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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 V

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.

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

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

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plaintiffs have invoked to evade a finding of mutual assent to arbitrate. They include imagery of the corporate website and app presentations of the arbitration agreements at issue, and explain how those agreements fared when tested in court.

Take the case of *Valelly v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, which the court found to be a binding clickwrap agreement because it required the user opening a new bank account to affirmatively check a box to indicate that the user "agree[d] to these terms and conditions by checking this box" and called out to the user in boldface font in a textbox immediately above the checkbox that the user agreed to arbitrate all disputes. The agreement at issue in *Deanda v. DoorDash, Inc.*, was also upheld as a valid agreement, even though the Terms and Conditions hyperlink was red and was not underlined. Despite these variations from the traditional use of blue and underlining to indicate a hyperlinked term, the court found the link was sufficiently conspicuous and "pop[ped] out on the page" to put a user on inquiry notice of the Terms and Conditions and the arbitration clause.

By contrast, in *Shron v. LendingClub Corp.*, although the interface required users to click on a box, which advised would "constitute[] your electronic signature and acceptance of" "the Loan Agreement" and "the Borrower Membership Agreement," the court found inquiry notice wanting because the labeling of those agreements in the context of the interface could have led a reasonable loan applicant to believe that they "reflected her consent to borrowing the loan amount applied for," but not that they would affect the scope of her legal rights and remedies. And *Bell v. Royal Seas Cruises, Inc.*, illustrates some of the creative strategies employed by plaintiffs to create factual issues that can either defeat a motion to compel arbitration or, as in this case, secure a bench trial, even where the court finds the website's design and hyperlinked terms and conditions to be sufficiently conspicuous to provide inquiry notice and where the defendant submits timestamped evidence showing that the plaintiff had visited the website and assented to the arbitration agreement.

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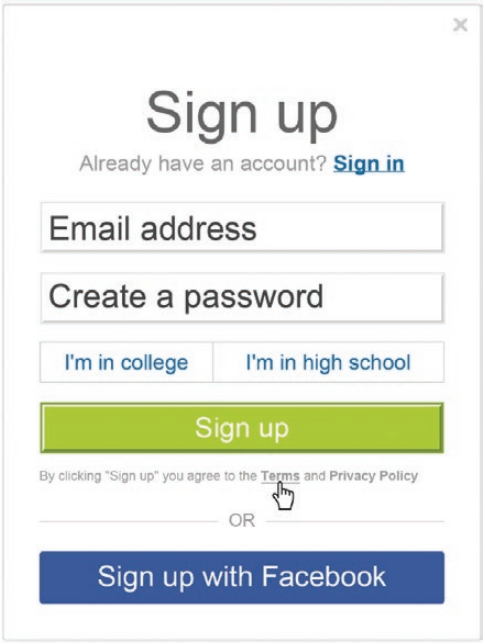
***Lyles v. Chegg, Inc.*, 2020 WL 1985043 (D. Md. Apr. 27, 2020) (Bennett, J.) (applying Maryland law)—**Chegg provides education materials and services to high school and college students. Plaintiff filed a putative class action against the company following a data breach resulting in the exposure of its customers' personally identifiable information. Chegg moved to compel plaintiff to arbitration.

A user that wished to use Chegg's services created an account through the company's online registration process by entering their email and password and clicking a large green button on Chegg's website. Immediately below the button, the webpage indicated in small gray font that, "By clicking 'Sign up' you agree to the **Terms** and **Privacy Policy**." By hovering over the words "Terms" or "Privacy Policy" with a cursor, the phrase would become underlined. Both bolded terms were hyperlinked to the relevant terms. The Terms included an arbitration clause.

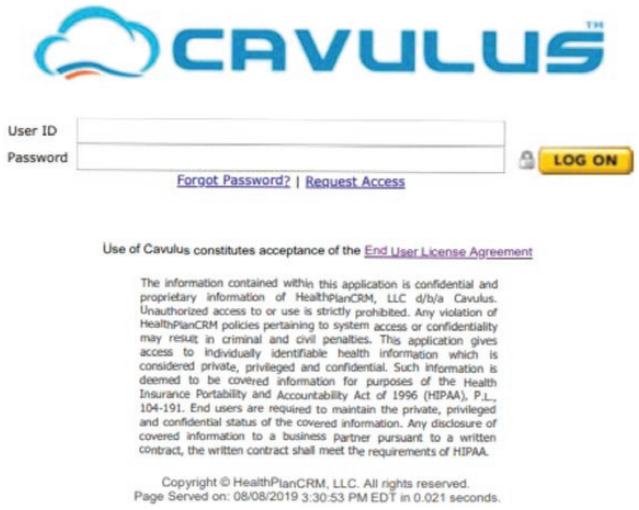


The district court held that Chegg's website "layout reasonably communicated the terms of the 2014 Terms of Use and clearly indicated that, by signing up for a Chegg account, a user agreed to those terms." *Id.* at ⋆4. The court thus concluded that there was no triable issue to be presented concerning the formation of an arbitration agreement and ordered the parties to proceed to arbitration.

***HealthplanCRM, LLC v. AvMed, Inc.*, 2020 WL 2028261 (W.D. Pa. Apr. 28, 2020) (Ranjan, J.) (applying Pennsylvania law)—**Cavulus, which licensed cloud-based customer relation management software to insurance companies managing Medicare Advantage plans, sought to compel a licensee, AvMed and sub-licensee, NTT, to arbitrate trade-secret claims arising from defendants' use of Cavulus' software. Cavulus argued that defendants were bound by Cavulus' License and End-User Agreements, which each included arbitration provisions. Defendants opposed the motion on

multiple grounds, and NTT claimed that they had never contracted with Cavulus and thus had never agreed to arbitrate any dispute with Cavulus.

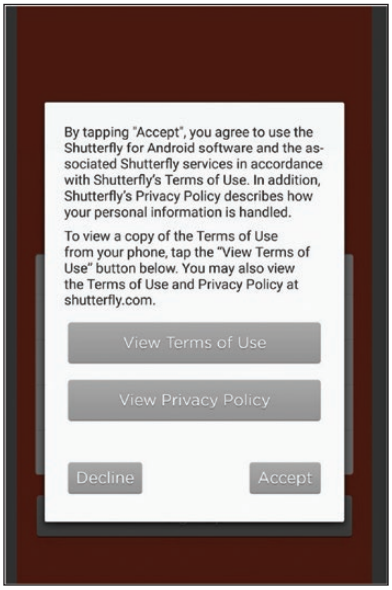
Each time Cavulus and defendants' employees accessed defendants' software platform, they were directed to a secure log-in page, which required them to enter their user ID and password to access the software by tapping a yellow "LOG ON" button. Below the User ID and password fields was a notice in black font stating that "Use of Cavulus constitutes acceptance of the End User License Agreement." The phrase "End User License Agreement" was underlined and in purple and hyperlinked to the agreement, which included an arbitration clause.



Relying on the Third Circuit's decision in *James v. Global TelLink Corp.*, 852 F.3d 262 (3d Cir. 2017), the district court concluded that Cavulus' log-in page had created an enforceable browsewrap agreement. NTT argued that the browsewrap agreement was not sufficiently conspicuous to be enforced because the link to the End-User Agreement was "in small font, positioned close to a large paragraph of text in the same small font, and [was] far enough below the log-in boxes and button so as not to command the viewer's attention." *HealthplanCRM*, 2020 WL 2028261, at *17 (internal quotation marks omitted). But the district court disagreed, observing that "[t]he link to the End-User Agreement appear[ed] no more than an inch below the log-in boxes, and it [was] both above and set apart from the large paragraph of text . . . (which [was] itself only six sentences long)." *Id.* The court further explained that "[t]he link [was] not concealed at the bottom of a webpage or hidden in fine print," and "the blue hyperlink to access the full End-User Agreement st[ood] out against the white background of the log-in page and appear[ed] in a sentence which straightforwardly advise[d] the user that '[u]se of Cavulus constitutes acceptance' of the linked agreement." *Id.* The court further credited the presentation of Cavulus' End User License Agreement, suggesting that, because the warning that use of the software would constitute the user's acceptance appeared immediately below the yellow "LOG ON" button, Cavulus' presentation "arguably function[ed] more like a 'clickwrap' agreement" because "the placement of an explicit warning directly below a log-in button ha[d] a similar psychological effect." *Id.* at *18.

***Miracle-Pond v. Shutterfly, Inc.*, 2020 WL 2513099 (N.D. Ill. May 15, 2020) (Rowland, J.) (applying Illinois law)—**Plaintiffs brought this putative class action against Shutterfly, which maintains a web-based database for users to upload and store their photos, claiming that the company collected, stored, and used customers' biometric data without consent and in violation of Illinois law. Only one of the two plaintiffs had a Shutterfly account and thus Shutterfly moved to compel only that plaintiff to arbitrate her claims pursuant to Shutterfly's arbitration agreement, which the company argued the plaintiff had assented to.

