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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 II

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.

This Part II and the subsequent parts of this article 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 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

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agreements fared when tested in court. Take the motion to compel arbitration at issue in *Mason v. Midland Funding LLC*, for example, which the Eleventh Circuit found wanting, not because of any issue necessarily with the agreement itself, but because of deficiencies in the company's motion papers; particularly, imprecise and ambiguous language used in a company declaration submitted to authenticate the particular agreement that was presented to the plaintiff. Or consider the agreements at issue in *Wilson v. Huuuge, Inc.*, and *Benson v. Double Down Interactive, LLC*, which the Ninth Circuit characterized as so convoluted that "[o]nly curiosity or dumb luck might bring a user to discover the Terms" tucked away deep in the companies' apps and websites. By contrast, the agreement at issue in *Porcelli v. JetSmarter, Inc.*, exemplifies a pure clickwrap agreement where a user could not consent to arbitration without affirmatively assenting to the terms of the agreement by checking a box next to the phrase "I accept terms and conditions of the Membership Agreement," which was displayed in a different color font than the surrounding text and was underlined, tipping off a reasonable user that the phrase was hyperlinked so that, if clicked on, it would display the relevant terms. Together, the various cases summarized in this Part II and subsequent parts are intended to serve as a resource for both in-house counsel designing these agreements and outside counsel moving to enforce them and defend them in court, as the cases highlight common pitfalls and agreement features credited by courts as strengthening a finding that a reasonable user would have had notice of the arbitration agreement.

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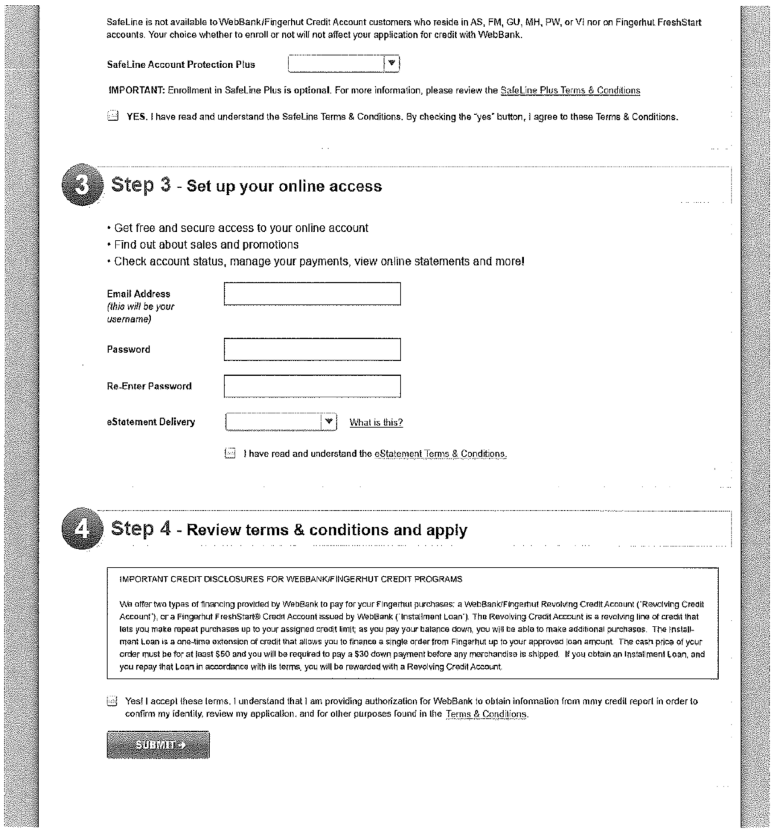
***Mason v. Midland Funding LLC*, 2018 WL 9439879 (N.D. Ga. Sept. 5, 2018) (May, J.) (applying Utah law), *aff'd in part, rev'd in part, and remanded*, 815 F. App'x 320 (11th Cir. 2020) (per curiam) –** The following case illustrates the perils of submitting an incomplete motion to compel arbitration and imprecise supporting company declaration that is intended to detail the steps the plaintiff took to assent to the arbitration agreement and authenticate the agreement. This was a Fair Debt Collection Practices Act putative class action filed by plaintiffs against Encore Capital Group, alleging that the company was engaged in a scheme of purchasing vast amounts of uncollectable debt that was unsupported by evidence and that the company would then file debt collection lawsuits to induce consumers into believing that Encore had a claim and intended to collect on the debt. Defendants moved to compel plaintiffs to arbitrate their claims pursuant to their clickwrap agreement.



SafeLine is not available to WebBank/Fingerhut Credit Account customers who reside in AS, FM, GU, MH, PW, or VI nor on Fingerhut FreshStart accounts. Your choice whether to enroll or not will not affect your application for credit with WebBank.

SafeLine Account Protection Plus

IMPORTANT: Enrollment in SafeLine Plus is optional. For more information, please review the SafeLine Plus Terms & Conditions

YES. I have read and understand the SafeLine Terms & Conditions. By checking the "yes" button, I agree to these Terms & Conditions.

3 Step 3 - Set up your online access

- Get free and secure access to your online account
- Find out about sales and promotions
- Check account status, manage your payments, view online statements and more!

Email Address
(this will be your username)

Password

Re-Enter Password

eStatement Delivery — What is this?

I have read and understand the eStatement Terms & Conditions.

4 Step 4 - Review terms & conditions and apply

IMPORTANT CREDIT DISCLOSURES FOR WEBBANK/FINGERHUT CREDIT PROGRAMS

We offer two types of financing provided by WebBank to pay for your Fingerhut purchases: a WebBank/Fingerhut Revolving Credit Account ("Revolving Credit Account"), or a Fingerhut FreshStart® Credit Account issued by WebBank ("Installment Loan"). The Revolving Credit Account is a revolving line of credit that lets you make repeat purchases up to your assigned credit limit; as you pay your balance down, you will be able to make additional purchases. The Installment Loan is a one-time extension of credit that allows you to finance a single order from Fingerhut up to your approved loan amount. The cash price of your order must be for at least $50 and you will be required to pay a $30 down payment before any merchandise is shipped. If you obtain an Installment Loan, and you repay that Loan in accordance with its terms, you will be rewarded with a Revolving Credit Account.

Yes! I accept these terms. I understand that I am providing authorization for WebBank to obtain information from many credit report in order to confirm my identity, review my application, and for other purposes found in the Terms & Conditions.

SUBMIT →

The matter presented a case of first impression, the first court to consider whether a clickwrap agreement may constitute a binding contract under Utah law. As is relevant here, according to defendants, in order to submit an online credit card application, a user had to fill in the application and then click a box at the bottom of the webpage under a large bold heading titled "**Step 4 - Review terms & conditions and apply**," that stated "Yes! I accept these terms. I understand that I am providing authorization for WebBank to obtain information from my credit report in order to confirm my identity, review my application, and for other purposes found in the Terms & Conditions." The phrase "Terms & Conditions" was underlined.

To prove that the parties had entered into a clickwrap agreement, defendants relied almost entirely on the declaration of Richard Winship, the Senior Vice President, Credit Operations and Collections Management for Bluestem Brands, Inc. The court found that the declaration provided sufficient evidence that one of the plaintiffs had completed an online credit application because the declaration attached Bluestem's business records with the data submitted by that plaintiff. But the district court found that the declaration failed to establish that, in filling out the online application, the plaintiff had been presented with certain terms, and thus defendants had not met their burden in proving the existence of an arbitration agreement through the clickwrap agreement. The court observed that the declarant had stated that when the plaintiff submitted his online application, "the application 'could not be submitted and would not be processed' unless the user clicked the box indicating 'Yes! I accept these terms.'" *Id.* at *3 (internal quotation marks omitted). By way of proof, the declarant attached to the declaration "'a true and correct copy of a template application for a Fingerhut Credit Account issued by WebBank, in a substantially similar form to the application that existed on August 11, 2013, on the Fingerhut website.'" *Id.* Relying on *Bazemore v. Jefferson Capital Systems, LLC*, 827 F.3d 1325, 1330 (11th Cir. 2016), the district court observed that the Eleventh Circuit had made clear that a "'substantially similar form to the application' submitted by Plaintiff Mason [was] not enough to meet Defendants' burden." *Mason*, 2018 WL 9439879, at *3. Rather, under *Bazemore*, the court explained, a defendant "must offer a basis for [the declarant's] personal knowledge of a clickwrap agreement or documentary proof of the existence of a clickwrap agreement, with certainty regarding the terms of that agreement." *Id.* Thus, because the declarant had failed to explain how he knew the terms of the alleged clickwrap agreement and failed to provide "evidence concerning what, if any clickwrap agreement appeared on plaintiff['s] computer screen," the district court concluded that it could not "be certain as to the terms plaintiff agreed to when ordering [his] credit card." *Id.* (second alteration in original) (internal quotation marks omitted). The district court thus denied defendants' motion to compel plaintiff Mason to arbitrate his claims.

