UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MELINA BERNARDINO,

Plaintiff,

-against-

BARNES & NOBLE BOOKSELLERS, INC.,

Defendant.

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REPORT AND RECOMMENDATION

17-CV-04570 (LAK) (KHP)

TO: THE HONORABLE LEWIS A. KAPLAN, United States District Judge

FROM: KATHARINE H. PARKER, United States Magistrate Judge

INTRODUCTION

According to recent newspaper articles, consumers now buy more than 50% of their purchases online. Laura Stevens, *Survey Shows Rapid Growth in Online Shopping*, WALL STREET JOURNAL, (June 8, 2016), https://www.wsj.com/articles/survey-shows-rapid-growth-in-online-shopping-1465358582. Not surprisingly then, courts have been presented with new forms of commercial agreements entered into by retailers and customers in the context of web-based transactions. This case involves just such an agreement.

On February 3, 2017, Plaintiff Melina Bernardino, a smart phone user who likes to shop online, purchased a DVD of a classic children's movie for herself and her daughter from Defendant Barnes & Noble's ("B&N") website using her Apple iPhone 7. After her purchase, she retained an expert and a lawyer to replicate her purchase and evaluate whether her privacy had been violated by B&N. Her expert, James Sherwood, proceeded to purchase the same DVD she did from B&N's website through an iPhone and analyzed 800 pages of computer code

generated in connection with that purchase with the aid of a special software program called "Web Inspector." (Doc. No. 23 ("Sherwood Decl.") ¶¶ 2, 13-27.) This endeavor revealed that certain data about his purchase was transmitted from B&N's website to Facebook's database. (Sherwood Decl. ¶¶ 2, 13-14, 20-21, 29-33.) The information included the name of the DVD purchased, the DVD's product ID and purchase price, the IP address used for the purchase, a Facebook "fr" cookie, and certain information about the phone through which the purchase was made ("DVD purchase information"). (Compl. ¶¶ 7, 54.) There is no contemporaneous proof of Bernardino's DVD purchase information being shared with Facebook; rather, she posits that the same process that occurred with her expert occurred with respect to her purchase. She asserts that the transmittal of the DVD purchase information, and in particular, that the name of the video she purchased can be associated with her name, violated her privacy.

Based on this alleged breach of privacy, Bernardino filed suit on her own behalf and on behalf of a putative class against B&N pursuant to the federal Video Privacy Protection Act (the "VPPA"), 18 U.S.C. § 2710, the New York Video Consumer Privacy Act ("NY VCPA"), N.Y. Gen. Bus. L. §§ 670-675, and the New York Consumer Protection Statute ("NY CPA"), N.Y. Gen. Bus. L. § 349.[1] She seeks compensatory damages, including statutory damages, restitution, punitive damages, attorneys' fees and costs, and an injunction permanently restraining B&N from violating its customers' privacy.

[1] Under the VPPA, renters and sellers of video tapes are prohibited from disclosing "personally identifiable information" about consumers without first obtaining the "informed, written consent . . . of the consumer." 18 U.S.C. § 2710(b)(1)-(2)(B). The intent of the federal law was "to prevent disclosures of information that would, with little or no extra effort, permit an ordinary recipient to identify a particular person's video-watching habits." *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 284 (3d Cir. 2016), *cert. denied, C.A.F. v. Viacom, Inc.*, 137 S. Ct. 624 (2017).

B&N has moved to compel arbitration, contending that Bernardino is bound by the arbitration provision in its Terms of Use ("TOU") found on its website. In Paragraph 84 of her Complaint, Bernardino states, among other things, that she "never agreed to the TOU, nor was she even aware of its existence. At no point during the purchase process was [Bernardino] asked to agree to the TOU, nor even informed that a TOU existed." (Compl. ¶ 84.) She also contends that the arbitration provision is unconscionable and therefore unenforceable. Accordingly, she opposes B&N's motion.

For the reasons that follow, this Court finds that Bernardino was on notice of B&N's TOU and assented to arbitration. This Court also finds that the arbitration provision in the TOU is not unconscionable. Accordingly, this Court respectfully recommends that B&N's motion to compel arbitration be granted.

LEGAL STANDARD

The Federal Arbitration Act ("FAA") provides that a written agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In light of the federal policy favoring arbitration, the U.S. Supreme Court has repeatedly rejected challenges to arbitration agreements and held that "courts must 'rigorously enforce' arbitration agreements according to their terms." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (citation omitted); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344-46 (2011); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *JLM Indus., Inc. v. Stolt-Nielson SA*, 387 F.3d 163, 171 (2d Cir. 2004); *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 844 (2d Cir. 1987). Here, the parties do not dispute that New York state contract law governs whether a valid arbitration

agreement exists. *See Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 231 (2d Cir. 2016). And, it is "'well settled' under New York law that arbitration will not be compelled absent the parties' 'clear, explicit and unequivocal agreement to arbitrate.'" *Manigault v. Macy's East, LLC,* 318 F. App'x 6, 7-8 (2d Cir. 2009) (summary order) (quoting *Fiveco, Inc. v. Haber,* 11 N.Y.3d 140, 144 (2008)).

Because B&N is moving to compel arbitration, it bears the initial burden of showing that an arbitration agreement exists by a preponderance of the credible evidence. *See Oppenheimer & Co., Inc. v. Neidhardt*, 56 F.3d 352, 358 (2d Cir. 1995); *Fleming v. J. Crew*, No. 16-cv-2663 (GHW), 2016 WL 6208570, at *3 (S.D.N.Y. Oct. 21, 2016) (quoting *Couch v. AT&T Servs., Inc.*, No. 13-cv-2004 (DRH) (GRB), 2014 WL 7424093, at *3 (E.D.N.Y. Dec. 31, 2014)). "A preponderance of the evidence means such evidence which, when considered and compared with that opposed to it, produces a belief that what is sought to be proved is more likely true than not." *In re Omeprazole Patent Litig.*, 490 F. Supp. 2d 381, 414 (S.D.N.Y. 2007) (citation omitted).

If B&N meets that prima facie showing, the burden shifts to Bernardino to show that: (i) she did not consent to arbitration, (ii) the arbitration agreement is invalid or unenforceable, or (iii) the arbitration agreement does not encompass her claims. *See Green Tree Fin. Corp.-Alabama v. Randolph,* 531 U.S. 79, 90-92 (2000); *Application of Whitehaven S.F., LLC v. Spangler*, 45 F. Supp. 3d 333, 342-43 (S.D.N.Y. 2014), *aff'd*, 633 F. App'x 544 (2d Cir. 2015). In this case, Bernardino contends that she did not consent to arbitration and that the arbitration provision in B&N's TOU is invalid and unenforceable. The parties agree that if the arbitration provision in B&N's TOU is enforceable as to Bernardino, then it would encompass her claims.

