16-2750(L)

16-2752(CON)

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 16-2750(L), 16-2752(CON)

SPENCER MEYER, Individually and on behalf of those similarly situated,

Plaintiff-Counter-Defendant - Appellee,

—v.—

UBER TECHNOLOGIES, INC.,

Defendant-Counter-Claimant - Appellant,

TRAVIS KALANICK,

Defendant-Appellant,

ERGO,

Third-Party Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-COUNTER-DEFENDANT - APPELLEE

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Preliminary Statement

Plaintiff Spencer Meyer ("Plaintiff") respectfully requests that this Court affirm the order of the United States District Court for the Southern District of New York (Hon. Jed S. Rakoff, J.), which denied motions by defendants Uber Technologies, Inc. ("Uber") and its co-founder and CEO, Travis Kalanick ("Kalanick," collectively with Uber, "Defendants") to compel arbitration. As the district court properly found, Plaintiff never assented to an arbitration agreement with Uber through Uber's smartphone registration interface. (AA488).[1]

Plaintiff filed this putative antitrust class action alleging that Kalanick orchestrated a price-fixing conspiracy among Uber drivers; Uber was later joined as a necessary party. Defendants initially decided not to attempt to assert a right to arbitration—and so advised the district court—but, after the district court held that Plaintiff stated legally sufficient federal and state

[1] Citations to "AA__" refer to the appendix submitted by Defendants; citations to "SPA__" refer to the Special Appendix submitted by Defendants; citations to "SA__" refer to the Supplemental Appendix submitted by Plaintiff; citations to "Br. at __" refer to Defendants-Appellants' Opening Brief; citations to "Chamber Br. at __" refer to the brief of amicus curiae the Chamber of Commerce; and citations to "IACTA Br. at __" refer to the brief of amici curiae the Internet Association and the Consumer Technology Association.

antitrust claims, and after facing sanctions for defense-side misconduct, Defendants filed motions to compel arbitration. Defendants premised their motions on small text and a hyperlink displayed on one of Uber's registration screens. The district court denied the motions, finding that the display was not reasonably conspicuous and did not permit a user to manifest unambiguous assent to Uber's terms.

The district court properly denied Defendants' motions. Applying well-established California contract law and Second Circuit precedent, the court concluded that the small and relatively obscure text on Uber's payment screen did not provide reasonably conspicuous notice to Plaintiff that he was agreeing to contractual terms merely by entering his payment information and pressing a "Register" button. Just three months ago, in *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016), this Court reiterated its skepticism that such screens could bind users to arbitration and overturned a district court's conclusion to the contrary. Here, in keeping with *Nicosia*, the district court permissibly found, among other findings, that the key words were in much smaller font and not in any way highlighted, that the terms-of-service hyperlink was not in close proximity to the register button, and that there was no "I agree" button or any other aspect of the screen design from which to find an unambiguous manifestation of assent. This

Court must defer to these findings, which are entirely reasonable and far from clearly erroneous.

The district court's order should be affirmed.

Jurisdictional Statement

The district court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331, 1332, 1337, and 1367, as well as 15 U.S.C. § 4. This Court has appellate jurisdiction under 9 U.S.C. § 16(a)(1)(B).[2]

Issue Presented for Review

Whether the district court's finding that Plaintiff never assented to an arbitration agreement through the Uber App was free of clear error.

Statement of the Case

On December 16, 2015, Plaintiff filed a putative class action against Kalanick, alleging that Kalanick orchestrated a price-fixing conspiracy with Uber drivers in violation of the antitrust laws. (AA1, 23). On January 29, 2016, Plaintiff amended his complaint. (AA9, 43). On February 8, 2016, Kalanick moved to dismiss. (AA9, 97 n.10). The district court denied that

[2] Defendants mistakenly cite 9 U.S.C. § 16(a)(1)(C) as the basis for this Court's jurisdiction. (Br. at 1). That section is inapplicable as it provides solely for jurisdiction over appeals of motions to compel arbitration under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards under 9 U.S.C. § 206. *See* 9 U.S.C. §§ 201-206.

motion on March 31, 2016 (AA10, SA40-62), in an opinion reported at 174 F. Supp. 3d 817 (S.D.N.Y. 2016), and then denied a motion to reconsider on May 7, 2016 (AA11, SA88-108).

Uber joined the suit as a necessary party by order dated June 19, 2016. (AA15-16, 276). Kalanick and Uber moved to compel arbitration by motions dated June 7, 2016 (AA14, SA109), and June 21, 2016 (AA16, SA111), respectively. The district court denied the motions to compel in an opinion and order dated July 29, 2016. (AA20, 460-89).

On August 5, 2016, Defendants filed notices of interlocutory appeals from the district court's July 29, 2016 order. (AA20, 569-74). By opinion and order dated August 26, 2016, the district court entered a stay pending appeal. (AA22, 561-68). This Court expedited consideration of this consolidated appeal by order dated September 21, 2016. (2d Cir. ECF Dkt. No. 85).

Statement of Facts

A. Plaintiff's Registration on the Uber App

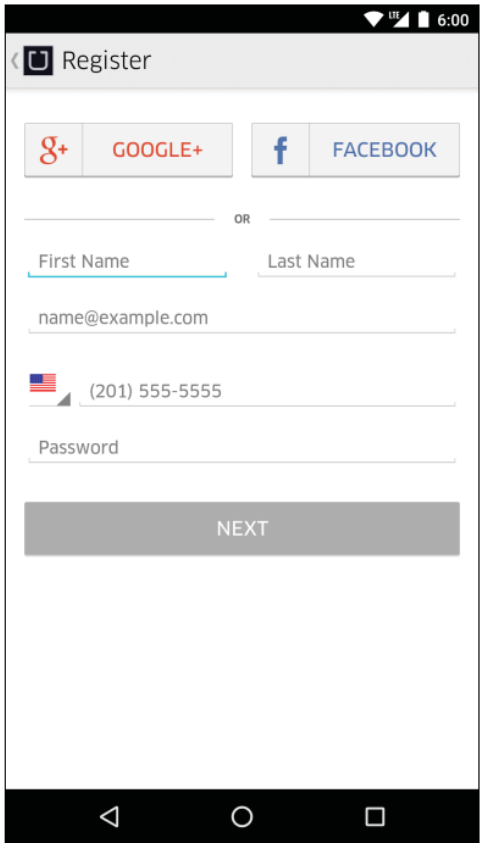
In October 2014, Plaintiff registered for the Uber App using his Samsung Galaxy S5 smartphone running the Android operating system. (AA314; AA320). Plaintiff provided Uber his credit card information and

believes he pressed a "REGISTER" button (AA320), as Uber claims would have been required for him to use the App (AA316).

There is no evidence that Plaintiff ever noticed any contract terms relating to the App or any hyperlink to Uber's terms of service. (AA320). Plaintiff never read any such terms. (*Id.*). Nor did he take any action meant to indicate that he accepted them. (*Id.*). There is no evidence that Plaintiff was otherwise aware of any proposed agreement to arbitrate with Uber. (*Id.*).

There is likewise no evidence as to exactly what screen Plaintiff would have encountered when he registered for the Uber App. Rather than proffering such evidence, an Uber senior software engineer provided the district court with a purported snapshot of the "account registration process" for unspecified "Uber users who register using an Android-operating smartphone." (AA315). No witness averred that the proffered screenshot reflected what Plaintiff would have seen when registering with Uber. (*Id.*).

The proffered screenshots were part of Uber's self-described "simple, two-step process," comprised of two separate screens. (AA315-16). According to Uber, the first screen appeared as follows:

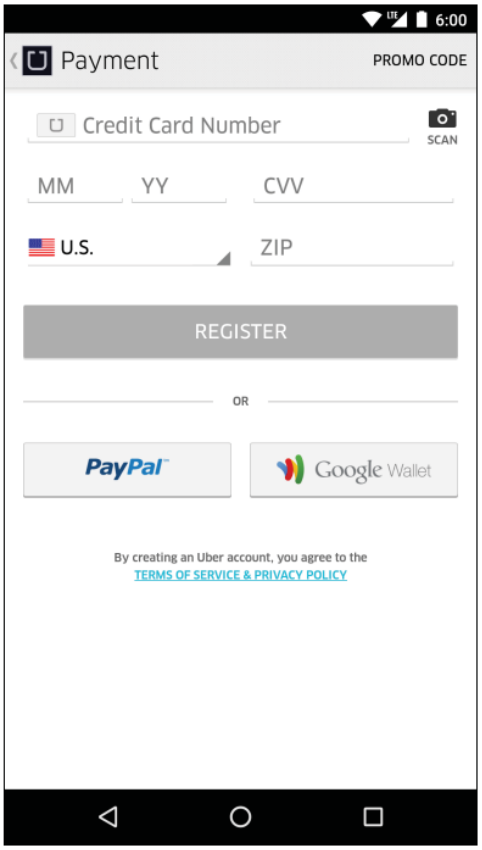


(*Id.*)[3]

This first screen was titled "Register," but contained no purported contract terms or any links to any such terms. (AA318). The screen simply required a user to enter his or her name, email address, mobile phone number, and password into underlined fields, and then to press a prominent button marked "NEXT" to proceed. (*Id.*). Each of the buttons on this first screen featured contrasting colors. (*Id.*). The buttons and fields were easy to read. (*Id.*).

[3] Both screen images reproduced here are in the size they would have appeared on a Samsung Galaxy S5 5.1-inch touchscreen. (A560).

After pressing "NEXT," the user would be taken to a second screen (AA315), which, according to Uber, appeared as follows:



(AA319).

This second screen did not have a title reflecting that the screen required the user to accept any contract terms. Instead, the second screen was titled "Payment." (*Id.*) Consistent with that title, the screen required the user to enter payment information. (AA315-16). The user could do so either by typing in credit card information or by pressing "PayPal" or "Google Wallet" buttons. (AA319). The screen prompted users to press a large "REGISTER" button after entering payment information. (*Id.*).