Defendants appealed from the court's order denying their motion to compel to the Eleventh Circuit. With respect to the district court's denial of defendants' motion to compel as it related to plaintiff Mason, who defendants argued agreed to arbitrate through a clickwrap agreement, the Eleventh Circuit affirmed. The Eleventh Circuit concluded that the declaration submitted by defendants failed to establish that the plaintiff agreed to arbitrate when he completed the online application because "we do not know what terms [plaintiff] actually saw on August 11, 2013, when he viewed the website." *Mason v. Midland Funding LLC*, 815 F. App'x 320, 325 (11th Cir. 2020). This, the court explained, was because the declarant admitted that the exhibit attached to his declaration "show[ed] the application in only a 'substantially similar form,'" which is inadequate under Eleventh Circuit caselaw to establish the existence of an agreement. *Id.*

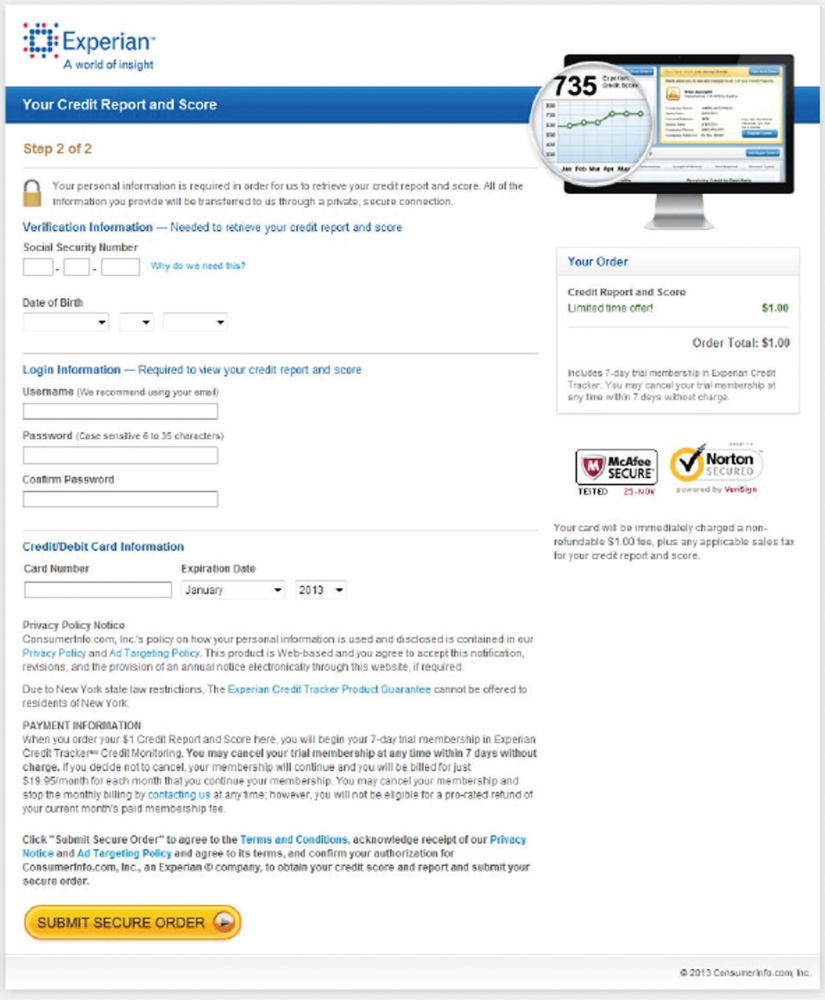
The Eleventh Circuit also found defendants' declaration wanting because the declaration "still lack[ed] any evidence showing that the online application or its terms and conditions contained an arbitration provision." *Id.* The court observed that the declaration "stated that '[t]he entire terms and conditions were contained on the same page as the application form.' But the attached application display[ed] just two paragraphs of terms and conditions," none of which mentioned arbitration. *Id.* The Eleventh Circuit also noted that, while the "Terms & Conditions" phrase appeared to be a hyperlink, defendants had not provided any information about the contents of the linked page. The court observed that the Card Agreement attached to defendants' declaration contained an arbitration provision, but that the declarant "never stated that the website ever displayed *that* agreement . . . to [plaintiff] during his online application. Nor did [the declarant] state that the Card Agreement was the 'terms and conditions.'" *Id.* The Eleventh Circuit thus held that "the record evidence neither show[ed] the actual application form that [plaintiff] filled out and agreed to online nor demonstrate[d] that that online application contained an arbitration provision." *Id.* And thus, the court concluded that defendants had "failed to prove that it[] [was] more probable than not that [plaintiff] was provided with a copy of the terms of the arbitration agreement via the online application." *Id.*

Notably, defendants argued that, if the Eleventh Circuit concluded that they had failed to prove the

existence of an agreement to arbitrate with plaintiff, the case should be remanded to the district court to hold a mini trial on the issue pursuant to section 4 of the FAA. But the Eleventh Circuit rejected defendants' attempt at a second bite at the apple, explaining that, "though the defendants may have presented competent evidence that [plaintiff] agreed to certain terms and conditions when completing the online application, they submitted no evidence that those terms and conditions (or anything else available through the online application) contained an arbitration agreement." *Id.* at 328. The court reasoned that "[o]nly competent evidence about [plaintiff's] agreement to arbitrate – and not his agreement as to anything else – c[ould] create a genuine dispute of material fact entitling the defendants to a trial under § 4 of the FAA." *Id.* Because defendants had not offered any evidence about the particular terms and conditions plaintiff agreed to, the court held that no trial was warranted and that defendants' motion to compel arbitration necessitated denial as a matter of law without the need for a trial.

***Stover v. Experian Holdings, Inc.*, No. 18-cv-00826 (C.D. Cal. Oct. 31, 2018), ECF No. 32 (Carney, J.) (applying California law), *aff'd*, 2020 WL 6156048 (9th Cir. Oct. 21, 2020) –** Plaintiff filed this putative class action under the Fair Credit Reporting Act against Experian and Consumerinfo.com, alleging that they charged consumers inaccurate credit scores and misled consumers by failing to clearly inform them that the companies generated credit scores through a different credit scoring system than that used to give credit scores to lenders. Defendants moved to compel plaintiff to arbitrate her claims.

On June 17, 2014, plaintiff visited Experian's website, where she paid $1 for an Experian credit report, a PLUS Score credit score, and a seven-day trial membership in an Experian credit monitoring product. When plaintiff placed her order, she entered her personal information



and payment information, and clicked on a large yellow button that said "SUBMIT SECURE ORDER." Immediately above that button was a notice in black boldface that said "**Click 'Submit Secure Order' to agree to the Terms and Conditions, acknowledge receipt of our Privacy Notice and Ad Targeting Policy and agree to its terms, and confirm your authorization for Consumerinfo.com, Inc., and Experian© company, to obtain your credit score and report and submit your secure order.**" The phrases "Terms and Conditions," "Privacy Notice," and "Ad Targeting Policy" were in bolded turquoise font and hyperlinked to the applicable terms. The Terms and Conditions included an arbitration clause.

These terms, which had been in effect since 2012, stated that they "may be updated from time to time" and that "[e]ach time you order, access or use any of the Products, Product Website, and/or Content, you signify your acceptance and agreement, without limitation or qualification, to be bound by the then current agreement." Plaintiff's seven-day trial membership with Experian transitioned into a monthly membership that terminated on July 23, 2014. On May 10, 2018, plaintiff accessed defendants' website again that had a new Terms of Use Agreement in place, which, unlike the 2012 terms, expressly addressed claims relating to the Fair Credit Reporting Act, stating that such claims "shall not be governed by this agreement to arbitrate."

Defendants argued that the 2012 Terms and Conditions applied, since those were the terms in effect when plaintiff made her purchase in 2014. But the district court disagreed, holding that the 2018 Terms of Use Agreement applied because the 2012 Terms and Conditions contained an explicit change-of-terms provision based on future access of the website, and plaintiff accessed the website again on May 10, 2018, thereby signifying her acceptance and agreement to the updated terms in effect. The court reasoned that "Defendant cannot have it both ways, whereby they reserve the right to change the agreement's terms and adopt a new set of terms, but then refuse to be bound by the later agreement." *Id.* at 6. Defendants contended that the change-of-terms provision was inapplicable to situations where, as here, plaintiff and defendants no longer had an ongoing website when she visited the website in 2018 because her membership had expired in 2014. But the district court observed that "the change-of-terms provision [was] not limited to occasions where Plaintiff maintain[ed] a membership or purchase[d] a product," and the court therefore found that the 2018 terms governed and that plaintiff was bound by those terms. *Id.* at 7. The district court further held that the 2018 arbitration agreement encompassed plaintiff's claims and did not carve them out as plaintiff maintained. The district court thus granted defendants' motion and stayed the case pending resolution of arbitration.

