UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

NAJAH EDMUNDSON, individually and on behalf of all others similarly situated, Plaintiff, v. KLARNA, INC., Defendant.	:	Case No.: 3:21-cv-00758-KAD August 16, 2021

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL ARBITRATION AND TO STAY PROCEEDINGS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(Continued)

Page(s)

TABLE OF AUTHORITIES
(Continued)

Page(s)

Statutes

Defendant Klarna, Inc. respectfully submits this memorandum of law in support of its motion to compel arbitration and to stay proceedings pending resolution of the arbitration. Klarna seeks an order (i) compelling plaintiff Najah Edmundson to submit her claim to arbitration on an individual basis as required by the binding arbitration provision in the Service Agreement she entered with Klarna, and (ii) staying all further proceedings in this case pending arbitration.

INTRODUCTION[1]

Klarna is a financial-technology company that has provided tens of millions of shoppers a consumer-friendly alternative to traditional credit-card transactions: use Klarna to finance a purchase, pay for it in four equal and timely installments, and Klarna will charge no interest or fees. Najah Edmundson received the benefit of Klarna's popular "Pay in 4" plan. Ms. Edmundson, a Connecticut resident, repeatedly purchased goods using Klarna's service. Ms. Edmundson does not allege that Klarna violated any agreement with her or charged her any interest or fees. Instead, she seeks to blame Klarna for charges allegedly imposed by an independent third party—Ms. Edmundson's credit union—after Ms. Edmundson overdrew her checking account when making payments to Klarna. Despite admitting the fees were "not assessed by Klarna," Compl. ¶ 27, Ms. Edmundson now brings a putative class action against Klarna, seeking to hold it liable for common-law fraud and violation of the Connecticut Unfair Trade Practices Act on the theory that Klarna caused her to purchase products she could not afford, thereby resulting in her credit union's independent decision to impose overdraft fees.

[1] Unless otherwise noted, all emphasis is added and all internal quotation marks and citations are omitted.

Ms. Edmundson's claims are meritless. But there is no need for this Court to reach the merits at all because the only question presented by this motion is whether Ms. Edmundson is obligated to arbitrate this dispute. Under the Klarna Service Terms to which she agreed when she used Klarna's services, Ms. Edmundson agreed to arbitrate "any and all disputes or claims, including without limitation … state … statutory claims" and "common law claims"—precisely the sort of claims she asserts here—and to do so on an individual basis, though she now seeks to represent a class.

Arbitration agreements, like any other contract, must be enforced according to their terms, and it is the law of this Circuit that terms as clear and conspicuous as Klarna's reasonably notified Ms. Edmundson of her agreement to arbitrate. The Court should compel Ms. Edmundson to submit her claims to arbitration under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. (the "FAA"), and should stay this action pending the outcome of that arbitration under 9 U.S.C. § 3.

BACKGROUND

A. Klarna's Services and the Service Terms

Klarna, which was established in 2005, is a widely accepted payment service that processes 2 million transactions a day for its 90 million active customers in 17 countries.[2] Unlike traditional credit-card purchases, Klarna offers consumers a number of no-interest payment options, including the "Pay in 4" plan, which allows shoppers to buy a product and pay for it in installments spread over several weeks. *See* Declaration of Erin Riffe ¶ 3 ("Riffe Decl."); Compl. ¶¶ 16, 17. This gives customers the flexibility to enjoy larger purchases immediately without having to rely on credit. Compl. ¶¶ 17, 19. If customers make all four

[2] *See* "Klarna: About Us" at www.klarna.com/us/about-us.

installment payments on time, then Klarna charges them no interest or fees. *See* Riffe Decl. ¶ 3. Ms. Edmundson's experience proves the point: Klarna has never charged any interest or fees on any of the purchases she made using Klarna. *See id.* ¶¶ 16, 24, 25, 26.

Ms. Edmundson's relationship with Klarna is governed by agreements that she entered with Klarna when she first agreed to use Klarna to finance her purchases. Ms. Edmundson first used Klarna on or about December 23, 2020, to make a purchase of $319.03 on the website of GameStop, one of Klarna's merchant partners. *See id.* ¶ 9. Consumers shopping on a merchant partner's website are offered the ability to pay with Klarna's service during the online-checkout process. *See id.* ¶ 10, Ex. 1. Once Ms. Edmundson elected to pay with Klarna, she was taken to Klarna's checkout widget to proceed with the purchase. *See id.* ¶ 11, Ex. 2. The checkout widget would have displayed the following message to Ms. Edmundson before she could proceed: "By continuing I accept Klarna Service Terms, Privacy Policy, Pay Later in 4 terms and request electronic communications." *Id.* ¶ 12, Ex. 2. Each of the underlined terms was a hyperlink the user could click to access the linked terms. *See id.* ¶ 12.

