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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

LORETTA WILLIAMS,

Plaintiff,

v.

DDR MEDIA, LLC, *et al.*,

Defendants.

Case No. [22-cv-03789-SI](#)

**ORDER DENYING DEFENDANTS'  
JOINT MOTION TO COMPEL  
ARBITRATION**

Re: Dkt. No. 29

On February 17, 2023, the Court held a hearing on defendants' joint motion to compel arbitration. For the reasons set forth below, the Court DENIES the motion.

**BACKGROUND**

On June 27, 2022, Loretta Williams filed a class action complaint against defendants DDR Media LLC and Lead Intelligence Inc., d/b/a/ Jornaya, alleging that defendants violated the California Invasion of Privacy Act, Cal. Penal Code § 631,<sup>1</sup> and California's Unfair Competition Law, and invaded Williams's and class members' privacy rights under the California Constitution. Williams alleges that defendants unlawfully recorded her electronic communications or interactions with DDR Media's website "SnappyRent2own.com" when she used the website on or around December 10, 2021. Compl. ¶¶ 20–24 (Dkt. No. 1).

According to the complaint, Jornaya offers a product called "TCPA Guardian" to lead generators and telemarketers. *Id.* ¶ 5. The product is "designed to allow these lead generators and

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<sup>1</sup> The California Invasion of Privacy Act criminalizes the use of a recording device to "read[], or attempt[] to read, or to learn the contents or meaning of any message, report, or communication" without the consent of all parties to the communication. Cal. Penal Code § 631.

1 telemarketers to attempt compliance with the federal Telephone Consumer Protection Act by  
2 documenting alleged evidence of prior express consent to receive telemarketing calls provided on  
3 websites.” *Id.* One feature of TCPA Guardian is a “visual playback” function, which records, in  
4 real time, a person’s interactions with a website that is using TCPA Guardian. *Id.* ¶ 6. DDR Media  
5 installed TCPA Guardian by embedding Jornaya’s code onto the SnappyRent2own.com website.  
6 *Id.* ¶ 11.

7 Williams alleges that when she visited SnappyRent2own.com on December 10, 2021, “the  
8 Jornaya TCPA Guardian replay function created a video that captured Williams’ keystrokes and  
9 clicks on the website.” *Id.* ¶ 21. TCPA Guardian also captured the date and time of the visit, her IP  
10 address, and her geographic location, as well as Williams’ name, address, and phone number. *Id.*  
11 ¶¶ 21–23. Williams alleges that the recording was done without her consent, and that defendants  
12 did not inform website visitors that their strokes and clicks would be recorded. *Id.* ¶ 24.

13 On December 15, 2022, defendants filed a joint motion to compel arbitration based upon an  
14 arbitration agreement contained in the Terms of Use on the SnappyRent2Own.com website.  
15 Defendants have submitted pictures of the website, which they implicitly represent is the version of  
16 the website that Williams accessed.<sup>2</sup> *See* Swaminathan Decl., Ex. 1 (Dkt. No. 29-2). The hyperlink  
17 to the Terms of Use is on lines sixteen and seventeen of twenty-one in a full-justified paragraph of  
18 text.<sup>3</sup> *See id.*; *see also* Appendix A. The paragraph states,

19 By clicking the “Get Started” button, I am agreeing by my  
20 electronic signature to give SnappyRent2Own, NHAProgram, and  
21 its partners my prior express written consent and permission to  
22 send emails, as well as to call and send to me recurring text  
23 messages at the cellphone number(s) I provided above and to any  
24 other subscriber or user of these cellphone number(s), using an  
25 automated dialing system at any time from and after my inquiry to

24 <sup>2</sup> The Court accessed the SnappyRent2Own.com website on February 22, 2023. On that  
25 day, the website differed from the version depicted in defendants’ briefing in significant ways,  
26 including the absence of a long paragraph—or any language—stating that by taking any particular  
27 action on the website, such as clicking a button, the user was agreeing to the Terms of Use.