As with the first screen, most of the text and buttons on the second screen were likewise easy to see. (AA319). The screen featured several underlined credit card fields near the top, into which a user could key information. (AA315, 319). A "REGISTER" button appeared prominently near the middle of the screen in white text on a dark gray contrast, similar to the "NEXT" button on the prior screen. (AA319). The screen featured two more buttons, both also displayed in contrast: a two-toned blue large font "PayPal" text on a light gray button, and a multi-color "Google Wallet" icon with text on a similar light gray button. (*Id.*). Both buttons also contained highlighting shadows. (*Id.*).

Below all of these buttons, this second screen contained text smaller than found anywhere else on the two screens. That small text purported to create an agreement between the user and Uber, declaring: "By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY." (*Id.*). Unlike the larger-font user information and credit card fields on either screen, this smaller-font contractual language was neither near the top of the screens nor form-fillable, nor was it necessary for a user to key through before moving to the next screen. (*Id.*). And, unlike any of the prominent buttons on the two screens, this language lacked any button outline, any gray contrast, or any shadowing. (*Id.*).

Instead, this key language appeared in the smallest font of any text on either screen. (*Id.*). The phrase "TERMS OF SERVICE & PRIVACY POLICY" appeared as a hyperlink. (*Id.*). According to Uber, that hyperlink would lead a user to terms and conditions including an agreement to arbitrate. (AA316). The hyperlink was underlined and blue. (AA319). But the text that Uber claims created an agreement—"By creating an Uber account, you agree"—was not highlighted in any manner. (*Id.*). That key phrase was in plain roman font, smaller than any other text, and without any coloring or contrast. (*Id.*).

This purported contractual language did not match any option presented to the user. The language read, "[b]y creating an Uber account," but the user was never permitted to select any option entitled "create an Uber account." (*Id.*). There was no such button. (*Id.*). Rather, the user would have completed the "Payment" page by entering payment information and clicking the prominent "REGISTER" button in the center of the page. (*Id.*).

The "you agree" language was also well below the last operative button on the screen for users, like Plaintiff (AA320), who submitted credit card information. (AA319). Such users would come to, and press, the large "REGISTER" button immediately below the credit card fields and be taken to the next screen. (AA316). The small, non-contrasting "you agree"

language and hyperlink would have appeared well below those buttons. (AA319). In fact, only if the user first looked two levels below the "REGISTER" button, past an "or" and then past two large "PayPal" and "Google Wallet" buttons, would the user see the small text with the "you agree" language and hyperlink. (*Id.*). Yet there was no need for a user to look these two levels below the "REGISTER" button because pressing that button was the final action required. (AA316, 319).

There was no evidence that Plaintiff ever noticed the small roman text reading, "By creating an Uber account, you agree," or the hyperlink that followed. (AA320-21).

B. Plaintiff's Complaint

Plaintiff used the Uber App on multiple occasions to arrange for transportation in New York City and elsewhere. (AA45). In December 2015, he filed a civil antitrust action against Kalanick, Uber's CEO and co-founder, alleging that "Kalanick designed Uber to be a price fixer." (AA23). The complaint, which was later amended, stated legally sufficient claims against Kalanick for unlawful horizontal and vertical price-fixing, as the district court concluded. (SA40-62). Plaintiff sued on behalf of himself and a putative nationwide class of other Uber users, seeking injunctive and monetary relief. (AA43).

The complaint had included a vague reference to "Uber's terms and conditions." (AA48). Although the complaint nowhere incorporated or relied on the "terms of service" and never alleged that Plaintiff personally agreed to those terms, the complaint had included the statement that "[t]o become an Uber account holder, an individual first must agree to Uber's terms and conditions." (*Id.*). This statement did not reference any particular period, device, operating system, or person—certainly not Plaintiff—and the complaint nowhere cited any term within Uber's terms of service. (AA48-49). With the Court's leave, Plaintiff later amended the complaint, by oral stipulation, to delete this allegation. (AA433-46; SPA9-10).

C. Defendants' Motions to Compel Arbitration

By motions dated June 7, 2016, and June 21, 2016, Defendants moved to compel arbitration. (SA109; SA111). These motions came only after Kalanick had lost a motion to dismiss (SA40-62) and had engaged in merits discovery (AA10, AA338-383), and only after Defendants were forced to respond to extensive judicial inquiries, comply with substantial additional discovery, and engage in significant motion practice regarding "fraudulent and arguably criminal" misconduct that Uber had commissioned (SA130-60).

Defendants' motions to compel arbitration represented a reversal of their earlier litigation strategy.[4] Originally, in moving to dismiss the case, Kalanick challenged only Plaintiff's right to bring a class action (SA34-38; AA96-100) while reserving only a challenge to Plaintiff's right to a jury trial (SA7). And Kalanick repeatedly and expressly informed the district court that he would not move to compel arbitration. He wrote that he did "not seek to enforce the arbitration agreement here," with the only caveat being he would "not waive and expressly reserves his right to move to compel arbitration *in other cases*." (SA34 n.9 (emphasis added); *see also* AA97 n.10). Defense counsel characterized this as a "decision not to invoke its right to arbitration." (SA80).

Changing course after significant litigation setbacks (*see, e.g.*, SA40-62; SA130-160), Defendants moved for an order compelling arbitration (SA109; SA111). Plaintiff opposed the motions, arguing that no arbitration

[4] The district court concluded, after examining Kalanick's and Uber's lawyers, that Defendants had developed litigation strategy jointly from the outset of the case. (AA430 ("[T]here's no question that there was close cooperation between Uber and Mr. Kalanick at all stages of this litigation. It could hardly be otherwise.")).

agreement had been formed.[5] The parties agreed that it was the role of the district court to "find" whether Plaintiff "did enter into an agreement." (AA416-17).

As support for such a finding, Defendants compiled an evidentiary record comprised primarily of declarations, exhibits, and arguments. (AA314-19, 338-83). Uber specifically asked the district court to rule on the basis of Defendants' declarations "and all exhibits thereto, all documents in the Court's file, any matters of which the Court may take judicial notice, and any evidence or arguments presented." (SA111). In addition, Defendants presented demonstrative evidence to the district court, seeking to compare and contrast Uber's screens to other screen layouts. (AA407-10).

Defendants did not seek to submit any further evidence or testimony. They did not seek an evidentiary hearing, even after a colloquy with the district court in which Defendants recognized they had that option. (AA410 (Uber acknowledging that it could have an evidentiary hearing on formation

[5] Plaintiff also argued that Defendants had waived any right to arbitrate through their litigation conduct, an issue not decided below. (SPA29; *but see* SA9 (noting "no motion to compel has been made" "and, as noted, appears to have been effectively relinquished"); SA7 n.3).

questions)).[6] Instead, Defendants submitted that the existing record "established that arbitration is compelled." (AA446). Plaintiff argued Defendants had not met that burden. (AA436-44).

D. The District Court's Relevant Decisions

The district court issued two decisions addressing Defendants' motions to compel: a July 29, 2016 opinion and order denying the motions and an August 26, 2016 opinion and order staying the case pending appeal.

1. The District Court's July 29, 2016 Decision Denying the Motions to Compel

In a 31-page opinion issued on July 29, 2016, the district court denied Defendants' motions to compel arbitration. (SPA1). The district court held that Defendants had failed to prove contract formation and therefore could not enforce any arbitration agreement against Plaintiff. (SPA29). Because the motion was "resolved by the threshold question of whether plaintiff actually formed any agreement to arbitrate," the district court did not reach questions regarding the enforceability of any such agreement, including whether Defendants had waived enforcement. (SPA5-6, 29).

[6] At the same appearance, the Court examined two witnesses on a separate issue. (SA120-28).

The district court held that California contract law, amplified by this Court's precedent, governed its analysis of whether a contract had been formed. (SPA6-9, 18). As an initial matter, the district court noted the tension between the presumption against waiving jury rights and the presumption in favor of arbitration, as well as the "legal fiction" by which "ordinary customers are deemed to have regularly waived th[eir jury] right . . . because they have supposedly agreed to lengthy 'terms and conditions' that they had no realistic power to negotiate or contest and often were not even aware of." (SPA1). But the court recognized the law nevertheless often binds unsuspecting consumers to arbitration clauses when they "press[] a button." (SPA2).

To determine whether Plaintiff too was bound when he pressed the "Register" button, the district court explained that it needed to engage in a "'fact-intensive inquiry.'" (SPA25 (quoting *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1034-35 (7th Cir. 2016) (Wood, C.J.)). Judge Rakoff concluded that the appropriate test for assessing formation, under either California or Second Circuit law, is "whether plaintiff Meyer had [1] '[r]easonably conspicuous notice of the existence of contract terms and [2] unambiguous manifestation of assent to those terms.'" (SPA19 (quoting

Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 35 (2d Cir. 2002)). The district court found that the screen at issue failed both parts of the test.

First, the district court found no reasonably conspicuous notice. (SPA29). The court found that the words, "By creating an Uber account, you agree to the Terms of Service & Privacy Policy" were "in considerably smaller font" than other words and buttons on the same screen. (SPA12). The court also found that these "key words . . . are not in any way highlighted and, indeed are barely legible," "in approximately 6-point font" or "even smaller."[7] (SPA12 & n.5; *see also* SPA18). Judge Rakoff likewise found that the hyperlink that followed these key words was "by no means prominently displayed," noting that it "appears far below and in much smaller font" than the "very user-friendly and obvious" "payment information and 'Register' button." (SPA23 (quotation marks omitted)).

The district court contrasted the "considerably more obscure presentation" in this case to other designs. (SPA19-21). For example, a separate Uber interface more conspicuously placed the phrase "Terms of

[7] The district court had to scale down the image provided by Defendants because they magnified the image before submitting it to the court. (SPA11). Defendants conceded that their submission was oversized and later submitted a properly sized image. (*Compare* AA319 *with* AA560).

Service & Privacy Policy" in "bold white lettering on a black background, in a size similar to, if not larger than, the size of the . . . button that users clicked in order to register." (SPA20). Here, that phrase was "much smaller and more obscure, both in absolute terms and relative to the 'Register' button." (SPA21). Moreover, here, Uber placed the relevant text *below* any buttons users needed to press to operate the screen, rather than *over* those buttons, where such text would have been "more likely to disrupt the viewers' experiences in some way and draw their attention to the terms and conditions." (SPA24). The district court found that the key words consequently took "on the appearance of an afterthought." (*Id.*).