Plaintiff moved for reconsideration of the district court's order, or in the alternative, asked the court to dismiss the case so that it could appeal from a final judgment or certify the matter for immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The district court denied plaintiff's request for substantive relief but granted her motion in as much as it sought dismissal of the case. Plaintiff then appealed from the district court's orders to the Ninth Circuit.

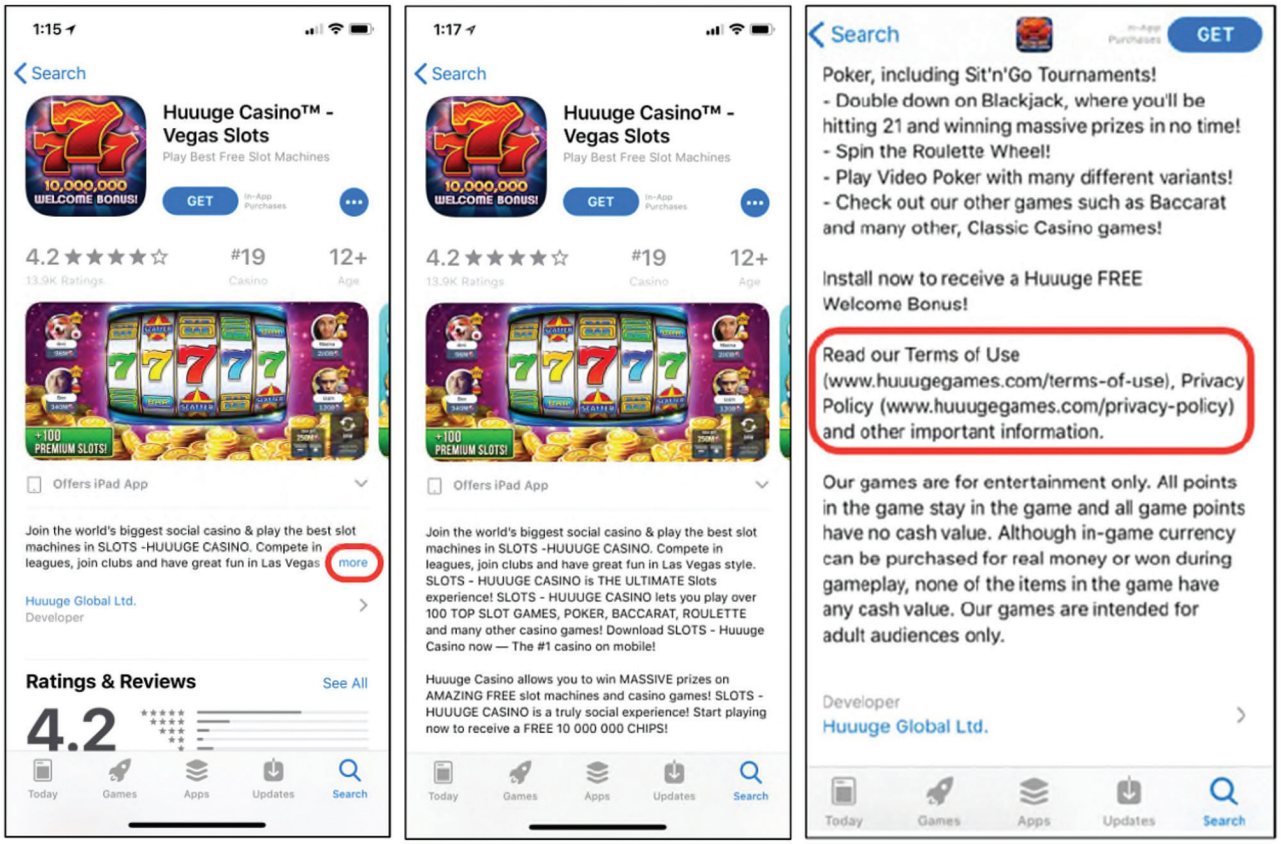
The Ninth Circuit affirmed but on slightly different grounds. Although the district court had enforced the updated 2018 Terms of Use Agreement, the Ninth Circuit held that plaintiff assented to defendants' clickwrap agreement in 2014, but that the new terms in 2018 that purported to alter the 2014 agreement were presented to plaintiff as an unenforceable browsewrap agreement, and therefore the original Terms and Conditions in effect at the time of plaintiff's transaction applied to plaintiff's claims.

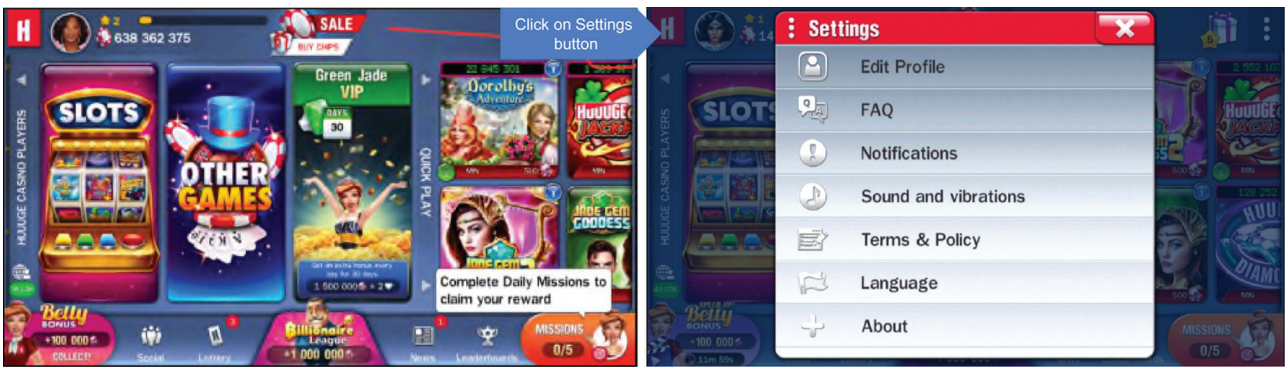
In *Douglas v. U.S. District Court for the Central District of California*, 495 F.3d 1062 (9th Cir. 2007) (per curiam), the Ninth Circuit held that changed terms were unenforceable due to lack of notice even if the plaintiff had visited the website where the new contract was posted because "he would have had no reason to look at the contract posted there," since "[p]arties to a contract have no obligation to check the terms on a periodic basis to learn whether they have been changed by the other side." *Id.* at 1066. "Although the 2014 terms contained a change-of-terms provision, nothing in *Douglas*[,] . . ." the Ninth Circuit reasoned, "suggest[ed] that mere inquiry notice of changed terms is enough to bind the parties to them." *Stover*, 2020 WL 6156048, at *3. The Ninth Circuit held that plaintiff had assented only once to the terms of a single contract in 2014 and that the later modification to the terms was done without providing plaintiff with notice of the new terms. The court explained that plaintiff "had no obligation to investigate whether Experian issued new terms without providing notice to her that it had done so. Indeed, the opposite rule would lead to absurd results: contract drafters who included a change-of-terms provision would be permitted to bind individuals daily, or even hourly, to subsequent changes in the terms." *Id.* The Ninth Circuit therefore held "that in order for changes in terms to be binding pursuant to a change-of-terms provision in the original contract, both parties to the contract – not just the drafting party – must have notice of the change in contract terms." *Id.* The Ninth Circuit thus concluded

that plaintiff's claims were arbitrable under the 2014 terms of the contract to which she assented, rather than the 2018 terms under which the district court had held plaintiff was bound.

***Wilson v. Huuuge, Inc.*, 351 F. Supp. 3d 1308, 1310 (W.D. Wash. 2018) (Leighton, J.) (applying Washington law), *aff'd*, 944 F.3d 1212 (9th Cir. 2019) –** The following agreement presents an example of an unenforceable browsewrap agreement whose terms were presented so inconspicuously that it was held that no reasonable user would have had notice of them. Plaintiff filed a putative class action against Huuuge Casino, claiming that the company's mobile gambling app constituted illegal gambling in violation of Washington law and that plaintiff therefore was entitled to recover the money he had lost gambling on the app. Huuuge moved to compel arbitration of plaintiff's claims pursuant to the company's Terms of Use, which Huuuge contended plaintiff had agreed to when he downloaded the Huuuge Casino app.

Plaintiff downloaded the Huuuge Casino app from the Apple App Store. When a user searched for the Huuuge Casino app, a list of apps would be displayed that matched the user's search query with the app's name, developer, user rating, and a picture showing the





gameplay experience, accompanied by a blue "GET" button on the right that, when clicked on, initiates the downloading of the app. If a user wanted to learn more about the app before downloading it, they could click to visit the app's page, which provided additional information with another place to download by clicking a blue "GET" button. At the bottom of the app page, a user could click a light blue icon that said "more," which would reveal additional details about the app. After scrolling through several screens' worth of text, a user would be presented with the statement "Read our Terms of Use," followed by a non-hyperlinked URL that a user could copy and paste into a web browser to access. A user that followed these steps would find the Terms of Use, which included an arbitration provision.