Shutterfly submitted evidence showing that plaintiff registered for her Shutterfly account using the Shutterfly Android mobile app in August 2014 and uploaded nearly 300 photographs to her account between August 2014 and December 2018, and ordered Shutterfly products on several occasions. During the registration process, the app presented plaintiff with a white screen with a notice in black typeface that advised plaintiff, "By tapping 'Accept', you agree to use the Shutterfly for Android software and the associated Shutterfly services in accordance with Shutterfly's Terms of Use. In addition, Shutterfly's Privacy Policy describes how your personal information is handled." That text is followed by a second paragraph of text in black font stating, "To view a copy of the Terms of Use from your phone, tap the 'View Terms of Use' button below. You may also view the Terms of Use and Privacy Policy at shutterfly.com. Immediately below were two large gray buttons, which read "View Terms of Use" and "View Privacy Policy," and which linked to the relevant policies. The Terms of Use included an arbitration clause. Below those buttons were two smaller gray buttons requiring the user to click "Accept" or "Decline."

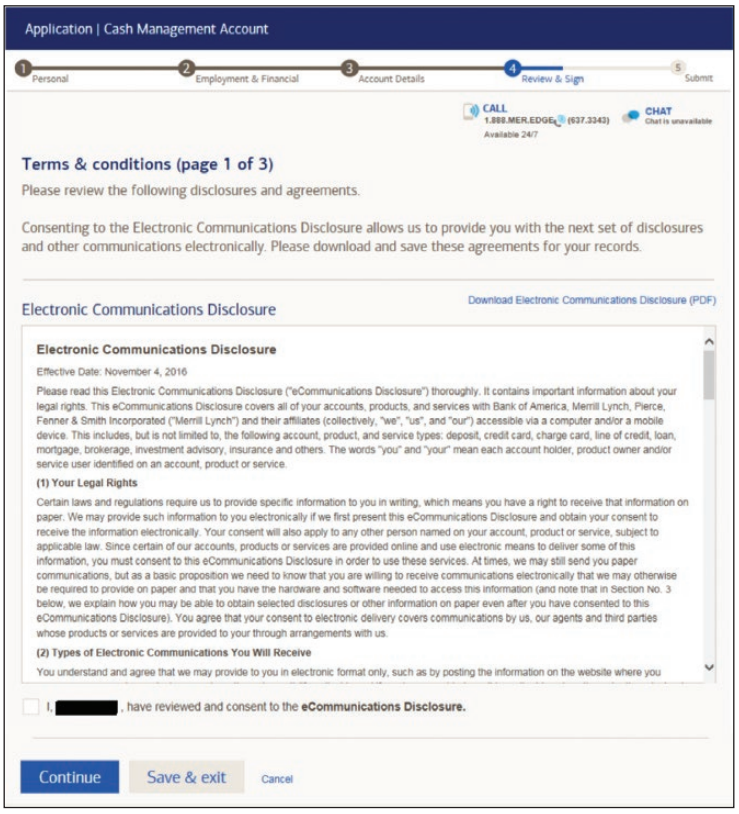


Plaintiff argued that Shutterfly's agreement constituted an unenforceable browsewrap agreement and that she did not assent to Shutterfly's Terms of Use because she merely agreed that her use of Shutterfly's website and services would comply with the Terms of Use, not that she would be bound by them. According to plaintiff, because the text above the "Accept" button stated, "By tapping 'Accept', you agree to use the Shutterfly for Android software and the associated Shutterfly services in accordance with Shutterfly's Terms of Use," rather than "by tapping 'Accept', you agree to the Terms of Use," plaintiff argued that she had not assented to be bound by the Terms of Use. The district court, however, found that Shutterfly's agreement was a valid clickwrap agreement because "Shutterfly's page presented the Terms of Use for viewing, stated that clicking 'Accept' would be considered acceptance of the Terms of Use, and provide[d] both an 'Accept' and 'Decline' button." *Id.* at *4. The court explained that, "because Shutterfly's app contained a clear and conspicuous statement that . . . a user agreed to the Terms of [Use] and Privacy Policy by clicking a link or pressing a button, a reasonable user who complete[d] that process would understand that she was manifesting assent to the Terms." *Id.* The court thus held that plaintiff had failed to raise a genuine dispute as to whether she entered into an enforceable agreement with Shutterfly, and she was therefore bound by Shutterfly's Terms of Use.

***Valelly v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 2020 WL 2907676 (S.D.N.Y. June 3, 2020) (Caproni, J.) (applying New York law)**—Plaintiff filed this putative class action against Merrill Lynch, claiming that the company "swept" customers' uninvested cash into a Bank of America money market account without their consent. Merrill Lynch moved to compel plaintiff to arbitrate her claims.

Merrill Lynch submitted evidence showing that plaintiff opened three accounts at Merrill Lynch and had used an iPad provided by Merrill Lynch to complete the account-opening process for each of her accounts. In the final step of the registration process, Merill Lynch included three pages entitled "**Terms & conditions**" in large navy font. The first page instructed plaintiff in black typeface to review the Electronic Communications Disclosure, which included a blue hyperlink prompting plaintiff to "Download Electronic Communications Disclosure (PDF)" as well as a text window displaying the Disclosure. The text window included a scroll bar on the right-hand side, indicating that plaintiff should scroll down for the complete agreement. At the bottom of the page, before moving on to the next step, plaintiff was required to click a box next to black text stating "I, [insert name], have reviewed and consent to the **eCommunications Disclosure**." Once that box was checked, in order to continue with the application, plaintiff had to click a large blue button that said "Continue."

The second page of the Terms & conditions required plaintiff to check a box certifying under penalty of perjury that certain tax certification statements were true. And the third and final page of Merrill Lynch's Terms & conditions instructed plaintiff in black font at the top of the page to "please review important account terms, disclosures, privacy and affiliate marketing notices and account attestations." The page directed plaintiff in black typeface to "Select the links to review each item, or print and save copies for your records" and stated that "These documents apply to your new account." Immediately below was a large textbox that advised plaintiff, among other things, in black font that "The following contains your consent to the Merrill Edge Self-Directed Investing Client Relationship Agreement, the Merrill Edge Self-Directed Investing Terms of Service, the agreement applicable to the type of account you are applying for, the Bank of America Privacy Policy for U.S. Consumers, the Federally Required Affiliate Marketing Notice, and our Business Continuity Plan. Please carefully review these documents. You can also request printed copies for your records." Immediately above that textbox was a blue hyperlink that read "Download all documents (PDF)," which, if clicked on, would download all of the documents and policies at once. Immediately below the textbox was a heading titled "Brokerage Account Documents," followed by blue hyperlinks directing plaintiff to PDFs of the "Merrill Edge Self Directed Investing Client Relationship Agreement (PDF)," "Cash Management Account Disclosures and Account

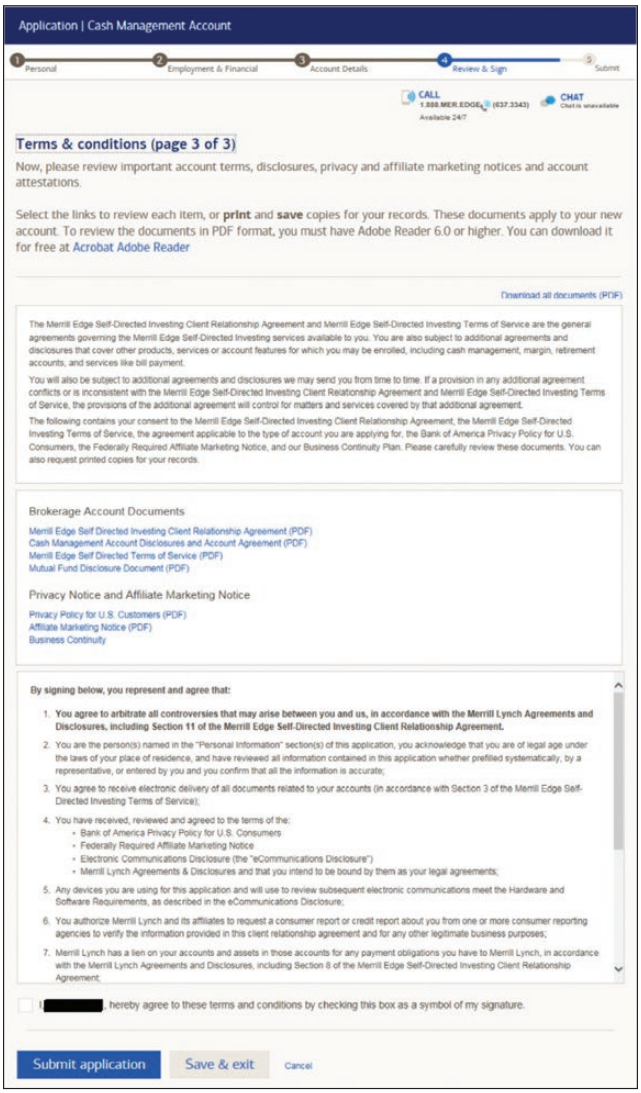


Agreement (PDF)," "Merrill Edge Self Director Terms of Service (PDF)," and "Mutual Fund Disclosure Document (PDF)." The page also included a textbox with twelve individually numbered additional attestations, instructing plaintiff in boldfaced type that, "**By signing below, you represent and agree that: 1. You agree to arbitrate all controversies that may arise between you and us, in accordance with the Merrill Lynch Agreements and Disclosures, including Section 11 of the Merrill Edge Self-Directed Investing Client Relationship Agreement.**" Although the first attestation regarding arbitration was in bold, the following ten attestations were in regular typeface. Before plaintiff could submit her application by tapping on a large blue "Submit application" button, she was required to check a box next to text stating in black font that, "I, [insert name], hereby agree to these terms and conditions by checking this box as a symbol of my signature." Plaintiff did not deny that she checked that box, thereby agreeing to the terms and conditions.

