



makes out a *prima facie* case for the existence of an agreement to arbitrate, the burden shifts to the adverse party to come forward with competent admissible evidence that, if credited and given all reasonable inferences in favor of that party, would raise a genuine issue of fact for trial.

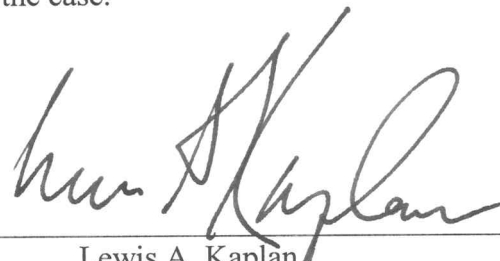
Magistrate Judge Parker concluded that defendant, the proponent of arbitration, “proffered sufficient credible, admissible, and relevant evidence to demonstrate by a preponderance of the evidence that an agreement to arbitrate existed and that it fell into the category of a ‘sign-in-wrap’ agreement.”<sup>4</sup> The R&R thus is phrased in a manner suggesting that the magistrate judge perhaps resolved the dispute concerning the existence of an agreement to arbitrate on the basis of what she viewed as a preponderance of the credible evidence.

Such an approach, if that is what occurred, in my view would have been incorrect. The Court nonetheless finds that any error by the magistrate judge here was harmless. Applying the correct standard, on the basis of the undisputed facts and “drawing all reasonable inferences in favor of the non-moving party,”<sup>5</sup> this Court holds that no trier of fact reasonably could have found that an agreement to arbitrate did not exist between the parties. The Court otherwise agrees with the findings and conclusions of Magistrate Judge Parker in all respects.

Defendant’s motion to compel arbitration [DI 39] is granted. Plaintiff’s motion to strike [DI 49] is denied as moot. The Clerk shall close the case.

SO ORDERED.

Dated: January 31, 2018




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Lewis A. Kaplan  
United States District Judge

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the formation of the arbitration agreement, however, remand to the district court for a trial is necessary.” (quoting *Wachovia Bank, Nat. Ass'n v. VCG Special Opportunities Master Fund*, 661 F.3d 164, 172 (2d Cir. 2011) (quoting *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003))).

4

DI 78, at 17.

5

*Meyer*, 868 F.3d at 74 (citing *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 229 (2d Cir. 2016)).