28 <sup>3</sup> The paragraph also contains a hyperlink to a Privacy Policy. While the Privacy Policy is  
not directly at issue in this motion, defendants emphasize that the Privacy Policy discloses that the  
website is collecting users’ personally identifying information. Williams asserts that the hyperlink  
displayed to access the Privacy Policy is not functioning. Peluso Decl. ¶ 3 (Dkt. No. 31-1).

1 SnappyRent2Own, NHAProgram for purposes of all federal and  
2 state telemarketing and Do-Not-Call laws, in each case to market  
3 to me products and services and for all other purposes. I  
4 understand that my telephone company may impose charges on me  
5 for these contacts. I understand that my consent is not required to  
6 buy any of these business's products or services and it can be  
7 revoked at any time. For SMS message campaigns: text STOP to  
8 stop and HELP for help. Terms & Conditions/privacy policy  
9 apply. In addition, I agree to the Terms of Use and the Privacy  
10 Policy. I also authorize the auto dealers and financial institutions  
11 that receive my request to order my credit report to determine my  
12 creditworthiness. I understand that SnappyRent2own.com,  
13 NHAProgram does not make credit decisions and is not a lender  
14 or broker.

15 *Id.* The text of the entire paragraph is darker gray on a lighter gray background. *Id.* The Terms of  
16 Use hyperlink is underlined, but otherwise is in the same style and color as the surrounding  
17 words. *Id.* Above the paragraph containing the Terms of Use hyperlink are four white data fields,  
18 which contain font approximately two times the size<sup>4</sup> of the Terms of Use hyperlink font, where  
19 users are prompted to fill in their contact information (first name, last name, phone number, and  
20 email address). *Id.* Below the Terms of Use hyperlink paragraph is a large "CHECK LISTINGS"  
21 button. *Id.* The button is blue and the text within it is white, in all caps, and the font is approximately  
22 two to three<sup>5</sup> times the size of the Terms hyperlink font. *Id.* Below the "CHECK LISTINGS" button  
23 are photos of listings and their locations. *Id.* Below the photos is a "Get Started Today" button,  
24 which is the same size as the "CHECK LISTINGS" button. *Id.* The "Get Started Today" button is  
25 blue, the text within the button is white, and the font is approximately two to three times the size of  
26 the Terms hyperlink font. *Id.* The Terms of Use hyperlink leads to a page titled "Terms and  
27 Conditions." Dkt. No. 29-3. The Terms and Conditions document is seven pages and is mostly  
28 single-spaced. *Id.* The arbitration agreement appears on page five of seven. *Id.* at 5.

### LEGAL STANDARD

A party seeking to compel arbitration bears the burden of proving the existence of an agreement to arbitrate by a preponderance of the evidence. *Johnson v. Walmart Inc.*, 57 F.4th 677,

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<sup>4</sup> The Terms of Use hyperlink font is 1/16th of an inch while the font in the data fields is 1/8th of an inch.

<sup>5</sup> The font of the "CHECK LISTINGS" button measures between 1/8th and 1/4th of an inch.

1 681 (9th Cir. 2023). The Federal Arbitration Act (“FAA”) “requires federal district courts to stay  
 2 judicial proceedings and of claims covered by a written and enforceable arbitration agreement.” 9  
 3 U.S.C. § 3; *Nguyen v. Barnes & Nobel Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014). “The FAA limits  
 4 the district court’s role to determining whether a valid arbitration agreement exists, and whether the  
 5 agreement encompasses the disputes at issue.” *Nguyen*, 763 F.3d at 1175. “In determining whether  
 6 a valid arbitration agreement exists, federal courts ‘apply ordinary state-law principles that govern  
 7 the formation of contracts.’” *Id.*<sup>6</sup>

## 8 9 DISCUSSION

10 Before analyzing whether Williams agreed to arbitrate her claims, it is helpful to understand  
 11 the type of contract contained on the SnappyRent2Own.com website. The Ninth Circuit has  
 12 explained,

13 Contracts formed on the Internet come primarily in two flavors: “clickwrap” (or  
 14 “click-through”) agreements, in which website users are required to click on an “I  
 15 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.

