The summaries of the Colorado Court of Appeals published opinions constitute no part of the opinion of the division but have been prepared by the division for the convenience of the reader. The summaries may not be cited or relied upon as they are not the official language of the division. Any discrepancy between the language in the summary and in the opinion should be resolved in favor of the language in the opinion.

SUMMARY
May 4, 2023

2023COA40

No. 21CA1421, *Macasero v. ENT Credit Union* — Contracts — Arbitration — Constructive Notice — Email Correspondence

A division of the court of appeals considers whether plaintiff was placed on constructive notice of updated terms and conditions of her membership agreement with defendant credit union, including an arbitration agreement with an opt-out provision, by language, including hyperlinks, in her monthly banking statement email. The division concludes that plaintiff was placed on constructive notice of the change in terms because she received the notice in the manner she had agreed upon, and the notice was sufficiently clear and conspicuous considering the parties' prior course of dealing, the email was designed in such a way that the notice was reasonably conspicuous, and the change in terms was easily accessible.

Because the district court incorrectly determined that the plaintiff did not have constructive notice, the division reverses the district court's order and remands to the district court for further proceedings.

COLORADO COURT OF APPEALS **2023COA40**

Court of Appeals No. 21CA1421
City and County of Denver District Court No. 20CV32226
Honorable Marie Avery Moses, Judge

Cecilia Macasero,

Plaintiff-Appellee,

v.

ENT Credit Union,

Defendant-Appellant.

ORDER REVERSED AND CASE REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE HAWTHORNE*
Dailey, J., concurs
Johnson, J., specially concurs

Announced May 4, 2023

Franklin D. Azar & Associates, P.C., Franklin D. Azar, Paul R. Wood, Michael D. Murphy, Brian J. Hanlin, Margeaux R. Azar, Aurora, Colorado; Frank Sims & Stolper LLP, Scott H. Sims, Irvine, California, for Plaintiff-Appellee

Campbell Wagner Frazier & Dvorchak, LLC, Michael O. Frazier, Greenwood Village, Colorado; Katten Muchin Rosenman LLP, Stuart M. Richter, Los Angeles, California, for Defendant-Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2022.

¶ 1 The primary issue in this appeal is whether the plaintiff, Cecilia Macasero, had constructive notice that the defendant, Ent Credit Union (Ent), had updated the terms of its membership agreement to include an arbitration agreement, and that she had the right to opt out of the arbitration agreement within a certain time period. We conclude that she had constructive notice of the updated terms. So we reverse the district court's order denying Ent's motion to dismiss and compel arbitration.

I. Factual Background

¶ 2 In 2014, Macasero purchased a car and entered into a finance agreement with an automobile dealer. The dealer assigned the agreement to Ent, which became Macasero's creditor. To complete the assignment, Macasero became an Ent member by opening a savings account and signing an "Account Application & Signature Card," which included the following "Authorization":

> By signing this Application and Signature Card, I/We agree to the terms and conditions of and receipt of ***Important Account Information For Our Members*** disclosure which includes: Membership and Account Agreement . . . . I/We agree to receipt and acceptance of all rate and fee schedules and if applicable, to any amendment of the respective disclosures, rate and fee schedules, that Ent

> makes from time to time which are incorporated therein. . . . I/We further agree to the acceptance of statements, notices, and disclosures by means of electronic delivery, and notice to any one (1) account owner or applicant is considered notice to all owners of the account.

¶ 3 By signing the Authorization, Macasero also agreed to the following "Notice of Amendments" provision in the "Membership and Account Agreement" (the membership agreement):

> Except as otherwise prohibited by applicable law, the terms of this Agreement are subject to change at any time at the discretion of Ent. We will notify you of any changes in terms, rates or fees as required by law. By utilizing your account and related services described herein, you agree to amendments to the terms of this Agreement which have been made available to you by mail, electronically on our website or in person. We reserve the right to waive any term in this Agreement. Any such waiver shall not affect our right to enforce any right in the future.

¶ 4 Macasero then received email notices from Ent, including monthly electronic banking statements, many of which she opened.

¶ 5 In 2019, Ent updated the membership agreement's terms to add an arbitration agreement titled "Arbitration and Waiver of Class

Action."[1] Ent notified members by mail or email, depending on how they had agreed to receive important notices, but both groups were sent a notice with their monthly bank statement. Members who had consented to electronically delivered notices, as Macasero had, received the following email that notified them their monthly bank statement was available, contained information about an Ent promotion, and alerted them to "Membership and Account Agreement" updates:

---

[1] Macasero argues that by adding the arbitration agreement to the existing terms and conditions, Ent seeks to incorporate a document by reference into the existing membership agreement. This is not the case. Because the membership agreement preexisted and contained a clause allowing Ent to unilaterally change the terms, it is a modified contract. *See, e.g.*, *Taubman Cherry Creek Shopping Ctr., LLC v. Neiman-Marcus Grp., Inc.*, 251 P.3d 1091, 1094-95 (Colo. App. 2010) (finding that amendments to American Arbitration Association rules that were to be adopted in the future were not incorporated by reference in the parties' contract because they did not yet exist).

Dear Ep Test,

Your May 2019 eStatement is now available. Review it by logging in to online or mobile banking or Ent's Mobile Banking App.

Other services available to you...

Their chores are done, now it's time for a show.

Even our youngest members work hard for their goals. That's why youth banking gives them a place to save their allowance and get rewarded with a free movie ticket.

Open their youth banking account June 1 – August 31 at your nearest Ent Service Center and get a free movie ticket.*

Learn more at Ent.com/MovieTicket.

*Electronic movie gift card will be emailed to the primary account email address within 30 days of account opening. Gift cards are subject to the terms and conditions of the issuer. The minor who is the primary member is the only account owner eligible to receive the free movie ticket gift card. Accounts must be opened prior to or on 08/31/2019. Qualifications apply.

