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10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**

12
13 **Amber Ferrell and Sara Schneider,**
individually and on behalf of all others
14 similarly situated,

15 Plaintiffs,

16 v.

17 **SnapCommerce Holdings, Inc., and**
18 **SnapMoney, Inc.,** both d/b/a as Super.com

19 Defendants.
20

Case No. 4:25-cv-03160-JST

**PLAINTIFF’S RESPONSE IN OPPOSITION
TO DEFENDANT’S MOTION TO COMPEL
ARBITRATION**

Hearing: August 21, 2025

Time: 2:00 PM

Judge: Hon. Jon S.Tigar

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I. INTRODUCTION

1 Defendants SnapCommerce Holdings, Inc. and SnapMoney, Inc.’s (collectively
2 “Super.com”) seek to duck the instant lawsuit challenging Super.com’s violations of the Telephone
3 Consumer Protection Act, 47 U.S.C. § 227 *et seq.* (“TCPA”) and the Oklahoma Telephone
4 Solicitation Act, Okla. Stat. Tit. 15, § 775C.1 *et seq.* (“OTSA”) by moving to compel Plaintiffs
5 Amber Ferrell and Sara Schneider to arbitrate their claims. But Super.com cannot compel Plaintiffs
6 to arbitration because the law in the Ninth Circuit is clear that sign-up pages like the ones at issue
7 here are insufficient to provide adequate notice of the Terms and unambiguous manifestation of
8 intent to be bound by them. *See Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849 (9th Cir. 2022);
9 *Chabolla v. ClassPass, Inc.*, 129 F.4th 1147 (9th Cir. 2025).

10 Super.com’s Motion is also based on thin evidence. That is, Plaintiffs, in their attached
11 declarations, deny ever visiting the website or using the app that Super.com claims was used to obtain
12 their supposed assent, and Super.com submits little evidence that they did. Indeed, its Motion to
13 Compel Arbitration fails to include *any* identifying information whatsoever linking Plaintiffs to the
14 supposed arbitration-agreeing actions—no name, signature, email address, mailing address, or IP
15 address linking Plaintiffs to the alleged website and app interactions is provided by Super.com. Thus,
16 while Super.com’s Motion claims in conclusory fashion that Plaintiffs entered their phone numbers
17 and clicked the “Send code” button, Super.com has not actually provided any evidence that Plaintiffs
18 ever did these things. Because Super.com presents no evidence of any affirmative action by Plaintiffs
19 that constitutes their assent to these Terms, its Motion should be denied.

20 Moreover, even assuming *arguendo* that Plaintiffs visited the website and app as Super.com
21 claims they did, the declaration and screenshots provided by Super.com are insufficient to show there
22 was any binding arbitration agreement. Among other reasons, the link to the Terms of Use (which
23 Super.com represents contains the arbitration agreement at issue) is difficult to read and bears none
24 of the hallmarks of a conspicuous notice—it is displayed in small font, is in the same font color as
25 the surrounding text, and it fails to draw a reasonable user’s attention. And, importantly, users using
26 their cellphone to interact with the form (which any App user would naturally do) would have the
27 “Terms of Use” language at the bottom of the page completely concealed by the cellphone’s
28

1 keyboard once the user began typing in a phone number at the top of the page. Put simply, the website
2 and app are insufficient to form an agreement to arbitrate with *any* user, Plaintiffs included.

3 The Court must afford Plaintiffs the benefit of all reasonable doubts and inferences in
4 opposing a motion to compel arbitration. As such, the Motion to Compel Arbitration should be
5 denied and the case should proceed to discovery and a ruling on the merits.

6 **II. STATEMENT OF ISSUES TO BE DECIDED**

7 1. Whether Super.com has proven by a preponderance of the evidence that Plaintiffs
8 used its website or its app and agreed to Super.com’s Terms of Use.

9 2. Whether the Super.com Terms of Use are displayed in a manner that is sufficient to
10 constitute reasonably conspicuous notice of the Terms to which Defendants seek to bind Plaintiffs.