This evidence permitted the court to infer "that the creators of Uber's registration screen hoped that the eye would be drawn seamlessly to the credit card information and register buttons instead of being distracted by the formalities in the language below." (SPA25-26; *see also* SPA29 (stating interface was "designed to encourage users to overlook contractual terms")). The district court found that such distraction was "the reasonably foreseeable result" of Uber's design. (SPA26).

The district court ultimately found that "the Uber registration screen . . . did not adequately call users' attention to the existence of Terms of Service" because the hyperlink's "placement, color, size and other qualities

relative to the Uber app registration screen's overall design is simply too inconspicuous to meet the *Specht* standard" and because "the key words, 'By creating an Uber account, you agree to' are even more inconspicuous." (SPA25-26 (quotation marks omitted)).

Second, the district court found that Plaintiff did not unambiguously manifest assent to Uber's terms of service. (SPA25). Rather, the district court found Uber's design created ambiguity because Plaintiff "could sign up for Uber by clicking on the 'Register' button without explicitly indicating his assent to the terms and conditions that included the arbitration provision." (SPA17; *see also* SPA20).[8]

The district court again contrasted Uber's screen with other designs. (SPA17-18, 22-23). The court found that Plaintiff was "clearly" not presented with "a clickwrap agreement" (SPA17)—in contrast to the "Yes, I agree" button Uber had used with drivers (SPA19-20)—because Plaintiff

[8] The district court also found that the wording of the hyperlink was ambiguous: "The Court cannot simply assume that the reasonable (non-lawyer) smartphone user is aware of the likely contents of 'Terms of Service,' especially when that phrase is placed directly alongside 'Privacy Policy.'" (SPA26). The court found that, in this context, a "reasonable user might be forgiven for assuming that 'Terms of Service' refers to a description of the types of services that Uber intends to provide," rather than contractual terms. (*Id.*).

"did not need to affirmatively click any box saying that he agreed to Uber's 'Terms of Service'" (SPA17; *see also* SPA22). Nor did "the license terms in the instant case appear on the screen in view of the user." (SPA23). The district court concluded that Uber's registration screen thus allowed users to believe that they could press "Register" without adopting particular terms. (SPA27). The district court therefore found a lack of unambiguous assent.

Based on these findings, the district court concluded that Plaintiff never agreed to the terms of service and thus never agreed to arbitration. (SPA3).[9] Accordingly, it denied the motions to compel.

2. The District Court's August 26, 2016 Decision Staying the Case Pending Appeal

On August 26, 2016, the district court granted a joint motion by Defendants to stay the litigation pending appeal. (AA567). In moving for a stay, Defendants argued primarily that the district court had improperly indulged in a presumption against the existence of an arbitration agreement. (AA531-32). The district court observed, however, that this contention was

[9] At Plaintiff's request, the court deemed the complaint amended to excise paragraph 29 and noted that, in any event, that paragraph was not a concession that Plaintiff had agreed to arbitrate. (SPA10; *see also* SPA9 ("defendants read this statement out of context, as the statement does not specifically reference the plaintiff")).

"materially premised on mischaracterizations of the [underlying] Order's holding." (AA563). Judge Rakoff clarified that, while he "had noted the tension between the standard for waiver of a constitutional right and the presumption in favor of arbitration, the Court nonetheless acceded to, and applied, that presumption in reaching its decision." (*Id.*).[10] Notwithstanding that presumption in favor of arbitration, however, the district court had concluded that Plaintiff could not be required to arbitrate because no contract had been formed under *Specht*'s test of (1) reasonably conspicuous notice and (2) an unambiguous manifestation of assent. (*Id.*).

Summary of Argument

The district court properly denied Defendants' motions to compel. There is no merit to Defendants' lead argument, which wrongly charges that the district court "flout[ed] Supreme Court precedent regarding arbitration." (Br. at 18). The district court did no such thing, and Defendants never even acknowledge the district court's stay opinion, which fully refuted this unwarranted charge. *See infra* Point I.A.

[10] The district court also reiterated that it had "found that plaintiff was not on inquiry notice of the *entire* User Agreement, '*including* its arbitration clause.'" (AA564 (emphases in original)).

The district court faithfully applied California law and this Court's precedents, which bind users to terms presented online only when such terms are reasonably conspicuous and there are unambiguous manifestations of assent, as with so-called "clickwrap" designs. This Court has never upheld a non-clickwrap interface like Uber's and has expressed deep skepticism of such designs. *See infra* Point I.B.

Ultimately, as this Court recently held in *Nicosia v. Amazon.com, Inc.*, mutual assent is a question of fact. This Court should defer to the district court's well-supported findings that Uber's contractual language was not reasonably conspicuous and did not provide a means for unambiguous assent. The district court's findings mirrored the *Nicosia* court's observations, which questioned the sufficiency of non-clickwrap interfaces, like Uber's here. Defendants identify no clear error in those findings. *See infra* Point I.C. Indeed, in light of the clickwrap alternatives available to Uber—as well as Defendants' failure to establish a foundational basis for their motion—denial of their motion was compelled as a matter of law. *See infra* Point I.D.

Finally, Defendants' request that this Court instruct the district court to compel arbitration directly conflicts with this Court's holding in *Nicosia* and finds no support in any other precedent of this Court. *See infra* Point

II.A. If the Court disagrees with the ruling below, the only appropriate decree would be a remand to the district court for additional factfinding on formation and for consideration of Plaintiff's other grounds for denying the motions to compel. *See infra* Point II.A-B.

ARGUMENT

Standard of Review

This Court reviews the district court's legal conclusions, such as its interpretation of state contract law, *de novo*. *Nicosia*, 834 F.3d at 230; *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 26 (2d Cir. 2003). (*Accord* Br. at 12-13). "The findings upon which that conclusion is based, however, are factual and thus may not be overturned unless clearly erroneous." *Specht*, 306 F.3d at 26; *see also Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 119 n.7 (2d Cir. 2012); *Cont'l Ins. Co. v. Polish Steamship Co.*, 346 F.3d 281, 282 (2d Cir. 2003); *Chelsea Square Textiles v. Bombay Dyeing & Mfg.*, 189 F.3d 289, 295 (2d Cir. 1999).

This Court must defer to such factual findings absent clear error. Clear error exists only when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Tho Dinh Tran v. Alphonse Hotel Corp.*, 281 F.3d 23, 31 (2d Cir. 2002) (quotation marks omitted). It is the factfinder's role to "exercise

common sense" to draw "such reasonable inferences as would be justified in light of [his] experience." 4-75 Modern Federal Jury Instructions-Civil § 75-1. (2016). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985); *Siewe v. Gonzales*, 480 F.3d 160, 167 (2d Cir. 2007); *see also MHany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 608 (2d Cir. 2016) (deeming this "a bedrock principle"). "[A] reviewing court must defer to that choice so long as the deductions are not 'illogical or implausible.'" *Siewe*, 480 F.3d at 167 (quoting *Anderson*, 470 U.S. at 577).

"[T]he fact that this Court might have drawn one inference does not entitle it to overturn the trial court's choice of the other." *Healey v. Chelsea Res., Ltd.*, 947 F.2d 611, 618 (2d Cir. 1991). Otherwise, this Court would "usurp the district court's position as finder of fact." *United States v. Santos*, 403 F.3d 1120, 1128 (2d Cir. 2005).

POINT I

THE DISTRICT COURT PROPERLY DENIED DEFENDANTS' MOTIONS TO COMPEL ARBITRATION.

A. The District Court Properly Applied State Contract Law Without Employing A Presumption Against Arbitration.

Defendants' primary argument is the erroneous charge that the district court "indulged in every presumption against arbitration" in its July 29, 2016 opinion. (Br. at 15). As the district court made clear, however, it did nothing of the sort. In its August 26, 2016 opinion granting a stay, the court observed that Defendants' points were "materially premised on mischaracterizations" and "an inaccurate account of the Court's holding." (AA563). The district court explicitly applied "the presumption in favor of arbitration" in "reaching its decision." (*Id.*). And it "nevertheless found that plaintiff could not be compelled to arbitrate because, under established Second Circuit precedent, 'he did not have reasonably conspicuous notice of Uber's User Agreement, including its arbitration clause, or evince unambiguous manifestation of assent to those terms.'" (*Id.* (quoting Opinion July 29, 2016 (SPA25)).[11]

[11] The district court also clarified that, contrary to Defendants' interpretation (Br. at 16-17), it did not rest its findings on how and where the arbitration clause appeared within the terms of service but, instead, relied on

[Footnote continued on next page]

The district court's own description of its approach conclusively refutes Defendants' lead argument. *Cf. United States v. Nichols*, 56 F.3d 403, 411 (2d Cir. 1995) ("Here, the district court simply clarified that its finding . . . did not depend on the allocation of the burden of proof, thereby aiding this court in avoiding . . . a possible remand, the outcome of which would be a foregone conclusion. . . . [This] was a permissible act in aid of this appeal.").

Defendants ignore the district court's stated rationale for its decision altogether and grossly misread the district court's July 29 opinion. It is true that the court's opinion contrasted the typical presumption against jury waiver with the FAA's presumption in favor of arbitration. (SPA1-2). But the opinion recognized that the FAA "routinely forced" consumers to submit to arbitration. (SPA2). And the court properly explained that its task was to ascertain the existence of an arbitration agreement in accordance with the principles stated in *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002). (SPA2-30). There was thus no ambiguity as to the standard the court was applying. And even if there had been, this Court still would

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[Footnote continued from previous page]

the wholesale absence of mutual assent to any part of the terms of service. (AA563).

not "attribute to the district court [a position] that is directly contrary to well-established and oft-repeated circuit precedent," as Defendants do. *Legnani v. Alitalia Linee Aeree Italiane, SpA*, 400 F.3d 139, 142 n.2 (2d Cir. 2005).

