could click on the "SKIP FOR NOW" hyperlink on the app sign-in screen, but would be unable to place an order without eventually signing up through the Facebook or email buttons.

The district court observed that "sign-in-wrap" agreements, such as Postmates', "have been upheld where: (1) hyperlinked terms and conditions are next to the only button that will allow the user to continue use of the website; (2) the user signed up to the website with a clickwrap agreement and was presented with hyperlinks to the terms of use on subsequent visits; and (3) notice of the hyperlinked terms and conditions is present on multiple successive pages on the site." *Id.* at 829 (footnote omitted) (citation omitted) (internal quotation marks omitted). Although plaintiff did not explain where she used the Postmates website or app to sign up for the service, the court held that both interfaces provided sufficient inquiry notice of the arbitration agreement under *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66 (2d Cir. 2017), because the hyperlinked Terms of Service were reasonably conspicuous to the reasonably prudent user.

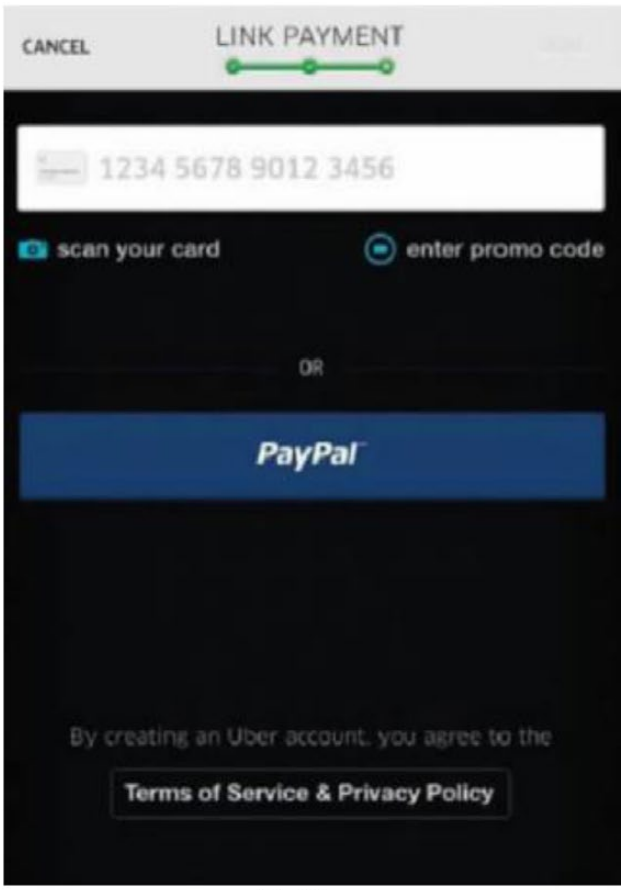
On the Postmates website, the court observed that "a white 'Sign Up' box appear[ed] with spaces for a user to enter his or her email address and a password. The sign-up box pop[ped] up in front of the Postmates home screen that [was] decorated with pictures of food, but the sign-up box itself ha[d] a white background with black and grey text that [was] clear and conspicuous." *Id.* at 830. The court further observed that the "hyperlinks to the TOS and Privacy Policy [were] in a darker, bolder font than the rest of the text, signifying to a reasonably prudent user that these would be clickable terms," and that the "notice showing the hyperlinks [was] spatially coupled with the sign-up button, i.e., the text appear[ed] directly above the sign-up options on the same screen without requiring the user to scroll to see the notice." *Id.* at 831. The court also found that "the notice and the sign-up options [were] also temporally coupled, i.e., the notice appear[ed] at the time of account creation, such that [a] reasonably prudent . . . user would understand that the terms were connected to the creation of a user account." *Id.* (fourth alteration in original) (internal quotation marks omitted). Last, the court noted that the language of the notice providing that the user's click to sign up would indicate the user's agreement to the Terms of Service would put reasonably prudent users on inquiry notice because it was "a clear prompt directing users to read the [Terms of Service] and signaling that their acceptance of the benefit of registration would be subject to contractual terms." *Id.* (internal quotation marks omitted).

The court held that the app sign-up interface's disclosure of the Terms of Service was equally conspicuous, observing that, although it did not use a white background, the app "ha[d] an uncluttered, solid background," and that "[t]he 'Terms of Service' and 'Privacy Policy' terms appear[ed] in blue type that contrast[ed] with the sign-up page background, indicating that they [were] hyperlinks; the remainder of the text [was] black." *Id.* at 831-32. Last, the court noted that "the notice [was] spatially and temporally coupled with signing up for Postmates' service on the App," as "the notice and hyperlinks [were] directly above buttons allowing users to choose to sign up using their Facebook accounts or email addresses, and the notice appear[ed] at the time a user [was] creating an account." *Id.* at 832.

***Theodore v. Uber Techs., Inc.*, 442 F. Supp. 3d 433 (D. Mass. 2020) (Woodlock, J.) (applying Massachusetts law), *appeal dismissed per stipulation*,**



Theodore



Cullinane

Appeal No. 20-01574 (1st Cir.) – Plaintiffs brought this putative class action against Uber seeking permanent injunctive relief to enjoin the company from failing to provide wheelchair accessible vehicles to all areas of Massachusetts served by Uber. Uber moved for an order to compel arbitration of all claims under the Terms and Conditions to which Uber claimed plaintiff agreed when he created his Uber account. In order to use Uber's services, a user had to create an account on Uber's website where they were presented with a "SIGN UP TO RIDE" page, which required them to input certain personal information. To complete the registration process, a user had to click a turquoise "Create Account" button at the bottom of the page, which appeared above the following notice in small black text: "By clicking 'Create Account' you agree to Uber's Terms and Conditions and Privacy Policy." The phrases "Terms and Conditions" and "Privacy Policy" were colored blue but not underlined, and operated as hyperlinks so that if clicked, a user was directed to the relevant terms, the former of which included an arbitration clause. Uber submitted evidence that showed that plaintiff created an account on Uber's website on October 4, 2016 and downloaded the app to his smartphone.