11 **III. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

12 *Plaintiffs receive unwanted telemarketing text messages pitching Super.com’s products and* 13 *services despite registering on the DNC List*

14 On April 8, 2025, Plaintiffs filed their Complaint, alleging violations of the TCPA and the
15 OTSA against Super.com. (Dkt. 1.) In Plaintiff Ferrell’s case, she registered her personal cellular
16 telephone number on the DNC Registry on September 12, 2024. (*Id.* ¶ 21.) Despite her registration,
17 Super.com sent her numerous text message solicitations over several subsequent months, all
18 advertising Super.com’s products and services, all sent from the short code 34378. (*Id.* ¶¶ 23-24.)
19 Ferrell never provided any prior express invitation, permission, or consent to Super.com to receive
20 texts at issue. (*Id.* ¶ 25.) She also specifically alleged that she is an Oklahoma resident and that her
21 cellphone number at issue has an Oklahoma area code, thus triggering the OTSA. (*Id.* ¶ 26.)

22 Plaintiff Schneider’s story is similar. She alleges that she placed her personal cellphone
23 number on the Do Not Call Registry on July 25, 2024. (*Id.* ¶ 32.) Despite this, she received numerous
24 telephone solicitations from Super.com more than 30 days after that date, all sent from the short code
25 34378. (*Id.* ¶ 35.) Like Ferrell, Schneider did not provide consent, did not provide her number to
26 Super.com, and did not opt-in to any membership or program with Super.com. (*Id.* ¶ 39.)

27 To be clear, both Plaintiffs unequivocally deny visiting Super.com’s website or using its app,
28 and therefore of course deny the allegations that they agreed to arbitrate any claims with Super.com.

1 (See “Plaintiff Declarations,” attached hereto as Exhibits A and B.)

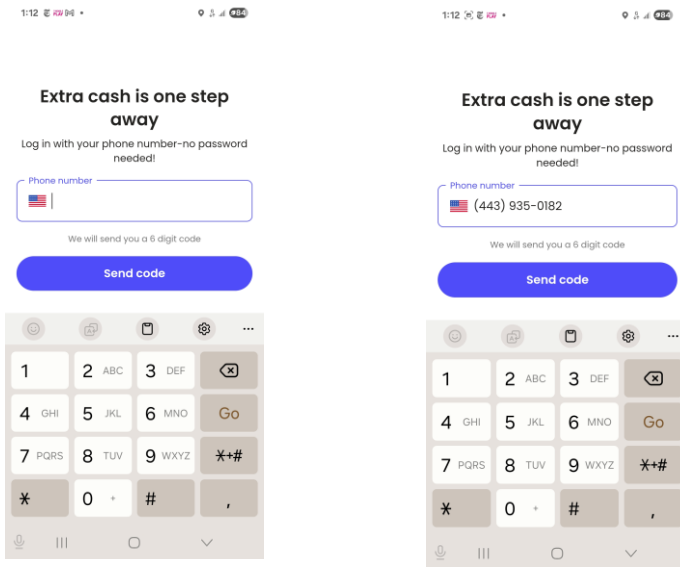
2 ***Super.com seeks to compel arbitration based on flimsy evidence***

3 Rather than reform its telemarketing practices—let alone offer an apology— Super.com
4 instead moves to compel arbitration. (Dkt. 15.) Super.com’s motion seeks to enforce an arbitration
5 agreement included within the Terms of Use contained on its website and its app. (Mot. at 2-4.) In
6 support of its motion, Super.com submitted a declaration from Matthew Culver, who states that he
7 is Super.com’s “Engineering Chief of Staff”. (Dkt. 16.)

8 Though the declaration states that Schneider submitted her cellphone number on
9 www.super.com on November 16, 2024 and that Ferrell signed up on the Super.com App on
10 September 30, 2024 and October 24, 2024, the declaration fails to provide any evidence that these
11 actions actually occurred. Rather, the declaration simply states in conclusory fashion that these
12 events occurred and provides a screenshot of the template sign-up page. No signature, name, email
13 address, or identifying information of any kind is provided in the declaration about either named
14 plaintiff, nor is any metadata or IP address provided from the alleged website and app interactions.

