UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DANIEL BERMAN,

Plaintiff,

vs.

FREEDOM FINANCIAL NETWORK, LLC, ET AL.,

Defendants.

CASE NO. 18-cv-01060-YGR

ORDER DENYING MOTION TO COMPEL ARBITRATION

Re: Dkt. No. 224

In this action, plaintiffs Daniel Berman, Stephanie Hernandez, and Erica Russell on behalf of himself and a putative class, allege violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. section 227 *et seq.* by means of autodialed text messages and prerecorded voice calls as part of a telemarketing campaign by Lead Science, LLC (also known as "Drips") and Fluent, Inc. ("Fluent") promoting the services of Freedom Financial Network, LLC and Freedom Debt Relief, LLC (collectively "Freedom"). Fluent obtained leads for the text message campaign via its consumer-facing websites which offer users the possibility of rewards, discounts, product samples or entry into sweepstakes, which collect the users' data for use in Fluent's clients' marketing campaigns. The instant motion seeks to compel arbitration of the claims asserted by plaintiffs Stephanie Hernandez and Erica Russell. (Dkt. No. 224.)

Having carefully considered the papers submitted, the admissible evidence, and the pleadings in this action, and for the reasons set forth below, the Court **DENIES** the motion to compel arbitration.

The Federal Arbitration Act (the "FAA") requires a district court to stay judicial proceedings and compel arbitration of claims covered by a written and enforceable arbitration agreement. 9 U.S.C. § 3. A party may bring a motion in the district court to compel arbitration. 9 U.S.C. § 4. The FAA reflects "both a 'liberal federal policy favoring arbitration' and the 'fundamental principle that arbitration is a matter of contract.'" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *Mortensen v. Bresnan Commuc'ns, LLC*, 722 F.3d 1151, 1157 (9th Cir. 2013) ("The [FAA] . . . has been interpreted to embody "'a liberal federal policy favoring arbitration.'"). The FAA broadly provides that an arbitration clause in a contract involving a commercial transaction "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. Once a court is satisfied the parties agreed to arbitrate, it must promptly compel arbitration. 9 U.S.C. § 4.

In ruling on the motion, the Court's role is typically limited to determining whether: (i) an agreement exists between the parties to arbitrate; (ii) the claims at issue fall within the scope of the agreement; and (iii) the agreement is valid and enforceable. *Lifescan, Inc. v. Premier Diabetic Servs., Inc.*, 363 F.3d 1010, 1012 (9th Cir. 2004). The party seeking to compel arbitration bears the burden to establish these conditions. "[I]f there is a genuine dispute of material fact as to any of these queries, a [d]istrict [c]ourt should apply a 'standard similar to the summary judgment standard of Fed.R.Civ.P. 56.'" *Ackerberg v. Citicorp USA, Inc.*, 898 F. Supp. 2d 1172, 1175 (N.D. Cal. 2012) (quoting *Concat LP v. Unilever, PLC*, 350 F.Supp.2d 796, 804 (N.D. Cal. 2004)); *see also Starke v. SquareTrade, Inc.*, No. 17-2474-CV, 2019 WL 149628, at *1 (2d Cir. Jan. 10, 2019) (same). "If the parties contest the *existence* of an arbitration agreement, the presumption in favor of arbitrability does not apply." *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 742 (9th Cir. 2014).

The Ninth Circuit in *Nguyen* described contracts formed through internet websites as generally taking on one of two forms: (1) "browsewrap" agreements whereby the website's terms and conditions of use are provided via a hyperlink at the bottom of a webpage and assent to the terms is assumed by continued use of the website; and (2) "clickwrap" agreements in which users are presented with the terms of the agreement in question and must click on a

button or box to indicate they agree before proceeding. *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175–77 (9th Cir. 2014).

Often websites present some hybrid of the two, such as putting a link to the terms of the agreement on the page, sometimes near a button the user must click to continue. For instance, in *Nguyen* the "Terms of Use" hyperlink was near the buttons a user would need to click to complete an online purchase. *Id*. at 1177. In considering the conspicuousness of the notice there, the Court noted details of the layout of the website in question:

- "the 'Terms of Use' link appears either directly below the relevant button a user must click on to proceed in the checkout process or just a few inches away"
- "the content of the webpage is compact enough that a user can view the link without scrolling. . . [or] is close enough to the 'Proceed with Checkout' button that a user would have to bring the link within his field of vision in order to complete his order;" and
- "checkout screens here contained "Terms of Use" hyperlinks in underlined, color-contrasting text."

Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1178 (9th Cir. 2014). Despite these elements supporting conspicuousness, the Ninth Circuit nevertheless held that the website was insufficient to bind the consumer because it contained no admonition to "review terms" or otherwise prompt the user to take affirmative action to demonstrate assent to the terms at issue, including the arbitration clause. *Id*. at 1178-79 ("where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice.") *Id.*; *see also Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1033-34 (7th Cir. 2016) (courts enforce contracts accepted by an electronic "click" on a website only if "the layout and language of the site give the user reasonable notice that a click will manifest assent to an agreement."); *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 63–64 (1st Cir. 2018) (affirming denial of motion to compel arbitration where "[e]ven though the hyperlink did possess some of the characteristics that make a term conspicuous, the presence of other terms on the same screen with a similar or larger size, typeface, and with more noticeable attributes diminished the hyperlink's

capability to grab the user's attention.")[1]

In essence, "the onus [is] on website owners to put users on notice of the terms to which they wish to bind consumers." *Nguyen*, 763 F.3d at 1178–79. "Given the breadth of the range of technological savvy of online purchasers, consumers cannot be expected to ferret out hyperlinks to terms and conditions to which they have no reason to suspect they will be bound." *Id*. at 1179.

Here, defendants have failed to meet their burden to establish that plaintiffs Hernandez and Russell entered into an agreement for mandatory arbitration. As a preliminary matter, an evidentiary dispute exists as to whether the webpage screenshots offered by defendants in support of their motion evidenced an agreement with either plaintiff. Defendants based their motion on a declaration of Mitenkumar Bhadania, a computer system engineer for Fluent, submitted January 22, 2020. (Dkt. No. 224-1.) Bhadania very generally explains how he "recreated" the set of multiple webpages each plaintiff would have seen when they visited the websites based on a unique visitor ID generated for each session, and "regenerated images" of the webpages.[2] The exhibits submitted by Bhadania are the equivalent of blank form contracts, with no clear indication that these plaintiffs agreed to them. (*Id*. at Exh. 1, 4.) Fluent elected to omit other pages from the multiple page "flow" for these website visits which might have demonstrated that these particular users interacted with these particular pages. (*Compare id. with* Bhadania Decl. submitted July 31, 2020, Dkt. No. 260-4, Exh. 1, 3 [including images of checked boxes, additional identifying information, and a system timestamp image].) Given that plaintiffs each submit declarations disputing seeing elements of these pages, and defendants failed to provide complete information to

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[1] Defendants cite to authorities that are neither binding nor on point here. In *Garcia v. Enter. Holdings, Inc.*, 78 F. Supp. 3d 1125, 1131 (N.D. Cal. 2015), plaintiff alleged privacy violations and the hyperlink to the "Privacy Policy" at issue was in the same text box as the "Okay" button for completing registration through Facebook, putting plaintiff on notice of the Privacy Policy terms. Likewise distinguishable is *Silverman v. Move Inc.*, No. 18-CV-05919-BLF, 2019 WL 2579343, at *11 (N.D. Cal. June 24, 2019), *appeal dismissed*, No. 19-16468, 2019 WL 5431367 (9th Cir. Oct. 18, 2019) in which the court found the *Nguyen* analysis an "ill fit" since the contract there was formed when plaintiff telephoned defendant to sign up for the contract, spoke to an account executive about entering into a contract, thereafter receiving the terms of the contract in an emailed response.

[2] Bhadania avers that Hernandez registered through a website called "getsamplesonlinenow.com" and Russell visited a website called "retailproductzone.com." (Bhadania Decl. ¶¶ 8, 13.)

authenticate the exhibits, the Court finds that there are material facts in dispute.[3]

Even if there were no dispute that the proffered webpages caused these plaintiffs' phone numbers to be recorded as leads for Fluent, the webpages do not conspicuously indicate to users that they are agreeing to the Terms and Conditions, including an agreement to mandatory arbitration. The webpages at Exhibits 1 and 3 to the Bhadania declaration do not include a specific affirmative means of indicating consent to the Terms & Conditions or arbitration clause.[4] (*See* Appendix A to this Order.) Similar to the website at issue in *Nguyen*, while there is text including a hyperlink to the terms of the agreement located near a button the user must click to continue, there is no text that notifies users that they will be deemed to have agreed to these terms "nor prompts them to take any affirmative action to demonstrate assent." *Nguyen*, 763 F.3d at 1179. *Nguyen*, 763 F.3d at 1178-79. There is no tickbox or "I agree" button for the Terms & Conditions. As in *Nguyen*, the hyperlink to them is only located in proximity to button with which the user must interact to continue. The "This is correct, Continue!" and "Continue" buttons plainly refer to the entry of other information on the page, not assent to the Terms & Conditions. (*See* Appendix A ["Confirm your ZIP Code Below" and "Complete your shipping information to continue towards your reward"].) Although the user must interact with the page and click a button to continue using it, that click is completely divorced from an expression of assent to the Terms & Conditions or to mandatory arbitration. Further, the phrase "I understand and agree to the Terms & Conditions which includes mandatory arbitration and Privacy Policy" is formatted in black font against a white background which is exceedingly small compared to the larger, more colorful and

