

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA

Amber Ferrell, et al. v. SnapCommerce Holdings, Inc., et al.

Ferrell · No. 25-cv-03160-JST · Decided November 25, 2025

OPINION

1 2 3 4 5 UNITED STATES DISTRICT COURT 6 NORTHERN DISTRICT OF CALIFORNIA 7
8 AMBER FERRELL, et al., Case No. 25-cv-03160-JST 9 Plaintiffs, ORDER DENYING
MOTION TO 10 v. COMPEL ARBITRATION AND ADMINISTRATIVE MOTION FOR 11
SNAPCOMMERCE HOLDINGS, INC., et EVIDENTIARY HEARING al., 12 Re: ECF Nos. 15,
24 Defendants. 13 14 Before the Court are a motion to compel arbitration and an administrative
motion for an 15 evidentiary hearing filed by Defendants SnapCommerce Holdings, Inc. d/b/a
Super.com and 16 SnapMoney, Inc. d/b/a Super.com (together, “Super”).

ECF Nos. 15, 24. The Court will deny 17 both motions. 18 I. BACKGROUND 19 A. Procedural
History 20 Plaintiffs Amber Ferrell and Sara Schneider, individually and on behalf of a putative
class, 21 filed this action on April 8, 2025, regarding Super’s alleged practice of sending text
message 22 solicitations and making commercial telephone calls to consumers who have placed
themselves on 23 the National Do Not Call Registry.

ECF No. 1 ¶ 1. Plaintiffs assert causes of action for violations 24 of the federal Telephone
Consumer Protection Act, 47 U.S.C. § 227 et seq., and the Oklahoma 25 Telephone Solicitation
Act, 15 § 775C.3. 26 On June 9, 2025, Super filed a motion to compel arbitration, ECF No. 15.
Plaintiffs 27 oppose the motion, ECF No. 20, and Super has filed a reply, ECF No. 22.

On July 7, 2025, Super 1 ECF No. 24. Plaintiffs oppose the administrative motion, ECF No. 25.
On August 25, 2025, 2 ¶ Super filed a statement of recent decision, alerting the Court of the Ninth
Circuit’s decision in 3 Morrison v. Yippee Entertainment, Inc., No. 24-7235, 2025 WL 2389424
(9th Cir. 2025). ECF 4 ¶ No. 27. 5 B. Super’s Website and App 6 The following facts regarding the
layout of Super’s new user signup on its website and app 7 are taken from Super’s briefs and
supporting declaration and are not disputed by Plaintiffs.

See 8 ¶ ECF No. 20 (“The layout of the sign-up page is exactly as Super.com represents it to be in
its 9 ¶ Motion and accompanying declaration.”). When a new user signs up for an account on
Super’s 10 ¶ website or app, they are presented with a page that requires them to enter a phone
number: 11 b Enter your phone number Your phone number will be used to login and for security,
13 Servicing, and product marketing purposes PRane ferrieeer 14 = = 15 16 TEE» = 17 Z 18 19
20 21 22 23 24 25 26 27 28 1 ECF No. 15 at 7.

Super states at the bottom of this webpage, in relevant part, “By clicking 2 ‘Send code’ you agree to our Super.com Terms of Use.” Id. This statement appears in small, gray 3 font on a white background, and the words “Super.com Terms of Use” are underlined and 4 hyperlinked. A user who clicks on the hyperlink is taken to a separate page with the Terms of 5 Use, which include an arbitration agreement.

ECF No. 16-3 at 19–24. 6 II. JURISDICTION 7 The Court has jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1332(d). 8 III. LEGAL STANDARD 9 The Federal Arbitration Act (“FAA”) applies to written contracts “evidencing a transaction 10 involving commerce.” 9 U.S.C. § 2.

Under the FAA, arbitration agreements “shall be valid, 11 irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation 12 of any contract.” 9 U.S.C. § 2. This provision reflects “both a liberal federal policy favoring 13 arbitration, and the fundamental principle that arbitration is a matter of contract.” *AT&T Mobility 14 LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quotation marks and citations omitted).

On a 15 motion to compel arbitration, the Court’s role under the FAA is “limited to determining (1) 16 whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement 17 encompasses the dispute at issue.” *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 18 1130 (9th Cir. 2000) (citing 9 U.S.C. § 4). If the Court is “satisfied that the making of the 19 agreement for arbitration or the failure to comply therewith is not in issue, the [C]ourt shall make 20 an order directing the parties to proceed to arbitration in accordance with the terms of the 21 agreement.” 9 U.S.C. § 4.