15 ***App users have the Terms of Use entirely blocked by their keyboards***

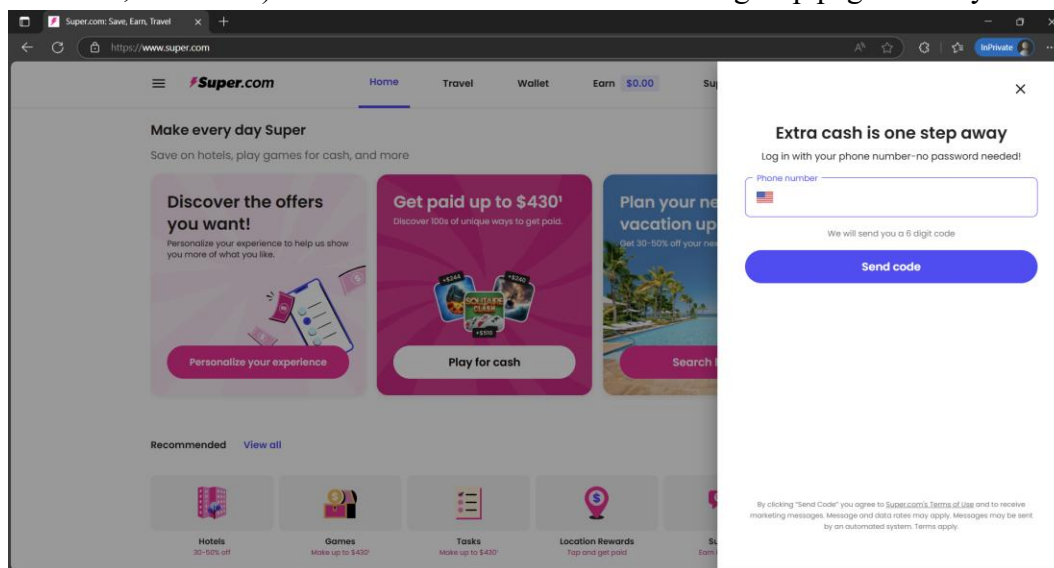
16 Plaintiffs’ Counsel, in the process of preparing this brief, downloaded the Super.com app to
17 investigate the user experience. (“Declaration of Patrick H. Peluso,” attached hereto as Exhibit C.)
18 The layout of the sign-up page is exactly as Super.com represents it to be in its Motion and
19 accompanying declaration. However, when Counsel clicked the text box below “Phone number” to
20 enter his number, the cellphone’s keyboard appeared and blocked from view the “Terms of Use”
21 language at the bottom of the page. (*See id.*) Screenshots of the user experience are below, at the top
22 of the next page:



Ultimately, once the text box is clicked, a user is able to enter their phone number and click “Send code” without the “Terms of Use” language every being visible again. (*Id.*)

The screenshot of the website sign-up page provided by Super.com is incomplete

Counsel also visited www.super.com to investigate the user experience on the website, which is how Super.com contends that Schneider signed up. (*See* Exhibit C.) The layout of the sign-up page differs from what Super.com represents in its declaration. That is, Super.com provides a partial screenshot which isolates the sign-up page from the surrounding website. (Dkt. 16 at 2.) In reality, the sign-up page is not isolated when a user is on the website and instead the sign-up page appears in conjunction with the rest of the website (Super.com does provide the full screenshot in Ex. A to its declaration, Dkt. 16-1). A screenshot of how the website sign-up page actually looks is below:



1 Based on these facts, the Court should deny Defendant’s motion to compel arbitration.

2 **IV. ARGUMENT**

3 “When considering a motion to compel arbitration, a court applies a standard similar to the
4 summary judgment standard[.]” *Concat LP v. Unilever, PLC*, 350 F. Supp. 2d 796, 804 (N.D. Cal.
5 2004) (internal quotation marks and citation omitted). “[A]rbitration ‘is a matter of consent, not
6 coercion.’” *Berman v. Freedom Fin. Network, LLC*, Case No. 18-cv-01060-DMR, 2018 WL
7 2865561, at *1 (N.D. Cal. June 11, 2018) (quoting *Stolt–Nielsen S.A. v. AnimalFeeds Int’l Corp.*,
8 559 U.S. 662, 681 (2010)). A court deciding whether to compel arbitration must first determine: (1)
9 “whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses
10 the dispute at issue.” *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir.
11 2000). “If the parties contest the *existence* of an arbitration agreement, the presumption in favor of
12 arbitrability does not apply.” *Berman v. Freedom Fin. Network, LLC*, No. 18-CV-01060-YGR, 2020
13 WL 5210912, at *1 (N.D. Cal. Sept. 1, 2020) (quoting *Goldman, Sachs & Co. v. City of Reno*, 747
14 F.3d 733, 742 (9th Cir. 2014)) (emphasis in original). Important here, even in the context of internet
15 commerce, the basic principles of contract law remain the same: a mutual manifestation of assent “is
16 the touchstone of contract.” *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014).

17 As explained below, Super.com’s motion to compel arbitration should be denied. The
18 Super.com Terms were not displayed in a conspicuous manner sufficient to bind any consumer and
19 no assent was obtained from Plaintiffs.

