IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ASHLEY MOORE and GREG SAFIAN, Plaintiffs, v. DOORDASH, INC., Defendant.	))))))))))	C.A. No. 19-00636-MN

REPLY IN SUPPORT OF DOORDASH, INC.'S MOTION TO COMPEL ARBITRATION AND DISMISS

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INTRODUCTION

When Plaintiffs signed up for DoorDash accounts, the following phrase appeared immediately above the "Sign Up" button: "By tapping Sign up, Continue with Facebook, or Continue with Google, ***you agree*** to our Terms and Conditions and Privacy Statement" (emphasis added). The phrase "Terms and Conditions" was highlighted in blue text and hyperlinked to DoorDash's Terms & Conditions ("T&C"), which included the Arbitration Agreement in bold and all-capital letters. And the Arbitration Agreement indisputably covers the claims at issue here. In these circumstances, when confronted with similarly formatted sign-up pages containing links to binding terms and conditions, courts have consistently upheld the agreements and compelled arbitration. This Court should reach the same result.

Plaintiffs' primary authority, *James v. Global TelLink Corp.*, 852 F.3d 262 (3d Cir. 2017), is inapposite because it involved a *telephone audio message* that notified users they could go to a website to view terms and conditions. The Third Circuit expressly distinguished those facts from the situation at issue here, where "the terms and conditions were immediately available to online users." *Id.* at 266. Indeed, the district court in *James* compelled arbitration of the computer-user plaintiff who (like Plaintiffs here) was provided with the terms and conditions at the same time she signed up online. That ruling was not disturbed on appeal, and thus *James* supports DoorDash.

Finally, Plaintiffs do not mention—let alone challenge—the Arbitration Agreement's delegation clause, thereby conceding that any disputes regarding arbitrability must be decided by an arbitrator. Thus, to the extent there are any questions about the enforceability of the parties' Arbitration Agreement, the Court should direct those questions to an arbitrator.

ARGUMENT

A. The Terms & Conditions Are A Valid Contract

Plaintiffs argue that: (1) the Third Circuit's decision in *James* precludes a finding that the T&C constitute a valid contract; and (2) even if the T&C constitute a "sign-in wrap" agreement, the T&C remain unenforceable. Neither argument has merit.

1. *James* Favors DoorDash

Plaintiffs' sole authority, *James*, supports DoorDash. In *James*, there were two types of plaintiffs—those who signed up for the services by phone and those who signed up online. 852 F.3d at 264. The Third Circuit refused to compel arbitration with respect to the plaintiffs who signed up over the phone, but the plaintiff who signed up on the Internet (like Plaintiffs in this case) *was* compelled to arbitration. *Id.* at 264 n.2.

The Third Circuit explained this important distinction. When callers used an automated voice-response system to create an account or conduct transactions by phone, they received an audio notice that "any transactions you complete … are governed by the terms of use … posted at [the defendant's website]." *James*, 852 F.3d at 264. Users were not "required to visit the website," "demonstrate acceptance of the terms of use through any affirmative act," or "notified by the automated telephone service that their use of [the defendant's] service would constitute assent to the terms of use." *Id.* at 266. In contrast, those who signed up online were "presented with all the terms of use on the computer screen, including the arbitration provision, and provided [their] assent by clicking the 'Accept' button." *Id.* at 264 n.2. The district court therefore compelled those users to arbitration, *id.*, and the Third Circuit left that ruling intact, explaining the significance of the fact that "the terms and conditions were immediately available to online users." *Id*. at 266.

Thus, *James* squarely supports arbitration in this case. As in *James*, the T&C were immediately available to Plaintiffs. To view the T&C, Plaintiffs needed only to click the conspicuous blue hyperlink immediately next to the "Sign Up" button that said "Terms and Conditions." D.I. 9 ("Tang Decl.") ¶ 8 & Ex. B. And Plaintiffs were clearly notified that "[b]y tapping Sign up, Continue with Facebook, or Continue with Google, you agree to our Terms and Conditions." *Id.*

