

Introduction to Contracts

Caroline Bradley¹

Uber: Meyer v Kalanick..... [3](#)

Loans..... [27](#)

Most commercial outlines and many casebooks begin the study of contract law with a focus on **formalities**: the legal requirements for the formation of a binding contract. The formal requirements of a contract are stated as **offer**, **acceptance** and **consideration**. These are legal terms of art: the words have specific meaning for lawyers that they do not have in everyday life. Non-lawyers may use the word “offer” to mean a number of different sorts of act. I may offer to drive a friend to lunch, for example (how is this offer different from the sort of offer made to a prospective passenger via the uber app?). But when a lawyer considers whether words spoken or written by a person constitute an “offer” the acceptance of which can create a contract, she is using the word in a very specific way.

Lawyers need to learn to be very careful about what words they use because some words have very specific legal meanings (using a word with a specific legal meaning wrongly could disadvantage your client), and because **ambiguity** (the use of words that have uncertain or multiple possible meanings) creates opportunities for litigation. A contracting party who wants to get out of a contractual obligation by invoking the idea of ambiguity, and who succeeds in persuading a court to interpret the contract in her favor may be happy about the ambiguity. But litigation is costly, and a legal system which was prepared to see many contractual provisions as ambiguous might discourage contracting.

While the legal term “offer” has a specific meaning, different lawyers may have different views on whether a given set of spoken or written words actually does constitute an “offer.” And figuring out whether a set of words constitutes an “offer” involves thinking not just about the words (contract law is not about magic incantations) but also about the circumstances in which they were spoken or written. Stewart Macaulay (one of the authors of our casebook) has written: “The more you know about language, the less comfortable you are with ideas that any collection of words has but

¹ © Caroline Bradley 2017. All rights reserved..

one complete and clear meaning apart from context.”²

Different possible views about how to think about the words and their **context** are the basis for lawyers to make arguments. In thinking about contract formation issues we want to distinguish between the sort of promises a court will enforce as a binding contract and words which either do not constitute promises at all, or which do not constitute the sort of promises the law will enforce as a binding contract.

Even where the legal formalities of offer, acceptance and consideration are satisfied, and the lawyers for both sides recognize there is no scope for dispute about these issues, there may not be a binding contract. If two people agree to do an **illegal** act³ the agreement will not be treated as a binding contract. If one person lies to persuade another to enter into an agreement the **fraud**⁴ will prevent a court from enforcing the agreement as a binding contract. If one person pressurizes another into making an agreement a court may find that the pressure (the “**duress**”) means that the agreement should not be enforced as a binding contract. We will consider issues of this type (involving issues of “public policy”) at the end of the semester. For now you do not need to know anything about the details of illegality, fraud or duress, but it is a good idea to bear in mind at the outset that there are some **public policy** limits to the ability to contract.

Lawyers do need to know about the formalities of contract creation (and we are going to begin with a brief examination of some of these formation issues). But disputes about contracts that give rise to litigation are often about **interpretation** of the contract rather than about whether a contract exists, or about what remedies are available

² Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 MODERN LAW REVIEW 44, 48 (2003).

³ An act is illegal if the law prohibits it. For example a contract to buy and sell illegal drugs would be an illegal, and therefore unenforceable (as a matter of law), contract. Obviously bargains are frequently made and kept which do not rely on the formal legal system for their enforcement.

⁴ Fraud in the inducement is an intentional misstatement of a material fact to induce another to enter into a contract. Notice that this is a legal test with multiple parts: a (1) misstatement of (2) a fact which is (3) material and which is (4) made intentionally and (5) made to induce another to enter into a contract.

where there is a breach of a contract. The Casebook we are using begins with a lengthy discussion of how the authors think about contract law and an explanation of what they are trying to achieve in the book. You will be or have been a party to many contracts: ongoing contracts like leases or cellphone contracts or agreements for student loans, or one-off contracts for the purchase of goods. You may or may not have thought much about these transactions and relationships as contractual. Now you will. For the first weeks of the semester most of our time will be spent on thinking about remedies for breach of contract (rather than on the perhaps more traditional issues relating to offer and acceptance and consideration). As a general matter we could say that we cannot really understand the law if we do not understand what sanctions may be imposed on those who break the law or what remedies may be sought by those whose legal rights are infringed. Understanding how contract remedies work is important in order to understand contracts. Figuring out what it means to say that a contract exists involves understanding what are the consequences of breach of that contract.

During the semester we are going to see examples of issues relating to contract law that arise in some different contexts, such as agreements between family members (where the parties may not focus at all on issues of formalities), employment and franchising. But even in the context of commercial transactions the parties to the transactions may not think about the issues of contract law in the same way that a court does.

Uber: Meyer v Kalanick

The decision set out below is by Judge Jed Rakoff⁵ in the Southern District of New York (a federal district court) on July 29, 2016. The decision is one decision in ongoing litigation in which Spencer Meyer, an Uber customer, is suing Travis Kalanick, who was at the time Uber's CEO,⁶ arguing that Kalanick and Uber drivers were involved

⁵ You may be interested to read this article by the judge: Jed S Rakoff, The Cure for Corporate Wrongdoing: Class Actions vs. Individual Prosecutions, New York Review of Books (Nov. 19, 2015) at <http://www.nybooks.com/articles/2015/11/19/cure-corporate-wrongdoing-class-actions/>

⁶ In 2017 Travis Kalanick resigned as CEO of Uber after shareholders decided that a change in corporate culture was necessary at the firm. See, e.g., Mike Isaac, Uber Founder Travis Kalanick Resigns as C.E.O., New York Times Jun. 21, 2017) ("The move caps months of questions over the leadership of Uber, which has become a prime example of Silicon Valley start-up culture gone awry. The company has been

in a price-fixing conspiracy in violation of the anti-trust laws.⁷ Although the suit was initially against Mr Kalanick, Uber subsequently became a party to the litigation. Uber investigated Mr Meyer and his lawyer, then denied it had done so, but subsequently admitted the investigation.⁸

The complaint in the case stated:

Kalanick designed Uber to be a price fixer. Kalanick has long insisted that Uber is not a transportation company and that it does not employ drivers. Instead, Uber is a technology company, whose chief products are smartphone apps. Those apps match riders with drivers. The apps provide a standard fare formula, the Uber pricing algorithm. Drivers using the Uber app do not compete on price. Rather, drivers charge the fares set by the Uber algorithm. Those fares surge at times to extraordinary levels, which are uniformly charged by drivers using the Uber app. Uber takes a cut of those price-fixed fares. Kalanick's business plan thus generates profit through price fixing... The price-fixing Kalanick has arranged among Uber drivers is an open secret. In September 2014, Uber conspired with hundreds of drivers to negotiate an effective hike in fares that would benefit them, collectively, at the expense of their riders. Uber had initially required drivers of SUVs and black cars to accept a lower fare for rides. Drivers, who should have been in direct competition with one another over price, instead banded together to ask Uber to reverse its decision and reinstitute higher fares. Uber colluded with those drivers and put the higher fares back in place. This collective agreement to fix prices among competitors illustrates Uber's essential role, as designed by

exposed this year as having a workplace culture that included sexual harassment and discrimination, and it has pushed the envelope in dealing with law enforcement and even partners. That tone was set by Mr. Kalanick, who has aggressively turned the company into the world's dominant ride-hailing service and upended the transportation industry around the globe.")

⁷ The complaint argues violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 340 of the Donnelly Act, N.Y. Gen. Bus. Law § 340.

⁸ Michael Hiltzik, How sleazy is Uber? This federal judge wants to know, at <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-uber-rakoff-20160610-snap-story.html>
!

Kalanick: to fix prices among competing drivers.

