UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-62408-CIV-SINGHAL/VALLE

PHILIPPE CALDERON, ANCIZAR MARIN,
and AMIR CHARNIS, on behalf of themselves
and all others similarly situated,

Plaintiffs,

v.

SIXT RENT A CAR, LLC,

Defendant.
_____/

ORDER ON MOTION TO COMPEL ARBITRATION

THIS CAUSE is before the Court on Defendant Sixt Rent a Car, LLC's Motion to Compel Arbitration of Plaintiff Amir Charnis's Claims, to Stay His Claims, and for Oral Argument ("Motion to Compel") (DE [101]). Plaintiff Charnis has filed a Response in Opposition (DE [106]), and Sixt has filed a Reply (DE [115]). The Court has also considered all the attachments submitted in support of the parties' positions. For the reasons discussed below, the Court grants Sixt's Motion to Compel.

I. BACKGROUND

This putative class action arises out of allegedly unauthorized fees and costs imposed by Sixt, a luxury rental-car company, after Plaintiffs each rented cars from it.[1] First Am. Compl. ¶ 1 (DE [74]). Plaintiffs allege that Sixt "organized a company-wide scheme to systematically charge unfair, deceptive, and unauthorized repair fees to

[1] On February 12, 2020, this Court denied Sixt's Motion to Compel Arbitration of Plaintiff Marin's claims, (DE [30]), which Sixt has appealed, (DE [44]). The appeal has not yet been decided. Plaintiffs Calderon and Marin were later granted leave to amend their original complaint to add Charnis as Plaintiff. *See* (DE [73], [74]). This Motion involves only Charnis's claims.

customers in order to increase revenue." *Id.* ¶ 3. Charnis and Sixt provide different accounts of how the events unfolded in this case.[2]

A. Allegations of the First Amended Complaint

Sixt asserts that its rental agreement with Charnis consists of two separate documents that constitute the entire agreement: the Face Page and the Rental Jacket. First Am. Compl. ¶ 23 (DE [74]); *see also* Ex. G to First Am. Compl. (DE [74-7]) (Face Page). Charnis alleges that the customer signs the Face Page at a Sixt kiosk when picking up the rental. First Am. Compl. ¶ 25 (DE [74]). The Face Page includes language that Sixt asserts is an incorporation by reference of the Rental Jacket: "By signing below, you agree to the Terms and Conditions printed on the Rental Jacket and to the terms found on this Face Page, which together constitute this Agreement." *Id.* ¶ 29. The Rental Jacket is a tri-fold pamphlet that includes the same material terms used by Sixt at all locations across the United States. *Id.* ¶ 28; *see also* Ex. C to First Am. Compl. (DE [74-3]) (Rental Jacket). The version of the Rental Jacket attached to the First Amended Complaint does not appear to contain an arbitration provision.

Sixt allegedly imposed two categories of unauthorized fees on its customers: (1) fees authorized only by the Rental Jacket; and (2) fees authorized by neither the Rental Jacket nor the Face Page. *See* First Am. Compl. ¶¶ 26–27, 29, 40 (DE [74]). The only authorized fees, Charnis alleges, are those included in the Face Page. *See id.* ¶ 26. Charnis alleges that Sixt did not provide him instructions on how to access the Rental Jacket before signing the Face Page. *Id.* ¶ 27; *see also id.* ¶¶ 32–33. According to

[2] In ruling on a motion to compel arbitration, the Court applies "a summary judgment-like standard" and "may conclude as a matter of law that [the] parties did or did not enter into an arbitration agreement only if there is no genuine dispute as to any material fact concerning the formation of such an agreement." *Mason v. Midland Funding LLC*, 815 F. App'x 320, 328 (11th Cir. 2020) (quoting *Bazemore v. Jefferson Capital Sys., LLC*, 827 F.3d 1325, 1333 (11th Cir. 2016)).

Charnis, the Rental Jacket is not provided to customers until *after* they sign the Face Page. *Id.* ¶¶ 30, 35. Charnis also alleges that Sixt does not provide any instructions on its website on how to access the Rental Jacket when making an online reservation. *Id.* ¶ 30.

Turning to Charnis's specific rental, he reserved a rental car through Sixt's website, www.sixt.com, on November 17, 2019. *Id.* ¶ 115. Charnis did not pay for the rental at that time, and it was freely cancelable. *Id.* The confirmation email reflected merely an "estimated price." *Id.* ¶¶ 115, 117. Charnis contends that he did not agree to any of the terms in the Rental Jacket when he made his reservation. *Id.* ¶ 35.