2. The T&C Is A Valid And Enforceable Sign-In Wrap Agreement

Plaintiffs next argue that "browsewrap" agreements are unenforceable. Tellingly, however, they stop short of arguing that the T&C constitute a "browsewrap" agreement—as they clearly do not. *See* D.I. 11 at 7–8. As DoorDash explained (D.I. 7 at 12), "[a] 'browsewrap' agreement is one in which an internet user accepts a website's terms of user merely by browsing the site." *Selden v. Airbnb, Inc.*, 2016 WL 6476934, at *4 (D.D.C. Nov. 1, 2016). "Several courts have enforced browsewrap agreements," *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 836 (S.D.N.Y. 2012), and Plaintiffs cite no authority that browsewrap agreements are *per se* unenforceable. They invoke *Hough Associates, Inc. v. Hill*, 2007 WL 148751 (Del. Ch. Jan. 17, 2007) (cited at D.I. 11 at 8), but *Hough* is inapposite. In *Hough*, two contracts were at issue, but only one contained an arbitration clause. The court denied a motion to compel arbitration over a dispute in the contract that contained no arbitration clause. *Id.* at *12–13. Here, Plaintiffs do not dispute that the only contract at issue (the T&C) contains an Arbitration Agreement.

In any event, this Court need not resolve the enforceability of "browsewrap" agreements because the T&C are not "browsewrap." Rather, the T&C constitute an enforceable "sign-in wrap" agreement "in which a user signs up to use an internet product or service, and the signup screen states that acceptance of a separate agreement is required before the user can access the service." *Selden*, 2016 WL 6476934, at *4 (enforcing "sign-in wrap" agreement). Plaintiffs

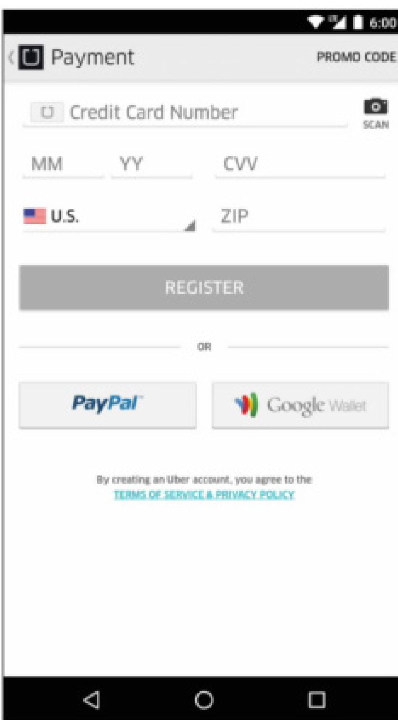
argue that *Selden* is distinguishable because "DoorDash's disclosure is … buried at the bottom of the sign-up splash screen, in small font, beneath much larger Google, Facebook, and DoorDash logos that serve to distract users, and/or possibly obscure the text if viewed on mobile devices." D.I. 11 at 9–10. In reality, the disclosure is not "buried"—it is the *only* text near the "Sign Up" button.

Sign up
Already have an account? Sign in
Continue with Facebook
Continue with Google
or continue with email
First name
Last name
Email
Mobile number
Password
at least 8 characters
Show
By clicking Sign up, Continue with Facebook, or Continue with Google, you agree to our Terms and Conditions and Privacy Statement.
Sign up

Tang Decl. Ex. B. And the Facebook and Google logos are located nowhere near the disclosure. *See id.* Tellingly, neither Moore nor Safian alleges that she or he had issues with "obscure … text," and they have presented no evidence of such obscuring.

Many courts have found that "sign-in wrap" agreements like the T&C are enforceable. *See, e.g.*, *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 80 (2d Cir. 2017); *Crawford v. Beachbody, LLC*, 2014 WL 6606563, at *3 (S.D. Cal. Nov. 5, 2014); *Starke v. Gilt Groupe, Inc.*, 2014 WL 1652225, at *3 (S.D.N.Y. Apr. 24, 2014); *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 912 (N.D. Cal. 2011); *Fteja*, 841 F. Supp. 2d at 840.

The Second Circuit's decision in *Meyer* is instructive. In that case, the court found that "a reasonably prudent smartphone user knows that text that is highlighted in blue and underlined is hyperlinked to another webpage where additional information will be found." 868 F.3d at 77–78. In considering the sign-in screen below, the court concluded that the blue hyperlinked text in close proximity to the "Register" button provided adequate notice to prospective Uber users that by clicking "Register," they were agreeing to Uber's Terms & Conditions. *Id.* at 78–80.