The rules which regulate price-fixing are part of a system of rules to regulate competition, including rules to limit cartels and monopolies.⁹ These rules are examples of how public policy limits the freedom of businesses to contract: contracts which are designed to fix prices in violation of the anti-trust rules are prohibited. Violation of the rules can lead to criminal and civil liability. Consumers injured by price-fixing can sue for damages, and a successful claim can give rise to treble damages (damages which are calculated as a multiple of the harm caused by the violation). Treble damages (and attorney's fees) can incentivize lawsuits, and are meant to disincentivize price-fixing. We do not know if Mr Meyer will win his case againsts Kalanick and Uber. And this semester we are concerned with contract law, rather than with anti-trust law.

The contract law issue in the case arises because Kalanick filed a **Motion to compel arbitration** of the dispute. The motion stated:

Defendant Travis Kalanick respectfully asks this Court to compel arbitration of Plaintiff's claims. The Court has already found, and Plaintiff has never disputed, that Plaintiff agreed to Uber's Terms and Conditions (the "Terms" or "Rider Terms") as a condition of using Uber's services... Those Terms include a clear and conspicuous agreement to arbitrate disputes (the "Arbitration Agreement"), which mandates dismissing this action in favor of arbitration. Because the Arbitration Agreement delegates arbitrability issues to the arbitrator, the Court should allow the arbitrator to address any arbitrability issues in the first instance, including whether Mr. Kalanick can avail himself of the Arbitration Agreement.

Here is the Dispute resolution provision Kalanick and Uber are seeking to enforce:

Dispute Resolution

You and Company agree that any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof or the use of the Service or Application (collectively, "Disputes") will be settled by binding arbitration, except that

⁹ See, e.g., US Department of Justice, Antitrust Enforcement and the Consumer, at <https://www.justice.gov/atr/file/800691/download>.

each party retains the right to bring an individual action in small claims court and the right to seek injunctive or other equitable relief in a court of competent jurisdiction to prevent the actual or threatened infringement, misappropriation or violation of a party's copyrights, trademarks, trade secrets, patents or other intellectual property rights. You acknowledge and agree that you and Company are each waiving the right to a trial by jury or to participate as a plaintiff or class User in any purported class action or representative proceeding. Further, unless both you and Company otherwise agree in writing, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of any class or representative proceeding. If this specific paragraph is held unenforceable, then the entirety of this "Dispute Resolution" section will be deemed void. Except as provided in the preceding sentence, this "Dispute Resolution" section will survive any termination of this Agreement.

Do you use Uber? Are you a party to any other agreements which include arbitration agreements? Why do you think Kalanick and Uber want to arbitrate this dispute rather than go to court? Why does Meyer not want to arbitrate the dispute?

Uber's current terms and conditions¹⁰ state:

The arbitration will be administered by the American Arbitration Association ("AAA") in accordance with the AAA's Consumer Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (the "AAA Rules") then in effect, except as modified by this Arbitration Agreement. The AAA Rules are available at www.adr.org/arb_med or by calling the AAA at 1-800-778-7879.

In 2017 the CFPB, the Bureau of Consumer Financial Protection, which is a federal agency which has the responsibility to protect financial services consumers, published a final rule to limit the use of pre-dispute arbitration agreements by providers of financial services to consumers. The CFPB stated:

Congress directed the Bureau to study these pre-dispute arbitration

¹⁰ See <https://www.uber.com/legal/terms/us/> .

agreements in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd- Frank or Dodd-Frank Act). In 2015, the Bureau published and delivered to Congress a study of arbitration (Study). In the Dodd-Frank Act, Congress also authorized the Bureau, after completing the Study, to issue regulations restricting or prohibiting the use of arbitration agreements if the Bureau found that such rules would be in the public interest and for the protection of consumers. Congress also required that the findings in any such rule be consistent with the Bureau's Study. In accordance with this authority, the final rule issued today imposes two sets of limitations on the use of pre-dispute arbitration agreements by covered providers of consumer financial products and services. First, the final rule prohibits providers from using a pre-dispute arbitration agreement to block consumer class actions in court and requires most providers to insert language into their arbitration agreements reflecting this limitation. This final rule is based on the Bureau's findings-which are consistent with the Study-that pre-dispute arbitration agreements are being widely used to prevent consumers from seeking relief from legal violations on a class basis, and that consumers rarely file individual lawsuits or arbitration cases to obtain such relief.¹¹

The Dodd-Frank Act was enacted during the global financial crisis to improve financial regulation in the US. Recently the current administration has begun to review financial regulation in the US with a view to deregulation.¹² The CFPB is unpopular with some people who are in favor of financial deregulation, and this rule about arbitration agreements is among the CFPB's actions that have been criticized.

We are not focusing on financial regulation but this example of rules restricting arbitration agreements in one context, and the controversy this is causing, raise some

¹¹ Bureau of Consumer Financial Protection, Arbitration Agreements, 82 Fed. Reg. 33210, 33210 (Jul. 19, 2017).

¹² See, e.g., Presidential Executive Order on Core Principles for Regulating the United States Financial System (Feb. 3, 2017) (identifying as core principles, inter alia, "foster economic growth and vibrant financial markets through more rigorous regulatory impact analysis that addresses systemic risk and market failures, such as moral hazard and information asymmetry" and "advance American interests in international financial regulatory negotiations and meetings."

quite fundamental questions about how we think about contracts and what role the state has and should have in controlling the contracts that people can create and enforce.

Here is how Judge Rakoff dealt with the motion in the case. You will want to read the text very slowly and carefully to figure out exactly what the judge is saying. Who is the judge writing this opinion for?¹³

"Since the late eighteenth century, the Constitution of the United States and the constitutions or laws of the several states have guaranteed U.S. citizens the right to a jury trial.¹⁴ This most precious and fundamental right can be waived only if the waiver is knowing and voluntary, with the courts "indulg[ing] every reasonable presumption against waiver." *Aetna Ins. Co. v. Kennedy to Use of Bogash*, 301 U.S. 389, 393 (1937); *Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc.*, 500 F.3d 171, 188 (2d Cir. 2007). But in the world of the Internet, ordinary consumers are deemed to have regularly waived this right, and, indeed, to have given up their access to the courts altogether, because they supposedly agreed to lengthy "terms and conditions" that they had no realistic power to negotiate or contest and often were not even aware of.

This legal fiction is sometimes justified, at least where mandatory arbitration is concerned, by reference to the "liberal federal policy favoring arbitration," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)... Application of this policy to the Internet is said to inhere in the Federal Arbitration Act, as if the Congress that enacted that Act in 1925 remotely contemplated the vicissitudes of the World Wide Web.¹⁵ Nevertheless,

¹³ I have edited the judgment slightly to improve readability. The footnote numbering follows the numbering in this document but I have added the original footnote numbering from the judgment. Other footnotes include my questions and comments for you. I have included the citations to other cases that appear in the judgment. This does make the judgment harder for you to read but you want to notice how the judge supports his decision in this case by invoking case law.

¹⁴ **What is this reference to the right to a jury trial doing here?**

¹⁵ **Technological change causes difficulties for the interpretation of legal texts adopted before the changes occur. This is only one example.**

in this brave new world, consumers are routinely forced¹⁶ to waive their constitutional right to a jury and their very access to courts, and to submit instead to arbitration, on the theory that they have voluntarily agreed to do so in response to endless, turgid, often impenetrable sets of terms and conditions, to which, by pressing a button, they have indicated their agreement.

But what about situations where the consumer is not even asked to affirmatively indicate her consent? What about situations in which the consumer, by the mere act of accessing a service, is allegedly consenting to an entire lengthy set of terms and conditions? And what about the situation where the only indication to the consumer that she is so consenting appears in print so small that an ordinary consumer, if she could read it at all, would hardly notice it?¹⁷ Writing for the Second Circuit Court of Appeals in 2002, then-Circuit Judge Sonia Sotomayor presciently held that "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility." *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 35 (2002). Applying these principles to the matter at hand, the Court finds that the plaintiff here never agreed to waive his right to a jury trial or to submit to mandatory arbitration.