20 **A. Plaintiffs Deny Visiting the Super.com Website or the App and**
21 **Agreeing to Arbitrate any Dispute, and Super.com Provides No**
22 **Evidence to the Contrary.**

23 Conspicuously absent from Super.com’s motion to compel is any substantive explanation as
24 to how it concluded that Plaintiffs visited its website or used its app, provided their phone numbers,
25 and agreed to arbitrate. Indeed, the Motion lacks any evidence at all that Plaintiffs did the things
26 Super.com says they did—Super.com does not provide any identifying information, signature, or
27 metadata tying the supposed website and app interactions to Plaintiffs. Instead, it appears to be
28 merely assuming that these actions occurred because Super.com has Plaintiffs’ phone numbers in its
system. But Plaintiffs deny ever visiting the website or using the app and both deny ever agreeing

1 to the Terms. Super.com fails to come forward with any evidence proving they did, and its Motion
2 should be denied on this basis alone.

3 As previously stated, “parties cannot be forced to arbitrate if they have not agreed to do so.”
4 *Est. of Arce by & through Huerta v. Panish Shea & Boyle LLP*, No. 19-CV-0500 AJB, 2019 WL
5 6218781, at *3 (S.D. Cal. Nov. 20, 2019) (citing *Volt Info. Sciences, Inc. v. Board of Trustees*, 489
6 U.S. 468, 478 (1989)). When considering whether the parties agreed to arbitration, “courts apply a
7 standard similar to the summary judgment standard applied under Rule 56”. *Dickey v. Ticketmaster*
8 *LLC*, No. CV 18-9052-GW(GJSX), 2019 WL 9096443, at *3 (C.D. Cal. Mar. 12, 2019) (citing
9 *Concat LP v. Unilever, PLC*, 350 F. Supp. 2d 796, 804 (N.D. Cal. 2004) (citing *McCarthy v.*
10 *Providential Corp.*, No. C 94-0627, 1994 WL 387852, at *2 (N.D. Cal. July 19, 1994))). The Court
11 must construe “all facts and reasonable inferences that can be drawn from those facts in a light most
12 favorable to the non-moving party.” *Stover-Davis v. Aetna Life Ins. Co.*, No. 1:15-CV-1938-BAM,
13 2016 WL 2756848, at *2 (E.D. Cal. May 12, 2016) (citation omitted).

14 Here, Super.com fails to provide sufficient evidence (or, more accurately, *any* evidence, other
15 than a conclusory declaration) to demonstrate—without any genuine issue of material fact—that
16 Plaintiffs entered into an agreement to arbitrate their claims. Because “[c]ourts have refused to
17 compel arbitration where the declarations submitted ‘summarily assert[.]’ that the plaintiff signed the
18 arbitration agreement,” Super.com’s Motion should be denied. *Zamudio v. Aerotek, Inc.*, 698 F.
19 Supp. 3d 1202, 1208 (E.D. Cal. 2023) (citing *Ruiz v. Moss Bros. Auto Grp.*, 232 Cal. App. 4th 836,
20 181 Cal. Rptr. 3d 781 (2014)); *see also Saeedy v. Microsoft Corp.*, 757 F. Supp. 3d 1172, 1194 (W.D.
21 Wash. 2024) (citing *Pohl v. MH Sub I, LLC*, 332 F.R.D. 713, 716-17 (N.D. Fla. 2019) for the
22 proposition that “courts generally hold that an affidavit of a witness, when viewed in combination
23 with circumstantial indicia of authenticity (such as the existence of the URL, date of printing, or
24 other identifying information) would support a reasonable juror in the belief that the documents are
25 what the proponent says they are.”); *Henry v. Sas Retail Servs.*, 2022 Cal. Super. LEXIS 19497, *4
26 (“the Screenshot provided in support of the assertion that plaintiff opened the subject email lacks
27 any identifying information whatsoever”); *Dawson v. Target Corp.*, No. 3:24-cv-08167-AMO, 2025
28 U.S. Dist. LEXIS 111315, at *3-4 (N.D. Cal. June 11, 2025) (denying motion to compel arbitration

1 in part due to the defendant’s failure to provide sufficient evidence and “it is Defendants’ burden to
 2 prove that a valid, enforceable agreement to arbitrate was formed by a preponderance of the
 3 evidence”).¹

