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California federal court compels arbitration based on a modified sign-in wrap agreement

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Takeaway: Terms and conditions requiring individual arbitrations can effectively end many consumer class actions. But courts rigorously scrutinize consumers' assent to such terms, insisting upon reasonably conspicuous notice that a specified action by the consumer will constitute agreement to the terms and conditions. A California federal district court recently compelled arbitration based on a "modified sign-up wrap agreement," reiterating the key factors courts consider in evaluating online assent to terms and conditions. *Kroskey v. Elevate Labs, LLC*, No. 5:24-cv-08113-EJD, 2025 WL 1507091, at *3 (N.D. Cal. May 27, 2025).

The named plaintiff in *Kroskey* sued Elevate Labs, LLC ("Elevate Labs"), and MindSnacks, Inc. ("MindSnacks"), which operated a mobile meditation application called Balance: Meditation & Sleep ("Balance App"). 2025 WL 1507091, at *1. Mr. Kroskey alleged that Elevate Labs and MindSnacks disclosed Balance App users' personal information to a third party without authorization in violation of federal and California state privacy laws. *Id.* Elevate Labs and MindSnacks moved to compel arbitration of Mr. Kroskey's claims based on an individual arbitration agreement contained within Balance App's terms and conditions. *Id.*

When creating an account on Balance App, the consumer must click through a page in which the consumer elects to create an account using an email or another platform. *See Kroskey*, No. 5:24-cv-081130EJD, Doc. 37, at 2 (including an image of the account creation screen not currently available in the Westlaw version of the decision). The bottom of that page includes the following text in different font: "By creating your account, you agree to Balance's **Terms & Conditions** and **Privacy Policy**." *Id.*; *see also* 2025 WL 1507091, at *1 (quoting language). Those "Terms & Conditions" included a broad individual arbitration agreement. 2025 WL 1507091, at *1-2.

The *Kroskey* court found that clicking through this account creation page sufficed to bind the named plaintiff to the arbitration agreement in the Terms & Conditions. *Id.* at *2-4. In terms of assent to internet contracts, a continuum exists between true "clickwrap" agreements—in which the consumer must check a box explicitly stating, e.g., "I agree" to proceed—and "browsewrap" agreements, in which the business's website provides access to terms and conditions and states that the consumer will be deemed to have assented to those terms "simply by continuing to use the website." *Id.* at *3. Between these extremes are "sign-in wrap agreements," in which the consumer is notified that by clicking a button or making some other type of affirmative act, the consumer thereby assents to the terms and conditions. *Id.*

Characterizing Balance App's website as presenting a "modified sign-in wrap agreement," the *Kroskey* court evaluated whether it provided "reasonable conspicuous notice of the terms to which the consumer will be bound" and required "some action, such as clicking a button or checking a box," that manifested assent to those terms. *Id.* The evaluation of conspicuousness, in turn, considered the "context of the transaction" and the "visual placement of the notice." *Id.*

Because the Balance App contemplated a "continuing, forward-looking relationship likely governed by terms and conditions," the court focused on the "visual placement" element. *Id.* After discussing various cases in which Ninth Circuit courts had found notice of the terms and conditions inconspicuous, the *Kroskey* court compared the notice screens of those cases with Balance App's account creation screen. *Id.* at *3-4. Unlike the "inconspicuous" cases, Balance App's account creation screen "is free from clutter," offering "four simple boxes where users can choose how to set up an account, separated by significant white space surrounding the Terms & Conditions notice." *Id.* at *4. Moreover, the hyperlink to the Terms & Conditions was "not buried in text or placed in a confusing location"; appeared "clearly" in a font different from the background color; and was "in bold with the first letters capitalized, making them stand apart from the other text in the sentence." *Id.*

Thus, a "reasonably prudent internet user" would understand that the phrase "**Terms & Conditions**" was a link to the terms containing the arbitration agreement. *Id.* Having found reasonably conspicuous notice, the *Kroskey* court had little trouble finding the requisite unambiguous manifestation of assent, because the notice informed the consumer that "[b]y creating your account, you agree to Balance's **Terms & Conditions** and **Privacy Policy**." *Id.*

The court briefly addressed two other issues. First, Mr. Kroskey disputed whether MindSnacks could invoke the arbitration agreement when the Terms & Conditions only referenced Elevate Labs. *Id.* at *4-5. Because Mr. Kroskey alleged MindSnacks constituted an "affiliate" of Elevate Labs, and because nonsignatory corporate entities can compel arbitration under arbitration agreements signed by their "'affiliates,'" MindSnacks could enforce the arbitration agreement. *Id.* (quoting *Prograph Int'l Inc. v. Barhyd*, 928 F. Supp. 983, 990 (N.D. Cal. 1996)).

Second, Mr. Kroskey disputed the arbitrability of his various claims. *Id.* at *5. But because the arbitration agreement "explicitly delegates questions regarding arbitrability to an arbitrator," and because Ninth Circuit courts uphold such "delegation" provisions, the *Kroskey* court refused to address the arbitrability challenges. *Id.* (citing, *inter alia*, *Patrick v. Running Warehouse, LLC*, 93 F.4th 468, 481 (9th Cir. 2024)).

Thus, *Kroskey* granted the defendants' motion to compel arbitration and stayed the litigation pending arbitration. *Id.* (citing *Smith v. Spizzirri*, 601 U.S. 472, 475-76 (2024)).