Harrison v Revel Tr. Inc.
2022 NY Slip Op 30430(U)
February 7, 2022
Supreme Court, Kings County
Docket Number: Index No. 519046/2020
Judge: Debra Silber
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 7th day of February, 2022.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

- -X

TROY HARRISON,

Plaintiff,

- against -

REVEL TRANSIT INC.,

Defendant.

- -X

DECISION / ORDER

Index No. 519046/2020

Mot. Seq. 1 - 3

The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	7-15; 30-43; 53-61
Opposing Affidavits (Affirmations)	16-21; 44-52; 63-70
Reply Affidavits (Affirmations)	71-74; 38

Upon the foregoing papers, defendant Revel Transit Inc. (Revel) moves, in motion (mot.) sequence (seq.) one, for an order changing the place of trial of this action from Kings County to New York County based on the forum selection clause contained within the parties' agreement. Plaintiff moves, in mot. seq. two, for an order permanently staying arbitration and striking Revel's 18th, 19th, 21st, 23rd and 24th Affirmative Defenses pursuant to CPLR 3211. Revel cross-moves, in mot. seq. three, for an order compelling plaintiff to arbitrate pursuant to the terms of the parties' agreement. For the reasons which follow, defendant's motions are granted, and plaintiff's motion is denied.

Background

On April 24, 2020, plaintiff Troy Harrison (plaintiff) was riding a Revel electric moped on 7th Avenue and West 122nd Street in Manhattan when, due to allegedly faulty or malfunctioning brakes, plaintiff was thrown off the moped. As a result of the injuries that he sustained from this incident, on October 6, 2020, plaintiff commenced the instant action against Revel seeking to recover for his injuries.

On November 24, 2020, along with service of its verified answer, Revel served a Demand to Change Venue, seeking to change the place of trial to New York County pursuant to the forum selection clause contained in its Terms of Use. Plaintiff failed to respond to said demand. On December 9, 2020, Revel timely filed the instant motion to change venue. Thereafter, on March 3, 2021, Revel served a Demand for Arbitration on plaintiff, based on the mandatory arbitration provisions contained within its “Rental Agreement, Waiver of Liability, and Release” (hereinafter Rental Agreement) as well as its Terms of Use. On March 19, 2021, plaintiff filed the instant motion seeking a permanent stay of arbitration. Revel cross-moved, on April 22, 2021, seeking to compel plaintiff to participate in binding arbitration. The court first turns to the parties’ motions regarding the mandatory arbitration clause contained in Revel’s Rental Agreement and Terms of Use.

Motions to Stay and Compel Arbitration

Plaintiff moves to stay arbitration on several grounds. First, plaintiff argues that mandatory arbitration clauses, like the one herein, are null and void under New York’s General Business Law (GBL) § 399-c. He also avers that the Federal Arbitration Act, under 9 USC § 2 (hereinafter FAA) does not displace GBL § 399-c because the parties’ agreement does not

involve or affect interstate commerce. In support of his position, plaintiff references the fact that, per Revel's website, a prospective Revel moped user must: (1) pick up and return a rented moped in the designated service areas within Manhattan, Queens, Brooklyn, and the Bronx only; (2) not operate a Revel moped on major bridges, tunnels, and highways; and (3) only operate on roads with speed limits of 30 mph or less. Based on the foregoing and the 60-mile maximum range capacity of a Revel moped when fully charged, plaintiff contends that the use of Revel's mopeds can only be for purposes of intrastate commerce, not interstate commerce.

Secondly, plaintiff contends that the subject arbitration clause is unenforceable because he did not agree to it. Further, plaintiff argues that Revel's arbitration clause was not "reasonably conspicuous" under relevant caselaw because: (1) Revel does not require the user to either view (by clicking the hyperlink) or scroll through its Rental Agreement prior to finalizing his or her membership; (2) the Rental Agreement starts with certain "Important Bullet Points" but does not refer to an arbitration clause or alert the user that he or she is giving up certain rights; and (3) there is only a "single brief reference" to arbitration in the 17-page Rental Agreement which provides:

> "11.0 Dispute Resolution: Member and Revel agree to submit to the Dispute Resolution provisions of the Terms of Use, which are fully incorporated herein by this reference. Those provisions include a binding arbitration provision."

Plaintiff argues that this language is deficient because there is no explanation of the term "Dispute Resolution" which informs the user that he or she is agreeing to submit to arbitration and thereby relinquishing the right to proceed with a claim in a court of law. According to plaintiff, the insufficiency of the foregoing language, which doesn't provide a user with notice, is evidenced by the vastly different version reflected in Revel's recently updated "Moped

Rental Agreement Waiver of Liability and Release" (hereinafter 2021 Rental Agreement). Plaintiff contends that the 2021 Rental Agreement differs from the November 2019 version he encountered because the reference to binding arbitration is on the first page, in bold face type, with all capitalized letters. Now, the relevant paragraph begins by providing: "[W]e want to highlight the following at the beginning for ease of reference," and then it proceeds to describe the mandatory arbitration provision in detail, in bold face, capitalized letters and in larger print. The court notes here that the plaintiff does not dispute that the printed versions of defendant's agreements provided in these motions by defendant are the versions he confronted when he signed up in March of 2020.