Ent has updated its Membership and Account Agreement, effective May 20, 2019 (unless otherwise noted). Please visit www.Ent.com/Legal for more information.

©2019 Ent Credit Union. All Rights Reserved. This email was sent to you by Ent Credit Union located at 7250 Campus Drive, Colorado Springs, CO 80920. Ent will never request sensitive information through email. If you receive an email requesting your account number(s), Social Security number, PINs, or passwords, do not divulge any information or click on any links contained within.

You are receiving this email because you opted in to eStatements. TO UNSUBSCRIBE please change your statement preference to paper statement delivery by contacting a Member Service Representative or within online banking.

¶ 6 According to Ent's records, Macasero received this email, but she did not open it.

¶ 7 If a member did open the email, they could have clicked[2] on the blue "www.Ent.com/Legal" hyperlink[3] contained in the email that directed them to an Ent webpage titled "Important Disclosures," with a subheading titled "Important Account Information." In the first section, titled "Important Account Information for Our Members," the text says that a reader can see recent changes to the membership agreement by following a bold, blue, underlined hyperlink. Clicking this hyperlink brought up a page titled "Changes in Terms" summarizing the updates, including information on how to find them and how to opt out of them.

¶ 8 Specifically, the new arbitration agreement provision states:

---

[2] "Clicked" refers to the user selecting the hyperlink in the email with their mouse, which then opens the associated webpage. *See* Merriam-Webster Dictionary, https://perma.cc/KM5N-UX2C ("click" is defined as "to select especially in a computer interface by pressing a button on a control device").

[3] "Hyperlink" refers to a webpage address itself, or one that is embedded into text, that is coded to bring a user to a specific, corresponding webpage referenced in the text. *See* Merriam-Webster Dictionary, https://perma.cc/8PVL-QGMG ("hyperlink" is defined as "an electronic link providing direct access from one distinctively marked place in a hypertext or hypermedia document to another in the same or a different document").

> You and the credit union agree that we shall attempt to informally settle any and all disputes arising out of, affecting, or relating to your accounts, or the products or services the credit union has provided, will provide or has offered to provide to you, and/or any aspect of your relationship with the credit union (hereafter referred to as the "Claims"). If that cannot be done, then you agree that any and all Claims that are threatened, made, filed or initiated after the Effective Date (defined below) of this Arbitration and Waiver of Class Action provision ("Arbitration Agreement"), even if the Claims arise out of, affect or relate to conduct that occurred prior to the Effective Date, shall, at the election of either you or us, be resolved by binding arbitration administered by the American Arbitration Association ("AAA") in accordance with its applicable rules and procedures for consumer disputes ("Rules"), whether such Claims are in contract, tort, statute, or otherwise.

¶ 9 The arbitration agreement also contains an opt-out provision:

> You have the right to opt-out of this Arbitration Agreement and it will not affect any other terms and conditions of your Account Agreement or your relationship with Ent. To opt out, you must notify Ent in writing of your intent to do so within 30 days after the Arbitration Agreement was provided to you. Your opt-out will not be effective and you will be deemed to have consented and agreed to the Arbitration Agreement unless your notice of intent to opt out is received by the credit union in writing . . . within such 30-day time period. Your notice of intent to opt out can be a letter that is signed by you, or an email sent

> by you . . . that states "I elect to opt out of the Arbitration Agreement" or any words to that effect.

¶ 10 The arbitration provision also provides members the email or physical address where they could send the required written opt-out request.

¶ 11 Macasero did not exercise her right to opt out of the arbitration agreement and continued to use her account after she received Ent's email containing the update notice.

II. Procedural History

¶ 12 When Macasero purchased her car, she also purchased a Guaranteed Automobile Protection (GAP) waiver. The GAP waiver agreement provides that, if the purchaser's automobile insurance payout on a "total loss" claim does not cover the remaining loan balance, the creditor would waive the difference. Macasero elected to pay for the GAP waiver in monthly installments, and the cost was added to the principal balance of her finance agreement. Macasero paid off her finance agreement in 2018.

¶ 13 In 2020, Macasero filed a class action complaint and jury demand in district court alleging breach of contract on behalf of herself and the members of a class who entered into finance

agreements with GAP waivers, paid off their agreements ahead of schedule, and were not refunded the unearned GAP waiver fees.

¶ 14 In 2021, Ent filed the motion to dismiss and compel arbitration. The district court denied Ent's motion. While it agreed that Ent had the right to unilaterally modify the membership agreement's terms, it concluded that Macasero did not have actual or constructive notice of the arbitration agreement. Ent appeals.

III. Macasero Had Constructive Notice of the Arbitration Agreement

¶ 15 Ent contends that the district court erred in determining that its email did not place Macasero on constructive notice of the arbitration agreement and her right to opt out because its notice was sufficiently clear and conspicuous. We agree.

A. Standard of Review

¶ 16 Macasero argues that this is not, in fact, an appeal of a denial of a motion to compel arbitration, but rather a question of whether a contract exists. We disagree. It is undisputed that the parties entered into a contract. We address whether their contract requires arbitration because Ent sufficiently placed Macasero on constructive notice of the arbitration agreement. And that presents

a legal question that we review de novo. *Moffett v. Life Care Ctrs. of Am.*, 219 P.3d 1068, 1072 (Colo. 2009).

B. Legal Principles

¶ 17 Colorado and federal law recognize a strong public policy interest in favor of enforcing arbitration agreements. *See* Colo. Const. art. XVIII, § 3; §§ 13-22-201 to -239, C.R.S. 2022; 9 U.S.C. § 3; *see also J.A. Walker Co. v. Cambria Corp.*, 159 P.3d 126, 128 (Colo. 2007); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Still, "[i]t is well-settled that 'arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *N.A. Rugby Union LLC v. U.S. Rugby Football Union*, 2019 CO 56, ¶ 20 (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). A motion to compel arbitration may be denied only where either there is no valid agreement to arbitrate, or the issue sought to be arbitrated is clearly outside the scope of arbitration. *Shotkoski v. Denver Inv. Grp. Inc.*, 134 P.3d 513, 515 (Colo. App. 2006).