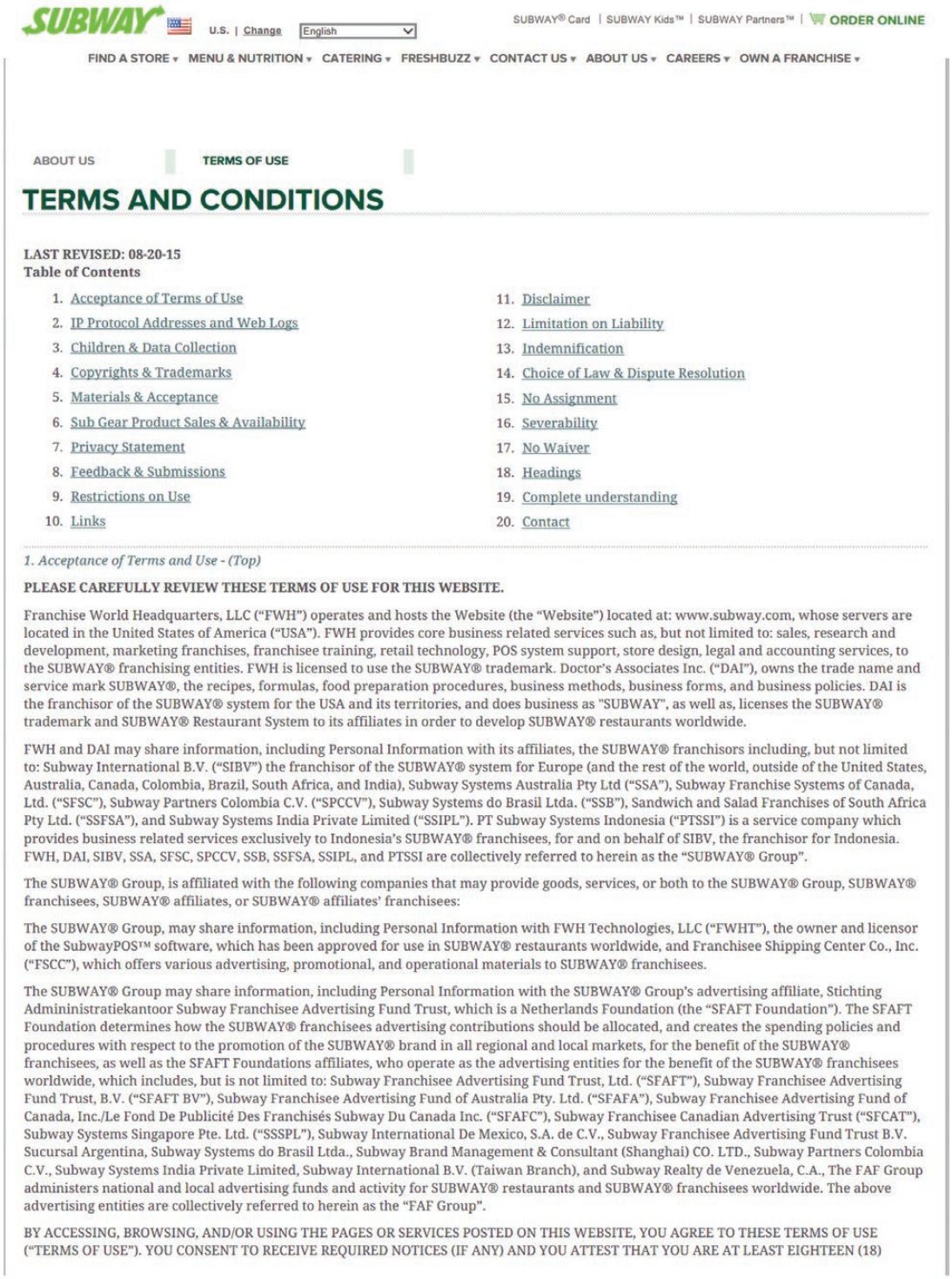
The district court denied Uber's motion, concluding that inquiry notice was wanting based on the First Circuit's decision in *Cullinane v. Uber Technologies., Inc.*, 893 F.3d 53, 61 (1st Cir. 2018), which held that the Uber app's interface failed to reasonably notify plaintiffs of the arbitration agreement because Uber's Terms of Service & Privacy hyperlink was not conspicuous. The district court found that, apart from "two differences," by which (1) the link to the Terms and Conditions was in blue rather than white and against a white backdrop rather than a black backdrop, and (2) the notification to new users that they would be bound by the Terms and Conditions was in black text against a white backdrop rather than in gray text against a black backdrop, "the other characteristics that gave the First Circuit pause generally were found on the relevant Uber screen for" plaintiff. *Theodore*, 442 F. Supp. 3d at 441. The court explained that "some of the other terms on the page

were still in the same color as the hyperlink, including 'enter promo code,' and the links to the 'Terms and Conditions' and 'Privacy Policy' were still not the largest text on the screen." *Id.* The district court further faulted Uber because "'[t]he hyperlinks also continued to appear without any underlining,'" and "the Terms and Conditions were linked at the bottom of the screen and did not require an affirmative acknowledgment from the prospective user that he or she was agreeing to be bound by the Terms and Conditions or the Privacy Policy by creating an Uber account." *Id.* (footnote omitted). Accordingly, the district court held that the Terms and Conditions presented to plaintiff were not conspicuous enough to reasonably communicate the existence of the arbitration agreement to him.

Notably, Uber moved for reconsideration of the district court's order. But in his opposition to Uber's motion for reconsideration, plaintiff indicated that he would accede to Uber's arbitration agreement and stipulate that Uber's Terms and Conditions applied to his claims and that he would serve Uber with a demand for arbitration. Uber sought vacatur of the district court's order in light of plaintiff's stipulation, but the district court denied Uber's motions for reconsideration and for vacatur of the court's prior order. Uber thus took an appeal to the First Circuit to vacate the court's arbitration decision. The First Circuit, however, issued an order to show cause why the appeal should not be dismissed as moot and for want of appellate jurisdiction in light of the parties' stipulation to arbitration. Uber thus agreed to voluntarily dismiss its appeal.

***Soliman v. Subway Franchisee Advert. Fund Tr. Ltd.*, 442 F. Supp. 3d 519 (D. Conn. 2020) (Meyer, J.) (applying California law), *appeal pending*, Appeal No. 20-00946 (2nd Cir.) –** Plaintiff filed a putative class action against Subway, alleging that Subway's unwanted text messages violated the Telephone Consumer Protection Act. The dispute stems from a marketing campaign run by Subway through which consumers were invited to opt in to receive sales promotions via text message by texting a keyword to a short code. The campaign was communicated to consumers through print and digital advertisements that highlighted in large bold and green typeface how customers could receive weekly Subway offers directly to their phones. As to plaintiff, she learned about the promotion from an employee who pointed out the promotion to her while she was standing in line at a Subway store, and was advised that she could receive a free sandwich if she texted Subway to a particular number. It was not clear whether plaintiff saw a particular advertisement or whether the ad was hanging in the Subway store. But any such advertisement contained, what the district court described as, a "100-word, small-font black-on-white disclaimer stating in part, 'Terms and conditions at subway.com/subwayroot/TermsOfUse.aspx.'" *Id.* at 521. The Terms and conditions URL was sandwiched between the phrase "Consent not required to buy goods/svcs" and a "Privacy Policy" located at a different URL listed in the ad. Neither URL was underlined nor hyperlinked.

Accordingly, a customer would need to type in the Terms and conditions URL into their phone or a computer to locate the terms on Subway's website. At the top of the "**TERMS AND CONDITIONS**" webpage, Subway instructed customers in bolded all caps print to "**PLEASE CAREFULLY REVIEW THESE TERMS OF USE FOR THIS WEBSITE**." Also at the top of the webpage was a table of contents that appeared to hyperlink to the various sections of the terms so that users would not have to scroll down to reach any particular one. Section 14 was titled "Choice of Law & Dispute Resolution." If a user clicked on the section 14 hyperlink, they would have been presented with an arbitration clause.



SUBWAY U.S. | Change English

SUBWAY® Card | SUBWAY Kids™ | SUBWAY Partners™ | ORDER ONLINE

FIND A STORE ▾ MENU & NUTRITION ▾ CATERING ▾ FRESHBUZZ ▾ CONTACT US ▾ ABOUT US ▾ CAREERS ▾ OWN A FRANCHISE ▾

ABOUT US | TERMS OF USE

TERMS AND CONDITIONS

LAST REVISED: 08-20-15

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1. Acceptance of Terms and Use - (Top)

PLEASE CAREFULLY REVIEW THESE TERMS OF USE FOR THIS WEBSITE.

Franchise World Headquarters, LLC ("FWH") operates and hosts the Website (the "Website") located at: www.subway.com, whose servers are located in the United States of America ("USA"). FWH provides core business related services such as, but not limited to: sales, research and development, marketing franchises, franchisee training, retail technology, POS system support, store design, legal and accounting services, to the SUBWAY® franchising entities. FWH is licensed to use the SUBWAY® trademark. Doctor's Associates Inc. ("DAI"), owns the trade name and service mark SUBWAY®, the recipes, formulas, food preparation procedures, business methods, business forms, and business policies. DAI is the franchisor of the SUBWAY® system for the USA and its territories, and does business as "SUBWAY", as well as, licenses the SUBWAY® trademark and SUBWAY® Restaurant System to its affiliates in order to develop SUBWAY® restaurants worldwide.