Similarly, plaintiff argues that Revel's Terms of Use failed to give a user adequate notice because it is also hyperlinked, and a user did not need to click the hyperlink or review the Terms of Use to complete the Revel registration process. Further, plaintiff argues that, by its own terms, Revel's Terms of Use pertains solely to the rider's use of the Revel "[p]latform" and not to the actual use or operation of its mopeds. That "[p]latform" is defined as "the website App, and, in the case of a Member, the Service." "Service" is defined as the

> "reservation and rental management service that allows for the reservation of and invoicing for the rental and use of Mopeds, the incidental cost associated with such rentals. Service also includes the App and underlying technology necessary or used to operate the Service, the support and other services provided to Members by or on behalf of Company to ensure the smooth operation of the rental and maintenance of the Moped and Supplemental Equipment and any exchanges, interaction or Communications that a Member has with our employees, representatives with respect to the Service" (see NYSCEF Doc. Nos. 12, 48 and 57, Terms of Use, "Definitions," § 3)

Plaintiff contends that nothing in the foregoing paragraph refers to the actual use of the Revel mopeds.

Lastly, plaintiff argues that Revel waived its right to enforce the mandatory arbitration provision by (1) moving to change venue prior to serving plaintiff with its Demand for Arbitration and (2) by unreasonably delaying service of its Demand for Arbitration. According to plaintiff, based on the language contained in the venue selection clause, Revel's decision to change venue precludes Revel from subsequently enforcing its mandatory arbitration provision because by moving to change venue first, Revel acknowledged that the arbitration clause "do[es] not apply…." (*see id.* at § 17, "Exclusive Venue for Litigation").[1] Plaintiff also contends that he has been prejudiced by Revel's decision to wait to file its Demand for Arbitration until after it sought a venue change because plaintiff spent time and resources opposing Revel's motion and engaging in discovery, such as serving a Bill of Particulars, Combined Discovery Demands and a preliminary conference request with the court, prior to the service of the demand.

In opposition to plaintiff's motion and in support of its cross-motion to compel plaintiff to participate in binding arbitration, Revel contends that GBL § 399-c is preempted by the FAA because the parties' agreement affects interstate commerce under both U.S. Supreme Court and New York State court precedents. In this regard, Revel states that it is in the business of facilitating the rental of mopeds across the United States, including in Florida, California, Washington, D.C. and New York through its Internet-based application. Further, defendant Revel claims that its application provides cellular and GPS maps and tracking throughout the

[1] The "Exclusive Venue for Litigation" provision provides as follows: "To the extent that the arbitration clause set forth above does not apply and a Claim proceeds in court rather than in arbitration, each party waives any right to a jury trial, and agrees that any litigation between them shall be filed exclusively in state or federal courts located in New York, NY except for small claims court actions which may be brought in New York, NY or in any county where you reside."

United States to allow its members to navigate, and so Revel can provide customer support and remote assistance, while also giving Revel the ability to track its mopeds. Additionally, defendant Revel claims that the mopeds are manufactured in China by NIU, distributed in the United States by Genuine, and leased to Revel through agreements with Farnam Street Financial, a Minnesota company, and NFS Leasing, a Massachusetts company. Because Revel's service relies on this web of out-of-state and international partners and suppliers, Revel contends that the parties' agreement and plaintiff's use of a Revel moped affects "interstate commerce."

Secondly, Revel contends that, regardless of whether plaintiff was in fact aware of the arbitration clause, plaintiff was on inquiry notice of everything contained in Revel's Rental Agreement and Terms of Use as a result of the application's registration process since, among other things, the hyperlinks to these agreements when registering were clear and reasonably conspicuous.

In support, Revel proffers an affidavit from its Director of Product, Asa Block (Block), as well as corresponding exhibits showing screenshots of the screens that a prospective user would have encountered when plaintiff signed up. Block avers that, on March 13, 2020, prior to the alleged accident, plaintiff created an account with Revel on his mobile device via the Revel Application (App) (NYSCEF Doc Nos. 13, 46, and 55, Asa Block Affidavit, ¶ 7). To become a Revel moped user, plaintiff had to download and open the App on his mobile device and complete the "Sign-Up Flow" (*id.* at ¶ 9), which is a "series of screens and queries that a [prospective] Revel user must complete before registering his or her account" (*id.* at ¶ 5). Defendant claims that at the bottom of the first screen encountered by plaintiff were the words,

"I accept the Terms of Use and Privacy Policy" with the words "Terms of Use" and "Privacy Policy" appearing in light blue text indicating that each contain hyperlinks, while the rest of the text on this screen appears in black or gray (*id.* at ¶ 10). Clicking on the words redirects the prospective user, through their mobile device's web browser, to a webpage displaying Revel's Terms of Use (*see id.* at ¶ 11). Further, at the bottom of the screen, to the right of the words "I accept the Terms of Use and Privacy Policy," there is a "toggle" button which must be activated, indicating acceptance of Revel's Terms of Use and Privacy Policy, in order to proceed and gain access to Revel's mopeds (*see id.* at ¶¶ 12-14). Similarly, defendant claims plaintiff could not move through the Sign-Up Flow without indicating his acceptance of Revel's Rental Agreement, which also required plaintiff to activate a toggle button confirming "I have read, understand, and accept Revel's Rental Agreement" (*id.* at ¶¶ 18-19).

