UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CASE NO. 8:25-cv-01288-MSS-LSG

ELLIOT SMITH,
individually and on behalf of all
others similarly situated,

CLASS ACTION

Plaintiff,

JURY TRIAL DEMANDED

v.

BUILT USA LLC d/b/a
REDLINE SOCIETY,

Defendant.
____________________________________/

PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION TO COMPEL ARBITRATION

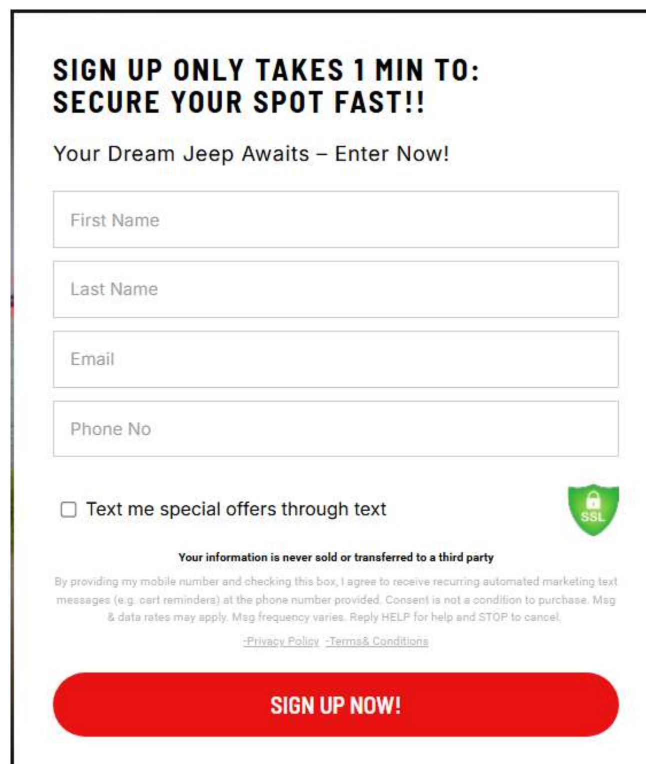
Plaintiff Elliot Smith responds in opposition to Defendant's Motion to Compel Arbitration ("Mot." or "Motion"), [DE 15], and states:

I. INTRODUCTION

"To determine whether a user had inquiry notice of a browsewrap agreement, courts look to 'the design and content of the website and the agreement's webpage.'" *Herman v. SeaWorld Parks & Entm't, Inc.*, No. 8:14-cv-3028-T-35JSS, 2016 U.S. Dist. LEXIS 181173 (M.D. Fla. Aug. 26, 2016) (Scriven, J.)(quoting *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014)). But rather than provide this Court with evidence depicting its entire website, Defendant submits a declaration consisting of a *partially cropped* screenshot of its on-line form so that it can misleadingly claim that

Plaintiff had inquiry notice of the hyperlink containing Defendant's arbitration agreement.

Florida law[1] requires Defendant to prove that it provided Plaintiff with conspicuous notice of the hyperlink containing the arbitration agreement it seeks to enforce. Defendant fails to meet its burden. The complete on-line form on Defendant's website (www.redlinesociety.com)[2] is depicted below:



[1] Plaintiff agrees with Defendant that Florida law applies to the contract formation question.

[2] "[A] court may take judicial notice of information publicly announced on a party's website, as long as the website's authenticity is not in dispute." *Grecco v. Age Fotostock Am., Inc.*, No. 21-cv-423 (JSR), 2021 U.S. Dist. LEXIS 144023, at *7 (S.D.N.Y. Aug. 2, 2021) (quoting *Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC*, 127 F. Supp. 3d 156, 167 (S.D.N.Y. 2015)).

Two courts in this Circuit recently denied motions to compel arbitration based on similarly deficient on-line forms that failed to provide conspicuous notice. In *Farsian v. Alphalete Ath., LLC*, the court applied Florida law and held that the following form was deficient because "[a]lthough underlined, the hyperlink, without more, does not provide a sufficient contrast from the rest of the paragraph[]":