Defendants' arguments are further misplaced because the presumption in favor of arbitration is not—as they would have it—a thumb on the scales when a court weighs whether facts establish contract formation. "Arbitration under the [Federal Arbitration Act] is a matter of consent." *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989). The FAA "make[s] arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n.12 (1967). Thus, "while § 2 of the FAA preempts state law that treats arbitration agreements differently from other contracts, it also preserves general principles of state contract law as rules of decision on whether parties have entered into an agreement to arbitrate." *Chelsea Square Textiles*, 189 F.3d at 295-96 (quotation marks omitted). "The Act places arbitration agreements upon the same footing as other contracts," but "it does not require parties to arbitrate when they have not agreed to do so." *Schnabel*, 697 F.3d at 118. "The threshold question facing any court considering a motion to compel arbitration is therefore whether the parties have indeed agreed to arbitrate." *Id.*; *see also Volt Info. Scis.*, 489 U.S. at

478; *AT&T Techs. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986); *Specht*, 306 F.3d at 26 ("It is well settled that a court may not compel arbitration until it has resolved the question of the very existence of the contract embodying the arbitration clause.") (internal citations omitted).

Courts thus do *not* approach the threshold question of formation—whether the parties reached an agreement—by applying a presumption in favor of arbitration. "Application of the presumption . . . is constrained by the fact that the source of the obligation to arbitrate is the contract between the parties." *Chevron Res. Co. v. Consol. Edison Co. of N.Y., Inc.*, 872 F.2d 534, 537 (2d Cir. 1989). The presumption only applies *after* a court finds an "express agreement to arbitrate [that] was validly formed." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 303 (2010). And "[s]tate law principles of contract formation govern" that threshold question. *Nicosia*, 834 F.3d at 231; *see First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Schnabel*, 697 F.3d at 119.

The district court recognized as much and did not employ a presumption against arbitration in assessing formation; rather, it appropriately applied neutral state contract law. (SPA15-25; AA563-64).

B. The District Court Correctly Held That, Under California Law, Contract Formation Requires Mutual Assent.

1. Formation Requires Reasonably Conspicuous Notice and Unambiguous Manifestation of Assent.

Mutual manifestation of assent is the touchstone for all binding contracts. *Specht*, 306 F.3d at 29 (Sotomayor, J.). "If there is no evidence establishing a manifestation of assent to the 'same thing' by both parties, then there is no mutual consent to contract and no contract formation." *Bustamante v. Intuit, Inc.*, 45 Cal. Rptr. 3d 692, 698-99 (Cal. Ct. App. 2006); *accord Express Indus. & Terminal Corp. v. N.Y. State DOT*, 93 N.Y.2d 584, 589 (1999) ("To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms."). "Arbitration agreements are no exception to the requirement of manifestation of assent." *Specht*, 306 F.3d at 30.

A party's assent to a contract can be demonstrated in a variety of ways—by written or spoken word or by any other conduct—so long as the party is given notice of the contract's terms and takes some clear action assenting to those terms. "[A]n offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is

not obvious." *Schnabel*, 697 F.3d at 123 (applying California law). "Clarity and conspicuousness of arbitration terms are important in securing informed assent." *Specht*, 306 F.3d at 30. "If a party wishes to bind in writing another to an agreement to arbitrate future disputes, such purpose should be accomplished in a way that each party to the arrangement will fully and clearly comprehend that the agreement to arbitrate exists and binds the parties thereto." *Id.* (applying California law).

As distilled by then-Judge Sotomayor in *Specht*, contract formation under California law boils down to two elements: (1) "reasonably conspicuous notice of the existence of contract terms," and (2) the "unambiguous manifestation of assent to those terms." *Specht*, 306 F.3d at 35; *accord Schnabel*, 697 F.3d at 120; *Sgouros*, 817 F.3d at 1034-35; *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 569 (9th Cir. 2014); *Hancock v. AT&T Co.*, 701 F.3d 1248, 1257 (10th Cir. 2012); *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 388 (E.D.N.Y. 2015). If a party does not receive reasonably conspicuous notice of contract terms or does not unambiguously assent to those terms, there can be no mutual assent and no contract.

2. Internet and Smartphone Contract Formation Follows These Same Principles.

"[N]ew commerce on the Internet . . . has not fundamentally changed the principles of contract." *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004). "Courts around the country have recognized that [an] electronic 'click' can suffice to signify the acceptance of a contract" just as meaningfully as traditional pen and paper. *Sgouros*, 817 F.3d at 1033. "There is nothing automatically offensive about such agreements, as long as the layout and language of the site give the user reasonable notice that a click will manifest assent to an agreement." *Id.* at 1033-34.

But just as with pen and paper, no electronic contract can be formed without the mutual assent of the parties. Online contract formation questions thus require a fact-intensive inquiry into the design and content of the particular app or webpage at issue to determine whether they provided reasonably conspicuous notice of the contract terms and a mechanism by which the contracting party conveyed his or her unambiguous assent to those terms. *See Nicosia*, 834 F.3d at 231; *Sgouros*, 817 F.3d at 1034-35.

3. This Court Has Been Highly Skeptical of Non-Clickwrap Designs.

A common way of notifying users of contract terms and obtaining their consent is the "clickwrap" agreement. Clickwraps "require a user to

affirmatively click a box on the website acknowledging awareness of and agreement to the terms of service before he or she is allowed to proceed." *Berkson*, 97 F. Supp. 3d at 397 (Weinstein, J.). A familiar variation of the clickwrap agreement, sometimes called a "scrollwrap," requires not only that the user click an "I agree" button, but also that he or she scroll through the agreement's terms before continuing. *Id.* at 398. Clickwraps are "the primary means of forming a contract" over the internet. *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 366 (E.D.N.Y. 2009).

Non-clickwrap designs include "browsewraps," *Register.com*, 356 F.3d at 429-30, and modified browsewraps, such as "sign-in-wraps," *Berkson*, 87 F. Supp. 3d at 399. Such designs generally provide less conspicuous notice of contractual terms, often by including a hyperlink to such terms. *See id*. These designs lack any mechanism for users to specifically indicate assent. *Id.* Instead, they allow only the illusion of user assent from ambiguous dual-purpose actions by the user that are no more consistent with knowing consent than with the user's mere unsuspecting continued use of the website or app. As this Court recently explained in *Nicosia*, users interfacing with such designs, "unlike typical 'clickwrap' agreements . . . do[] not specifically manifest assent to the [contract] terms,

for the purchaser is not specifically asked whether she agrees or to say 'I agree.'" 834 F.3d at 236.

This Court has expressed deep skepticism of the notion that non-clickwrap designs can legally bind users. The reason clickwraps may bind users is that they "force users to expressly and unambiguously manifest either assent or rejection" to proposed contract terms. *Id.*[12] Non-clickwraps do not compel such unambiguous assent. *Id.* at 232-233. And when this Court has reviewed non-clickwraps, it has never held that any would bind users. *See, e.g., id.*; *Specht*, 306 F.3d at 28-35; *Hines v. Overstock.com, Inc.*, 380 F. App'x 22, 25 (2d Cir. 2010) (summary order); *see also Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171, 1177-79 (9th Cir. 2014). The deemphasized notice provisions and intentionally ambiguous dual-purpose assent mechanisms of such schemes present significant barriers to mutual assent.

[12] Randy E. Barnett, *Consenting to Form Contracts*, 71 Fordham L. Rev. 627 (2002), which Defendants cite (Br. at 32), repeatedly invokes the "I agree" language as a means of showing consent. *E.g., id.* at 639 ("The issue is what the parties have (objectively) agreed to. If I am right, parties who sign forms or click 'I agree' are manifesting their consent to be bound by the unread terms in the forms.").

It is true that this Court has not held, as an absolute matter, that clickwraps are "necessarily required." *Nicosia*, 834 F.3d at 237. Yet the Court has cautioned that "they are certainly the easiest method of ensuring that terms are agreed to." *Id.* And, more pointedly, this Court has expressed "no doubt" that "in many circumstances, such a statement of agreement by the offeree"—*i.e.*, via the user's "click on an 'I agree' icon"—"is essential to the formation of a contract." *Register.com*, 356 F.3d at 403 (Leval, J.).

C. The District Court's Finding That There Was Not Mutual Assent Was Free of Clear Error.

1. The District Court's Findings of Fact Are Subject to Clear Error Review.

The district court's findings of fact are entitled to deference by this Court. Under the FAA, a litigant may move to compel arbitration under a written agreement. *See* 9 U.S.C. § 4. If an opponent disputes formation, "the 'court shall proceed summarily to . . . trial' of th[at] issue," *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135, 145 (2d Cir. 2001) (quoting 9 U.S.C. § 4), and movant bears the burden of proof by a preponderance, *see Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 46 (2d Cir. 1993). Where the parties ask the court to rule on formation, and the movant "does not seek an evidentiary hearing," and where "[n]o dispute exist[s] as to the authenticity

of the[parties'] communications," but "[i]nstead the parties disagree[] over the meaning of the communications," the parties will be deemed to have "tried the issue of formation . . . on the papers" before the district court. *U.S. Titan*, 241 F.3d at 145.[13] That is what happened below.

This Court must defer to the district court's factual findings even though they were based on documentary evidence equally available to this Court. *See Anderson*, 470 U.S. at 574; *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 170-72 (2d Cir. 2001). "It is well-established that even when findings of fact are not based on observations of credibility, but rather on undisputed evidence or on entirely documentary evidence, appellate courts must nonetheless defer to the trial court's factfinding function." *United*

[13] This Court thus regularly reviews the findings of district courts, made after motions to compel argued to the district court solely on the papers, for clear error. *See, e.g.*, *Denney v. BDO Seidman, LLP*, 412 F.3d 58, 64 (2d Cir. 2005) (reviewing post-motion findings for clear error); *U.S. Titan*, 241 F.3d at 145 (same); *Chelsea Square Textiles*, 189 F.3d at 295 (same and noting, in reviewing a motion to compel decided on papers, that while "precedent reveals some confusion," the Court "believe[s], and now hold[s], that . . . the findings . . . are factual and may not be overturned unless clearly erroneous"); *accord Bauer v. Qwest Commc'ns Co., LLC*, 743 F.3d 221, 227 (7th Cir. 2014) (same); *Seaboard Coast Line R.R. Co. v. Trailer Train Co.*, 690 F.2d 1343, 1348-49 (11th Cir. 1982) (same). By contrast, this Court applies a *de novo* standard of review in cases involving no "issues of fact as to the making of the agreement for arbitration." *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 174-75 (2d Cir. 2003), *discussed in dicta by Nicosia*, 834 F.3d at 229-30.