4 **B. The Super.com Website and App Did Not Adequately Notify or Obtain Assent**
 5 **From Plaintiffs or the Class Members to Support Enforcement of Its Terms,**
 6 **Including the Arbitration Clause.**

7 Broadly speaking, internet contracts typically fall into one of two categories: clickwrap
 8 agreements, where users are required to click on an “I Agree” box after being presented with terms
 9 and conditions; and browsewrap agreements, where terms and conditions are posted via hyperlink at
 10 the bottom of a webpage. *Nguyen*, 763 F.3d at 1175-76. Some websites (such as Super.com’s website
 11 and app at issue here) present a hybrid of these two categories (often referred to as “hybridwrap” or
 12 “sign-in wrap” agreements) by notifying the user of the existence of terms and conditions and,
 13 “instead of providing an ‘I agree’ button, advis[ing] the user that he or she is agreeing to the terms
 14 of service when registering or signing up.” *Snow v. Eventbrite, Inc.*, No. 3:20-CV-03698-WHO,
 15 2021 WL 3931995, at *3 (N.D. Cal. Sept. 2, 2021); *see also Honor Fin. Holdings, LLC v. Spireon,*
 16 *Inc.*, No. G063359, 2024 Cal. App. Unpub. LEXIS 6884, at *12-13 (Oct. 30, 2024) (“The
 17 enforceability of a sign-in wrap agreement generally depends on the nature of the transaction and the
 18 conspicuousness of the notice given to the user.”)²

19
 20 ¹ To the extent Super.com provides evidence in its Reply, that evidence should not be
 21 considered. *See Dawson*, 2025 U.S. Dist. LEXIS 111315, at *5-6 (“For the first time on reply,
 22 Target submitted a second declaration . . . which improperly introduced new evidence . . . The
 Court declines to consider that new evidence. *See Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir.
 2007) (“The district court need not consider arguments raised for the first time in a reply brief.”).”)

23 ² As one judge put it, “the notions of conspicuousness and consent in the context of the
 24 internet, especially, surely shift over time as do the underlying technologies and the evolving user
 25 interfaces. The fictional ‘reasonable person’ may be held by a court to know e.g., terms of service,
 26 but this isn't usually true in the real world. For example, in the social media context (admittedly not
 27 that here) a study confirmed what readers surely suspect, which is that almost no one reads the terms
 of services and privacy policies. In the study's use of a fictitious site, 98% missed the ‘gotcha clauses’
 by which the user agreed to provide his or her first born child in return for the service.” *Talbot v.*
Lyft, Inc., 2018 Cal. Super. LEXIS 6553, at *5-6 (San Francisco Sup. Ct., Dec. 21, 2018).

1 As the Ninth Circuit has explained:

2 The Ninth Circuit has applied browsewrap principles to these hybridwrap agreements:
3 Courts have also been more willing to find the requisite notice for constructive
4 assent where the browsewrap agreement resembles a clickwrap agreement—that is,
5 where the user is required to affirmatively acknowledge the agreement before
6 proceeding with use of the website. . . .

7 But where, as here, there is no evidence that the website user had actual knowledge
8 of the agreement, the validity of the browsewrap agreement turns on whether the
9 website puts a reasonably prudent user on inquiry notice of the terms of the contract.
10 Whether a user has inquiry notice of a browsewrap agreement, in turn, depends on
11 the design and content of the website and the agreement's webpage.

12 *Nguyen*, 763 F.3d at 1176–77 (citations omitted); *see also Berman v. Freedom Fin. Network, LLC*,
13 30 F.4th 849, 856 (9th Cir. 2022). Inquiry notice is found where: “(1) the website provides reasonably
14 conspicuous notice of the terms to which the consumer will be bound; and (2) the consumer takes
15 some action, such as clicking a button or checking a box, that unambiguously manifests his or her
16 assent to those terms.” *Berman*, 30 F.4th at 856 (citation omitted).

17 There is no inquiry notice here. The Terms are not conspicuous, and users do not manifest
18 unambiguous assent. Super.com’s Terms are unenforceable, and its Motion should be denied.

