

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIAJULIAN METTER,
Plaintiff,

v.

UBER TECHNOLOGIES, INC.,
Defendant.Case No. [16-cv-06652-RS](#)**ORDER DENYING DEFENDANT
UBER'S MOTION TO COMPEL
ARBITRATION****I. INTRODUCTION**

Defendant Uber Technologies, Inc. ("Uber") moves to compel arbitration in this putative class action filed by plaintiff Julian Metter. Because Metter raises a genuine issue of fact as to whether he assented to Uber's terms of service and arbitration agreement therein, Uber's motion is denied.

II. BACKGROUND

On October 24, 2014, Metter created an account on the Uber ride-sharing app. The app was installed on Metter's Samsung Galaxy S4 phone, which ran the Android operating system. On August 7, 2015, Metter used the Uber app to request a ride in Seattle. Metter's requested ride did not appear after five minutes, leading him to call the driver. The driver told Metter he could not reach Metter's location, and that Metter would have to cancel the requested ride and request a new one. Metter cancelled the ride, and ultimately obtained one from a different driver. Later, Metter learned he had been assessed a \$5 fee for cancelling his first ride request. This putative

class action advancing four claims for relief against Uber followed, claiming “Uber’s cancellation fees are arbitrarily imposed against Riders who are not informed in advance of contracting for a ride that such fees, including the specific amount of the fees, may be automatically charged to their credit cards,” Compl. ¶ 2. In response, Uber filed this motion to compel arbitration, claiming Metter agreed to Uber’s terms of service which mandate arbitration of this dispute.¹

As will become clear, the registration process Metter went through when creating his Uber account is of paramount importance in deciding this motion. That process featured two screens. The first asked for Metter’s name, email address, and phone number, along with a password for his new account. See Appendix, Figure 1. The next screen sought his credit card number, expiration date, security code, and billing zip code. It also featured a large “REGISTER” button that allowed Metter to complete the registration process. At the bottom of the screen, the following alert was displayed: “BY CREATING AN UBER ACCOUNT, YOU AGREE TO THE **TERMS OF SERVICE & PRIVACY POLICY**.” The bold, underlined portion of this alert is a clickable hyperlink to Uber’s terms of service, which contain the arbitration provision Uber now seeks to invoke. See Appendix, Figure 2. When Metter tapped any of the numerical information fields on this screen, like the “Credit Card Number” field, a keypad popped up allowing him to enter numerical information. The keypad would have remained activated for as long as Metter

¹ According to Uber, the terms of service Metter agreed to contained the following arbitration agreement: “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 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.” Mot. to Compel Arbitration 6.

entered numerical information, and until Metter pressed “REGISTER” to complete the registration process. The keypad obstructed the previously visible terms of service alert. See Appendix, Figure 3. Had Metter scrolled down on this page, the terms of service alert would have returned to view, even if the pop-up keypad remained activated. See Appendix, Figure 4. Metter successfully registered for an account through this registration process.

III. LEGAL STANDARD

Because Uber’s terms of service are “a contract evidencing a transaction involving commerce,” they are subject to the Federal Arbitration Act (“FAA”). 9 U.S.C. § 2; Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1130 (9th Cir. 2000). “The FAA provides that any arbitration agreement within its scope ‘shall be valid, irrevocable, and enforceable,’ . . . and permits a party ‘aggrieved by the alleged . . . refusal of another to arbitrate’ to petition any federal district court for an order compelling arbitration in the manner provided for in the agreement.” Chiron, 207 F.3d at 1130 (quoting 9 U.S.C. § 4) (second omission in original). The FAA “leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 218 (1985) (citing 9 U.S.C. §§ 3, 4). The role of a district court under the FAA “is therefore limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue.” Chiron, 207 F.3d at 1130 (citations omitted). “If the response is affirmative on both counts, then the [FAA] requires the court to enforce the arbitration agreement in accordance with its terms.” Id.

