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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 III

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); 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 part of this article (published in the February issue of *The Computer & Internet Lawyer*) and this part survey 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. The summaries 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 plaintiffs have invoked in an effort to evade a finding of

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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.

Take the case of *Arnaud v. Doctor's Associates Inc.*, for example, where the Second Circuit held that Subway's electronic survey by which it presented its arbitration agreement to customers did not put a user on inquiry notice of arbitration because the webpage was cluttered and nothing about it suggested to a reasonable user that additional terms applied when they clicked a button stating "I'm in" on the Subway survey. Compare that agreement with the one at issue in *Spacil v. Home Away, Inc.*, which required users to agree to HomeAway's terms and conditions multiple times throughout the checkout process and check a box confirming that "I have read and agree to comply with all rental policies and terms" before they could proceed further with the rental process.

The cases summarized herein also show that the language used by plaintiffs in their declarations opposing arbitration is critical. In *Harbers v. Eddie Bauer, LLC*, for example, the plaintiff insisted in her declaration that she never saw key language on Eddie Bauer's webpage before making her purchase, which the district court found inadequate to defeat a finding of mutual assent. Similarly, in *Heller v. Rasier, LLC*, one of the plaintiffs asserted by declaration that he had no recollection of entering into an arbitration agreement with Uber and that had he been made aware of the agreement and been given the right to opt out, he would have done so. But the court there, too, held that such statements could not create a genuine issue of disputed fact as to whether the plaintiff agreed to arbitrate disputes with Uber.

By contrast, in *Hansen v. Rock Holdings, Inc.*, the district court concluded that a plaintiff declaration attesting that he had never visited the website at issue, had never input any information on the website, and never clicked any buttons on it, coupled with declarations from three other individuals who had visited the website and claimed to have received communications from the defendants without ever entering their personal information or clicking any buttons on the website, called into doubt the defendants' evidence that the only way they could have obtained the plaintiff's information to contact him was necessarily by his own submission on their website and agreement to their terms of use and arbitration agreement.

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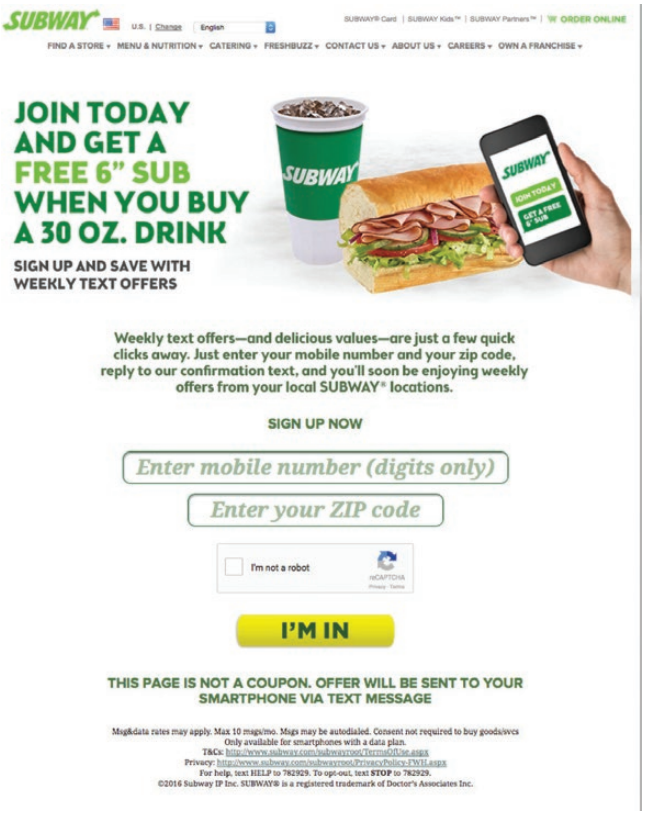
***Arnaud v. Doctor's Assocs. Inc.*, 2019 WL 4279268 (E.D.N.Y. Sept. 10, 2019) (Garaufis, J.) (applying New York law because no conflict with Connecticut law), *aff'd*, 2020 WL 5523507 (2d Cir. Sept. 15, 2020) –** Plaintiff brought a nationwide class action against Subway, claiming violation of the Telephone Consumer Protection Act after he allegedly received unsolicited commercial text messages from the company on his cell phone after he completed a survey online about a recent visit to a Subway restaurant in exchange for a free or discounted Subway item. Subway moved to compel arbitration pursuant to terms and conditions it maintained plaintiff agreed to when he completed the survey.

Users who completed the survey online had to enter their phone number and zip code, click on a CAPTCHA verification, and then click a large yellow "**I'M IN**" button in order to proceed. Below that button, the webpage included text that read in all caps, large bolded green typeface "**THIS PAGE IS NOT A COUPON. OFFER WILL BE SENT TO YOUR SMARTPHONE VIA TEXT MESSAGE**." Below that, in smaller black print, it stated, "Msg&data rates may apply. Max 10 msgs/mo. Msgs may be autodialed. Consent not required to buy goods/svcs Only available for smartphones with a data plan." And below that appeared two hyperlinks in turquoise and underlined, one labelled "T&Cs" and the other labelled "Privacy." Users who clicked on the



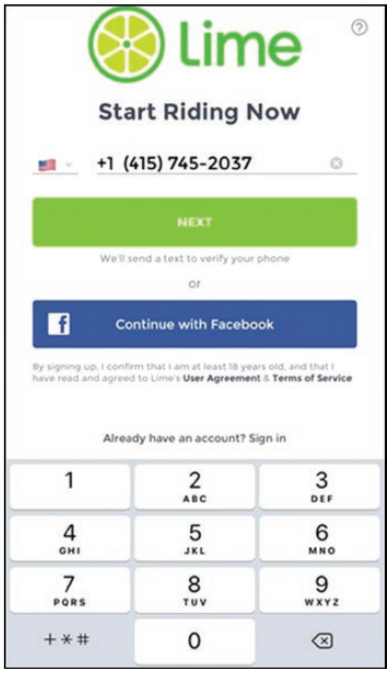
link labelled "T&Cs" were taken to a document titled "TERMS AND CONDITIONS." Section 14 of that document was titled "Choice of Law and Dispute Resolution" and included an arbitration provision.

To determine whether plaintiff had inquiry notice of Subway's Terms and Conditions, the district court examined the interfaces present in *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66 (2d Cir. 2017), and *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016), only the former of which the Second Circuit had held presented the relevant contract terms in a clear and conspicuous way. As in *Meyer*, the district court observed that the link to the Terms and Conditions appeared at the same time as the "I'm In" button. The link and the button were separated by just a few lines of text, "relatively close to each other," and "[t]he page was more cluttered than that in *Meyer*, but not quite as cluttered as the one at issue in *Nicosia*." *Arnaud*, 2019 WL 4279268, at *6. The district court noted that there was only one other hyperlink on the page "and limited additional text information that might district a user," and that, "although it was one of the few blue items on the page and so was set aside by its color," "the link was not particularly conspicuous in size or font." *Id.* But the critical feature of the Subway ad that the district court found distinguished the interface from Uber's presented to the user in *Meyer* was that "the page did not include language that served as a clear prompt directing users to read the Terms of Use or that signaled that their acceptance of the benefit of registration would be subject to contractual terms." *Id.* (alterations omitted) (internal quotation marks omitted). The district court explained that "no text anywhere on the webpage indicated that the user was agreeing to *any* additional terms, and the fact that the link was labeled "T&Cs" provide[d] little or no notice to the user that he might be bound by additional information contained at that link." *Id.* This fact, the court found, "weigh[ed] heavily against finding that Plaintiff manifested assent" to the Terms and Conditions." *Id.* The district court concluded that, "[w]ithout language explicitly informing Plaintiff that clicking 'I'm in' would constitute agreement to additional terms not contained on the page – and without especially clear and conspicuous display of the relevant links – merely placing the links on the same page as the action button is insufficient to provide inquiry notice." *Id.*

Subway filed an interlocutory appeal to the Second Circuit from the court's order denying its motion to compel arbitration. The Second Circuit affirmed by summary order, holding that the Subway webpage failed to provide inquiry notice because a reasonable user would not have found the terms and conditions link to be conspicuous because "the link was at the bottom of the page, in relatively small font, and was introduced by no language other than the shorthand 'T & Cs." *Arnaud*, 2020 WL 5523507, at *2. The court likened Subway's webpage to the webpage presented by Amazon in *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016), which the Second Circuit had held failed to put the user on inquiry notice under Washington law of Amazon's hyperlinked terms and conditions because of the small font used to display the terms and conditions hyperlink, which appeared on a cluttered webpage, and because nothing about the "Place your order" button used by Amazon suggested to the user that additional terms applied. Specifically, the language linking the button to the terms and conditions, the court had found, was "not bold, capitalized, or conspicuous in light of the whole webpage." *Id.* at 237. There, like here, the Second Circuit reasoned that a reasonable user would not have recognized that, by clicking the yellow "**I'M IN**" button, they were agreeing to be bound by Subway's terms and conditions, which hyperlink was similarly inconspicuous. Subway argued that plaintiff's failure to submit any evidence, such as a sworn declaration substantiating his version of events precluded a finding that plaintiff lacked actual notice of the terms of the arbitration agreement. But the Second Circuit rejected Subway's argument, explaining that Subway had failed to provide any evidence demonstrating plaintiff's knowledge of the terms and conditions, and plaintiff therefore did not need to submit evidence to substantiate his factual allegations.