States v. Stevenson, 396 F.3d 538, 543 (4th Cir. 2005); *Boroff v. Tully*, 818 F.2d 106, 109 (1st Cir. 1987) (holding clear error applies "unconditionally to factfinding emanating from a 'paper' record"); *accord United States v. Grigsby*, 692 F.3d 778, 787 (7th Cir. 2012) ("There is no exception for factual findings based on documentary evidence.").

The clear error standard mandates such deference for institutional reasons. *Anderson*, 470 U.S. at 574-75; *see also United States v. Quinones*, 511 F.3d 289, 303-04 (2d Cir. 2007). "The trial judge's major role is the determination of fact and with experience in fulfilling that role comes expertise." *Anderson*, 470 U.S. at 574. As another Circuit noted in the context of a motion to compel, "[t]he district court is in a superior position to sift and weigh the evidence and as the factfinder is entitled to draw all reasonable inferences that are supported by the record." *Bauer*, 743 F.3d at 227. Moreover, "[t]o permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority." Fed. R. Civ. P. 52, Advisory Cmt. Notes, 1985 Amendment. "[T]he parties to a case on appeal have already been forced to concentrate their energies and resources to persuading the trial judge that their account of the facts is

the correct one; requiring them to persuade three more judges at the appellate level is requiring too much." *Anderson*, 470 U.S. at 575.

Significantly, the issue of "mutual assent is a question of fact," not law. *Nicosia*, 834 F.3d at 232 (applying Washington law); *see Chi. Title Ins. Co. v. AMZ Ins. Servs., Inc.*, 115 Cal. Rptr. 3d 707, 725-26 (Cal. Ct. App. 2010) ("Mutual assent is a question of fact"); *Alexander v. Codemasters Grp. Ltd.*, 127 Cal. Rptr. 2d 145, 151 (Cal. Ct. App. 2002) (same). The subsidiary question of whether a consumer was given reasonable notice of an agreement to arbitrate is likewise a question of fact, not law. *See Nicosia*, 834 F.3d at 238 (applying Washington law holding that "[w]hether particular notice was reasonable is ordinarily a question of fact for the [factfinder]"); *see Union Oil Co. v. O'Riley*, 276 Cal. Rptr. 483, 492 (Cal. Ct. App. 1990) (similarly holding whether "notice was reasonable" "is purely a question of fact"); *cf. Chapman v. Skype Inc.*, 162 Cal. Rptr. 3d 864, 872-73 (Cal. Ct. App. 2013) (holding conspicuousness of linked terms was a question of fact); *Pierce v. San Jose Mercury News*, 263 Cal. Rptr. 410, 415 (Cal Ct. App. 1989) (holding "conspicuousness of a retraction is a question of fact").

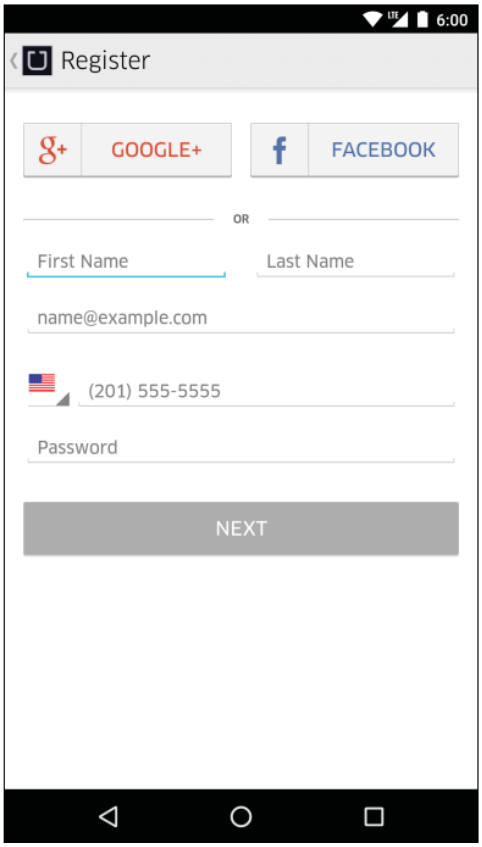
The question of mutual assent is reserved for the factfinder whenever "reasonable minds could disagree." *Nicosia*, 834 F.3d at 238. Thus, "[t]he critical question here is a factual one: Did [the party] objectively manifest

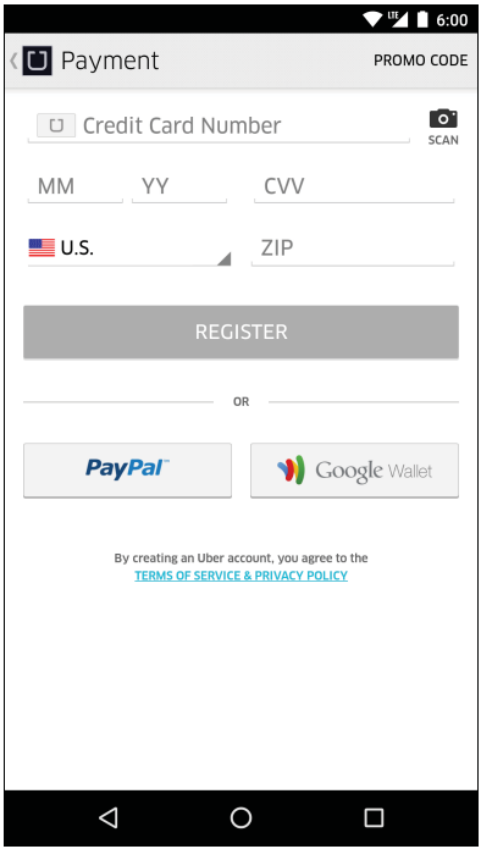
assent [to] be bound[?] . . . [This Court] review[s] that determination deferentially." *Bauer*, 743 F.3d at 227.

2. The District Court Permissibly Found That Uber's Screen Did Not Provide Reasonably Conspicuous Notice.

The district court, applying the first element of the *Specht* test, permissibly found that the screens below did not provide Plaintiff with reasonably conspicuous notice of contract terms:[14]

[14] These images are reproduced in the size they would have appeared on a Samsung Galaxy S5. (AA558). By contrast, the images Defendants include in their brief (Br. at 8, 30) are larger than any common smartphone display and 37% larger than the 5.1" Samsung Galaxy S5 used by the Plaintiff. (AA557). Presumably the images—like those on breakfast cereal boxes—are "enlarged to show texture" so that the Court can more easily read them.





The district court permissibly found that the phrase, "By creating an Uber account, you agree to the" and the following hyperlink were not reasonably conspicuous. The district court cited a series of observations that supported these findings: "the key words, 'By creating an Uber account, you agree to' are not in any way highlighted"; those key words were "in approximately 6-point font" or "even smaller"; those key words and the following hyperlink were "in considerably smaller font" than the text on the buttons. (SPA 12 & n.15). The court ultimately found that the screen "did

not adequately call users' attention to the existence of Terms of Service" and was "simply too inconspicuous to meet the *Specht* standard."[15] (SPA25-26).

In making these findings, the district court appropriately considered the placement, size, color, and contrasts surrounding the contractual terms in relation to the other terms on the screens. The court explained that the key text, in comparison to the "very user-friendly and obvious" "payment information and 'Register' button," was "by no means prominently displayed." (SPA23). Rather, the notice took "on the appearance of an afterthought." (SPA24). Judge Rakoff permissibly used this compare-and-contrast approach to ascertain whether Uber had given reasonably conspicuous notice. Indeed, just a few weeks later, this Court took the same approach in *Nicosia*, where the panel similarly noted that "the critical sentence appear[ed] in smaller font" than other text and that the critical text was "not bold, capitalized, or conspicuous in light of the whole webpage." *Nicosia*, 834 F.3d at 236.

The district court also appropriately considered readily available alternative designs in assessing notice. This Court's opinions demonstrate

[15] The district court also permissibly concluded that the phrase "terms of service" was unclear. (SPA26). *Accord Berkson*, 97 F. Supp. 3d at 380, 404 (concluding the phrase "terms of use" "does not clearly inform a user that she is subjecting herself to a one-sided contract").

the relevance of such alternatives. *See, e.g.*, *Nicosia*, 834 F.3d at 237-38 (questioning, in assessing notice, why "Amazon chose not to employ a clickwrap mechanism"); *Register.com*, 356 F.3d at 403 (assessing notice in light of "I agree" box alternative). In finding that Uber's disclosure was not reasonably conspicuous, the court observed that the text in this case was "smaller and more obscure, both in absolute terms and relative to the 'Register' button" compared to another design the Defendants had submitted with their motion papers. (SPA20-21).

The district court then reasonably inferred "that the creators of Uber's registration screen hoped the eye would be drawn seamlessly to the credit card information and register buttons instead of being distracted" by the contract language. (SPA25-26, 29). Such a conclusion flows logically from the layout of the page, the available alternatives, the facts placed before the court, and common sense.[16] Significantly, Defendants do not contest this

[16] The district court was also free to draw an adverse inference from Defendants' failure to proffer any testimony from Uber's App designers regarding their knowledge, beliefs, or intentions in setting the contractual text as they did, or regarding whatever instructions they were given by Uber in designing the layout. *See, e.g.*, 4-75 Modern Federal Jury Instructions-Civil § 75-3 (2016) ("If . . . defendant was in the best position to produce this witness, and . . . this witness would have given important new testimony, then you are permitted . . . to infer that the testimony . . . would have been unfavorable to the defendant.").

inference on appeal. The fact that "[t]he District Court's findings on this point, which are not squarely challenged on appeal, may have been somewhat in the nature of 'common sense' assumptions . . . does not make them clearly erroneous." *Savin Corp. v. Savin Grp.*, 391 F.3d 439, 461-62 (2d Cir. 2004).

The district court's finding that Uber's notice of contractual terms was not reasonably conspicuous was sound and constitutes an independent ground upon which this Court may affirm. *See Specht*, 306 F.3d at 35.