Once the app was downloaded, a user could also view the Terms of Use by visiting the settings menu, which was accessible via an unlabeled three-dot "kebob" menu button in the top-right corner of the game screen. Clicking on that button would reveal a menu of seven options, including an option titled "Terms & Policy." Clicking on the "Terms and Policy" button would reveal the Terms of Use and arbitration clause.

Applying the Ninth Circuit's decision in *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171 (9th Cir. 2014), the district court held that Huuuge's interface was an unenforceable browsewrap agreement because Huuuge's "GET" button to download the app was not accompanied by a notification next to the button informing a user that it served as a manifestation of assent to Huuuge's Terms of Use. The district court found numerous other flaws with the presentation of Huuuge's app page, including that a user could download the app without even visiting the full app page that contained the Terms of Use URL and accompanying "Read our Terms of Use" disclosure. As to the in-game link to the Terms of Use, the district court found it equally deficient because viewing the Terms of Use were not necessary to use the app and a user would have to first click on the three dotted kebob menu button, and the Terms of Use were not accompanied by any notification that advised the user that they were bound to those terms by their use of the app. The mere consistent availability of the Terms of Use, the court explained, without actual or constructive knowledge of them, could not establish mutual assent. Huuuge appealed.

The Ninth Circuit affirmed, holding that Huuuge did not provide reasonable notice of its Terms of Use, which the Ninth Circuit observed "a user would need Sherlock Holmes's instincts to discover." *Wilson v. Huuuge, Inc.*, 944 F.3d 1212, 1214 (9th Cir. 2019). The Ninth Circuit agreed that the Huuuge interface constituted a browsewrap agreement because it "d[id] not require[] [plaintiff] to assent to Huuuge's Terms before downloading or using the app – or at any point at all." *Id.* at 1220. And the court found that "Huuuge's app [was] littered with the[] flaws" that render constructive notice wanting. *Id.* at 1221. The court provided a heavy critique of Huuuge's purported agreement:

> When downloading the app, the Terms [were] not just submerged – they [were] buried twenty thousand leagues under the sea. Nowhere in the opening profile page [was] there a reference to the Terms. To find a reference, a user would need to click on an ambiguous button to see the app's full profile page and scroll through multiple screen-lengths of similar-looking paragraphs. Once the user unearth[ed] the paragraph referencing the Terms, the page d[id] not even inform the user that he w[ould] be bound by those terms. There [was] no box for the user to click to assent to the Terms. Instead, the user [was] urged to read the Terms – a plea undercut by Huuuge's failure to hyperlink the Terms. This is the equivalent to admonishing a child to 'please eat your peas' only to then hide the peas. A reasonably prudent user cannot be expected to scrutinize the app's profile page with a fine-tooth comb for the Terms.

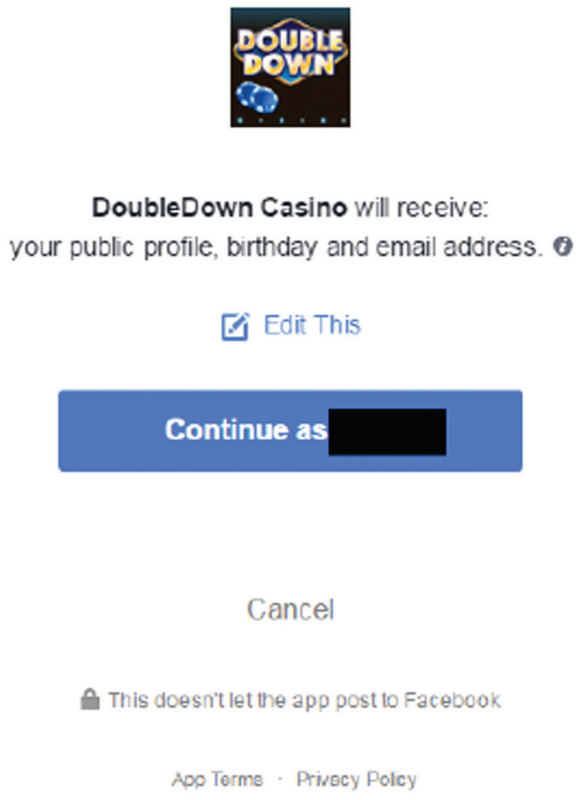
The Ninth Circuit found the Terms of Use available during gameplay to be a similar "hide-the-ball exercise." *Id.* "A user c[ould] view the Terms through the 'Terms & Policy' tab of the settings menu. Again, the user [was] required to take multiple steps. He must first find and click on the three white dots representing the settings menu, tucked away in the corner and obscured amongst the brightly colored casino games. The 'Terms & Policy' tab within the settings [was] buried among many other links, like FAQs, notifications, and sound and volume. The tab [was] not bolded, highlighted, or otherwise set apart." *Id.* Huuuge argued that the plaintiff's use of the app put him on constructive notice of the Terms of Use because he was likely to come across them during gameplay. But the Ninth Circuit rejected the argument, explaining that there was no reason to assume that users would click on the settings menu simply because it existed and there was nothing that pointed the user to the settings tab. "Only curiosity or dumb luck might bring a user to discover the Terms." *Id.*

***Benson v. Double Down Interactive, LLC*, 2018 WL 5921062 (W.D. Wash. Nov. 13, 2018) (Leighton, J.) (applying Washington law), *aff'd*, 798 F. App'x 117 (9th Cir. 2020) –** Plaintiffs brought a putative class action against defendants, alleging that the companies' Double Down Casino electronic gambling game

constituted illegal gambling in violation of Washington law, and therefore that plaintiffs were entitled to recover the money they lost playing. Double Down moved to compel arbitration of plaintiffs' claims.

Plaintiff Benson played Double Down Casino on Facebook. When a user played the game on Facebook for the first time, they were presented with a pop-up window that advised the user about Facebook and Double Down's data sharing practices. The screen included a large blue "Continue" button in the middle of the screen. At the bottom of the page was text in small gray font that said "App Terms." That text was hyperlinked so that a user that clicked on the phrase would be directed to the applicable terms, which included an arbitration provision.

Once the user continued to play the game, the gameplay screen included a hyperlink to the Terms of Use at the bottom of the screen in white, alongside several other links. Below each of the links was a small notification in light blue font stating that "DoubleDown Casino is provided by DoubleDown Interactive, LLC in accordance with the DoubleDown Interactive, LLC Privacy Policy and Terms of Service." Neither the hyperlinks nor the notification, however, were viewable by a user on the screen unless they scrolled down to the bottom of the screen.



Plaintiff Simonson played Double Down Casino by downloading it as an app on her iPhone. To download the app, a user must first search for it, which brought up a list of apps from which the Double Down Casino app could be directly downloaded. No hyperlink to the Terms of Use would appear to any user who downloaded the app in this way. For users who clicked on the app's individual page after searching for it and before downloading it, a blue "License Agreement" hyperlink would be displayed after substantial scrolling through the page.

Once downloaded, a user could also view the Terms of Use by clicking a link in the settings menu of the app in the upper-right corner of the game screen, and which only displayed the "Terms of Use" link after further scrolling down by the user through the settings menu.

The district court observed that Double Down's arbitration agreement constituted a browsewrap agreement because it did not require users to affirmatively click a box manifesting their assent to the Terms of Use. The court held that Double Down's interface failed to "provide a conspicuous link with some accompanying notification alerting a user that they [were] entering into a contract," and therefore had failed to establish inquiry notice. *Benson*, 2018 WL 5921062, at *4. The district court faulted the Facebook app's presentation for placing the "App Terms" link on the initial pop-up screen "far below the 'Continue' button in small grey text." *Id.* The district court further observed that "the pop-up window's main purpose [was] to gain permission for data sharing between Facebook and Double Down, which is not a point traditionally associated with binding terms unrelated to the data sharing itself." *Id.* The court explained: "When a user first downloads the iPhone app, the app page contains a link to the 'License Agreement' that may only be viewed after significant scrolling, and the app may be downloaded directly from the search results list without ever accessing the particular Double Down Casino app page. Neither the initial link on Facebook or on the mobile app [was] coupled with a notification informing a user that downloading or playing Double Down Casino create[d] a binding agreement. *Id.* The court also found the hyperlinks within the game equally deficient. On Facebook, the district court found that "the 'Terms of Use' hyperlink [was] located at the very bottom of the gameplay screen in small font next to several other links, and [was] not visible unless a user scroll[ed] down." *Id.* And on the mobile app, the court found that "the link to the