... By way of brief background, on December 16, 2015, plaintiff Spencer Meyer filed suit against defendant Travis Kalanick, alleging that Mr. Kalanick had orchestrated and participated in an antitrust conspiracy arising from the algorithm that co-defendant Uber Technologies, Inc. ("Uber") uses to set ride prices.... Mr. Kalanick did not, at that time, make any motion to compel arbitration. Instead, he filed a motion to dismiss plaintiff's First Amended Complaint, which was denied on March 31, 2016, as well as a motion to reconsider the Court's determination that plaintiff could seek to proceed via class action, which was denied on May 9, 2016. ..Following these Court rulings, Mr.Kalanick, on May 20, 2016, moved to join Uber as a defendant in this case... and that motion was granted...

¹⁶ **Do you agree with the Judge that consumers are forced to waive their rights? A consumer does not have to use Uber at all. Contrast this story about prisoners being forced to accept JP Morgan's costly terms for the debit cards used to remit funds to prisoners on their release:**
<http://www.bloomberg.com/news/articles/2016-08-02/jpmorgan-pays-prison-inmates-who-couldn-t-get-out-of-jail-free>

¹⁷ **What is the relevance of small print?**

Uber had also moved to intervene... , and, once Mr. Kalanick's motion to join Uber was granted, Uber's motion to intervene was denied as moot... But attached to Uber's motion to intervene was a motion to compel arbitration....Uber argued that Mr. Meyer was required to arbitrate his claims pursuant to a contract formed when he signed up to use Uber... On June 7, 2016, defendant Kalanick also moved to compel arbitration... Mr. Kalanick claimed that even though he was not a signatory to the contract that plaintiff had formed with Uber, he could enforce the arbitration provision of that contract against plaintiff... After Uber was joined as a defendant, it re-filed its motion to compel arbitration...

As the motions to compel arbitration were then ripe, the Court ordered full briefing. By papers filed on June 29, 2016, plaintiff opposed the motions to compel arbitration filed by defendants Kalanick and Uber... On July 7, 2016, Mr. Kalanick and Uber filed separate replies to plaintiff's opposition...Thereafter, on July 14, 2016, the Court held oral argument...

Having now carefully considered all these submissions and arguments, the Court hereby denies the motions to compel arbitration filed by Uber and by Mr. Kalanick. It should be noted at the outset that the parties' submissions raise a number of important but subsidiary questions, such as, for example, whether Mr. Kalanick is permitted to enforce an alleged arbitration agreement to which he is not a signatory and whether Mr. Kalanick and/or Uber have waived any right to compel arbitration through their prior statements and participation in litigation in this Court. At this juncture, however, the Court need not decide these questions, since it finds that the motions are resolved by the threshold question of whether plaintiff actually formed any agreement to arbitrate with Uber, let alone with Mr. Kalanick.¹⁸

Plaintiff denies that such an agreement was ever formed, on the ground that when he registered to use Uber, he did not have adequate notice of the existence of an arbitration agreement... The question of whether an arbitration agreement existed is for the Court and not an arbitrator to decide, as Uber acknowledged at oral argument...

¹⁸ **The judge characterizes the issue as a contract formation issue: is there a valid agreement to arbitrate? The judge says no. Does this mean there was no contract at all between Uber and Meyer, or just no arbitration agreement? Meyer did agree to use Uber for some trips. There was some sort of an agreement between Meyer and Uber. But was it a binding contract and, if so, what were the terms of the agreement?**

The parties argue, however, over which state's law should be applied to the issue of whether plaintiff agreed to arbitrate his claims.¹⁹ The Court previously indicated that California law would apply to the User Agreement between Uber and its riders - ~' the agreement that contains the arbitration clause and to which plaintiff is alleged to have assented.²⁰ .. Plaintiff supports the application of California law,... and in fact, defendant Kalanick expressly stated in previous briefing in this case that California law applied....Yet Mr. Kalanick and Uber now contend that New York law should apply to the User Agreement, citing "evidence now available" concerning Uber rides that plaintiff Meyer has taken...

Although the Court does not view the choice between California law and New York law as dispositive with respect to the issue of whether an arbitration agreement was formed, the Court confirms its prior decision to apply California law to the User Agreement. To reach this result, the Court first employed (and again employs) New York's "interest analysis" for deciding which state law to apply in these circumstances. According to that analysis, a court "must consider five factors: (1) the place of contracting; (2) the place of the contract negotiations; (3) the place of the performance of the contract; (4) the location of the subject matter of the contract; and (5) the domicile, residence, nationality, places of incorporation, and places of business of the parties." *Philips Credit Corp. v. Regent Health Grp., Inc.*, 953 F. Supp. 482, 502 (S.D.N.Y. 1997).

Here, the fact that Uber - one of the parties to the alleged contract, and the contract's drafter - is located in California weighs heavily in favor of the application of California law. Consistent with this finding is the fact that although Uber's May 17, 2013 User Agreement (the one to which plaintiff is alleged to have assented) contains no explicit choice-of-law clause, that agreement indicates that the arbitrator referenced in the agreement's arbitration provision "will be either a retired judge or an attorney licensed to practice law in the state of California," ... Moreover, later versions of the User

¹⁹ **Contract law is a matter of state law, and the contract law of different states can vary as we will see during the semester. Here the court uses New York conflicts of laws rules to decide what law should apply. Don't worry about this too much right now. But be aware that sometimes there is an issue about which rules a court should apply.**

²⁰[Footnote 1] Defendants Kalanick and Uber refer to this agreement as Uber's "Rider Terms." The Court refers to the agreement as the "User Agreement" for the sake of consistency with the Court's previous rulings, but no substantive point depends on this terminological choice.

Agreement contain an explicit California choice-of-law clause...

The other interest analysis factors do not favor any other state's law more strongly than that of California. According to the uncontested representation of Uber's Senior Software Engineer Vincent Mi, the plaintiff has taken three Uber rides in New York City; one in Connecticut; three in Washington, D.C.; and three in Paris... Plaintiff Meyer lives in Connecticut, ... and he recalls being in Vermont when he registered to use Uber... None of these features of the case, or any others, supports the choice of New York law over California law. Accordingly, the Court reaffirms its prior holding that California law applies to the User Agreement.²¹

Turning, then, to the question of whether plaintiff agreed to arbitrate his claims, defendants first argue that plaintiff conceded that he had so agreed through a statement made in his Amended Complaint.... Specifically, plaintiff stated in his Amended Complaint that "[t]o become an Uber account holder, an individual first must agree to Uber's terms and conditions and privacy policy."... But defendants read this statement out of context, as the statement does not specifically reference the plaintiff. And plaintiff's counsel clarified at oral argument that the statement was not intended as some kind of implicit waiver, and that, if required, he could amend the complaint to so clarify... The Federal Rules of Civil Procedure provide that "[t]he court should freely give leave [to amend a pleading] when justice so requires," Fed. R. Civ. P. 15(a) (2), and so, for instant purposes, the Court will deem the complaint so amended. Moreover, even without the amendment, the Court does not construe this one sentence of the complaint as somehow a knowing and voluntary waiver of the right to argue that Mr. Meyer was never adequately notified of the alleged agreement to arbitrate.²²

The Court therefore turns to the heart of plaintiff's argument that he did not agree to arbitrate his claims. As previously indicated, guidance from the Court of Appeals was provided in *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17 (2d Cir. 2002), and that

²¹ [Footnote 2] Nevertheless, as indicated above, the Court does not see the choice between California law and New York law as dispositive with regard to the issue of whether plaintiff formed an agreement to arbitrate. Even if the Court were to apply New York law, it would hold that plaintiff had not formed such an agreement.