3. The District Court Permissibly Found That Uber's Screen Did Not Provide For Unambiguous Assent.

The district court also permissibly found, applying the second element of the *Specht* test, that the Uber App did not give rise to an unambiguous manifestation of assent. In making this finding, the court observed that Plaintiff "could sign up for Uber by clicking on the 'Register' button without explicitly indicating his assent to the terms and conditions that included the arbitration provision." (SPA17; *see also* SPA20). Thus, clicking "Register" was inherently ambiguous.

The court found this ambiguity compounded because the registration screen lacked "parallel wording as between the 'Register' button and the statement 'By creating an Uber account you agree to the Terms of Service & Privacy Policy.'" (SPA24). This too was a permissible inference. *Cf.*

Sgouros, 817 F.3d at 1035-36 (affirming finding of ambiguity in assent to "Service Agreement," where button stated "I accept & Continue").

The district court again properly considered readily available alternatives. In particular, the court observed that Uber declined to use a clickwrap agreement (with a "Yes, I agree" button), as Uber had used in other contexts (SPA19-20), or a screen that would automatically display license terms to potential users (SPA23). The court thus concluded that, unlike with those layouts, Uber's screen permitted a user to sign up without unambiguously assenting to Uber's terms. That finding is consistent with—and, indeed, foreshadowed by—this Court's significant observation that "in many circumstances [an "I agree" click box] is essential to the formation of a contract." *Register.com*, 356 F.3d at 403.

The district court's permissible finding that the interface did not provide for unambiguous assent provides this Court with another independent ground for affirmance. *Specht*, 306 F.3d at 35.

4. Defendants Identify No Clear Error.

a. The district court's findings were consistent with *Nicosia v. Amazon.com*.

This Court's recent opinion in *Nicosia v. Amazon.com* forecloses any assignment of clear error to the district court's findings. Before Judge Rakoff, Defendants strenuously argued that the operative screenshot in this

case "closely mirrors" and is "quite comparable" to the screens before Judge Townes in *Nicosia* (AA544-45; AA409), which that court had held created a binding agreement, *see Nicosia v. Amazon.com, Inc.*, 84 F. Supp. 3d 142 (E.D.N.Y. 2015). Since then, of course, this Court has overruled Judge Townes's decision and has rejected his determination that such an interface provided reasonable notice and allowed for unambiguous assent as a matter of law. 834 F.3d at 238.

The district court's findings below are consistent with this Court's observations and decision in *Nicosia*. In that case, this Court considered the design and content of Amazon.com's order page. Near the top of the order page, below a boldfaced "**Review your order**" heading were the words "By placing your order, you agree to Amazon.com's privacy notice and conditions of use." One line down, in a boxed-off order frame on the right of the screen, was a large "Place your order" button. "The phrases 'privacy notice' and 'conditions of use' appear[ed] in blue font, indicating that they [we]re clickable links to separate webpages." At the very bottom of the page appeared another set of hyperlinks to the Conditions of Use and Privacy Notice, again in blue font. *Nicosia*, 834 F.3d at 236.

Judge Rakoff's findings below mirror the concerns expressed by the *Nicosia* court regarding the Amazon.com screen. For instance, the *Nicosia*

panel noted that "the purchaser is not specifically asked whether she agrees or to say 'I agree,'" *id.*, a concern that Judge Rakoff likewise expressed in this case (SPA17, 20). *Nicosia* also observed that "[n]othing about the 'Place your order' button alone suggests that additional terms apply," *id.*, mirroring Judge Rakoff's finding below that nothing on the "Uber registration screen" made clear "that, by registering to use Uber, a user was agreeing" to terms of service (SPA25). Finally, the *Nicosia* court noted that the notice was "obscured," by "numerous other links" "in several different colors, fonts, and locations," with "the critical sentence appearing in smaller font," "not bold, capitalized, or conspicuous in light of the whole webpage." *Id.* at 236-37. So too, Judge Rakoff found the contractual language below to be "smaller and more obscure, both in absolute terms and relative to the 'Register' button" (SPA21), based on colors, fonts, and location (SPA12 & n.5, 23).

Indeed, here, as the district court found, "the Uber registration process . . . involved a considerably *more obscure* presentation of the relevant contractual terms" than existed in *Nicosia.* (SPA21 & n.9 (emphasis added)). A number of differences made Uber's screen even more obscure than the interface this Court faulted in *Nicosia*. First, as the district court noted, the critical contractual language on Amazon's order page was located

in a place of prominence under a boldface heading at the top of the order page, rather than as the last text on the page as in this case. (*See* SPA 21 n.9). Second, the Amazon.com statement and hyperlinked terms were located above—rather than far below, as here—the "Place your order" button from which acceptance was inferred. This meant, as the district court observed, that Amazon.com users, unlike Plaintiff, had to navigate past the critical language by clicking an icon below it. (*Id.*). In addition, in *Nicosia,* parallel language connected the hyperlinks with the "Place your order" button one line below. By contrast, the Uber screen here lacked "parallel wording as between the 'Register' button and the statement 'By creating an Uber account you agree to the Terms of Service & Privacy Policy.'" (SPA24).

Thus, not only does *Nicosia* support the district court's findings below, but, when compared to the screen in *Nicosia,* Uber's payment and registration screens failed even more conclusively to provide Plaintiff with reasonably conspicuous notice or a mechanism for unambiguous assent. The district court's findings were clearly reasonable in light of the similar observations by this Court in *Nicosia*.

b. Defendants' duty argument lacks merit.

On appeal, Defendants argue that because it allegedly "would have been clear to Plaintiff that Uber's 'payment' page contemplated some kind of contract," Plaintiff had a duty "to take reasonable steps to inform himself of the contract's terms." (Br. 34.) Defendants make this argument to sidestep the elements of mutual assent under California law, as set out in *Specht*. (*See* Br. at 31-38).

Yet, in *Specht*, this Court rejected this "duty to read" argument. There, the defendants had argued—as Defendants argue in this appeal—that Netscape Communications users had a duty to review license terms made available to them. 306 F.3d at 30-31. This Court soundly rejected that argument, holding that the purported "duty to read" cannot bind users to unread contract terms absent both (1) conspicuous notice ("immediately visible notice") and (2) "unambiguous manifestation of assent to those terms." *Specht*, 306 F.3d at 31; *see also Schnabel*, 697 F.3d at 124 ("[C]ases applying the 'duty to read' principle to terms delivered after a contracting relationship has been initiated do not nullify the requirement that a consumer be on notice of the existence of a term before he or she can be legally held to have assented to it.").

On appeal, Defendants propose an unworkable distinction to try to avoid *Specht*—that, "[p]ut simply, Plaintiff knew or should have known that he was forming a contractual relationship with Uber, whereby Uber would provide software services in exchange for money, when he registered for an account and entered his credit card information." (Br. at 31).

This newly proposed distinction lacks any factual basis. Uber is a free app: Users do not enter their credit card information to pay Uber for its App or for its services; rather, that payment information is kept on file for future fares paid to drivers. As set out in the complaint (AA6 (¶31)) and admitted by Uber (AA211 (¶31); AA496 (¶31)), riders use the Uber App to pay their drivers, not to pay Uber. Indeed, Uber's driver terms and conditions go to great lengths to make clear that users do not buy rides from Uber. (*See* AA115-28). Instead, Uber explains that drivers—not users—pay Uber for its software services in the form of a commission on fares. (AA123). Uber's own terms of service thus refute Defendants' new contention that Plaintiff formed a "contractual relationship with Uber, whereby Uber would provide software services in exchange for money." (Br. at 31). Rather, just as Netscape users were "urged to download free software at the immediate click of a button" in *Specht*, 306 F.3d at 32, Uber users may likewise download the App for free.

In addition to lacking a factual basis, Defendants' new distinction finds no support in this Court's case law. Defendants seize on two facts: that Plaintiff entered his credit card information (Br. at 32-33, 35) and that he downloaded the Uber App for use (Br. at 33). But this Court has already rejected Defendants' expansive duty to read argument in both scenarios: *Nicosia* concerned an Amazon.com purchase, likewise requiring payment information, *see* 834 F.3d at 236, and *Specht* concerned the downloading of free software, *see Specht*, 306 F.3d at 32. In neither case did this Court conclude that the plaintiff should have been bound by terms that were not reasonably conspicuous and to which he had not unambiguously manifested his assent. Defendants cite no decision supporting their novel argument.

In any event, Defendants did not make this argument below. "The law in this Circuit is clear that where a party has shifted his position on appeal and advances arguments available but not pressed below . . . waiver will bar raising the issue on appeal." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 124 n.29 (2d Cir. 2005). Defendants' theory is unavailing.

c. Defendants offered no proof of the perspectives of "modern consumers."

Nor may Defendants evade this Court's precedents by labelling Judge Rakoff's findings as supposedly "out of touch with the experience of modern consumers." (Br. at 20, 33-34). Defendants' motion papers nowhere argued

Uber's screen would be reasonably conspicuous *if* viewed from the perspective "of modern consumers." (AA390-93). Nor did they present any evidence of that perspective. (*Id.*). Even now, amici primarily press this argument (Chamber Br. at 6-7; IACTA Br. at 3-16), and Defendants themselves cite no record evidence to back it up (Br. at 20).

Of course, the district court would have properly rejected such an argument, if Defendants had made it. *See Berkson*, 97 F. Supp. 3d at 377-83 (surveying evidence about modern consumers and finding non-clickwrap unenforceable). But the district court did not err by failing to anticipate it.

d. The district court properly re-sized the oversized image proffered by Defendants.

Contrary to Defendants' suggestion (Br. at 38-42), the district court did not commit clear error by rescaling the oversized images proffered by Defendants to their actual size.[17] Defendants chose the risky strategy of

[17] Plaintiff objects to Defendants' lodging with the Court, or bringing "to oral argument," "Samsung Galaxy S5 smartphones loaded with the same 'payment' screen image that appears in the record." Br. at 24 n.4. The district court, not this Court, is the appropriate forum for factfinding, *see, e.g.*, *Anderson*, 470 U.S. at 575, and Defendants cannot introduce new evidence into the record that they failed to proffer below, *see* Fed. R. App. P. 10(a), (b)(2); *Sira v. Morton*, 380 F.3d 57, 63 n.3 (2d Cir. 2004) (declining to consider material "not part of the record in the district court, nor . . . in the record on appeal").

proffering an image that was larger than the image Plaintiff would have seen on his phone. The district court caught Defendants in their exaggeration and simply corrected their oversized image by scaling it to its actual size. (SPA11). Defendants cannot object to the rescaling necessitated by their own tactic—a tactic they repeat in their opening brief (*see* Br. at 8, 30 (showing oversized image)).