¶ 18 In determining whether an arbitration agreement exists between the parties, courts should generally apply state-law

principles that govern the formation of contracts to determine whether a party has assented to such an agreement. *See Hardin v. First Cash Fin. Servs., Inc.*, 465 F.3d 470, 475 (10th Cir. 2006). A party's "assent may be implied from the totality of circumstances and the acts of the parties." *Vernon v. Qwest Commc'ns Int'l, Inc.*, 857 F. Supp. 2d 1135, 1149 (D. Colo. 2012) (published order) (applying Colorado law), *aff'd*, 925 F. Supp. 2d 1185 (D. Colo. 2013). When evaluating assent in the context of email and the internet, "the threshold issue is . . . did the consumer have reasonable notice, either actual or constructive, of the terms of the putative agreement and did the consumer manifest assent to those terms." *Id.* And Colorado law recognizes that "one generally cannot avoid contractual obligations by claiming that he or she did not read the agreement." *Loden v. Drake*, 881 P.2d 467, 469 (Colo. App. 1994).

C. Constructive Notice

¶ 19 Black's Law Dictionary 1277 (11th ed. 2019) defines constructive notice as "[n]otice arising by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of . . . ; notice presumed by law to have been acquired

by a person and thus imputed to that person." The term is most often used in property law to describe the principle that "[w]hen a party properly records his interest in property with the appropriate clerk and recorder, he constructively notifies 'all the world' as to his claim." *Franklin Bank, N.A. v. Bowling*, 74 P.3d 308, 313 (Colo. 2003). But this principle has been applied more frequently in recent years when determining whether a party is bound by contract terms, including arbitration agreements. *See, e.g.*, *Wilson v. Huuuge, Inc.*, 944 F.3d 1212, 1220 (9th Cir. 2019); *Needleman v. Golden 1 Credit Union*, 474 F. Supp. 3d 1097, 1103 (N.D. Cal. 2020); *Page v. Alliant Credit Union*, No. 19-cv-5965, 2020 WL 2526488, at *2 (N.D. Ill. May 18, 2020).

¶ 20 Constructive notice occurs when a party "abstains from inquiry when inquiry ought to be made" because "[w]illful ignorance is equivalent, in law, to actual knowledge." *Mackey v. Fullerton*, 7 Colo. 556, 560, 4 P. 1198, 1200 (1884); *see also Needleman*, 474 F. Supp. 3d at 1103 ("Constructive notice occurs when a consumer has inquiry notice of the terms of service and takes an affirmative action to demonstrate assent to them." (citing *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1176-79 (9th Cir. 2014))).

¶ 21 "Inquiry notice requires sufficient facts to attract the attention of interested persons and prompt a reasonable person to inquire further. The receipt of inquiry notice charges a party with notice of all the facts that a reasonably diligent inquiry would have disclosed." *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 25 (Colo. 1996) (quoting *Monaghan Farms, Inc. v. City & Cnty. of Denver*, 807 P.2d 9, 15 (Colo. 1991)).

¶ 22 When determining whether a plaintiff had constructive notice of an arbitration agreement based on email correspondence, courts consider the parties' prior course of dealing, whether the email was designed in such a way that the notice or hyperlink was reasonably conspicuous, and the accessibility of the change in terms. *Page*, 2020 WL 2526488, at *2; *Needleman*, 474 F. Supp. 3d at 1104; *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 76 (2d Cir. 2017).[4]

[4] We recognize that some of the language and reasoning we use as to contract terms and emails are from nonbinding federal district court cases authored by a single judge. We would prefer to rely on appellate authority, but the parties did not provide, nor have we found, such authority. In its absence, we find the reasoning in the federal district court cases cited in this opinion to be persuasive.

D. Analysis

1. Prior Course of Dealing

¶ 23 Courts consider the parties' prior course of dealing when determining whether a party had constructive notice. *See Wilson v. Redbox Automated Retail, LLC*, 448 F. Supp. 3d 873, 886 (N.D. Ill. 2020) (The user's "history with Redbox did not suggest that she should have expected to receive an email adding new terms to her dealings with the company."); *see also Needleman*, 474 F. Supp. 3d at 1102.

¶ 24 The ongoing *electronic* relationship between Macasero and Ent is relevant to our review because a reasonable person who elects to receive banking statements and other important notices and communications electronically "would have understood this as an obligation to [view electronic notices] to stay apprised of important disclosures." *Needleman*, 474 F. Supp. 3d at 1104.

¶ 25 Macasero agreed to receive all communications from Ent electronically. So both parties mutually understood that important notices would be conveyed in this manner. And when a member has consented to email notice of changes to their contract terms and the entire membership communications have been exchanged

in that way, such course of dealing shows that an email notice was sent in the exact manner to which the parties had agreed.

¶ 26 After agreeing to receive important banking notifications via email, Macasero then received the important notification at issue here in the exact manner she had affirmatively chosen. *See Needleman*, 474 F. Supp. 3d at 1102-05 (finding that where a user had no notification of an amendment on the face of an email, because he had agreed to receive all important notifications in his online banking portal, there was constructive notice). Macasero's "failure to view [her] statements electronically is akin to one of [Ent]'s paper statement customer's failing to open one's mail." *Id.* at 1104. Because of the parties' ongoing banking relationship, and under their membership agreement, Macasero and Ent had certain responsibilities to each other, including that Macasero would be reasonably expected to read *the entirety* of the email sent to her by Ent. *See Page*, 2020 WL 2526488, at *2.