IV. DISCUSSION

Metter argues Uber’s motion to compel arbitration should be denied because he never agreed to Uber’s terms and conditions, which are the source of the arbitration provision Uber seeks to invoke. “‘Before a party to a lawsuit can be ordered to arbitrate . . . there should be an express, unequivocal agreement to that effect. Only when there is no genuine issue of fact concerning the formation of the agreement should the court decide as a matter of law that the

parties did or did not enter into such an agreement.” Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., 925 F.2d 1136, 1141 (9th Cir. 1991) (quoting Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., 636 F.2d 51, 54 (3d Cir. 1980)). In deciding whether there is a genuine issue of fact concerning formation of an agreement, the party opposing arbitration shall receive “the benefit of all reasonable doubts and inferences.” Id. (quoting Par-Knit Mills, 636 F.2d at 54). “When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.” First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995)). Under California law, mutual assent is the key to contract formation. See Binder v. Aetna Life Ins. Co., 75 Cal. App. 4th 832, 850 (1999). In the context of an electronic consumer transaction, the occurrence of mutual assent ordinarily, as here, turns on whether the consumer had reasonable notice of a merchant’s terms of service agreement. See, e.g., Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1173 (9th Cir. 2014) (“We agree with the district court that Barnes & Noble did not provide reasonable notice of its Terms of Use, and that Nguyen therefore did not unambiguously manifest assent to the arbitration provision contained therein.”). Reasonable notice in this context requires that the consumer had either actual or constructive notice of the terms of service; constructive notice occurs when the consumer has inquiry notice of the terms of service — like a hyperlinked alert — and takes an affirmative action to demonstrate assent to them. See id. at 1176-79.²

According to Uber, when Metter registered his Uber account, he would have been required to click “REGISTER” to complete his sign-up process on a page displaying the alert: “BY CREATING AN UBER ACCOUNT, YOU AGREE TO THE **TERMS OF SERVICE &**

² In determining whether the plaintiff “agreed to be bound by [the defendant] Barnes & Noble’s Terms of Use” the Nguyen court purported to “apply New York law, to the extent possible.” 763 F.3d at 1175. Although the court implicitly acknowledged the question was potentially one of California law, it did not decide if California or New York law should govern the question “because both California and New York law dictate the same outcome.” Id. In deciding the issue, the court cited to multiple cases applying California law. See id. at 1175-79. Accordingly, Nguyen amounts to a binding decision of California law on the questions of notice and assent at the heart of this motion. The parties apparently agree, citing Nguyen in their briefs without qualification.

PRIVACY POLICY.” Mot. to Compel Arbitration 4; Cosentini Decl. 3. The bold, underlined portion of this alert is a clickable hyperlink to Uber’s terms of service, which contain the arbitration provision Uber now seeks to invoke. Uber argues Metter affirmatively assented to its terms of service by clicking “REGISTER” in the face of this alert. Metter disagrees, arguing that: (1) the alert is not sufficiently conspicuous to put a registrant on notice that he is agreeing to Uber’s terms of service; (2) the alert is confusing and does not put the registrant on notice that he is waiving his right to a jury trial; (3) the alert is an unenforceable “browsewrap” agreement; and (4) in any event, a pop-up keypad enabling Metter to enter his credit card information blocked the terms of service alert, preventing him from seeing it and thereby preventing him from assenting to the terms of service.³

The first three of Metter’s arguments are unavailing. To begin with, the alert informing Metter he agreed to Uber’s terms of service by registering an Uber account is not an unenforceable “browsewrap agreement.” See *Cordas v. Uber Techs., Inc.*, No. 16-CV-04065-RS, 2017 WL 658847, at *4 (N.D. Cal. Jan. 5, 2017) (explaining in detail why the equivalent notice in a related case was not an unenforceable “browsewrap” agreement). Likewise, generally speaking, the alert’s font, size, color, and placement relative to the “REGISTER” button render it sufficiently conspicuous to alert an Uber registrant that he is agreeing to Uber’s terms of service. Finally, it is immaterial that the alert itself does not indicate to an Uber registrant that he is waiving his right to a jury trial by agreeing to the terms of service; Metter identifies no case requiring an explicit alert of the sort. What matters is that the alert references and links to a terms of service agreement that contains a valid arbitration provision. See *id.* at *2-3.

Metter’s fourth argument, however, is well-taken. As he argues in response to Uber’s motion and attests in his declaration, when he reached the payment and registration page displaying the terms of service alert, the alert itself would have been blocked by a keypad that

³ The parties also dispute whether Uber’s terms of service validly delegate to an arbitrator any question of arbitrability. Because Metter has raised a genuine issue of fact as to whether an agreement to arbitrate was formed, it is not necessary to resolve this dispute.