²² [Footnote 3] The same is even more true of a passing remark plaintiff's counsel made at oral argument in one of the hearings before the Court on another issue. See Transcript dated June 16, 2016, Dkt. 94, at 15:14-15.

decision is particularly apt because it applied California law. Applying that law, the Specht court found that certain plaintiffs had not assented to a license agreement containing a mandatory arbitration clause because adequate notice and assent were not present on the facts of that case... In the instant case, the essentially undisputed facts relevant to the issue of whether plaintiff assented to the arbitration agreement are as follows. According to a declaration submitted by Uber engineer Mi, plaintiff Meyer registered for Uber on October 18, 2014 via the Uber smartphone application (the "Uber app") using a Samsung Galaxy S5 phone with an Android operating system... At the time that Mr. Meyer registered to use Uber, Uber rider registration using a smartphone involved a two-step process... At the first screen, potential Uber riders were prompted either to register using Google+ or Facebook, or to enter their name, email address, phone number, and password and click "Next."... Potential riders who clicked "Next" at the first screen were directed to a second screen, where they could make payment and register to use Uber... Uber has provided an image of this second screen - the crucial one for the purposes of determining plaintiff's assent to the arbitration agreement - that is considerably larger than the screen that would be faced by the user of a Samsung Galaxy S5 phone. Therefore, the Court attaches to this opinion an image of the second screen scaled down to reflect the size of such a phone (with a 5.1" or 129.4 mm display size).²³

The second screen of the Uber registration process features, at the top of the screen, fields for users to insert their credit card details... Beneath these fields is a large, prominent button whose width spans most of the screen; it is labeled "Register." .. Beneath this button are two additional buttons, with heights similar to that of the "Register" button, labeled "PayPal" and "Google Wallet." ... These buttons indicate that a user may make payments using PayPal or Google Wallet instead of entering his or her credit card information...

Beneath these two additional buttons, in considerably smaller font, are the words "By creating an Uber account, you agree to the Terms of Service & Privacy Policy." ...While the phrase "Terms of Service & Privacy Policy" is in all-caps, the key words "By creating an Uber account, you agree to" are not in any way highlighted and, indeed, are barely

²³ [Footnote 4] See Tech Specs, Samsung Galaxy S5, <http://www.samsung.com/uk/consumer/mobile-devices/smartphones/galaxy-s/SMG900FZKABTU>

legible.²⁴

Although the fact that the phrase "Terms of Service & Privacy Policy" is underlined and in blue suggests that the phrase is a hyperlink,...a potential user may click on the "Register" button and complete the Uber registration process without clicking on this hyperlink... Even if a potential user does click on the hyperlink, she is not immediately taken to the actual terms and conditions. Rather, in the words of Uber engineer Mi, "the user is taken to a screen that contains a button that accesses the 'Terms and Conditions' and 'Privacy Policy' then in effect."....²⁵ Thus, it is only by clicking first the hyperlink and then the button - neither of which is remotely required to register with Uber and begin accessing its services - that a user can even access the Terms and Conditions. Further still, even if a user were to arrive at the Terms and Conditions, these terms (which the Court calls the "User Agreement") consist of nine pages of highly legalistic language that no ordinary consumer could be expected to understand. And it is only on the very bottom of the seventh page that one finally reaches the following provision:

Dispute Resolution You and Company agree that any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof or the use of the Service or Application (collectively, "**Disputes**") will be settled by binding arbitration, except that each party retains the right to bring an individual action in small claims court and the right to seek injunctive or other equitable relief in a court of competent jurisdiction to prevent the actual or threatened infringement, misappropriation or violation of a party's copyrights, trademarks, trade secrets, patents or other intellectual property rights. **You acknowledge and agree that you and Company are each waiving the right to a trial by jury or to participate as a plaintiff or class User in any purported class action or representative**

²⁴ [Footnote 5] In the Court's reckoning, the word "Register" is in approximately 10-point font, the phrase "Terms of Service & Privacy Policy" is in approximately 6-point font, and the words "By creating an Uber account, you agree to" may be in even smaller font and certainly no greater than 6-point font.

²⁵[Footnote 6] In fact, unlike a declaration that Uber submitted in another recent case, Mr. Mi's declaration does not attest that "[t]he Terms & Conditions then in effect would be displayed when the 'Terms & Conditions' button was clicked....

proceeding. Further, unless both you and Company otherwise agree in writing, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of any class or representative proceeding. If this specific paragraph is held unenforceable, then the entirety of this "Dispute Resolution" section will be deemed void. Except as provided in the preceding sentence, this "Dispute Resolution" section will survive any termination of this Agreement.

User Agreement at 7-8 (boldface in the original). The bolded sentence in the middle of this paragraph is the only bolded sentence in the User Agreement that is not part of a header, although other statements in the User Agreement are in all-caps...

Plaintiff Meyer states that he does not recall noticing the Terms of Service hyperlink when he registered to use Uber and does not believe that he clicked on the hyperlink... Uber does not contest this statement, and the Court finds no basis for a claim that plaintiff Meyer had "actual knowledge of the agreement." *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014) (applying New York law). However, an individual may still be said to have assented to an electronic agreement if "a reasonably prudent user" would have been put "on inquiry notice of the terms of the contract."²⁶

²⁶ **"Inquiry notice"?** In *Nguyen v Barnes & Noble* the 9th Circuit wrote: "where, as here, there is no evidence that the website user had actual knowledge of the agreement, the validity of the browsewrap agreement turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract. *Specht*, 306 F.3d at 30-31; see also *In re Zappos.com, Inc. Customer Data Sec. Breach Litig.*, 893 F.Supp.2d 1058, 1064 (D.Nev.2012). Whether a user has inquiry notice of a browsewrap agreement, in turn, depends on the design and content of the website and the agreement's webpage. *Google*, 2013 WL 5568706, at *6. Where the link to a website's terms of use is buried at the bottom of the page or tucked away in obscure corners of the website where users are unlikely to see it, courts have refused to enforce the browsewrap agreement. See, e.g., *Specht*, 306 F.3d at 23 (refusing to enforce terms of use that "would have become visible to plaintiffs only if they had scrolled down to the next screen"); *In re Zappos.com*, 893 F.Supp.2d at 1064 ("The Terms of Use is inconspicuous, buried in the middle to bottom of every Zappos.com webpage among many other links, and the website never directs a user to the Terms of Use."); *Van Tassell*, 795 F.Supp.2d at 792-93 (refusing to enforce arbitration clause in browsewrap agreement that was only noticeable after a "multi-step process" of clicking through non-obvious links); *Hines*, 668 F.Supp.2d at 367 (plaintiff "could not even see the link to [the terms and conditions] without scrolling down to the bottom of the screen—an action

Barnes & Noble, 763 F.3d at 1177; see also Schnabel v. Trilegiant Corp., 697 F. 3d 110, 120 (2d Cir. 2012); Specht, 306 F.3d at 20.²⁷

Courts addressing electronic contract formation have at times distinguished between two types of agreements: "'clickwrap' (or 'click-through') agreements, in which website users are required to click on an 'I agree' box after being presented with a list of terms and conditions of use; and 'browsewrap' agreements, where a website's terms and conditions of use are generally posted on the website via a hyperlink at the bottom of the screen." Barnes & Noble, 763 F.3d at 1175-76. "The defining feature of browsewrap agreements is that the user can continue to use the website or its services without visiting the page hosting the browsewrap agreement or even knowing that such a webpage exists." Be In, Inc. v. Google Inc., No. 12-cv- 03373, 2013 WL 5568706, at *6 (N.D. Cal. Oct. 9, 2013) see also Long v. Provide Commerce, Inc., 200 Cal. Rptr. 3d 117, 123 (Cal. Ct. App. 2016)...

