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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0455-22

NICHOLAS RACIOPPI, JR.,

Plaintiff-Appellant,

v.

AIRBNB, INC., and AIRBNB  
PAYMENTS, INC.,

Defendants-Respondents,

and

AARON LATIMER, IVYROCK  
EQUITIES LLC, DANI TB LLC,  
MICHAEL AND ERIN LLC,  
NADIA TB LLC, T BAE 4 BEE  
LLC, T BAY 3A LLC, TURTLE B  
2 BE LLC, TURTLE BAE 1 BEE  
LLC, TURTLE BAY 2 AYY,  
LLECESTER YIP, and APEX  
EAST MANAGEMENT LLC,

Defendants.

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Argued March 6, 2023 – Decided July 17, 2023

Before Judges Gooden Brown and Mitterhoff.



On appeal from the Superior Court of New Jersey, Law Division, Morris County, Docket No. L-0876-22.

Ryan M. Dunn argued the cause for appellant (Riker Danzig LLP, attorneys; Marc D'Angiolillo, of counsel and on the briefs; Ryan M. Dunn, on the briefs).

Deborah J. Davison argued the cause for respondents Airbnb, Inc. and Airbnb Payments, Inc. (Wood Smith Henning & Berman, LLP, attorneys; Deborah J. Davison, of counsel and on the brief; Sean P. Shoolbraid, on the brief).

#### PER CURIAM

This appeal arises from an internet consumer contract dispute and concerns the question of whether the contract's embedded arbitration agreement is binding. Plaintiff Nicholas Racioppi, Jr. appeals from an August 31, 2022 order granting defendants', Airbnb, Inc. and Airbnb Payment, Inc. (collectively, "Airbnb"), motion to compel arbitration.<sup>1</sup> We affirm, substantially for the reasons articulated in Judge David Harold Ironson's statement of reasons.

We discern the following facts from the record. On April 24, 2022, plaintiff used Airbnb's website to book a Manhattan rental property from June 6, 2022 through July 29, 2022. On May 18, 2022, plaintiff's booking was cancelled and fully refunded without explanation. Following various

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<sup>1</sup> The other captioned defendants are no longer parties to this appeal.



communications initiated by plaintiff, defendants offered to find plaintiff a replacement rental property in New Jersey or Queens. However, plaintiff found the suggested properties unacceptable and, as a result, "expend[ed] tens of thousands of dollars more than the agreed[-]upon price" to book another rental property in Manhattan.

On May 23, 2022, plaintiff filed a complaint against defendants, alleging breach of contract; breach of the implied covenant of good faith and fair dealing; common law fraud; fraud in the inducement; negligent misrepresentation; and violation of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 to -19. On June 28, 2022, defendants filed a motion to compel arbitration and stay litigation pursuant to the arbitration agreement included in defendants' terms of service ("TOS").

In support, defendants submitted the certification of employee Darien Shepherd, which asserted that, on January 5, 2015, plaintiff used a mobile device to create an Airbnb account. In creating his Airbnb account, plaintiff allegedly completed and clicked through two sign-up screens that required explicit acknowledgement of defendants' TOS and arbitration agreement.

The first sign-up screen contained three buttons against a white background: (1) a blue button reading "Sign up with Facebook"; (2) a white



button reading "Sign up with Google"; and (3) a red button reading "Sign up with Email." Below those three buttons, in red font on a white background, were hyperlinks to the TOS, policy documents, and the following disclaimer: "By signing up, I agree to Airbnb's [TOS], Privacy Policy, Guest Refund Policy, and Host Guarantee Terms."

The second sign-up screen contained fields for the user to input their first name, last name, email address, password, and a field to confirm the selected password. Below those fields was a second hyperlink to the TOS and a red button which read, "Sign up." Neither screen required scrolling or adjustment of the screen to view the texts and prompts.

On July 28, 2022, plaintiff filed an opposition to defendants' motion, certifying that: he never consented to the TOS; he was never made aware of the TOS prior to litigation; and he was never directed to be aware of the TOS during the Airbnb sign-up process. On August 25, 2022, the judge heard defendants' motion to compel arbitration.