Revel also argues that the language of its arbitration clause was clear and conspicuous, and that any revisions or updates made to its Rental Agreement does not prove it was not. According to Revel, the language in its Rental Agreement, at the time of plaintiff's registration, reflected Revel's intent to arbitrate by using an all-capitalized and bolded text header entitled "**11.0 DISPUTE RESOLUTION**" (NYSCEF Doc Nos. 11, 47 and 56, Revel Rental Agreement, 10). Additionally, Revel points out that on the first page of the Rental Agreement, there is a section entitled "**IMPORTANT BULLET POINTS**" which also references binding arbitration (*id.* at 1). Thus, Revel argues that plaintiff's assertion that there is only one reference to binding arbitration in the Rental Agreement is incorrect.

Further, Revel contends that plaintiff separately agreed to its Terms of Use in the Sign-Up Flow. On the first page, under section 1 entitled "**Important Notice**" (emphasis in

original), it provides, in all capitalized letters, that the Terms of Use "REQUIRES THE USE OF ARBITRATION…TO RESOLVE DISPUTES, RATHER THAN JURY TRIALS OR ANY OTHER COURT PROCEEDINGS...." (NYSCEF Doc Nos. 12, 48 and 57, § 1). In addition, under section 17 of the Terms of Use, entitled "**Dispute Resolution**" (emphasis in original), a detailed description of the arbitration process is provided. Further, the first sentence of this section also instructs the user to "read this clause carefully" as "[i]t may significantly affect your legal rights, including your right to file a lawsuit in court" (*id.* at § 17). Section 17, Revel points out, also contains a subheading in bold text "**Agreement to Binding Arbitration**" (emphasis in original) and that beneath this subheading is another clear explanation of the arbitration agreement.

Under this subheading, the arbitration clause provides:

> "EXCEPT FOR DISPUTES THAT QUALIFY FOR SMALL CLAIMS COURT, ALL DISPUTES ARISING OUT OF OR RELATED TO THE LEGAL TERMS OF YOUR USE OF (INCLUDING ACCESS TO) THE PLATFORM OR ANY ASPECT OF THE RELATIONSHIP BETWEEN YOU AND COMPANY, WHETHER BASED IN CONTRACT, TORT, STATUTE, FRAUD, MISREPRESENTATION OR ANY OTHER LEGAL THEORY, WILL BE RESOLVED THROUGH FINAL AND BINDING ARBITRATION BEFORE A NEUTRAL ARBITRATOR INSTEAD OF IN A COURT BY A JUDGE OR JURY AND YOU AGREE THAT YOU AND COMPANY ARE EACH WAIVING THE RIGHT TO TRIAL BY A JURY" (*id.* at § 17).

In support of its contention that its contract terms and user interface were clear and conspicuous, Revel proffers the affidavit of Eric Boelhouwer (Boelhouwer), PhD, CSP, CPE, a "Human Factors expert with professional experience in product safety and the evaluation of instructions, warnings and other safety communications" (NYSCEF Doc Nos. 49 and 58,

Boelhouwer Affidavit, ¶ 2). Boelhouwer explains that "Human Factors Engineering is the scientific discipline concerned with the understanding of interactions among humans and other elements of a system, including written communications" (*id.* at ¶ 7). From a "Human Factors perspective," Boelhouwer opines that "the presentation and the content of the subject Revel application (app) user interface is consistent, reasonable and appropriate" insofar as "[t]he signup flow in the app makes use of customary design features to make the hyperlinks prominent and conspicuous as compared to the surrounding text (*id.* at ¶¶ 11-12). And that "[t]hese traditional technical writing conventions include layout, color, capitalizing the first letter of each word for the hyperlinks, and concise messages" (*id.* at ¶ 12). And that based "upon visual appearance, readers can readily identify the statements are communicating information to which they must agree before continuing the enrollment process" (*id.*). Boelhouwer also opines on the content of the Rental Agreement and Terms of Use, stating that the information contained therein "meet the objective of any written communication, which is to present information that is capable of being noticed, read and understood by anticipated readers" (*id.* at ¶ 24). And that "[a]s it relates to the format and presentation of the Terms of Use and the Rental Agreement, these documents are reasonable and appropriate" (*id.* at ¶ 25). For example, Boelhouwer explains that "the organization of topics into sections and corresponding subsections facilitates the transfer of information and increases the potential recall of such information" and "the language used is defined and is neither confusing nor unnecessarily technical in nature" (*id.* at ¶ 32). Boelhouwer concludes that "[f]rom a Human Factors perspective, both the Terms of Use and Rental Agreement would be readable and understandable to anticipated consumers" (*id.*).