"Clickwrap" agreements are more readily enforceable, since they "permit courts to infer that the user was at least on inquiry notice of the terms of the agreement, and has outwardly manifested consent by clicking a box." Cullinane, 2016 WL 3751652, at *6; see also Specht, 306 F.3d at 22 n.4; Savetsky v. Pre-Paid Legal Servs., Inc.,

that was not required to effectuate her purchase"). On the other hand, where the website contains an explicit textual notice that continued use will act as a manifestation of the user's intent to be bound, courts have been more amenable to enforcing browsewrap agreements. See, e.g., Cairo, Inc. v. Crossmedia Servs., Inc., No. 04-04825, 2005 WL 756610, at *2, *4-5 (N.D.Cal. Apr. 1, 2005) (enforcing forum selection clause in website's terms of use where every page on the website had a textual notice that read: "By continuing past this page and/or using this site, you agree to abide by the Terms of Use for this site, which prohibit commercial use of any information on this site"). But see Pollstar v. Gigmania, Ltd., 170 F.Supp.2d 974, 981 (E.D.Cal.2000) (refusing to enforce browsewrap agreement where textual notice appeared in small gray print against a gray background). In short, the conspicuousness and placement of the "Terms of Use" hyperlink, other notices given to users of the terms of use, and the website's general design all contribute to whether a reasonably prudent user would have inquiry notice of a browsewrap agreement."

²⁷ [Footnote 7] Much of the case law on electronic bargaining relates to the context of Internet transactions, while the alleged agreement in the instant case was formed via mobile application. However, the Court sees little reason to distinguish between the two contexts, and neither does existing case law. See, e.g., Cullinane, 2016 WL 3751652, at *6.

14-cv-03514, 2015 WL 604767, at *3 (N.D. Cal. Feb. 12, 2015); Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 397 (E.D.N.Y. 2015); United States v. Drew, 259 F.R.D. 449, 462 n.22 (C.D. Cal. 2009). "Browsewrap agreements are treated differently under the law than 'clickwrap' agreements." Schnabel, 697 F.3d at 129 n.18. Courts will generally enforce browsewrap agreements only if they have ascertained that a user "'had actual or constructive knowledge of the site's terms and conditions, and . manifested assent to them.'" Id. (quoting Cvent, Inc. v. Eventbrite, Inc., 739 F. Supp. 2d 927, 937 (E.D. Va. 2010)). This is rarely the case for individual consumers. In fact, courts have stated that "the cases in which courts have enforced browsewrap agreements have involved users who are businesses rather than, as in Specht, consumers." Fjeta v. Facebook, Inc., 841 F. Supp. 2d 829, 836 (S.D.N.Y. 2012); see also Berkson, 97 F. Supp. 3d at 396 ("Following the ruling in Specht, courts generally have enforced browsewrap terms only against knowledgeable accessors, such as corporations, not against individuals."); Mark A. Lemley, Terms of Use, 91 Minn. L. Rev. 459, 472 (2006) ("An examination of the cases that have considered browsewraps in the last five years demonstrates that the courts have been willing to enforce terms of use against corporations, but have not been willing to do so against individuals.").

Here, the User Agreement to which plaintiff Meyer allegedly assented was clearly not a clickwrap agreement. Mr. Meyer did not need to affirmatively click any box saying that he agreed to Uber's "Terms of Service." On the contrary, he 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... As with a browsewrap agreement, an Uber user could access Uber's services "without visiting the page hosting the browsewrap agreement or even knowing that such a webpage exists." Be In, 2013 WL 5568706, at *6.

Nevertheless, Uber's User Agreement differs from certain browsewrap agreements in which "by visiting the website - something that the user has already done - the user agrees to the Terms of Use not listed on the site itself but available only by clicking a hyperlink." Barnes & Noble, 763 F.3d at 1176... ; see also Fjeta, 841 F. Supp. 2d at 838 ("Facebook's Terms of Use are somewhat like a browsewrap agreement in that the terms are only visible via a hyperlink, but also somewhat like a clickwrap agreement in that the user must do something else - click 'Sign Up' - to assent to the hyperlinked terms."). Uber's User Agreement might be characterized as a "sign-in wrap," since a user is allegedly "notified of the existence and applicability of the site's 'terms of use' when proceeding through the website's sign-in or login process." Berkson, 97 F. Supp.

3d at 399; see also Cullinane, 2016 WL 3751652, at *6. Sign-in wraps have been described as "[a] questionable form of internet contracting." Berkson, 97 F. Supp. 3d at 399. Here, as indicated, the notification was in a font that was barely legible on the smartphone device that a would-be Uber registrant could be expected to use.

Of course, all these labels can take courts only so far. The issue of whether plaintiff Meyer agreed to arbitrate his claims "turns more on customary and established principles of contract law than on newly-minted terms of classification." Cullinane, 2016 WL 3751652, at *6. For while the Internet may have reduced ever further a consumer's power to negotiate terms, "it has not fundamentally changed the principles of contract." Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 403 (2d Cir. 2004). One of these principles is that "[m]utual manifestation of assent . . . is the touchstone of contract." Specht, 306 F.3d at 29. Moreover, "[a]rbitration agreements are no exception to the requirement of manifestation of assent," id. at 30, and "[c]larity and conspicuousness of arbitration terms are important in securing informed assent." Id. The Specht standard provides a way for courts to ascertain whether this fundamental principle of contract law has been vindicated, and it is this standard - whether plaintiff Meyer had "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms" - that the Court will apply. Id. at 35.

While every case is different, the Court has examined the decisions of other courts that have considered issues of electronic contract formation, even where, as in many cases, these decisions are not binding on this Court. In numerous cases in which electronic contracts were held to have been properly formed, notice of the existence of those contracts was more conspicuous - in some cases, much more conspicuous - than in the instant case, and indications of assent were much more express. For example, in Mohamed v. Uber Technologies, Inc., a case cited by Uber,...a court in the Northern District of California concluded that a binding contract had been formed between Uber drivers and Uber. See Mohamed v. Uber Techs., Inc., 109 F. Supp. 3d 1185, 1197 (N.D. Cal. 2015). There, Uber drivers could not access the Uber app without clicking a button marked "Yes, I agree" beneath the phrase "By clicking below, you acknowledge that you agree to all the contracts above," with those contracts hyperlinked above, and then clicking "Yes, I agree" on a screen containing text stating "Please confirm that you have reviewed all the documents and agree to all the new contracts." Id. at 1190-91. In the instant case, by contrast, plaintiff Meyer did not have to click any button explicitly indicating assent to Uber's User Agreement, and the hyperlink to Uber's "Terms of

Service" was nowhere near as prominent as in Mohamed.²⁸

In *Cullinane v. Uber Techs., Inc.*, on which Uber also relies, a court held that Uber users had formed an agreement to arbitrate their claims. See *Cullinane*, 2016 WL 3751652, at *7. There, the applicable version of Uber's registration screen for users, like in the instant case and unlike in *Mohamed*, did not require users to affirmatively click "I agree." See *id.* (Dkts. 32-2, 32-3). However, in the user interface that some of the *Cullinane* plaintiffs faced, the clickable box with the phrase "Terms of Service & Privacy Policy" was clearly delineated, and the words appeared in bold white lettering on a black background, in a size similar to, if not larger than, the size of the "Done" button that users clicked in order to register. See *Cullinane*, 2016 WL 3751652 (Dkts. 32-3, 32-5). In the instant case, by contrast, the phrase "Terms of Service & Privacy Policy" is much smaller and more obscure, both in absolute terms and relative to the "Register" button.²⁹

A review of numerous other cases finding that an electronic agreement was formed highlights the point that the Uber registration process in plaintiff Meyer's case involved a considerably more obscure presentation of the relevant contractual terms.³⁰ Further, by

²⁸ **Why might Uber deal with drivers differently than with passengers?**

²⁹ [Footnote 8] In fact, in the user interface that other *Cullinane* plaintiffs faced, the phrase "Terms of Use & Privacy Policy" was placed between the field in which the user's credit card number would appear and the numbers that users would tap in order to enter their credit card information - a clearly prominent location. See *Cullinane*, 2016 WL 3751652 (Dkts. 32-2, 32-4).