There, defendants argued that: (1) the contract between the parties' mandates arbitration; (2) plaintiff's assent to defendants' TOS was undisputed; and (3) the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, requires the court to stay litigation if the matter is referred to arbitration. In opposition, plaintiff



argued that: (1) defendants' TOS was designed to conceal their arbitration provisions; (2) a web-based consumer contract's design and layout must be evaluated for reasonable notice pursuant to Wollen v. Gulf Stream, 468 N.J. Super. 483 (App. Div. 2001); and (3) he is entitled to discovery with respect to the validity of the arbitration provisions contained in the TOS.

On August 31, 2022, the trial judge entered an order dismissing plaintiff's claims against defendants without prejudice and compelling the matter to arbitration. In a statement of reasons affixed to the order, the judge analyzed two cases before reaching his conclusion.

First, the judge analyzed Selden v. Airbnb, Inc., 4 F.4th 148, 152 (D.C. Cir. 2021), wherein the United States Court of Appeals for the D.C. Circuit evaluated the exact same Airbnb sign-up screens at issue here under California law, stating:

[In Selden,] [t]he [c]ourt concluded that:

Airbnb's sign-up screen placed Selden on reasonable notice that by signing up he agreed to the [TOS]. Airbnb's screen used a simple design. It had three buttons allowing users to sign up using Facebook, Google, or email. Directly below the three buttons, it stated: "By signing up, I agree to Airbnb's Terms of Service, Privacy Policy, Guest Refund Policy, and Host Guarantee Terms." [] These terms and policies



appeared in red text against a white background and were hyperlinked to the full policies. Moreover, the sign-in appeared on a single screen for an iPhone user like Selden and required no scrolling to see the notice of the Terms of Service. As the district court explained, Airbnb's notice was "clearly legible, appropriately sized, and unobscured by other visual elements."

Although not binding on this [c]ourt, the [c]ourt finds that the legal analysis in Selden is persuasive. The [c]ourt notes that in both Selden and the present matter, the same issue is at dispute . . . whether Airbnb's sign-up screen puts a reasonably prudent internet user on notice[,] that by signing up to use the platform, they agreed to Airbnb's [TOS]. Furthermore, in both Selden and the instant matter, the sign-up screen is the same and uses the exact same formatting and wording.

[(citations omitted).]

Next, the judge distinguished the instant matter from Wollen, wherein this court invalidated a sign-in-wrap agreement, finding that it did not put users on "reasonable notice":

[T]he facts [in] Wollen are distinguishable from the current matter. First, in Wollen, plaintiff was required to create an online account to submit a service request which entailed navigating multiple webpages – none of which referred to the defendant's separate terms and conditions webpage.[.] Here, plaintiff did not have to go through multiple webpages in order to sign up for Airbnb's services and reference to the [TOS] was on the first page encountered by a consumer.



[(citations omitted).]

Ultimately, the judge concluded that:

Based on the formatting and wording of [defendants' TOS] provision, the [c]ourt finds that the [a]rbitration [c]lause is phrased in "plain language that is understandable to the reasonable consumer" and that it adequately "identif[ies] the specific constitutional or statutory right guaranteeing a citizen access to the courts that is waived by agreeing to arbitration." [] The wording is clear and unmistakable that by agreeing to the terms, [p]laintiff was waiving his right to a jury trial and agreeing that he would enter into arbitration to solve any disputes.

This appeal followed. On appeal, plaintiff raises the following arguments:

#### POINT I

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION BECAUSE THE ARBITRATION PROVISIONS CONCEALED WITHIN THE TERMS OF SERVICE ARE INVALID AND UNENFORCEABLE.

A. The Trial Court Erred in Relying on Out-of-Jurisdiction Authority When Wollen Is Binding, Dispositive and Indistinguishable.

1. The Hyperlink to the Terms of Service is Not Underlined, Bolded or Enlarged.



2. Defendants' Sign-Up Screens Did Not Indicate Plaintiff Was Required to Read the Terms of Service.

3. Defendants' Sign-Up Screens Did Not Require Plaintiff to Affirmatively Assent or View the Terms of Service.

## POINT II

ALTERNATIVELY, THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S REQUEST FOR LIMITED DISCOVERY REGARDING THE ENFORCEABILITY OF THE ARBITRATION PROVISIONS.