Klarna's Service Terms (the "Service Terms") are most relevant here, because they contain a mandatory arbitration provision. *See id.* ¶ 12, Ex. 3. Specifically, the Service Terms contain a broad arbitration provision, the existence of which is noted at the beginning of the Terms in bold font. *See id.* Ex. 3 at 1 ("By accepting these terms you also agree to … **Mandatory Arbitration of Disputes**"). That detailed and distinctly captioned arbitration provision sets forth the terms of mandatory arbitration applicable to disputes between Ms. Edmundson and Klarna:

> You agree that any and all disputes or claims, including without limitation federal and state regulatory and statutory claims, common law claims, and those based in contract, tort, fraud, misrepresentation or any other legal theory, arising out of or relating to these Terms or the relationship between you and Klarna or WebBank,

> and their agents, employees, officers, directors, predecessors in interest, and successors and assigns, shall be resolved exclusively through final and binding arbitration, as set forth in this ("Arbitration Provision"), rather than in court, except that you may assert claims in small claims court, if your claims qualify … This Arbitration Provision and any dispute or arbitration hereunder will be governed by the Federal Arbitration Act ….

Id. at 12-13. The provision gave Ms. Edmundson the choice to opt out of arbitration, and provided clear instructions on how to do so. *See id.* at 12.

The arbitration provision also contains, in capitalized letters, a prohibition on class and representative actions and non-individualized relief:

> YOU AGREE THAT EACH PARTY MAY BRING CLAIMS AGAINST THE OTHER ONLY ON AN INDIVIDUAL BASIS AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS, CONSOLIDATED OR REPRESENTATIVE ACTION OR PROCEEDING. UNLESS BOTH YOU AND THE OTHER PARTY AGREE OTHERWISE, THE ARBITRATOR MAY NOT CONSOLIDATE OR JOIN MORE THAN ONE PERSON'S OR PARTY'S CLAIMS AND MAY NOT OTHERWISE PRESIDE OVER ANY FORM OF A CONSOLIDATED, REPRESENTATIVE, OR CLASS PROCEEDING. THE ARBITRATOR MAY AWARD RELIEF (INCLUDING MONETARY, INJUNCTIVE, AND DECLARATORY RELIEF) ONLY IN FAVOR OF THE INDIVIDUAL PARTY SEEKING RELIEF AND ONLY TO THE EXTENT NECESSARY TO PROVIDE RELIEF NECESSITATED BY THAT PARTY'S INDIVIDUAL CLAMS). ANY RELIEF AWARDED CANNOT AFFECT OTHER KLARNA USERS.

Id. at 13.

The "Pay Later in 4 terms" likewise state:

> In addition to these terms and conditions, your use of this payment option is governed by the Klarna User Terms, which are incorporated into and made part of these terms and conditions (collectively, the "Agreement"). The Klarna User Terms include:
>
> - **Mandatory Arbitration of Disputes**

Id. Ex. 4 at 1. The underlined text "Klarna User Terms" was a hyperlink that would take users to the same Service Terms described above. *Id.* ¶ 32. And the underlined, bolded, bullet-pointed

text "Mandatory Arbitration of Disputes" was a hyperlink that would take users to the arbitration provision in those Service Terms. *Id.*

Ms. Edmundson was free to exit the Klarna checkout widget at any time before completing her GameStop purchase, without incurring any fee or penalty, and could have chosen to use another payment method to complete her purchase. *See* Riffe Decl. ¶ 15. Instead, Ms. Edmundson elected to confirm her purchase using Klarna's service. *See id.* Before confirming her purchase, Ms. Edmundson would have once more seen "I agree to the **payment terms**" on the final screen before clicking "Confirm and continue." *Id.* ¶ 14, Ex. 5. The "payment terms" was a hyperlink that would have taken Ms. Edmundson to the "Pay Later in 4 terms" described above; these Pay in 4 terms cross-referenced the arbitration agreement in the Service Terms. *Id.* Once Ms. Edmundson clicked "Confirm and continue," Klarna notified GameStop that it had approved the transaction, and GameStop completed the purchase. *See id.* ¶ 15.