The district court held that plaintiff entered a valid, binding clickwrap agreement, finding that "[t]he terms were reasonably conspicuous, and Plaintiff was required to affirmatively agree to them." *Id.* at *4. The court credited Merrill Lynch for including at the top of the third page of the Terms & Conditions instructions to users to review the various important disclosures, notices, and attestations, and to review each of the hyperlinks, which were colored blue. The court also observed that the page's blue hyperlink that allowed plaintiff to download all of the documents at once also weighed in favor of a finding of conspicuousness. The court further noted that the textbox with the twelve individually numbered account attestations "ha[d] a visible scroll bar, indicating that Plaintiff should scroll down to read all twelve terms," and "instruct[ed] Plaintiff in boldfaced type that her signature manifest[ed] agreement to each paragraph." *Id.* at *5.

Plaintiff argued that that she lacked inquiry notice because the twelve attestations were not all simultaneously visible on the screen. But the court found this argument "silly," because "[t]he fact that a user might need to scroll down to read all of the attestations terms does not render them unenforceable any more than the fact that a paper contract has more than one page renders it unenforceable." *Id.* The court concluded that, "[b]ecause the text box included individually numbered paragraphs, a visible scroll bar, and a bolded instruction that, by indicating assent, Plaintiff was agreeing to the listed terms, the attestations [were] binding." *Id.*

Last, the court observed that "the webpage included a box at the bottom of the page requiring Plaintiff to indicate affirmatively her assent to the terms and conditions before

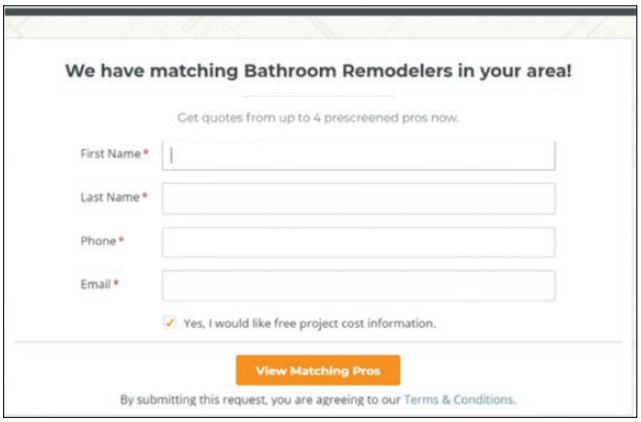


submitting her application" and that "the hyperlinks to the relevant agreements [were] included on the same page as the box requiring Plaintiff to indicate her assent and to submit her application, thereby connecting the contractual terms to the services to which they apply." *Id.* The court also approved of "the language 'I . . . agree to these terms and conditions,'" which it found to be "a clear prompt directing users to read the Terms and Conditions and signaling that their acceptance of the benefit of registration would be subject to contractual terms." *Id.* The court held that "[t]he combination of the conspicuous hyperlinks, the text box with individually numbered attestations and a visible scroll bar, and the box at the bottom of the page requiring the user to click 'I Agree,' provided sufficiently clear notice of the terms of the agreement, including the sweep provision, and formed a binding agreement." *Id.*

***HomeAdvisor, Inc. v. Waddell*, 2020 WL 2988565 (Tex. App. June 4, 2020) (applying Texas law)—** HomeAdvisor operates a website that allows customers to obtain information regarding home improvement projects and local home service professionals. Plaintiffs were homeowners that had sought referrals through the HomeAdvisor website for contractors to perform remodeling work on their homes, and entered into home remodeling agreements with contractors they found through HomeAdvisor's website. The contractors abandoned the jobs before the work was completed in each instance. Plaintiffs sued the various contractors and their companies, asserting violations of Texas law. HomeAdvisor moved to compel arbitration of the claims against it and submitted a declaration of HomeAdvisor's vice president of software development. The declaration stated that HomeAdvisor's business records showed that each plaintiff created an account with HomeAdvisor and submitted service requests through HomeAdvisor's website. In order to complete a service request, each plaintiff had to complete a series of "interview pages" before proceeding to the final page where they were presented with a screen that required them to input their personal information. Below those fields was an orange button that said "View Matching Pros." Immediately below the orange button was a notice in black lettering that said, "By submitting this request, you are agreeing to our Terms & Conditions."The phrase "Terms & Conditions" was in blue lettering and hyperlinked to the relevant terms, which included an arbitration agreement.

Plaintiffs admitted that they had submitted requests on HomeAdvisor's website, but argued that they lacked notice of the arbitration provision because the hyperlink to the Terms & Conditions was inconspicuous. The trial court agreed and denied HomeAdvisor's motion to compel arbitration, concluding, among other things, that there was no valid agreement to arbitrate.

HomeAdvisor brought an interlocutory appeal challenging the trial court's order. The Texas Court of Appeals reversed and remanded the case with instructions to order the parties to arbitration. Although the appellate court applied Texas law, it relied on *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66 (2d Cir. 2017), and *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829 (S.D.N.Y. 2012), to hold that HomeAdvisor's sign-in wrap agreement presented the Terms & Conditions hyperlink reasonably conspicuously. The Texas Court of Appeals observed that "the submittal page was uncluttered, with only a few spaces to enter information, and a large orange submit button with the phrase 'By submitting this request, you are agreeing to our Terms & Conditions' written directly underneath.'" *HomeAdvisor*, 2020 WL 2988565, at *4. The court further credited HomeAdvisor's presentation, noting that "[t]he text with the hyperlink to the terms and conditions [was] dark against a bright white background,

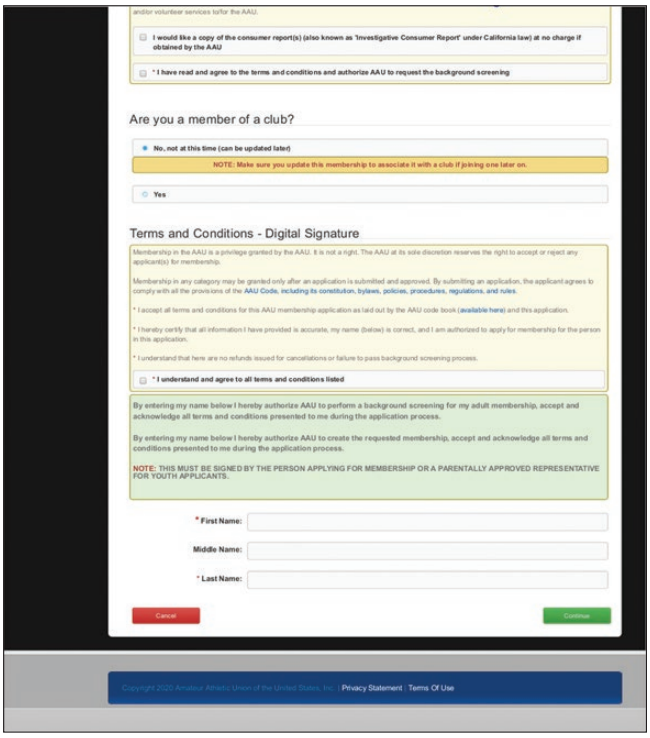


clearly legible, and the same size as the nearly all of the text on the screen," and "[t]he entire screen [was] visible at once with no scrolling necessary." *Id.* While the Terms & Conditions were "lengthy," this did not bother the court because "the arbitration provision [was] prominently noted with bolded and capitalized print." *Id.*

Relying further on the Second Circuit's decision in *Meyer*, the Texas appellate court further held that plaintiffs' assent to HomeAdvisor's Terms was unambiguous as a matter of law. The court explained that "[t]he mechanism for manifesting assent – clicking the submit button – [was] temporally coupled with the website user's receipt of the company's services and the user [was] clearly advised that clicking the submit button indicate[d] such assent." *HomeAdvisor*, 2020 WL 2988565, at *4. The court thus concluded that "the reasonably prudent user would have understood that they could only receive HomeAdvisor's referral services by agreeing to the company's terms and conditions." *Id.* at *5.