16 *Id.* at 1175–76. “Courts routinely find clickwrap agreements enforceable.” *Oberstein v. Live Nation*  
 17 *Ent., Inc.*, \_\_\_ F.4th \_\_\_, No. 21-56200, 2023 WL 1954688, at \*5 (9th Cir. Feb. 13, 2023). “Courts  
 18 are generally reluctant to enforce [browsewrap] agreements because they often leave users ‘unaware  
 19 that contractual terms were even offered, much less that continued use of the website will be deemed  
 20 to manifest acceptance of those terms.’” *Id.* (quoting *Berman v. Freedom Fin. Network, LLC*, 30  
 21 F.4th 849, 856 (9th Cir. 2022)). “When an online agreement falls between these two extremes,  
 22 courts analyze mutual assent under an objective-reasonableness standard.” *Id.*

23 The agreement here falls somewhere between a clickwrap and a browsewrap agreement. A  
 24 user is not required to click an “I agree” button after being shown the website’s Terms and  
 25 Conditions, but the website does inform users that if they click a button (the “Get Started” button),  
 26

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27 <sup>6</sup> The parties’ briefing assumes California law applies to this analysis. *See* Dkt. Nos. 29–32.  
 28 Accordingly, the Court will apply California law to determine whether a valid arbitration agreement  
 exists.

1 they agree to the Terms of Use. Regarding the enforceability of these types of agreements, the Ninth  
2 Circuit has instructed:

3 Unless the website operator can show that a consumer has actual knowledge of the  
4 agreement, an enforceable contract will be found based on an inquiry notice theory  
5 only if: (1) the website provides reasonably conspicuous notice of the terms to which  
6 the consumer will be bound; and (2) the consumer takes some action, such as clicking  
7 a button or checking a box, that unambiguously manifests his or her assent to those  
8 terms.

9 *Berman*, 30 F.4th at 856 (applying California law).

10 Defendants do not contend that Williams had actual notice. Instead, they argue that she had  
11 inquiry notice because the website provided reasonably conspicuous notice of the Terms of Use,  
12 and the Terms of Use hyperlink is conspicuous when viewed in the context of the website. Williams  
13 contends that the notice of the Terms of Use is not reasonably conspicuous and that defendants have  
14 not shown that she took any action that unambiguously manifested her assent to those terms.

#### 15 **I. Reasonably conspicuous notice**

16 Reasonably conspicuous notice requires that: (1) the “notice must be displayed in a font size  
17 and format such that the court can fairly assume that a reasonably prudent internet user would have  
18 seen it,” and (2) the hyperlink to the terms and conditions “must be readily apparent” to a reasonably  
19 prudent user. *Id.* at 856–57.

#### 20 **A. Font size and format of notice**

21 Defendants contend that the notice disclosing the Terms of Use is conspicuous because it is  
22 “primarily surrounded by text no larger than the notice itself” and it is “above the button to proceed,  
23 meaning that a user cannot continue to use the next page without at least scrolling past” the Terms  
24 of Use hyperlink. Dkt. No. 32 at 3. Defendants assert that the website in this case is “materially  
25 indistinguishable” from the website in *Pizarro v. QuinStreet, Inc.*, Case No. 22-cv-02083-MMC,  
26 2022 WL 3357838 (N.D. Cal. Aug. 15, 2022), in which Judge Chesney of this court enforced an  
27 arbitration agreement contained in a website’s Terms of Use.