Ms. Edmundson agreed to Klarna's Service Terms, including the mandatory arbitration provision, again when first logging into Klarna's own software application ("Klarna's app"). *See id.* ¶¶ 17-20. On or about December 27, 2020, Ms. Edmundson downloaded Klarna's app for the first time, and was shown a home screen informing her: "By proceeding, I accept the Klarna Shopping Service and confirm that I have read Klarna's Privacy Notice." *See id.* ¶¶ 18-19, Ex. 6. Each of the underlined terms in the message is a hyperlink. *Id.* ¶ 18. The "Klarna Shopping Service" link would have taken Ms. Edmundson to the Service Terms, which contained the mandatory arbitration provision to which Ms. Edmundson previously agreed. *See id.*, Ex. 3.

On January 22, 2021, Ms. Edmundson made another purchase through GameStop's website, again using the checkout widget. *Id.* ¶ 21. Using that widget, she would have once more been presented with the message: "By continuing I accept Klarna Service Terms, Privacy

Policy, Pay Later in 4 terms and request electronic communications." *Id.* ¶ 12, Ex. 2. Those terms were hyperlinked and underlined, in dark and bolded font against a white background. *See id.* Before confirming her purchase, Ms. Edmundson would have once more seen "I agree to the **payment terms**" on the final screen before clicking "Confirm and continue." *Id.* ¶ 22, Ex. 5. The "payment terms" was a hyperlink that would have taken Ms. Edmundson to the "Pay Later in 4 terms" that cross-referenced the arbitration agreement in the Service Terms. *Id.*

On February 18, 2021, Ms. Edmundson made her final purchase with Klarna. She purchased an item from Walmart through Klarna's app. *See id.* ¶ 25.[3]

B. Ms. Edmundson's Allegations

Even though the Service Terms to which Ms. Edmundson clearly and unequivocally agreed mandate individual arbitration of claims arising from "the relationship between [her] and Klarna," *id.* Ex. 3 at 12, Ms. Edmundson has filed putative class claims alleging that Klarna's advertising is fraudulent. Ms. Edmundson's contention that Klarna falsely promises users that they can pay for purchases later with no interest or fees is premised on the unremarkable fact that Klarna customers who lack sufficient funds to cover their purchases may—just like any customer anywhere—face overdraft fees from their third-party financial institutions.[4] Compl. ¶ 27; *see id.* ¶¶ 1–8, 22–26, 40–47. The complaint alleges that Klarna's actions constitute common law fraud and violate the Connecticut Unfair Trade Practices Act (CUTPA).

Ms. Edmundson filed suit on behalf of herself and a purported class of all persons who used the Klarna service and incurred an overdraft or insufficient-funds fee as the result of a

[3] Ms. Edmundson also made an additional purchase through the Klarna app on April 22, 2021, but canceled this order for unknown reasons. *See* Riffe Decl. ¶ 26.

[4] Ms. Edmundson's allegations run headlong into Klarna's disclosures that, "[d]epending on your payment method, your financial institution may charge you interest or fees under your agreement with them." Riffe Decl. Ex. 4.

Klarna repayment deduction, Compl. ¶ 48, seeking actual and punitive damages, pre-judgment interest and attorneys' fees and costs, disgorgement, declaratory relief, and injunctive relief. *See* Compl., Prayer for Relief.

ARGUMENT

I. MS. EDMUNDSON IS OBLIGATED TO ARBITRATE HER CLAIMS.

The arbitration agreement between Ms. Edmundson and Klarna is governed by the FAA, which mandates that arbitration agreements "evidencing a transaction involving [interstate] commerce . . . 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. This statutory provision "reflect[s] both a 'liberal federal policy favoring arbitration' and the 'fundamental principle that arbitration is a matter of contract.'" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Thus, "courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." *Id*. That is, federal courts must "rigorously enforce agreements to arbitrate." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Ms. Edmundson's arbitration agreement with Klarna expressly provides that the FAA governs that agreement "and any dispute or arbitration hereunder." Riffe Decl. Ex. 3 at 12.