***Hidalgo v. Amateur Athletic Union of U.S., Inc.*, 2020 WL 3442029 (S.D.N.Y. June 24, 2020) (Koeltl, J.) (applying New York law)—**Plaintiff filed this putative class action against the Amateur Athletic Union of the United States following a data breach that resulted in alleged financial losses and identity theft to AAU's customers. AAU moved to compel plaintiff to arbitrate his claims.

Individuals could apply to become members of AAU's athletic union as athletes or non-athletes by filling out an online application. Before submitting the application by clicking a green "Continue" button at the bottom of the screen and application, an applicant was required to, among other things, check a box that appeared to the immediate left of a phrase in bold, black text, following a red-colored asterisk, "***I understand and agree to all terms and conditions listed**." If an applicant clicked on the "Continue" button without checking the box, an error message would appear. The checkbox and the accompanying text appeared in a white box at the bottom of a larger yellow box in the application,



immediately below the large bold heading "**Terms and Conditions - Digital Signature**." One of the statements in black typeface in that section of the application was "Membership in any category may be granted only after an application is submitted and approved. By submitting an application, the applicant agrees to comply with the provisions of the AAU Code, including its constitution, bylaws, policies, procedures, regulations, and rules." The phrase "AAU Code, including its constitution, bylaws, policies, procedures, regulations, and rules" was blue and a hyperlink that took the applicant to a separate "AAU Code Book" screen. Also in the "terms and conditions" section was the statement in black typeface following a red asterisk, "*I accept all terms and conditions for this AAU membership application as laid out by the AAU code book (available here) and this application." The blue text, "available here," was another hyperlink that would take the applicant to the same AAU Code Book screen. Additionally, in the subsequent green box immediately following the "I understand and agree" checkbox, was the statement in large black, bold text: "**By entering my name below, I hereby authorize AAU to create the requested membership, accept and acknowledge all terms and conditions presented to me during the application process.**" Regardless which of the two hyperlinks one used to access the AAU Code Book screen from the application page, the resulting page that a user was taken to displayed the table of contents of the AAU Code Book, which included an

arbitration agreement. AAU submitted records showing that plaintiff had applied for and completed his membership application on AAU's website on May 16, 2019 and paid the $32 fee for a coach's certificate.

The district court held that plaintiff had reasonable notice that, by completing his membership application and becoming a member, he would be bound by contractual language contained in the documents, including the binding arbitration provision that could be accessed through the hyperlinks on the application page. The court found that an applicant's attention was adequately directed to a conspicuous hyperlink that was clearly identified as containing contractual terms to which the customer manifested assent by completing the membership application. The court credited several salient features with AAU's agreement. The court observed that the AAU application page was "relatively uncluttered," the relevant portion of the application page was "labeled 'Terms and Conditions – Digital Signature' in large bold font," the relevant section was "in a distinctive yellow color," and the AAU Code to which a member must agree was hyperlinked and "marked with the distinctive blue color characteristic of hyperlinks." *Id.* at *6. While the membership application page had "various colors," the court observed that "the layout [was] not distracting," and "[t]he relevant text in the 'terms and conditions' box on the AAU application screen clearly dr[ew] a reasonable user's attention to it because of the blue hyperlinks, the red asterisks, the normal font size, and the clear contrast between the mostly black text and the yellow background." *Id.* The court also found relevant that the "terms and conditions box" was "prominently placed squarely in the middle of the very end of the application, which [was] a conspicuous part of the application because it [was] the last place an applicant look[ed] before finishing the application process." *Id.*

Next, the court found that the fact that an applicant would have to scroll down through many pages of the application to reach the terms and conditions box did not undermine plaintiff's assent to those terms and conditions. The district court reasoned that an applicant would be unable to avoid the part of the application containing the hyperlinks leading to the AAU Code because "the applicant would necessarily proceed through the application in linear fashion and could not complete the application without having reviewed that page." *Id.* The court also credited the fact that the agreement operated as a clickwrap agreement in which an applicant necessarily had to check the box next to the acknowledgment of the terms and conditions to indicate his agreement to the AAU terms and conditions listed, one of which included compliance with the contents of the AAU Code Book, before he could submit his application. In addition, the district court noted that "the fact that notice about the terms and conditions of AAU membership was both spatially and temporally coupled to the applicant's submission of an application further indicate[d] that the plaintiff had reasonable notice that he would be bound by the attendant terms and conditions upon becoming an AAU member." *Id.* at *7.

Plaintiff sought to evade arbitration by contending that, because he applied for membership on an iPhone using a web browser, and the AAU application was not compatible for smartphone use, he had to move the screen back and forth for each line of text and zoom in and out because the full application was not visible on the iPhone screen at one time. The court, however, rejected this argument, finding that plaintiff had failed to explain why a reasonably prudent smartphone user would not have had reasonable notice of the hyperlinks simply because he or she had to scroll around and zoom in and out to complete the application, which still required him to click on the checkbox indicating his agreement to the terms and conditions.

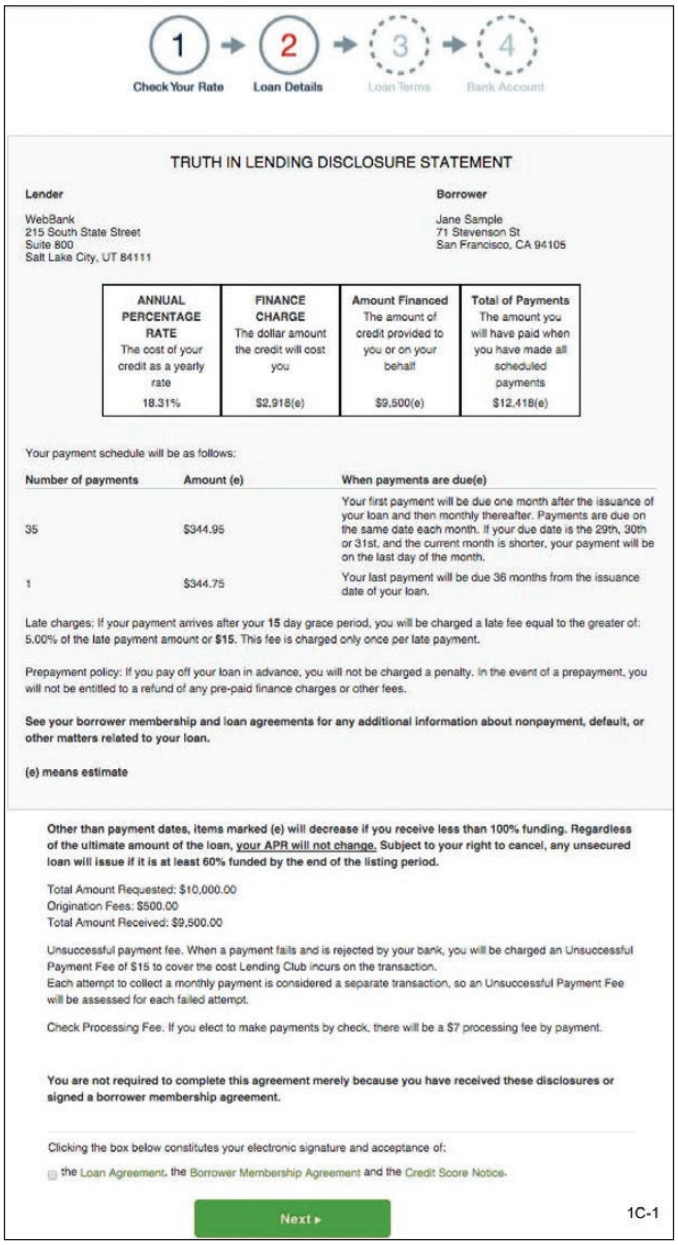
Plaintiff further argued that he could not be bound by the arbitration provision in the AAU Code Book because a reasonable user would have no reason to know that a document titled AAU Code Book would have contained contractual language as opposed to general code of conduct matters. But the district court noted that plaintiff had pointed to no authority for this novel proposition, which, in any event, the court found was belied by the fact that "[t]he relevant portion of the AAU membership application [was] labeled 'Terms and Conditions – Digital Signature,' which [was] standard language used in web-based contracts to indicate the existence of contractual language." *Id.*

Plaintiff also maintained that, because the arbitration provision was allegedly "hidden" in the middle of the roughly 170-page AAU Code Book accessible through the hyperlinks, he did not have notice of the arbitration provision. *Id.* at *8. But the court observed that a user would not have had to read through the entire AAU Code Book to find the arbitration clause because the screen contained a much shorter table of contents with a section labeled "Binding Arbitration."

***Shron v. LendingClub Corp.*, 2020 WL 3960249 (S.D.N.Y. July 13, 2020) (Torres, J.) (applying New York law), *appeal dismissed per stipulation*, Appeal No. 20-02594 (2d Cir.)—**In 2018, plaintiff applied for a loan using LendingClub's online platform for facilitating the issuance of personal loans. Plaintiff accepted a personal loan offer from LendingClub in the amount of $35,000 but was charged a $2,100 origination fee, which was deducted from the loan amount she thought she was receiving. Plaintiff brought this putative class action against LendingClub, claiming that this practice violated the Truth in Lending Act and New York law.