[3] Plaintiffs object that these recreations differ from those websites' archives webpages, submitted the declaration of Jodi Nuss Schexnaydre and screenshots of archived pages at or near the time when plaintiffs would have visited them. However, those archived pages are inconclusive on the question here since all parties acknowledge that website users who engage with the survey questions or registration steps see multiple webpages in the "flow" of their interaction with the advertising campaigns, all of which are not replicated in the archive.

[4] The Terms & Conditions include a choice-of-law provision stating that New York law controls. (*See* Bhadania Decl., Exh. 5 at Fluent_004063.) "[W]hether the choice of law provision applies depends on whether the parties agreed to be bound by [the terms of use] in the first place." *Nguyen*, 763 F.3d at 1175. However, as in *Nguyen*, "we need not engage in this circular inquiry because both California and New York law dictate the same outcome" on this issue of contract formation. *Id.*

high-contrast fonts on the rest of the page, making it difficult to read on a large, high-resolution monitor, much less a mobile device. (*Id.*) That the very small text providing the hyperlink to the Terms & Conditions also uses the words "which includes mandatory arbitration" does not change the analysis since the website does not prompt affirmative assent to this statement.[5]

For the foregoing reasons, the Court finds that defendants have failed to meet their burden to establish assent to the mandatory arbitration agreement in their Terms & Conditions as to plaintiffs Hernandez and Russell. The motion to compel arbitration is **DENIED** on those grounds.

IT IS SO ORDERED.

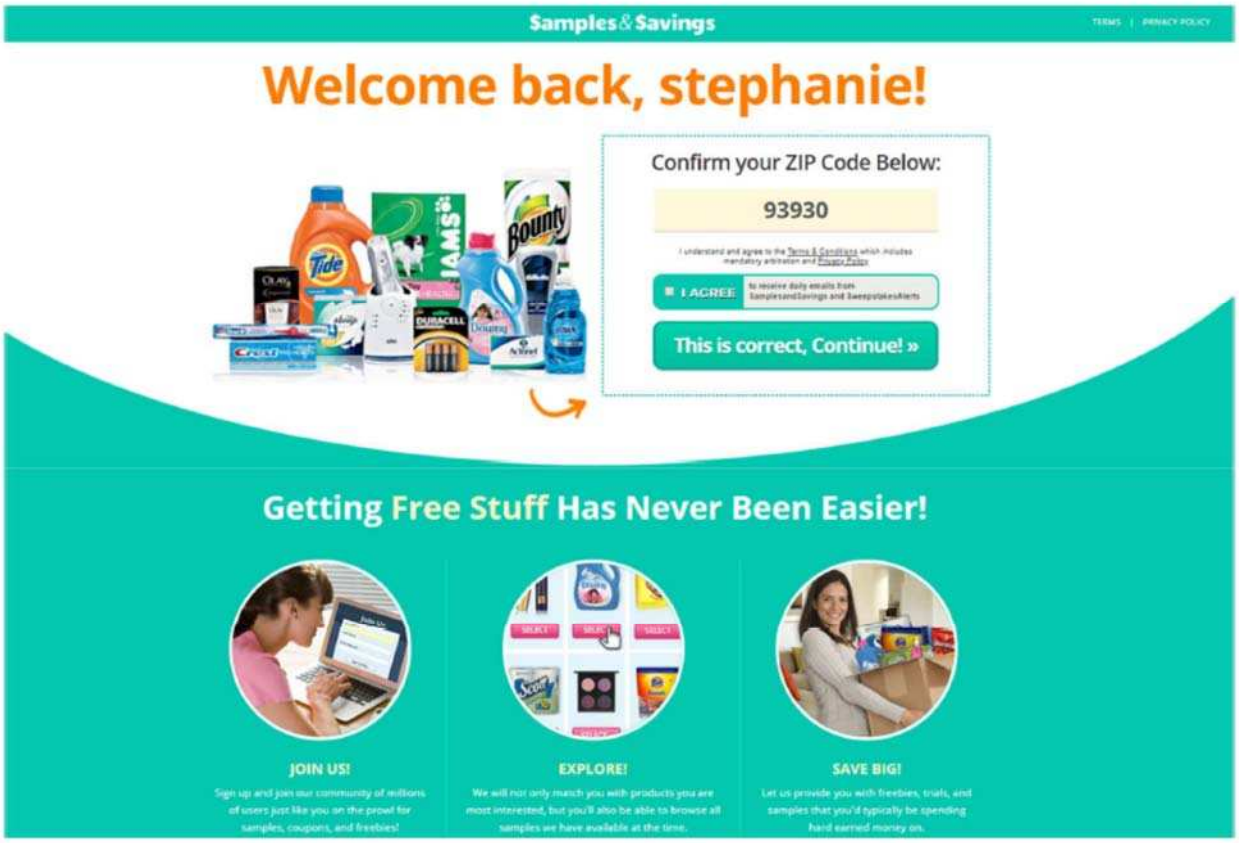
This terminates Docket No. 224.