Moreover, Defendants do not and cannot complain that the district court erred in scaling the image to a size of 5.1 inches because, on their stay motion, they submitted a declaration stating that the image would have been scaled down to that exact size. (AA558). *See, e.g.*, *Ceglia v. Zuckerberg*, No. 10-CV-00569A(F), 2013 U.S. Dist. LEXIS 45500 at *66-67 (W.D.N.Y. Mar. 26, 2013) (finding objection to resizing of image "spurious").

Instead, their complaint seems to be that the court allegedly relied only on the black-and-white, low-resolution image. But the record is clear that the court fully considered the oversized high-resolution color screenshot that Defendants proffered. Not only did the court receive that screenshot with the motion papers (AA319), but defense counsel also handed a copy of that exhibit to the court during oral argument (AA408 (discussing the screenshot as the "first slide.")). Moreover, Judge Rakoff repeatedly referred to the various colors that Defendants complain he never saw. (*See,*

e.g., SPA12 (noting text "in blue"); AA408). The district court made clear that it scaled down the image "to reflect the size of such a phone," not to limit colors or resolution. (SPA11).

In any event, Defendants mooted this issue when they provided the district court with an appropriately sized image as part of its stay motion (AA557-560), and the district court reaffirmed that the screen did not provide Plaintiff with reasonably conspicuous notice (AA563-64).

e. Plaintiff did not concede formation in his complaint.

Finally, this Court need not address Defendants' meritless argument that Plaintiff somehow conceded formation in paragraph 29 of the complaint because Defendants bury that argument in a footnote. (Br. at 19 n.3) It is well established that this Court will not consider footnote arguments. *See, e.g.*, *N.Y. Psychiatric Ass'n v. UnitedHealth Group*, 798 F.3d 125, 128 n.3 (2d Cir. 2015); *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998).

In any event, the argument lacks merit. Defendants mischaracterize the record below by contending that the district court "sua sponte amend[ed]" the complaint and that the court "refused to consider" the allegations of paragraph 29. (Br. at 19 n.3). Neither contention is true.

As an initial matter, Plaintiff's counsel expressly stipulated on the record at oral argument to an amendment deleting paragraph 29. (AA434). An amendment made by counsel cannot be deemed "sua sponte."

Nor did the district court refuse to consider paragraph 29. Defendants cite cases standing for the proposition that a factfinder may consider—and that a party may argue for favorable inferences from—allegations in a superseded pleading. *See, e.g.*, *Andrews v. Metro N. Commuter R.R. Co.*, 882 F.2d 705, 707 (2d Cir. 1989); *United States v. McKeon,* 738 F.2d 26, 31 (2d Cir. 1984). The district court followed those precedents: it entertained argument about the import of the deleted allegation (AA407-08), acknowledged the prior allegation, and took care to explain that it would have reached the same result even without the amendment because the paragraph was not a concession, was being read out of context, and did not even refer to Plaintiff (SPA10).

D. Moreover, No Reasonable Factfinder Could Conclude That Plaintiff Assented to Arbitration.

Even if this Court were to apply a *de novo* standard—and it should not because the district court's factfinding is owed deference, as explained above—the Court would need to affirm the opinion below. That is true because here, just as in *Specht*, "upon the record assembled, a fact-finder

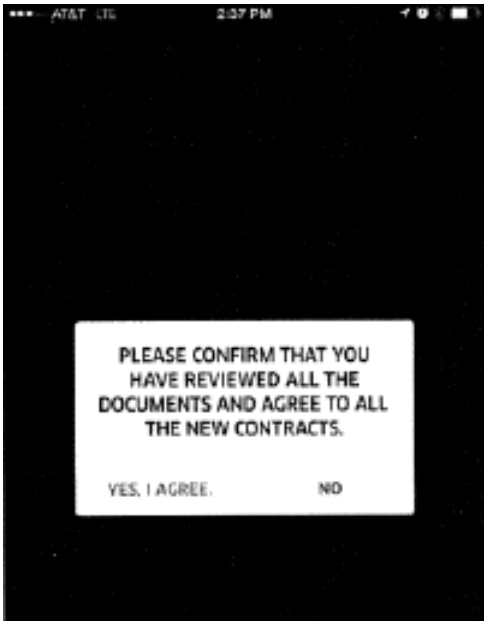
could not reasonably find that defendants prevailed in showing that any . . . plaintiff [] had entered into an agreement on defendants' license terms." 306 F.3d at 28. The district court's conclusion was unavoidable, as a matter of law, both (1) because no reasonable factfinder could conclude that Uber's screens provided reasonable notice or permitted unambiguous assent, and (2) because Defendants never established that Plaintiff ever viewed the particular screen they proffered.

1. No Reasonable Factfinder Could Conclude That Uber's Screen Provided for Mutual Assent.

No reasonable factfinder could find that Uber's non-clickwrap design allowed for mutual assent in this case. This Court has held that "there is no policy rationale supporting [a passive acceptance scheme]" when "there are a plethora of other ways—such as requiring express acknowledgement of receipt of terms—through which [the defendant] could have met the minimum requirements of notice." *Schnabel*, 697 F.3d at 128. Accordingly, the Court regularly considers readily available alternatives when confronting an online interface. *See, e.g., id.*; *Specht*, 306 F.3d at 22, 32-35 & n.4 (contrasting legally insufficient design with clickwrap and scrollwrap alternatives). In the Court's most recent decision, *Nicosia*, the panel thus vacated the enforcement of hyperlinked Amazon.com terms after observing

that Amazon, "[i]n a seeming effort to streamline customer purchases," had "chose[n] not to employ a clickwrap mechanism." 834 F.3d at 237.

Likewise, here, Uber cannot establish mutual assent through its comparatively inconspicuous and ambiguous interface when it could have easily "require[ed] express acknowledgment" through a clickwrap. Indeed, Uber itself has relied on a conspicuous clickwrap mechanism in other cases, such as when it notified its drivers of contract changes in July 2013. That notice-and-assent scheme required drivers to select a "Yes, I agree" button, in large font, beneath hyperlinks and a disclosure statement indicating that clicking the button would constitute acceptance. Clicking "Yes, I agree," took drivers to a second screen that required them to confirm their click:



See Mohamed v. Uber Techs. Inc., 109 F. Supp. 3d 1185, 1190-91 (N.D. Cal. 2015). Uber could have used a similar design here.

The practicality of a clickwrap is most clearly demonstrated by the fact that Uber's competitor, Lyft, also relied on a clickwrap arrangement, one which the U.S. District Court for the District of Massachusetts recently found effective to form an agreement between Lyft and its drivers:

See Brannstrom Decl. dated May 20, 2015, ¶ 7, ECF Dkt. 17-1, *Bekele v. Lyft, Inc.*, No. 15-cv-11650 (D. Mass.). Users of the Lyft app had "the opportunity to scroll all the way through the text of the TOS, and the 'I accept' button remain[ed] at the bottom of the screen while scrolling." *Bekele v. Lyft, Inc.*, No. 15-11650-FDS, 2016 U.S. Dist. LEXIS 104921, at

*8 (D. Mass. Aug. 9, 2016). Again, Uber could have designed a similar layout to obtain customer assent.

Yet, in this case, Uber chose to employ a non-clickwrap design. Notice of contractual terms is placed well beneath prominent interface features, and then Uber purports to obtain assent to those terms from the inherently ambiguous, dual-purpose action a user would be expected to take had he not seen them. Here, this Court may hold Uber's interface insufficient, as a matter of law, because "no policy rationale support[s]" Defendants' inconspicuous and ambiguous interface, in light of these other available means for meeting "the minimum requirements of notice." *Schnabel*, 697 F.3d at 128.

2. In Addition, Defendants Never Established a Foundation for Their Proffered Screen.

In any event, Defendants failed to lay an adequate foundation for their motions to compel. In sharp contrast to other cases involving Uber, like *Cullinane*, Defendants below relied on a declaration that failed to attest to "personal knowledge regarding the appearance, flow, and function of the Uber App *during the time that Plaintiffs registered for their Uber accounts*" or that the attached images are "true and correct screen shots of the Uber App . . . registration process as they appeared to users who . . . registered [on

the specific date at issue]." Holden Decl. dated May 4, 2015, ¶¶ 5-14, 11 ECF Dkt. 32-1, *Cullinane v. Uber Techs., Inc.*, No. 14-cv-14750 (D. Mass.). Without evidence of the exact screen that Plaintiff used during registration, Defendants could not possibly establish assent. *Cf. Nicosia*, 834 F.3d at 235 (rejecting declarations with "nothing . . . to suggest that the Registration Page did not change" in six years between registration with Amazon and the date of image capture); *Resorb Networks, Inc. v. YouNow.com*, 51 Misc. 3d 975, 980-83 (Sup. Ct., N.Y. Cty. 2016) (denying motion to compel in absence of evidentiary foundation).

Absent this foundation, Defendants cannot establish formation. The Court may affirm on this alternative ground, which Plaintiffs raised below. (A441).

POINT II

IF THIS COURT DISAGREES WITH THE DISTRICT COURT'S DECISION, THIS COURT SHOULD REMAND FOR FURTHER DEVELOPMENT OF THE RECORD.

A. If This Court Vacates the Contract Formation Ruling, It Should Remand for Further Discovery and Factfinding.

For the reasons set forth above, this Court should affirm. If the Court were to vacate the contract formation ruling below, however, the Court should remand the case for further discovery and factfinding. Not a single Circuit precedent supports Defendants' request that this Court reverse the

order below and instruct the district court to compel arbitration. (Br. at 61).