STAY CONNECTED

Email

liam@acme.com

Phone Number

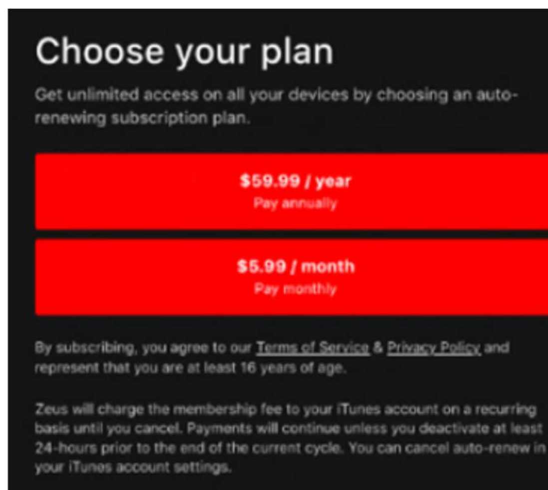
(123)-123-1234

Subscribe

By signing up via text you agree to receive recurring automated marketing messages and shopping cart reminders at the phone number provided. Consent is not a condition of purchase. Reply STOP to unsubscribe. HELP for help. Msg frequency varies. Msg & Data rates may apply. View Privacy Policy & Terms of Service

No. 24-61027-CIV-DIMITROULEAS/HUNT, 2025 U.S. Dist. LEXIS 33619, at *12 (S.D. Fla. Feb. 25, 2025) ("the design of the website, which is wholly within Defendant's control, does not support the conclusion that Plaintiff was on constructive notice that he would be bound to the Terms of Service by clicking the call-to-action button.")

Similarly, in *Tejon v. Zeus Networks, LLC*, the court denied a motion to compel arbitration on the basis that the hyperlink was not in contrasting color and, therefore, it failed to place the plaintiff on reasonable notice:



No. 24-cv-20498-PCH, 2024 U.S. Dist. LEXIS 53122 (S.D. Fla. Mar. 25, 2024) ("First, it is generally recognized that hyperlinks are usually displayed in a blue font, as a means to stand out from the rest of the page…. Under these circumstances, a reasonable user would not be on inquiry notice that there were hyperlinks on Zeus' subscription webpage containing important terms and conditions that the user should click.").

Equally important is that Defendant's on-line form fails to notify website visitors like Plaintiff that the act of clicking "SIGN UP NOW!" will constitute assent to Defendant's Terms & Conditions. In the context of contract formation, including arbitration agreements, Florida law "requires a manifestation of mutual assent to sufficiently definite contract terms." *Worthington v. JetSmarter, Inc.*, 2019 U.S. Dist. LEXIS 173571, at *11 (S.D.N.Y. Oct. 7, 2019) (citations omitted). Recently, the Ninth Circuit applied the principles set out in *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849 (9th Cir. 2022), to affirm denial of a motion to compel arbitration in a case where the defendant, like Defendant here, failed to tell website visitors of the significance of

clicking on a button on the website. *See Chabolla v. Classpass Inc.,* 129 F.4th 1147 (9th Cir. 2025) ("Similarly, here, screen 3 fails to tell the user the significance of clicking 'Redeem now,' and therefore fails to provide the opportunity to unambiguously manifest assent to the Terms of Use."); *see also Johnson v. Hum. Power of N Co.*, 767 F. Supp. 3d 845, 853 (N.D. Ill. 2025) ("Merely writing 'View' is an insufficient prompt when there is no additional statement explaining the importance of the hyperlinked information to the consumer."); *Mochan v. Madison Reed, Inc.*, No. 22-80915-CIV-SMITH, 2023 U.S. Dist. LEXIS 123921 (S.D. Fla. July 19, 2023) ("Because [Plaintiff] did not unambiguously manifest her assent to be bound by Defendant's terms, including the arbitration agreement, Defendant's Motion will be denied.")

Accordingly, even if the Defendant could establish that it provided conspicuous notice (it cannot), Defendant's Motion fails because simply including a hyperlink with no assent language is not sufficient to form an on-line contract.

II. ARGUMENT

A. <u>Legal Standard</u>

"Despite courts' proclivity for enforcement, a party will not be required to arbitrate where it has not agreed to do so." *Fridman v. 1-800 Contacts, Inc.*, No. 21-cv-21700-BLOOM/Otazo-Reyes, 2021 U.S. Dist. LEXIS 152553, at *4-5 (S.D. Fla. Aug. 12, 2021) (citing *Nat'l Auto Lenders, Inc. v. SysLOCATE, Inc.*, 686 F. Supp. 2d 1318, 1322 (S.D. Fla. 2010), *aff'd*, 433 F. App'x 842 (11th Cir. 2011) (citing *United*

Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960))). "Under federal law, arbitration is a matter of consent, not coercion." *Fridman*, 2021 U.S. Dist. LEXIS 152553, at *5 (quoting *World Rentals & Sales, LLC v. Volvo Constr. Equip. Rents, Inc.*, 517 F.3d 1240, 1244 (11th Cir. 2008)).