With regard to plaintiff's assertion that the Terms of Use only apply to the use of the mobile application, and not use of the actual mopeds themselves, Revel asserts that contrary to plaintiff's argument, the definition of "Service" under section 3 includes the rental, management of mopeds and support provided to Revel members/users. Further, since plaintiff is alleging the accident occurred while he was renting a Revel moped, the Terms of Use plainly apply.

Revel also argues that it did not waive its right to arbitration simply by first moving to change venue since Revel was statutorily forced to file its motion to change venue within fifteen (15) days of plaintiff's failure to consent, object or respond to its Demand to Change Venue. Moreover, that plaintiff is unable to demonstrate any prejudice or provide any case law to support his claim of waiver under these circumstances. Lastly, since Revel has not served any discovery demands whatsoever, Revel's delay of three months in serving its arbitration demand cannot be deemed unreasonable, it avers.

Finally, responding to plaintiff's request that the court strike several of the Affirmative Defenses contained within its Verified Answer, Revel contends that plaintiff fails to specify why such defenses should be stricken, nor does he provide any case law in support of his position. Thus, Revel concludes, plaintiff's remaining contentions are without merit.

In opposition to Revel's cross-motion and in reply to his own motion, plaintiff argues that the Rental Agreement and Terms of Use are inadmissible pursuant to CPLR 4544 and should not be considered by the court because the text within said agreements is smaller than an 8-point font.[2] In support, plaintiff proffers the affidavit of Brett Taranda (Taranda), co-

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[2] CPLR 4544 provides in relevant part: "The portion of any printed contract or agreement involving a consumer transaction or a lease for space to be occupied for residential purposes where the print is

owner of Sir Speedy, a printing shop that designs and prints materials for professional clients, who opines that, based on his experience in the printing industry, the relevant contract terms contained within Revel's Terms of Use, when viewed on a smartphone as they were by plaintiff, are written in 7-point font size or smaller, in violation of CPLR 4544. According to plaintiff, an agreement to arbitrate will not be enforceable if it fails to comply with CPLR 4544.

Plaintiff also contends that expert testimony is inappropriate to determine whether an ordinary user had a clear and explicit understanding of Revel's contractual terms, because determining whether the language used by Revel is clear to the ordinary user is an issue that should be determined by the trier of fact and is not something that requires professional or technical knowledge that is beyond the common knowledge or experience of a juror. In this regard, plaintiff submits his own affidavit as well as affidavits of other plaintiffs who are pursuing negligence claims against Revel, all of whom state that when they signed up to rent a Revel moped, they did not understand, nor were they made aware, that they were giving up their rights to proceed in court with any potential negligence claims that they had against Revel.

With regards to his claim of waiver, plaintiff reiterates that, by moving to change venue pursuant to its own contract provision, Revel acknowledged that its arbitration provision did not apply. And thus, that Revel must live with the decision that it has made and should not be able to simultaneously enforce its arbitration clause. Further, plaintiff argues that he has been prejudiced by the delay insofar as plaintiff has spent time and resources serving discovery

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not clear and legible or is less than eight points in depth or five and one-half points in depth for upper case type may not be received in evidence in any trial, hearing or proceeding on behalf of the party who printed or prepared such contract or agreement, or who caused said agreement or contract to be printed or prepared."

demands and responding to Revel's motion to change venue prior to being served with defendant's Demand for Arbitration.

Finally, with regard to the branch of his motion to dismiss Revel's affirmative defenses, plaintiff explains that Revel's 18th, 19th, 21st and 24th affirmative defenses are predicated upon its alleged right to binding arbitration, and that for the reasons argued by plaintiff, the court should dismiss these affirmative defenses as inapplicable.

Revel, in reply, points out that plaintiff's argument based on CPLR 4544 is being raised for the first time in his opposition papers, and that, in any case, this argument is meritless because the subject clause is more than five and a half points in size and is written in all capital letters, which complies with CPLR 4544 as a matter of law. Also, as explained by Block in his supplemental affidavit (see NYCEF Doc No. 81, Supplemental Affidavit of Asa Block), plaintiff could increase the size of the font at any time by simply turning his phone or mobile device horizontal, or by zooming in on the screen. As for Taranda's affidavit, Revel contends that Taranda's conclusions are not supported by any evidence or explanation, nor did Taranda provide a chart showing industry standards regarding font sizes despite his reliance on same.

As for its own expert, Revel contends that Boelhouwer is a Human Factors expert, and that expert testimony regarding Human Factors standards is admissible pursuant to First Department caselaw. Moreover, that the purpose of Boelhouwer's opinion is not to establish that plaintiff read and understood the subject agreements but, rather, that the Sign-Up Flow, Rental Agreement and Terms of Use were sufficiently clear to apprise a reasonable person that he would be binding himself to a contract. And since the science of Human Factors is something that involves professional, technical knowledge that is beyond common knowledge or experience, the court may properly consider Boelhouwer's affidavit.

With regard to plaintiff's submission of affidavits from five individuals who are plaintiffs in pending lawsuits against Revel, Revel argues that these affiants are interested parties, thereby rendering their affidavits self-serving and devoid of credibility or probative value.