19 **1. The Super.com Terms are not conspicuously disclosed.**

20 In *Berman*, the Ninth Circuit set out a framework regarding what constitutes “reasonably
21 conspicuous notice” and declined to enforce a hybrid agreement that was more attention-grabbing
22 than the website and app at issue here. *Berman*, 30 F.4th at 856. First, to be conspicuous the notice
23 “must be displayed in a font size and format such that the court can fairly assume that a reasonably
24 prudent Internet user would have seen it.” *Id.* In *Berman*, the font was printed in “tiny gray font
25 considerably smaller than the font used in the surrounding website elements.” *Id.* The “comparatively
26 larger font used in all of the surrounding text naturally directs the user’s attention everywhere else.”
27 *Id.* at 857. The text was “further deemphasized by the overall design of the webpage, in which other
28 visual elements draw the user’s attention away from the barely readable critical text.” *Id.*

Second, while terms may be disclosed through a hyperlink, “the fact that a hyperlink is
present must be readily apparent.” *Id.* at 857. “Simply underscoring words or phrases, as in the

1 webpages at issue here, will often be insufficient to alert a reasonably prudent user that a clickable
2 link exists.” *Id.* Rather, utilizing “contrasting font color (typically blue) and the use of all capital
3 letters” can alert a user the text provides a pathway to another webpage. *Id.* Put simply, “[c]onsumers
4 cannot be required to hover their mouse over otherwise plain-looking text or aimlessly click on words
5 on a page in an effort to ‘ferret out hyperlinks.’” *Id.*

6 In this case, the operative notice is not conspicuous. Indeed, the language used to supposedly
7 notify users that they would be bound by those Terms is displayed in tiny gray font far below the
8 phone number text box and the large, bright-blue “Send code” button”. Notably, Super.com felt the
9 need to provide a significantly zoomed-in screenshot of the disclosure language so that the Court
10 could read what it says. (Dkt. 15 at 5.) Users of the website and app do not have this luxury.

11 The “Terms of Use” hyperlink is also not readily apparent. While the hyperlink is underlined,
12 it is neither in all-caps nor is it set off in the [typical blue color](#), which would denote the existence of
13 a hyperlink. (*Id.*) Indeed, though the Ninth Circuit has stated that “[s]imply underscoring words or
14 phrases is not enough” to make a hyperlink conspicuous, that is all Super.com did here and its Terms
15 are therefore unenforceable. *Chabolla v. Classpass Inc.*, 129 F.4th 1147, 1162 (9th Cir. 2025); *see*
16 *also Dawson*, 2025 U.S. Dist. LEXIS 111315, at *9 (“the hyperlinks on the account creation and
17 check-out screens are particularly problematic in this regard because they lack a contrasting color
18 and are in the same black text as the majority of the text on the screens.”); *Massel v.*
19 *SuccessfulMatch.com*, 718 F. Supp. 3d 1112, 1117 (N.D. Cal. 2024) (denying motion to compel
20 arbitration because hyperlinked terms were underlined, but “appeared in the same dark gray color as
21 the unlinked text in the rest of the sentence”); *Lopez v. Dave, Inc.*, Case No. 22-16915, 2023 WL
22 8594393 at *1 (9th Cir. Dec. 12, 2023) (no reasonable notice even where the hyperlinked terms were
23 underlined partially because they were in small gray font); *Shultz v. TTAC Publ’g, LLC*, 2020 U.S.
24 Dist. LEXIS 198834, at *10-11 (N.D. Cal. Oct. 26, 2020) (denying motion to compel arbitration
25 where “the hyperlink to the Terms and Conditions is in light blue, [but] it is not underlined,
26 highlighted, in all caps, or otherwise set off from the page” and the “phrase ‘I agree to the terms and
27 conditions’ is in very small text and is dwarfed by the large and colorful green ‘Complete Purchase’
28 button”); *Farmer v. BarkBox, Inc.*, 2023 WL 8522984, at *2 (C.D. Cal. Oct. 6, 2023) (holding

1 “modified clickwrap” presenting terms in blue, underlined hyperlink located immediately above the
2 mechanism for assent did “not satisfy the objective reasonableness standard” in the Ninth Circuit
3 because it was in similar miniscule font).

4 Super.com’s Motion only mentions *Berman* in passing. Instead, Super.com relies on two
5 cases which it contends have similar landing pages to those at issue here, *Kroskey v. Elevate Labs,*
6 *LLC* and *Sarhadi v. Pear Health Labs, Inc.* (Mot. at 10.) But neither landing page is similar.