When resolving a motion to compel arbitration, a court's review is limited to two discrete issues: (i) whether the parties agreed to a valid arbitration provision and (ii) whether that provision covers the claims at issue. *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297 (2010); *Holick v. Cellular Sales of N.Y., LLC*, 802 F.3d 391, 394 (2d Cir. 2015). In making these determinations, "it is proper (and in fact necessary) to consider … extrinsic evidence," such as declarations. *Bissonette v. Lepage Bakeries Park St., LLC*, 460 F. Supp. 3d 191, 196 (D. Conn. May 14, 2020), *appeal docketed*, No. 20-1681 (2d Cir. filed May 27, 2020); *Beaupre v. Chubb & Son, Inc.*, 2020 WL 4569990, at *2 n.2 (D. Conn. Aug. 7, 2020) ("The

Court may properly consider documents outside of the pleadings for purposes of deciding a motion to compel arbitration."); *Doctor's Assocs., Inc. v. Distajo*, 944 F. Supp. 1010, 1013–14 (D. Conn. 1996) (similar), *aff'd* 107 F.3d 126 (2d Cir. 1997).

If both requirements are met, the court must enforce the arbitration agreement. *See, e.g.*, *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (the FAA "leaves no place for the exercise of discretion by a district court"). "The party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Bissonette*, 460 F. Supp. 3d at 196; *see also Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2001). State contract law governs the threshold question of whether an enforceable arbitration agreement exists between litigants, *see First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995), and the federal substantive law of arbitrability governs whether the litigants' dispute falls within the scope of that agreement, *see Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

Here, because the parties entered into a valid arbitration agreement that covers Ms. Edmundson claims, the Court should grant Klarna's motion to compel and order Ms. Edmundson to arbitrate her claims as she agreed to do.

A. Ms. Edmundson Entered a Valid Agreement to Arbitrate.

State-law principles of contract formation govern the question whether the parties entered into a valid agreement to arbitrate. *See First Options*, 514 U.S. at 944; *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 73–74 (2d Cir. 2017). Under Connecticut law,[5] the essential elements of

[5] Although Klarna's Services Terms contain a choice-of-law provision agreeing that Ohio law will govern, *see* Riffe Decl. Ex. 3 at 11, that provision "does not determine the law that the Court should apply to determine *whether* the parties have entered into a valid and binding agreement," because "[a]pplying the choice-of-law clause to resolve the contract formation issue would presume the applicability of a provision before its adoption by the parties has been established." *Edmundson v. City of Bridgeport Bd. of Educ.*, 2019 WL 5066951, at *2 (Conn.

contract formation are offer and acceptance. *See, e.g.*, *Auto Glass Express, Inc. v. Hanover Ins. Co.*, 975 A.2d 1266, 1272–73 (Conn. 2009). Connecticut law tracks the law of other states, and courts in the Second Circuit routinely rely on other states' contract-law principles in adjudicating the enforceability of arbitration provisions. *See, e.g.*, *Meyer*, 868 F.3d at 74 (noting analysis would be the same under New York law because the states "apply substantially similar rules for determining whether the parties have mutually assented to a contract term"); *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 119 (2d Cir. 2012) (applying Connecticut and California law on assent and noting that there was no "need [to] resolve th[e] typically thorny choice-of-law question," because both states "apply substantially similar rules").

Klarna indisputably offered Ms. Edmundson a service pursuant to certain terms; the only remaining question is whether Ms. Edmundson accepted those terms. She did. Acceptance of an online contract, like any other contract, can be accomplished by "words or silence, action or inaction," so long as the user "'intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.'" *Schnabel*, 697 F.3d at 120 (footnote omitted) (quoting Restatement (Second) of Contracts § 19(2) (1981)); *see also Conn. Light & Power Co. v. Proctor*, 152 A.3d 470, 478–79 (Conn. 2016) (relying on Restatement for contract-law principles). Thus, "even where the offeree does not have *actual* notice of the contract terms, she will still be bound by such terms if a 'reasonably prudent'

Super. Ct. Sept. 18, 2019). Connecticut contract law therefore applies until the Court decides whether the parties entered a valid agreement to arbitrate. If the Court concludes they did, the contract's choice-of-law provision then controls any remaining analysis of the arbitration agreement's scope and enforceability. That said, the contract-formation principles are generally consistent in Ohio and Connecticut, such that a valid agreement to arbitrate exists here regardless of which state law applies. *See, e.g.*, *N. Side Bank & Tr. Co. v. Trinity Aviation, LLC*, 153 N.E.3d 889, 894 (Ohio Ct. App. 2020) (a contract exists under Ohio law "when there is [an] offer, acceptance, and mutual assent").

person would be on *inquiry* notice of those terms and she unambiguously manifested assent to those terms." *Soliman v. Subway Franchisee Advert. Fund Tr., Ltd.*, 999 F.3d 828, 834 (2d Cir. 2021) (applying California law); *see Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 30 n.14 (2d Cir. 2002) (same).