FWH and DAI may share information, including Personal Information with its affiliates, the SUBWAY® franchisors including, but not limited to: Subway International B.V. ("SIBV") the franchisor of the SUBWAY® system for Europe (and the rest of the world, outside of the United States, Australia, Canada, Colombia, Brazil, South Africa, and India), Subway Systems Australia Pty Ltd ("SSA"), Subway Franchise Systems of Canada, Ltd. ("SFSC"), Subway Partners Colombia C.V. ("SPCCV"), Subway Systems do Brasil Ltda. ("SSB"), Sandwich and Salad Franchises of South Africa Pty Ltd. ("SSFSA"), and Subway Systems India Private Limited ("SSIPL"). PT Subway Systems Indonesia ("PTSSI") is a service company which provides business related services exclusively to Indonesia's SUBWAY® franchisees, for and on behalf of SIBV, the franchisor for Indonesia. FWH, DAI, SIBV, SSA, SFSC, SPCCV, SSB, SSFSA, SSIPL, and PTSSI are collectively referred to herein as the "SUBWAY® Group".

The SUBWAY® Group, is affiliated with the following companies that may provide goods, services, or both to the SUBWAY® Group, SUBWAY® franchisees, SUBWAY® affiliates, or SUBWAY® affiliates' franchisees:

The SUBWAY® Group, may share information, including Personal Information with FWH Technologies, LLC ("FWHT"), the owner and licensor of the SubwayPOS™ software, which has been approved for use in SUBWAY® restaurants worldwide, and Franchisee Shipping Center Co., Inc. ("FSCC"), which offers various advertising, promotional, and operational materials to SUBWAY® franchisees.

The SUBWAY® Group may share information, including Personal Information with the SUBWAY® Group's advertising affiliate, Stichting Admininistratiekantoor Subway Franchisee Advertising Fund Trust, which is a Netherlands Foundation (the "SFAFT Foundation"). The SFAFT Foundation determines how the SUBWAY® franchisees advertising contributions should be allocated, and creates the spending policies and procedures with respect to the promotion of the SUBWAY® brand in all regional and local markets, for the benefit of the SUBWAY® franchisees, as well as the SFAFT Foundations affiliates, who operate as the advertising entities for the benefit of the SUBWAY® franchisees worldwide, which includes, but is not limited to: Subway Franchisee Advertising Fund Trust, Ltd. ("SFAFT"), Subway Franchisee Advertising Fund Trust, B.V. ("SFAFT BV"), Subway Franchisee Advertising Fund of Australia Pty. Ltd. ("SFAFA"), Subway Franchisee Advertising Fund of Canada, Inc./Le Fond De Publicité Des Franchisés Subway Du Canada Inc. ("SFAFC"), Subway Franchisee Canadian Advertising Trust ("SFCAT"), Subway Systems Singapore Pte. Ltd. ("SSSPL"), Subway International De Mexico, S.A. de C.V., Subway Franchisee Advertising Fund Trust B.V. Sucursal Argentina, Subway Systems do Brasil Ltda., Subway Brand Management & Consultant (Shanghai) CO. LTD., Subway Partners Colombia C.V., Subway Systems India Private Limited, Subway International B.V. (Taiwan Branch), and Subway Realty de Venezuela, C.A., The FAF Group administers national and local advertising funds and activity for SUBWAY® restaurants and SUBWAY® franchisees worldwide. The above advertising entities are collectively referred to herein as the "FAF Group".

BY ACCESSING, BROWSING, AND/OR USING THE PAGES OR SERVICES POSTED ON THIS WEBSITE, YOU AGREE TO THESE TERMS OF USE ("TERMS OF USE"). YOU CONSENT TO RECEIVE REQUIRED NOTICES (IF ANY) AND YOU ATTEST THAT YOU ARE AT LEAST EIGHTEEN (18)

The district court found that reasonably conspicuous notice was lacking because a reasonably prudent consumer in plaintiff's shoes would not have known about the arbitration clause and would not have understood that the offer was conditioned on her acceptance of it. The district court faulted Subway for its "plain, small-print disclaimer in the advertisement, which [was] dwarfed by the surrounding colorful text and imagery and which reference[d] terms and conditions only at the end of the second line." *Id.* at 524. The Subway

advertisement's design, the court said, "appear[ed] actively to draw attention away from the notice." *Id.* at 525. This "obstacle alone," the court concluded, deprived the notice of reasonable conspicuousness. *Id.* The court reasoned that this assumed the consumer would have even been aware and capable of reading the notice. And if the customer "happened to read the notice, she would have to have inferred that the vague reference to terms and conditions applied to the promotional offer, notwithstanding the immediately preceding language that '[c]onsent not required to buy goods/svcs.'" *Id.* (alteration in original). The court observed that, even a consumer who discovered the notice "would have to have typed each character of the tiny URL – which spill[ed] over from the second into the third line of the disclaimer – into a web browser on her smartphone, typo-free and in a Subway store with decent cell or internet service, or else recorded the URL and accessed it elsewhere." *Id.* at 524. The court also noted that the customer "would have to have ignored the bold, all-caps descriptor at the top of the linked webpage which state[d] that the terms [were] 'FOR THIS WEBSITE,' suggesting by implication that they d[id] not apply to the promotional offer at hand but rather to her use of Subway's website." *Id.* The court also faulted Subway because a customer "would have to have jumped (via hyperlink) or scrolled several screens down just to find the arbitration clause." *Id.* These numerous "obstacles," the court found, "dispel[led] any conclusion that the arbitration clause was reasonably conspicuous." *Id.* The fact that the notice was arguably presented proximately to the offer was insufficient to presume reasonable notice, the court explained, because "[e]ven if a reasonable consumer would have become aware of the notice, it [was] doubtful she would have connect[ed] the contractual terms to the services to which they appl[ied]" given the vagueness of the notice that simply stated "Terms and conditions at [URL]" immediately preceded by "Consent not required" language. *Id.* at 525 (third alteration in original) (internal quotation marks omitted). "Proximity without more, such as an express statement linking acceptance of the terms to the offer, is insufficient to presume awareness of the terms' applicability," the court explained. *Id.*

Subway tried to liken its case to *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66 (2d Cir. 2017), because notice of its terms were "in plain view" and "in close proximity" to the offer. *Soliman*, 442 F. Supp. 3d at 526. But the district court found *Meyer* distinguishable because the notice in *Meyer* was a blue and underlined hyperlink directly adjacent to the button intended to manifest assent to the terms, "was uncluttered by other verbiage," and advised the user that by creating an account by clicking on a "register" button, the user agreed to the terms of service. *Id.* By contrast, here, Subway's notice, the court observed, "was sandwiched (so to speak) between roughly 100 words of small black text compared to which it was unimpressive, was tucked away at the bottom corner of the advertisement relatively distant from the offer, and contained no express language explaining that by accepting the offer, a consumer was agreeing to be bound by the terms." *Id.* at 526.