³⁰ [Footnote 9] See, e.g., *Defillipis v. Dell Fin. Servs.*, 14-cv-115, 2016 WL 394003, at *3 (M.D. Pa. Jan. 29, 2016) ("an applicant had to affirmatively click a box agreeing: 'I have read and agree to the Privacy Policy and Terms & Conditions, which contain important account information.'"); *Bassett v. Elec. Arts, Inc.*, 93 F. Supp. 3d 95, 99 (E.D.N.Y. 2015) ("Plaintiff would have been presented with four buttons, two of which are the links to the terms of service and privacy policy, one which reads 'I Do Not Accept,' and one which reads 'I Have Read And Accept Both Documents.' . If the registrant . does not click the button reading 'I ... Accept . . the registration process stops and the online features cannot be activated.'"); *Nicosia v. Amazon.com, Inc.*, 84 F. Supp. 3d 142, 150 (E.D.N.Y. 2015) (Dkt. 53-3) (the statement "By placing your order, you agree to Amazon.com's privacy notice and conditions of use" appears directly under "Review your order" and higher on the page than the button to click to "Place your order," so that "[t]o place his orders, Plaintiff had to navigate past this screen by clicking a square icon below and to the right of this disclaimer, which states: 'Place your

contrast to the situation in *Register.com*, 356 F.3d 393 at 401-02, there is no evidence

order."); *Whitt v. Prosper Funding, LLC*, 15-cv-136, 2015 WL 4254062, at *1 (S.D.N.Y. July 14, 2015) (Dkt. 41-1) ("An applicant could not complete a loan application without clicking the box indicating his or her acceptance of the Agreement."); *Tompkins v. 23andMe, Inc.*, 13-cv-05682, 2014 WL 2903752, at *3 (N.D. Cal. June 25, 2014) ("The account creation page requires customers to check a box next to the line, 'Yes, I have read and agree to the Terms of Service and Privacy Statement' . Similarly, during the registration process, [c]ustomers must then click a large blue icon that reads 'I ACCEPT THE TERMS OF SERVICE' before finishing the registration process"); *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."); *Zaltz v. JDATE*, 952 F. Supp. 2d 439, 453-54 (E.D.N.Y. 2013) ("defendant's reference to its Terms and Conditions of Service appear above the button" that "a prospective user had to click in order to assent"); *5831 Partners LLC v. Shareasale.com*, 12-cv-4263, 2013 WL Register.com, 356 F.3d 393 at 401-02, there is no evidence that plaintiff Meyer repeatedly visited Uber's registration screen. 10 Rather, Uber's interface here shares certain characteristics in common with instances in which courts have declined to hold that an electronic agreement was formed. Most obviously, Uber riders need not click on any box stating "I agree" in order to proceed to use the Uber app - a feature that courts have repeatedly made note of in declining to find that an 5328324, at *7 & n.4 (E.D.N.Y. Sept 23, 2013) ("defendant's reference to its Merchant Agreement appears adjacent to the activation button . . in determining that the forum selection clause was reasonably communicated to plaintiff, [the Court] is solely relying on the second page of the sign up process (in which a prospective merchant must click to activate its account and is informed that 'By clicking and making a request to Activate, you agree to the terms and conditions in the Merchant Agreement.'"); *Vernon v. Qwest Commc'ns Int'l, Inc.*, 925 F. Supp. 2d 1185, 1191 (D. Colo. 2013) ("At each stage of the enrollment process the consumer was referred to the Subscriber Agreement and, in some instances, specifically to the existence of an arbitration clause."); *Fjeta*, 841 F. Supp. 2d (Dkt. 12 at 17) (the phrase "By clicking Sign Up, you are indicating that you have read and agree to the Terms of Policy" appeared directly below the button marked "Sign Up," and, this Court finds, the symmetry between the "Sign Up" phrases would help to catch the reader's eye); *Guadagno v. E*Trade Bank*, 592 F. Supp. 2d 1263, 1267, 1271 (C.D. Cal. 2008) (Dkt. 31-2) (users had to check a box acknowledging that they had reviewed the Account Agreement); *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 233, 237 (E.D. Pa. 2007) (Dkt. 16-2) (in order to activate their accounts, users had to click a box stating "Yes, I agree to the above terms and conditions" displayed in a scrollable text box); *Major v. McCallister*, 302 S.W.3d 227 (Mo. Ct. App. 2009) (the party seeking to enforce the contract "did put 'immediately visible notice of the existence of license terms' - ~~~ 'By submitting you agree to the Terms of Use' and a blue hyperlink - right next to the button that Appellant pushed.").

that plaintiff Meyer repeatedly visited Uber's registration screen.³¹

Rather, Uber's interface here shares certain characteristics in common with instances in which courts have declined to hold that an electronic agreement was formed. Most obviously, Uber riders need not click on any box stating "I agree" in order to proceed to use the Uber app - a feature that courts have repeatedly made note of in declining to find that an electronic contract was formed. See, e.g., *Barnes & Noble*, 763 F.3d at 1176; *Specht*, 306 F.3d at 22-23; *Savetsky v. Pre-Paid Legal Servs., Inc.*, 14-cv-03514, 2015 WL 604767, at *4 (N.D. Cal. Feb. 12, 2015). Nor do the license terms in the instant case appear on the screen in view of the user. See *Motise v. Am. Online, Inc.*, 346 F. Supp. 2d 563, 565 (S.D.N.Y. 2004). As the Seventh Circuit has stated, a court "cannot presume that a person who clicks on a box that appears on a computer screen has notice of all contents not only of that page but of other content that requires further action (scrolling, following a link, etc.)." *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1035 (7th Cir. 2016).

Significantly for the purposes of determining whether plaintiff was on inquiry notice, the hyperlink here to the "Terms of Service & Privacy Policy" is by no means prominently displayed on Uber's registration screen. While the payment information and "Register" button are "very user-friendly and obvious," *Berkson*, 97 F. Supp. 3d at 404, Uber's statement about "Terms of Service" appears far below and in much smaller font. As a result, "the design and content of" Uber's registration screen did not "make the 'terms of use' (~, the contract details) readily and obviously available to the user." *Id.* at 402; see also *Long*, 200 Cal. Rptr. 3d at 126 (recognizing "the practical reality that the checkout flow is laid out in such a manner that it tended to conceal the fact that placing an order was an express acceptance of [defendant's] rules and regulations.") ...

Indeed, the Terms of Service hyperlink in the instant case is less conspicuous than the

³¹[Footnote 10] In *Register.com* the Second Circuit drew an analogy between an electronic contract and an apple stand with a sign, visible only as one turns to exit, naming the price of apples. The Second Circuit indicated that an individual who eats an apple without paying might avoid contractual liability the first time he did so, but he would not be able to do so if he thereafter visited the stand and ate apples several times a day. See *Register.com*, 356 F.3d at 401-02. Other courts have since extended the *Register.com* analogy in different directions, see *Fteja*, 841 F. Supp. 2d at 839; *Cullinane*, 2016 WL 3751652, at *7, but *Register.com* itself focuses on the repetition of the activity of seeing the sign.

one found not to give rise to an electronically-formed contract in Berkson. In that case, the statement "By clicking 'Sign In' I agree to the terms of use and privacy policy" appeared above the most prominent "Sign In" button on the web page. See Berkson, 97 F. Supp. 3d at 373-74, 403-04. This statement, while plausibly providing inadequate notice, was actually more likely to disrupt viewers' experiences in some way and draw their attention to the terms and conditions than the interface in the instant case, where the hyperlink stating "Terms of Service & Privacy Policy" is located far beneath the "Register" button and takes on the appearance of an afterthought... Moreover, unlike in Berkson, the registration screen here does not contain parallel wording as between the "Register" button and the statement "By creating an Uber account, you agree to the Terms of Service & Privacy Policy." See Berkson, 97 F. Supp. 3d at 373-74; see also Fjeta, 841 F. Supp. 2d (Dkt. 12 at 17). The relative obscurity of the reference to "Terms of Service" in the Uber interface is significant; courts have declined to hold that a valid electronic contract was formed when "the website did not prompt [a party] to review the Terms and Conditions and because the link to the Terms and Conditions was not prominently displayed so as to provide reasonable notice of the Terms and Conditions." Hines v. Overstock.com, Inc., 668 F. Supp. 2d 362, 367 (E.D.N.Y. 2009), aff'd, 380 F. App'x 22 (2d Cir. 2010).