1 popped up so that he could enter his credit card number and related payment information.
2 Accordingly, he claims to have never seen the terms of service agreement alert. Uber does not
3 dispute that such an obstruction occurred, but it argues the obstruction was irrelevant because
4 Metter could have seen the alert when he first reached the payment and registration screen, before
5 he began entering his credit card information, and that the alert itself would have been visible to
6 Metter while the pop-up keypad was visible, had Metter scrolled down to the bottom of the screen.
7 Uber's assertions, however, are not sufficient to obviate any dispute of fact as to whether Metter
8 was on notice of Uber's terms of service and thereby assented to them.

9 For one thing, Uber never explains why Metter would have scrolled down to find a terms
10 of service alert he was not otherwise aware of, especially when the registration and payment
11 screen neither instructed him to scroll down nor presented any reason for him to do so. Moreover,
12 although it is true that the terms of service alert would have been visible to Metter when he first
13 reached the payment and registration screen, it would have been obscured immediately when
14 Metter pressed any field asking for his credit card information. As these fields are at the top of the
15 screen, and entry of payment information is one of the primary purposes of this page, the Uber app
16 essentially prompts a user to enter his credit card information as soon as he reaches the payment
17 and registration screen. As a result, an ordinary registrant will often be compelled to activate the
18 pop-up keyboard and obscure the terms of service alert before having the time or wherewithal to
19 identify other features of the screen, including the alert. When such a registrant presses
20 "REGISTER" without having seen the alert, he does so without inquiry notice of Uber's terms of
21 service and without understanding that registering is a manifestation of assent to those terms.
22 Although the terms of service alert seems designed to put a registrant on inquiry notice of Uber's
23 terms of service and to alert the registrant that registration will amount to affirmative assent to
24 those terms, the keypad obstruction is a fatal defect to the alert's functioning. That defect turns
25 what would be a sufficient notice process, see Cordas, 2017 WL 658847, at *2-4, into a deficient
26 one, see Nguyen, 763 F.3d at 1178-79 (holding no constructive notice where "a website makes its
27 terms of use available via a conspicuous hyperlink on every page of the website but otherwise

1 provides no notice to users nor prompts them to take any affirmative action to demonstrate
2 assent”). In effect, the keypad obstruction turns Uber’s terms of service alert into something
3 resembling an unenforceable “browsewrap agreement” because a registrant can purportedly agree
4 to Uber’s terms of service without knowing he is doing so. See *id.* at 1176 (“[A] browsewrap
5 agreement does not require the user to manifest assent to the terms and conditions expressly . . .
6 [a] party instead gives his assent simply by using the website.”).

7 Given the functioning of the Uber app’s registration process, and the reasonable doubts
8 and inferences that must be drawn in Metter’s favor, see *Three Valleys*, 925 F.2d at 1141, Metter’s
9 declaration that he never saw the terms of service alert is credible and consistent with the
10 functioning of the Uber app. Accordingly, Metter has raised a genuine issue of fact concerning his
11 notice of, and assent to, Uber’s terms of service. It is therefore improper to conclude as a matter
12 of law that Metter had actual notice of Uber’s terms of service, or that he was on inquiry notice of
13 the terms of service and affirmatively assented to them, and the motion to compel arbitration must
14 be denied. See *Nguyen.*, 763 F.3d at 1173 (holding plaintiff did not assent to terms of service of
15 which he did not have reasonable notice); *Three Valleys*, 925 F.2d at 1141 (“Only when there is no
16 genuine issue of fact concerning the formation of the agreement should the court decide as a
17 matter of law that the parties did or did not enter into such an agreement.”).

18 This is not to say a litigant, like Metter, can defeat a motion to compel arbitration simply
19 by claiming he never saw the terms of service alert. For instance, arbitration was proper in
20 *Cordas*, where the plaintiff conclusorily claimed he never saw the terms of service alert, but did
21 not affirmatively identify any particular reason he would not or could not have seen it. 2017 WL
22 658847, at *3 (citing *Three Valleys*, 925 F.2d at 1141) (“*Cordas* raises no genuine dispute of any
23 material fact, and it is proper to conclude, as a matter of law, that he was on notice of Uber’s terms
24 and conditions, and assented to them in signing up for Uber.”). But where, as here, the party
25 opposing arbitration sufficiently alleges he had no notice of Uber’s terms of service because the
26 Uber app functionally prevented him from seeing the terms of service alert, he will have raised a
27

genuine dispute as to whether he received inquiry notice of and assented to those terms.⁴ See Nguyen., 763 F.3d at 1179 (“[T]he onus must be on website owners to put users on notice of the terms to which they wish to bind consumers. . . . [C]onsumers cannot be expected to ferret out hyperlinks to terms and conditions to which they have no reason to suspect they will be bound.”).