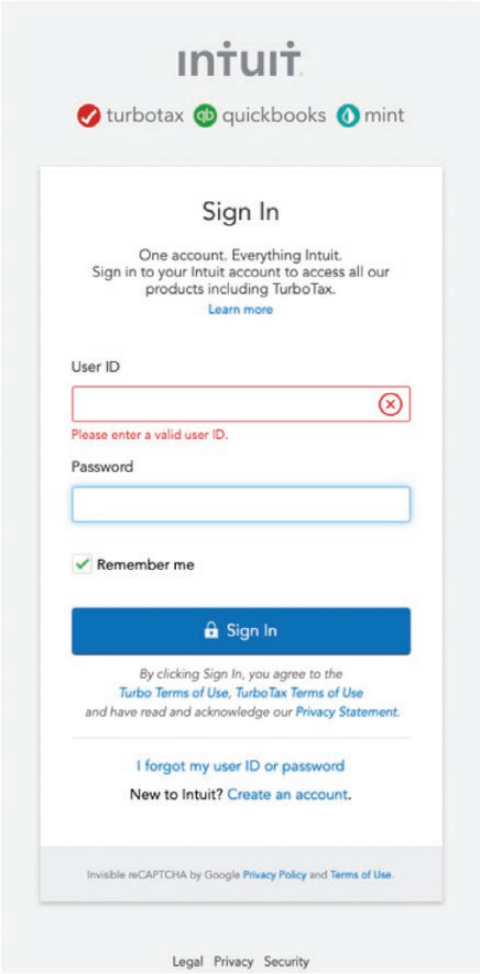
Subway took an immediate interlocutory appeal as of right to the Second Circuit.

***Arena v. Intuit Inc.*, 444 F. Supp. 3d 1086 (N.D. Cal. 2020) (Breyer, J.) (applying California law), *rev'd and remanded sub nom. Dohrmann v. Intuit, Inc.*, 2020 WL 4601254 (9th Cir. Aug. 11, 2020) –** Plaintiffs filed a putative class action against Intuit, alleging the company misled consumers into paying for Intuit's online TurboTax tax preparation services when consumers were entitled to use the company's free filing option for low-income tax payers and active military members. Intuit moved to compel plaintiffs to arbitrate their claims.

Consumers accessing TurboTax online as returning users would have seen a "Sign In" page to enter their user ID and password and then click a large blue "Sign In" button. Immediately below that button was the following notice in small italicized gray print: "*By clicking Sign In, you agree to the Turbo Terms of Use, TurboTax Terms of Use and have read and acknowledge our Privacy Statement.*" The phrases "Turbo Terms of Use," "TurboTax Terms of Use," and "Privacy Statement" were colored blue, though not underlined, and were hyperlinked to the applicable policies. A user that clicked on the "TurboTax Terms of Use" would have been presented with the relevant terms, including an arbitration clause.

The district court credited Intuit for presenting the Terms of Use hyperlink "immediately under the sign-in button[] every time consumers signed in" and "featur[ing] an explicit statement that signing in constituted assent to the Terms" of Use on the sign-in page. *Arena v. Intuit Inc.*, 444 F. Supp. 3d 1086, 1091 (N.D. Cal. 2020) (Breyer, J.). But the court found that the hyperlinked text was itself inconspicuous and therefore plaintiffs did not receive adequate notice of TurboTax's Terms of Use and could not be bound by the arbitration provision contained therein.

The court explained that "the gold standard" for a hyperlink's conspicuousness is "when they are blue and underlined." *Id.* While TurboTax's hyperlinks were blue, the court observed, they were not underlined and thus fell short of that standard. The court also faulted Intuit for presenting the notice and hyperlinks "in the lightest font on the entire sign-in screen" because "a reasonable



consumer would be less likely to notice text in a significantly fainter font than other text on the same page." *Id.* at 1092. The court credited expert testimony of a PhD in cognitive science that plaintiffs had submitted in opposition to Intuit's motion to compel, which the court found "confirm[ed] the common-sense conclusion that, because 'Intuit chose to use a lighter shade of gray for the text associated with the terms and conditions,' [it] ma[de] that notice 'less prominent' '[o]n the page's white background.'" *Id.*

The court further found the sign-in page deficient because it "contain[ed] multiple, confusingly similar hyperlinks" and "[t]he notice . . . purport[ed] to warn users that clicking 'Sign In" . . . would bind them to 'the Turbo Terms of Use, Turbo Tax Terms of Use,'" which were "two separate hyperlinks to two different agreements" and "[o]nly the latter contained the arbitration agreement Intuit [was] seeking to enforce by way of the instant motion." *Id.* "A reasonable user[,] . . ." the court explained, "might well find this arrangement confounding. He or she might not realize the notice contained a second hyperlink." *Id.* In other words, "the confusing presence of two nearly-identically named hyperlinks might have prevented a user from realizing the second hyperlink existed at all, regardless of whether they clicked on the first one," a conclusion the court observed was confirmed by plaintiffs' expert. Last, the district court found "it relevant that less than 0.55% of users logging into TurboTax's website between January 1 and April 30, 2019, actually clicked on the hyperlink to the Terms." *Id.* at 1093. The court reasoned that "[t]he fact that so few users actually clicked on the hyperlink support[ed] the inference that many of them did not notice it." *Id.*

Intuit took an immediate interlocutory appeal to the Ninth Circuit, which appeal was *sua sponte* expedited by the panel, as the district court sought to resolve the merits of the case during the present tax season. In an unpublished, divided decision, the Ninth Circuit reversed the district court's order denying Intuit's motion to compel arbitration, concluding that Intuit's interface constituted an enforceable browsewrap agreement, and remanded the case with instructions to the district court to compel arbitration.

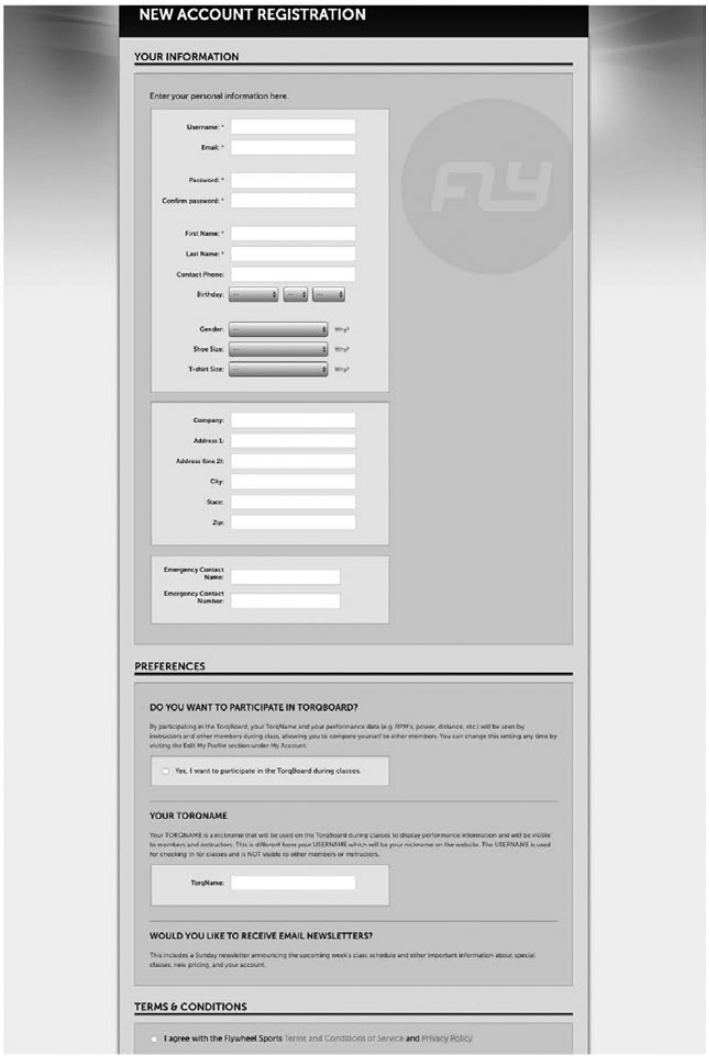
Relying on *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171 (9th Cir. 2014), the Ninth Circuit majority observed that TurboTax's website "required users to affirmatively acknowledge the agreement before proceeding, and the website contained explicit textual notice that continued use will act as a manifestation of the user's intent to be bound." *Dohrmann v. Intuit, Inc.*, 2020 WL 4601254, at *2 (9th Cir. Aug. 11, 2020) (internal quotation marks omitted). The majority decision further noted that "[t]he relevant warning language and hyperlink to the Terms of Use were conspicuous – they were the only text on the webpage in italics, were located directly below the sign-in button, and the sign-in page was relatively uncluttered." *Id.* Notably, the Ninth Circuit held that, because conspicuousness is a question of law, the district court erred in relying on the opinion of plaintiffs' cognitive science expert in reaching its conspicuousness conclusion, because experts interpret and analyze factual evidence, and their opinions are not proper for issues of law. The majority thus concluded that TurboTax's website "provided sufficient notice to a reasonably prudent internet user of its Terms of Use, which include[d] an arbitration clause." *Id.*