Motion to Change Venue

Revel moves pursuant to CPLR 511 to change venue to New York County pursuant to the venue selection clause contained within section 17 of its Terms of Use, which provides, in relevant part, that "any litigation between [each party] shall be filed exclusively in state or federal courts located in New York, NY, except for small claims court actions which may be brought in New York, NY, or in the county where you reside" (NYSCEF Doc. Nos. 12, 48 and 57, Terms of Use, "Exclusive Venue for Litigation," § 17).

In support of its contention that plaintiff voluntarily accepted the venue selection clause by completing the registration process via Revel's Sign-Up Flow, Revel relies on the previously mentioned affidavits from Block and Boelhouwer as well as its previous arguments that plaintiff was on inquiry notice of its Terms of Use. In addition, Revel argues that, given the close proximity between Kings County and New York County, plaintiff cannot demonstrate a hardship or argue that trial in the selected forum (New York County) would be so difficult that it would deprive plaintiff of his day in court. In opposition to Revel's motion to change venue, plaintiff contends that the term "New York, NY" in Revel's Terms of Use refers to New York City as a whole, not solely New York County as argued by Revel. In support of this argument, plaintiff relies on the Wikipedia entry for "New York City" which begins: "New York City (NYC), often simply called New York, is the most populous city in the United States…" (NYSCEF Doc No. 18) as well as the Wikipedia entry for "New York, New York" which

begins: "New York, New York, usually refers to the city of New York, in the state of New York" (NYSCEF Doc No. 19). Plaintiff also references the song, "New York, New York" from the musical *On the Town* by Betty Comden, Adolph Green and Leonard Bernstein, which refers to New York, New York's five boroughs, beginning:

> "New York, New York, a helluva town
> The Bronx is up, but the Battery's down
> The people ride in a hole in the groun'
> New York, New York, it's a helluva town!"

Based on the foregoing, plaintiff posits that "New York, NY" has always been reasonably understood to refer to New York City as a whole, and that, accordingly, plaintiff's choice of Kings County based on defendant's residence was proper. To the extent that "New York, NY" is ambiguous and could also mean New York County, plaintiff argues that it is well established that any ambiguous language in a contract must be construed against the party that drafted the contract. Thus, plaintiff concludes that Revel's venue provision must be interpreted by the court in the light most favorable to plaintiff, and thus his choice to place venue in Kings County must stand.

In reply, Revel contends that plaintiff's argument that "New York, NY" applies to any of the five counties that make up New York City is meritless, based on the clear terms of the forum selection clause. Moreover, it claims "New York, NY" refers to, and is the mailing address for, New York County alone, not for Kings County or any other counties, is demonstrated by a simple review of the addresses of the Kings County Supreme Courthouse (360 Adams Street, Brooklyn, New York 11201) versus the New York County Supreme Court Courthouse (60 Centre Street, New York, New York 10007). Finally, Revel reiterates that there would be no prejudice to plaintiff in moving this case from Brooklyn to New York County

because, to date, the only discovery served was unilaterally served by plaintiff after he was served with Revel's Demand for Arbitration.

Discussion

FAA and GBL § 399-c Preemption

The court first addresses the threshold issue of whether the subject arbitration clause is unenforceable because it is prohibited under GBL § 399-c, which provides that an arbitration clause shall be null and void in a contract of sale for customer goods (defined therein to include services), or whether the parties' contract involves interstate commerce and therefore triggers the FAA.

The FAA provides, in pertinent part, "[a] written provision in any contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" (9 USC § 2). The United States Supreme Court has held that the FAA preempts any state law which burdens an agreement to arbitrate (*see Marinet Health Care Center v Brown*, 565 US 530 [2012]; *Perry v Thomas*, 482 US 483 [1987]; *South/and Co. v Keating*, 465 US 1 [1984]). To determine whether the FAA applies, the contract must first be found to involve or "affect" interstate commerce (*see Matter of Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp.*, 4 NY3d 247, 252 [2005]).

In *Matter of Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp.*, *supra*, the Court of Appeals concluded that the construction project arising from the contract to repair and reconstruct the facade and roof of a nationally landmarked residential building in Manhattan:

> "affected interstate commerce, triggering application of the [Federal Arbitration Act]. Numerous out-of-state entities were involved in the transaction. The project manual and the engineer's drawings were created in a joint effort with a structural engineering firm headquartered in Illinois. Diamond Systems' largest supplier of materials for the project, MJM Studios, Inc., was a New Jersey company, and project meetings and visits were often scheduled at MJM's offices. The largest supplier of equipment for the project, Dunlop Equipment, Inc., was a Massachusetts company. Further, various additional materials, equipment and services for the project were obtained from Oklahoma, Maryland and Kansas" (4 NY3d at 252).

Similarly, the First Department held, in *Carlton Hobbs Real Estate, LLC v Sweeney & Conroy, Inc.*, 41 AD3d 214, 215, 838 NYS2d 516 [1st Dept 2007], that the FAA applied to the parties' construction contract since the

> "project entailed the retention of subcontractors, suppliers, consultants and designers from New Jersey, Connecticut and Europe, and some of the supplies and materials were purchased from, and/or manufactured by, out-of-state entities. In addition, the contractor utilized the services of a New Jersey asbestos monitoring company, which called for the transport of asbestos and other waste from New York to Hackensack for analysis."