LendingClub moved to compel plaintiff to arbitrate her claims, arguing that the loan in question and an earlier loan plaintiff accepted from LendingClub in 2015 required plaintiff to agree to an arbitration agreement.

LendingClub submitted a declaration from a company senior manager of member support that explained that, in order to complete the loan application process in 2015 and 2018, applicants were required to check a box on the application next to the following notice in black font: "Clicking the box below constitutes your electronic signature and acceptance of: the Loan Agreement, the Borrower Membership Agreement and the Credit Score Notice. The phrases "Loan Agreement," "Borrower Membership Agreement," and "Credit Score Notice" were colored green and hyperlinked to the relevant policies. The Loan Agreement and Borrower Membership Agreement included arbitration clauses. Immediately below the notice was a large green button that said "Next >." The declaration explained that, if plaintiff declined to check the box or click the button accepting the terms, the online platform would not have allowed plaintiff to proceed to the next screen.



1 Check Your Rate → 2 Loan Details → 3 Loan Terms → 4 Bank Account

TRUTH IN LENDING DISCLOSURE STATEMENT

Lender

WebBank
215 South State Street
Suite 800
Salt Lake City, UT 84111

Borrower

Jane Sample
71 Stevenson St
San Francisco, CA 94105

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate	FINANCE CHARGE The dollar amount the credit will cost you	Amount Financed The amount of credit provided to you or on your behalf	Total of Payments The amount you will have paid when you have made all scheduled payments
18.31%	$2,918(e)	$9,500(e)	$12,418(e)

Your payment schedule will be as follows:

Number of payments	Amount (e)	When payments are due(e)
35	$344.95	Your first payment will be due one month after the issuance of your loan and then monthly thereafter. Payments are due on the same date each month. If your due date is the 29th, 30th or 31st, and the current month is shorter, your payment will be on the last day of the month.
1	$344.75	Your last payment will be due 36 months from the issuance date of your loan.

Late charges: If your payment arrives after your **15** day grace period, you will be charged a late fee equal to the greater of: 5.00% of the late payment amount or **$15**. This fee is charged only once per late payment.

Prepayment policy: If you pay off your loan in advance, you will not be charged a penalty. In the event of a prepayment, you will not be entitled to a refund of any pre-paid finance charges or other fees.

See your borrower membership and loan agreements for any additional information about nonpayment, default, or other matters related to your loan.

(e) means estimate

Other than payment dates, items marked (e) will decrease if you receive less than 100% funding. Regardless of the ultimate amount of the loan, your APR will not change. Subject to your right to cancel, any unsecured loan will issue if it is at least 60% funded by the end of the listing period.

Total Amount Requested: $10,000.00
Origination Fees: $500.00
Total Amount Received: $9,500.00

Unsuccessful payment fee. When a payment fails and is rejected by your bank, you will be charged an Unsuccessful Payment Fee of $15 to cover the cost Lending Club incurs on the transaction.
Each attempt to collect a monthly payment is considered a separate transaction, so an Unsuccessful Payment Fee will be assessed for each failed attempt.

Check Processing Fee. If you elect to make payments by check, there will be a $7 processing fee by payment.

You are not required to complete this agreement merely because you have received these disclosures or signed a borrower membership agreement.

Clicking the box below constitutes your electronic signature and acceptance of:

☐ the Loan Agreement, the Borrower Membership Agreement and the Credit Score Notice.

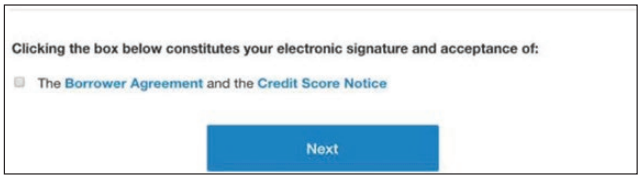
Next ▸

1C-1

2015 loan agreement

The 2018 loan application screen was nearly identical with a slightly different acceptance interface, presenting the very same notice and checkbox, but in bolded black typeface, and presenting just two hyperlinked bolded terms in blue to "**The Borrower Agreement** and the **Credit Score Notice**," immediately followed by a large blue "Next" button.

2018 loan agreement



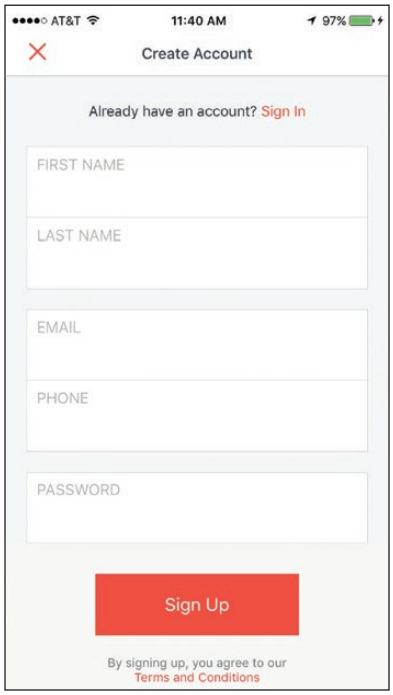
In an effort to defeat inquiry notice of the arbitration agreement, plaintiff submitted her own declaration in opposition to LendingClub's motion, stating that she never saw a borrower membership agreement, borrower agreement, or loan agreement in the course of applying for her loan and never saw any arbitration provision. Plaintiff also sought to undermine LendingClub's declaration on the basis that it only discussed what a typical consumer would need to comply with to effectuate the loan application but did not reflect plaintiff's specific experience when applying for the loan.

The district court agreed with plaintiff, and held that LendingClub's interface failed to provide consumers inquiry notice of the arbitration terms. The court found that, "[i]n the context of the interface, a loan applicant could reasonably have believed that such agreements reflected her consent to borrowing the loan amount applied for—as suggested by the words '[l]oan' and '[b]orrower'—but not that such agreements w[ould] affect the scope of her legal rights and remedies." *Id.* at *5 (first and second alterations in original). The court further observed that, while LendingClub's "website required consumers to check off the boxes indicating acceptance of the terms within the hyperlinked documents before proceeding to the next page, this technical requirement [was] not tantamount to establishing that Plaintiff was on inquiry notice because the language on the page d[id] not alert the user to the legal significance of proceeding with that step." *Id.*

On August 4, 2020, LendingClub filed an interlocutory appeal to the Second Circuit from the district court's order denying LendingClub's motion to compel arbitration. That appeal was dismissed by the parties without prejudice to refiling after the parties reported to the district court that a settlement in principle was reached with the assistance of the Second Circuit's mediation program that is contingent on the district court vacating its order denying LendingClub's motion to compel arbitration.

***Deanda v. DoorDash, Inc.*, No. 19-cv-08305 (N.D. Cal. Aug. 5, 2020), ECF No. 31 (Tigar, J.) (applying California law)—**Plaintiff filed a putative class action against DoorDash, claiming that the company engaged in deceptive tipping practices by representing that customer tips would benefit drivers, but instead used those tips to fund the minimum payments DoorDash guaranteed to its drivers. DoorDash moved to compel arbitration of plaintiff's claims.

DoorDash submitted internal documents showing that plaintiff first set up her DoorDash account on November 10, 2016 and created additional accounts on three separate occasions thereafter. When plaintiff signed up for her first account on her phone, she was presented with a screen to enter her personal information followed by a large red "Sign Up" button. Directly below that button was the statement in small gray typeface, "By signing up, you agree to our Terms and Conditions," with the phrase "Terms and Conditions" in red and hyperlinked to the DoorDash Terms and Conditions, which included an arbitration clause.



Plaintiff argued that she did not assent to the Terms and Conditions because DoorDash did not provide her with sufficient notice of those terms. Specifically, plaintiff contended that notice was wanting because the sign-up page's hyperlink to the terms was in the same font size as the surrounding sentence, was not formatted as a button, was not underlined, and was not colored blue.