When deciding a motion to compel arbitration, the court applies a "standard similar to that applicable for a motion for summary judgment." *Myer v. Uber Techs., Inc.,* 868 F.3d 66, 74 (2d Cir. 2017) (quoting *Nicosia*, 834 F.3d at 229). The court should consider all relevant, admissible evidence contained in the pleadings, admissions on file, and affidavits. *Id.* (citations omitted). In the absence of a genuine issue of material fact regarding the formation of the arbitration agreement, the motion to compel must be granted if the dispute falls within the scope of the arbitration agreement. *Id.*

In the context of a web-based agreement to arbitrate like the one in this case, where there is no paper document signed by the parties, the court must determine whether the plaintiff manifested assent to the agreement to arbitrate or was otherwise on notice of the agreement. *See id.* at 75. Web-based arbitration agreements come in various formats, some of which have been deemed enforceable and others which have not been enforced. Those that require a user to click an "I agree" button after being presented with terms have been termed "clickwrap" agreements. *Id*. Courts have routinely upheld such agreements. *Id.; see also Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 837 (S.D.N.Y. 2012) (collecting cases). Some websites post terms of use via a hyperlink but do not prompt users to take any action manifesting consent; rather, the online host dictates that assent is given merely by using the site. *See Fteja*, 841 F. Supp. 2d. at 837-42*; Meyer*, 868 F.3d at 75. These types of agreements have been referred to as "browsewrap" agreements. *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 394-97 (E.D.N.Y. 2015). The validity of browsewrap agreements depends on whether the user had actual or constructive knowledge of the website's terms and conditions. *See Meyer,* 868 F.3d at 75; *Fteja*, 841 F. Supp. 2d at 836-37.

In *Berkson*, the Honorable Jack B. Weinstein coined the term "sign-in-wraps" to describe a hybrid between clickwrap and browsewrap agreements. 97 F. Supp. 3d at 399-401. He described this type of agreement as one that does not require the user to click a box showing acceptance of the terms of use in order to continue, but rather notifies the user of the existence and applicability of the website's terms of use when proceeding through the website's sign-in or login process. *Id.* at 399. Recently, the Second Circuit in *Meyer* upheld the validity of a "sign-in-wrap" agreement posted by the ride-sharing app company Uber on its mobile app and enforced an arbitration provision contained in Uber's posted terms of service. 868 F.3d at 71-81. B&N's arbitration agreement falls under the "sign-in-wrap" category of agreements; however, in this case, it is more appropriately labeled a "checkout-wrap" agreement because the link to B&N's TOU was posted during the checkout process for purchasing a product. The *Meyer* decision provides clear guidance on the factors relevant to determining the enforceability of "sign-in-" and "check-out-" wrap agreements. While noting that this determination is fact-intensive, it nonetheless stated that a court "may determine that an agreement to arbitrate exists where [(1)] notice of the arbitration provision was reasonably conspicuous and [(2)] manifestation of assent unambiguous as a matter of law." *Id.* at 76. As discussed below, this Court finds that B&N's arbitration provision was reasonably conspicuous and that Bernardino's assent was unambiguous.

Whether the terms of an arbitration agreement are unconscionable also is a matter of law for the court to decide. *Dall. Aerospace, Inc. v. CIS Air Corp*., 352 F.3d 775, 786-87 (2d Cir. 2003). In this case, the Court also finds that B&N's arbitration provision is not unconscionable.

DISCUSSION

B&N's TOU have been in place since at least 2011. *See Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1174 (9th Cir. 2014) (summarizing arbitration provision in B&N's terms of use); (*see also* Doc. No. 41 ("Sharrett Decl."), Ex. I) (appending B&N's TOU, which bears an arbitration provision that is identical to one cited in *Nguyen*). Section XVII of the TOU is entitled "Dispute Resolution." (Sharrett Decl. Ex. I.) The arbitration provision within the TOU states in pertinent part:

> Any claim or controversy at law or equity that arises out of the Terms of Use, the Barnes & Noble.com Site or any Barnes & Noble.com Service (each a 'Claim'), shall be resolved through binding arbitration conducted by telephone, online or based solely upon written submissions where no in-person appearance is required. In such cases, the arbitration shall be administered by the American Arbitration Association under its Commercial Arbitration Rules (including without limitation the Supplementary Procedures for Consumer-Related Disputes, if applicable), and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.
>
> Alternatively, at Barnes & Noble's sole option, a Claim (including Claims for injunctive or other equitable relief) may be adjudicated by a court of competent jurisdiction located in New York County, New York.
>
> Any Claim shall be arbitrated or litigated, as the case may be, on an individual basis and shall not be consolidated with any Claim of any other party whether through class action proceedings, class arbitration proceedings or otherwise . . . .
>
> Each of the parties hereby knowingly, voluntarily and intentionally waives any right it may have to a trial by jury in respect of any litigation (including but not limited to any claims, counterclaims, cross-claims, or third party claims) arising out of, under or in connection with these Terms of Use. Further, each party hereto certifies that no representative or agent of either party has represented, expressly or otherwise, that such party would not in the event of such litigation, seek to enforce this waiver of right to jury trial provision. Each of the parties acknowledges that this section is a material inducement for the other party entering into these Terms of Use.

(Sharrett Decl. Ex. I.)

Although the operative TOU and arbitration provision have been in place for some time, B&N's website has changed in recent years in the wake of a court decision in *Nguyen* concerning its website. Specifically, in 2014, the Ninth Circuit found that a B&N customer did not have constructive notice of the TOU when he attempted to purchase a Touchpad from B&N's website and, therefore, upheld a district court decision denying B&N's motion to compel arbitration. *Nguyen*, 763 F.3d at 1173. The Ninth Circuit characterized the TOU as they appeared on the website at the time as constituting a "browsewrap" agreement that did not require the user to expressly manifest assent to its terms and conditions. *Id.* at 1176. It noted that there was no evidence in the record that the plaintiff had actual notice of the TOU or was required to affirmatively acknowledge the TOU before completing his online purchase. *Id*. at 1076-77. Had there been such evidence, the court suggested it would have enforced the arbitration agreement in the TOU*. Id*. The court explained that even though B&N at the time made its TOU available via a hyperlink on the bottom of every page of its website, it provided no notice to users nor prompted users to take any affirmative action to demonstrate assent to the TOU. *Id.* at 1177-79. In reaching its holding, the Ninth Circuit specifically contrasted B&N's hyperlink to other websites that utilized a "sign-in-wrap" agreement, which it indicated does provide adequate notice to users. *Id.* at 1176-77 (citing *Fteja*, 841 F. Supp. 2d at 838-40 and *Cairo, Inc. v. Crossmedia Servs., Inc*., No. 04-cv-04825 (JW), 2005 WL 756610, at *2, *4-5 (N.D. Cal. Apr. 1, 2005)).