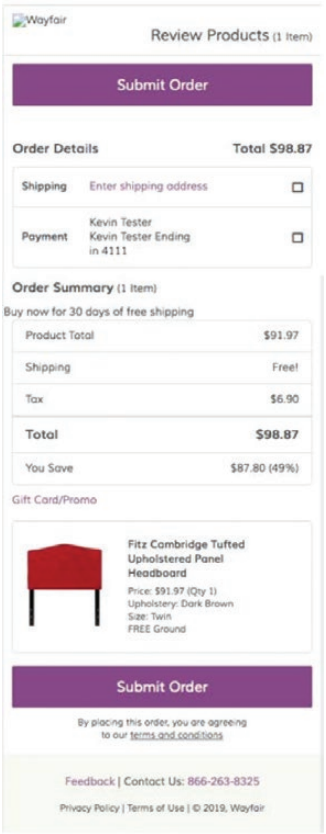
***Phillips v. Neutron Holdings, Inc.*, 2019 WL 4861435 (N.D. Tex. Oct. 2, 2019) (Scholer, J.) (applying Texas law because no conflict with California law) –** Plaintiffs brought this action against Lime, an e-scooter rental company, after a user died from a fall while riding a Lime e-scooter. Lime moved to compel plaintiffs to arbitrate their claims.

To use a Lime e-scooter, a user had to first download the Lime app and create an account by either entering their phone number or using a Facebook link to populate their information. If a user entered their phone number, they had to click a large green button that said "NEXT." A user that signed up using Facebook would click a large blue button that said "Continue with Facebook." Underneath the Facebook button was a notice in gray font that read, "By signing up, I confirm that I am at least 18 years old, and that I have read and agreed to Lime's **User Agreement** & **Terms of Service**." The phrases "User Agreement" and "Terms of Service" were black and bold, and hyperlinked to the relevant policies, the former of which included an arbitration agreement. Lime submitted internal documents to show that the decedent had signed up for Lime by entering his phone number and tapping the "NEXT" button on July 4, 2018.



The district court found that Lime's hyperlink to the User Agreement presented on the sign-up screen was reasonably conspicuous such that it placed the decedent on notice of the User Agreement and thus the arbitration agreement. The district court observed that "[t]he sign-up screen [was] visible on one page, and the hyperlink [was] in close proximity to the two sign-up buttons," and that the "the notice [was] legible, and the hyperlinked words "**User Agreement & Terms of Service**" [were] in dark, bold font, making them stand out from both the white screen and the surrounding gray text." *Id.* at *5. The court thus concluded that a reasonably prudent smartphone user would have understood that, by registering for Lime's e-scooter service, they were assenting to Lime's User Agreement, by which the decedent manifested his assent to be bound when he tapped the "NEXT" button after entering his phone number. The court therefore granted Lime's motion to compel.

***Nicholas v. Wayfair Inc.*, 410 F. Supp. 3d 448 (E.D.N.Y. 2019) (Weinstein, J.) (applying New York law) –** Plaintiff, "a well-informed internet consumer" with a college degree, who had worked in management consulting and at a prominent bank, filed this putative class action against Wayfair, claiming to have purchased a headboard from the company that was infested by bedbugs. *Id.* at 451. Wayfair moved to compel arbitration of plaintiff's claims pursuant to the company's terms and conditions. The court ordered an evidentiary hearing on the motion and subsequently granted Wayfair's motion.



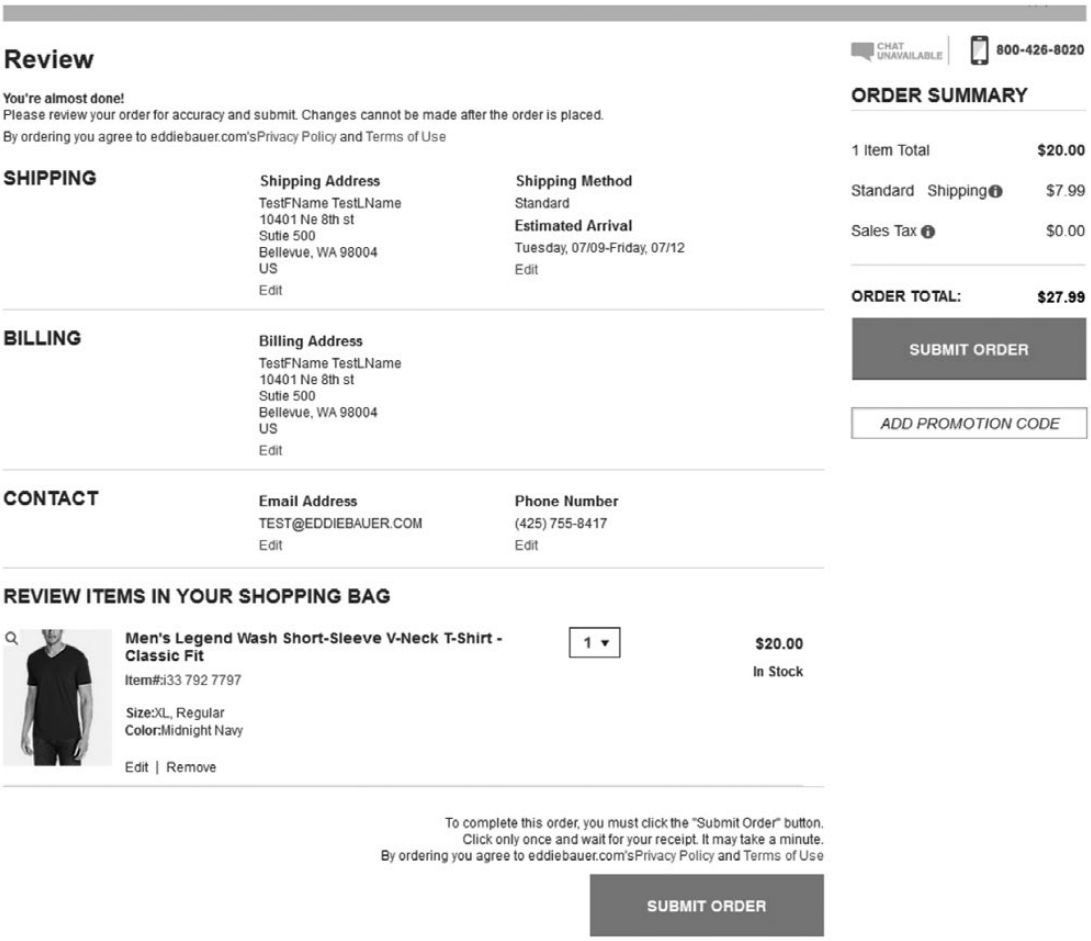
Users who made purchases on Wayfair's website were required to click on a large purple "Submit Order" button, immediately under which was text that read, "By placing this order you are agreeing to our terms and conditions." The underlined text was hyperlinked, though it was black just like the rest of the text. The terms and conditions included an arbitration clause. The terms and conditions were also available through a link appearing at the bottom of every page of Wayfair's website. According to records maintained by Wayfair, plaintiff clicked on the terms and conditions hyperlink, which webpage remained open for 107 seconds. Plaintiff subsequently canceled her order and repurchased the same product, clicking the "Submit Order" button, but this time without the terms and conditions text presented immediately below the button. At the evidentiary hearing, plaintiff testified that she recalled placing the order but did not remember clicking on the terms and conditions webpage.