28 In *Pizarro*, the plaintiff visited the defendant’s website and input personal information in a

1 form and clicked a “See My Rates” button under the form. *Pizarro*, 2022 WL 3357838, at \*2. The  
2 defendant argued that by clicking the “See My Rates” button, Pizarro agreed to arbitrate her claims  
3 because directly underneath the “See My Rates” button, the website notified users that “By clicking  
4 See My Rates you agree to the following,” including the Terms of Use containing an arbitration  
5 agreement. *Id.* at \*1–2. Judge Chesney held that the arbitration agreement was enforceable because  
6 the website provided reasonably conspicuous notice of the Terms of Use:

7         QuinStreet’s textual notice and Terms of Use hyperlink, when viewed in the context  
8         of the overall design and content of the webpage, are “reasonably conspicuous” . . .  
9         . In particular, the notice and hyperlink appear directly below the “See My Rates”  
10         button, are set off by ample white spacing, and are primarily surrounded by text no  
11         larger than the notice itself. Further, the general design of the webpage, which is  
12         comprised of only two data fields, is relatively uncluttered and has a muted, and  
13         essentially uniform, color scheme.

14 *Id.* at \*3; *see* Appendix C (*Pizarro* website).

15         Williams argues the website here does not provide reasonably conspicuous notice of the  
16         Terms of Use because the notice is in tiny gray font on a lighter gray background while other  
17         elements of the website are in much larger font with contrasting color backgrounds. Williams  
18         contends that the SnappyRent2Own.com website is similar to the browsewrap agreement in *Berman*  
19         that the Ninth Circuit held unenforceable.

20         In *Berman*, the plaintiffs visited two of the defendants’ websites. The websites differed in  
21         certain respects, but both “contained a set of hyperlinked terms and conditions that included a  
22         mandatory arbitration provision.” *Berman*, 30 F.4th at 853. Both plaintiffs clicked on a “continue”  
23         button found on the websites, and defendant argued that in doing so, the plaintiffs had agreed to the  
24         terms and conditions. *Id.* at 857. The Ninth Circuit described the layout of one of the websites as  
25         follows:

26         [T]he webpage she saw stated, in large orange letters across the top of the page,  
27         “Welcome back, stephanie!” In the middle of the screen, the webpage proclaimed,  
28         “Getting Free Stuff Has Never Been Easier!” and included brightly colored graphics.  
29         In between those two lines of text appeared a box that stated at the top, “Confirm  
30         your ZIP Code Below,” followed immediately by a pre-populated text box displaying  
31         the zip code 93930. Below that, the page displayed a large green button inviting  
32         Hernandez to confirm the accuracy of the zip code so that she could proceed to the  
33         next page in the website flow. The text inside the button stated, in easy-to-read white  
34         letters, “This is correct, Continue! >>” . . . .

1 Between the comparatively large box displaying the zip code and the large green  
 2 “continue” button were two lines of text in a tiny gray font, which stated: “I  
 3 understand and agree to the Terms & Conditions which includes mandatory  
 4 arbitration and Privacy Policy.” The underlined phrases “Terms & Conditions” and  
 5 “Privacy Policy” were hyperlinks, but they appeared in the same gray font as the rest  
 6 of the sentence, rather than in blue, the color typically used to signify the presence  
 7 of a hyperlink.

8 *Id.* at 853–54 (internal citation omitted).<sup>7</sup> The Ninth Circuit held that the text disclosing the Terms  
 9 and Conditions was not conspicuous because “[i]t [was] printed in a tiny gray font considerably  
 10 smaller than the font used in the surrounding website elements, and indeed in a font so small that it  
 11 is barely legible to the naked eye,” *id.* at 856, and the font was surrounded by “comparatively larger  
 12 font . . . direct[ing] the user’s attention everywhere else.” *Id.* at 856–57; *see* Appendix B (*Berman*  
 13 websites).