"[T]he presumption of arbitrability 'does not apply to disputes concerning whether an agreement to arbitrate has been made.'" *Bell v. Royal Seas Cruises, Inc.*, No. 19-CV-60752-RUIZ/STRAUSS, 2020 U.S. Dist. LEXIS 85273, at *6 (S.D. Fla. May 13, 2020) (quoting *Bazemore v. Jefferson Capital Sys., LLC*, 827 F.3d 1325, 1329 (11th Cir. 2016) (quoting *Dasher v. RBC Bank (USA)*, 745 F.3d 1111, 1115-16 (11th Cir. 2014))). In *Morgan v. Sundance, Inc.*, the Supreme Court reiterated this rule and rejected the claim that arbitration is broadly favored over litigation:

> Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation.…***The federal policy is about treating arbitration contracts like all others, not about fostering arbitration***.

142 S. Ct. 1708, 1710 (2022) (emphasis supplied).

B. Defendant Failed to Provide Conspicuous Notice as Required Under Florida law and no Agreement was Formed

Under Florida, there are two types of on-line agreements:

> "A 'clickwrap' agreement occurs when a website directs a purchaser to the terms and conditions of the sale and requires the purchaser to click a box to acknowledge that they have read those terms and conditions." [*MetroPCS Commc'ns, Inc. v. Porter,* 273 So. 3d 1025, 1028 (Fla. 3d DCA 2018)] (quoting [*Vitacost.com, Inc. v. McCants*, 210 So. 3d 761, 762 (Fla. 4th DCA 2017)]). "A 'browsewrap'

> agreement occurs when a website merely provides a link to the terms and conditions and does not require the purchaser to click an acknowledgement during the checkout process. The purchaser can complete the transaction without visiting the page containing the terms and conditions." *Id*. (quoting *Vitacost*, 210 So. 3d at 762). Courts generally enforce clickwrap agreements. *Vitacost*, 210 So. 3d at 762. Browsewrap agreements, however, "have only been enforced when the purchaser has actual knowledge of the terms and conditions, or when the hyperlink to the terms and conditions is conspicuous enough to put a reasonably prudent person on inquiry notice." *MetroPCS,* 273 So. 3d at 1028 (quoting *Vitacost*, 210 So. 3d at 762).

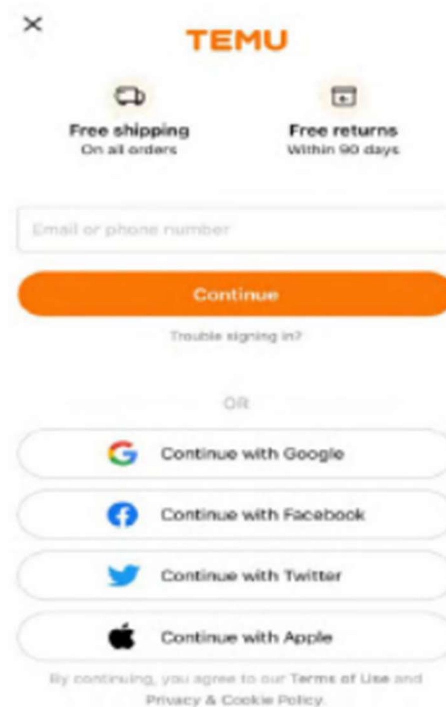
Bell v. Royal Seas Cruises, Inc., No. 19-CV-60752-RUIZ/STRAUSS, 2020 U.S. Dist. LEXIS 85273, at *15 (S.D. Fla. May 13, 2020).

Defendant's on-line form is a browsewrap agreement because Plaintiff was not required to click a box to acknowledge that he read the terms and conditions. Instead, the form merely provided a hyperlink to Defendant's terms without requiring Plaintiff to click any type of acknowledgement. Where, as here,

> "there is no evidence that the website user had actual knowledge of the agreement, the validity of the browsewrap agreement turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract." *Nguyen*, 763 F3d at 1177. "Whether a reasonably prudent user is put on inquiry notice turns on the clarity and conspicuousness of [the] terms." *Babcock v. Neutron Holdings, Inc.*, 454 F. Supp. 3d 1222, 1230 (S.D. Fla. 2020) (citations and quotations omitted). "In the context of web-based contracts, clarity and conspicuousness are a function of the design and content of the relevant interface." *Id*. (citations and quotations omitted).