The district court held that plaintiff's actions constituted agreement to Wayfair's terms and conditions and thus, to arbitration. The court found that plaintiff's protestation that she did not recall accessing the terms and conditions was not credible given the technical evidence submitted by Wayfair that showed otherwise. The court

also found that plaintiff's "own sophistication . . . ma[d]e it more probable than not that she did take note of the terms and conditions . . . before concluding her purchase," and that her failure to read the agreement before concluding her purchase was not a proper defense to contract formation. *Id.* at 453-54. The court further observed that, the fact that plaintiff canceled the order associated with her clicking on the terms and conditions did not negate assent to those same terms in connection with the order immediately placed thereafter. Relying on *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66 (2d Cir. 2017), the district court further found that "[t]he placement of the terms and conditions support[ed] the inference that Plaintiff manifested her assent to the terms and conditions" because "[t]he text indicating that submitting an order would result in acceptance of the terms and conditions was clearly visible" and a hyperlink to the terms and conditions appeared on every page of the Wayfair website that plaintiff visited. *Id.* at 454.

***Harbers v. Eddie Bauer, LLC*, 2019 WL 6130822 (W.D. Wash. Nov. 19, 2019) (Robart, J.) (applying Washington law) –** After plaintiff made two online purchases on Eddie Bauer's website, she brought a putative class action against the retailer, claiming that the company had engaged in false discount advertising by advertising perpetual discounts. Eddie Bauer moved to compel arbitration, contending that plaintiff had agreed to arbitrate any disputes with the company when she made her purchases.

In support of its motion, Eddie Bauer asked the court to take judicial notice of a screenshot of the company's Terms of Use through the Wayback Machine, which it supported with a declaration from an Eddie Bauer senior developer who attested that the page accurately reflected how the Terms of Use on Eddie Bauer's website appeared at the time of plaintiff's purchases. Plaintiff, however, urged the district court to reject Eddie Bauer's request because the screenshots at issue were unreliable, Eddie Bauer needed to provide the court with a declaration from an internet archive representative with personal knowledge of the contents of the Wayback Machine website, and the declaration submitted failed to authenticate the Terms of Use because the employee did not explain how he had personal knowledge regarding



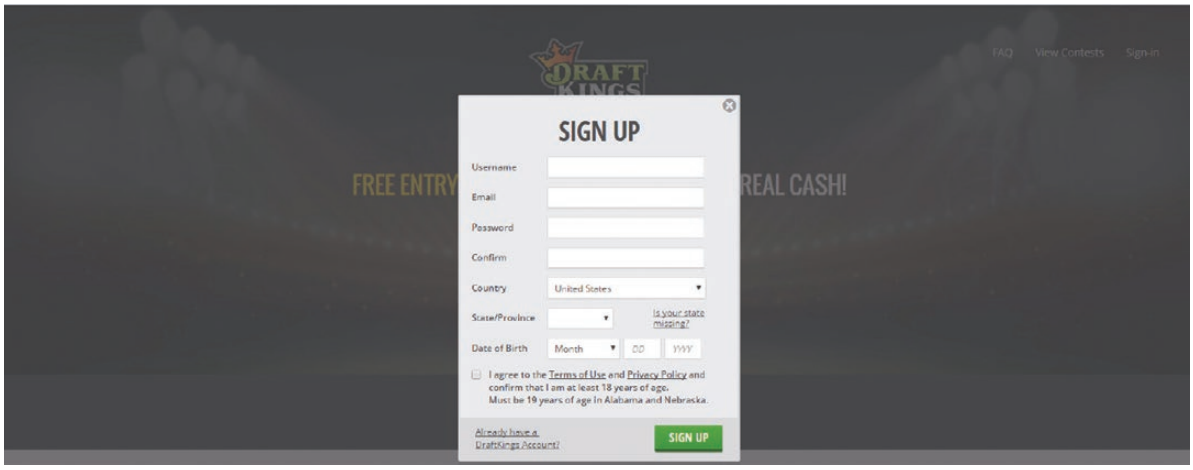
the Terms of Use in effect on the dates of plaintiff's purchases. The district court disagreed and found the Eddie Bauer employee declaration adequately authenticated the Terms of Use, such that the court could consider it on the motion to compel arbitration, finding that the declarant had stated that he made his statements based on his own personal knowledge and review of Eddie Bauer's business records.

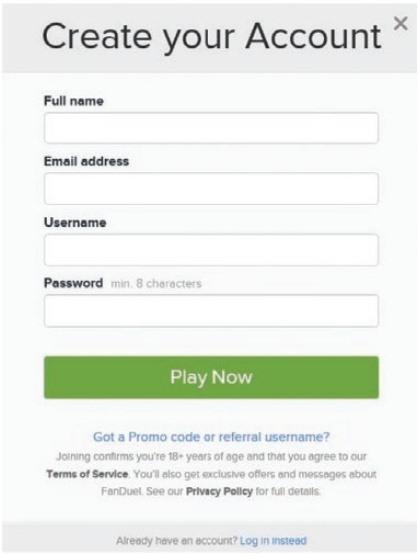
The district court next turned to the question of whether plaintiff had manifested assent to the Terms of Use, which were presented to plaintiff during the online checkout process. At the top of the "**Review**" page, users were advised in black typeface, "**You're almost done!** Please review your order for accuracy and submit. Changes cannot be made after the order is placed. By ordering you agree to eddiebauer.com's Privacy Policy and Terms of Use." That statement was repeated again at the bottom of the page, immediately above the large "SUBMIT ORDER" button. The "phrases "Privacy Policy" and "Terms of Use" were both colored gray in each notice on the screen and hyperlinked to the relevant terms. The Terms of Use included an arbitration clause.

Plaintiff argued that the interface amounted to an unenforceable browsewrap agreement because she did not click on the Terms of Use and therefore did not consent to them. But the district court found that the Review page gave plaintiff notice sufficient to manifest mutual assent, likening it to Amazon's "Review your order" page in *Fagerstrom v. Amazon.com, Inc.*, 141 F. Supp. 3d 1051, 1069 (S.D. Cal. 2015), *aff'd sub nom.*, 709 F. App'x 862 (9th Cir. 2017), which concluded that, although the notice "may not dominate the entire checkout page display, . . . it [was] reasonable notice, and that is all that is required." Plaintiff sought to rebut Eddie Bauer's claim of conspicuousness by submitting a declaration from a graphic artist and design consultant to argue that the typography and placement of the disclosures rendered them inconspicuous. But the district court was unmoved by the submission and held that the declaration could not create a material issue of fact by contradicting the weight of caselaw evaluating disclosures similar to Eddie Bauer's. Plaintiff also insisted that she never saw the "By ordering you agree" language on the Review page when she made her purchase. But the district court explained that plaintiff could not defeat a finding of mutual assent on the grounds that she had failed to read or recall the terms of the agreement. The court also observed that plaintiff had not raised any authenticity objection to the Review page and had not submitted any evidence or argument that the Review page did not appear to her at the time of purchase as Eddie Bauer presented it in its motion, or that plaintiff was able to bypass the Review page by some other means.

***In re Daily Fantasy Sports Litig.*, 2019 WL 6337762 (D. Mass. Nov. 27, 2019) (O'Toole, J.) (applying Massachusetts and New York law) –** This multidistrict litigation stemmed from plaintiffs' participation in DraftKings' and FanDuel's online daily fantasy sports contests. Plaintiffs filed class actions against both companies alleging a variety of claims, including insider trading, illegal gambling, and fraud. DraftKings and FanDuel moved to compel arbitration against most of the plaintiffs, arguing that they had agreed to arbitrate their claims when they registered for accounts with both companies.

In order to participate in DraftKings' contests, a user had to register using the DraftKings' website or mobile application, where they would have been presented with a "**SIGN UP**" screen, requiring them to provide certain personal identifying information and click on a check box next to a statement in black font that read, "I agree to the Terms of Use and Privacy Policy and





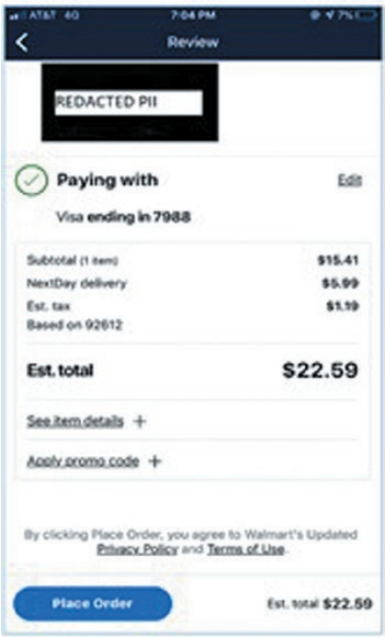
confirm that I am of at least 18 years of age," before they could click on a green "SIGN UP" button immediately below in the bottom-right corner of the screen. The underlined terms were in black font but hyperlinked to the relevant policies. The Terms of Use contained an arbitration clause.

The district court observed that that a user could not participate in any contests without affirmatively signifying assent by checking the box labeled "I agree," which appeared directly next to the Terms of Use hyperlink. The court found that this procedure reasonably communicated the applicable terms and conveyed unambiguous assent under Massachusetts law, and thus compelled the Draft Kings' plaintiffs to arbitrate their claims.