14 The Court concludes that the SnappyRent2own.com website<sup>8</sup> did not provide reasonably  
 15 conspicuous notice of the Terms of Use, and that the website is closer to (and arguably worse than)  
 16 the deficient *Berman* websites, and different from the *Pizarro* website in several material respects.  
 17 Here, like *Berman*, the text disclosing the Terms of Use is in a very small gray font. *See* Appendix  
 18 A. Worse than *Berman*, where the notice was two lines of gray text on a contrasting white  
 19 background, the text here is darker gray against a lighter gray background, and is buried in lines  
 20 sixteen and seventeen of twenty-one in a full-justified block paragraph. *Id.* The long paragraph  
 21 begins by stating “By clicking the ‘Get Started’ button, I am agreeing to,” followed by a long list of  
 22 items before reaching the sentence “In addition, I agree to the Terms of Use . . .” *Id.* In addition,  
 23 similar to the websites in *Berman*, “the textual notice is further deemphasized by the overall design  
 24 of the webpage, in which other visual elements draw the user’s attention away from the barely  
 25 readable critical text.” *Berman*, 30 F.4th at 857; *see* Appendix A (text and images to the left of the  
 26 textual notice, photographs of properties underneath textual notice, “CHECK LISTINGS” button

27 <sup>7</sup> The other website in *Berman* was formatted slightly differently, but “[a]s with the webpage  
 28 Hernandez viewed, sandwiched between the buttons allowing Russell to select her gender and the  
 large green ‘continue’ button were the same two lines of text in tiny gray font stating, ‘I understand  
 and agree to the Terms & Conditions which includes mandatory arbitration and Privacy Policy.’  
 The hyperlinks were underlined but again appeared in the same gray font as the rest of the sentence.”  
*Id.*

<sup>8</sup> The Court’s analysis pertains to the version of the website depicted in Exhibit 1 to the  
 Swaminathan Declaration, and not the version that the Court accessed on February 22, 2023.

1 directly below notice). This design runs contrary to the Ninth Circuit’s admonition that “[w]ebsite  
2 users are entitled to assume that important provisions—such as those that disclose the existence of  
3 proposed contractual terms—will be prominently displayed, not buried in fine print.” *Berman*, 30  
4 F.4th at 857. Further, “[b]ecause ‘online providers have complete control over the design of their  
5 websites,’ the onus must be on website owners to put users on notice of the terms to which they  
6 wish to bind consumers.” *Id.* (internal citations omitted).

7 The Court finds that *Pizarro* does not aid defendants because in that case the notice  
8 disclosing the Terms of Use was much more conspicuous. In *Pizarro*, directly below the “See My  
9 Rates” button, the website user was notified that “By clicking See My Rates you agree to the  
10 following:” followed by “To AmOne’s Privacy Notice, Terms of Use, and Consent to Receive  
11 Electronic Communications.” Both “By clicking See My Rates . . .” and “To AmOne’s . . . Terms  
12 of Use . . .” were set off by white space, and the text containing the Terms of Use hyperlink was  
13 only two lines. *See* Appendix C; *Pizarro*, 2022 WL 3357838, at \*1. In contrast, here the notice of  
14 the Terms of Use is contained in a long gray-on-gray paragraph and it does not have any  
15 distinguishing qualities to make the text conspicuous. *See* Appendix A. In addition, unlike  
16 *Pizarro*’s website, which had “only two data fields,” was “relatively uncluttered,” and “a muted,  
17 and essentially uniform, color scheme,” *Pizarro*, 2022 WL 3357838, at \*3, the  
18 SnappyRent2Own.com website has four data fields, multiple colors, pictures, and a more cluttered  
19 appearance—all “elements that draw the user’s attention away from the barely readable critical  
20 text.” *Berman*, 30 F.4th at 857.

## 21

### 22 **B. Terms hyperlink**

23 The Court also finds that the Terms of Use hyperlink is not “readily apparent” to a reasonably  
24 prudent user. *Id.* Here, the hyperlink is underlined, but it is not in the traditional blue, nor is it all  
25 capitalized or otherwise distinguishable from the surrounding text. *See* Appendix A. “Consumers  
26 cannot be required to hover their mouse over otherwise plain-looking text or aimlessly click on  
27 words on a page in an effort to ‘ferret out hyperlinks.’” *Berman*, 30 F.4th at 857 (quoting *Ngyuen*,  
28 763 F.3d at 1179). “A web designer must do more than simply underscore the hyperlinked text in



1 order to ensure that it is sufficiently ‘set apart’ from the surrounding text.” *Id.*

2 Customary design elements denoting the existence of a hyperlink include the use of  
3 a contrasting font color (typically blue) and the use of all capital letters, both of which  
4 can alert a user that the particular text differs from other plain text in that it provides  
a clickable pathway to another webpage.