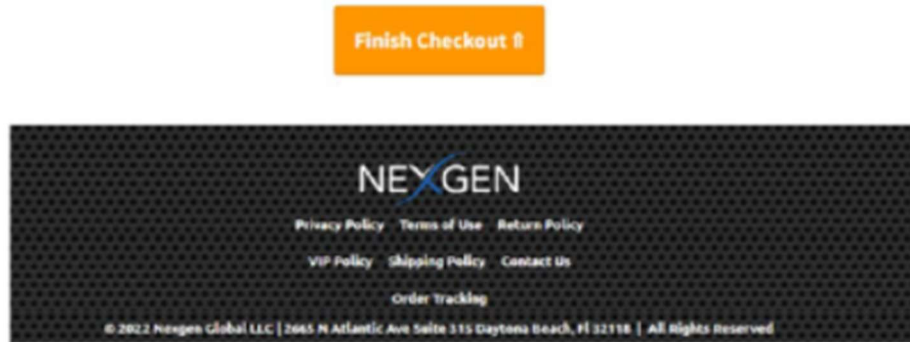
Fridman v. 1-800 Contacts, Inc., No. 21-cv-21700-BLOOM/Otazo-Reyes, 2021 U.S. Dist. LEXIS 152553, at *13 (S.D. Fla. Aug. 12, 2021).

Consistent with this approach, in addition to the cases cited above, courts in this Circuit have refused to enforce browsewrap agreements where the hyperlinks containing the arbitration provision were not in any type of contrasting color. For example, in *Johnson v. Whaleco*, Inc., Judge Presnell held that the following form was not sufficiently conspicuous because it did not contain any of the visual cues traditionally used to denote the existence of a hyperlink, just like Defendant's form:



2023 U.S. Dist. LEXIS 184104, at *7-8 (M.D. Fla. Oct. 13, 2023) (Presnell, J.) ("***Most damning to Defendant's attempt to enforce the Agreement is its use of a very light grey font against a white background***[.]") (citations omitted) (emphasis supplied).

Similarly, in *Valiente*, Judge Altman denied a motion to compel based on the following form in part because it was not in a contrasting color:



2023 U.S. Dist. LEXIS 169829, at *26 (S.D. Fla. Sep. 22, 2023).

In reaching his conclusions, Judge Altman relied on the Ninth Circuit's opinion in *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849 (9th Cir. 2022). At issue in *Berman* was the following on-line form:

Shipping Information Required

TARGET
$100
Gift Card

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 »

Id. at Appendix B.

The Ninth Circuit analyzed the design of the above form and held that the terms were not reasonably conspicuous because

> [w]ebsite users are entitled to assume that important provisions—such as those that disclose the existence of proposed contractual terms—will be prominently displayed, not buried in fine print. Because "online providers have complete control over the design of their websites," *Sellers v. JustAnswer LLC*, 73 Cal. App. 5th 444, 289 Cal. Rptr. 3d 1, 16 (Ct. App. 2021), "the onus must be on website owners to put users on notice of the terms to