As for FanDuel, in order to participate in the company's fantasy sports contests, users had to create an account using FanDuel's website or mobile application, where they were presented with a screen to create an account before they could begin to play. To complete the registration process, users had to click a large green "Play Now" button. Immediately below the button was blue text asking "Got a Promo code or referral username?" And below that was a notice in small gray text stating "Joining confirms you're 18+ years of age and that you agree to our **Terms of Service**. You'll also get exclusive offers and messages about FanDuel. See our **Privacy Policy** for full details." The bolded terms were not underlined, but they were in black and hyperlinked, such that a user that clicked on the Terms of Service would have been redirected to the policy, which included an arbitration agreement.

The district court applied New York law and granted DraftKings' motion to compel. The court noted that, unlike DraftKings' interface, which required users to affirmatively select the statement "I Agree" to signify acceptance of the Terms of Service before they could proceed, FanDuel's account registration page did not include a similar requirement. But the court observed that the hyperlink to the Terms of Service appeared just a few lines below the "Play Now" button in a four-line block of text, and that "[a]ny reasonable viewer considering whether to click the 'Play Now' button would necessarily notice that text block, including the bolded text." *Id.* at *9. The court found that, although the text was small in size, "the text [was] simple and uncluttered," and that "any viewer noticing the block itself would notice the bolded words "**Terms of Service**" within and would recognize the phrase as a hyperlink to another document." *Id.* The court reasoned that "[t]he viewer would thus understand that there were terms that would govern the parties' relationship and that the terms were available to be reviewed." *Id.* The court added a few general comments regarding the use of electronic agreements in modern-day consumer transactions that bear repeating: "[O]n the cusp of the third decade of the twenty-first century it can fairly be said 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." *Id.* at *10. The court acknowledged that FanDuel's sign-up page "surely" "could have had a better design," but cautioned that was not the proper inquiry. *Id.* "[T]he question at hand is not whether the site was optimally designed, but whether a player had actual or constructive notice that there were terms requiring his assent to which he did give assent. Any player who deliberately clicked the 'Play Now' button had such notice from the text immediately adjacent to the button and, by clicking the button, indicated consent." *Id.*

***Maynez v. Walmart, Inc.*, 2020 WL 4882414 (C.D. Cal. Aug. 14, 2020) (Fischer, J.) (applying California law) –** Plaintiff filed a putative class action against Walmart, alleging that Walmart charged prices at its stores that exceeded the advertised prices on its phone app in violation of California's consumer protection laws. Walmart moved to compel arbitration, claiming that plaintiff had agreed to arbitrate any disputes arising out of her in-store purchase of baby wipes and diapers based on an earlier purchase of a car seat she had made through the Walmart app. Walmart submitted a declaration from the company's director of engineering, who was responsible for the cart and checkout process on the Walmart mobile application, to describe the checkout process that customers completed in order to make a purchase through the Walmart app. At the final stage of the checkout process on the app, a customer was presented with a page that contains order details



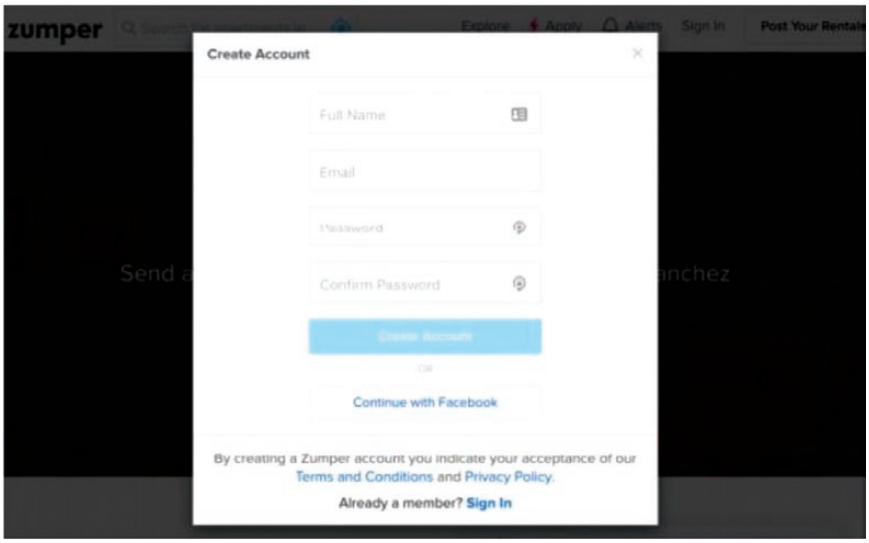
followed by a statement in gray font at the bottom of the page, immediately above a blue "Place Order" button that read, "By clicking Place Order, you agree to Walmart's Updated **Privacy Policy** and **Terms of Use**." The terms "Privacy Policy" and "Terms of Use" were in black bold typeface, underlined, and hyperlinked to the relevant policies, the latter of which included an arbitration clause. The customer could not complete the order without clicking the "Place Order" button.

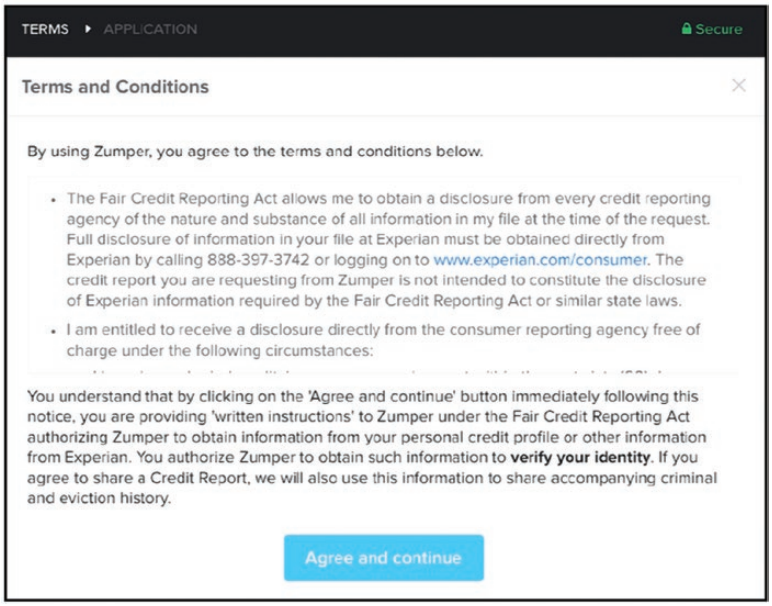
Plaintiff contended that Walmart's employee declaration was inadequate to establish an agreement to arbitrate because the declaration stated that the Walmart app "may be updated from time to time," which therefore left unclear whether the declaration described the current Walmart app checkout process rather than what plaintiff may have actually seen when she used it in 2019. *Id.* at *3. The district court rejected plaintiff's argument, which it found to be an unreasonable interpretation of the Walmart declaration, observing that the declarant specifically stated that "the Check Out Process in the Walmart App described in this declaration was in a substantially identical format in April and May 2019" when plaintiff made her purchase. *Id.*

Plaintiff also argued that mutual assent to arbitrate was wanting because she was not required to review the Terms of Use and was unaware of the arbitration provision contained therein. The district court disagreed and granted Walmart's motion. The court explained that "[t]he Walmart app required Plaintiff to affirmatively acknowledge and agree to the Terms of Use when she placed an order and "required Plaintiff to affirmatively acknowledge the Terms of Use before completing h[er] online purchase." *Id.* at *4 (second alteration in original) (internal quotation marks omitted). That plaintiff was provided with notice of the Terms of Use contemporaneously with her purchase, the court found, also distinguished her case from *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 119-21 (2d Cir. 2012), where the Second Circuit, applying California law, held that plaintiffs were not put on inquiry notice of the arbitration provision through the transmission of the terms by email after the initial enrollment and by failing to cancel their memberships. The district court further found that "the conspicuousness and placement of the 'Terms of Use' hyperlink on the Walmart app would have provided a reasonably prudent user [with] inquiry notice of the Terms of Use agreement," and thus that plaintiff assented to the arbitration clause when she made her April 9, 2019 purchase. *Id.* at *5 (alteration in original) (internal quotation marks omitted). The district court also held that the fact that plaintiff was not required to review the Terms of Use was irrelevant because, under California law, a party cannot avoid the terms of a contract by failing to read them. Last, the district court rejected plaintiff's argument that there could be no agreement to arbitrate because she never physically signed the Terms of Use, because "[n]either California law nor the FAA require a 'wet' signature on an arbitration agreement to show assent." *Id.* at *5 n.4.