2. Reasonably Conspicuous

¶ 27 Courts have found notice to be reasonably conspicuous if a reasonable person "would have known about the terms and the conduct that would be required to assent to them," as well as the

fact that by engaging in such conduct, "[they are] taking such goods or employing such services subject to additional terms and conditions that may one day affect [them]." *Meyer*, 868 F.3d at 77-78 (citations omitted). "Where an offeree does not have actual notice of certain contract terms, [they are] nevertheless bound by such terms if [they are] on inquiry notice of them and assent[] to them through conduct that a reasonable person would understand to constitute assent." *Starke v. SquareTrade, Inc.*, 913 F.3d 279, 289 (2d Cir. 2019).

¶ 28 Courts consider 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 [them] on inquiry notice of such terms." *Id.* As one court has observed,

> The more the . . . design diverges from [a] basic layout — such as by placing the notice further away from the action button, cluttering the screen with potentially distracting content, or omitting the language explicitly saying that by performing the action the user agrees to be bound by the terms — the less likely courts are to find that inquiry notice has been provided.

Nicosia v. Amazon.com, Inc., 384 F. Supp. 3d 254, 266 (E.D.N.Y. 2019), *aff'd*, 815 F. App'x 612 (2d Cir. 2020).

¶ 29 Ent's notice to Macasero regarding the membership agreement's updated terms, including the arbitration agreement provision, was reasonably conspicuous.[5]

¶ 30 Contrary to Macasero's argument, we do not deem the notice as being buried or hidden in Ent's email, or the surrounding information as cluttering the screen to the extent that a reasonable person would be distracted from the important notice about the "updated . . . Membership and Account Agreement." And even though the notice is below an Ent promotion, it is in the same font, size, and color, including a blue, underlined hyperlink to click for more information, as the bank statement notice near the top of the page and the promotion notices near the middle of the page. True, Ent's promotion notice for other services contains additional colors

---

[5] Macasero cites *In re HomeAdvisor, Inc. Litigation* to support her claim that the notice was not reasonably conspicuous. No. 16-cv-01849, 2019 WL 4463890 (D. Colo. Sept. 17, 2019) (unpublished order). But this case is distinguishable. In *HomeAdvisor*, the plaintiff enrolled for a service entirely through an automated telephone system that referenced terms and conditions but did not state them. The court concluded that the plaintiff did not have constructive notice of the terms and conditions because, among other factors, the reference to them "was obscured by the surrounding, unrelated inquiry regarding the plaintiff's role in his or her business." *Id.* at *6.

and a photo. But directly below the promotion is smaller, gray text, indicating its terms and conditions, and a gray line ending its content. And the promotion's content is mostly in the same font, size, and color, including blue, underlined hyperlinks, as both the bank statement and agreement update notice. Therefore, we conclude that Ent's email contained a reasonably conspicuous notice that it had updated the membership agreement.

¶ 31 Still, Macasero appears to argue that Ent was also required to send multiple emails to alert her to the agreement updates. But she does not explain, nor do we see, how sending numerous emails to members would make the notice more conspicuous. And to the extent Macasero argues that Ent was required to do more with its change-in-terms notice because an arbitration provision was involved, she would be asking us to improperly hold arbitration agreements to a higher standard than other types of notices, even though the United States Supreme Court specifically held that "courts must place arbitration agreements on an equal footing with other contracts." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

¶ 32 In sum, the email's design is basic and not confusing or distracting as to the update notice. The notice's hyperlink is in the same text as the rest of the notice, the screen is not cluttered with unnecessary content or graphics, and the member is directed to the blue, underlined www.Ent.com/Legal hyperlink for more information about the updates. And there are only three sections in the email: the bank statement, the promotion, and the update notice. Also, most of the email can be viewed at once, perhaps requiring the reader to scroll only once to view the email in its entirety. While including a hyperlink in a different color from the surrounding text, by itself, is not enough to render the notice reasonably conspicuous, the hyperlink here is underlined and is not more or less prominent than any of the other hyperlinks contained in the email, and it is surrounded by text urging the reader to "[p]lease visit" the legal website for more information. *See Wilson*, 448 F. Supp. 3d at 885; *see also Starkey v. G Adventures, Inc.*, 796 F.3d 193, 197 (2d Cir. 2015).

3. Accessibility

¶ 33 Courts consider how accessible the agreement's terms and conditions are to the user when they are notified that they will be

subjected to them, or that there has been a change. *See In re HomeAdvisor, Inc. Litigation*, No. 16-cv-01849, 2019 WL 4463890, *6 (D. Colo. Sept. 17, 2019) (unpublished order) (finding that the terms were not accessible where a user was required to assent to them over the phone and the terms were not read aloud).

¶ 34 Using the hyperlink in Ent's update notice takes the reader to a webpage clearly titled "Important Disclosures" with a subheading titled "Important Account Information." In the first section, titled "Important Account Information for Our Members," the text clearly states that a reader can see recent changes to the membership agreement by following a bold, blue, underlined hyperlink. Clicking this hyperlink brings up a page summarizing the updates to the agreement. While this process requires more than one click, it is not analogous to the *HomeAdvisor* case, where the terms and conditions were not provided to the user *at all* when the user was required to agree. *Id.*

¶ 35 The facts here are similar to those in *Rudolph v. Wright Patt Credit Union*, a case where the plaintiff argued that he "lacked constructive notice because the agreements were not prominently displayed on the website and he had to click through several links

to find them." 2021-Ohio-2215, ¶ 50, 175 N.E.3d 636, 651 (Ct. App.). The court rejected the argument and determined that "the terms were sufficiently conspicuous on the website, which [the plaintiff] repeatedly accessed." *Id.* at ¶ 57, 175 N.E.3d at 652.

¶ 36 Based on the record before us, we conclude that Macasero had constructive notice of the arbitration agreement because Ent's update notice was (1) provided to Macasero in the exact manner to which she had agreed to receive important information and consistent with her prior course of dealings with Ent; (2) reasonably conspicuous such that a reasonable person would have known about the updates and the process for assenting to, or opting out of, the arbitration agreement; and (3) easily accessible by using the included hyperlinks. So we reverse the district court's order denying Ent's motion to dismiss and compel arbitration.