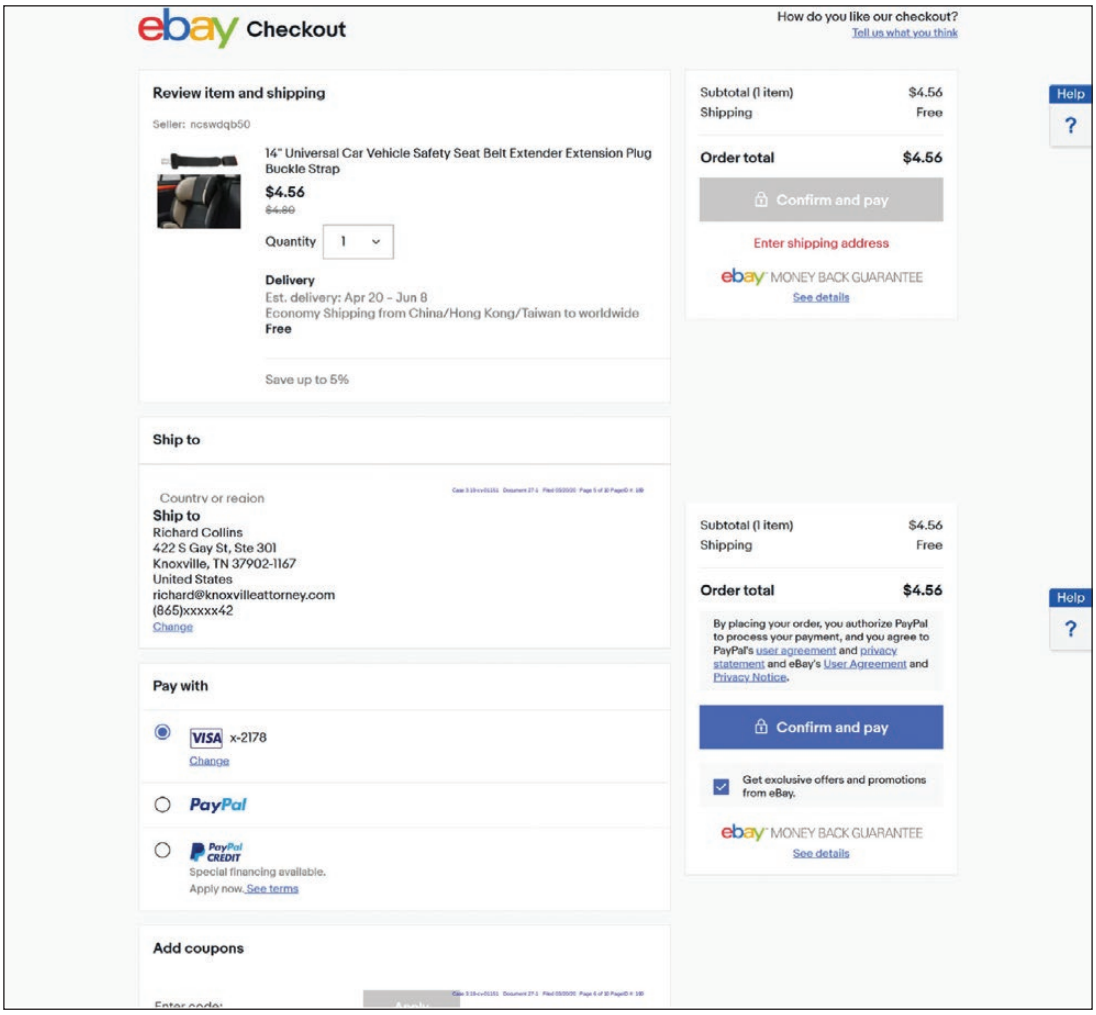
Relying on the district court's recent parallel decision in *Peter v. DoorDash, Inc.*, 445 F. Supp. 3d 580 (N.D.

Cal. 2020) (Tigar, J.), involving DoorDash's sign-in wrap agreement where the court had granted DoorDash's motion to compel arbitration, the court found that the only relevant difference between the two sign-up pages was that the hyperlink here was in red while in *Peter* it was colored blue, which the court found immaterial to the inquiry notice analysis, and thus granted DoorDash's motion to compel. Plaintiff argued that *Arena v. Intuit Inc.*, 444 F. Supp. 3d 1086 (N.D. Cal. 2020), *rev'd and remanded sub nom. Dohrmann v. Intuit, Inc.*, 2020 WL 4601254 (9th Cir. Aug. 11, 2020)—which at the time was still pending appeal and had not yet been reversed by the Ninth Circuit—established that a hyperlink that did not use "the gold standard" of a blue, underlined hyperlink deprived users of inquiry notice. Even without the benefit of the Ninth Circuit's reversal order in that case, the district court found *Arena* distinguishable because that "sign-in page was far more cluttered and confusing than the page at issue here," as the notice and hyperlinks in *Arena* were "in the lightest font on the entire sign-in screen, which contained multiple, confusingly similar hyperlinks that a reasonable user might well find confounding." *Deanda*, No. 19-cv-08305, ECF No 31 at 6 (alterations omitted) (internal quotation marks omitted). By contrast, here, the district court found that DoorDash's sign-in page was "simple and streamlined, containing just two, identically formatted hyperlinks — allowing users to access the T&C or to bypass this process if they already ha[d] an account — plus a sign-up button that [was] also in red." *Id*. The court observed that "[t]he red text of the link pop[ped] out on the page, and unlike in *Arena*, the surrounding text [was] darker than the other text on the page." *Id*. Accordingly, the court held that plaintiff was on inquiry notice of DoorDash's Terms and Conditions and the arbitration clause contained therein.

***Anderson v. Amazon.com, Inc.*, 2020 WL 4586173 (M.D. Tenn. Aug. 10, 2020) (Richardson, J.) (applying Tennessee and Utah law)—**Plaintiffs brought this putative class action against eBay, Amazon, and Walmart, claiming that the companies fraudulently misled consumers regarding the proper usage and safety ratings of seatbelt extenders sold on eBay's website. eBay moved to compel arbitration of the only plaintiff that asserted claims against it (Walmart moved to compel arbitration against a second plaintiff who bought their seatbelt extenders from Walmart, which motion was resolved by the district court in a separate, subsequent order in *Anderson v. Amazon.com, Inc.*, 2020 WL 5797973 (M.D. Tenn. Sept. 29, 2020)). That plaintiff had purchased a seatbelt extender online from eBay, and eBay submitted evidence establishing that the plaintiff had selected the "Buy Now" option, and then made the selection to "Check out as a guest." At the final "**Checkout**" screen, eBay's website provided plaintiff with a notice in black text encircled by a gray textbox that read, "By placing your order, you authorize PayPal to process your payment, as you agree to PayPal's user agreement and privacy statement and eBay's User Agreement and Privacy Notice." Below that notice was a large blue button that said "Confirm and pay" that had to be clicked to complete the purchase. The four policies listed in the notice were underlined and in blue font, and hyperlinked to the relevant policies. eBay's User Agreement, if clicked on, would direct the user to an arbitration agreement. The arbitration agreement included an opt-out provision, providing that new users could reject the arbitration agreement by mailing eBay a written and signed opt-out notice postmarked no later than 30 days after the date of acceptance of the user agreement for the first time, and that procedure was "the only way [users] c[ould] opt out of the Agreement to Arbitrate."

Plaintiff argued that he effectively opted out of the arbitration agreement within the prescribed time period and thus could not be governed by its terms because he filed suit against eBay within 30 days of accepting the agreement, which he claimed constituted substantial performance of the arbitration agreement's opt-out procedure. Plaintiff argued that filing suit constituted effective notice and that failing to send eBay's legal department a signed, physical opt-out notice was a technical defect that the law forgives. The district court disagreed, and observed that the filing of suit against eBay did not provide "much of the information requested through the opt-out procedure" and that "[t]he Arbitration Agreement's unambiguous terms indicate[d] that an individual may only opt out of the Arbitration Agreement by following the prescribed specific steps mentioned above." *Id*. at *6. The district court reasoned that eBay had "bargained for these terms," *i.e.*, it had "bargained not just for some technical mode of receiving opt-out forms, but also for the right essentially to receive notice of opting out *prior* to any lawsuit—prior notice that theoretically could help Defendant eBay avoid the very kind of in-court litigation its Arbitration Agreement was designed to avoid in the first place." *Id*. at *7. Given the specificity of the Arbitration Agreement's opt-out procedure, the court found that the filing of the lawsuit did not constitute substantial performance of the opt-out procedures.

Plaintiff also argued that the arbitration agreement was procedurally unconscionable because no reasonable consumer would give up their right to a jury, to sue eBay in court, or to file a class action suit simply because they clicked a button that said "Confirm and Pay," particularly given that the User Agreement could only be accessed by clicking a separate link. But the district rejected plaintiff's argument. The court observed that federal courts have consistently upheld such clickwrap agreements, and that