Whether a reasonably prudent user has inquiry notice turns on the "[c]larity and conspicuousness of arbitration terms." *Meyer*, 868 F.3d at 75 (quoting *Specht*, 306 F.3d at 30); *accord Soliman*, 999 F.3d at 835. In the context of web-based contracts, "clarity and conspicuousness are a function of the design and content of the relevant interface." *Meyer*, 868 F.3d at 75 (citing *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 233 (2d Cir. 2016)). Courts assessing clarity and conspicuousness of web-based contracts "must look at both the design of the screen … and the particular language used in relation to the hyperlinked or otherwise-referenced terms and conditions." *Soliman*, 999 F.3d at 837; *accord Starke v. SquareTrade, Inc.*, 913 F.3d 279, 289 (2d Cir. 2019) ("In the context of web-based contracts, we look to the design and content of the relevant interface to determine if the contract terms were presented to the offeree in [a] way that would put her on inquiry notice of such terms."); *Meyer*, 868 F.3d at 78 (similar).

Courts considering circumstances similar to these have consistently found that the parties entered a valid agreement to arbitrate based on inquiry notice of the terms. Agreements like the one Ms. Edmundson entered with Klarna are often called "sign-in wrap agreements" because "the sign-up screen" for the service "states that acceptance of a separate agreement is required before the user can access the service." *Selden v. Airbnb, Inc.*, 2016 WL 6476934, at *4–5 (D.D.C. Nov. 1, 2016). Although a link to the separate agreement is provided, the user is "not required to indicate that they have read the agreement's terms before signing up." *Id.* at *4.

Because "contracting for services on smartphone applications is now commonplace in the American economy," *Babcock v. Neutron Holdings, Inc.*, 454 F. Supp. 3d 1222, 1231 (S.D. Fla. 2020), "[a]ny reasonably-active adult consumer will almost certainly appreciate that by signing up for a particular service, he or she is accepting the terms and conditions of the provider," *Selden*, 2016 WL 6476934, at *5. That remains true even though "few people may take time to actually read the user agreements," because "ignorance of the precise terms does not mean that consumers are unaware they are entering contracts by signing up for internet-based services." *Id.*

The service that Klarna offers consumers is no exception. As outlined above, when Ms. Edmundson used Klarna's service—by using both the Klarna widget on a merchant's website and the Klarna app—she was required to agree to Klarna's Service Terms. In both contexts, the presentation of the Service Terms had characteristics that courts have held weigh in favor of inquiry notice.

First, on both the checkout widget and the app, the text presenting the Service Terms was reasonably conspicuous and specifically alerted Ms. Edmundson that she would be agreeing to the terms by proceeding. *See Meyer*, 868 F.3d at 78 ("Although the sentence is in a small font, the dark print contrasts with the bright white background, and the hyperlinks are in blue and underlined."). *Cf. Soliman,* 999 F.3d at 835 (no inquiry notice where terms were "buried within a fine-print paragraph with over eighty other words" and "not set off in any way within that paragraph (by color, emphasis, etc.)"); *Starke*, 913 F.3d at 293 (no inquiry notice where language "[did] not advise [plaintiff] that he would be deemed to agree to the contract terms in the document to be found by clicking that link"). Klarna's checkout widget stated: "By continuing I accept Klarna Service Terms Privacy Policy Pay Later in 4 terms and request electronic communications." Riffe Decl. ¶ 12, Ex. 2. Those terms were hyperlinked and

underlined, in dark and bolded font against a white background. *See id.* Ex. 2. Similarly, the Klarna app home screen stated: "By proceeding, I accept the Klarna Shopping Service and confirm that I have read Klarna's Privacy Notice." *See id.* ¶¶ 18–19, Ex. 6. Again, the terms were hyperlinked and underlined, but this time in white font that stood out against a black background. *See id.* Ex. 6.