Id., Addendum B.

Similarly, the *Crawford* court compelled arbitration where "Plaintiff had to click an orange button that read 'PLACE ORDER,'" and where "[t]he following sentence appear[ed] immediately above the 'PLACE ORDER' button, 'By clicking Place Order below, you are agreeing that you have read and understand the Beachbody Purchase Terms and Conditions, and Team Beachbody Terms and Conditions.'" 2014 WL 6606563, at *3 (citations omitted). Similar to this case, "the terms 'Terms and Conditions' were in blue font while the rest of the

language in the sentence was in grey font, which was hyperlinked to the full text of the Terms and Conditions." *Id.*

Plaintiffs argue that *Crawford* is distinguishable because (i) "an arbitration/class waiver provision was not at issue," (ii) DoorDash did not require its customers to read the T&C or notify customers about the T&C's "rights-altering … provisions," and (iii) *Crawford* did not consider the conspicuousness of the notice. D.I. 11 at 10 n.1. All three arguments fail.

First, Plaintiffs do not (and cannot) identify anything unique about arbitration agreements or class waivers that would impact contract *formation*—and any attempt to do so would be prohibited by the FAA, which forbids treating arbitration contracts less favorably than other contracts. *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89–90 (2000). Second, DoorDash's sign-up screen uses language that is substantially similar to the language in *Crawford*. *Compare Crawford*, 2014 WL 6606563, at *3, *with* Tang Decl. Ex. B ("By clicking Sign up, Continue with Facebook, or Continue with Google, you agree to our Terms and Conditions and Privacy Statement."). Third, the *Crawford* court considered the conspicuousness of the notice—it found that (as here) the notice "appears immediately above the 'PLACE ORDER' button," and that (as here) the phrase "Terms and Conditions" was in blue font among the other text in gray font, and that (as here) "Terms and Conditions" was hyperlinked to the text of the T&C. *Crawford*, 2014 WL 6606563, at *3. The ruling in *Crawford* should apply here as well.

Plaintiffs cite *Applebaum v. Lyft, Inc.*, 263 F. Supp. 3d 454 (S.D.N.Y. 2017), to argue that courts should not enforce "sign-in wrap" agreements "where the disclosure of the terms is not conspicuous or is ambiguous." D.I. 11 at 10 n.1. But *Applebaum granted* a motion to compel

arbitration, and it cited a long list of cases where the location of hyperlinks to contractual provisions "cured" any "ambiguity about their significance" and thus rendered them enforceable. 263 F. Supp. 3d at 468 n.4. Here, the location of the hyperlink directly above the "Sign Up" button makes its significance clear.

Finally, Plaintiffs rely on *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359 (E.D.N.Y. 2015), but *Berkson* is no longer good law in light of the Second Circuit's subsequent decision in *Meyer*. Even so, *Berkson* is an outlier in a growing consensus that "sign-in wrap" agreements are enforceable. *See, e.g.*, *Bernardino v. Barnes & Noble Booksellers, Inc.*, 2017 WL 7309893, at *11 (S.D.N.Y. Nov. 20, 2017) (distinguishing *Berkson* and compelling arbitration when terms were available by hyperlink); *Selden*, 2016 WL 6476934, at *5 (finding reasonably conspicuous notice despite *Berkson*). Indeed, the *Berkson* court acknowledged that courts have enforced "sign-in wrap" agreements where (as here) "the hyperlinked 'terms and conditions' is next to the only button that will allow the user to continue use of the website." 97 F. Supp. 3d at 401. Because DoorDash presented hyperlinks to the T&C in conspicuous font near the "Sign Up" button, the Court should join the consensus of *Meyer*, *Selden*, *Fteja*, *Crawford*, *Starke*, and *Swift* and find the T&C to be a valid contract.[1]

[1] Plaintiffs argue that *Newell Rubbermaid Inc. v. Storm*, 2014 WL 1266827 (Del. Ch. Mar. 27, 2014), and *Cabela's LLC v. Wellman*, 2018 WL 5309954, at *7 n.86 (Del. Ch. Oct. 26, 2018), are inapposite because *Newell* concerned "clickwrap" and *Cabela's* involved an electronic signature. D.I. 11 at 7–8. But Plaintiffs cite nothing for the proposition that contracts are valid only when signed, and no such rule exists. *See Carlson v. Hallinan*, 925 A.2d 506, 524 (Del. Ch. 2006) (listing three elements for valid contract under Delaware law, none of which is a signature). And courts have rejected attempts to evade "sign-in wrap" agreements "in light of recent caselaw holding that clickwrap presentations providing a user with access to the terms of service and requiring a user to affirmatively accept the terms, even if the terms are not presented on the same page as the acceptance button, are sufficient." *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 912 (N.D. Cal. 2011).