Three days later, Charnis picked up the car from the Sixt kiosk at the Miami International Airport. *See id.* ¶ 119; Ex. G to First Am. Compl. (DE [74-7]). He was asked to electronically sign acceptance of the Face Page. First Am. Compl. ¶ 120 (DE [74]). He alleges that at no point before signing was he "presented with, provided the opportunity to review, or given instructions on how to access the Sixt Rental Jacket." *Id.* ¶ 121; *see also id.* ¶¶ 124, 126. After Charnis electronically signed, the Face Page was printed, folded, and placed in a folded paper envelope, which was the Rental Jacket that contained additional terms and conditions unknown to Charnis. *Id.* ¶ 122. Charnis alleges that, "[o]n information and belief," the Rental Jacket did not include an arbitration provision when he signed the Face Page, *id.* ¶ 31, nor was his online reservation subject to an arbitration provision, *id.* ¶ 116.

Charnis returned his car on November 25, 2019; he maintains that it sustained no damage and was in the same condition as when he picked it up. *Id.* ¶ 128. Sixt did not inspect the car for damage at that time. *Id.* ¶ 129. But on December 9, 2019, Charnis received a letter from Sixt indicating that the rental sustained damage while in his

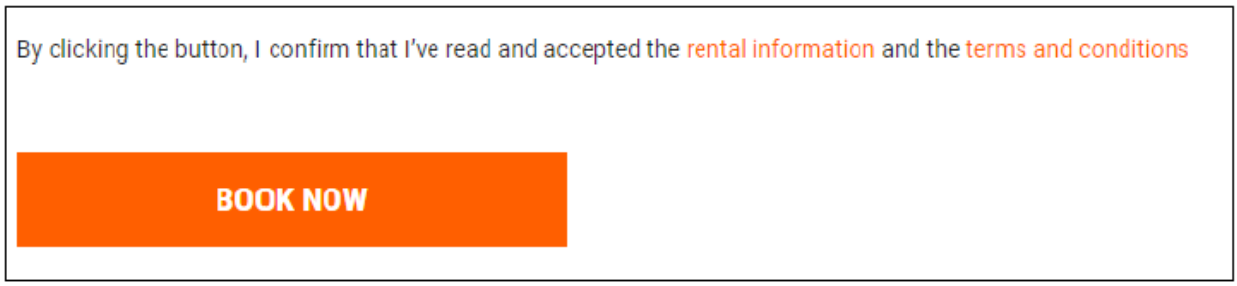
possession and required him to pay $519 in fees, consisting of $361.20 in estimate of repair; $90.30 in diminution of value; $45 in administrative fees; and $22.50 in estimate/appraisal fees. *Id.* ¶ 130; *see also* Ex. H to First Am. Compl. (DE [74-8]) (invoice). Charnis denied causing any damage to the car but submitted the invoice to his independent insurance company, ultimately paying Sixt $361.20 through his insurance for the estimate of repair. First Am. Compl. ¶¶ 131–33 (DE [74]). Charnis alleges that the diminution of value and administrative fees were authorized only by the Rental Jacket, not the Face Page. *Id.* ¶ 135. The estimate of repair and estimate/appraisal fee were allegedly authorized neither by the Rental Jacket nor by the Face Page. *Id.* Nevertheless, Charnis paid the remaining balance of $157.80 to avoid harm to his credit. *Id.* ¶ 142.

Charnis and the other named Plaintiffs filed this putative class action alleging five counts: (I) breach of contract (on behalf of the unauthorized-fee class and the Florida Consumer Collections Practices Act ("FCCPA") subclass); (II) violation of Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") on behalf of the unauthorized-fee class and the FCCPA subclass; (III) violation of the FCCPA on behalf of the FCCPA subclass; (IV) breach of contract on behalf of the non-repair class, pleaded in the alternative to counts I through III; and (V) violation of FDUTPA on behalf of the pass-through fee class, pleaded in the alternative to counts I through III.