Second, both Klarna pages are relatively uncluttered, and the hyperlink is visible without any scrolling. *See id.* Ex. 2, Ex. 6; *compare Meyer*, 868 F.3d at 78 ("The entire screen is visible at once, and the user does not need to scroll beyond what is immediately visible to find notice of the Terms of Service."), *with Nicosia*, 834 F.3d at 236–37 (page contained "between fifteen and twenty-five links," "text ... in at least four font sizes and six colors," and several buttons and advertisements).

Third, the language on merchant sites with Klarna widgets appears shortly before the customer's payment screen, and language on the Klarna app is right next to the button for signing in. *Compare Starke*, 913 F.3d at 294 (no inquiry notice where "the 'Terms & Conditions' hyperlink was neither spatially nor temporally coupled with the transaction").

Taken together, these factors show that the Klarna Service Terms "were reasonably clear and conspicuous such that a reasonable person in [the user's] shoes would have been on inquiry notice of them," *Soliman*, 999 F.3d at 834–35, and myriad courts have found valid agreements to arbitrate in similar circumstances. In *Meyer*, for example, the Second Circuit held that a sign-up interface put users on inquiry notice of Uber's Terms of Service under California law. *See* 868 F.3d at 74, 81. The court concluded that Uber's interface provided reasonable notice of its service terms because a hyperlink to those terms was clear and conspicuous on the Uber app's payment screen. *Id.* at 77–78. The court noted that the payment screen was uncluttered, with

relatively few fields and only one external link; the text including hyperlinks to the relevant documents appeared directly below the registration button; the text alerting the user to the other terms of use was clear and obvious by virtue of its font and color; the text including hyperlinks to the relevant documents was "temporally coupled" with the registration button; and the language "[b]y creating an Uber account, you agree" was a "clear prompt directing users to read the Terms and Conditions and signaling that their acceptance of the benefit of registration would be subject to contractual terms." *Id.* at 78–79.

Similarly, in *Feld v. Postmates, Inc.*, 442 F. Supp. 3d 825 (S.D.N.Y. 2020), the court found a consumer had inquiry notice of a service's terms, including an arbitration provision, where the language "By clicking the Sign Up or Facebook button, you agree to our **Terms of Service** and **Privacy Policy**" appeared "[b]elow the spaces for a user's email and password, and above the 'Sign Up' and 'Facebook' buttons" on the app's interface. *Id.* at 830–31 (applying California law, while noting analysis was same under New York law). "That the notice and hyperlinks are in a smaller font size does not render the disclaimer inconspicuous; the grey and black color contrast against the white background and are clear to the reasonably prudent user creating an account," plus the hyperlinks were "in a darker, bolder font than the rest of the text, signifying to a reasonably prudent user that these would be clickable terms." *Id.* at 831. Additionally, the "notice showing the hyperlinks is 'spatially coupled' with the sign-up button," such that "the text appears directly above the sign-up options on the same screen without requiring the user to scroll to see the notice," and also "temporally coupled," such that "the notice appears at the time of account creation." *Id.*

Each of these facts is true here, too. And, just as in *Feld*, "[t]hat the contents of the [terms of service] do not appear on the screen or that [the service] does not require a user to

actually examine the terms before assenting does not change the analysis." *Id.* "By signing up for" the service in these circumstances, a user "manifest[s] assent to the [terms of service], even if she did not click on the hyperlink to read the contract." *Id.* at 832. Numerous other decisions from across the country—applying the same contract-law principles as apply in Connecticut, *see supra* p. 9—confirm this conclusion. *See, e.g.*, *Bernardino v. Barnes & Noble Booksellers, Inc.*, 2017 WL 7309893, at *9–13 (S.D.N.Y. Nov. 20, 2017) (applying New York law, magistrate recommending that court enforce arbitration agreement hyperlinked on last screen user saw before placing order, citing same reasons as those in *Meyer*), *adopted*, 2018 WL 671258 (S.D.N.Y. Jan. 31 2018); *Whitt v. Prosper Funding LLC*, 2015 WL 4254062, at *1 (S.D.N.Y. July 14, 2015) (applying New York law and finding inquiry notice where term "borrower registration agreement" was underlined and shaded blue to signify a hyperlink); *Starke v. Gilt Groupe, Inc.*, 2014 WL 1652225, at *1 (S.D.N.Y. Apr. 24, 2014) (applying New York law and finding inquiry notice where "Shop Now" button was next to statement that "the consumer will become a Gilt member and agrees to be bound by the 'Terms of Membership,'" which were available next to the button as a hyperlink); *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 835, 837–39 (S.D.N.Y. 2012) (finding assent to venue provision in terms of service where, immediately below "Sign Up" button it said: "By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service," where phrase "Terms of Service" was underlined and clicking on hyperlink led user to Terms of Service.).[6]