***Gonzalez-Torres v. Zumper, Inc.*, 2019 WL 6465283 (N.D. Cal. Dec. 2, 2019) (Hamilton, J.) (applying California law) –** Plaintiff filed a putative class action against Zumper – which operates a website that enables prospective renters to search and apply for apartment rentals – claiming that the company systematically reported inaccurate and derogatory information to potential landlords and overcharged consumers for copies of that information in violation of the Fair Credit Reporting Act. Zumper moved to compel plaintiff to arbitrate his claims, arguing that the parties entered into an enforceable arbitration agreement when plaintiff created a Zumper account.

Prospective Zumper users attempting to rent an apartment would begin by creating a Zumper account online. To do so, users had to input their name and email and click on a light blue button that said "Create Account." Below the button was a notice in black font that stated, "By creating a Zumper account you indicate your acceptance of our Terms and Conditions and Privacy Policy." The phrases "Terms and Conditions" and "Privacy Policy" were in blue and hyperlinked to the relevant policies, the former of which linked to a document titled "Terms of Use, which included an arbitration clause.





Further, Zumper presented evidence that showed that users, such as plaintiff, who created an account through a realtor's referral link, were presented with a pop-up screen after they completed the account registration process entitled "**Terms and Conditions**," which stated in bold black typeface that, "**By using Zumper, you agree to the terms and conditions below**," followed by a large light blue "Agree and continue" button.

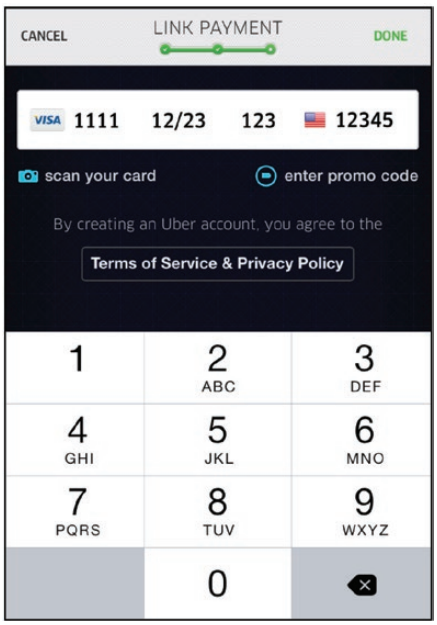
In an effort to avoid arbitration, plaintiff argued that Zumper had "pulled a bait-and-switch" by telling the user in the initial signup page that they were agreeing to "Terms and Conditions," but the linked document was titled differently as "Terms of Use." *Id.* at *5. Thus, according to plaintiff, it would not be clear to a reasonable user that clicked on the hyperlink whether they were agreeing to the terms in the hyperlinked document. The district court rejected plaintiff's argument, finding the signup page clearly incorporated the hyperlinked terms, and that, while the heading differed from the linked text, "a reasonable person reading that document would understand that it contained the terms agreed to when creating an account." *Id.* Plaintiff also argued that mutual assent was lacking because of the pop-up screen presented to him after he created his account through the realtor link, which he argued made it ambiguous as to which set of terms he was accepting. But the district court explained that, by the time plaintiff was presented with the new pop-up screen, he would have

already created an account and therefore already entered into the arbitration agreement; so the presence of the subsequent pop-up screen, the court reasoned, could have no bearing on whether there was a meeting of the minds to arbitrate any disputes at the time plaintiff created his account, which had already been consummated.

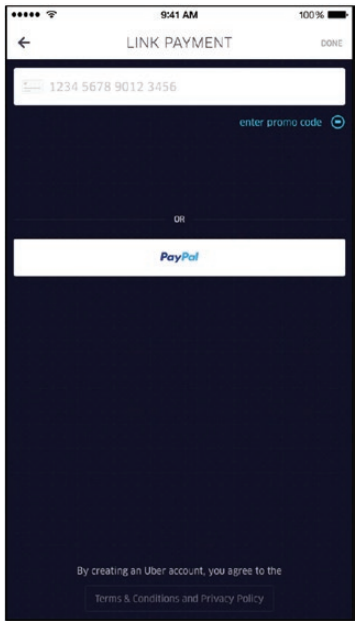
***Heller v. Rasier, LLC*, 2020 WL 413243 (C.D. Cal. Jan. 7, 2020) (Gutierrez, J.) (applying California law) –** This multidistrict litigation stems from a group of three Uber riders and an Uber driver that filed putative class actions against Uber, claiming that the company failed to safeguard riders' and drivers' personally identifiable information after hackers stole 57 million Uber driver and rider accounts. Uber moved to compel arbitration of their claims, and plaintiffs sought to avoid arbitration by contending that Uber relied on inadmissible and misleading evidence, and because they lacked reasonable notice of the arbitration provisions, such that an agreement to arbitrate was never formed.

Riders who wished to use the Uber app had to first assent to Uber's Terms and Conditions. According to Uber's internal records, plaintiff Heller registered for a rider account on April 11, 2014, plaintiff Lokietz registered on March 18, 2015, and plaintiff Luna registered on March 1, 2014. Rider plaintiffs were each presented with materially similar registration processes. They were presented with an initial screen to create their account and asked to enter their email address, phone number, and password. They were then directed to a second screen to enter their first and last name. And then they were presented with a third and final screen titled "LINK PAYMENT" to add payment information either with a credit card or through a PayPal button. At the bottom of that screen, the app stated in gray lettering against a black background, "By creating an Uber account, you agree to the Terms of Service & Privacy Policy." For Heller, the words "Terms of Service & Privacy Policy" were displayed as a button with white lettering on a black background, which linked to the text of the agreements, the former of which included an arbitration agreement. The notice of the Terms of Service remained visible on the screen throughout the final step, even as credit card information was added by Heller. Plaintiffs Lokietz and Luna followed the same process, though the bottom of their final screens presented the same notification except displayed the button in gray font against a black background.

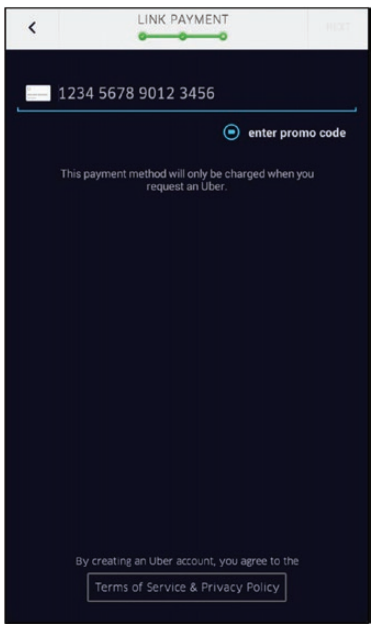
Similar to riders, Uber drivers were also required to enter into a Services Agreement with Uber's subsidiary before using Uber's services. According to Uber's records, plaintiff Fluss signed up to use the Uber app as a driver twice on February 19, 2015 and December 18, 2017. Drivers were required to select a username and password and then presented with a "**TERMS AND CONDITIONS**" screen that advised drivers in all caps and bolded gray text "**TO GO ONLINE, YOU MUST REVIEW ALL THE DOCUMENTS BELOW AND AGREE TO THE CONTRACTS BELOW.**" The screen listed hyperlinks to three different documents, the first of which was the Services Agreement that included an arbitration clause. In order