In addition to arguing for the sufficiency of its terms of service alert, Uber argues Metter cannot disclaim notice of and assent to Uber’s terms and conditions because his complaint alleges the existence of a contract, references Uber’s terms of service, and brings a claim under California Civil Code section 1671(d), which requires the existence of a contract. Although Uber is correct that statements in a complaint amount to judicial admissions, *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988), these additional arguments nonetheless fail because no statements in Metter’s complaint amount to an admission that he agreed to Uber’s terms of service. While Metter may believe he formed a contract with Uber by registering an account and using Uber’s services, nowhere has he admitted that the scope of that contract is defined by Uber’s terms of service agreement. Likewise, the fact that Metter brings a claim sounding in contract does not mean Uber’s terms of service are the purported contract. The complaint’s references to Uber’s terms of service, meanwhile, prove only that Metter was aware of the terms of service at the time he began litigating his case; those references prove nothing regarding Metter’s awareness

⁴ Unlike Cordas, Metter identifies specific features of the Uber app’s functionality that explain why he allegedly never saw the terms of service alert: “[A] numbered keypad would have immediately appeared below the ‘Register’ button that then blocks the entire bottom portion of the screen. The blocked portion of the screen appears to include the [terms of service alert]. Because I would have clicked the top area of the screen to enter my credit card number . . . immediately upon encountering the ‘Payment’ screen rather than scrolling [down], and because I did not notice the [terms of service alert], the keypad to enter my credit card information would have obstructed my view of the entire screen below the ‘Register’ button. I do not recall viewing, and . . . was not required to view, the blocked portion of the screen in order to click the ‘Register’ button and complete the registration process.” Metter Decl. ¶ 5. At the hearing on this motion, Uber challenged the sufficiency of Metter’s allegations because his declaration refers to what he “would have” seen and done rather than what he did see and do. The significance of the distinction is not obvious in this context. For one, Uber acknowledges that the numbered keypad would have blocked the terms of service alert from view. Moreover, Metter does not have to state with perfect memory that he immediately clicked the credit card number field when he reached the payment screen in order to create a genuine dispute of fact. It is enough that, when presented now with the evidence of registration process he encountered in 2014, he is able to state how he would have used it at the time.

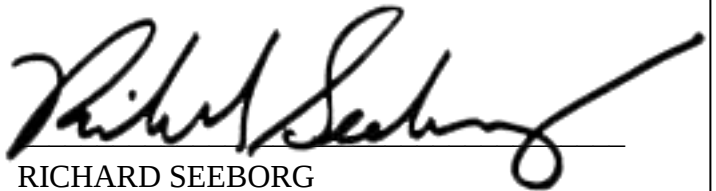
1 of the terms of service at the time he registered with Uber, used Uber services, or incurred the
2 disputed cancellation fees, nor do they prove Metter assented to the terms of service.

3 **V. CONCLUSION**

4 For the foregoing reasons, Uber's motion to compel arbitration is denied.

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6 **IT IS SO ORDERED.**

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8 Dated: April 17, 2017

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11 RICHARD SEEBORG
12 United States District Judge
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APPENDIX

The screenshot displays a mobile application's registration interface. At the top, the status bar shows various icons and the time 11:40. The app's header bar is titled 'Register'. Below the header, there are two large buttons for social media registration: 'GOOGLE+' and 'FACEBOOK'. A horizontal line with the word 'OR' in the center separates these from the standard registration fields. These fields include 'First Name' and 'Last Name' input boxes, an email field containing 'tonycuber1@gmail.com', a phone number field with a US flag icon and the number '(415) 794-1279', and a 'Password' field. A grey 'NEXT' button is positioned below the password field. The bottom of the screen shows the standard Android navigation bar with back, home, and recent apps buttons.

Figure 1.