5 *Id.* (citing *Sellers v. JustAnswer LLC*, 289 Cal. Rptr. 3d 1, 29 (Cal. Ct. App. 2021) (finding “Terms  
6 of Service” insufficiently conspicuous because it did not use all capital letters or contrasting font  
7 color).

8 Defendants argue that the Terms of Use hyperlink is readily apparent because it is in the  
9 same formatting as the surrounding text, and it is located above the “button to proceed” (the  
10 “CHECK LISTINGS” button). Dkt. No. 32 at 3–4. However, when the Terms hyperlink is not  
11 conspicuously distinguished from the surrounding text, it is not readily apparent. *Oberstein*, 2023  
12 WL 1954688, at \*8 (“And, crucially, the “Terms of Use” hyperlink is conspicuously distinguished  
13 from the surrounding text in bright blue font, making its presence readily apparent.”).

## 14 **II. Manifesting unambiguous assent**

15 The second requirement that must be met in order to enforce DDR Media’s online agreement  
16 is that “the consumer takes some action, such as clicking a button or checking a box, that  
17 unambiguously manifests his or her assent to those terms.” *Berman*, 30 F.4th at 856. “The conduct  
18 of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct  
19 and knows or has reason to know that the other party may infer from his conduct that he assents.” *Id.*  
20 at 855 (citing Restatement (Second) of Contracts § 19(2) (1981)). In *Berman*, the Ninth Circuit  
21 rejected the defendant’s argument that the plaintiffs manifested their assent to be bound by the  
22 websites’ terms and conditions by clicking large green “continue” buttons:

23 [M]erely clicking on a button on a webpage, viewed in the abstract, does not signify  
24 a user’s agreement to anything. A user’s click of a button can be construed as an  
25 unambiguous manifestation of assent only if the user is explicitly advised that the act  
26 of clicking will constitute assent to the agreement. The presence of “an explicit  
27 textual notice that continued use will act as a manifestation of the user’s intent to be  
bound” is critical to the enforceability of any browsewrap-type agreement. *Nguyen*,  
28 763 F.3d at 1177.

The webpages here did provide advisals concerning the terms and conditions in  
proximity to the “continue” buttons. On the webpage Russell visited, the notice

1 appeared directly above the button, and on the webpage Hernandez visited it  
 2 appeared above the button separated by several intervening lines of text. But “even  
 close proximity of the hyperlink to relevant buttons users must click on—without  
 more—is insufficient to give rise to constructive notice.” *Id.* at 1179.

3 Rather, the notice must explicitly notify a user of the legal significance of the action  
 4 she must take to enter into a contractual agreement. The notice did not do so here.  
 Both webpages stated, “I understand and agree to the Terms & Conditions,” but they  
 5 did not indicate to the user what action would constitute assent to those terms and  
 conditions. Likewise, the text of the button itself gave no indication that it would  
 6 bind plaintiffs to a set of terms and conditions. This notice defect could easily have  
 been remedied by including language such as, “By clicking the Continue >> button,  
 you agree to the Terms & Conditions.”

7  
 8 *Id.* at 857–58.