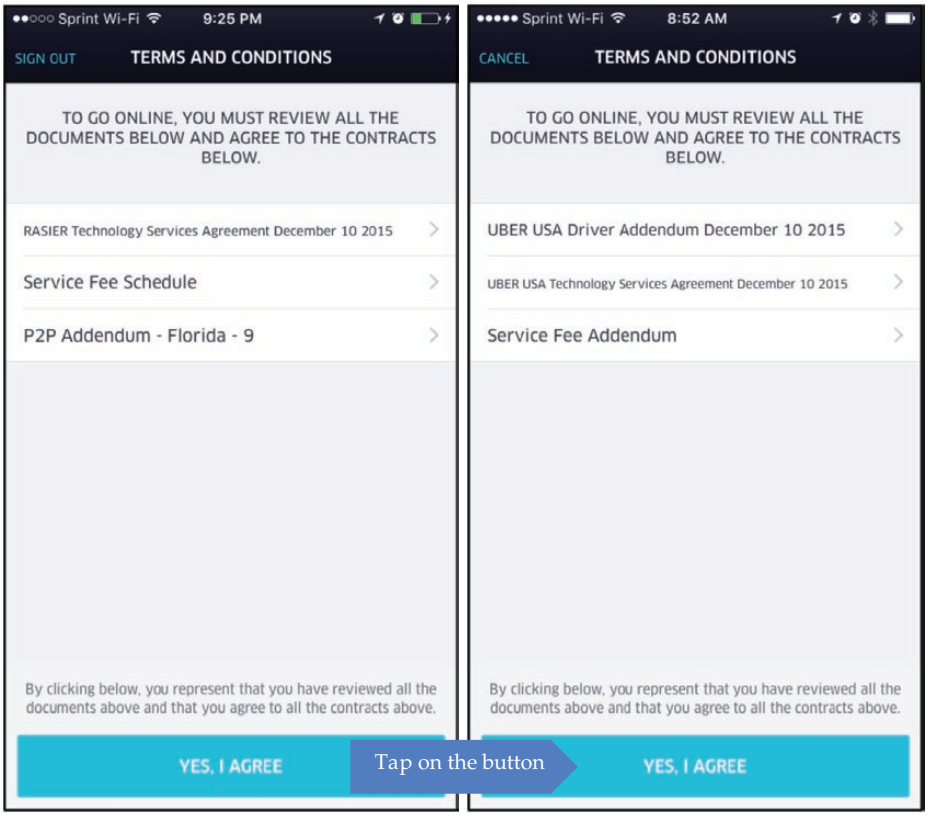
Plaintiff Heller



Plaintiff Lokietz



Plaintiff Luna



to advance to the next screen, a driver needed to click on a large turquoise button that said "YES, I AGREE" in all caps typeface. Immediately above the button, users were advised in gray font that, "By clicking below, you represent that you have reviewed all the documents above and that you agree to all the contracts above." Upon clicking the button, drivers were prompted to confirm acceptance of the Services Agreement for a second time. Only after clicking the "YES, I AGREE" button twice could a driver use the Uber app.

Plaintiffs urged the district court to strike the Uber employee declarations and associated images attached as exhibits to substantiate the registration processes experienced by each plaintiff. Plaintiffs argued that the employees were not qualified to establish the foundation of the business records and that their declarations constituted "mere speculation about irrelevant hypotheticals about what users would do." *Id.* at *9. Alternatively, plaintiffs asked for a trial to resolve factual issues regarding formation of the arbitration agreements. The court disagreed, finding that each Uber employee's testimony was "based on their personal knowledge and experience as former or current software engineers who designed and implemented the sign-up registration processes for the Uber App." *Id.* And although one of the declarants was not a software engineer, the court observed that the declarant "state[d] that he ha[d] personal knowledge as a Product Manager of the process [that] drivers must go through to sign up to use the Uber App." *Id.* Plaintiffs also argued that the screenshots submitted with the declarations were misleading because they were more than twice the size of what a smartphone would have shown. But the court found this argument unpersuasive because plaintiffs did not claim that any parts of the images were inaccurate.

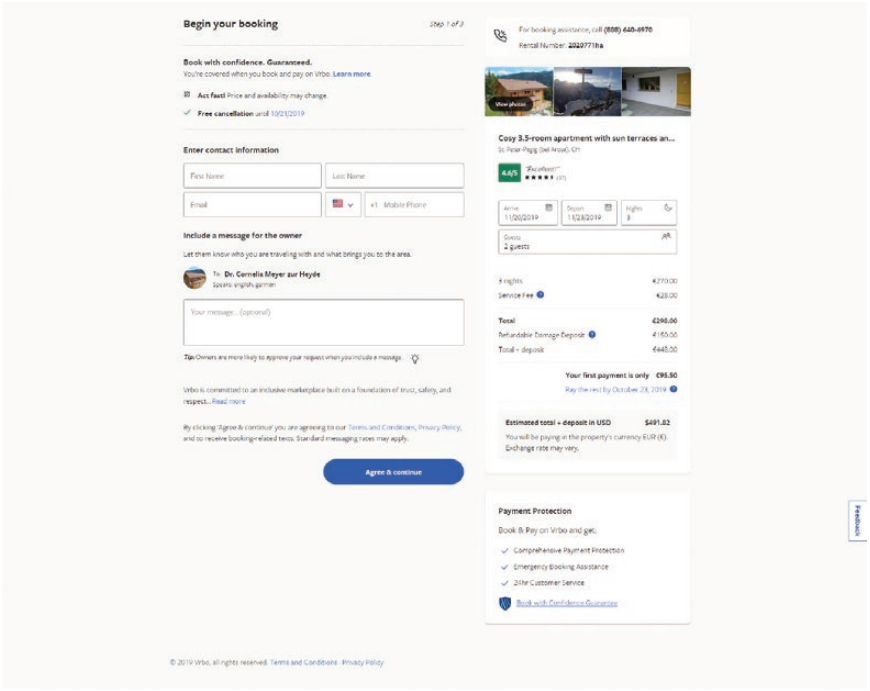
With respect to plaintiffs' reasonable notice argument, plaintiffs maintained that they lacked notice of Uber's Terms and thus the arbitration agreement contained therein. Specifically, plaintiffs argued that the notice of terms, which was in small gray font against a black background, would not have stood out, and that there would have been little reason for them to believe that Uber's Terms was a hyperlink because hyperlinks are generally blue. The court rejected the argument, reasoning that, "given that modern cellphones . . . are now such a pervasive and insistent part of daily life, . . . a reasonably prudent smartphone user would recognize that a box with the text 'Terms of Service' is clickable and would lead to a display of those terms." *Id.* (internal quotation marks omitted). Plaintiff Heller argued that he lacked notice of the arbitration agreement because the bottom portion of the screen with the Terms of Service hyperlink

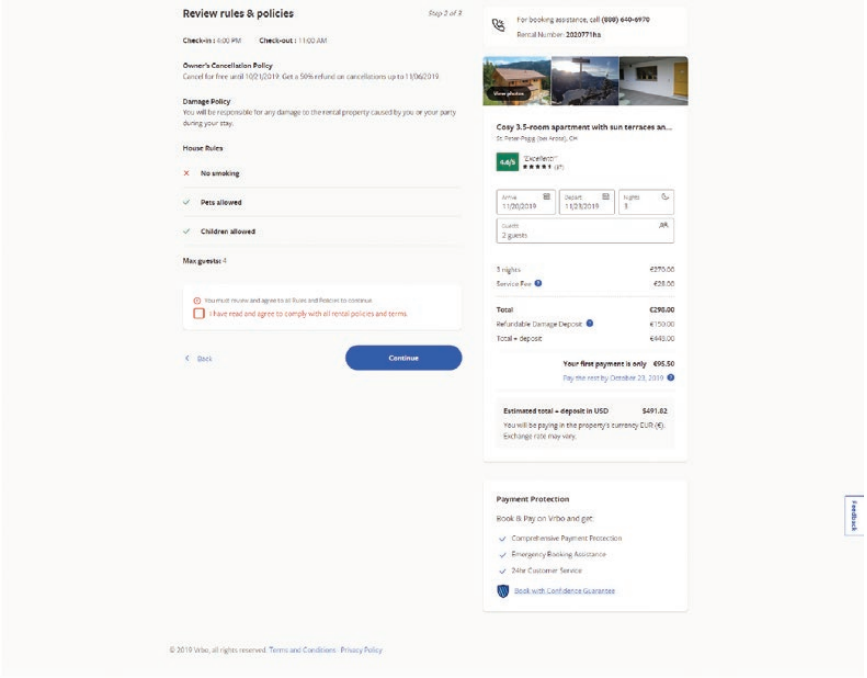
was obstructed by the keyboard when he input his payment information. But the district court observed that contention was belied by the screenshot submitted by Uber, which established that the keypad did *not* obstruct the hyperlink to the Terms of Service. Plaintiffs Lokietz and Luna raised similar challenges to the evidence of the interfaces presented to them, arguing that Uber did not present evidence regarding whether the keyboard blocked the hyperlinked Terms. The district court, however, found that this argument missed the point, because the evidence established that neither Lokietz nor Luna "had to scroll down on their screen to see the notice." *Id.* at *10.

The driver plaintiff, Fluss, sought to avoid arbitration by submitting a declaration that he had no recollection entering into an arbitration agreement and that if he had been made aware of the agreement and been given the right to opt out, he would have done so. The district court observed that Fluss could not have used the Uber app without accepting Uber's Service Agreement by twice clicking on the "YES, I AGREE" button, and that Uber had submitted records showing the dates and times Fluss accepted each version of the Services Agreement. The court explained that, "[i]f a party could get out of a contract by arguing that he did not recall making it, contracts would be meaningless." *Id.* at *11. The court thus reasoned that "Fluss's contention that he d[id] not remember the opt-out d[id] not controvert Uber's evidence to create a genuine issue of disputed fact as to whether Plaintiff agreed to the arbitration provision." *Id.*

***Spacil v. HomeAway, Inc.*, 2020 WL 184985 (D. Nev. Jan. 13, 2020) (Youchah, M.J.) (applying Nevada law) –** HomeAway operates an online platform allowing property owners and managers to list properties for short-term rental. Plaintiff filed a putative class action against the company, claiming that HomeAway knowingly allowed its website to be used by scammers to post fraudulent rental postings on HomeAway's website. HomeAway moved to compel arbitration of plaintiff's claims.