Here, similar to *Matter of Diamond Waterproofing Sys., Inc.* and *Carlton Hobbs Real Estate*, an agreement to rent a Revel moped sufficiently affects interstate commerce because Revel's service relies on a host of out-of-state and international partners and suppliers. As stated by Revel, the company rents mopeds in Florida, California, and Washington D.C. in addition to New York. The mopeds themselves are manufactured in China and leased to Revel by companies located in Minnesota and Massachusetts. The fact that, theoretically, plaintiff's moped was meant to be solely operated within New York City does not alter this finding, as Revel has a multi-state presence, and its service relies on multiple out-of-state partners. Accordingly, this matter involves interstate commerce and thus triggers application of the FAA.

Validity of Arbitration Clause

Next, the court turns to whether plaintiff can be deemed to have agreed to Revel's mandatory arbitration clause. It is well settled that "[a] party to an agreement may not be compelled to arbitrate its dispute with another unless the evidence establishes the parties' clear, explicit and unequivocal agreement to arbitrate" (*God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP*, 6 NY3d 371, 374, 845 NE2d 1265, 812 NYS2d 435 [2006] [internal quotation marks omitted]. When one party seeks to compel the other to arbitrate any disputes between them, the court must first determine whether the parties made a valid arbitration agreement (*see Harriman Group v Napolitano*, 213 AD2d 159, 162, 623 NYS2d 224 [1st Dept 1995]). "The proponent of arbitration has the burden of demonstrating that the parties agreed to arbitrate the dispute at issue" (*Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 [1st Dept 2007 [citation omitted]). The party seeking to avoid arbitration, conversely, bears the burden of showing that the agreement is inapplicable or invalid (*Applebaum v Lyft, Inc.*, 263 F Supp 3d 454, 464 [SDNY 2017], quoting *Harrington v Atl. Sounding Co.*, 602 F 3d 113, 124 [2d Cir 2010]).

"The creation of online contracts 'has not fundamentally changed the principles of contract'" (*Resorb Networks, Inc. v YouNow.com*, 51 Misc 3d 975, 980-981, 30 NYS3d 506 [Sup Ct NY County 2016], *quoting Register.com, Inc. v Verio, Inc.*, 356 F3d 393, 403 [2d Cir 2004]). "To form a binding contract there must be a 'meeting of the minds' such that there is a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" (*Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 448 [2016] [internal and external citations omitted]). Mutual assent may be

manifested by written or spoken words, or by conduct (*Meyer v Uber Techs., Inc.*, 868 F3d 66, 74 [2d Cir 2017] [citations omitted]). "[W]here the purported assent is largely passive, the contract-formation question will often turn on whether a reasonably prudent offeree would be on notice of the term at issue" (*Schnabel v Trilegiant Corp.*, 697 F3d 110, 120 [2d Cir 2012]). "In other words, where there is no actual notice of the term, an offeree is still bound by the provision if he or she is on inquiry notice of the term and assents to it through the conduct that a reasonable person would understand to constitute assent" (*id.*). Inquiry notice is actual notice of circumstances sufficient to put a prudent man upon inquiry (*see Specht v Netscape Communs. Corp.*, 306 F3d 17, 31 [2d Cir 2002]). In making this determination, the "[c]larity and conspicuousness [of the term is] important . . . ." (*id.* at 30).

In *Berkson v Gogo LLC*, 97 F Supp 3d 359, 394-403 [EDNY 2015], Judge Weinstein identified the four general types of online consumer contracts as (a) browsewrap; (b) clickwrap; (c) scrollwrap; and (d) sign-in-wrap. As explained by Judge Weinstein:

> "Browsewrap exists where the online host dictates that assent is given merely by using the site. Clickwrap refers to the assent process by which a user must click 'I agree,' but not necessarily view the contract to which she is assenting. Scrollwrap requires users to physically scroll through an internet agreement and click on a separate 'I agree' button in order to assent to the terms and conditions of the host website. Sign-in-wrap couples assent to the terms of a website with signing up for use of the site's services . . . ." (*id.* at 394-395)

Generally, courts find clickwrap agreements enforceable since they necessitate an active role by the user of a website (*id.* at 397). "By requiring a physical manifestation of assent, a user is said to be put on inquiry notice of the terms assented to" (*id.*). However, "[r]egardless of the nomenclature, the classification of an online agreement does not conclude the inquiry,

nor does the fact a consumer may have clicked a box" (*Applebaum v Lyft, Inc.*, 263 F Supp 3d at 466). "The presentation of the online agreement matters: 'Whether there was notice of the existence of additional contract terms presented on a webpage depends heavily on whether the design and content of that webpage rendered the existence of terms reasonably conspicuous'" (*id. citing Nicosia v Amazon.com, Inc.*, 834 F3d 220, 233 [2d Cir 2016]). "Clarity and conspicuousness of arbitration terms are important in securing informed assent" (*id.* [citation omitted]). Generally, whether a plaintiff has inquiry notice of the terms in electronic agreements is a fact-intensive inquiry (*see Meyer v Kalanick*, 200 F Supp 3d 408, 420 [SDNY 2016]).