On November 18, 2015, after the Ninth Circuit's decision in *Nguyen*, B&N took action to implement two changes to its website. (Doc. No. 66 ("Burgos Decl.") ¶ 7.) B&N has presented this Court with the Declaration of Antonio Burgos, who was the Director, Quality Assurance and

Release Engineering, for B&N during the relevant time period. (Burgos Decl. ¶ 2.) Among other duties, Burgos supervised and managed the software development process for B&N's mobile website and ensured that all changes to the website were tested and implemented. (Burgos Decl. ¶¶ 3-4, 8-10, 12, 15-17.) In his declaration, Burgos attests that B&N changed the "Sign In or Continue As Guest" website page to add language immediately below the "Continue as Guest" button informing customers that "[b]y signing in you are agreeing to our Terms of Use and our Privacy Policy." (Burgos Decl. ¶ 7.) He attests that B&N also changed the "Submit Order" page of its website to add language immediately below the "Submit Order" button informing customers who had chosen to check out as guests on the earlier "Sign In or Continue As Guest" page that "[b]y making this purchase you are agreeing to our Terms of Use and Privacy Policy." (Burgos Decl. ¶ 7.) According to Burgos, B&N implemented these changes in 2015 and they remained in place through February 22, 2017. (Burgos Decl. ¶¶ 10-13; Doc. No. 67 ("Kresse Decl.") ¶¶ 2-3.)

B&N transitioned control of its website to a third-party between February 22 and May 3, 2017. (Kresse Decl. ¶ 3.) There appears to have been various changes made to its website during and/or after the transition. (Kresse Decl. ¶¶ 2-3; Doc. No. 62 ("Labaton Decl.") Ex. 1 (website view from August 18, 2017).)

Importantly, Burgos attests that on February 3, 2017, when Bernardino purchased a DVD from B&N's website, she had to click on a "Submit Order" button with the language "[b]y making this purchase you are agreeing to our Terms of Use and Privacy Policy" immediately below it in order to complete her purchase. (Burgos Decl. ¶¶ 7-17.) Burgos provided two images showing how the "Submit Order" screen appeared (with the exception of a "banner

ad") to customers who purchased DVDs through its website on February 3, 2017 via an iPhone 7. (Burgos Decl. ¶¶ 13-17, Ex. 4-5.) These images show the screen in both a landscape and portrait view. (Burgos Decl. ¶¶ 14, 17, Exs. 4-5.) Burgos explained that, while the exact version of the Website page that Bernardino would have seen on February 3, 2017 is no longer in production, he was able to obtain these images by accessing B&N's quality assurance server through his iPhone 7.[2] (Burgos Decl. ¶¶ 11-13.) The quality assurance server contains a copy of B&N's website data as it existed when hosted by B&N on February 3, 2017, though the data was used for internal quality assurance purposes. (Burgos Decl. ¶ 12.)

For her part, Bernardino submitted a declaration stating that it was her general practice to hold her phone in landscape orientation when surfing the internet on her smartphone and that she did not recall seeing any reference or link to B&N's TOU when purchasing the DVD. (Doc. No. 61 ("Bernardino Decl.") ¶¶ 6-7.) Though her Complaint specifically references the arbitration provision in B&N's TOU, she also states that she "never read" the TOU. (Bernardino Decl. ¶ 7.) Bernardino appears to be a relatively sophisticated internet and smartphone user. She has explained to this Court that she wanted to purchase the DVD at issue in anticipation of her daughter's birth. (Doc. No. 24 ("Bernardino July 7 Decl.") ¶ 3.) Using Apple's Safari browser on her iPhone, she searched for the movie on B&N's online store. (Bernardino July 7 Decl. ¶ 4.) She elected to checkout as a "guest." (Bernardino July 7 Decl. ¶ 5.) She recalls providing her

[2] B&N did not retain its customer-facing, external server data when it transitioned responsibility for hosting it to a third-party vendor. Because the image was obtained via the quality assurance server data, the screenshot shows a space for a banner advertisement. According to Burgos, as a matter of practice, B&N did not insert banner advertisements in the space, such that the visible content on the page would have shifted up further than depicted on the screenshot. (Burgos Decl. ¶ 16.) The Court notes that, consistent with Burgos' Declaration, no banner advertisements are shown in any screenshots obtained from B&N's customer-facing website by Bernardino or B&N.

name, email address, shipping address, and credit card number as part of the checkout process. (Bernardino July 7 Decl. ¶ 4.) She also recalls that, although she is a Facebook member, she did not click on a social media button as part of the checkout process. (Bernardino July 7 Decl. ¶¶ 7-8.) She concedes that she was logged into her Facebook account at the time she purchased the DVD and that it is her "usual practice" to remain logged into Facebook when she accesses the internet from her phone. (Bernardino July 7 Decl. ¶ 8.) She states that her friends and family use Facebook and that she anticipates continuing to use Facebook. (Bernardino July 7 Decl. ¶ 14.) She states that it is more convenient to purchase video media online and does not want to limit her video purchasing options to downloaded or streaming videos. (Bernardino July 7 Decl. ¶ 14.) Bernardino speaks English and Portuguese, has a technical degree in Accounting and Business, and has taken 20 college classes. (Bernardino Decl. ¶¶ 3-4.) She apparently has the sophistication to retain a lawyer and an expert in connection with her concern that Facebook might know that she purchased a specific children's DVD but, notwithstanding how important privacy is to her, elected to be a member of Facebook, to make internet purchases, and not to read B&N's TOU when browsing B&N's website.

A. *Existence Of An Agreement To Arbitrate*

As a threshold matter, this Court finds that B&N has met its prima facie burden of proving the existence of an agreement to arbitrate.

First, there is no dispute that the TOU were posted on B&N's website and contain an arbitration provision. Second, B&N has produced the affidavit of its then Director, Quality Assurance and Release Engineering, who attested that he supervised the implementation of changes to B&N's website after the *Nyugen* decision to add language immediately below the

"Submit Order" button informing customers who had chosen to check out as guests that "[b]y making this purchase you are agreeing to our Terms of Use and Privacy Policy." (Burgos Decl. ¶ 7.) Burgos attested that he personally reviewed B&N's records of changes made to its website to confirm that the language referenced above remained unchanged through the date Bernardino made her purchase on B&N's website. (Burgos Decl. ¶¶ 6-10.) Third, in addition to these sworn statements describing the language and placement of same in relation to the "Submit Order" button, B&N submitted images obtained from its quality assurance server data depicting how this language looked to users on February 3, 2017. (Burgos Decl. Ex. 4-5.) According to Burgos, the only difference between the image obtained from the quality assurance server and the one viewed by users was that users would not have seen a line of text that reads "101 NOOK Books Under $2.99" above the "Submit Order" button. (Burgos Decl. ¶ 16.) He explained that this text was a placeholder where a banner advertisement could be inserted, but that B&N did not insert advertisements or other text into that space as a matter of practice on its external website. (Burgos Decl. ¶¶ 12-17.)