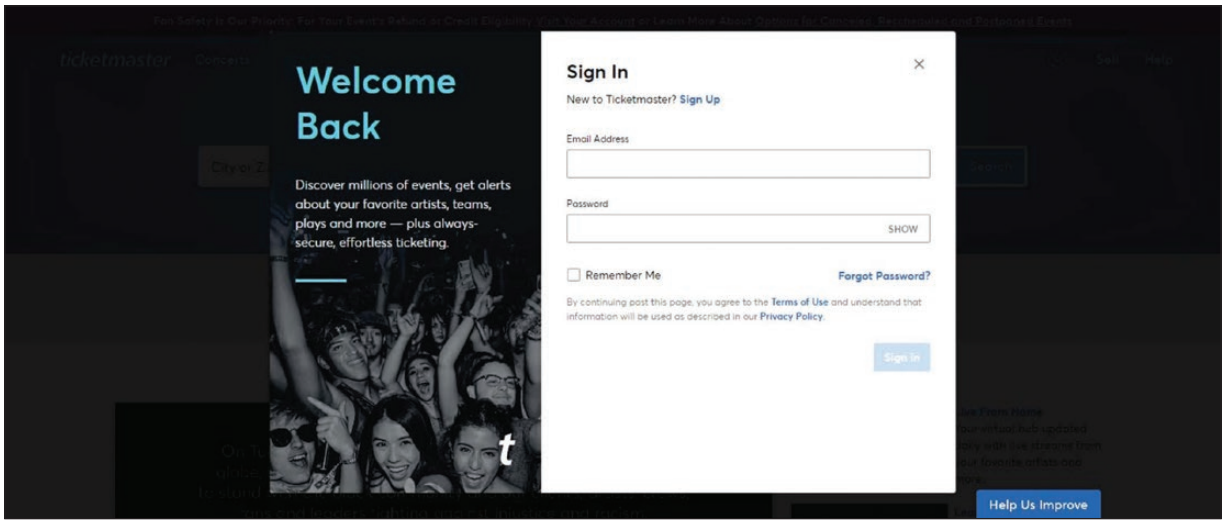


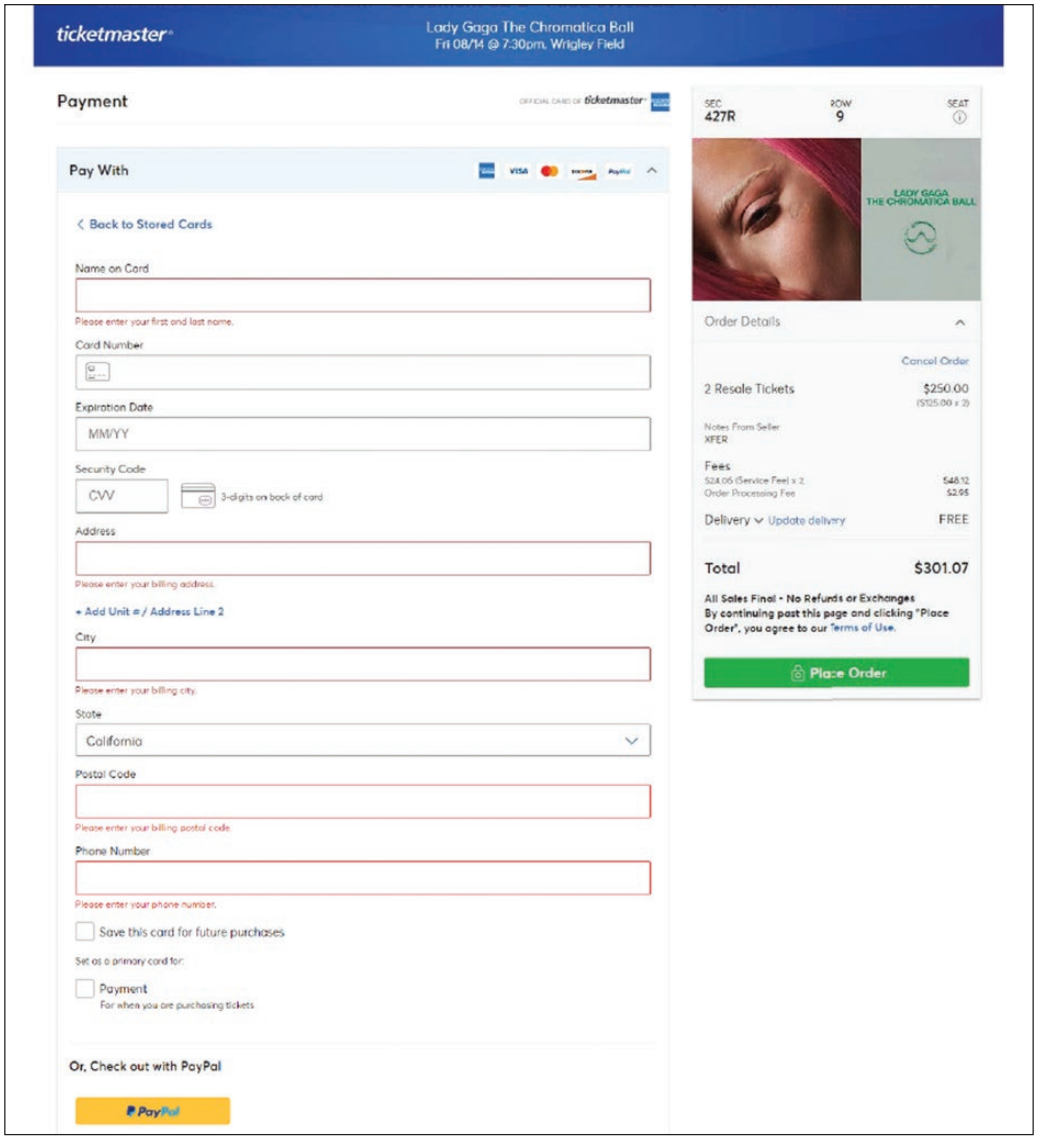
the hyperlink to the User Agreement in this case "was available on the same screen in which [plaintiff] was asked to confirm the agreement, and that, "[i]n one click of a mouse, Plaintiff Cooper would have been able to access the User Agreement and its Arbitration Agreement." *Id.* at *8.

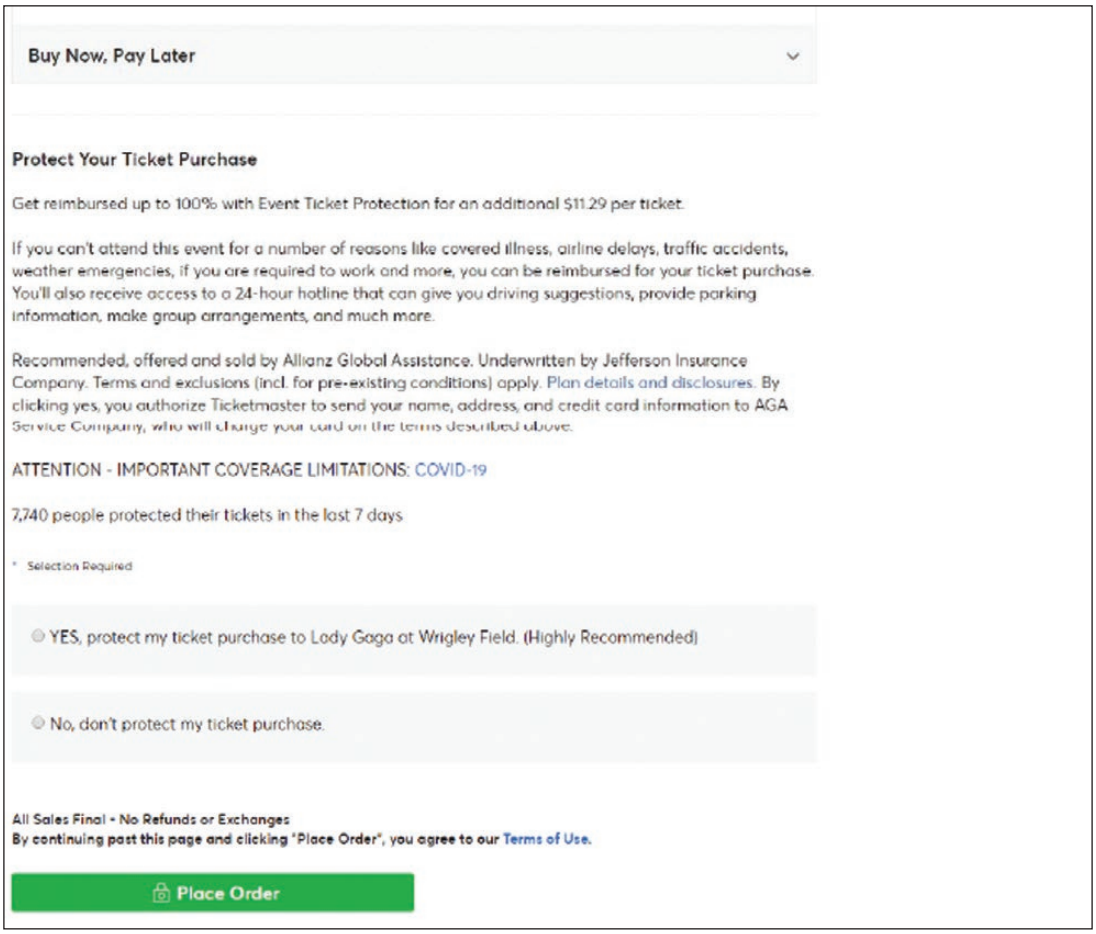
Last, plaintiff maintained that the arbitration agreement was inaccessible to most users because it was located on page 12 of a 17-page, single-spaced, small font document that users were not required to scroll through before acceptance. The district court, however, explained that "information regarding the existence of [that] agreement c[ould] be found in bold font on the first page," and "a party's failure to read a contract he or she signed is not a valid indicator of procedural unconscionability nor a defense to enforcement." *Id.* at *9. The court thus granted eBay's motion to compel arbitration.