IV. Macasero Assented to the Change Adding the Arbitration Agreement

¶ 37 Macasero contends that even if Ent's notice was reasonably conspicuous, the addition of an arbitration provision was not the type of change contemplated by the parties when they entered into the membership agreement. And she specifically argues that,

without her express and affirmative consent, Ent could not amend the agreement to add the arbitration provision. We are not persuaded.

A. Legal Principles

¶ 38 An arbitration agreement allowing a party the "unfettered right to alter [its] existence or its scope is illusory." *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002). But if the right to make unilateral material and adverse changes to an agreement is "conditioned upon prior notice and the [user's] right to reject those changes by . . . cancelling their service," an arbitration provision is not "illusory or unenforceable on that basis." *Vernon*, 857 F. Supp. 2d at 1156.

B. Analysis

¶ 39 Macasero relies on *Badie v. Bank of America*, a case addressing a challenge by bank customers to the bank's attempt to add an arbitration clause to the terms of their preexisting account agreement. 79 Cal. Rptr. 2d 273, 275-77 (Ct. App. 1998). Even though the original agreement expressly authorized the bank to change its terms unilaterally, the court concluded that the arbitration clause was not a change contemplated by the

contracting parties. *Id.* at 287-89. But it also noted that the material issue in the case concerned the *types* of terms the agreement allowed the bank to change, not whether the bank could add new terms at all. *Id.* at 284-85. And the bank had sought to "add an entirely new *kind* of term to the original account agreements, which did not include any provision regarding the method or forum for resolving disputes." *Id.* at 283.

¶ 40 But other courts reaching a different result than *Badie* have distinguished it because (1) the defendant in *Badie* did not allow customers to opt out and (2) the original agreement's change-in-terms provision did not explicitly allow additions to the agreement, as opposed to alterations or deletions. *See, e.g.*, *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 833 (S.D. Miss. 2001) (in *Badie*, "the plaintiffs were not given the option of rejecting the arbitration clause"), *aff'd*, 34 F. App'x 964 (5th Cir. 2002); *see also Goetsch v. Shell Oil Co.*, 197 F.R.D. 574, 576-79 (W.D.N.C. 2000) (enforcing amendments to credit card agreement that first added and then modified the added arbitration agreement where the original agreement provided for amendment by notice to cardholder).

¶ 41 The case most similar to the one before us is *Coates*, where a bank mailed a notice about adding a proposed arbitration clause to the agreement, with a one-month opt-out period. 125 F. Supp. 2d at 826. The plaintiff argued that the change-in-terms provision did not authorize the addition of an arbitration clause, as compared to changes in the fees, interest rates, or finance charges referred to in the change-in-terms provision itself. The court emphasized that the notification of the impending agreement used clear language and a legible, though small, font. *Id.* at 830-32, 834. And it concluded that the plaintiff was bound by the arbitration clause because the original signed agreement authorized the bank to make amendments without limitation and the bank had complied with its change-in-terms provision. *Id.* at 831.

¶ 42 Contrary to Macasero's argument, we conclude that her "express and affirmative" consent was not required for Ent to amend the agreement to add the arbitration provision because she was constructively notified of the change; she did not opt out; and she continued to use Ent's services, which, under the Notice of Amendments provision, *supra* Part I, she agreed would act as her consent to any amendments to the agreement. Under the totality of

these circumstances, Macasero is deemed to have assented to the addition of the arbitration agreement. *See, e.g.*, *In re Facebook Biometric Info. Priv. Litig.*, 185 F. Supp. 3d 1155, 1167 (N.D. Cal. 2016) (users were deemed to have assented to the amended terms by their continued use where users with registered email addresses were provided email notice that the terms were changing with a link to the new terms); *see also Needleman*, 474 F. Supp. 3d at 1105 ("In light of the finding that Needleman did have constructive notice of the document, his failure to opt out of the agreement within the allotted time was sufficient to constitute assent."). And such assent renders irrelevant whether this type of change was contemplated by the parties when they entered into the membership agreement.

V. Conclusion

¶ 43 The order denying Ent's motion to dismiss and compel arbitration is reversed, and the matter is remanded to the district court for further proceedings.

JUDGE DAILEY concurs.

JUDGE JOHNSON specially concurs.

JUDGE JOHNSON, specially concurring.

¶ 44 I agree with the majority opinion, including its disposition: Cecilia Macasero (Macasero) had constructive notice of her bank's updated terms and conditions requiring her to opt out of the arbitration agreement within a specified period of time.

¶ 45 So why am I specially concurring?

¶ 46 Macasero does not cite to, nor does she claim a violation of, any state or federal law that governs the *manner* in which a financial institution must provide electronic notice to its customers about updated terms and conditions.[1] And I cannot by judicial fiat require a financial institution to send updated terms and conditions in a different manner than was done here because that is a policy decision left to a legislative body. But I can note that the current "reasonable person" standard that courts use for constructive notice is outdated given the economic realities of the digital age.

---

[1] Macasero's complaint alleged that Ent Credit Union violated Colorado law when, after she paid off her car loan, the bank failed to pay her the unearned GAP fee in connection with the retail installment sales contract. *See* § 5-1-301, C.R.S. 2022; *see also* Unif. Consumer Credit Code Rule 8(h), 4 Code Colo. Regs. 902-1.