7 In *Kroskey*, the relevant language is directly below options such as “Continue with Apple”
8 and “Continue with Google”. Not only is the language proximately closer to the action buttons than
9 the sign-up page in this case, the hyperlink is bolded. In *Sarhadi*, the Terms of Service link is in blue.
10 Super.com’s hyperlink is not bolded or in a different color, and it is far below the “Send code” button,
11 rendering it insufficiently conspicuous. *See Dawson*, 2025 U.S. Dist. LEXIS 111315, at *10-11
12 (“The hyperlinked terms and preceding disclaimers on Target's sign-in and check-out screens are
13 also spatially decoupled from the relevant buttons to proceed with the transactions and manifest
14 assent to those terms. On the sign-in screen (if encountered at all), a user need only enter their email
15 or phone number and password in the fields located at the very top of the screen and then click the
16 glaring red buttons in the middle of the screen to proceed. And the current version of the check-out
17 screen confirms that a user would have no reason to scroll through the entirety of the screen to click
18 "Place your order" because the order total is located at the very top of the screen. **The lack of spatial**
19 **proximity between the Terms and Conditions and the mechanism for assent forecloses**
20 **reasonable notice of those terms.**”) (emphasis added); *See also Nicosia v. Amazon, Inc.*, 834 F.3d
21 220, 236 (2d Cir. 2016) (declining to enforce hybridwrap agreement in part because “the presentation
22 of terms is not directly adjacent to the ‘Place your order’ button so as to indicate that a user should
23 construe clicking as acceptance.”). Additionally, in *Sarhadi* the “[plaintiff did] not dispute that he
24 engaged in an ongoing relationship” with the defendant, and this “context . . . supports reasonably
25 conspicuous notice”. *Sarhadi*, 2025 U.S. Dist. LEXIS 93495, at *17-18. Here, of course, Plaintiffs
26 deny using Super.com at all, much less continuously.

27 Moreover, both the *Kroskey* and *Sarhadi* sign-up pages collect information about the user
28 that would further evidence assent to a contract, such as a name and email address. Here, Super.com

1 comes forth with no identifying information at all. *See Gilliam v. Prince Health Grp. LLC*, No. 1-
2 24-cv-00033, 2025 U.S. Dist. LEXIS 72328, at *9 (M.D. Tenn. Apr. 16, 2025) (“Unlike other cases
3 where electronic signature and online consent has been found to be effective, here, other than the
4 fact that Plaintiff’s name and phone number were used, Prince Health offers no evidence that Plaintiff
5 was the person who entered the information. . . . [it] does not provide any metadata or other
6 information to show that the user who completed the form and associated consents was, in fact,
7 [plaintiff].”; *Ramirez v. Samsung Elecs. Am., Inc.*, 2023 U.S. Dist. LEXIS 204950, at *8-9 (C.D. Cal.
8 Nov. 14, 2023) (“Samsung, however, presents no evidence linking the Samsung account to Plaintiff,
9 aside from the account holder using Plaintiff’s email address. In a sworn declaration, Plaintiff stated
10 that he does not recall creating a Samsung account . . . Samsung thus has not met its burden to show
11 that Plaintiff was the one who agreed to the arbitration provision.”)

12 The more apt comparison in this case is not to *Kroskey* and *Sarhadi*, but rather to the sign-up
13 pages at issue in *Berman* and *Chabolla* themselves. True and accurate copies of such pages are
14 attached to the Peluso Declaration, Exhibit C. Taking *Berman* first, both pages at issue in *Berman*—
15 though ultimately not good enough to pass muster—actually do a better job of notifying the
16 consumer of the existence of the Terms than Super.com’s sign-up page does. That is, in *Berman*,
17 though the language and hyperlink to the Terms suffers from the same defects that are present here
18 (i.e., small gray font, no blue color) the language is proximately closer to the action button
19 (“Continue” in *Berman*, “Send Code” here) than Super.com’s language is. A user of the website at
20 issue in *Berman* would at least encounter the small print prior to reading the action button, since it
21 appears above the action button and a normal person reads a website starting at the top of the page.
22 Here, the language is far below the action button, buried at the bottom of the screen below significant
23 empty space, such that a user reading from top to bottom would never encounter it prior to entering
24 their phone number and hitting “Send Code”. Moreover, as in *Berman*, Super.com’s language is
25 “deemphasized by the overall design of the webpage, in which other visual elements draw the user’s
26 attention away from the barely readable critical text”. *Berman*, 30 F.4th at 857. As explained above,
27 Super.com’s sign-up page on the website appears alongside the rest of the webpage, which one could
28 describe as “busy”.