Welcome to DoubleDown Casino
DOUBLE DOWN CASINO
Buy Chips
DIAMOND Club
$1,201,000
YOU JUST WON
$51,000
$1,000
RETURN BONUS
$1,000 PER DAY!
(MAX 25)
+
$50,000
DAILY SPIN
A NEW SPIN EVERY DAY!
=
$51,000
COLLECT
2 00K
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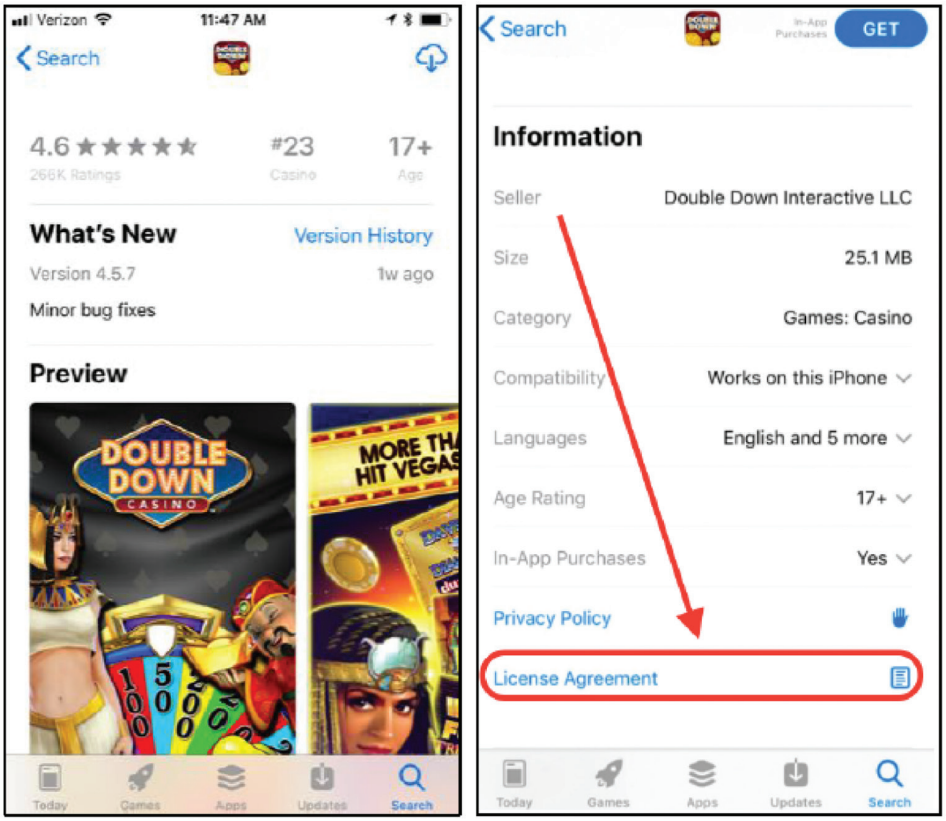
1 MIL
DAILY BONUS
WHEEL OF FORTUNE
WHERE THE WORLD PLAYS!
Privacy Policy | Terms of Use | Need Help? | Log Out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Version 4.5.7
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Apps
Updates
Search
Search
In-App Purchases
GET
Information
Seller
Double Down Interactive LLC
Size
25.1 MB
Category
Games: Casino
Compatibility
Works on this iPhone
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Age Rating
17+
In-App Purchases
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Privacy Policy
License Agreement
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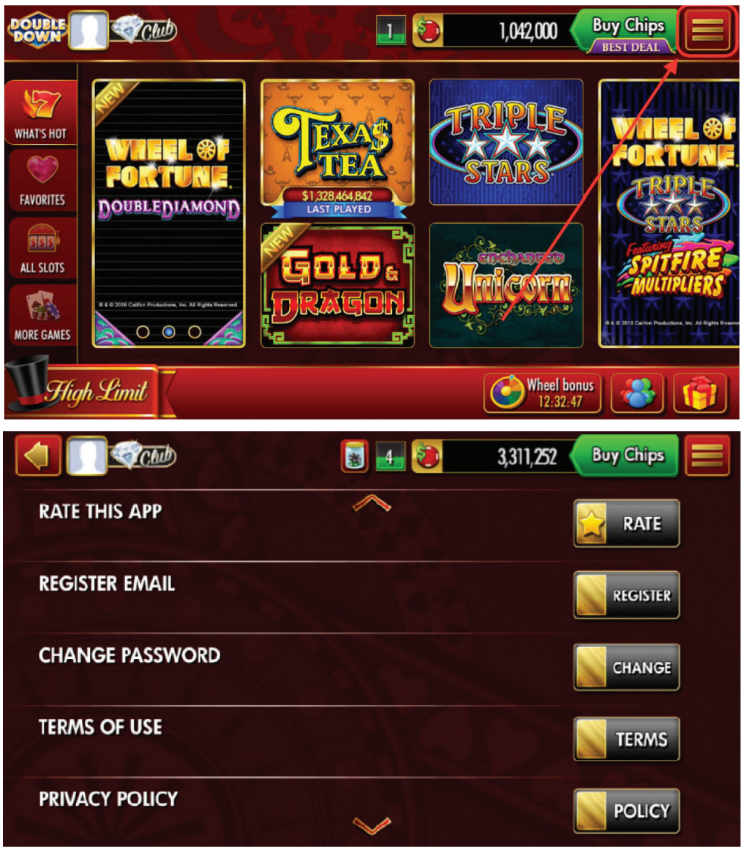


Terms of Use [was] located within a settings menu that a player may never even need to access," and the "links that [were] available only via the settings menu [were] not temporally coupled with a discrete act of manifesting assent, such as downloading an app or making a purchase, and [were] thus less likely to put a reasonable user on inquiry notice." *Id.* (internal quotation marks omitted).

The district court also examined Double Down's "generic notification" that the game was "provided . . . in accordance with the . . . Privacy Policy and Terms of Service," which the court found wanting because it "d[id] not identity any action by the user that would manifest assent, nor d[id] the reference to 'Terms of Service' in the notification even match the 'Terms of Use' hyperlink above it." *Id.* In any event, the court also observed that "the notification [was] in extremely small print and in no way demand[ed] a user's attention or alert[ed] them that the information [was] important." *Id.*

Double Down argued that, because plaintiffs played the Double Down Casino game so many times, they could be charged with inquiry notice of the terms. But the district court observed that, "on a logical level, Double Down's position [was] not compelling," because "[w]hile repeatedly playing a game may make it more likely that at some point the 'Terms of Use' hyperlink will cross the user's field of vision," the Ninth Circuit had "specifically held that this is not enough for inquiry notice." *Id.* at *5. Moreover, the district court noted that, "after moving beyond the initial download, a user likely becomes *less* alert to binding contract terms while casually using the product." *Id.*

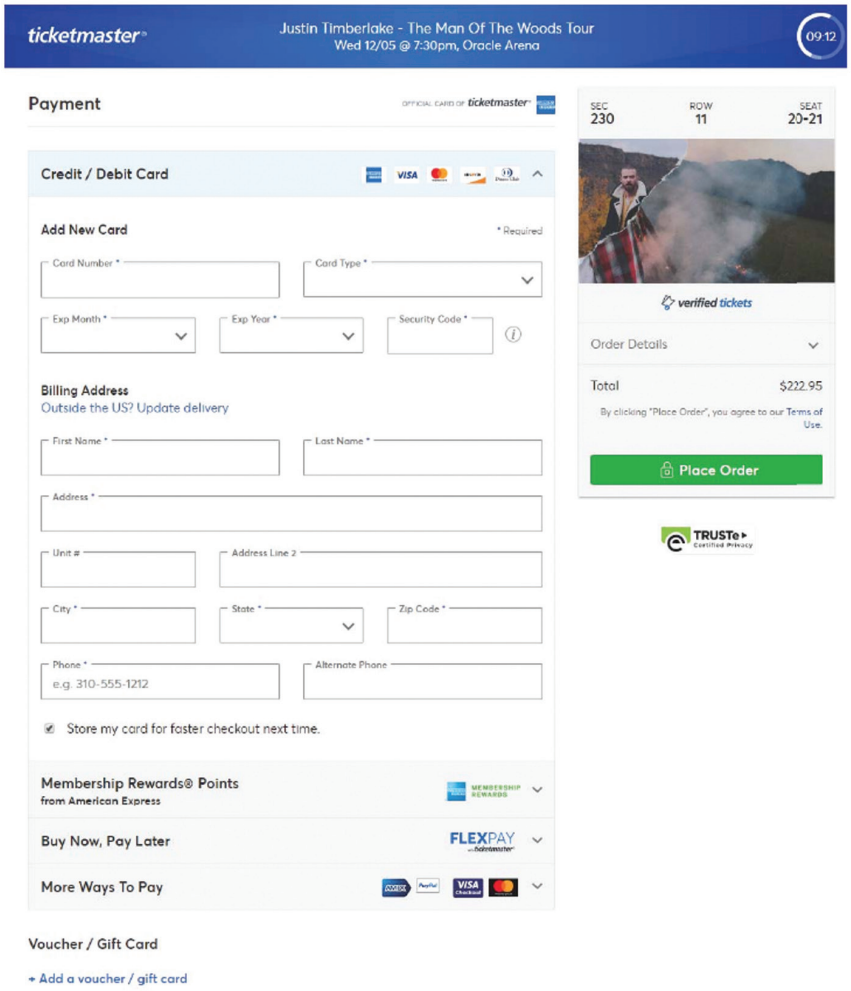
Double Down immediately appealed from the district court's order to the Ninth Circuit. In an unpublished decision, the Ninth Circuit affirmed, concluding that Double Down had failed to establish that plaintiffs had assented to the arbitration clause in the Terms of Use because plaintiffs Benson and Simonson never received constructive notice of the terms. *Benson*, 798 F. App'x at 118. Applying *Wilson v. Huuuge, Inc.*, 944 F.3d 1212 (9th Cir. 2019), the Ninth Circuit found that a user like Simonson "would have to closely scrutinize Double Down's page on the Apple App Store in order to find the Terms of Use during the downloading process," that "[t]here [was] no reference to them on the opening screen of Double Down's page; instead, they [were] buried at the bottom of the page and accessible only after scrolling past multiple screens and images that a user need not view to download the platform." *Id.*