The booking process involved a user selecting a property online and then being presented with a "**Begin your booking page**." At the bottom of that page was a blue button against a gray background with white text that read "Agree & continue." Immediately above that button, there was a notification stating, "By clicking 'Agree & continue' you are agreeing to our Terms and Conditions, Privacy Policy, and to receive booking-related texts." The text was in all black except for the words "Terms & Conditions" and "Privacy Policy," which were in blue and hyperlinked so that, when clicked, they took the user to the full terms of the policies in effect. An arbitration agreement appeared on the hyperlinked Terms and Conditions page. A user using the website could not continue to the next step of the booking process without clicking on the blue "Agree & continue" button.





Once a user clicked on that button, they were taken to a page titled "**Review rules & policies**." The user was required to check a box that stated in gray typeface, "I have read and agree to comply with all rental policies and terms" before they could click on a blue "Continue" button with white writing. If a user tried to click on the "Continue" button without checking the box indicating that they had read and agreed to comply with all rental policies and terms, a red circle containing an exclamation point would appear immediately above the checkbox and next to a statement in gray font that "You must review and agree to all Rules and Policies to continue." The checkbox and statement that "I have read and agree to comply with all rental policies and terms" also changed color from gray to red. The user would then be presented with a screen to enter their payment information and submit their rental request. At the bottom of each webpage throughout the rental process were small blue hyperlinks with the words "Terms and Conditions" and "Privacy Policy."

Plaintiff opposed HomeAway's motion, claiming that HomeAway had merely provided exemplars of screens with its employee declaration submitted in support of its motion that were "substantially similar" to the ones plaintiff would have seen, and HomeAway had failed to identify what differences existed between what was submitted to the court and what plaintiff would have actually seen. Plaintiff also argued that no agreement to arbitrate was formed because HomeAway had failed to produce any documentation to show that plaintiff had completed the clickthrough process and electronically signed the agreement to adhere to HomeAway's Terms and Conditions. The district court rejected plaintiff's objections, finding that HomeAway's declarant was "unequivocal" and plaintiff did not dispute that neither plaintiff nor any other user could have completed the booking process for any property on HomeAway's website without completing all of the steps discussed in the employee declaration. The district court also found that HomeAway's clickwrap agreement, which required plaintiff to click on the "Agree & continue" button on the very first page of the booking request, sufficed to establish that plaintiff assented to the arbitration clause contained in HomeAway's Terms and Conditions and that no further electronic signature was required to signify acceptance of the contract. Moreover, because plaintiff did not deny her use of the HomeAway website, that she could only have submitted her request to book a property after clicking the "Agree & continue" button, and that the Terms and Conditions included an arbitration clause, the court held that plaintiff's declaration had failed to counter any of HomeAway's factual allegations sufficient to create a material issue of fact regarding plaintiff's knowledge and understanding of HomeAway's Terms and Conditions. The court therefore granted HomeAway's motion to compel arbitration.

***Hansen v. Rock Holdings, Inc.*, 2020 WL 310098 (E.D. Cal. Jan. 21, 2020) (Mueller, J.) (applying California law), *appeal pending*, Appeal No. 20-15272 (9th Cir.) –** This was a putative class action

brought against LowerMyBills.Com and Core Digital Media Solutions, alleging the companies violated the TCPA by sending unsolicited text messages advertising refinancing services. Defendants moved to compel plaintiff's claims to arbitration, claiming that plaintiff agreed to arbitrate his TCPA claim when he agreed to their Terms of Use.

According to defendants, plaintiff agreed to these Terms of Use when he entered his personal information into LowerMyBills.com and clicked a large green button labeled "Click to See Your Free Results!" Directly above that button, it stated in small gray print, "By entering your number, you consent to be contacted, including through automated or prerecorded means." Below the green button, defendants advised in small gray print that, "By clicking the button, you agree to the Terms of Use and Privacy Policy to be matched with up to 5 participants in the LMB Partner Network and consent (not required as a condition to purchase a good/service) for us and/or them to contact you (including through automated or prerecorded means) via telephone, mobile device (including SMS and MMS, and/or e-mail about lending information." The phrases "Terms of Use," "Privacy Policy," and "LMB Partner Network," were all underlined and in blue font (notwithstanding the "T" in "Terms of Use" which was neither colored nor underlined), and hyperlinked to the relevant policies. The Terms of Use included a mandatory arbitration clause. Defendants submitted a variety of evidence to prove that plaintiff clicked the button on their website and agreed to the Terms of Use. Defendants' general counsel submitted a declaration attesting that company records showed a consumer with plaintiff's last name and telephone number navigated to defendants' website on March 11, 2004 and entered plaintiff's personal information. Attached to that declaration was a company record submitted, showing plaintiff's information populated in a spreadsheet. The general counsel further attested that the website generated a unique "Lead ID" associated with plaintiff's information, which could only occur if an individual clicked the green button after entering their information.

In opposition, plaintiff submitted his own declaration stating the following:

> I have never in my life visited the website LowerMyBills.com or any other websites associated with LMB. . . . I have never inputted my telephone number or any other personal information or contact information into the intake fields located on any such websites, have never clicked any buttons on any such websites, have never submitted any information through any such websites, and have never received notice of or agreed to any purported terms of service related to any such websites.

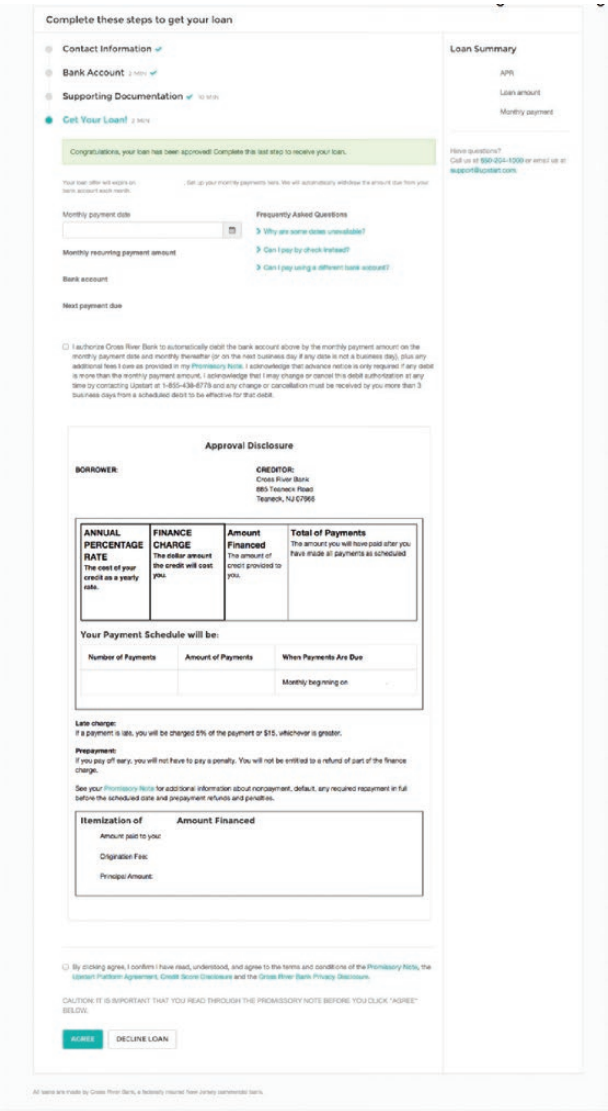
Plaintiff also submitted declarations from three separate third parties who visited LowerMyBills.com and entered personal information, did not press the submit button, but still received text messages from defendants.

The court held that plaintiff's proffered evidence created a genuine dispute of material fact regarding whether plaintiff had ever visited LowerMyBills.com and whether he clicked the submit button and agreed to the Terms of Use. The court found that defendants' evidence that plaintiff had clicked the submit button because defendants could not have obtained plaintiff's information otherwise was "called into doubt by plaintiff's uncontroverted evidence of other consumers receiving text messages despite never clicking the submit button." *Id.* at 826. The court explained that "[a] reasonable inference [was] that anyone, including [plaintiff], could have entered [plaintiff's] information into the website, never pressed the submit button and experienced the same result." *Id.* The court held that the genuine factual disputes were to be resolved by a jury, and thus denied defendants' motion to compel.

Defendants filed an interlocutory appeal from the district court's order denying their motion to compel arbitration.