As this brief review suggests, electronic agreements fall along a spectrum in the degree to which they provide notice, and it is difficult to draw bright-line rules because each user interface differs from others in distinctive ways. Consequently, courts must embark on a "fact-intensive inquiry," Sgouros, 817 F.3d at 1034-35, in order to make determinations about the existence of "[r]easonably conspicuous notice" in any given case. Specht, 306 F.3d at 35.

Here, the Court finds that plaintiff Meyer did not have "[r]easonably conspicuous notice" of Uber's User Agreement, including its arbitration clause, or evince "unambiguous manifestation of assent to those terms." .. Most importantly, the Uber registration screen ... did not adequately call users' attention to the existence of Terms of Service, let alone to the fact that, by registering to use Uber, a user was agreeing to them. Like in Long, the "Terms of [Service] hyperlink[] - [its] 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." Long, 200 Cal. Rptr. 3d at 125-26. When to this is coupled the fact that the key words "By creating an Uber account, you agree to" are even more inconspicuous, it is hard to escape the inference 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. And this, the Court finds, is the reasonably foreseeable result.

Further still, the wording of Uber's hyperlink adds to the relative obscurity of Uber's User Agreement. 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." There is, after all, a "breadth of the range of technological savvy of online purchasers" (and smartphone users). *Barnes & Noble*, 763 F.3d at 1179; see also *Long*, 200 Cal. Rptr. 3d at 127; *Berkson*, 97 F. Supp. 3d at 400. The 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, not to the user's waiver of his constitutional right to a jury trial or his right to pursue legal redress in court should Uber violate the law.³² In other words, "the importance of the details of the contract" was "obscured or minimized by the physical manifestation of assent expected of a consumer seeking to purchase or subscribe to a service or product." *Berkson*, 97 F. Supp. 3d at 402. There is a real risk here that Uber's registration screen "made joining [Uber] fast and simple and made it appear - falsely - that being a [user] imposed virtually no burdens on the consumer besides payment." *Schnabel*, 697 F.3d at 127-28.

Additionally, the hurdles for Uber users were not at an end even if they did click on the initial hyperlink. Such users were "taken to a screen that contains a button that accesses the 'Terms and Conditions' and 'Privacy Policy' then in effect." Once users reached the "Terms of Service" (i.e, the User Agreement), they had to scroll down several pages in order to come across the arbitration provision, located in a "dispute

³² [Footnote 11] It may be noted, a propos the expectations of the ordinary consumer, that according to a 2015 study carried out by the Consumer Financial Protection Bureau, "[o]ver three quarters of those who said they understood what arbitration is acknowledged they did not know whether their credit card agreement contained an arbitration clause. Of those who thought they did know, more than half were incorrect about whether their agreement actually contained an arbitration clause. Among consumers whose contract included an arbitration clause, fewer than 7 percent recognized that they could not sue their credit card issuer in court." See Consumer Financial Protection Bureau Study Finds That Arbitration Agreements Limit Relief for Consumers, Consumer Protection Financial Bureau, March 10, 2015, <http://www.consumerfinance.gov/about-us/newsroom/cfpb-study-finds-thatarbitration-agreements-limit-relief-for-consumers>.

resolution" section. See Sgouros, 817 F.3d at 1033; Savetsky, 2015 WL 604767, at *4. While the "dispute resolution" heading in the User Agreement is bolded, as is the waiver (in the arbitration context) of the right to a jury trial or class proceeding, users would have had to reach this part of the agreement to discover the bolded text at all (unlike, for example, the prominent warning about the existence of an arbitration clause in *Guadagno v. E*Trade Bank*, 592 F. Supp. 2d 1263, 1271 (C.D. Cal. 2008)). Though "[a] party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing," *Specht*, 306 F.3d at 30 (internal quotation marks omitted), the placement of the arbitration clause in Uber's User Agreement constituted, as a practical matter, a further barrier to reasonable notice.

At bottom, what is at stake is the "integrity and credibility" of "electronic bargaining." *Specht*, 306 F.3d at 35. When contractual terms as significant as the relinquishment of one's right to a jury trial or even of the right to sue in court are accessible only via a small and distant hyperlink titled "Terms of Service & Privacy Policy," with text about agreement thereto presented even more obscurely, there is a genuine risk that a fundamental principle of contract formation will be left in the dust: the requirement for "a manifestation of mutual assent." *Schnabel*, 697 F.3d at 119 (internal quotation marks omitted). One might be tempted to argue that the nature of electronic contracts is such that consumers do not read them, however conspicuous these contracts are, and that consumers have resigned themselves simply to clicking away their rights. But that would be too cynical and hasty a view, and certainly not the law.³³ The purveyors of electronic form contracts are legally required to take steps to provide consumers with "reasonable notice" of contractual terms. See *Specht*, 306 F.3d at 20. User interfaces designed to encourage users to overlook contractual terms in the process of gaining access to a product or service are hardly a suitable way to fulfill this legal mandate.

"[T]he Federal Arbitration Act does not require parties to arbitrate when they have not agreed to do so." *Schnabel*, 697 F.3d at 118 (internal quotation marks omitted) The Court finds that, in light of all the relevant facts and circumstances, plaintiff Meyer did not form such an agreement here. Consequently, defendant Uber may not enforce the arbitration clause against Mr. Meyer. As a result, even if defendant Kalanick were entitled to enforce this arbitration clause and had not waived such a right - issues that

³³ **What do you think of these 2 sentences? Do you read electronic contracts? Evidence suggests that almost no-one does. And, if you did, would you be able to negotiate for different terms?**

the Court does not now decide - he too would be unable to enforce the arbitration clause. The Court hence denies the motions to compel arbitration filed by both Mr. Kalanick and Uber.”

The decision in this case has been appealed to the Second Circuit. In an **Amicus Brief** on the case the **US Chamber of Commerce** argued that Judge Rakoff’s decision was wrong. As you read this excerpt, think about whether you agree with the Chamber of Commerce or not. Do you think that all of the arguments they make in this excerpt are strictly legal arguments? ³⁴

“Many of the Chamber’s members and affiliates conduct substantial business online. Indeed, hundreds of billions of dollars’ worth of e-commerce transactions are conducted every year in the United States. Most of those transactions involve online contracts. The enforceability of online contracts is thus of critical importance to the Chamber and its members, as well as the Nation’s economy more generally. Moreover, many of the Chamber’s members and affiliates regularly employ arbitration agreements in their online contracts. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Based on the legislative policy reflected in the Federal Arbitration Act (“FAA”) and the United States Supreme Court’s consistent affirmation of the legal protection the FAA provides for arbitration agreements, the Chamber’s members have structured millions of contractual relationships - including enormous numbers of online contracts - around arbitration agreements.