Here, Revel's Rental Agreement and Terms of Use when plaintiff signed up were click-wrap agreements, as identified in *Berkson*, since a prospective user had to click the toggle button to indicate assent to the agreements before being able to proceed but did not need to actually view the agreements or click the hyperlinks. Thus, the issue herein is whether Revel's registration process, i.e., the Sign-Up Flow, as well as the agreements themselves, put a reasonably prudent user on inquiry notice of the relevant terms. Based on a review of the evidence presented, the court finds that a reasonably prudent user would have been on notice of the subject arbitration clause.

First, plaintiff was required to indicate his assent to Revel's Terms of Use on the first screen that he encountered in the Sign-Up Flow. The statement "I accept the Terms of Use and Privacy Policy" along with the toggle button, is positioned right above the "Next" button bar, which the user must click to proceed to the next screen. The hyperlinks for "Terms of Use" and "Privacy Policy" appear in blue, a general indicator that the terms are hyperlinked,

while the rest of the text on the screen is black or gray, thereby rendering the hyperlinked terms conspicuous to a reasonably prudent user. In addition, the user had to affirmatively click the toggle button to indicate assent in order to be able to proceed. Otherwise, the user would be confronted with a message in the center of the screen asking the user to "Please review and accept [Revel's] Terms of Use and Privacy Policy." Similarly, regarding the Rental Agreement, the screen in which the Rental Agreement appears is titled "Confirm Terms" and below this are the words "Read Rental Agreement" which appears in blue text, with a right arrow indicating that same is hyperlinked. Below this were three statements, each with toggle buttons adjacent to them, that had to be clicked, indicating confirmation of the corresponding statement, in order to proceed. The very first statement is "I have read, understand, and accept Revel's Rental Agreement." The court finds the design and content of these mobile application screenshots rendered the existence of Revels' agreements to be reasonably conspicuous.

The court also finds that the language of the mandatory arbitration provision, in the version encountered by plaintiff, was sufficiently clear and conspicuous. First, the Rental Agreement references the mandatory arbitration clause on the very first page, under the section entitled "IMPORTANT BULLET POINTS" which is bolded and in capitalized letters. The last bullet point provides, in all caps, that "THIS AGREEMENT CONTAINS RELEASES, DISCLAIMERS, AND ASSUMPTION-OF-RISK PROVISIONS (AND A BINDING ARBITRATION AGREEMENT IN THE TERMS OF USE) THAT LIMIT YOUR LEGAL RIGHTS AND REMEDIES." In the Terms of Use, also on the very first page under section 1 entitled "Important Notice," which is bolded, it reads in all capitalized letters that:

> "THE ToU CONTAIN A MANDATORY ARBITRATION PROVISION THAT…REQUIRES THE USE OF ARBITRATION ON AN INDIVIDUAL BASIS TO RESOLVE DISPUTES, RATHER THAN JURY TRIALS OR ANY OTHER COURT PROCEEDINGS OR CLASS ACTIONS OF ANY KIND" (NYSCEF Doc Nos. 12, 48 and 57, § 1).

Mandatory arbitration is also referenced later, under section 17 entitled "Dispute Resolution," where the first sentence instructs the user to "read this clause carefully" as "[i]t may significantly affect your legal rights, including your right to file a lawsuit in court." Thereafter, there are multiple subheadings in bold pertaining to arbitration including "Agreement to Binding Arbitration" and "Arbitration Process."

The foregoing is sufficiently clear to apprise the user that a mandatory arbitration clause exists, and that the user is relinquishing the right to proceed with any claim that he or she may have against Revel in a court of law. The fact that later versions of the Terms of Use expanded, modified or fine-tuned the language or layout of the arbitration clause or the references thereto does not establish that the earlier version was inadequate to put a reasonably prudent user on notice of the arbitration clause.[3]

The court also finds plaintiff's argument that the Terms of Use only apply to the "Platform" to be without merit. The definition of "Service" in the Terms of Use includes the "reservation and rental management service that allows for the reservation of and invoicing for

[3] The court notes that several recent New York County cases have found Revel's arbitration clause to be reasonably conspicuous and therefore enforceable (*see Weiss v Revel Tr. Inc.*, Index No. 651018/2021, 2021 WL 288993 [Sup Ct, NY County 2021] [Perry, J.] *citing Long v Revel Tr. Inc.*, Index No. 150413/2021, 2021 WL 2457057 [Sup Ct, NY County 2021] [Nervo, J.]; *see also Vergel v Revel Tr. Inc.*, 2021 NY Slip Op 31590[U], 5 [Sup Ct, NY County 2021] [Nervo, J.]).

the rental and use of Mopeds…" which covers the reservation and use of mopeds, though inexpertly drafted (see NYSCEF Doc. Nos. 12, 48 and 57, Terms of Use, "Definitions," § 3).