If, however, “the making of the arbitration agreement” is “in issue, the 22 court shall proceed summarily to the trial thereof.” Id. Until a trial on arbitrability is held, “any 23 motion to compel arbitration” must be held “in abeyance until the factual issues have been 24 resolved.” *Hansen v. LMB Mortg. Servs., Inc.*, 1 F.4th 667, 672 (9th Cir. 2021). 25 On a motion to compel arbitration, “courts rely on the summary judgment standard of Rule 26 56 of the Federal Rules of Civil Procedure.” Id. at 670. “Courts may consider evidence outside of 27 the pleadings, such as declarations and other documents filed with the court.” *Burger v. Northrop* 1 2021).

Under Rule 56, “[a]n affidavit or declaration used to support or oppose a motion must be 2 made on personal knowledge, set out facts that would be admissible in evidence, and show that the 3 affiant or declarant is competent to testify on the matters stated.” Fed. R. Civ. P. 56(c)(4).

The 4 Court must “give to the opposing party the benefit of all reasonable doubts and inferences that 5 may arise.” *Concat LP v. Unilever, PLC*, 350 F. Supp. 2d 796, 804 (N.D. Cal. 2004) (citations 6 omitted). If the parties contest the existence of an arbitration agreement, courts “generally... 7 apply state-law principles of contract interpretation to decide whether a contractual

obligation to 8 arbitrate exists.” *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

9 IV. DISCUSSION 10 A. Existence of Contract to Arbitrate 11 The parties dispute whether Plaintiffs and Super formed a contract to arbitrate. Such 12 “challenges to the very existence of the contract are, in general, properly directed to the court.” 13 *Kum Tat Ltd. v. Linden Ox Pasture, LLC*, 845 F.3d 979, 983 (9th Cir. 2017). This is because 14 “arbitration is a matter of contract and a party cannot be required to submit any dispute which [it] 15 has not agreed so to submit.” *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 648 16 (1986) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 17 (1960)).

18 The parties agree California law on contract formation applies here. ECF No. 15 at 13; 19 ECF No. 20 at 9. To form a contract under California law, there must be “actual or constructive 20 notice of the agreement” and a “manifest[ation of] mutual assent.” *Oberstein v. Live Nation Ent., Inc.*, 60 F.4th 505, 512–13 (9th Cir. 2023).

The party seeking to compel arbitration has the burden 22 to prove, by a preponderance of the evidence, that a contract to arbitrate exists. *Knutson v. Sirius 23 XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014) (citing *Rosenthal v. Great W. Fin. Sec. Corp.*, 24 14 Cal. 4th 394, 413 (1996)). 25 Super does not attempt to show that Plaintiffs had actual notice of the Terms of Use.

To 26 determine whether Plaintiffs had constructive notice, the Court must consider “the design and 27 content of the website and the agreement’s webpage.” *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1 provides reasonably conspicuous notice of the terms to which the consumer will be bound; and (2) 2 the consumer takes some action, such as clicking a button or checking a box, that unambiguously 3 manifests his or her assent to those terms.” *Oberstein*, 60 F.4th at 515 (quoting *Berman v. 4 Freedom Fin.*

Network, LLC, 30 F.4th 849, 856 (9th Cir. 2022)). 5 1. Reasonably Conspicuous Notice 6 For an online notice to be reasonably conspicuous, it “must be displayed in a font size and 7 format such that the court can fairly assume that a reasonably prudent Internet user would have 8 seen it.” *Oberstein*, 60 F.4th at 515 (quoting *Berman*, 30 F.4th at 856). “[C]onsumers cannot be 9 expected to ferret out hyperlinks to terms and conditions to which they have no reason to suspect 10 they will be bound.” *Nguyen*, 763 F.3d at 1179.

Thus, if there is a hyperlink, “the fact that a 11 hyperlink is present must be readily apparent.” *Berman*, 30 F.4th at 857. Plaintiffs raise several 12 complaints regarding the form of notice provided in this case: (1) it is “displayed in tiny gray font 13 far below the phone number text box and the large, bright-blue ‘Send code’ button,” (2) “[t]he 14 ‘Terms of Use’ hyperlink is not readily apparent,” (3) it does not capture a user’s name, email 15 address, or other identifying

information that would evidence assent, and (4) the notice is obscured by a user's cellphone keyboard once the user clicks on the text box.

ECF No. 20 at 13–16. The Court agrees that the notice provided by Super's website and app is insufficient. As the Ninth Circuit held in *Berman v. Freedom Financial Network, LLC*, 30 F.4th 849 (9th Cir. 19 2022), "a web designer must do more than simply underscore the hyperlinked text in order to ensure that it is sufficiently 'set apart' from the surrounding text." *Id.* at 857; see also *Sellers v. JustAnswer LLC*, 73 Cal. App.