***Ajzenman v. Office of the Comm'r of Baseball*, 2020 WL 6031899 (C.D. Cal. Sept. 14, 2020) (Fischer, J.) (applying California law)**—Plaintiffs brought this putative class action against numerous defendants, including Ticketmaster and Major League Baseball, claiming violations of California state law after MLB canceled fan-attended baseball games due to the COVID-19 pandemic, but had not issued any ticket refunds to fans. Ticketmaster moved to compel one of the plaintiff's claims to arbitration who purchased her tickets through Ticketmaster's website.

To make a purchase on Ticketmaster's website, users were required to sign into their account. The sign-in page presented a pop-up screen for users to enter their email address and password and then click a blue "Sign In" button. Immediately above that button, Ticketmaster advised that, "By continuing past this page, you agree to the **Terms of Use** and understand that information will be used as described in our **Privacy Policy**." The phrases "Terms of Use" and "Privacy Policy" were in bolded blue text and hyperlinked to the full policies, the former of which included an arbitration agreement.


Welcome Back
Discover millions of events, get alerts about your favorite artists, teams, plays and more — plus always-secure, effortless ticketing.
Sign In
New to Ticketmaster? Sign Up
Email Address
Password
SHOW
Remember Me
Forgot Password?
By continuing past this page, you agree to the Terms of Use and understand that information will be used as described in our Privacy Policy.
Sign In
Help Us Improve


ticketmaster
Lady Gaga The Chromatica Ball
Fri 08/14 @ 7:30pm, Wrigley Field
Payment
Pay With
Back to Stored Cards
Name on Card
Please enter your first and last name.
Card Number
Expiration Date
MM/YY
Security Code
CVV
3-digits on back of card
Address
Please enter your billing address.
+ Add Unit # / Address Line 2
City
Please enter your billing city.
State
California
Postal Code
Please enter your billing postal code.
Phone Number
Please enter your phone number.
Save this card for future purchases
Set as a primary card for:
Payment
For when you are purchasing tickets
Or, Check out with PayPal
PayPal
SEC 427R
ROW 9
SEAT
LADY GAGA THE CHROMATICA BALL
Order Details
Cancel Order
2 Resale Tickets
$250.00
Notes From Seller
XFER
Fees
Order Processing Fee
$2.95
Delivery
Update delivery
FREE
Total
$301.07
All Sales Final - No Refunds or Exchanges
By continuing past this page and clicking "Place Order", you agree to our Terms of Use.
Place Order



In addition, when purchasing tickets on Ticketmaster's website, users were presented with a Payment screen to enter their payment and personal information before clicking a large green "Place Order" button that appeared twice, in the upper-right-hand side of the Payment screen and again at the bottom of the Payment page. Directly above the button in both locations was a notification in bold font stating that "**All Sales Final - No Refunds or Exchanges[.] By continuing past this page and clicking 'Place Order', you agree to our Terms of Use.**" The phrase "Terms of Use" was in bolded blue text and hyperlinked to the full text of the terms, which included an arbitration clause.

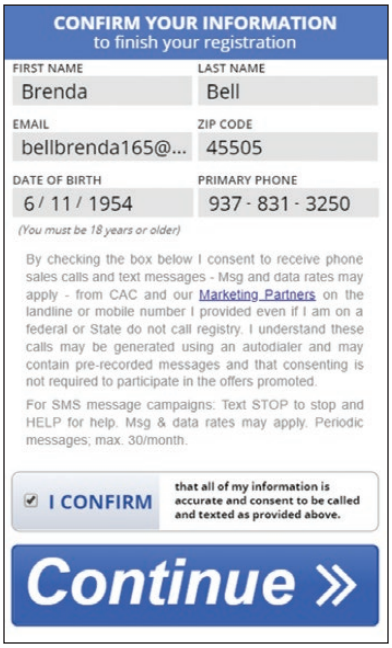
Moreover, at the bottom of numerous pages of the Ticketmaster website, including the website homepage and seat selection page for events, Ticketmaster included a link in white font across the bottom of the page that read: "By continuing past this page, you agree to our **Terms of Use**." The phrase "Terms of Use" was in bold typeface and hyperlinked to the applicable terms.

The district court found that the Ninth Circuit's recent decision in *Lee v. Ticketmaster L.L.C.*, 817 F.App'x 393 (9th Cir. 2020), was instructive and held that plaintiff assented to the arbitration provision. Plaintiff argued that the district court should ignore *Lee* because it was unpublished, non-precedential, and did not address identical webpages to those presented to plaintiff. But the district court found this argument "unpersuasive," noting that *Lee* was still "guidance . . . provided" by the Ninth Circuit on the issue, and "though the pages differ[ed] slightly, the Ticketmaster sign-in and purchase pages filed in *Lee* [were] almost identical to those here," as "[a]ll use[d] the same or similar language and present[ed] 'Terms of Use' in text that [was] blue and hyperlink[ed] to the full Terms of Use." *Ajzenman*, 2020 WL 6031899, at *4.

***Bell v. Royal Seas Cruises, Inc.*, 2020 WL 5639947 (S.D. Fla. Sept. 21, 2020) (Ruiz, J.) (applying Florida law)**—Plaintiff filed a putative class action, alleging violations of the Telephone Consumer Protection Act after receiving several telemarketing calls from Royal Seas Cruises. Royal Seas Cruises moved to compel plaintiff's claims to arbitration, arguing that plaintiff had agreed to an arbitration provision governing the dispute.

Royal Seas Cruises submitted an affidavit in support of its motion to compel arbitration, showing that plaintiff visited Royal Seas Cruises' website on September 11, 2018 at 11:09 a.m. eastern where she provided her personal information on the website's registration page and clicked on a large green "Continue >>" button. Immediately above that button was a notice stating in black boldface, "**I understand and agree to email marketing, the Terms & Conditions which includes mandatory arbitration and Privacy Policy**." The phrases "Terms & Conditions" and "Privacy Policy" were both underlined and hyperlinked to the applicable terms, the former of which included an arbitration agreement.

After a user clicked on the "Continue >>" button, they were asked to confirm their personal information and complete their registration by checking a box next to a statement that "**I CONFIRM that all of my information is accurate and consent to be called and texted as provided above**," which appeared immediately above a large blue "Continue >>" button.



In a declaration submitted in opposition to Royal's motion, plaintiff denied that she ever visited the website prior to the filing of the motion to compel arbitration and claimed she never authorized anyone to visit the site on her behalf.

Applying Florida law, the district court found inquiry notice based on the Florida District Court of Appeal's decision in *MetroPCS Communications, Inc. v. Porter*, 273 So. 3d 1025 (Fla. Dist. Ct. App. 2018), which explained that browsewrap agreements, such as Royal Seas Cruises', are enforceable only "when the purchaser has actual knowledge of the terms and conditions, or when the hyperlink to the terms and conditions is conspicuous enough to put a reasonably prudent person on inquiry notice," *id.* at 1028, and do "not require an explicit statement informing the user that his use of the service, or any other act on behalf of the user, would constitute acceptance and render the agreement enforceable," *Bell*, 2020 WL 5639947, at *5. The district court found that, while plaintiff claimed she had no actual knowledge of Royal Seas Cruises' terms and conditions, the website's design with the hyperlink to the terms and conditions was sufficiently conspicuous to provide inquiry notice. The court observed that "[t]he sentence regarding the applicability of the Terms and Conditions . . . include[d] a hyperlink to the Terms and Conditions and [was] placed directly above the 'Continue' button that any user must click to proceed with using the website." *Id.* at *6. The district court further noted that, "[b]ecause it [was] nearly impossible that any user would not see" the statement that "**I understand and agree to email marketing, the Terms & Conditions which includes mandatory arbitration and Privacy Policy**" "before hitting 'Continue,' this design [was] a far cry far from those wherein the hyperlink to the terms and conditions is buried at the bottom of the page, and the website never directs the user to review them." *Id.* (internal quotation marks omitted). The court further found that "a reasonable person would understand that by clicking 'Continue' directly under a sentence that begins 'I understand and agree[,] . . .' the user [was] assenting to the statements or conditions that follow," and that "[t]he affirmative act of clicking the 'Continue' button present[ed] at least as much, if not more, compelling evidence of assent than that which was present in *MetroPCS*, where the court held that the appellee's mere continued use of the company's services after receiving the text messages with the hyperlinked terms and conditions constituted assent." *Id.* (internal quotation marks omitted).

Although the district court concluded that the hyperlink to the terms and conditions was conspicuous enough to put a reasonably prudent user on inquiry notice of the Terms and Conditions, and that a user's clicking "Continue" was sufficient to constitute assent to the Terms and Conditions, the court found that a

factual question remained regarding whether plaintiff or someone authorized by plaintiff actually visited the website in question and clicked the "Continue" button on September 11, 2018. Accordingly the district court ordered a bench trial to be held on this narrow question pursuant to 9 U.S.C. § 4.