With regard to plaintiff's argument that Revel waived arbitration by first moving to change venue, either pursuant to the terms of its own agreement or by the doctrine of waiver, the court finds that Revel did not waive its right to arbitration. First, there is nothing in the language of the subject venue selection clause here that supports plaintiff's position that, by moving to change venue, Revel has effectuated a waiver of its right to arbitrate. Secondly, plaintiff cannot show any prejudice stemming from Revel's failure to serve its arbitration demand with its answer or prior to moving for a venue change since, clearly, plaintiff opposes both the demand to change venue and the demand to arbitrate. Thus, both motions by Revel, and consequently plaintiff's opposition thereto, still would have been necessary. That plaintiff served a bill of particulars and combined discovery demands is too insufficient a harm for the court to apply principles of equity and deem that Revel has waived its right to enforce its arbitration clause.

In addition, plaintiff's argument that the Rental Agreement and Terms of Use are unenforceable because the font is too small, in violation of CPLR 4544, is without merit. Not only is this argument without merit because CPLR 4544 applies to "printed" contracts and, here, the Rental Agreement and Terms of Use appear for the user on a mobile screen where a user can "zoom in" to increase the font size, but because the subject arbitration clause is in all "upper case type" and, therefore, the font only needed to be "five and one-half points in depth" which plaintiff fails to dispute is satisfied in the case herein.

For the reasons stated above, Revel has established that an agreement to arbitrate exists

and that its mandatory arbitration clause is enforceable. Thus, plaintiff's motion to permanently stay arbitration must be denied and Revel's cross-motion to compel plaintiff to participate in binding arbitration granted. Accordingly, that portion of plaintiff's motion seeking to dismiss Revel's affirmative defenses that are predicated upon Revel's right to compel arbitration must also be denied.

Venue

The court now turns to Revel's motion seeking to change venue to New York County pursuant to its venue selection clause. Written agreements fixing the place of trial, made before an action is commenced, shall be enforced upon a motion for change of place of trial (*see* CPLR 501). "A contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court" (*Puleo v Shore View Ctr. for Rehabilitation & Health Care*, 132 AD3d 651, 652 [2d Dept 2015] [citations omitted]).

Here, to the extent that plaintiff challenges Revel's motion on the grounds that he was not aware of or did not actually agree to the subject venue selection clause, plaintiff is deemed to have been on inquiry notice of said provision, based on the court's reasoning above. As for plaintiff's contention that his chosen venue of Kings County is proper because "New York, NY" as it is used in the subject venue selection clause is generally understood to mean all of New York City, or that the term is at least ambiguous, the court disagrees.

It is well established that "a written agreement that is complete, clear and unambiguous

on its face must be enforced according to the plain meaning of its terms" (*County of Suffolk v Long Is. Power Auth.*, 100 AD3d 944, 947 [2d Dept 2012] [citations omitted]). Moreover, "[w]ords in a contract are to be construed to achieve the apparent purpose of the parties" (*Hooper Associates, Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]). "Although the words might 'seem to admit of a larger sense, yet they should be restrained to the particular occasion and to the particular object which the parties had in view'" (*id.* quoting *Robertson v Ongley Elec. Co.*, 146 NY 20, 23, 40 NE 390 [1885]). "The threshold question of whether a contract is unambiguous, and the subsequent construction and interpretation of a contract determined to be unambiguous, are issues of law within the province of the court" (*County of Suffolk v Long Is. Power Auth.*, 100 AD3d at 947).

Here, "New York, NY" in the context of the subject venue selection clause is unambiguous. The relevant sentence provides that "any litigation between [each party] shall be filed exclusively in state or federal courts located in New York, NY, **except for small claims court actions which may be brought in New York, NY, or in the county where you reside**" (emphasis added). First, the term "New York, NY" as written, is generally understood to refer to Manhattan to anyone living in New York City (such as plaintiff) or familiar with the New York City area, as that is how mail intended for Manhattan addresses are generally addressed. In addition, if there was any ambiguity as to whether "New York, NY" signified New York County versus New York City, then the remainder of the sentence, "except for small claims court actions which may be brought in New York, NY, *or in the county where you reside*" (emphasis added), eliminates such ambiguity. Given the context of the parties' agreement, specifically that a Revel moped user is renting a moped that can only be operated within four

New York City boroughs (not on Staten Island), the only possible meaning of "New York, NY" in this forum selection clause is New York County. As plaintiff does not provide any other reason for invalidating the requested venue change, Revel's motion to change venue must be granted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that Revel's motion to change venue to New York County (mot. seq. 1) is granted; it is further

ORDERED that the Kings County Clerk, upon service of a copy of this order with Notice of Entry and payment of required fees, if any, is directed to transfer all papers filed in this action to the New York County Clerk for filing and assignment; it is further

ORDERED that plaintiff's motion seeking an order permanently staying arbitration (mot. seq. 2) is denied; and it is further

ORDERED that Revel's motion seeking an order compelling arbitration is granted, and plaintiff is directed to proceed to arbitration.

Any arguments not explicitly addressed herein were considered and deemed to be without merit.

This constitutes the decision and order of the court.

E N T ER,

Hon. Debra Silber, J.S.C.