5th 444, 481 (2021) (rejecting as not sufficiently conspicuous a "hyperlink to the terms of service [that] is underlined, but does not otherwise draw the user's attention in any way"). Super, simply put, did not "do more than simply underscore the hyperlinked text." *Berman*, 30 F.4th at 857. A link to its terms of use appears in very small, gray font on a white background at the bottom of a page on which it requires users to enter a phone number.

The font of this notice is smaller than any other font on the page. See *Sellers*, 73 Cal. App. 5th at 481. The hyperlink to the terms of use is underlined but is not distinguished in any other way. This is insufficient to constitute reasonably conspicuous notice. *Berman*, 30 F.4th at 857; see also *Massel 3 v. SuccessfulMatch.com*, 718 F. Supp. 3d 1112, 1117 (N.D.

Cal. 2024) ("Because Millionaire Match's links were underlined but did not appear in a contrasting color, the Court must conclude, under *Berman*, that they were not reasonably conspicuous to put Mr. Massel on notice of the terms and that Mr. Massel therefore cannot be said to have assented to them."). Super contends that its form of notice is just like two others recently approved by courts in this district, ECF No. 22 at 13–15, but the Court disagrees.

In *Sarhadi v. Pear Health Labs, Inc.*, 9 No. 24-cv-07921-TLT, 2025 WL 1350033 (N.D. Cal. Apr. 18, 2025), the words "Terms of Service" were not just underlined but also capitalized and colored blue, which helped "indicate they are hyperlinked." *Id.* at *6; see *Berman*, 30 F.4th at 857 ("Customary design elements denoting the existence of a hyperlink include the use of a contrasting font color (typically blue) and the use of all capital letters, both of which can alert a user that the particular text differs from other plain text in that it provides a clickable pathway to another webpage.").

And in *Kroskey v. Elevate Labs, LLC*, No. 5:24-cv-08113-EJD, 2024 WL 1507091 (N.D. Cal. May 27, 2025), the 16 hyperlinks were "in bold with the first letters capitalized," which the court held was sufficient when considered in the "full context of the transaction"—which was "creating an account and paying for a subscription membership." *Id.* at *4. Neither *Sarhadi* or *Kroskey* is an apt comparison to Super's notice, which was not bolded, not colored blue, and not in the context of a paid subscription membership. As the California Court of Appeal has held, [e]ven text that is just slightly smaller, or slightly further away from the box or button

the consumer must click on must, at some point, 23 exceed the limits of what constitutes adequate notice.

Here, [defendant] chose to use a textual notice attached to a hyperlink as 24 opposed to a pure clickwrap or scrollwrap form, and then chose to 25 1 For the same reasons, the case for which Super filed a statement of recent decision, ECF No. 27, 26 is also inapposite.

In that case, *Morrison v. Yippee Entertainment, Inc.*, No. 24-7235, 2025 WL 2389424 (9th Cir. Aug. 18, 2025), “the hyperlink appeared in bright blue font against a clean 27 white background that stood out from the surrounding text to indicate it was clickable.” *Id.* at *1. display that notice in extremely small print and not immediately 1 adjacent to the ‘Start my trial’ button.

By doing so, [defendant] ran the risk of a court concluding, as we do here, that the notice was not 2 sufficiently conspicuous. 3 *Sellers*, 73 Cal. App. 5th at 481—82 (citation modified). Likewise here, where Super had 4 “complete control over the design of [its] website[,]” *id.* at 465, it chose not to do more than 5 || present an underscored hyperlink in small, gray font, not distinguished by bolding or a different 6 || color.

The Court accordingly finds the notice not reasonably conspicuous. 7 Because Super has not shown that its website and app provided reasonably conspicuous 8 || notice of its terms of service, Super has not carried its burden to show that a user entering a phone 9 || number on Super’s website or app constitutes contract formation.

The Court therefore declines to 10 || reach any subsequently-presented questions, including whether Plaintiffs actually entered their 11 phone numbers into Super’s website or app. Because the Court resolves the motion without 12 || relying on any disputed facts, the Court also denies the administrative motion for an evidentiary 5 13 hearing. CONCLUSION 3 15 For the foregoing reasons, the motion to compel arbitration and administrative motion for 16 || evidentiary hearing are denied.

IT IS SO ORDERED. 18 Dated: November 25, 2025. 19 JON S. TIGA 20 United States District Judge 21 22 23 24 25 26 27 28