[6] *See, e.g.*, *Peter v. DoorDash, Inc.*, 445 F. Supp. 3d 580, 586 (N.D. Cal. 2020) (applying California law and finding inquiry notice where "notice text appears" close to "sign-up button" and "text contrasts clearly with the background and is plainly readable"); *Melo v. Zumper, Inc.*, 439 F. Supp. 3d 683, 699–700 (E.D. Va. 2020) (applying Virginia law and finding inquiry notice where "*[d]irectly* below the 'Create Account' button, the popup window displayed an acceptance statement that read: 'By creating a Zumper Account you indicate your acceptance to our Terms and Conditions'" and the phrase "'Terms and Conditions' appeared in blue, indicating that

B. The Broad Arbitration Agreement Encompasses Ms. Edmundson's Claims.

Any reasonable reading of the arbitration agreement in Klarna's Service Terms confirms that it covers Ms. Edmundson's claims. She agreed to arbitrate "any and all disputes or claims … arising out of or relating to these Terms or the relationship between [the user] and Klarna … and their agents, employees, officers, directors, predecessors in interest, and successors and assigns." *See* Riffe Decl. Ex. 3 at 12-13. Arbitration provisions applying to "any claim or controversy arising out of or relating to [an] agreement" are "the paradigm of a broad [arbitration] clause," and are therefore interpreted broadly by courts in this Circuit. *Sportvision, Inc. v. MLB Advanced Media, LP*, 2020 WL 1957450, at *5 (S.D.N.Y. 2020) (quoting *Collins & Aikman Prods. Co. v. Bldg. Sys., Inc.*, 58 F.3d 16, 20 (2d Cir. 1995)); *see also Merrick v. UnitedHealth Grp. Inc.*, 127 F. Supp. 3d 138, 151 (S.D.N.Y. 2015) (collecting cases). By its terms, the arbitration provision here is broader still, applying to any controversy or claim that is "arising out of or relating to" either the Klarna Service Terms *or* "the relationship between [Ms. Edmundson] and Klarna." Riffe Decl. Ex. 3 at 12-13. This capacious language easily encompasses the claims here. Ms. Edmundson's dispute relates to Klarna's Service Terms

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Plaintiff could click a hyperlink to thoroughly read the Agreement" (emphasis in original)); *Dickey v. Ticketmaster LLC*, 2019 WL 9096443, at *7 (C.D. Cal. Mar. 12, 2019) (finding inquiry notice where terms were "*immediately* above the Sign Up Button and thus well-placed in terms of the action button taken to manifest acceptance," hyperlinked in blue font (emphasis in original)); *Cubria v. Uber Techs., Inc.*, 242 F. Supp. 3d 541, 544, 548–49 (W.D. Tex. 2017) (applying California law and finding inquiry notice where final screen of account registration process provided that "[b]y creating an Uber account, you agree to the Terms of Service"); *Selden*, 2016 WL 6476934, at *4–5 & n.1 (applying same and ruling same where text "By signing up, I agree to Airbnb's Terms of Service" was placed near middle of page, in close proximity to all sign-up buttons, and "any reasonably-observant user would notice the text and accompanying hyperlinks"); *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 908, 912 (N.D. Cal. 2011) (arbitration clause enforceable where user clicked on button marked "accept" below which was statement in small gray font indicating that clicking button meant accepting hyperlinked terms of service).

because those terms provide that Klarna's "[s]ervices are free of charge," *id.* at 5, and Ms. Edmundson contends that representation is fraudulent and unlawful, *see* Compl. ¶¶ 18, 22. Ms. Edmundson's dispute also arises out of "the relationship between [Ms. Edmundson] and Klarna" because she contests fees that she was charged because of her relationship with Klarna. *See, e.g.*, *id.* ¶¶ 4–5.