Bernardino contends that B&N has not made a prima facie showing that an agreement to arbitrate existed because Burgos' Declaration contradicts the declaration of another B&N employee, Kacey Sharrett, which was submitted and subsequently withdrawn by B&N. Sharrett stated in her affidavit that she accessed B&N's website on July 27, 2017 from her Apple iPhone and saw that when checking out as a "Guest," users could see text that stated "[b]y signing in or checking out as a guest you are agreeing to our Terms of Use" on the same screen directly below the "Checkout as Guest" button. (Sharrett Decl. ¶¶ 10, 12, 14-15, Ex. F.) Sharrett stated that customers followed the same process for purchasing DVDs on February 3, 2017 as they did

in July 2017. (Sharrett Decl. ¶¶ 14-15.) Sharrett appended a screenshot taken as of July 27, 2017 showing the language that appeared under the "Checkout as Guest" button. (Sharrett Decl. Ex. F.) Sharrett's Declaration did not append the "Submit Order" page or discuss steps that occur after the user elects to proceed with the purchase as a guest. B&N asked the Court to infer that Bernardino would have seen a materially similar image of the "Checkout as Guest" page on February 3, 2017. (*See* Sharrett Decl. ¶¶ 10-14.)

After Bernardino questioned the accuracy of Sharrett's Declaration based on research conducted by her counsel's office in April 2017, which included a screenshot of B&N's checkout process taken in August 2017 (*see* Labaton Decl. ¶¶ 3-6, Ex. 1), B&N's counsel further investigated. In its reply brief in support of its motion to compel arbitration and at oral argument, B&N withdrew the Sharrett Declaration insofar as it suggested that its website looked the same to users on February 3, 2017 as it did on July 27, 2017 and submitted the Burgos Declaration to correct the record. While it is regrettable that B&N initially submitted what turned out to be inaccurate information about what it thought the website looked like on February 3, 2017, its counsel was obliged to, and did, correct the record when the mistake was learned.[3] *See* N.Y. R. of Prof'l Conduct 3.3(a)(3), 3.4(a)(4).

Bernardino offers no evidence whatsoever to suggest that the website on February 3, 2017 did not look the way Burgos has stated. Rather, she simply states that she does not recall seeing the TOU, (Bernardino Decl. ¶ 7), even though Burgos states that the TOU language was

[3] To the extent Bernardino has asserted that the Court may not consider the Burgos Declaration because it is new evidence offered on reply, her argument fails. Bernardino had a full opportunity to evaluate that evidence and submit a sur-reply in response to it. Thus, she is not prejudiced by B&N's submission on reply or this Court's consideration of it. *Bayway Ref. Co. v. Oxygenated Mktg. & Trading A.G.*, 215 F.3d 219, 226-27 (2d Cir. 2000).

added prior to Bernardino's purchase and his representations are based on his personal oversight of those changes, his consultation with the records of changes to the website, and a screenshot that he took from an iPhone by accessing data on the quality assurance server that has been preserved from the relevant time period. (Burgos Decl. ¶¶ 4, 6-7, 12-17.) As the Seventh Circuit recently noted in *Specht v. Google Inc*., 747 F.3d 929, 933 (7th Cir. 2014), memory is fallible.[4] Bernardino did not save a copy of the screens she saw when she purchased her DVD, and her counsel offer screenshots only from a period of time after B&N transitioned its website to a third-party provider, when B&N concedes its website changed. Moreover, Bernardino does not dispute that she went through each and every step identified in the Burgos Declaration when she purchased her DVD on February 3, 2017; that the TOU are the same now as when she purchased her DVD; or that B&N changed the notice that customers were given about the TOU after the Ninth Circuit's decision in *Nguyen.*

Here, B&N has offered the sworn testimony of the person responsible for overseeing the implementation of a change to its website that required certain notice language to be added directly beneath the "Submit Order" button. (Burgos Decl. ¶ 7.) Rather than testifying solely from memory that the change was implemented and that the relevant text under the

[4] In *Specht*, the plaintiff used the "Android" trademark in commerce, but according to Google, abandoned it in 2002. 747 F.3d at 932. When Google started using Android thereafter, plaintiff sued for infringement. *Id.* The creators of the plaintiff's website offered screenshots dating from 2005 from an internet archive site showing alleged continued use. *Id.* at 932. But, because the declarants testified only from memory that the screenshots were accurate, without providing information about the reliability of the archive service, the district court excluded them. *Id*. at 932-33. In contrast, here, B&N submitted evidence from its own internal quality assurance server—not an internet archive site—and Burgos' Declaration provides sufficient basis for supporting B&N's position that the screenshot attached to Burgos' affidavit is an accurate depiction of what users of its website saw on February 3, 2017. Additionally, Burgos' testimony that B&N screenshots are accurate is not based solely on his memory, as was the case in *Specht*, but rather is also based upon his review of relevant documentation.

"Submit Order" button was in place on February 3, 2017, that person actually reviewed records of all of the changes made to the website during the relevant time period to confirm his memory was accurate. (Burgos Decl. ¶¶ 6-17.) In addition, that person accessed data that existed on February 3, 2017 that is preserved on B&N's quality assurance server to determine if the language that was added to the "Submit Order" screen could in fact be seen on an iPhone. (Burgos Decl. ¶¶ 6-17.)

While Bernardino contends that B&N's evidence regarding the existence of an agreement to arbitrate is not perfect insofar as the screenshots purporting to represent what users saw on February 3, 2017 came from data on its quality assurance server rather than its external facing server (*see* Plaintiff's letter to the Hon. Lewis A. Kaplan dated September 27, 2017 and oral argument transcript), perfect is not the standard. B&N is required only to demonstrate the existence of an agreement by a preponderance of the evidence. Furthermore, courts have accepted similar evidence as sufficient to establish the existence of an agreement. *See Selden v. Airbnb, Inc.,* No. 16-cv-933 (CRC), 2016 WL 6476934, at *9 (D.D.C. Nov. 1, 2016) (granting motion to compel arbitration based on image obtained from archived code); (Doc. No. 13-2 in *Selden v. Airbnb*, Declaration of Kyle Miller) (affiant rendered a wireframe image based on archived code of how Airbnb's sign-up page looked to users on the relevant date and provided screenshots that depicted how content would have been rendered on iPhones)).