9 Here, users are instructed that “By clicking the ‘Get Started’ button, I am agreeing by my  
 10 electronic signature . . . . In addition, I agree to the Terms of Use and the Privacy Policy.” *See*  
 11 Appendix A. The long paragraph containing this instruction is followed not by a “Get Started”  
 12 button, but by a “CHECK LISTINGS” button, and a user reaches a “Get Started Today” button  
 (there is no “Get Started” button) after scrolling past “CHECK LISTINGS” and pictures of various  
 13 properties. *Id.*

14 Defendants assert, without any evidence,<sup>9</sup> that a user “would have been required” to click  
 15 the “CHECK LISTINGS” button in order to proceed through the website, Dkt. No. 29 at 3, and they  
 16 argue that it is a “technicality” that the relevant assent button is labeled “CHECK LISTINGS” and  
 17 not “Get Started” as identified in the notice. Dkt. No. 32 at 4. Defendants argue, “there can be no  
 18 serious dispute that, as a real-world matter, any user of snappyrent2own.com would have been just  
 19 as aware of the Terms of Use regardless of whether the button . . . read ‘CHECK LISTINGS’ or  
 20 ‘Get Started.’” *Id.* at 5. Thus, under this theory, a user manifests assent to the Terms of Use by  
 21 clicking the “CHECK LISTINGS” button, despite the fact that the notice states that agreement is  
 22 manifested by “clicking the ‘Get Started’ button.” At the hearing on February 17, 2023, defense  
 23 counsel took a somewhat different position, arguing that inquiry notice does not require a user to  
 24 click any button, and that a user would be put on notice of the Terms of Use and therefore bound by  
 25

26  
 27 <sup>9</sup> For example, defendants have not submitted a declaration from the SnappyRent2Own.com  
 28 web designer stating that a user must click “CHECK LISTINGS” in order to proceed through the  
 website, nor have defendants submitted any evidence showing which buttons, if any, Williams  
 actually clicked.

1 the arbitration agreement contained in the Terms and Conditions simply by visiting the website.  
2 Under this latter theory, the Court would presumably analyze the agreement as a pure “‘browsewrap’  
3 agreement[], in which a website offers terms that are disclosed only through a hyperlink and the  
4 user supposedly manifests assent to those terms simply by continuing to use the website.” *Berman*,  
5 30 F.4th at 856.

6 The Court is unpersuaded by defendants’ arguments under either theory, and concludes that  
7 defendants have not met their burden to show that Williams took some action that unambiguously  
8 manifested her assent to the Terms and Conditions. As a threshold matter, the Court finds it  
9 problematic that the notice informs users that they agree to the Terms and Conditions by clicking  
10 the “Get Started” button, while neither button on the website is labeled “Get Started.” Even if  
11 Williams clicked the “CHECK LISTINGS” button, as defendants’ originally argued, it is the Court’s  
12 view that doing so would not unambiguously manifest assent to the Terms of Use because the notice  
13 informs users that they agree to the Terms of Use by clicking a “Get Started” button, not the  
14 “CHECK LISTINGS” button.

15 Defendants rely on *Hicks|Park LLP v. ING Bank, FSB*, No. CV 11-07330 ODW (AGRX),  
16 2011 WL 5509097 (C.D. Cal. Nov. 9, 2011), to argue that the labeling of the assent button is a  
17 “technicality” that should not defeat arbitration. In *Hicks*, a former client sued a law firm over a fee  
18 dispute, and the law firm signed a “Notice of Client’s Right to Arbitration” and informed the client  
19 of its right to mandatory fee arbitration. *Id.* at \*1. The client signed a petition for arbitration. *Id.*  
20 The law firm later objected to arbitration, arguing that the demand for arbitration was defective  
21 because the request was filed against the named partner personally rather than the law firm. The  
22 court rejected this argument, holding

23 The mere fact that the Notice of Attorney Responsibility is not addressed to HP, but  
24 rather “James B. Hicks” does not remove them from the original Petition. . . .  
25 Nonetheless, even if it were ambiguous as to whom the demand was filed against,  
26 allowing this technicality to defeat Defendant’s petition for arbitration would be in  
27 direct contradiction to public policy, which recognizes that “states are generally  
28 responsible for the regulation of lawyers.”

*Id.* at \*2. In *Hicks*, there was no dispute as to the parties’ agreement to arbitrate, and the case has  
no bearing on the questions presented here.