By subjecting online contracts that include arbitration provisions to a heightened test for enforceability, the district court has created an unacceptable cloud of uncertainty over those agreements..... The district court’s order departed from settled principles of contract law that courts consistently have applied in deciding whether parties have entered into enforceable contracts online. Courts have regularly held that the method of contractual formation at issue here-in which Uber’s sign-up process required plaintiff and any other potential Uber rider to click a “Register” button that was accompanied by both (1) a clear statement that pressing the button constituted assent to Uber’s terms of

³⁴ See

<http://www.chamberlitigation.com/sites/default/files/cases/files/17171717/U.S.%20Chamber%20Amicus%20Brief%20--%20Meyer%20v.%20Kalanick%2C%20Uber%20Technologies%2C%20Inc.%20%28Second%20Circuit%29.pdf>.

service and (2) a hyperlink to the terms themselves -satisfies traditional standards for contract formation.

But instead of recognizing these well-settled legal principles, and real-world practice, which compel enforcement of the contract here, the court below strained to conclude that an enforceable contract had not been formed, flyspecking the design of Uber's registration screen as it appeared on the plaintiff's mobile device—and doing so based on a meaningfully degraded version of the screen created by the court itself. The court found dispositive the absence of a separate checkbox stating "I agree" and the placement and font size of the statement on the screen acknowledging assent to Uber's terms. These justifications for refusing to enforce Uber's terms, including the arbitration provision, represent an extreme minority view—and one that is inconsistent with the standards of contract formation set forth by this Court. If the district court's approach is allowed to stand, it will create considerable uncertainty over the formation and enforceability of online contracts, imposing massive and unwarranted costs on businesses that enter into transactions in the mobile economy. Moreover, the district court's reliance on the location of the arbitration clause within Uber's terms as a basis for denying enforcement of the provision improperly created a higher standard for notice of arbitration agreements. That heightened notice requirement violates well-established Supreme Court precedent holding that arbitration clauses must be subject to the same standards as other provisions in the contract. As the Supreme Court has stated, the Federal Arbitration Act forbids courts from "singling out arbitration provisions for suspect status" under the guise of state-law contract rules....

..there is less reason to impose a heightened standard for contract formation with respect to the group of consumers who are knowledgeable enough about the Internet and mobile devices to sign up for and use Uber's services through its mobile application. Such riders must, at minimum (i) have a smartphone; (ii) have registered for an account to use Apple's or Google's application store (for iPhone or Android users); (iii) know how to search for and download Uber's application;(iv) know how to and be willing to enter their credit card information online to complete the registration process—a sure sign that a transaction is in progress; and (v) anticipate using Uber's application to obtain ride-sharing services. Thus, if there were any particular inference about Uber's customers that the district court should have drawn, it is that they are, relatively speaking, technologically sophisticated....

The "mistrust of the arbitral process" reflected in the conditions imposed by the court below on the enforceability of arbitration agreements long "has been undermined by" the Supreme Court's "arbitration decisions." ... Moreover, the district court's attack on the waiver of a jury trial is, not coincidentally, an attack on a defining characteristic of

arbitration. ... Thus, the district court's rule that contracts with waivers of jury trials should be viewed more harshly is plainly a contract defense that specifically targets arbitration agreements and is accordingly preempted by the FAA...."

Note that the Uber Terms of Use now state in the third paragraph and in capital letters:

IMPORTANT: PLEASE REVIEW THE ARBITRATION AGREEMENT SET FORTH BELOW CAREFULLY, AS IT WILL REQUIRE YOU TO RESOLVE DISPUTES WITH UBER ON AN INDIVIDUAL BASIS THROUGH FINAL AND BINDING ARBITRATION. BY ENTERING THIS AGREEMENT, YOU EXPRESSLY ACKNOWLEDGE THAT YOU HAVE READ AND UNDERSTAND ALL OF THE TERMS OF THIS AGREEMENT AND HAVE TAKEN TIME TO CONSIDER THE CONSEQUENCES OF THIS IMPORTANT DECISION.

Loans

Now we will consider agreements whereby one person agrees to lend money to another. A binding contract for a loan will be created if one person promises to lend money to another and the borrower promises to pay something for the loan and to repay the borrowed amount. Offer and acceptance would in these circumstances generally involve the lender presenting a document to the prospective borrower containing the lender's terms (this is the offer). When the borrower signs the document this is the borrower's acceptance of the offer. Consideration here would be the mutual promises of the parties: the promise to lend the money and the promise to pay interest and repay the loan.

1. Angela agrees to lend her son, Bob, money to cover the security deposit for the apartment he is renting, because he does not have enough savings to cover the deposit. Angela tells Bob "You can pay me back when you can afford to" but she doesn't really intend to make a fuss about getting the money back.

2. Carol agrees to lend her son, Dave, money to cover the security deposit for the apartment he is renting. Carol thinks that in two years' time Dave should have been able to save enough money to repay the loan. She gives Dave a document which states "I, Carol, promise to pay you, Dave, the sum of \$2000 for a security deposit for the apartment at 111 Elm Street, Elbowville. You Dave, promise to repay the amount of

\$2000 on December 1, 2017. Both Carol and Dave sign the document.

3. Fred has an urgent need for money to pay rent and decides to borrow money from Payday Payments which promises to make online loans fast without too much investigation. Payday Payments' webpage states "By clicking the agree button you agree to all of our terms and conditions which you should read before clicking." Fred does not read the terms and conditions.

4. Student Loans Company lends George the money he needs to pay for college (this is a private student loan). After George graduates he cannot find a job that pays well and finds it difficult to repay the loans. George's loans include a range of provisions that he worries about, such as "universal default" clauses (that have been interpreted to allow a loan to be placed in default if the borrower is not in good standing on an unrelated loan held by the lender, such as a credit card), clauses that permit a default if a lender believes the prospect of an obligor repaying their loan is impaired (even if the loan is otherwise in good standing), and clauses that may be interpreted to permit a default when a borrower does not quickly notify the lender of a name change or address change."³⁵ Student Loans Company has indicated to George that it plans to place his loans in default and require immediate repayment because it believes that the prospect of his ability to repay is impaired. Student Loans Company plans to go after George's co-signor, his mother, for repayment of the loans.

The CFPB report cited in note 32 states (at p. 14) that where student loans are securitized (the loans are packaged together on the basis that the interest payments will be used to pay investors in bonds) the firms responsible for servicing the loans may decide to treat loans as being in default under such provisions even though the original lender might have made a business decision not to enforce the provisions.

4. Greece issues debt securities. The purchasers of the debt securities (investors) pay money to Greece (this is like a loan) and Greece promises to make interest payments to the investors and to repay the principal (the amount the investors paid to Greece) at a specific time in the future. But Greece finds that it does not have the financial resources to meet its commitments. The investors demand that Greece implements

³⁵ This language is from the Consumer Financial Protection Bureau's (CFPB) Report, Mid-year Update on Student Loan Complaints (June 2015) at pp. 12-13 (see http://files.consumerfinance.gov/f/201506_cfpb_mid-year-update-on-student-loan-complaints.pdf .)

austerity measures that will reduce pensions payable to Greek workers. But Greek citizens are unhappy about the austerity measures and elect a new populist Government with a mandate to renegotiate Greece's debt. Greece's creditors insist on the maintenance of austerity measures, and Greek voters in a referendum reject the creditors' demands. Nevertheless the Greek Government makes concessions to the creditors and negotiations continue. But the International Monetary Fund (IMF) concludes that Greek debt is unsustainable (Greece will be unable to repay the debt on current terms given its economic condition) and that debt relief is necessary (i.e. a debt write-off or a reduction in the total amount of debt Greece would be treated as owing).³⁶

All four of these examples involve the borrowing of money. But how the law treats the obligations of the parties varies in the different situations. If the borrowers in the 4 examples have difficulties repaying the money they have borrowed what do you think the legal rights of the lenders should be? Do you think the lenders in the different situations should have the same rights or different rights?

³⁶ IMF, An Update of IMF's Preliminary Public Debt Sustainability Analysis, IMF Country Report No. 15/186 (Jul. 14, 2015).