¶ 47 Let me start with these two premises: (1) banks have the right to update the terms and conditions that apply to their members, and (2) banks must be able to engage in business practices that give them assurance that members have been notified about and have assented to those updated terms and conditions. In the context of this case, we are dealing with electronic notice because Macasero agreed to be notified by email of changes to her online bank account.[2]

---

[2] I use the term online banking to also include mobile banking, although the two terms have a technical difference:

> The term "mobile banking" describes products and services that allow depositors to manage their bank accounts — *e.g.*, check balances, make payments to third parties, and transfer funds — using the limited screen space, bandwidth, and processing power of smartphones and other mobile devices. By contrast, the term "online banking" describes similar products and services optimized for use with the large displays, high–speed Internet connections, and feature-rich web browsers typically found on desktop and laptop computers. In other words, while online banking and mobile banking both enable depositors to manage their bank accounts over the Internet, they are each specifically

¶ 48 As the majority points out, a member receives constructive notice when the party "abstains from inquiry when inquiry ought to be made." *Mackey v. Fullerton*, 7 Colo. 556, 560, 4 P. 1198, 1200 (1884). The party is charged with inquiry notice when there are "sufficient facts to attract the attention of interested persons and prompt a *reasonable person* to inquire further." *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 24 (Colo. 1996) (emphasis added) (quoting *Monaghan Farms, Inc. v. City & Cnty. of Denver*, 807 P.2d 9, 15 (Colo. 1991)).

¶ 49 The "reasonable person" is the default standard we use in the law. That person is generally "required to conform his or her conduct to a standard of objective behavior measured by what a *reasonable person of ordinary prudence* would or would not do under *the same or similar circumstances*." *United Blood Servs. v. Quintana*, 827 P.2d 509, 519 (Colo. 1992) (emphasis added); *see also* Restatement (Second) of Torts § 283 (Am. L. Inst. 1965)

> designed and streamlined for use with different types of consumer devices.

MShift, Inc. v. Digit. Insight Corp., 747 F. Supp. 2d 1147, 1149-50 (N.D. Cal. 2010), *aff'd*, 435 F. App'x 915 (Fed. Cir. 2011).

(“Sometimes this person is called a reasonable [person] of ordinary prudence, or an ordinarily prudent [person], or a [person] of average prudence, or a [person] of reasonable sense exercising ordinary care.”).

¶ 50 So who is this reasonable person that inquires further to determine whether terms and conditions are updated when the bank sends a monthly statement by email?[3] As with all reasonable person standards, we make assumptions about how the “ideal” person would act and behave under like circumstances. But the “reasonable person” from the strictly paper era of banking is not necessarily in “similar circumstances” to the “reasonable person” of the digital age, thus resulting in three flawed assumptions in the current inquiry notice analysis. First, we should not assume that prior dealing with the bank means what it meant in a strictly paper era. Second, we should not assume that all people view the same email in the same digital format. And finally, as many studies

---

[3] Even though I may discuss broad principles that could apply to a “reasonable person” standard involving online banking generally, my intended purpose is to limit my observations to the facts of this case.

support, we should not assume that people read as closely online as they do on paper.

I. Statistics Regarding Online Banking

¶ 51 Before we turn to "inquiry notice," I start with the approximate number of Americans who use online banking because these are the persons likely in "similar circumstances" as Macasero.

¶ 52 In 2013, the Pew Research Center concluded that approximately 51% of U.S. adults or 61% of internet users bank online. Susannah Fox, *51% of U.S. Adults Bank Online*, Pew Rsch. Ctr., https://perma.cc/EQ7D-2WQ3. These percentages increased following the COVID-19 pandemic. The four largest banks in the United States (JPMorgan, Bank of America, Citigroup, and Wells Fargo) saw a surge in online banking, with 72% of customers going digital, accounting for nearly a 10% increase from 2019. Wells Fargo, *Digital Banking Soars in the COVID-19 Pandemic,* https://perma.cc/6B4Y-LNLS; *see* Stephanie L. Tang, *Increasing the Role of Agency Deference in Curbing Online Banking Fraud*, 91 N.D. L. Rev. 329, 329 (2015) ("Over the past few decades, online banking has gone from a seldom-used, novel technology to one used by over seventy percent of all bank account holders.").

¶ 53 By March 2021, Business Insider reported an estimated 196.8 million digital bank users that year, which represented roughly 75% of the U.S. population. Business Insider, *US Digital Banking Users Will Surpass 200 Million in 2022*, https://perma.cc/KWS3-E2VY. That same article projected that there will be 216.8 million online bank users by 2025, comprising roughly 80.4% of the U.S. population. *Id.* This projection seems on track given that as recently as January 3, 2023, Forbes Magazine estimated 78% of Americans use online banking. Rebecca Lake, *Online Banking Security: How To Protect Your Online Banking Information*, Forbes, https://perma.cc/9N8T-QVZ3.

¶ 54 I understand that none of these statistics are in the record of this case, but the numbers simply set the backdrop for my analysis.

II. Inquiry Notice

¶ 55 As the majority points out, inquiry notice generally requires a factual analysis of (1) the parties' prior dealings; (2) whether the hyperlink or notice from the bank is reasonably conspicuous; and (3) the accessibility of the terms and conditions. *See Needleman v. Golden 1 Credit Union*, 474 F. Supp. 3d 1097, 1103 (N.D. Cal. 2020). The flawed assumptions I identify pertain to the prior

dealings and "reasonably conspicuous" aspects of the inquiry analysis.

A. Prior Dealings

¶ 56 In the strictly paper era, consumers would have at least one communication per month with their banking institutions — the monthly bank statement. The "reasonably prudent person" would review the monthly bank statement from the bank in the mail and reconcile the bank's information to the consumer's checkbook register. *See Vending Chattanooga, Inc. v. Am. Nat'l Bank & Tr., Co.*, 730 S.W.2d 624, 625 (Tenn. 1987) (after the bank mailed the monthly statement and cancelled checks to the depositor, one of the officer manager's duties was to reconcile the bank account with the statements); *Pine Bluff Nat'l Bank v. Kesterson*, 520 S.W.2d 253, 258 (Ark. 1975) ("The depositor must be held chargeable with knowledge of all the facts a reasonable and prudent examination of his bank statement and the accompanying items would have disclosed . . . ."). In addition to cancelled checks, the paper monthly statement might also have included a separate insert or printed material on the back of the statement with information

about promotions or, as relevant here, updated terms and conditions.