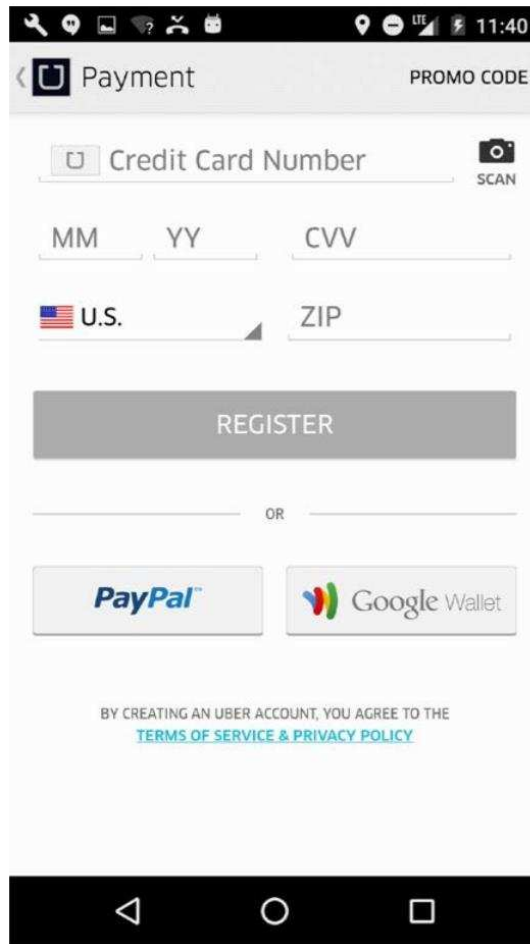


Figure 2.

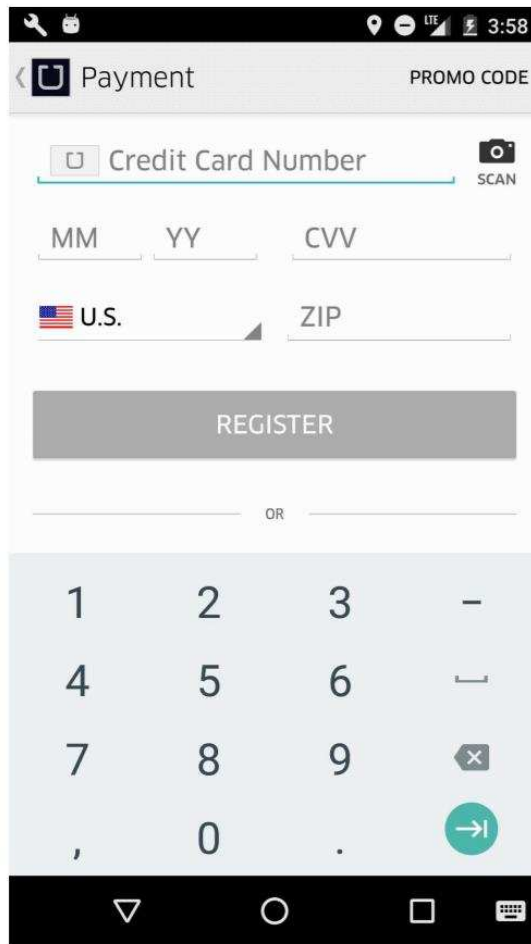


Figure 3.

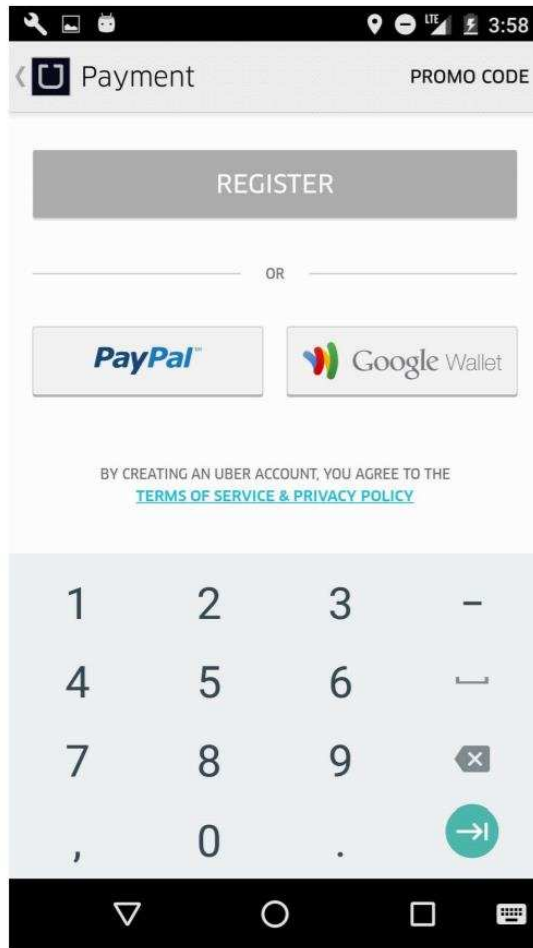


Figure 4.