The cases Bernardino cites do not hold otherwise. *See Carroll v. LeBoeuf, Lamb, Greene & MacRae, LLP*, 614 F. Supp. 2d 481, 483-85 (S.D.N.Y. 2009) (copies of evidence submitted through counsel's affidavit did not demonstrate counsel's competence to testify about the original documents and that the copies presented to the court were true copies of the

originals); *Dillon v. BMO Harris Bank, N.A.*, 173 F. Supp. 3d 258, 264-69 (M.D.N.C. 2016) (observing that: (i) defendant failed to explain how it created, acquired, maintained and preserved the pertinent electronically stored template loan document; (ii) there was no record of actual loan document signed by plaintiff; (iii) there was evidence that not all loan documents contained arbitration provisions; and (iv) there were reasons to question the truthfulness of the affidavit about online template agreements because of the custodian's history of submitting false declarations about lending operations); *Mayfield v. Asta Funding, Inc.,* 95 F. Supp. 3d 685, 693-95 (S.D.N.Y. 2015) (in a case that did not involve web-based agreements, denying motion to compel arbitration due to insufficient evidence without striking any portion of the defendants' supporting declaration where defendants failed to produce arbitration agreements between them and plaintiffs and only produced sample contracts involving non-parties); *Bazemore v. Jefferson Cap. Sys., LLC*, 827 F.3d 1325, 1331-32 (11th Cir. 2016) (ruling on the merits of motion to compel arbitration based on the sufficiency of the evidence—without addressing the relevance of any declarations submitted); *Dreyfuss v. Etelecare Glob. Sols.-U.S. Inc.*, 349 F. App'x 551, 553-55 (2d Cir. 2009) (same).[5]

Finally, at oral argument, Bernardino contended that the screenshots provided by Burgos in landscape view are not reliable because a status bar, navigation bar, and bottom tab

[5]Bernardino's other evidentiary objections also fail. Her contention that Burgos' attestations and screenshots are hearsay is without merit because Burgos' Declaration is based on his personal knowledge, and the screenshots were taken from data maintained in the regular course of B&N's business as part of its website quality assurance process. (Burgos Decl. ¶¶ 4, 7-17.) Her contention that Burgos is an expert whose statements are really opinions that should have been provided in conformance with Federal Rule of Evidence 702 is likewise specious. Burgos' Declaration contains factual statements made from his personal knowledge by virtue of his position and responsibilities with B&N and his review of business records when preparing his declaration. (Burgos Decl. ¶¶ 4, 7-17.)

bar are not visible in the image, whereas in contrast they are visible in the portrait view screenshots that were submitted to the Court. Bernardino speculated that had the top toolbars appeared in the landscape view, the language alerting the user to the TOU might not have been visible on the same page and might have required the user to scroll to the next page. At oral argument, this Court and the parties navigated to B&N's mobile website on an iPhone 7 and learned that the tool and navigation bars appear and disappear depending on whether the phone's orientation is moved by the user before or after accessing a webpage. Thus, there is no basis for questioning the truthfulness of Burgos' representation that Exhibit 4 was in fact the image he captured on his iPhone 7 when recreating what the checkout page looked like in landscape view to users on February 3, 2017. Additionally, because the space for the banner ad would not have appeared on B&N's external website (Burgos Decl. ¶¶ 16-17), there is no basis to credit Bernardino's conclusory assertion that that the addition of a tool bar at the top of the screen would have pushed the TOU language below the "Submit Order" button to another screen. Moreover, and in any event, Bernardino stated only that it was her usual practice to shop in landscape orientation – she might have checked out while the phone was in portrait orientation. There is no dispute that the pertinent notice appears in portrait orientation. Further, when asked whether an evidentiary hearing was needed on the reliability of Burgos' declaration and exhibits appended thereto, both parties indicated that such a hearing was not necessary. (*See* transcript of oral argument.) For all of the above reasons, this Court concludes that B&N has 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.

B. *Conspicuousness Of B&N's TOU*

The Court next turns to whether B&N's arbitration provision was "reasonably conspicuous." As noted above, in *Meyer*, the Second Circuit held that when deciding a motion to compel arbitration based on a web-based agreement, courts must evaluate whether the terms were reasonably conspicuous to reasonably prudent users of the website. 868 F.3d at 77 (citing *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 123 (2d Cir. 2012)).[6] The court in *Meyer* found that Uber's arbitration agreement was reasonably conspicuous, citing the design of the screen on which the hyperlink to its terms of service could be found, as well as language about the hyperlinked terms of service on that same screen. *Id.* at 78. The court noted that:

- the screen was uncluttered;
- the text alerting the user to the existence of other terms of use appeared directly below the registration button;
- the hyperlink to the terms of use also was easily located under the registration button without scrolling;
- the text alerting the user to the other terms of use was clear and obvious by virtue of its font and color;
- the text itself was a "clear prompt" or suggestion to read the terms insofar as it stated "[b]y creating an Uber account, you agree to the Terms of Service"; and
- the notice to the terms of use was temporally connected to an action by the user, meaning that the terms were provided simultaneous to the customer action.

Id. at 78-79. The court explicitly rejected the proposition that a hyperlink to terms of use renders the notice unreasonable and endorsed the idea that a hyperlink is equivalent to terms contained on the back of a sales receipt or ticket. *Id.* (citing *Fteja*, 841 F. Supp. 2d at 839).

[6] The court in *Meyer* evaluated the agreement under California law, but noted that New York law was essentially the same. 868 F.3d at 74.

Looking at Exhibits 4-5 to the Burgos Declaration, this Court finds that B&N's arbitration provision in its TOU was reasonably conspicuous to a reasonably prudent user of its website on February 3, 2017, as well as to Bernardino in particular. Like the screen or page on the Uber app that was examined in *Meyer*, the B&N "Submit Order" page was uncluttered. (*See* Appendix A.) Text alerting the user to the existence of B&N's TOU appeared directly below the "Submit Order" button and provided a hyperlink to the TOU. (*See* Appendix A.) No scrolling was needed to access the hyperlink to the TOU. (*See* Appendix A.) The language alerting the user to the TOU was clear and obvious by virtue of its black sans-serif font contrasted against a white background, with blue font indicating the hyperlink to the TOU, also contrasted against a white background. (*See* Appendix A.) The language of the text was a clear prompt to users to read the TOU before submitting their purchase order insofar as it stated "[b]y making this purchase you are agreeing to our Terms of Use and Privacy Policy." (*See* Appendix A.) The notice about the TOU also was temporally connected to an action by the user – the submission of a purchase order. (*See* Appendix A.) Further, in the case of B&N's website, the notice language appeared directly under the "Submit Order" button, whereas on the Uber app reviewed in *Meyer*, other text and buttons appeared between the "Register" button and the reference to Uber's terms of service. (*See* Appendix A.) Similarly, the fact that B&N's notice language has a left alignment, rather than a center alignment like the notice language on Uber's app, makes B&N's notice language more legible in this Court's opinion. (*See* Appendix A.) This is because most English-language readers naturally read from left to right. This Court also finds that the lack of underlining of the relevant text on B&N's "Submit Order" page also renders the text more legible than the text on Uber's registration page because underlining distracts the reader from

the actual letters and heightens the risk the letters will appear blurry. (*See* Appendix A.) Finally, in this reader's mind, B&N's use of upper and lower case letters makes the text more readable than Uber's, which is in all caps and, as such, makes it harder to distinguish one letter from another. (*See* Appendix A.)