Dated: September 1, 2020

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

[5] The Court notes that at least one other court has denied a motion to compel arbitration by defendant Fluent, finding that a similarly designed Fluent website (also for retailproductzone.com) did not provide sufficient notice of or assent to the Terms & Conditions, including mandatory arbitration, to create an enforceable agreement. *See Anand v. Heath*, 19-cv-0016-JJT, 2019 WL 2716213 (N.D. Ill. 2019).

APPENDIX A


Samples & Savings
TERMS | PRIVACY POLICY
Welcome back, stephanie!
Confirm your ZIP Code Below:
93930
I AGREE
This is correct, Continue! »
Getting Free Stuff Has Never Been Easier!
JOIN US!
Sign up and join our community of millions of users just like you on the prowl for samples, coupons, and freebies!
EXPLORE!
We will not only match you with products you are most interested, but you'll also be able to browse all samples we have available at the time.
SAVE BIG!
Let us provide you with freebies, trials, and samples that you'd typically be spending hard earned money on.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SAVE BIG!
Let us provide you with freebies, trials, and samples that you'd typically be spending hard earned money on.
Privacy Policy - Terms & Conditions


Shipping Information Required
TARGET
$100
Item #5160300095421
Complete your shipping information to continue towards your reward
First Name
Last Name
Street Address
ZIP Code
Telephone
Date of Birth:
MM
DD
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Select Gender:
Male
Female
I understand and agree to the Terms & Conditions which includes mandatory arbitration and Privacy Policy .
Continue »
Includes Express Shipping
NATIONAL CONSUMER CENTER
Program Requirements – Updated March 23, 2017. To earn an incentive, you must: 1) be a U.S. resident 18 years or older; 2) provide accurate and complete registration information; 3) complete the survey questions; 4) view optional offers; and 5) complete the requisite number of Silver, Gold and Platinum offers which are split into two tiers based on the incentive's value. For Tier 1 incentives with a value of $100 or less, complete 1 Silver, 1 Gold, and 2 Platinum offer. For Tier 2 incentives with a value of more than $100, complete 1 Silver, 1 Gold, and 8 Platinum offers. You must complete all offers within 20 days from when you complete your first offer. Completion of offers usually requires a purchase or entering into a paid subscription program for goods or services. Incentives are limited to one incentive of any kind per household (persons living at the same address) within any twelve calendar month period; provided you must wait 24 calendar months after you claim a Tier 2 incentive before you can claim another Tier 2 incentive. The Representative Offer Chart describes the terms of several offers including a description of the offer, the initial commitment, ongoing obligations and how to cancel. We reserve the right to substitute a gift card of greater or equivalent value for any incentive. Failure to submit accurate registration information, complete the survey questions or comply with claim verification process will result in disqualification. SOLVING A PUZZLE, PROVIDING YOUR REGISTRATION INFORMATION, COMPLETING THE SURVEY OR VIEWING OPTIONAL OFFERS WITHOUT COMPLETING THE NUMBER OF REQUIRED OFFERS SPECIFIED ABOVE DOES NOT QUALIFY YOU FOR AN INCENTIVE. We verify your registration information and if it's inaccurate, the pages with the Gold, Silver and Platinum offers may not be displayed. If that happens, you won't be eligible to earn an incentive.
By participating, you agree to the Terms & Conditions which includes mandatory arbitration and Privacy Policy which includes your consent to our sharing your personally identifiable information with our Marketing Partners for which we may be compensated.
RewardZone USA administers this website and does not claim to represent or own any of the trademarks, tradenames or rights associated with the displayed brands or any of the incentives which are the property of their respective owners who do not own, endorse, or promote RewardZone or this promotion.
Member Support - Prize Status - Privacy Policy - Terms & Conditions - FAQ