District Judge Hilda Tagle, of the U.S. District Court for the Southern District of Texas, sitting by designation, dissented, urging affirmance of the district court's order that held inquiry notice wanting on the basis that Intuit's presentation of the relevant terms was "confusing" and that "[m]ore than one terms-of-use link on

a sign-in screen by itself [was] enough to confound a reasonably prudent user." *Id.* at *3 (Tagle, J., dissenting). But the dissent went further, suggesting that "binding users to terms that appear after sign-in credentials runs contrary to ordinary [California] state law principles that govern the formation of a contract and to a reasonable person's understanding of contracts which in the ordinary course of business place terms and conditions before a signature." *Id.*

***Card v. Wells Fargo Bank, N.A.*, 2020 WL 1244859 (D. Or. Mar. 16, 2020) (Simon, J.) (silent regarding applicable law) –** The following case presents another instance of the dangers associated with a corporate defendant's failure to submit sufficient evidence in support of its motion to compel arbitration. Plaintiff brought a putative class action against Wells Fargo claiming that he received 197 prerecorded calls on his cell phone from Wells Fargo in violation of the Telephone Consumer Protection Act. Wells Fargo moved to compel plaintiff to arbitrate his claims.

Plaintiff had applied online for a Wells Fargo credit card, which the company approved in January 2011. According to Wells Fargo, its online credit card application webpage provided plaintiff with a hyperlink to review the disclosures and agreements that contained an arbitration clause. According to Wells Fargo, later in the application webpage, customers were asked whether they affirmatively acknowledged that they had reviewed the terms of those agreements, though they "could have clicked that acknowledgment even without clicking on the hyperlink and linking to the different webpage containing the agreements and disclosures." *Id.* at *6. Plaintiff disputed that he had assented to arbitration and submitted three declarations in opposition to Wells Fargo's motion, attesting that he never entered an arbitration agreement with Wells Fargo, never signed



an arbitration agreement with the company, was never made aware of any link to any agreement referring to arbitration, and was never presented with any screen requesting that he acknowledge receipt of any agreements or disclosures on Wells Fargo's website.

The district court reasoned that, even if it were "to find that Plaintiff did click on the acknowledgment of his receipt of the hyperlinked agreements and disclosures, the Court might still require further information to determine whether the digital agreement was enforceable, such as the nature of the hyperlink (e.g., how noticeable, how labelled), the placement of the agreements and disclosures and specifically the arbitration agreement after clicking on the hyperlink (e.g., a pop-up, a new browser window, how far down to the arbitration agreement, and so forth), and the placement of the acknowledgment after returning to the application webpage." *Id.* Wells Fargo, however, did not submit with its motion to compel a screenshot of its online credit card application webpage for the court to consider. Due to the absence of this evidence, the court held that "there [was] a genuine dispute of material fact regarding whether a valid arbitration agreement exist[ed]" because "Wells Fargo ha[d] not sufficiently proven that Plaintiff received and was aware of the terms of any of Customer Agreement purportedly provided to him." *Id.* at *7. The court thus concluded that an evidentiary hearing or jury trial would need to be held to determine whether a valid arbitration existed before ruling on Wells Fargo's motion to compel.

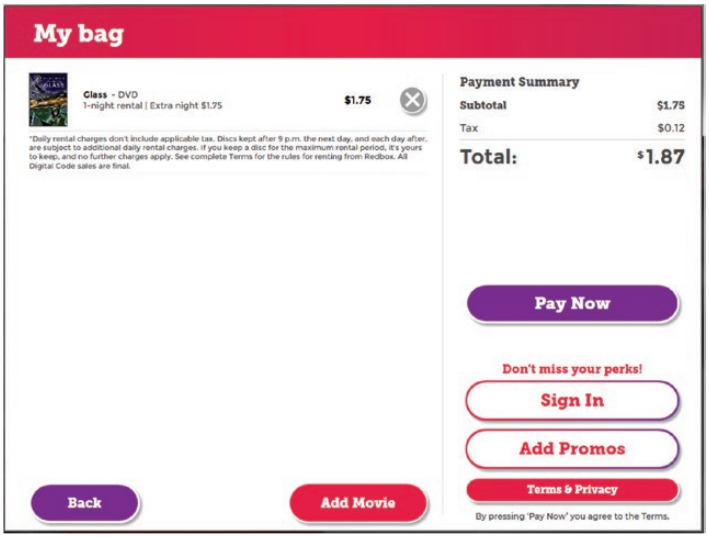
***Henricks v. Flywheel Sports, Inc.*, 2020 WL 1285453 (S.D.N.Y. Mar. 18, 2020) (Gardephe, J.) (applying New York law) –** Plaintiff commenced this putative class action against Flywheel Sports, an indoor cycling workout studio, claiming the company violated the Telephone Consumer Protection Act by sending unwanted text messages to her cell phone. Flywheel moved to compel arbitration.

In order to sign up for a class with Flywheel, a customer had to first create an account through Flywheel's registration webpage, which could be accessed at a Flywheel studio or online. A new user was presented with a "**NEW ACCOUNT REGISTRATION**" page, which required the user to input their personal information and then click a box at the bottom of the page stating in boldface, "I agree with the Flywheel Sports **Terms and Conditions of Service** and **Privacy Policy**." The phrases "Terms and Conditions of Service" and "Privacy Policy" were hyperlinked in blue, bold lettering, but not underlined. When the Terms and Conditions of Service hyperlink was clicked on, it directed the user to, among other things, an arbitration clause. Flywheel submitted records showing that plaintiff created an account on Flywheel's website on December 2, 2014 at 6:19 p.m.

The court granted Flywheel's motion, finding that Flywheel had established that plaintiff created an account with it and agreed to the company's Terms and Conditions of Service, which included an arbitration agreement. The district court noted that "the 'Terms and Conditions of Service' hyperlink [was] in distinctive blue lettering that st[ood] out to the user" and that "[i]t was also necessary for users to check a box to confirm that they agreed to those terms and conditions before an account could be created." *Id.* at *5. The court therefore concluded that Flywheel's registration page clearly and conspicuously presented the Terms and Conditions of Service.