Bernardino has suggested that the arbitration provision in B&N's TOU is not conspicuous because a user would have to read through the TOU and identify the arbitration provision under the heading "Dispute Resolution." However, the court in *Meyer* explicitly rejected the proposition that the location of an arbitration provision within a broader terms of use policy is a barrier to reasonable notice. *Id*. at 78-79. It went on to state that Uber's terms of service contained a section heading entitled "Dispute Resolution" that was bolded and therefore reasonably clear and conspicuous. *Id.* Like the section heading in Uber's terms of service, B&N also bolded the section heading "Dispute Resolution" in its TOU. Further, contrary to what Bernardino has suggested, use of the term "Dispute Resolution" instead of the term "Arbitration" does not render the section less conspicuous. In fact, Bernardino has attested that she did not know what "Arbitration" meant. (Bernardino Decl. ¶ 5.) "Dispute Resolution" is a plain English term, whereas the word "Arbitration" is legalese. If anything, therefore, use of the term "Dispute Resolution" enhanced conspicuousness.

Furthermore, in contrast to terms contained on a receipt provided after purchase, Bernardino, a self-proclaimed internet shopper, could have read B&N's TOU at her leisure at any time before deciding to make a purchase. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593 (1991) (enforcing forum selection clause printed on the back of a cruise ticket provided after purchase); *Anderson v. Walmart Stores, Inc.,* No. 16-cv-6488 (CJS), 2017 WL

661188, at *7-11 (W.D.N.Y. Feb. 17, 2017) (granting motion to compel arbitration where notice of arbitration agreement was given after purchase). Bernardino did not even need to go through the checkout process to locate B&N's TOU if she so desired—the TOU can be located by a Google search or on the landing page. But, in any event, B&N provided Bernardino with a prompt to read the TOU before clicking the "Submit Order" button. There was no time limit imposed on Bernardino to read the TOU. To the extent she needed to enlarge typeface, she could do so easily by zooming in on the language on her iPhone. Thus, she had ample opportunity to read the TOU without any pressure from B&N.

In sum, B&N's arbitration provision met the key aspects of being reasonably conspicuous by virtue of the format and design of the "Submit Order" page and the fact that customers could easily learn of the existence of and access and read the TOU before deciding to purchase a DVD. *See Crawford v. Beachbody, LLC*, No. 14-cv-1583 (GPC) (KSC), 2014 WL 6606563, at *3 (S.D. Cal. Nov. 5, 2014) (notice and effective opportunity to access terms and conditions are key to conspicuousness determination); *Starke v. Gilt Groupe, Inc.*, No. 13-cv-5497 (LLS), 2014 WL 1652225, at *2-3 (S.D.N.Y. Apr. 24, 2014) (same).

C. *Bernardino's Manifestation Of Assent To B&N's TOU*

Not only does this Court find that B&N's TOU and arbitration provision were reasonably conspicuous, but, as discussed below, Bernardino manifested assent to them. For an arbitration agreement to be enforceable, assent to arbitration need not be express; rather, assent must be unambiguous. *Meyer*, 868 F.3d at 79. To demonstrate this, there must be evidence that the offeree "'knew or should have known of the terms and understood that acceptance of the benefit would be construed by the offeror as an agreement to be bound.'" *Id.* (quoting

Schnabel, 697 F.3d at 128). Judge Weinstein in the *Berkson* case listed four indicia of assent to web-based agreements: (1) the user was provided with adequate notice of the existence of terms; (2) the user had a meaningful opportunity to review terms; (3) the user had adequate notice that taking a specified action manifests assent to terms; and (4) the user takes the action specified in the latter notice. 97 F. Supp. 3d at 384 (citing *The Electronic Contracting Working Group of the ABA Guidelines* p. 281); *see also Ticketmaster Corp. v. Tickets.com, Inc.,* No. 99-cv-7654 (HLH), 2003 WL 21406289, at *2 (C.D. Cal. Mar. 7, 2003) (noting that warning on website that further use binds a user to terms of use could not be missed). In *Meyer*, the Second Circuit found that the plaintiff's assent was unambiguous, citing only the objectively reasonable notice terms. 868 F.3d at 79-80 ("there is ample evidence that a reasonable user would be on inquiry notice of the terms, and the spatial and temporal coupling of the terms with the registration button indicate[d] to the consumer that he or she is . . . employing such services subject to additional terms and conditions that may one day affect him or her.") (citation omitted).

Here, there is assent under the four criteria listed in *Berkson,* as well as under the more flexible standard articulated in *Meyer*. As discussed above, the TOU were reasonably conspicuous, so Bernardino knew, or should have known, of B&N's TOU and understood that by submitting her order she would be deemed to have accepted those TOU. Bernardino had time to review the TOU before making her purchase. The language of the notice explicitly stated that "[b]y making this purchase you are agreeing to our TOU." Therefore, Bernardino was explicitly told that by submitting her order she was manifesting assent to the TOU. Finally, Bernardino in fact submitted her order and purchased the DVD – taking the very action linked with assenting to the TOU. Thus, this Court finds that, just as in *Meyer*, Bernardino's assent to the arbitration

provision was unambiguous. *See id.* ("A reasonable user would know that by clicking the registration button, he was agreeing to the terms and conditions accessible via the hyperlink, whether he clicked on the hyperlink or not.").

D. *Validity And Conscionability Of B&N's Arbitration Provision*

The Court next addresses Bernardino's contention that B&N's arbitration provision is unconscionable. The doctrine of unconscionability "is a flexible one" and "is intended to be sensitive to the realities and nuances of the bargaining process." *Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 10 (1988). B&N here, a purveyor of books, DVDs and other relatively inexpensive merchandise, asks consumers to consent to a simple arbitration process if they have a dispute about a purchase made on its website rather than commence a court action. This Court therefore evaluates the conscionability of B&N's arbitration provision in this context.