Defendants' request is not only unfounded, *see* Point I above, but also a clear overreach. This Court and other Circuits have frequently held that particular web-based interfaces failed, as a matter of law, to create a binding contract. *See, e.g.*, *Sgouros*, 817 F.3d at 1035; *Nguyen*, 763 F.3d at 1178-79; *Specht*, 306 F.3d at 28. This Court has also vacated a district court decision that improperly ruled, as a matter of law, that a questionable non-clickwrap interface created a binding agreement. *See Nicosia*, 834 F.3d 220. By contrast, Defendants cite no case in which this Court or another Circuit has concluded that an agreement was binding, as a matter of law, and then instructed a district court to enter an order compelling arbitration, as they ask this Court to do.[18]

[18] Defendants claim that district court cases present an "overwhelming weight of authority" supporting their request (Br. at 18), but they ignore the critical appellate posture and misconstrue the cases they cite. *Nicosia* was the first panel of this Court to address a non-clickwrap beyond the design rejected in *Specht*, 306 F.3d at 28, and it vacated the lower court's formation holding. All of the district court cases Defendants cite were decided without the benefit of *Nicosia*, and most or all involved notice-and-assent mechanisms considerably clearer than Uber's. *See Cullinane v. Uber Techs., Inc.*, No. 14-14750-DPW, 2016 U.S. Dist. LEXIS 89540 (D. Mass. July 11, 2016) (disclosure text of same size as other text on page and clearly delineated "Terms of Service & Privacy Policy" box of same height as "Done" button); *In re Facebook Biometric Info. Privacy Litig.*, No. 15-cv-03747-JD, 2016 U.S. Dist. LEXIS 60046 (N.D. Cal. May 5, 2016) ("Sign

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No matter how this Court rules on the decision below, Defendants are not entitled to a remand with instructions to compel arbitration. This Court

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Up" button immediately above statement that "clicking Sign Up" constituted acceptance of terms); *Small Justice LLC v. Xcentric Ventures LLC*, 99 F. Supp. 3d 190 (D. Mass. 2015) (legal notice beside checkbox in same font size as main page drew attention to hyperlinks, and outcome justified on alternative ground that user conferred non-exclusive license to publish); *Starke v. Gilt Groupe, Inc.*, No. 13 Civ. 5497 (LLS), 2014 U.S. Dist. LEXIS 58006 (S.D.N.Y. Apr. 24, 2014) (e-mail field and "Shop Now" and Facebook buttons above statement that "[b]y joining Gilt through email or Facebook" "you agree to the Terms of Membership"); *Crawford v. Beachbody, LLC*, No. 14cv1583-GPC(KSC), 2014 U.S. Dist. LEXIS 156658 (S.D. Cal. Nov. 5, 2014) (orange box containing the words "Place Order" immediately below statement that "[b]y clicking Place Order below, you are agreeing that you have read and understand the Beachbody Purchase Terms and Conditions"); *5381 Partners LLC v. Shareasale.com, Inc.*, No. 12-CV-4263 (JFB) (AKT), 2013 U.S. Dist. LEXIS 136003 (E.D.N.Y. Sept. 23, 2013) (activation button next to the statement that "[b]y clicking and making a request to Activate, you agree to the terms and conditions of the Merchant Agreement"); *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829 (S.D.N.Y. 2012) ("Sign Up" button immediately above statement that "[b]y clicking Sign Up, you are indicating that you have read and agree to the Terms of Policy" in the same font size as other page text); *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 911 (N.D. Cal. 2011) ("Plaintiff admits that she was required to and did click on an "Accept" button directly above a statement that clicking on the button served as assent to the YoVille terms of service along with a blue hyperlink directly to the terms of service."); *Snap-On Bus. Sols. Inc. v. O'Neil & Assocs.*, 708 F. Supp. 2d 669 (N.D. Ohio 2010) (browsewrap agreement between two business entities); *Druyan v. Jagger*, 508 F. Supp. 2d 228, 237 (S.D.N.Y. 2007) ("Look for Tickets" button immediately below statement that "clicking on the 'Look for Tickets' button" constitutes agreement with terms of use).

has repeatedly questioned whether non-clickwrap arrangements could provide reasonable notice, *see, e.g.*, *Register.com*, 356 F.3d at 403, and has counseled that a finding of mutual assent should be made only by a finder of fact, *see Nicosia*, 834 F.3d at 238. The holding Defendants seek—compelling enforcement of the type of web interface this Court has repeatedly questioned—runs counter to all of this Court's relevant precedent.

B. The District Court—Not This Court—Should Consider Plaintiff's Other Arguments in the First Instance

Even if this Court disagrees with the district court's ruling, the Court should not consider the alternative arguments set out in Part IV of Defendants' brief until the district court has first addressed them. As Defendants correctly note, Plaintiff presented the district court with these additional grounds for denying Defendants' motion to compel arbitration. (Br. at 42-61). The district court did not address any of those arguments; instead, it relied on its dispositive conclusion that there was no agreement to arbitrate. If this Court were to disagree with that decision, the Court should remand this case for the district court to consider in the first instance Plaintiff's other arguments for denial, including express and implied waiver.

Remand is this Court's preferred approach. Although this Court is "empowered to affirm a district court's decision on a theory not considered

below, it is [the Court's] distinctly preferred practice to remand such issues for consideration by the district court in the first instance." *Schonfeld v. Hilliard*, 218 F.3d 164, 184 (2d Cir. 2000). Remand would be particularly appropriate here because the district court must make factual findings on the waiver questions. *See PPG Indus., Inc. v. Webster Auto Parts, Inc.*, 128 F.3d 103, 107 (2d Cir. 1997) (holding "district court's factual determinations leading to its finding of waiver" must stand unless "clearly erroneous"). The district court, not this Court, should make those findings, *see, e.g.*, *Anderson*, 470 U.S. at 574-75, and the district court's findings would be entitled to deference, *see, e.g.*, *PPG Indus.*, 128 F.3d at 107; *Doctor's Assocs., Inc. v. Distajo*, 107 F. 3d 126, 130 (2d Cir. 1997); *Leadertex v. Morganton Dyeing & Finishing Corp.*, 67 F. 3d 20, 25 (2d Cir. 1995). Rather than considering the merits of the other grounds on which the district court might have denied Defendants' motion to compel arbitration, therefore, this Court should remand for further consideration of those grounds by the district court in the first instance.

On remand, the district court would necessarily also address Defendants' erroneous threshold argument that the alternative reasons for denying arbitration—such as express and implied waiver—are for an arbitrator, not a court, to consider. (Br. at 42-45, 55). Precedent forecloses

Defendants' position. In this Circuit, the district court, not an arbitrator, must address waiver defenses based on litigation conduct. *Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 456 & n.12 (2d Cir. 1995); *see also La. Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 626 F.3d 156, 159 (2d Cir. 2010) (judicially resolving the issue of "whether a party has waived its right to arbitration"); *S&R Co. of Kingston v. Latona Trucking, Inc.*, 159 F.3d 80, 82-83 (2d Cir. 1998) (holding that waiver is for a court, not an arbitrator, to decide, when it is based on "participation in the litigation" and noting that this approach "saves judicial resources"); *accord Marie v. Allied Home Mtg. Corp.*, 402 F.3d 1, 13 (1st Cir. 2005) ("[T]here are important policy reasons why a court and not an arbitrator should decide waiver issues, at least where the waiver . . . is due to litigation-related activity."). [19] As Judge Abrams recently explained, "[t]h[e district c]ourt . . .

[19] Defendants' reliance on *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011) (*quoted in* Br. at 55), is misplaced because "that case did not involve a claim of waiver based on a party's participation in protracted litigation," but rather concerned "a previous representation by the party's corporate predecessor that it would agree to submit itself to litigation." *LG Elecs., Inc. v. Wi-LAN USA, Inc.*, 13-cv-2237, 2014 U.S. Dist. LEXIS 99827, at *11 n.2 (S.D.N.Y. July 21, 2014). This Court's holding in *Republic of Ecuador* thus follows controlling precedent: arbitrators may consider questions of waiver by out-of-court conduct, but district courts must consider waiver through litigation conduct. *Id.*; *see*

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is in the best position to assess [defendants'] previous conduct in this matter [and should] do so." *LG Elecs., Inc. v. Wi-LAN USA, Inc.*, 13-cv-2237, 2014 U.S. Dist. LEXIS 99827, at *8-10 (S.D.N.Y. July 21, 2014). Plaintiff would thus properly present these issues to the district court once again following a remand.

Plaintiff chooses not to burden this Court with "every conceivable alternative ground for affirmance" because such briefing would "increase the complexity and scope of [the] appeal[] more than it would streamline the progress of the litigation." *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 740 (D.C. Cir. 1995). Plaintiff, as appellee, has that option. *See, e.g.*, *Frank v. Walker*, 819 F.3d 384, 387 (7th Cir. 2016) (Easterbrook, J.) ("the ability to make an alternative argument in defense of the district court's judgment is a privilege, not an obligation"); *Eichorn v. AT&T Corp.*, 484 F.3d 644, 657-58 (3d Cir. 2007) ("[T]he defendants were the *appellees* in the previous appeal. As such, they were not required to raise all possible alternative grounds for affirmance to avoid waiving those grounds.") (emphasis in original); *Indep.*

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Doctor's Assocs., Inc., 66 F.3d at 456 (distinguishing litigation conduct from other conduct).

Park Apartments v. United States, 449 F.3d 1235, 1240 (Fed. Cir. 2006) ("As appellee, the government was not required to raise all possible alternative grounds for affirmance in order to avoid waiving any of those grounds."); *Schering Corp. v. Illinois Antibiotics Co.*, 89 F.3d 357, 358 (7th Cir. 1996) (Posner, J.) ("We certainly agree that the failure of an appellee to have raised all possible alternative grounds for affirming the district court's original decision, unlike an appellant's failure to raise all possible grounds for reversal, should not operate as a waiver."); *Crocker*, 49 F.3d at 741 & n.2. The other grounds that Plaintiff presented below were equally dispositive of Defendants' motion to compel, and Plaintiff expressly reserves his right to urge those grounds, including waiver, on remand.

Accordingly, in the event this Court does not affirm the district court's formation holding, this Court should remand the remaining questions to the district court.

CONCLUSION

The order of the district court should be affirmed.

Dated: November 29, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief was prepared using Microsoft Word 2010, using a proportionately spaced typeface in 14-point Times New Roman, and, according to the word count function contains 13,408 words, excluding the table of contents, table of authorities, and signatures and certificates of counsel.

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