"The existence of a valid and enforceable arbitration agreement poses a question of law, and[, ] as such, [the] standard of review of an order [granting or] denying a motion to compel arbitration is de novo." Barr v. Bishop Rosen & Co., Inc., 442 N.J. Super. 599, 605 (App. Div. 2015).

We begin our analysis by reviewing the FAA, which governs the enforcement of arbitration clauses in contracts involving interstate commerce. See Litman v. Cellco P'Ship, 655 F.3d 225 (3d Cir. 2011). Section 2 of the FAA provides that an arbitration agreement "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; see Martindale v. Sandvik, Inc., 173 N.J. 76, 85 (2020). Thus, "[s]ection 2 is a congressional declaration of a liberal



federal policy favoring arbitration agreements." Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24 (1983).

It is well-established that New Jersey courts, like the federal courts, favor arbitration. See Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 133-34 (2020). In fact, this court has noted that there is a "strong public policy in our state favoring arbitration as a means of dispute resolution." Alamo Rent-A-Car, Inc. v. Galarza, 306 N.J. Super. 384, 389 (App. Div. 1997).

To balance our policy favoring arbitration, we must consider that "[b]y its very nature, an agreement to arbitrate involves a waiver of a party's right to have [their] claims and defenses litigated in court." Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 442 (2014) (quoting NAACP of Camden Cnty. E. v. Foulke Mgmt., 421 N.J. Super. 404, 425 (App. Div. 2011)). "An average member of the public may not know . . . that arbitration is a substitute for the right to have one's claim adjudicated in a court of law." Ibid. As such, we "take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent." Id. at 442-443 (quoting Foulke, 421 N.J. Super. at 425). "[U]pon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not



in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4.

Here, we are tasked with reviewing defendants' TOS and discerning whether plaintiff knowingly assented to its terms, including the embedded arbitration agreement, when he created an Airbnb account through defendants' digital sign-up screens. As a result, "the pertinent inquiry is whether [plaintiff] was provided with reasonable notice of the applicable terms, based on the design and layout of the website." Wollen, 468 N.J. Super. at 496.

"Courts have observed [that] the enforceability of an internet consumer contract often turns on whether the agreement is characterized as a 'scrollwrap,' 'sign-in wrap,' 'clickwrap,' or 'browsewrap' – or a hybrid version of these electronic contract types." Id. at 495. "Regardless of a web-based agreement's characterization," our inquiry is the same: "whether the user was provided with reasonable notice of the applicable terms, based on the design and layout of the website." Id. at 496. As specifically applied to arbitration agreements, the reasonable notice standard is satisfied if the provision is "sufficiently clear, unambiguously worded, [and] satisfactorily distinguished from the other [a]greement terms." Atalese, 219 N.J. at 445 (quoting Curtis v. Cellco Partnership, 413 N.J. Super. 26, 33-37 (App. Div. 2010)).



Based upon our review of the record and the applicable law, we affirm Judge Ironson's decision to enforce the arbitration agreement in this matter. Specifically, we agree with the judge's findings that plaintiff was provided with reasonable notice of defendants' TOS and its embedded arbitration agreement because "[t]he wording [of defendants' TOS] is clear and unmistakable."

Our fact-sensitive inquiry establishes that defendant's first sign-up screen required no scrolling and provided the following language in legible red text: "By signing up, I agree to Airbnb's Terms of Service, Privacy Policy, Guest Refund Policy, and Host Guarantee Terms." Immediately below that disclosure were red hyperlinks to defendants' TOS and referenced policy documents. Defendants' second sign-up page provided the same, which was clearly displayed in red hyperlinks below a prominent "Sign Up" button.

As to defendants' arbitration provisions, we find that they were similarly unambiguous and satisfactorily distinguished from the other terms of defendants' TOS. There is no question that the clarity and placement of defendants' TOS sufficiently departs from the facts of Wollen and satisfies the "reasonable notice" standard set forth in Atalese. Therefore, plaintiff is bound by his agreement to arbitrate his claims against defendants.



To the extent we have not addressed any argument raised by plaintiff, we have deemed them lacking sufficient merit to warrant discussion in a written opinion. Rule 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.



CLERK OF THE APPELLATE DIVISION