Characterization of a contract term as unconscionable "requires a showing that the contract was both procedurally and substantively unconscionable when made." *Berkson,* 97 F. Supp. 3d at 391 (quoting *Gillman*, 73 N.Y.2d at 10). Procedural unconscionability is determined by assessing what led to the formation of the contract, meaning the manner in which the agreement was reached. *Id.* Substantive unconscionability is determined by evaluating the fundamental fairness of the contract term itself. *Id.* at 391-92. Courts evaluate procedural and substantive unconscionability on a "sliding scale." *Id.* at 391 (citation omitted). However, "[c]ontractual terms will only be held unconscionable where the facts show substantive unconscionability; procedural unconscionability alone may not render a contract unreasonable on its face." *Id.* at 392 (citing *Brower v. Gateway 2000, Inc.,* 246 A.D.2d 246, 254 (1st Dep't 1998) (collecting cases)).

1. *Procedural Unconscionability*

Courts look at the following factors when evaluating whether the process of entering into a contract was procedurally unconscionable: (1) the business nature and size of the transaction; (2) whether the party claiming unconscionability had any meaningful choice; (3) the experience and education of the party claiming unconscionability; and (4) whether there was disparity in bargaining power. *Dall. Aerospace, Inc.*, 352 F.3d at 787 (quoting *Gillman*, 73 N.Y.2d at 10-11).

Bernardino contends that the agreement is procedurally unconscionable because she had to click on a TOU hyperlink and read through it to learn of the arbitration clause, which in turn referenced the American Arbitration Association's ("AAA") Commercial Arbitration Rules. She also contends that arbitration provision is procedurally unconscionable because there was a power disparity, she could not negotiate the terms of the arbitration provision, and she is not a native English speaker.

As to Bernardino's first point, the Second Circuit's decision in *Meyer* forecloses a finding that a hyperlink to the TOU is procedurally unconscionable. *Meyer*, 868 F.3d at 78-79. The Court also notes that reference to the AAA rules within the arbitration provision does not render the agreement procedurally unconscionable in and of itself, as those rules only discuss the procedures of the arbitration process, not the agreement to submit to arbitration. Moreover, it is common for arbitration agreements to include reference to AAA procedures or other procedures that will govern any potential dispute. Indeed, Uber's terms of service, which were deemed enforceable in *Meyer*, also stated that the AAA Rules would govern any arbitration proceeding. *See id.* at 72.

The Second Circuit also has rejected Bernardino's arguments that an arbitration agreement is procedurally unconscionable by virtue of it being offered on a take-it-or-leave-it basis or by the plaintiff not having a college degree or perfect grasp of the English language. *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 122 (2d Cir. 2010). Furthermore, Bernardino, who has some higher education and is a Facebook user and relatively sophisticated internet consumer, is not lacking in experience and education. (*See* Bernardino July 7 Decl. ¶¶ 8, 12.) The Court also notes that the DVD purchase at issue was only $10.12 and thus not a sizable transaction. *See Edwards v. Macy's, Inc.*, No. 14-cv-8616 (CM) (JLC), 2015 WL 4104718, at *8 (S.D.N.Y. June 30, 2015) (enforcing arbitration provision in credit card agreement based, in part, on the fact that the transaction at issue was a "modest" one). Finally, as noted above, Bernardino admits that she had other options for obtaining videos, including downloading and streaming, or purchasing the DVD in a physical B&N store or from another online vendor, such as Amazon.com. *Starke*, 2014 WL 1652225, at *4 ("There is no indication that Starke lacked a choice of other sources [besides defendant] to purchase the blankets. He alleges in the complaint that [the same product] . . . can be found . . . at Amazon websites."). Thus, there is no basis for finding that the arbitration provision is procedurally unconscionable.

2. *Substantive Unconscionability*

Next, the Court turns to the question of substantive unconscionability. In *Berkson,* the court explained that substantive unconscionability involves questions about the fundamental fairness of the agreement as a whole, or specific clauses within the agreement. 97 F. Supp. 3d at 391-92; *see also Gilman*, 73 N.Y.2d at 12. Bernardino raises a number of issues with B&N's

arbitration provision to support her argument that it grossly unreasonable and fundamentally unfair. These include that:

- B&N retains the right under the provision to bring suit in court;
- The provision also contains a jury trial waiver;
- The arbitration must be conducted by telephone, online, or solely on written submission, rather than in-person;
- The provision does not specifically refer to or conform to the updated due process protocol published by the AAA;
- B&N did not notify the AAA of its arbitration contract as other companies with similar arbitration contracts have done;
- Third-party discovery is unavailable in a AAA proceeding; and
- The TOU can be modified by B&N and, therefore, the agreement is illusory.

None of these arguments render B&N's arbitration provision substantively unconscionable under applicable law. Courts regularly uphold contracts with provisions allowing only one party to compel arbitration. *See Sablosky v. Edward S. Gordon Co.*, 73 N.Y.2d 133, 137 (1989) ("Mutuality of remedy is not required in arbitration contracts."); *Builders Grp. LLC v. Qwest Commc'ns Corp*., No. 07-cv-5464 (DAB), 2009 WL 3170101, at *1, *5-6 (S.D.N.Y. Sept. 30, 2009); *Les Constrs. Beauce-Atlas, Inc. v. Tocci Bldg. Corp. of N.Y., Inc.*, 7294 A.D.2d 409, 409-10 (2d Dep't 2002).[7]

[7] To the extent that Bernardino suggests the Supreme Court's decisions in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), and *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), somehow indirectly overruled *Sablosky*, she is mistaken.These decisions addressed only the question of "who . . . decides" enforceability challenges to contracts containing arbitration clauses. *Buckeye*, 546 U.S. at 444-55 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04 (1967)); *see also Rent-A-Center*, 561 U.S. at 70-76. Moreover, other courts in this Circuit have rejected this same argument. *See WeWork Cos. v. Zoumer*, No. 16-cv-457 (PKC), 2016 WL 1337280, at *6 (S.D.N.Y. Apr. 5, 2016); *Bassett v. Elec. Arts, Inc.*, 93 F. Supp. 3d 95, 105 n.7 (E.D.N.Y. 2015); *Clinton v. Oppenheimer & Co. Inc.*, 824 F. Supp. 2d 476, 484 (S.D.N.Y. 2011).

Courts also uphold waivers of jury trials in the context of enforcing arbitration provisions. *Ragone v. Atl. Video at Manhattan Ctr.*, No. 07-cv-6084 (JGK), 2008 WL 4058480, at *6 (S.D.N.Y. Aug. 29, 2008), *aff'd*, 595 F.3d 115 (2d Cir. 2010); *see also Desiderio v. Nat'l Ass'n of Secs. Dealers, Inc.*, 191 F.3d 198, 204-06 (2d Cir. 1999); *Ciago v. Ameriquest Mortg. Co.*, 295 F. Supp. 2d 324, 331 (S.D.N.Y. 2003).