Plaintiff, however, maintained that she never participated in the sign-up process, did not recognize the sign-up page, and did not recall ever visiting Flywheel's website, all of which she included in a declaration filed in opposition to defendant's motion to compel. The district court, however, was unmoved by this evidence, observing that "courts in this Circuit have repeatedly held that failing memories do not absolve a party from its contractual obligations." *Id.* The court further found that plaintiff's "assertion that she did not participate in Flywheel's sign-up process contradict[ed] evidence demonstrating that (1) her account was created on Flywheel's website on December 2, 2014 at 6:19 p.m.; and (2) all website users must follow the same sign-up process." *Id.* The court further noted that, given that plaintiff's profile with Flywheel was created nearly five years before she denied participating in the registration process through her declaration, it was "entirely implausible that [plaintiff] would have any memory of whether she visited Flywheel's registration page more than four years ago." *Id.* at *6. Plaintiff also speculated that Flywheel's desk attendants may have modified her account through some form of internal company web portal and accepted the arbitration agreement on her behalf. But the court found "this speculation . . . entirely implausible, because this theory would entail that Flywheel's employees submitted [plaintiff's] personal information through the registration webpage and, without her knowledge, created a username and password for her;" yet "[t]here [was] no evidence that this took place, and [plaintiff's] speculation on this point [was] not sufficient to create an issue of fact." *Id.*

***Wilson v. Redbox Automated Retail, LLC*, 2020 WL 1445622 (N.D. Ill. Mar. 25, 2020) (Wood, J.) (applying Illinois law), *appeal pending*, Appeal No. 20-01678 (7th Cir.) –** Plaintiff rented movies from Redbox's automated kiosks and filed a putative class

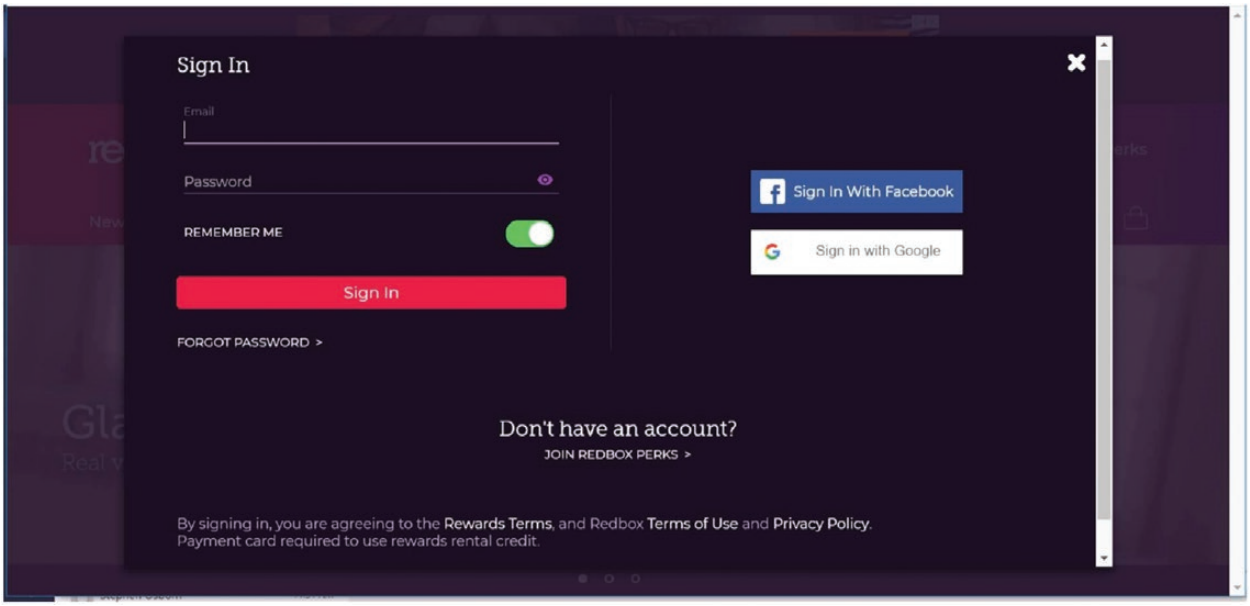


action against the company claiming violations of the Telephone Consumer Protection Act after she received numerous automated text messages from the company. Redbox moved to compel plaintiff's claims to arbitration, claiming that plaintiff had assented to the company's Terms of Use each time she rented a movie and signed into her Redbox account.

Customers could rent movies from Redbox in two ways. First, they could visit a Redbox kiosk and select a movie from the available inventory. The customer would swipe a payment card at the kiosk, which would dispense the selected movie. Second, customers could create an account on Redbox's website and rent and pay for movies online, and then select a kiosk from which to pick up the rented movie. When a customer rented directly from a Redbox kiosk, they were presented with a "My bag" screen, which was divided into two columns with a white background. The left column showed the movie(s) the customer selected and the price. The right column showed the total cost of the movie(s), followed by a large purple "Pay Now" button. Just below the "Pay Now" button was red text stating "Don't miss your perks!," and beneath that were two white buttons with red text. The first button read "Sign In," and the second read "Add Promos." Immediately below those two buttons appeared a smaller red button with white text titled "Terms & Privacy." A customer that tapped the button was taken to a screen titled "Terms of Use." Immediately below the "Terms & Privacy" button was small black text that said, "By pressing 'Pay Now' you agree to the Terms." No customer could complete a rental without affirmatively pressing the "Pay Now" button.

A customer seeking to initiate a rental online was presented with a "Sign In" screen with a black background. The left side of the screen were boxes for a customer to enter their email and password, followed immediately below by a green button next to all-caps white text that read "REMEMBER ME." Below the green button was a long red button with white text that read "Sign In." Below the red button was a hyperlink in white all-caps text that read "FORGOT PASSWORD >." Centered below on the screen in larger white font was verbiage that said "Don't have an account? JOIN REDBOX PERKS >." Below that in small gray text was a disclosure informing the user that "By signing in, you are agreeing to the Rewards Terms, and Redbox Terms of Use and Privacy Policy. Payment card required to use rewards rental credit." The phrases "Rewards Terms," "Terms of Use," and "Privacy Policy" appeared in white text and hyperlinked to separate pages containing the corresponding policies. The Terms of Use included an arbitration clause. Redbox submitted evidence establishing that plaintiff had opened a Redbox customer account on the company's website on October 27, 2007 and had rented over 125 movies from Redbox. Plaintiff submitted a declaration denying she had ever agreed to Redbox's Terms of Use, denying she was aware of their existence, claiming that she never received notice that she was agreeing to Redbox's Terms of Use when she signed into her account, and attesting that she was never presented with any screen that referenced the Terms of Use.

The district court first evaluated the "My bag screen," which it said "present[ed] a relatively close call." *Id.* at *5. While the "Pay Now" button was temporally



coupled with the Terms of Use button and the disclosure that pressing "Pay Now" constituted assent to those terms, the district court found that the "Pay Now" button was not spatially coupled with the Terms of Use. The district court observed that "[n]ormally, courts will find a sufficient spatial connection where a consumer has an opportunity to review the terms and conditions in the form of a hyperlink placed directly adjacent to the button by which the consumer manifests assent." *Id.* But, here, the court observed that "the button for the Terms of Use and accompanying disclosure [were] not adjacent to the 'Pay Now' button. Rather, the 'Pay Now' button appear[ed] in the middle of the right side of the screen while the Terms of Use and disclosure appear[ed] at the bottom." *Id.* The district court also faulted Redbox for designing the My Bag screen with two other buttons between the "Pay Now" button and link to the Terms of Use, which "perform[ed] functions entirely unrelated to the function by which a Redbox customer manifest[ed] assent to the Terms of Use – i.e., making payment." *Id.* The court reasoned that "[t]hose buttons, entirely unconnected to payment, ha[d] the effect of diverting the customer's attention from the Terms of Use and accompanying disclosure." *Id.* The court further observed that the text immediately above the two intervening buttons, which read "Don't miss your perks!" further "divert[ed] the Redbox customer's attention from the Terms of Use." *Id.* at *6. The court reasoned that "[a] customer m[ight] justifiably believe that the three buttons below that text address[ed] 'perks'" and that "a customer not interested in 'perks' might not bother looking down to see the Terms of Use and disclosure that she [was] agreeing to those terms by hitting 'Pay Now.'" *Id.*