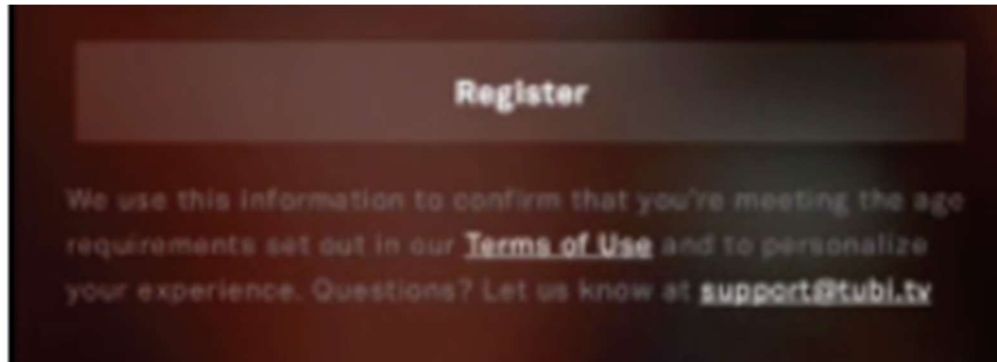
> which they wish to bind consumers," *Nguyen*, 763 F.3d at 1179. The designer of the webpages at issue here did not take that obligation to heart.
>
> Second, while it is permissible to disclose terms and conditions through a hyperlink, the fact that a hyperlink is present must be readily apparent. Simply underscoring words or phrases, as in the webpages at issue here, will often be insufficient to alert a reasonably prudent user that a clickable link exists. *See Sellers*, 289 Cal. Rptr. 3d at 29. Because our inquiry notice standard demands conspicuousness tailored to the reasonably prudent Internet user, not to the expert user, the design of the hyperlinks must put such a user on notice of their existence. *Nguyen*, 763 F.3d at 1177, 1179.
>
> A web designer must do more than simply underscore the hyperlinked text in order to ensure that it is sufficiently "set apart" from the surrounding text. *Sellers*, 289 Cal. Rptr. 3d at 29.

Id. at 857.

Here, as in *Berman*, Defendant failed to provide conspicuous notice of its arbitration provision. Instead, the form on which Defendant relies consist of hyperlinks in light gray font over a white backrgound. As held by the Ninth Circuit and courts in this Circuit, simply underlining a hyperlink is insufficient to ensure that website visitors are given adequate notice. The First and Second Circuits agree, noting that "[w]hile not all hyperlinks need to have the same characteristics, they are 'commonly blue and underlined.'" *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 63 (1st Cir. 2018) (quoting *CR Assocs. L.P. v. Sparefoot, Inc.*, No. 17-10551-LTS, 2018 U.S. Dist. LEXIS 26438, 2018 WL 988056, at *4 n.4 (D. Mass. Feb. 20, 2018); citing *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 78 (2d Cir. 2017) ("[T]he hyperlinks are in blue and

underlined."); *Adelson v. Harris*, 774 F.3d 803, 808 (2d Cir. 2014) ("[T]he hyperlinks were not hidden but visible in the customary manner, that is, by being embedded in blue, underlined text.")).

Consistent with the above cases, other district courts around the country have found notice inquiry only where hyperlinks were presented to the consumer in a contrasting color. *See, e.g., Bold Ltd. v. Rocket Resume, Inc.*, No. 22-cv-01045, 2023 U.S. Dist. LEXIS 108212, at *10 (N.D. Cal. June 22, 2023) ("The words 'Terms of Use' and 'Privacy Policy' are in blue font and underlined"); *Anderson v. Amazon.com, Inc.*, 490 F. Supp. 3d 1265, 1269 (M.D. Tenn. 2020) (hyperlinks noted through contrasting color and underlined); *Massel v. Successfulmatch.Com*, No. 23-cv-02389-PCP, 2024 U.S. Dist. LEXIS 33553, at *14-15 (N.D. Cal. Feb. 27, 2024) ("Because Millionaire Match's links were underlined but did not appear in a contrasting color, the Court must conclude, under *Berman*, that they were not reasonably conspicuous enough to put Mr. Massel on notice of the terms and that Mr. Massel therefore cannot be said to have assented to them….These distinctions may seem picayune, but website operators like Millionaire Match have ultimate control over their design decisions. Nothing requires them to present terms as subtle hyperlinks to separate pages instead of, say, requiring users to scroll through the actual terms before signing up.") (emphasis added); *Campos v. Tubi, Inc.*, No. 23-cv-3843, 2024 U.S. Dist. LEXIS 22247, at *4, (N.D. Ill. Feb. 8, 2024) (denying motion to compel based on the following gray font hyperlink):



Consistent with this line of cases, no reasonably prudent consumer would have been placed on inquiry notice of Defendant's arbitration provision. As depicted above, Defendant's Terms and Conditions hyperlinks were displayed to Plaintiff utilizing small light gray font. Defendant had the ability to design its forms using traditional contrasting colors. It opted not to do so and cannot now complain about an issue it created.