Unavailability of an in-person proceeding also does not render an arbitration provision unconscionable. *Matter of BDO USA, LLP v. Field*, 79 A.D.3d 604, 604 (1st Dep't 2010) (holding that a contractual provision that states that "'the arbitrator shall decide the dispute based on a written submission from each Party and a non-evidentiary hearing' was not unconscionable."); *Yonir Techs., Inc. v. Duration Sys. (1992) Ltd.*, 244 F. Supp. 2d 195, 209 (S.D.N.Y. 2002) ("the lack of a formal, oral hearing does not violate [the FAA] and is not fundamentally unfair."). Indeed, in the context of small consumer purchases such as a DVD purchase, providing consumers with the opportunity to arbitrate informally via phone or by written submission reduces costs and other barriers to dispute resolution. *See Carnival Cruise Lines, Inc.*, 499 U.S. at 594 (noting that reduction in costs of potential litigation ultimately benefits customers in the form of reduced fares).

Likewise, the AAA guidelines and protocols are discretionary (*see* Labaton Decl. Ex. 3 at 2-3 & Ex. 6 at 16), and courts have rejected arguments that a failure to follow discretionary guidelines renders an arbitration provision unconscionable. *See Stern v. Espeed, Inc.*, No. 06-cv-958 (PKC), 2006 WL 2741635, at *4 (S.D.N.Y. Sept. 22, 2006); *Pack v. Damon Corp.*, 320 F. Supp. 2d 545, 557 (E.D. Mich. 2004), *rev'd in part on other grounds*, 434 F.3d 810 (6th Cir. 2006).

As to Bernardino's next point, this Court is unaware of any authority that suggests the lack of third-party discovery renders an arbitration provision unconscionable. On the contrary, even where an arbitration agreement limits the parties' access to discovery, courts have nevertheless rejected arguments that such agreement is unconscionable. *See Ragone*, 2008 WL 4058480, at *8. Moreover, there is no reason to believe that third-party discovery from Facebook is required here or that B&N could not obtain information from Facebook pertaining to its relationship with Facebook. Indeed, Bernardino's expert appears to have obtained all of the critical information needed to bring suit by using software. (*See* Sherwood Decl. ¶¶ 2, 13-27.)

Finally, there is no basis for Bernardino's argument that the arbitration provision is illusory by virtue of the fact that B&N can amend its TOU as a whole. According to the Supreme Court's decision in *Buckeye*, a challenge to the TOU as a whole is a question for the arbitrator, not this Court. 546 U.S. at 444-46. None of the cases relied on by Bernardino are binding on this point or considered the question of who should adjudicate the illusoriness of the contract. Additionally, under New York Law, a contract is not illusory merely because it gives discretion to one party. *See Valle v. ATM Nat'l, LLC*, No. 14-cv-7993 (KBF), 2015 WL 413449, at *5 (S.D.N.Y. Jan. 30, 2015); *Bassett*, 93 F. Supp. 3d at 106-09.

In sum, this Court finds that the arbitration provision in B&N's TOU is neither procedurally nor substantively unconscionable.

CONCLUSION AND RECOMMENDATION

For the reasons stated above, this Court respectfully recommends that the Court grant B&N's motion to compel arbitration and stay all proceedings. (Doc. No. 39.) Additionally, in light of B&N's withdrawal of the parts of the Sharrett Declaration that Bernardino sought to strike, Bernardino's motion to strike (Doc. No. 49) should be denied as moot.

SO ORDERED.

Date: November 20, 2017
New York, New York

Katharine H Parker

KATHARINE H. PARKER
United States Magistrate Judge

NOTICE

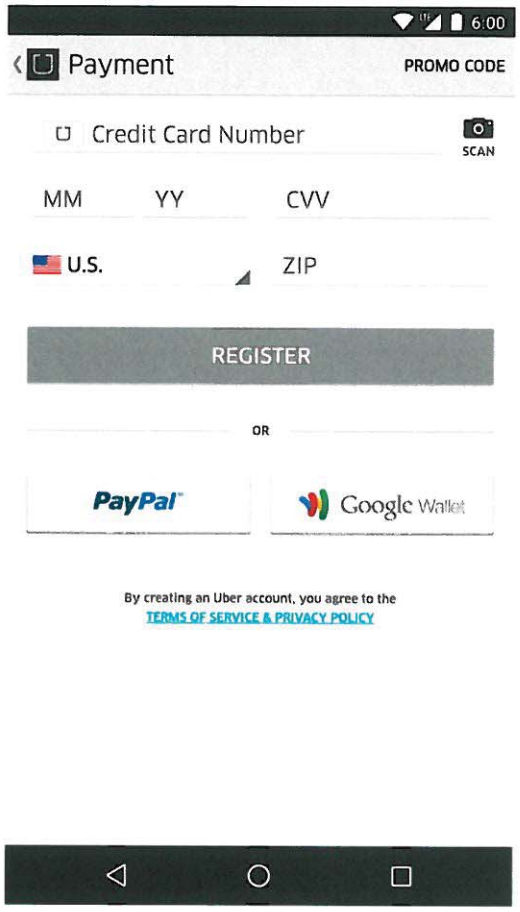
The parties shall have fourteen days from the service of this Report and Recommendation to file written objections to the Report and Recommendation, pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure (*i.e.,* until December 4, 2017). *See also* FED. R. CIV. P. 6(a), (d) (adding three additional days only when service is made under Fed. R. Civ. P. 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to by the parties)).

If any party files written objections to this Report and Recommendation, the opposing party may respond to the objections within fourteen days after being served with a copy. FED. R. CIV. P. 72(b)(2). Such objections shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Lewis A. Kaplan at the United States Courthouse, 500 Pearl Street, New York, New York 10007, and to any opposing parties. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 6(a), 6(d), 72(b). Any requests for an extension of time for filing objections must be addressed to Judge Kaplan. The failure to file these timely objections will result in a waiver of those objections for purposes of appeal. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 6(a), 6(d), 72(b); *Thomas v. Arn*, 474 U.S. 140 (1985).

APPENDIX A

MEYER

Addendum A, *Meyer v. Uber Techs., Inc.*, 868 F.3d 66 (2d Cir. 2017) [Dkt. #51-1]:



BERNARDINO

Decl. of Antonio Burgos, Ex. 4 [Dkt. #66-4] (scaled to dimensions of second image in 3d Decl. of Ralph E. Labaton, Ex. B [Dkt. #75-2]):