¶ 57 In other words, paper monthly statements before the online era were *extremely* important. But do they have the same significance now? Perhaps not. As one commentator put it, "the basic advantage of electronic banking [is] 'the triple anys — anytime, anywhere, anyway.'" Jon Newberry, *Anytime, Anywhere, Anyway*, A.B.A. J., Dec. 1996, at 94, 94. This means that "[o]nce an online account is opened, a user can access it to pay bills, monitor account balances or transfer funds between accounts 24 hours a day — from home, office, car or airport — by means of a PC or laptop computer, an ATM or a phone." *Id.* This article was written before the ubiquity of smartphones and tablets, which now make online banking even more accessible.

¶ 58 And Americans are taking advantage of the availability by checking their accounts more frequently. According to a survey conducted by Lexington Law in summer 2018, 36% of Americans check their accounts once a day, while another 30% check their accounts once a week. Lexington Law, *4 Personal Finance Tools You Need and Why*, https://perma.cc/HFK5-NRYJ. On a macro scale,

Statista reported that, as of August 2020, Wells Fargo was the most popular bank, with 182 million visits to its website in that month, and Bank of America ranked second, with 156 million visits to its website in the same time period. Statista, *Most Popular Banks in the United States as of August 2020, Based on Monthly Visits*, https://perma.cc/B8VH-R3DA.

¶ 59 In *Qualls v. Wright Patt Credit Union*, 2021-Ohio-2055, ¶ 40, 174 N.E.3d 874, 885 (Ct. App.), there were 6,572,843 "unique" visits to the defendant credit union's website between July 31, 2019 and April 20, 2020. This amounts to a daily average of over 24,000 "unique visits." Even without knowing the number of bank members or general inquiries, 24,000 unique visits a day to one credit union's online banking system is not an insignificant number.

¶ 60 If members are checking their bank accounts more frequently, then should we be assuming that Macasero, as a reasonable person, is checking her email just as frequently for bank notices? In the record, Exhibit F is a two-page list of emails that the bank sent to Macasero from January 2018 to February 2019. During that time period, Macasero opened seven emails identified as

monthly "eStatement," but she did not open nineteen emails with that same subject, including the email at issue in this case.[4] As the majority points out, Macasero's "failure to view [her] statements electronically is akin to one of [Ent]'s paper statement customers failing to open one's mail." *Needleman*, 474 F. Supp. 3d at 1104.

¶ 61 But is this "unopened mail" assumption correct? Now that Americans can check their balances and see what transactions have cleared at any time and from any location, the monthly bank statement is becoming obsolete, or at the very least has significantly diminished in importance. Therefore, was Macasero acting like a "reasonable person" by *not* opening her monthly online statement because she is like the majority of Americans, who can — and do — check their bank accounts more frequently, and therefore, she did not need to conduct the monthly reconciliation that was significant in the paper age? Can we really say that it is "willful ignorance" for people to prioritize bank emails based on subject line and only open

---

[4] At oral argument, counsel for Ent cautioned that the identified subjects of the emails in Exhibit F were not necessarily the subject header of the email that Macasero would have received. But the identified topics provide a general indication of the contents of the emails.

the emails for information that they do not have access to 24/7? Would it be too cynical of me to think that banking institutions have done their own market research in this area and are well aware that consumers are *not* opening their monthly bank statement email, and that they insert the hyperlink with updated terms and conditions knowing that most users will not perceive the email to contain *other* important information?[5]

¶ 62 This leads me to my next point about "inquiry notice" — whether the notice hyperlink is "reasonably conspicuous."

B. Reasonably Conspicuous

¶ 63 The majority concludes that, by signing up for electronic notifications, Macasero had certain responsibilities and she was "reasonably expected to read *the entirety* of the email sent to her." *Supra* ¶ 26.

¶ 64 To determine whether a notice is reasonably conspicuous for inquiry notice, courts look at the design and content of the email. Courts are less likely to find inquiry notice where the notice is

---

[5] At oral argument, counsel for Ent did not know whether the credit union routinely sent other updated terms and conditions in the eStatement monthly emails.

further away from the action button or the display is cluttered with additional images. *See Nicosia v. Amazon.com, Inc.*, 384 F. Supp. 3d 254, 266 (E.D.N.Y. 2019).

¶ 65 The majority provided an image of the email at issue, *supra* ¶ 5, and concluded that, though the notice was below text and an image of a promotion, a "reasonable person" would see the notice because it was in the same font size as the other parts of the email and it had the same blue hyperlink as the eStatement link at the top, *supra* ¶ 30. Perhaps so. But there are three reasons why these assumptions likewise may not be entirely accurate in the digital age.

¶ 66 First, the link is not close to the *primary* action button — if we presume the action button is the hyperlink for the "May 2019 eStatement," which is featured at the top, directly after the salutation and the main topic of the email. *See Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 857 (9th Cir. 2022) (In the context of browsewrap agreements, the "inquiry notice standard demands conspicuousness tailored to the reasonably prudent Internet user, not to the expert user, [so] the design of the hyperlinks must put such a user on notice of their existence.").

¶ 67 Ent claims that "most of the email can be viewed at once, perhaps requiring the reader to scroll only once to view the email in its entirety." Even assuming this statement is accurate for the majority of online users, the notice and hyperlink for the terms and conditions may then appear "below the fold." This term originally referred to content in print newspapers that falls "below the middle of the page where you cannot see it when the newspaper is folded." *Cambridge Dictionary*, https://perma.cc/R6F3-6C4R. In today's internet parlance, "below the fold" is similarly defined as any information "you must scroll down to the middle or bottom of the screen to see." *Id.*; *see Fed. Trade Comm'n v. Com. Planet, Inc.*, 878 F. Supp. 2d 1048, 1064 n.4 (C.D. Cal. 2012) ("The term 'fold,' originally a newspaper terminology, refers to the bottom edge of a webpage that is viewable on the computer screen without scrolling down."), *aff'd in part and vacated in part*, 815 F.3d 593 (9th Cir. 2016).