1 Further, defendants have not submitted any evidence showing that Williams actually clicked  
2 the “CHECK LISTINGS” button. *Berman* explicitly holds that a website user must “take[] some  
3 action, such as clicking a button or checking a box, that unambiguously manifests his or her assent  
4 to those terms.” *Berman*, 30 F.4th at 856. Finally, as to defendants’ assertion that Williams  
5 manifested her assent to the Terms of Use simply by visiting the website, the Ninth Circuit has  
6 repeatedly stated that “[c]ourts are generally reluctant to enforce such agreements because they often  
7 leave users ‘unaware that contractual terms were even offered, much less that continued use of the  
8 website will be deemed to manifest acceptance of those terms.’” *Oberstein*, 2023 WL 1954688, at  
9 \*5 (quoting *Berman*, 30 F.4th at 856).


10 Because the Court concludes that defendants have not shown that Williams agreed to  
11 arbitrate her claims, the Court does not reach the other arguments raised by the parties’ briefs,  
12 including the question of whether Jornaya has standing to seek arbitration.

### 13 CONCLUSION

14 For the foregoing reasons and for good cause shown, defendants’ joint motion to compel  
15 arbitration is DENIED.  
16

17 **IT IS SO ORDERED.**  
18

19 Dated: February 28, 2023

20   
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22 SUSAN ILLSTON  
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APPENDIX A

snappyrent2own.com Case 3:22-cv-03789-SI Document 29-2 Filed 12/15/22 Page 1 of 3 https://snappyrent2own.com

OPPORTUNITY

Our Partners Feature Thousands of Properties



\*Image for illustrative purpose only

Get Started Today

Looking to buy a house? Let us do the heavy lifting.

We'll guide you through the whole process of your real estate transaction.

snappyrent2own.com

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Get Started Today

By submitting this form, I agree that Snappy Rent 2 Own, including its partners/affiliates, may contact me regarding its programs and offers via email or telephone using automated technology to any wireless number I provide in order to provide me with important information and exclusive offers.

[Terms And Conditions](#) | [Privacy Policy](#)

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United States District Court Northern District of California


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APPENDIX B


United States District Court  
Northern District of California

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**Shipping Information Required**



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 1923

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 offers. 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, trade names 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 Rewards](#) - [How to Redeem](#) - [Privacy Policy](#) - [Terms & Conditions](#) - [FAQ](#)

Samples & Savings

## Welcome back, stephanie!


Confirm your ZIP Code Below:

93930


I understand and agree to the [Terms & Conditions](#) which includes mandatory arbitration and [Privacy Policy](#).

I AGREE To receive daily emails from Empowered Savings and Everyday Rewards.

**This is correct. Continue! »**




### Getting Free Stuff Has Never Been Easier!




**JOIN US!**

Sign up and you can accumulate millions of points just the way you go about your samples, coupons, and brands!



**EXPLORE!**

We will not only search 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 5-star, local, and samples that you'll actually be spending hard earned money on.

APPENDIX C

Last step to get your quotes

Phone  
PHONE ( )

EMAIL



We encrypt your information using 256 SSL technology.

See My Rates

By clicking See My Rates, you agree to the following:

To AmOne's [Privacy Notice](#), [Terms of Use](#), and [Consent to Receive Electronic Communications](#)

To share my information with up to five potential callers, lenders, or debt relief partners, for AmOne, and for them and/or AmOne to contact you (including by automated dialing systems, prerecorded messages and text) for marketing purposes by telephone, mobile device (including SMS and MMS), and/or email, even if you are on a corporate, state or national Do Not Call list. Consent is not required in order to purchase goods and services and you may choose instead to contact a customer care representative at 1-800-781-5187.

You authorize AmOne to obtain your credit report and Social Security Number from a credit bureau to verify your identity and match you with up to five lenders or debt relief providers. You further authorize AmOne to provide to these lenders your full Social Security. You further authorize these lenders separately to obtain your consumer credit report, credit score, and other information from one or more consumer reporting agencies to verify your identity and provide you with quotes.

United States District Court  
Northern District of California

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