C. <u>Defendant Fails to Demonstrate Plaintiff's Manifestation of Assent</u>

In addition to failing to provide conspicuous notice, Defendant's website form fails to "notify a user of the legal significance of the action she must take to enter into a contractual agreement." *Berman*, 30 F.4th at 858.[3] "Likewise, the text of the button

[3] There are no meaningful differences between California and Florida law on the manifestation of assent requirement in the context of arbitration contracts. *See Worthington v. JetSmarter, Inc.*, 2019 U.S. Dist. LEXIS 173571, at *11 (S.D.N.Y. Oct. 7, 2019) (citing *Bassett* v. *Electronic Arts Inc.*, No. 13 Civ. 4208 (MKB) (SMG), 2015 U.S. Dist. LEXIS 36175, 2015 WL 1298644, at *4 n.4 (E.D.N.Y. Feb. 9, 2015) ("The Court need not resolve this dispute, to the extent one exists, because the parties have not identified any meaningful difference between the relevant laws of California and New York[.]")). "Under both New York and Florida law, an arbitration agreement requires a manifestation of mutual assent to sufficiently definite contract terms." *Id.* (citing *Matter of Express Indus. & Term. Corp.* v. *N.Y. State Dep't. of Transp.*, 93 N.Y.2d 584, 589, 715 N.E.2d 1050, 693 N.Y.S.2d 857 (1999) (Under New York law, "[t]o create a binding contract, there must be a manifestation of mutual assent sufficiently

itself gave no indication that it would bind plaintiffs to a set of terms and conditions." *Berman*, 30 F.4th at 858. Indeed, the button at issue here says: "SIGN UP NOW!", which does not indicate to a reasonable consumer that by pressing it, the user was agreeing to anything other than to sign up for Defendant's promotion. Similarly, there is no text above the large red action button stating that clicking on the button or singing up is an agreement to be bound by Defendant's Terms & Conditions.

As the Ninth Circuit explained in rejecting a motion like Defendant's:

> Defendants rely on plaintiffs' act of clicking on the large green 'continue' buttons as manifestation of their assent, but merely clicking on a button on a webpage, viewed in the abstract, does not signify a user's agreement to anything. A user's click of a button can be construed as an unambiguous manifestation of assent only if the user is explicitly advised that the act of clicking will constitute assent to the terms and conditions of an agreement. *See Specht*, 306 F.3d at 29-30. The presence of 'an explicit 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*, 763 F.3d at 1177.

Berman, 30 F.4th at 857-58.

This defect in Defendant's website form "could easily have been remedied by including language such as, 'By clicking the Continue >> button, you agree to the Terms & Conditions[,]'" *id.*, as was the case with the form at issue in a recent Seventh Circuit case. *See Domer v. Menard, Inc.,* 116 F.4th 686, 692 (7th Cir. 2024)("By

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definite to assure that the parties are truly in agreement with respect to all material terms."); *Kolodziej* v. *Mason*, 774 F.3d 736, 744 (11th Cir. 2014) (Under Florida law, "an enforceable contract requires mutual assent as to sufficiently definite essential terms.")).

submitting your order you accept our Terms of Order."). Instead, Defendant opted to design its website form by merely including an inconspicuous hyperlink with no indication to Plaintiff that the act of clicking the "SIGN UP NOW!" button would bind Plaintiff to Defendant's Terms & Conditions.

The two cases on which Defendant relies are distinguishable and therefore not persuasive because in each of those cases, the plaintiffs did not just merely visit a website as is the case here. Instead, in each case, the plaintiffs took the additional step of exchanging text messages with the defendants to confirm their assent to the defendants' terms and conditions that included arbitration provision. *See* Mot. at 7-8 (citing *Derriman v. Mizzen & Main*, LLC, 710 F. Supp. 3d 1129, 1141 (M.D. Fla. 2023) ("Plaintiff's second relevant action is that, like the plaintiff in *Kravets*, he sent Defendant a pre-populated text message confirming his subscription to recurring messages."); *Greenberg v. Doctors Assoc., Inc.*, 338 F. Supp. 3d 1280 (S.D. Fla. 2018) ("As discussed, such an intent is obvious from the language of both the text messages and the email, which state that by texting back or clicking 'sign me up' the participant agrees to the terms of use, including the arbitration clause.").

Here, Plaintiff did not take any such additional steps indicating that he was assenting to Defendant's Terms & Conditions. Therefore, no contract was formed, and Defendant's Motion should be denied.

III. CONCLUSION

Defendant has not demonstrated the existence of an enforceable arbitration agreement, and its Motion should therefore be denied.

WHEREFORE, Plaintiff respectfully requests an Order denying Defendant's Motion and for such other relief deemed appropriate.

Date: July 26, 2025

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