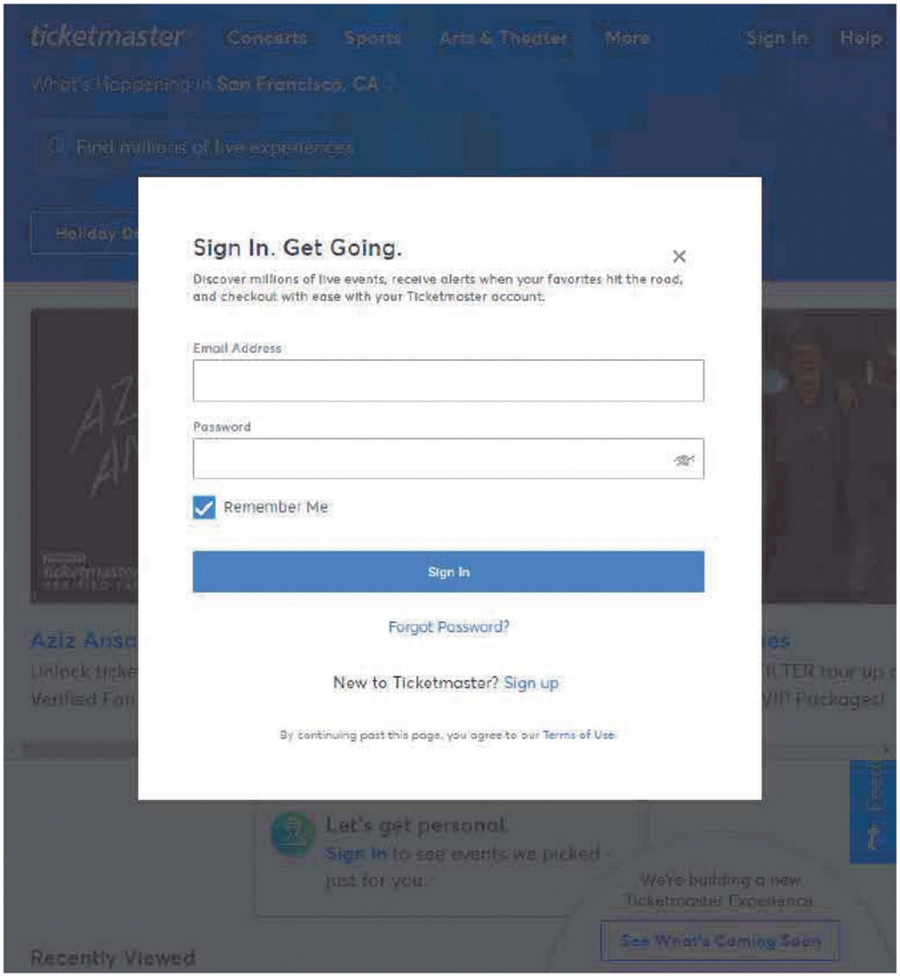
And, moreover, the Ninth Circuit explained that "finding the Terms of Use was just as much of a hide-the-ball exercise" on Double Down's mobile platform, as "[a] user must first locate a small settings menu in a corner of the screen that [was] obscured amongst the brightly colored casino games, and then find the 'Terms of Use' heading in the pop-up settings menu, which [was] not bolded, highlighted, or otherwise set apart from the four other headings in that menu." *Id.* (internal quotation marks omitted).

The Ninth Circuit also found that plaintiff Benson never received constructive notice of Double Down's Terms of Use either. The court explained that, "[w]hen a user first connect[ed] to the Facebook platform, the Terms of Use [were] accessible through a gray 'App Terms' hyperlink on a pop-up screen that [was] below and smaller than all other text on the screen," which "also d[id] not inform users that they [were] bound by the Terms of Use." *Id.* at 119. The Ninth Circuit further faulted Double Down's presentation of its Terms of Use hyperlink and accompanying notification that were accessible during gameplay on the Facebook platform because both "bec[a]me visible only after a user scroll[ed] to the bottom of the platform" and, "like the settings menu on the mobile platform, . . . [were] obscured amongst the brightly colored icons on the Facebook platform, and they [were] set out in typeface that [was] substantially smaller than all other text on the screen." *Id.* (internal quotation marks omitted).

Last, the Ninth Circuit rejected Double Down's argument that plaintiffs' repeated use of the game somehow established constructive notice, as "[r]epeated use of a website or mobile application does not contribute to constructive notice because users are no more likely to stumble upon inconspicuous hyperlinks on their hundredth or thousandth visit than they are on their first." *Id.* at 119–20.

***Lee v. Ticketmaster L.L.C.*, 2019 WL 9096442 (N.D. Cal. Apr. 1, 2019) (Chhabria, J.) (applying California law), *aff'd*, 2020 WL 3124256 (9th Cir.**





June 12, 2020) – Plaintiff brought a putative class action against Ticketmaster, claiming that Ticketmaster facilitated the sale of its tickets by scalpers on the secondary market in order to obtain fees on multiple sales of the same ticket in violation of California law. Ticketmaster moved to compel arbitration of the claims.

The district court granted Ticketmaster's motion, observing that plaintiff was required to assent to Ticketmaster's Terms of Use, which contained an arbitration agreement, when he made his purchase on Ticketmaster's website. Specifically, immediately above a large green "Place Order" button, Ticketmaster warned users in small gray font that, "By clicking 'Place Order', you agree to our Terms of Use," which the court observed was "in a contrasting color, and informed the user that 'continuing past this page' (i.e., placing an order) would indicate assent to the terms." *Lee v. Ticketmaster L.L.C.*, 2019 WL 9096442, at *1 (N.D. Cal. Apr. 1, 2019).

The district court dismissed the case and entered final judgment, and plaintiff appealed from the arbitration order.