¶ 68 Research suggests that "any information that resides 'below the fold,' i.e., requires scrolling to view, is less likely to be seen" by the user. Julie M. Jones, *Not Just Key Numbers and Keywords Anymore: How User Interface Design Affects Legal Research*, 101 L.

Libr. J. 7, 14 (2009); *see also* Claire M. Amodio, *23andMe: Attack of the Clones and Other Concerns*, 31 Fordham Intell. Prop. Media & Ent. L.J. 926, 975-76 (2021) (stating that "scrollwrap" agreements — where a user scrolls through the contract to the end for the "I accept" button — do not put consumers on notice because studies show that people either do not spend enough time to entirely read them or "simply do not understand what they are agreeing to").

¶ 69 This means that if the email had been opened, the more important information — the monthly eStatement link — would likely have been viewed by the user because it was "above the fold," but the notice about updated terms and conditions was more likely to be missed because it was located "below the fold." *See Com. Planet*, 878 F. Supp. 2d at 1064 (noting that when the action button is "placed at the very bottom of the page, below the fold," then "a reasonable consumer is not likely to scroll to the bottom and see or read it"); *accord* Jones, 101 L. Libr. J. at 14.

¶ 70 Second, the majority acknowledges that the notice is below a promotion that has a graphic. Surveys suggest that people fixate on pictures or images more than text and that people are more likely to click on a photo, even if it does not take them anywhere.

Jones, 101 L. Libr. J. at 14. Thus, by putting the promotion between the monthly statement link and the notice link, Ent increased the likelihood that a person would not scroll further down past the promotional image.

¶ 71 Finally, and most importantly, the manner in which people receive and view an email does not necessarily mean all users see it in the same format; thus, something being "reasonably conspicuous" to one user does not necessarily mean it is "reasonably conspicuous" for another. Recall Ent's claim that the email might require only one scroll to view the entire message. Ent's statement may be inaccurate when one considers two additional points. First, not all users are on the same device — as Americans can now view their online accounts on a smartphone, tablet, or desktop computer — and among those devices there are a plethora of brands and sizes. And second, users' screen resolution settings vary substantially. During a strictly paper era, the end user received the *same* layout and printed material. Not so in the digital era. When screen resolution is low, the screen real estate is

less because the text and icons are bigger.[6] This means that not all people will see the email as a single image, and some users might need to scroll down once — as Ent says — or perhaps even more if the screen real estate shows less. The farther down the notice of updated terms and conditions is placed, the more likely that people with less screen real estate will not view the entire email, thinking that all the *important* information was at the top.

C. Reading Comprehension

¶ 72 Finally, I turn to reading comprehension. While Americans have instantaneous access to their banks online, additional research suggests that "[u]sers typically don't read on the web, they scan." Jones, 101 L. Libr. J. at 15. Research also suggests that "[r]eading from a computer screen overall is slower, less accurate, more fatiguing, causes decreased comprehension and is rated as inferior by those engaged in the reading." Debra Moss Curtis & Judith R. Karp, *In a Case, On the Screen, Do They Remember What They've Seen? Critical Electronic Reading in the Law Classroom*, 30

[6] "Screen real estate" is defined as "the amount of space available on a phone or computer screen." Collins Dictionary, https://perma.cc/8TM3-Q3ML.

Hamline L. Rev. 247, 251 (2007); *see also* Amanda Watson, *Don't Burn the Books, Read Them!*, 46 Int'l J. Legal Info. 79, 82 (2018) (When testing reading comprehension, studies have shown that "[s]ubjects who read the texts on paper performed significantly better than subjects who read the texts on the computer screen.") (citation omitted). This is why most everyone has been advised at one time or another to proofread written work in printed paper form "because reading comprehension is higher for the printed page and errors are more likely to be detected." Duane A. Daiker, *Computer-Related Legal Malpractice: An Overview of the Practitioner's Potential Liability*, Fla. Bar J., Apr. 1995, at 12, 17.

¶ 73 I suspect that the average number of emails Americans reportedly receive and read in a day also contributes to the "scanning" phenomenon on the web. According to a Campaign Monitor survey conducted in 2021, the average person sends and receives 121 business emails per day. Fin. Online, *56 Email Statistics You Must Learn: 2023 Data on User Behavior & Best Practices*, https://perma.cc/6W6Q-H635. The number of spam or phishing emails clogging web traffic — reportedly comprising 47.3% of emails sent in September 2020 alone — exacerbates people

scanning email subject lines to empty out their inboxes. *Id.* Another study reveals that 42% of emails are mostly opened on smartphones and mobile devices. *Id.* Again, the smaller the screen, the more likely the user will need to scroll down to reach the hyperlink for updated terms and conditions. And across all industries, the "open" rate of email was approximately 18% in 2021. *Id.* This low rate is likely attributed to the amount of time in a day Americans must spend on their email: on average, an adult spends over three hours a day reading work email and two hours a day reading personal email. *Id.*

III. Conclusion

¶ 74 I adhere to the two premises I laid out in the beginning of this special concurrence: banks should be able to update terms and conditions and should also be able to engage in practices that give them assurance that their members have constructive notice of those updated terms and conditions. But because Americans interface with their financial institutions in different ways from the strictly paper era, who the "reasonable person" is in a digital age needs to be updated. But this standard cannot be updated until laws are changed to reflect the evolving banking norms of

Americans by restricting or prohibiting financial institutions from notifying consumers that they have updated terms and conditions in an email concerning one's monthly statement. Therefore, I must concur with the majority because the inquiry notice standard still assumes that the "reasonable person" will open and read the entirety of the monthly statement email.