1 The same is true of the pages at issue in *Chabolla*. There, the language and hyperlink are
2 proximately closer to the action button so that a user is more likely to notice it than a Super.com user
3 would be. (*See Ex. C.*) *Chabolla*'s page also used blue font to make the hyperlink stand out to the
4 user. (*Id.*) As with *Berman*, the Ninth Circuit held this was not enough to be enforceable, but it is
5 certainly closer to compliance than Super.com gets.

6 Finally, the Super.com app (which Super.com contends Ferrell used to sign up) fails to
7 provide conspicuous notice for a separate reason: the user's cellphone keyboard obscures the Terms.
8 As the declaration of Plaintiffs' Counsel explains (*see Ex. C.*), once a cellphone user clicks on the
9 text box at the top of the sign-up page to input his or her phone number as prompted, the language
10 at the very bottom, which Super.com relies upon, is completely hidden. In fact, once the keyboard is
11 activated, a user can input the phone number and click the prominent "Send code" blue button
12 without the Terms of Use language ever appearing on the screen again. (*See Ex. C.*) This fact weighs
13 heavily against granting Super.com's Motion. *See Britt v. ContextLogic, Inc.*, No. 3:20-cv-04333-
14 WHA, 2021 U.S. Dist. LEXIS 70414, at *12 (N.D. Cal. Apr. 9, 2021) ("As plaintiff points out, there
15 are three potential problems, in terms of constructive notice, presented by these latter two screens.
16 The first is that if the notice language is covered up by the user's keyboard when the user is entering
17 her email address and password to sign-in, she will not be able to see the notice language."); *Metter*
18 *v Uber Techs., Inc.*, No. 16-cv-06652-RS, 2017 U.S. Dist. LEXIS 58481, at *9-10 (N.D. Cal. Apr.
19 17, 2017) ("an ordinary registrant will often be compelled to activate the pop-up keyboard and
20 obscure the terms of service alert before having the time or wherewithal to identify other features of
21 the screen, including the alert. When such a registrant presses "REGISTER" without having seen the
22 alert, he does so without inquiry notice of Uber's terms of service and without understanding that
23 registering is a manifestation of assent to those terms.")

24 As a final point here, the Court should not re-write the disclosure to benefit Super.com.
25 Rather, because online providers have "complete control" over their website's design, "the onus
26 must be on website owners to put users on notice of the terms to which they wish to bind consumers".
27 *Id.* (quoting *Nguyen*, 763 F.3d at 1179). Ultimately, securing clear and unambiguous assent "is not
28 hard to accomplish." *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1035 (7th Cir. 2016). Super.com

1 could have included a check box to manifest assent and recorded that interaction. It could have
2 captured identifying information tying the supposed arbitration contract to a particular person, not
3 just a phone number. It could have ensured that the Terms of Use hyperlink stood out by using large,
4 bold font and by using a different color font from the rest of the text (or better yet, it could have
5 required that a person actually access the link and scroll through the Terms prior to clicking a box
6 manifesting assent and then proceeding). It could have placed the language and hyperlink directly
7 above the action button, not buried at the bottom of the page below significant blank space. It could
8 have designed its App so that the Terms of Use link was always visible during a user’s interactions
9 instead of being covered by a pop-up keyboard. But in reality, Super.com took none of these steps
10 and the Court should decline to let Super.com off the hook for its failure to take common-sense steps
11 to ensure its Terms are enforceable.

12 In short, Super.com fails to provide users adequate notice of its Terms, including the
13 mandatory arbitration clause. Without adequate notice, there is no enforceable agreement to arbitrate.
14 Accordingly, the Motion should be denied.

15 **V. CONCLUSION**

16 Super.com’s motion to compel arbitration should be denied. Plaintiffs deny visiting the
17 website or using the app. Even if they did, they were not given adequate notice of—and did not
18 manifest assent to—the Super.com Terms, including the purported arbitration clause, and thus there
19 is no agreement to arbitrate to enforce against Plaintiffs. Accordingly, the Court should deny
20 Defendants’ Motion to Compel Arbitration, permit the parties to proceed to discovery and a decision
21 on class certification and the merits, and award any such relief as it deems necessary and just.

22 * * * * *

23
24 Respectfully submitted,

25 Dated: June 19, 2025

AMBER FERRELL AND SARA SCHNEIDER,
individually and on behalf of all others similarly
situated,

27 By: /s/ Patrick H. Peluso
One of Plaintiff’s Attorneys

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the above titled document was served upon counsel of record by filing such papers via the Court’s ECF system on June 19, 2025.

/s/ Patrick H. Peluso