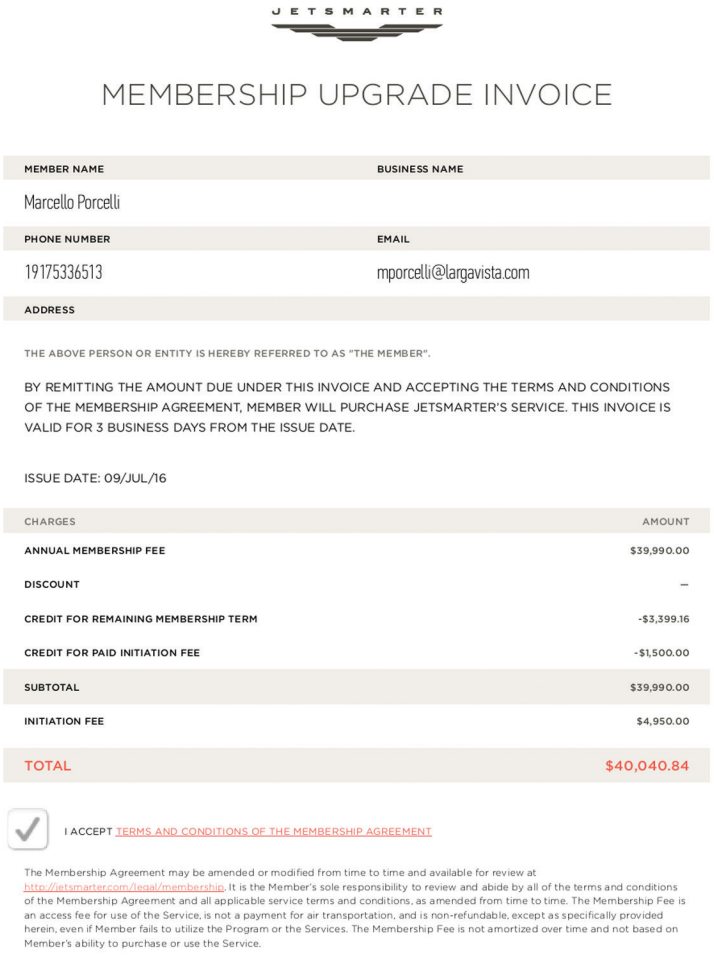
The Ninth Circuit affirmed. As an initial matter, the Ninth Circuit observed that Ticketmaster's interface did not constitute a browsewrap agreement because the Terms of Use were "not merely posted on Ticketmaster's website at the bottom of the screen." *Lee v. Ticketmaster L.L.C.*, 2020 WL 3124256, at *2 (9th Cir. June 12, 2020). But, while the Ninth Circuit found that "the Terms d[id] not constitute a true pure-form clickwrap agreement as California courts have construed it (because Ticketmaster d[id] not require users to click a separate box indicating that they agree to its Terms)," the court held that "Ticketmaster's website provided sufficient notice for constructive assent, and therefore, there was a binding arbitration agreement between [plaintiff] and Ticketmaster." *Id.* The Ninth Circuit found that plaintiff had validly assented to Ticketmaster's Terms of Use and arbitration in two separate ways, the first of which was a basis not reached by the district court. First, "each time he clicked the 'Sign In' button when signing into his Ticketmaster account, where three lines below the button, the website displayed the phrase, 'By

continuing past this page, you agree to our Terms of Use.'" *Id.* That plaintiff failed to read the Terms of Use before proceeding, the court held, was not a basis to vitiate the existence of the agreement. Notably, relying on data maintained and presented by Ticketmaster in support of its motion to compel arbitration, the Ninth Circuit observed that plaintiff had assented to Ticketmaster's Terms of Use roughly twenty times, which the court found "only reinforce[d] that he had many such opportunities" to review the Terms of Use before signing. *Id.*

Second, the Ninth Circuit found the creation of an agreement to arbitrate between Ticketmaster and plaintiff "each time [plaintiff] clicked the 'Place Order' button when placing an order for tickets, where directly above the button, the website displayed the phrase, 'By clicking 'Place Order,' you agree to our Terms of Use.'" *Id.* In both contexts, the court observed that the Terms of Use hyperlink was displayed in blue font and hyperlinked to the relevant policy, thus "requir[ing] users to affirmatively acknowledge the agreement before proceeding" and providing "explicit textual notice that continued use w[ould] act as a manifestation of the user's intent to be bound." *Id.* (internal quotation marks omitted).

***Porcelli v. JetSmarter, Inc.*, 2019 WL 2371896 (S.D.N.Y. June 5, 2019) (Engelmayer, J.) (applying New York and Florida law) –** This was a putative consumer class action filed against JetSmarter claiming breach of contract based upon JetSmarter's alleged reduction in service provided to consumers under a membership agreement. JetSmarter removed the action to federal court and moved to compel plaintiff to arbitrate his claims pursuant to JetSmarter's Membership Agreement and Terms of Use, to which JetSmarter claimed plaintiff agreed when he registered for JetSmarter's membership program.

When plaintiff originally signed up for JetSmarter's program, he received a membership invoice, which provided in all-caps typeface that, "BY REMITTING THE AMOUNT DUE UNDER THIS INVOICE AND ACCEPTING THE TERMS AND CONDITIONS OF THE MEMBERSHIP AGREEMENT, MEMBER WILL PURCHASE JETSMARTER'S SERVICE."



JETSMARTER

MEMBERSHIP UPGRADE INVOICE

MEMBER NAME	BUSINESS NAME
Marcello Porcelli	
PHONE NUMBER	**EMAIL**
19175336513	mporcelli@largavista.com
ADDRESS	

THE ABOVE PERSON OR ENTITY IS HEREBY REFERRED TO AS "THE MEMBER".

BY REMITTING THE AMOUNT DUE UNDER THIS INVOICE AND ACCEPTING THE TERMS AND CONDITIONS OF THE MEMBERSHIP AGREEMENT, MEMBER WILL PURCHASE JETSMARTER'S SERVICE. THIS INVOICE IS VALID FOR 3 BUSINESS DAYS FROM THE ISSUE DATE.

ISSUE DATE: 09/JUL/16

CHARGES	AMOUNT
ANNUAL MEMBERSHIP FEE	$39,990.00
DISCOUNT	–
CREDIT FOR REMAINING MEMBERSHIP TERM	-$3,399.16
CREDIT FOR PAID INITIATION FEE	-$1,500.00
SUBTOTAL	$39,990.00
INITIATION FEE	$4,950.00
TOTAL	$40,040.84

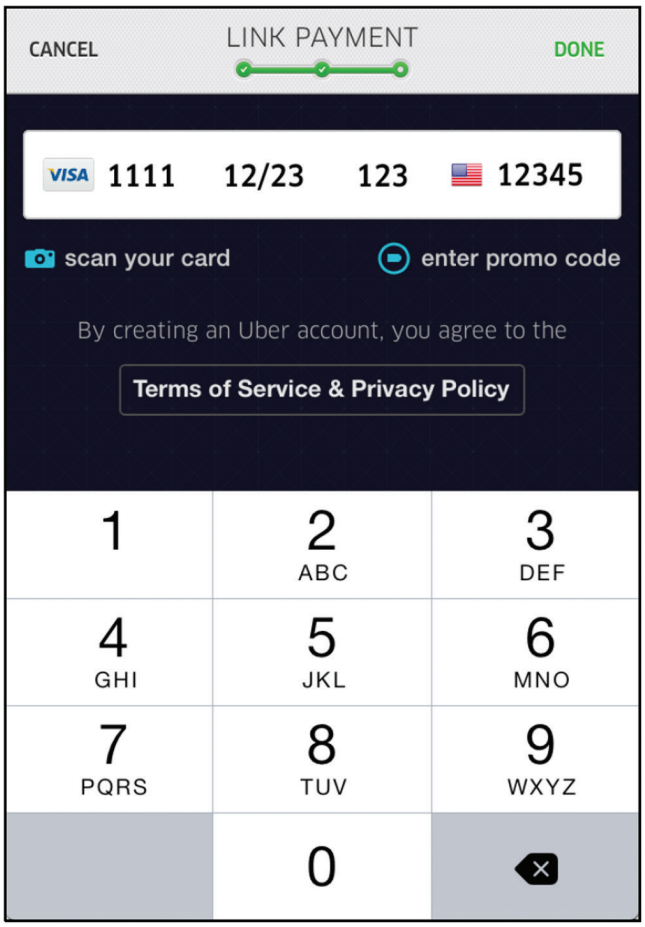
I ACCEPT TERMS AND CONDITIONS OF THE MEMBERSHIP AGREEMENT

The Membership Agreement may be amended or modified from time to time and available for review at http://jetsmarter.com/legal/membership. It is the Member's sole responsibility to review and abide by all of the terms and conditions of the Membership Agreement and all applicable service terms and conditions, as amended from time to time. The Membership Fee is an access fee for use of the Service, is not a payment for air transportation, and is non-refundable, except as specifically provided herein, even if Member fails to utilize the Program or the Services. The Membership Fee is not amortized over time and not based on Member's ability to purchase or use the Service.

Below the notice was a large checkbox to the left of the phrase, "I ACCEPT TERMS AND CONDITIONS OF THE MEMBERSHIP AGREEMENT." Immediately below the checkbox, JetSmarter advised users that "[t]he Membership Agreement may be amended or modified from time to time and available for review at http://jetsmarter.com/legal/membership." The full Membership Agreement was accessible by clicking on either of the orange underlined hyperlinks. The Membership Agreement included a provision requiring all disputes to be resolved by arbitration. Plaintiff had to click on the checkbox and signal his acceptance of the Membership Agreement in order to pay his invoice. JetSmarter submitted internal data showing that, when plaintiff upgraded his membership a year later, he again acknowledged and accepted the terms and conditions of the Memership Agreement, which included the arbitration clause.

Although plaintiff did not file an opposition to defendants' motion, the district court undertook its own independent analysis to determine whether the parties had agreed to artbirate the dispute. The district court explained that plaintiff had checked a box to indicate his acceptance to the terms of JetSmarter's Membership Agreement, which included an arbitration clause, and observed that the Second Circuit has held that such clickwrap agreements can serve as valid consent to arbitate because a user must affirmatively assent to the terms of the agreement by checking a box. The district court accordingly granted JetSmarter's motion and referred plaintiff's claims to arbitration.