Indeed, the arbitration agreement expressly applies, "without limitation," to "state regulatory and statutory claims" and "common law claims," among other things, *id.*—precisely the type of claims Ms. Edmundson asserts here. And if there were "any doubt concerning the scope of arbitrable issues" after considering this clear language—and there ought not be—it would have to be "resolved in favor of arbitration," given the FAA's "federal policy favoring arbitration." *Moses H. Cone*, 460 U.S. at 24–25. "[T]he existence of a broad agreement to arbitrate creates a presumption of arbitrability which is only overcome if it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *WorldCrisa Corp. v. Armstrong*, 129 F.3d 71, 74 (2d Cir. 1997).

C. Ms. Edmundson Agreed to Arbitrate Her Claims on an Individual Basis

Under the Service Terms, Ms. Edmundson agreed not only to arbitrate the claims at issue in this complaint, but also to "BRING CLAIMS [against Klarna] ONLY ON AN INDIVIDUAL BASIS AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS, CONSOLIDATED OR REPRESENTATIVE ACTION OR PROCEEDING." Riffe Decl. Ex. 3 at 13.

Class-action waiver provisions of this kind are enforceable. "In the [FAA], Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612,

1619 (2018); *see also Concepcion*, 563 U.S. at 352 (FAA preempts state-law decision that class waivers in arbitration agreements are unconscionable); *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 53 (2015) ("The [FAA] is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act."). And Ms. Edmundson's agreement with Klarna expressly provides that it will be governed by the FAA. *See supra* p. 4. Accordingly, Ms. Edmundson is required to arbitrate her claims on an individual basis, not through class-wide proceedings.

II. ALL PROCEEDINGS SHOULD BE STAYED PENDING ARBITRATION OF MS. EDMUNDSON'S CLAIMS.

For the foregoing reasons, this Court should grant the motion to compel and order that "such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. Once this Court has compelled arbitration of Ms. Edmundson's claims, "the FAA mandate[s] a stay of proceedings." *Edible Int'l, LLC v. Google, LLC*, 2018 WL 3421319, at *4 (D. Conn. July 13, 2018) (quoting *Katz v. Cellco P'ship*, 794 F.3d 341, 345 (2d Cir. 2015)); *see Dean Witter Reynolds*, 470 U.S. at 218 (similar). A stay is appropriate when "any party" requests one. *Abdullayeva v. Attending Homecare Servs. LLC*, 928 F.3d 218, 226 n.5 (2d Cir. 2019) (noting that "it is inappropriate for a court to dismiss an action after compelling arbitration where a stay has been requested by any party"); *Virk v. Maple-Gate Anesthesiologists, P.C.*, 657 F. App'x 19, 20–21 (2d Cir. 2016) (similar); *Bernardino v. Barnes & Noble Booksellers, Inc.*, 763 F. App'x 101, 104 (2d Cir. 2019) (similar).

This approach is consistent with the plain language of the FAA, which provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, *the court* …, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall on application of one of the parties stay the trial of the action until such arbitration has been had* ….

9 U.S.C. § 3. And this approach makes sense: allowing judges discretion to dismiss rather than stay "effectively converts an otherwise-unappealable interlocutory stay order into an appealable final dismissal order," and "[a]ffording judges such discretion would empower them to confer appellate rights expressly proscribed by Congress." *Katz*, 794 F.3d at 346. If a judge lacks discretion to confer appellate rights on a party that would otherwise lack them, surely a *litigant* lacks power simply by requesting a dismissal. This Court should thus stay Ms. Edmundson's claims against Klarna pending arbitration.

CONCLUSION

Online merchants throughout the United States regularly rely on the kind of sign-in wraps that contained the arbitration agreement between Ms. Edmundson and Klarna. Courts in the Second Circuit and beyond have consistently found such terms of service to be reasonable for putting consumers on notice of their agreement to arbitrate any disputes. To depart from that precedent here would not only upend Ms. Edmundson's agreement with Klarna but risk pulling the rug out from under many online merchants. For the reasons above, Klarna respectfully asks this Court to compel arbitration of Ms. Edmundson's claims and to stay proceedings pending resolution of that arbitration.

Dated: August 16, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2021, the foregoing motion was filed electronically and was served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent electronically to all registered e-filers in this case by operation of the Court's electronic filing system as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF system.

/s/ Leah Godesky
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