Next, the district court assessed the "Sign In" screen to determine whether plaintiff assented to the Terms of Use each time she signed into her Redbox account. But the court found that the disclosure on the Sign In screen failed to give plaintiff constructive notice of the Terms of Use. The court explained that, while the Sign In screen "d[id] not have the same clutter problem as the My Bag screen," and "exhibit[ed] temporal coupling between the notice of Terms of Use and the mechanism for manifesting assent," there was "some spatial decoupling caused by the prompt for new users to create an account, which separate[ed] the disclosure at the bottom of the screen from the Sign In buttons." *Id.* But the principle issue the court found with the Sign In screen, which deprived customers of inquiry notice of the Terms of Use, was that the hyperlink to the Terms of Use was not reasonably conspicuous. The court found Redbox's interface deficient because the hyperlinks appeared in white text, which matched other non-hyperlinked text on the Sign In screen, and because the contrast of the gray hyperlinked text against a black background was "insufficient." *Id.* at *7. The court explained that, to render a hyperlink reasonably conspicuous, there must be sufficient distinguishing characteristics to tip off a consumer that it is in fact a hyperlink that should be clicked on and the terms of which should be reviewed, "such as words to that effect, underlining, bolding, capitalization, italicization, or large font." *Id.* at *6. This problem, the court explained, was "particularly glaring" in this case, given

that the Sign In page included two other hyperlinks formatted differently from the Terms of Use hyperlink, both of which were in all caps and followed by a ">" symbol, "suggesting to the user that clicking on that text w[ould] direct them to a new page." *Id.* at *7. The contrast between "those more obvious hyperlinks," the court explained, "underscore[d] that the Terms of Use hyperlink [was] not reasonably conspicuous." *Id.*

Redbox filed an interlocutory appeal to the Seventh Circuit from the district court's order denying its motion to compel arbitration. On May 13, 2020, the parties were steered into the Seventh Circuit's mediation program and the Seventh Circuit suspended briefing on the appeal indefinitely pending further court order.

***James v. Synovus Bank*, 2020 WL 1479115 (D. Md. Mar. 26, 2020) (Chuang, J.) (applying Maryland and Georgia law) –** This was a putative class action filed by plaintiff against First Progress Card, alleging that First Progress provided inaccurate information to credit reporting agencies in violation of the Fair Credit Reporting Act. First Progress moved to compel plaintiff to arbitrate his claims pursuant to an agreement proffered as part of an online application he completed with First Progress. Plaintiff did not oppose First Progress's motion, which included a declaration of the Chief Risk Officer of the company that serviced the accounts tied to the credit cards issued by First Progress and detailed the clickthrough process, but notably lacked submission of a photograph of the online application plaintiff would have been presented with. The district court nevertheless undertook its own analysis to determine whether First Progress had produced sufficient evidence to show that plaintiff had accepted First Progress's Cardholder Agreement and assented to the arbitration agreement contained therein.

The court concluded that the declaration provided sufficient evidence of an agreement to arbitrate. The district court observed that the declarant asserted that he had personal knowledge of the records associated with plaintiff's account and stated that each First Progress credit card applicant was required to check a box signifying that the applicant agreed to be bound by the terms and conditions of the Cardholder Agreement. The declarant further asserted that he had personally reviewed the data records for plaintiff's account, which showed that plaintiff had affirmatively checked the box on May 7, 2016 as part of his First Progress credit card application, and that these records showed that plaintiff had not opted out of the arbitration agreement. The declarant also attached a copy of the Cardholder Agreement to which plaintiff consented, which included an arbitration provision. Although First Progress did not submit imagery of the actual interface presented to plaintiff, the court held that the evidentiary record submitted by First Progress established the existence of an arbitration agreement between the parties.

***Foster v. Walmart Inc.*, 2020 WL 6194432 (E.D. Ark. Apr. 9, 2020) (Miller, J.) (silent regarding applicable law) –** Plaintiffs brought this putative class action against Walmart, alleging that they bought Walmart gift cards with PIN numbers that third parties had already unlawfully copied down so that when plaintiffs loaded money onto the cards, the third parties could use the PIN numbers to steal plaintiffs' money. Plaintiffs claimed that Walmart was aware of this scheme and did nothing to prevent it. Walmart moved to compel each plaintiff to arbitrate their claims.

Walmart submitted a company declaration that explained that the gift cards plaintiffs purchased included language that said "Terms and conditions subject to change without notice. See Walmart.com for complete terms." The gift card terms and conditions were published on Walmart's website, and a user that visited Walmart's website and clicked on the terms and conditions would have discovered that one of the terms was an arbitration provision. The terms and conditions also incorporated by reference Walmart's "Gift Card Terms and Conditions." Although the gift card terms did not contain an arbitration provision, they stated that they were "applicable in addition to the Terms of Use and Privacy Policy applicable to the Walmart.com website." Walmart attached the various versions of its Terms of Use to its motion, but it did not include any imagery of the gift cards.

The district court denied Walmart's motion, holding that Walmart's gift card arbitration terms were conveyed to plaintiffs by unenforceable browsewrap because plaintiffs were not asked "to agree to the Walmart gift cards' terms of use as a condition of purchasing or using the cards," and "[n]othing in the record . . . indicate[d] that plaintiffs were placed on actual or constructive notice of the arbitration provision." *Id.* at *2. The court found that "[t]he undisputed facts show[ed] that the web address on the gift card did not take customers directly to the arbitration provision" and that "[t]o find it, a customer would have to read the gift card's packaging, go to Walmart.com, find the link to the terms of use, and read them. Then, the customer would have to find the link to the gift card's terms, and read them. Then, a customer would have to look up another set of policies which the arbitration provision incorporates by reference." *Id.* The court concluded that this multistep process did not constitute constructive notice.

Walmart argued that plaintiffs should nevertheless be bound by the arbitration agreement because plaintiffs used Walmart.com. But the district court rejected this argument because nothing in the record suggested that any plaintiff actually accessed the website.

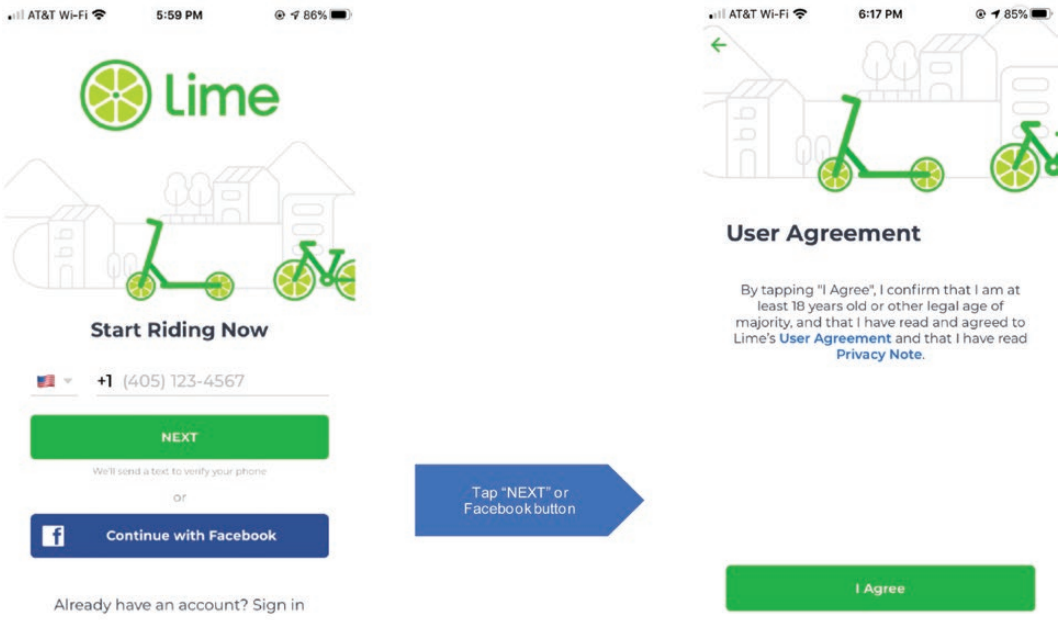
The district court denied Walmart's motion to compel and further held that no trial on the question of arbitrability was warranted because there was "nothing in the record showing that plaintiffs saw the terms of use, were otherwise aware that the terms existed before filing this lawsuit, or saw the notice on the gift cards that terms applied." *Id.*

Walmart took an interlocutory appeal as of right to the Eighth Circuit from the district court's denial of its motion to compel arbitration.