***In re Uber Techs., Inc.*, 2019 WL 6317770 (C.D. Cal. Aug. 19, 2019) (Gutierrez, J.) (applying California and Massachusetts law) –** Plaintiff brought this putative class action following a data security breach in which hackers accessed Uber's data, and plaintiff claimed that rider's personal information was stolen. Uber moved to compel arbitration pursuant to an arbitration agreement in its Terms of Service, which Uber maintained plaintiff agreed to when she created her Uber account through the Uber app. In order to use the Uber app, a rider was required to create an account by entering their email address and mobile phone number and selecting a password. After entering that information, a rider proceeded to a second screen, where they were prompted to enter their first and last name. They then proceeded to a third and final screen, labeled "LINK PAYMENT," which required the rider to enter their payment information by providing their credit card number or PayPal information. At the bottom of the screen, the app stated in gray font, "By creating an Uber account, you agree to the Terms of Service & Privacy Policy." The phrase "Terms of Service & Privacy Policy" were in white typeface and displayed as a button that linked to the text of the agreements, which included the arbitration agreement. After the payment information was entered, a green "DONE" button lit up in the top-right corner of the screen. Clicking the "DONE" button completed the creation of the Uber account.



Plaintiff sought to avoid arbitration by arguing that Uber's motion relied on inadmissible and misleading evidence and because she was not on reasonable notice of the arbitration provisions, such that no agreement to arbitrate was formed. As to the evidentiary objections, plaintiff sought to strike Uber's employee declaration because (1) the images of Uber's clickthrough process that were attached as exhibits to the declaration were not to scale of the actual images that would have been displayed on plaintiff's phone, and (2) the declarant was a *former* employee and his testimony was based on speculation regarding what a typical user would confront rather than on what plaintiff herself actually saw. As to the former evidentiary objection, the district court observed that plaintiff did not claim that the images were inaccurate, and noted that the fact that the screen

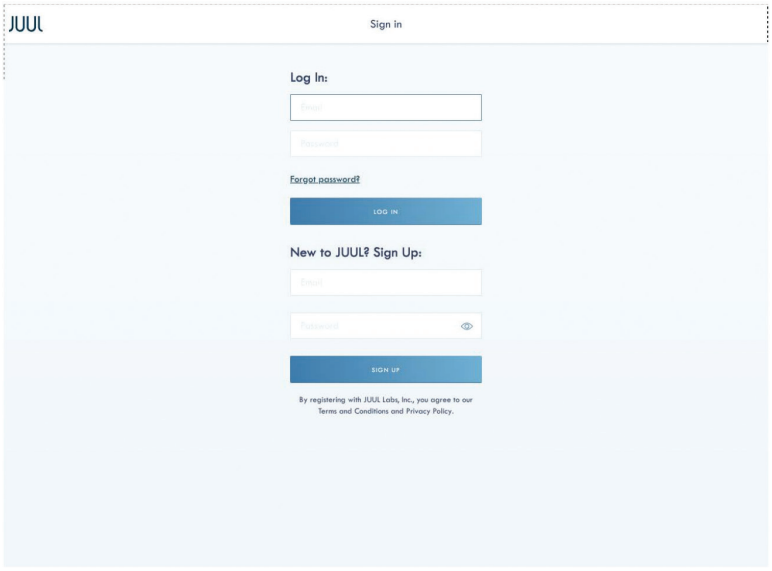
plaintiff viewed was smaller had no bearing on the court's holding. As to the latter evidentiary objection, the district court explained that the declarant's statements were based on his personal knowledge and experience as a former software engineer who designed and implemented the sign-up registration process for the Uber app, and the fact that he was no longer an Uber employee was irrelevant.

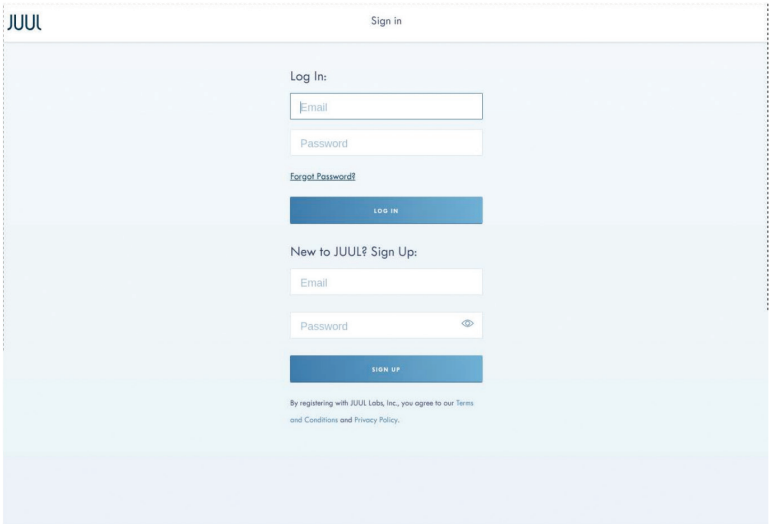
With respect to reasonable notice, plaintiff argued that, pursuant to *Cullinane v. Uber Technologies, Inc.*, 893 F.3d 53 (1st Cir. 2018), notice was lacking because Uber had failed to inform users of the existence and location of the Terms of Service because Uber used white text enclosed in a rectangle clickable button that was not sufficiently conspicuous, as it did not have the common appearance of a hyperlink, which is blue and underlined. The district court disagreed and explained that it was not bound by the First Circuit's *Cullinane* decision, which it found "depart[ed] dramatically from what other courts have found regarding Uber's registration process, and from the overall legal landscape regarding assent to online agreements." *In re Uber*, 2019 WL 6317770, at *4. Rather, citing the Second Circuit's decision in *Meyer v. Uber Technologies., Inc.*, 868 F.3d 66, 77, 79 (2d Cir. 2017), which applied California law, the district court held "that a reasonably prudent smartphone user would recognize that a box with text inside labeled 'Terms of Service' is clickable and would lead to a display of those terms." *In re Uber*, 2019 WL 6317770, at *4. Last, the district court noted that, even if plaintiff's initial registration process was somehow flawed, she was still on inquiry notice of the arbitration agreement because she received an email from Uber with updated Rider Terms that expressly stated that Uber had revised the arbitration agreement and that her continued use of the Uber app would serve as consent to the updated terms.

***Colgate v. JUUL Labs, Inc.*, 402 F. Supp. 3d 728 (N.D. Cal. 2019) (Orrick, J.) (applying California law) –** Ten plaintiffs brought a putative class action against JUUL, an e-cigarette manufacturer, alleging that the company had used research from the tobacco industry to target youth and design a more addictive and combustible product that delivered more nicotine to users. JUUL moved to compel five of the plaintiffs to arbitrate their claims pursuant to arbitration agreements that JUUL contended those plaintiffs agreed to when they created or logged into online accounts on JUUL's website.

JUUL's website required customers to create an online account in order to process transactions. Four of the five plaintiffs against whom JUUL moved to compel were presented with an initial sign-up page that contained fields and a large blue button for returning users to "LOG IN." Below the "LOG IN" button were fields for new users and a large blue button to "SIGN UP" Below the "SIGN UP" button, the page stated in small navy lettering, "By registering with JUUL Labs, Inc., you agree to our Terms and Conditions and Privacy Policy." Although neither term was underlined or colored differently from the other lettering in the notice, the "Terms and Conditions" and "Privacy Policy" portions of the phrase were hyperlinked to their respective policies, the former of which included an arbitration clause.

The district court held that the terms and conditions were not conspicuous to put plaintiffs on inquiry notice because "the hyperlink [was] wholly indistinguishable from the surrounding text." *Id.* at 764. JUUL's hyperlinked





language "was not highlighted, underlined, in all caps, or in a separate box." *Id.* at 765. The court reasoned that "[u]sers cannot be reasonably expected to click on every word of the sentence in case one of them is actually a link." *Id.* Thus, the court concluded that a reasonable user would not have been put on inquiry notice of the arbitration provision contained in the Terms and Conditions.

JUUL, however, argued that one of the plaintiffs was presented with an updated interface that highlighted the "Terms and Conditions" and "Privacy Policy" in the notice by changing their color from the surrounding text to a lighter shade of blue.

But the district court found that this change did not alter its conclusion. It faulted JUUL for not underlining or highlighting the Terms and Conditions by placing it in a box, and for making the term the same font size as the surrounding text. The district court further observed that the earlier hyperlinked "Forgot Password?" presented earlier on the same screen *was* underlined, bolded, and of a different color, and in a larger typeface than the Terms and Conditions, and thus, reasoned that "[a] reasonable user scanning the page would first see the 'Forgot Password?' hyperlink and would observe that it is a different color, underlined, and of a particular font size. That user would not then see the 'Terms and Conditions' and 'Privacy Policy' hyperlinks and conclude that they were clickable." *Id.* at 766.

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