***Hosseini v. Upstart Network, Inc.*, 2020 WL 573126 (E.D. Va. Feb. 5, 2020) (Ellis, J.) (silent regarding applicable law) –** Plaintiff brought suit against Upstart Networking, Inc., a high-interest lending entity, alleging violation of the Fair Credit Reporting Act for the company's failure to accurately report the status of plaintiff's account to the three major credit reporting agencies. Upstart moved to compel arbitration of plaintiff's claim.

Upstart submitted two employee declarations in support of its motion that described the process by which plaintiff sought to obtain a loan through Upstart's website through which plaintiff provided his personal information and created an account. During that process, Upstart assigned plaintiff unique applicant and borrower ID numbers. In order to proceed through the application process and submit a loan application, plaintiff had to accept various user agreements and documents, including a Platform Agreement, which included an arbitration clause. At the bottom of the online application, plaintiff was presented with a turquoise "AGREE" and white "DECLINE LOAN" buttons. Above those buttons was a checkbox next to text in black typeface that read, "By clicking agree, I confirm I have read, understood, and agree to the terms and conditions of the Promissory Note, the Upstart Platform Agreement, Credit Score Disclosure and the Cross River Bank Privacy Disclosure." The terms "Promissory Note," "Upstart Platform Agreement," "Credit Score Disclosure," and "Cross River Bank Privacy Disclosure" were all colored turquoise and hyperlinked to the relevant policies. Immediately below that language and above the "AGREE" and "DECLINE LOAN" buttons was a notice in all caps and gray font: "CAUTION: IT IS IMPORTANT THAT YOU READ THROUGH THE PROMISSORY NOTE BEFORE YOU CLICK 'AGREE' BELOW." Plaintiff's user account activity and history submitted by Upstart showed that plaintiff checked the box and clicked the "AGREE" button on July 10, 2014 at 11:19 a.m. PST and submitted a loan application. Had plaintiff not clicked on the "AGREE" button, he could not have submitted his loan application through Upstart's platform.

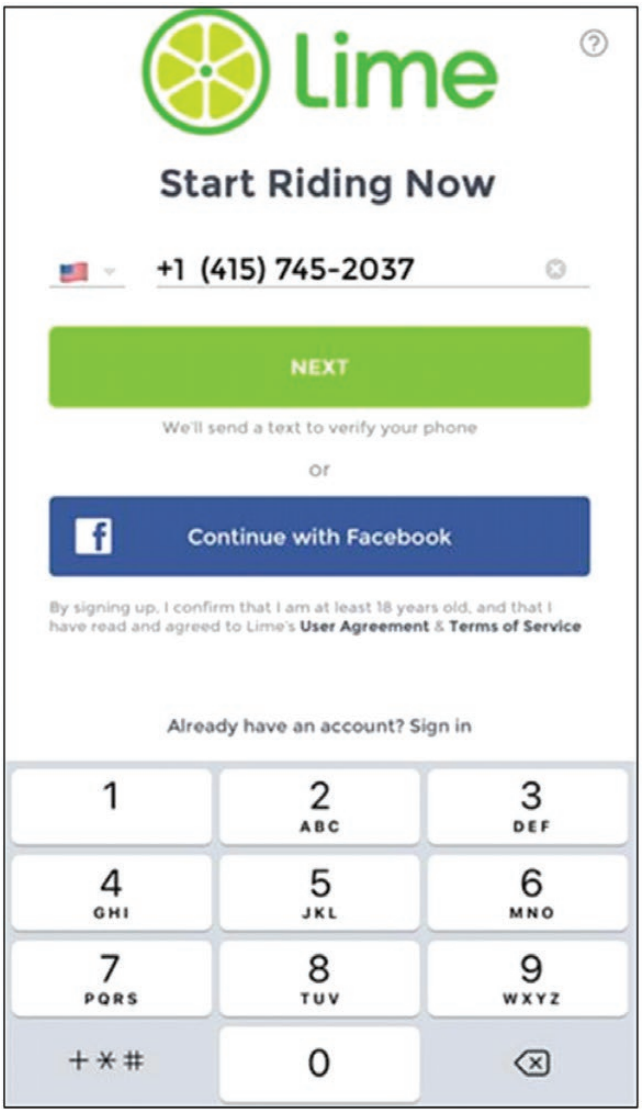


Notably, although Upstart submitted two employee declarations that detailed its clickwrap acceptance procedure, Upstart did *not* submit a screenshot of

the clickthrough agreement. Following a hearing on Upstart's motion, the court ordered Upstart to file the relevant screenshot of its clickwrap interface with a supporting declaration to authenticate the image. Thereafter, the district court found that Upstart's evidence established that the Platform Agreement, which contained the arbitration provision, was a valid agreement to which plaintiff had affirmatively consented by clicking an "AGREE" button before proceeding to use the Upstart platform.

In an effort to avoid arbitration, plaintiff argued that he did not intend to enter into an arbitration agreement with Upstart But the district court found "that assertion [was] meaningless and unpersuasive given that plaintiff admit[ted] that, when presented with electronic agreements like the modified clickwrap agreement here, he 'never review[s] the details in such boxes or click[s] on the hyperlinks.'" *Id.* at *5. Plaintiff also contended that the record was wanting of sufficient indicia of authenticity and credibility of an agreement to arbitrate and that the agreement was unenforceable because he did not physically sign it. The district court, however, rejected these arguments, explaining that Upstart had "provided undisputed testimony indicating not only that it was impossible to proceed to obtain a loan without agreeing to the Platform Agreement, but the exact time when such agreement took place." *Id.* at *6. The court also observed that "authenticity is not a high barrier to overcome," and that Upstart had submitted multiple declarations attesting to the authenticity of the Platform Agreement, and plaintiff had not offered any evidence to show that the Platform Agreement submitted was not the one that plaintiff had agreed to. The court also found plaintiff's physical-signature argument equally specious, observing that "courts have sensibly recognized" that "manifesting agreement by clicking 'I agree, . . . is sufficient" to manifest a plaintiff's agreement to a contract and "the FAA does not require arbitration agreements to be signed." *Id.*

***Walker v. Neutron Holdings, Inc.*, 2020 WL 703268 (W.D.Tex.Feb.11,2020) (Hightower,M.J.) (applying Texas law), *report and recommendation adopted*, 2020 WL 4196847 (W.D.Tex.Apr. 8, 2020) (Pitman, J.) –** Plaintiff brought a personal injury action against Lime Scooters, claiming the brakes failed on a scooter she rented through the company's app. Lime moved to compel arbitration of plaintiff's claims. In order to use the Lime app to rent a scooter, a user needed to download the app, enter their phone number, and either tap a large green button titled "NEXT" or a large blue button titled "Continue with Facebook." Immediately below the blue Facebook button was a notice in gray typeface stating, "By signing up, I confirm that I am at least 18 years old, and that I have read and agreed to Lime's **User Agreement** & **Terms of Service**." The phrases "User Agreement" and "Terms of Service" were in bold, black font and hyperlinked to the relevant policies, the former of which included an arbitration clause. Based on internal records maintained by the company, Lime submitted evidence to the court that plaintiff had registered for the Lime app on July 30, 2018 by tapping the "NEXT" button on the sign-up screen.



Plaintiff contended that she did not form a contract with Lime because she did not have constructive notice of the agreement, since the app's interface did not prompt her to review the User Agreement and the text of the User Agreement was in small, faint, gray typeface, far below Lime's invitation to use its service, and was "practically illegible." *Walker v. Neutron Holdings, Inc.*,

2020 WL 703268, at *3 (W.D. Tex. Feb. 11, 2020) (Ellis, M.J.). The district court observed that the Fifth Circuit had not yet confronted a case involving a clickthrough agreement, yet explained that such agreements are routinely enforced by courts in other jurisdictions as long as the user had reasonable notice of the existence of the terms because notice was reasonably conspicuous. The district court noted that another judge of the district had recently found that the hyperlink on Lime's sign-up screen to the company's User Agreement was reasonably conspicuous and placed plaintiff on inquiry notice of the arbitration agreement. *See Phillips v. Neutron Holdings, Inc.*, 2019 WL 4861435 (N.D. Tex. Oct. 2, 2019) (Scholer, J.).

The district court further observed that, despite plaintiff's claims to the contrary, as in *Phillips*, "a reasonable user would view the Lime App sign-in screen and see that the User Agreement [was] part of the offer to proceed with the transaction by clicking "NEXT" or "Continue with Facebook." *Walker*, 2020 WL 703268, at *4. The court thus held that the Lime app gave plaintiff adequate notice of the User Agreement and that the parties had therefore entered into a valid arbitration agreement.