***Babcock v. Neutron Holdings, Inc.*, 2020 WL 1849405 (S.D. Fla. Apr. 13, 2020) (Moreno, J.) (applying California law) –** Plaintiff brought this personal injury action against Lime after sustaining severe injuries riding one of the company's e-scooters. Lime moved to compel plaintiff to arbitrate her claims.

Before a user could rent a Lime e-scooter, the user had to download the Lime smartphone app and create an account. While creating an account, the user was prompted to agree to Lime's User Agreement. First, the user was prompted to enter their phone number or use a Facebook link to populate their user information. After completing the user information inputs and tapping a large green button titled "NEXT" or a large blue "Continue with Facebook" button, the user was directed to a registration page titled "User Agreement" with a notice in black typeface that stated, "By tapping 'I Agree', I confirm that I am at least 18 years old or other legal age of majority and that I have read and agreed to Lime's **User Agreement** and that I have read **Privacy Note**." The phrases "User Agreement" and "Privacy Note" were in blue and bold font but not underlined, and they each hyperlinked to the relevant terms if clicked on. The User Agreement would direct users to the full terms of the User Agreement, which included the arbitration agreement.

Plaintiff argued that there was no agreement between the parties to arbitrate because she lacked reasonable notice of the arbitration provision. The district court disagreed, and found "that the blue boldface hyperlink to the User Agreement's terms (where the user could read the full Arbitration Provision), combined with the unambiguous warning that '[b]y tapping I Agree,' the user confirm[ed] that he or she 'read and agreed to Lime's User Agreement,' [was] conspicuous enough to put a reasonably prudent smartphone user on inquiry notice of the Arbitration Provision." *Id.* at *5. The district court observed that the only full sentence on the entire sign-up page explained to the user that, "By tapping 'I Agree', I confirm that I am at least 18 years old or other legal age of majority, and that I have read and agreed to Lime's **User Agreement** and that I have read **Privacy Note**," and that only the words "User Agreement" and "Privacy Note" appeared in blue boldface font, the only language colored blue on the entire page, and that "[t]he blue boldface font signifie[d] that the words [were] hyperlinks to information located on another page." *Id.* at *6. "Taken together, . . ." the district court concluded that "the large black boldface User Agreement title, the non-bold black User Agreement acknowledgement, the blue boldface User Agreement hyperlink, and the lime-green 'I Agree' confirmation



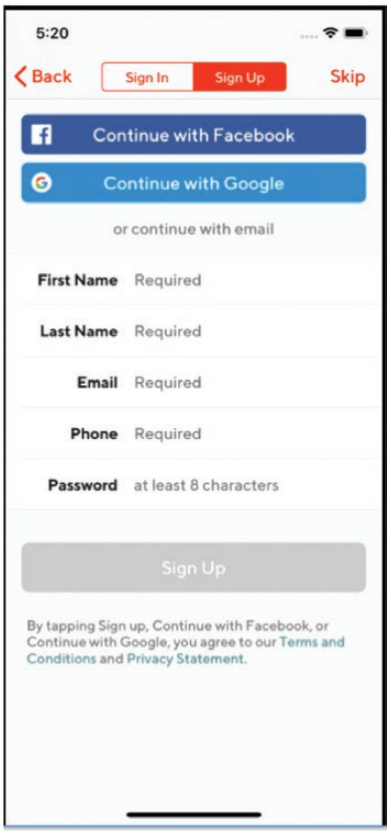
button create[d] a user friendly display." *Id.* The court explained that the "assortment of contrasting colors, and bold and non-bold fonts, combine[d] with empty white space to visually separate each piece of information so that the user clearly underst[ood] that by tapping 'I Agree,' he or she [was] agreeing to be bound by the User Agreement's terms, which [were] readily accessible by tapping on the blue boldface hyperlink." *Id.*

***Peter v. DoorDash, Inc.*, 445 F. Supp. 3d 580 (N.D. Cal. 2020) (Tigar, J.) (applying California law) –** This was a putative class action filed against DoorDash, an online and app-based food delivery platform, by two customers claiming that DoorDash engaged in deceptive tipping practices by representing that consumers' tips would benefit drivers but instead were used to fund the minimum payments DoorDash guaranteed to its drivers. DoorDash moved to compel plaintiffs' claims to arbitration.

To use DoorDash's delivery platform, a user had to register for a DoorDash account on their phone. The sign-up page required a user to either register by tapping large blue "Continue with Facebook" or "Continue with Google" buttons at the top of the screen. Alternatively, a user could "continue with email" by entering their personal information and then completing the registration process by clicking a large gray "Sign Up" button at the bottom of the page. Immediately below that "Sign Up" button was a statement in gray font that said "By tapping Sign up, Continue with Facebook, or Continue with Google, you agree to our Terms and Conditions and Privacy Statement." The phrases "Terms and Conditions" and "Privacy Statement" were in turquoise colored text and were hyperlinked to the relevant terms in effect at the time. A user that clicked on the Terms and Conditions would have been directed to DoorDash's arbitration agreement. DoorDash submitted records showing that plaintiffs had signed up for their DoorDash accounts on March 4, 2019 and May 8, 2019, respectively.

Plaintiffs argued that they lacked notice of the Terms and Conditions because the text informing them that signing up for an account would constitute agreement to the terms was displayed in gray font against a lighter-shade of gray background and the font was "unreasonably small." *Id.* at *4. Plaintiffs also argued that even if they had clicked through the Terms and Conditions, the terms would have been illegible on their phones.

The district court rejected these arguments and held that plaintiffs were on inquiry notice of DoorDash's Terms and Conditions and that plaintiffs were bound by its terms. The court likened the DoorDash sign-up page to the one approved by the Second Circuit in *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66 (2d Cir. 2017): "The screens are similarly uncluttered and wholly visible, and



the notice text appears even closer to the sign-up button on DoorDash's page than on Uber's." *Peter*, 445 F. Supp. 3d at 586. The court further rejected plaintiff's coloration argument that sought to undermine conspicuousness, finding that "the text contrast[ed] clearly with the background and [was] plainly readable." *Id.* The court faulted DoorDash for failing to capitalize or underline the hyperlinks to its terms as Uber had in *Meyer*, but noted that those characteristics were not dispositive of the notice inquiry. The district court observed that another judge of the district evaluating a similar sign-in screen displaying a hyperlink to JUUL's terms in a different color but without further emphasis failed to establish inquiry notice. *See Colgate v. JUUL Labs, Inc.*, 402 F. Supp. 3d 728 (N.D. Cal. 2019) (Orrick, J.). But the district court found DoorDash's sign-in page distinguishable from JUUL's, which included a second earlier displayed hyperlink on the page that was bolded, underlined, and in a larger font than the hyperlinked terms. That feature, the court explained, "worried" the district court in that case "that users would not know that the second link was in fact a link given the greater emphasis attending the earlier-appearing link." *Peter*, 445 F. Supp. 3d at 586-87. The district court thus granted DoorDash's motion.