B. The FAA Governs And Requires Arbitration

Plaintiffs do not dispute that the FAA governs this dispute. *See* D.I. 11 at 2–3 (citing FAA standard). Nor do they dispute that the FAA declares a "liberal federal policy" favoring the enforcement of arbitration agreements. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018). Thus, there is no dispute that, if the T&C constitute a valid contract, the FAA requires arbitration here.

C. The Parties Delegated Any Disputes Over Arbitrability To The Arbitrator

Because the T&C constitute a valid contract, the Court must enforce it according to its terms—including the clause delegating decisions of arbitrability to the arbitrator. Plaintiffs do not dispute that the T&C state that "[t]he arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, *enforceability* or *formation* of this Arbitration Agreement." Tang Decl. Ex. A, § 12(c) (emphasis added). The Supreme Court has repeatedly held that such clauses must be enforced according to their terms. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–84 (2002). That ends the inquiry—the Court must compel arbitration. *Henry Schein*, 139 S. Ct. at 529 ("When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract."). Plaintiffs fail to even address DoorDash's argument about the T&C's delegation clause and thus have waived the issue. *See Nagle v. Alspach*, 8 F.3d 141, 143 (3d Cir. 1993) (party waives issues it fails to brief).

D. In Any Event, This Dispute Is Arbitrable

Because the parties delegated arbitrability to the arbitrator, this Court should not resolve the two "gateway" questions of arbitrability itself. But even if it does, the Court should still

compel arbitration because both questions are satisfied. As DoorDash explained (D.I. 7 at 11–14), the parties formed a valid agreement to arbitrate under Delaware law. And the Arbitration Agreement clearly covers Plaintiffs' claims. *See id.* at 14–15; Tang Decl. Ex. A, § 12(a) (Arbitration Agreement applies to "any dispute or claim relating in any way to your access or use of the Services as a consumer of our Services, … or to any aspect of your relationship or transactions with Company as a consumer of our Services").

Plaintiffs highlight the fact that courts have compelled arbitration in cases involving DoorDash delivery providers rather than customers. D.I. 11 at 5–7. But Plaintiffs do not identify any legally relevant differences between the arbitration provision in DoorDash's Independent Contractor Agreements ("ICAs"), which courts *unanimously* have enforced, and the T&C's Arbitration Agreement here, which uses nearly identical language. Plaintiffs argue that DoorDash required a handwritten signature in *Magana*, but in both *Magana* and every other case compelling arbitration, the delivery providers agreed to electronic versions of the ICA that (as here) did not require a signature.

E. Plaintiffs Do Not Dispute The Enforceability Of The Parties' Class-Action Waiver

Plaintiffs make no attempt to dispute that the parties' class-action waiver is enforceable—nor can they. The Supreme Court has held that class-action waivers are enforceable. *See Epic Sys.*, 138 S. Ct. at 1619; *Am. Express Corp. v. Italian Colors Rest.*, 570 U.S. 228, 238–39 (2013); *Concepcion*, 563 U.S. at 352. And multiple courts have held that the class-action waiver in DoorDash's ICA is enforceable and compelled arbitration on an individual basis. *See Magana v. DoorDash, Inc.*, 343 F. Supp. 3d 891, 901 (N.D. Cal. 2018); *Farran*, D.I. 8 ("Lipshutz Decl.") Ex. A, at 2. This Court should do the same.

CONCLUSION

The Court should compel arbitration of Plaintiffs' claims and dismiss.

Dated: June 14, 2019

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CERTIFICATE OF SERVICE

I, Elena C. Norman, hereby certify that on June 14, 2019, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

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I further certify that on June 14, 2019, I caused a copy of the foregoing document to be served by e-mail on the above-listed counsel.

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