B. Facts in Sixt's Motion to Compel Arbitration

Sixt explains the facts differently. In support of its Motion to Compel, Sixt submits three declarations of Dennis Boehringer, its director of corporate development. *See* 1st Boehringer Decl. (DE [102]); 2d Boehringer Decl. (DE [104]); 3d Boehringer Decl. (DE [116]). Boehringer attests that he is familiar with the reservation booking process on Sixt's website, and he made several reservations in November 2019 to test the process.

1st Boehringer Decl. ¶ 5 (DE [102]); 3d Boehringer Decl. ¶ 2 (DE [116]). He explains the booking process as follows: Customers choose a vehicle and input their personal information. 1st Boehringer Decl. ¶¶ 6–7 (DE [102]). Before completing the online reservation, customers are required to click the "BOOK NOW" button that confirms that they have "read and accepted the rental information and the terms and conditions." *Id.* ¶¶ 7–8. The phrases "rental information" and "terms and conditions" are hyperlinked in orange against a white background:



Id. ¶ 8. Clicking on the "terms and conditions" hyperlink displays the general Rental Jacket. *Id.* ¶ 7; *see also* Ex. 1 to 1st Boehringer Decl. (DE [102-1]) (Rental Jacket); 3d Boehringer Decl. ¶¶ 4–5 (DE [116]).

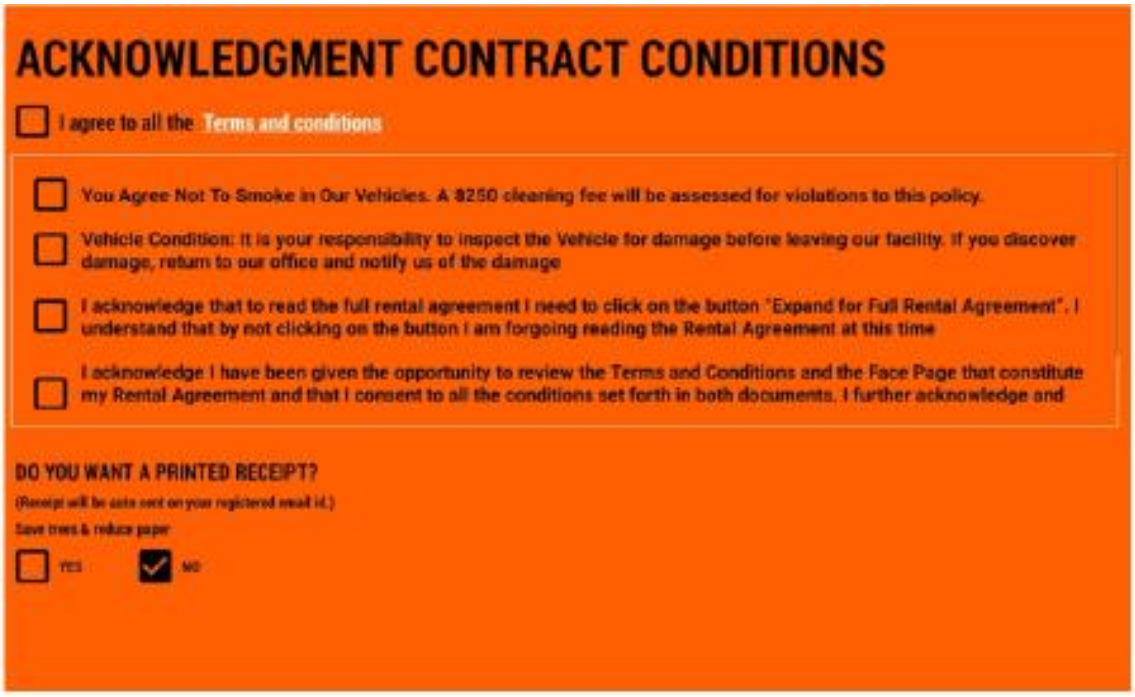
The version of the general Rental Jacket in effect in November 2019 contains an arbitration provision:

> 16. Arbitration Agreement and Class Action Waiver. YOU AND SIXT EACH WAIVE THEIR RIGHT TO A JURY TRIAL OR TO PARTICIPATE IN A CLASS ACTION PURSUANT TO THE FOLLOWING TERMS. YOU AND SIXT AGREE TO ARBITRATE ANY AND ALL CLAIMS, CONTROVERSIES OR DISPUTES OF ANY KIND ("CLAIMS") AGAINST EACH OTHER, INCLUDING BUT NOT LIMITED TO CLAIMS ARISING OUT OF OR RELATING TO THIS AGREEMENT, OR OUR PRODUCTS AND SERVICES, CHARGES, ADVERTISINGS, OR RENTAL VEHICLES INCLUDING WITHOUT LIMITATION CLAIMS BASED ON CONTRACT, TORT (INCLUDING INTENTIONAL TORTS), FRAUD, AGENCY, NEGLIGENCE, STATUTORY OR REGULATORY PROVISIONS OR ANY OTHER SOURCE OF LAW. THE ARBITRATOR, AND NOT ANY FEDERAL, STATE OR LOCAL COURT OR AGENCY, SHALL HAVE AUTHORITY TO RESOLVE ANY AND ALL DISPUTES RELATING TO

> THE INTERPRETATION, APPLICABILITY, ENFORCEABILITY OR FORMATION OF THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO ANY CLAIM THAT ALL OR ANY PART OF THIS AGREEMENT IS VOID OR VOIDABLE. . . .

Ex. 1 to 1st Boehringer Decl. (DE [102-1], at 21).

Boehringer also attests that in November 2019, Sixt's new checkout (pick-up) process was in effect at the Miami location. 1st Boehringer Decl. ¶¶ 12, 17–18 (DE [102]). Customers are provided details about their rental and receive disclosures on a touchscreen tablet, to which they must agree. *Id.* ¶ 13. Next, customers advance to a screen entitled "ACKNOWLEDGMENT CONTRACT CONDITIONS":



Id. ¶ 17. The hyperlinked "terms and conditions"—to which customers must also agree—leads to a copy of the general Rental Jacket when selected. *Id.* ¶ 15; *see also* 3d Boehringer Decl. ¶ 7 (DE [116]). Customers cannot proceed any further until they have agreed to all the terms and conditions. 1st Boehringer Decl. ¶ 15 (DE [102]). After agreeing to the terms and conditions, customers pay for the rental. *Id.* ¶ 16. Customers

sign their name on the touchscreen and hit "DONE" to complete the transaction. *Id.*; *see also* 3d Boehringer Decl. ¶ 8 (DE [116]).

In November 2019, each customer received (1) a printed copy of the terms and conditions at the rental counter and (2) a copy of the Face Page via email or printed, based on the customer's choice. *See* 1st Boehringer Decl. ¶ 18 (DE [102]); 3d Boehringer Decl. ¶ 8 (DE [116]). The printed copy of the Florida Rental Jacket is the same as the electronic copy available when customers click on the hyperlink at the kiosk before accepting the terms and conditions. *See* 1st Boehringer Decl. ¶ 36 (DE [102]); 3d Boehringer Decl. ¶ 9 (DE [116]); Ex. 9 to 1st Boehringer Decl. (DE [102-9]) (Florida Rental Jacket).

As to Charnis's specific reservation, Boehringer attests that, based on his "personal and professional observations and participation in making reservations" in November 2019, Charnis's experience in reserving his Florida rental "would have been identical" to the reservation process Boehringer described, 1st Boehringer Decl. ¶ 34 (DE [102]), and Charnis did, in fact, use the new checkout process that required him to agree to the Rental Jacket terms and conditions before picking up the car, *id.* ¶¶ 35–36; *see also* 3d Boehringer Decl. ¶ 10 (DE [116]). Attached to Boehringer's second declaration is a copy of the Florida Rental Jacket in effect in November 2019, which Charnis would have been able to view via hyperlink and of which he would have received a paper copy. *See* 1st Boehringer Decl. ¶ 36 (DE [102]); Ex. 9 to 1st Boehringer Decl. (DE [102-9]). The Florida Rental Jacket also contains an arbitration provision. *See* Ex. 9 to 1st Boehringer Decl. (DE [102-9], at 10). Boehringer also attaches a copy of Charnis's Face Page, which includes language referring to the "Terms and Conditions printed on the rental jacket." Ex. 1 to 2d Boehringer Decl. (DE [104-1], at 3). Sixt now

moves to compel arbitration based on the provisions in the Rental Jacket and Face Page.

II. LEGAL STANDARD

"The Federal Arbitration Act ('FAA'), 9 U.S.C. § 1 *et seq.*, governs the enforceability of an arbitration agreement." *Capua v. Air Europa Lineas Aereas S.A. Inc.*, 2021 WL 965500, at *3 (S.D. Fla. Mar. 15, 2021). An arbitration agreement is generally "valid, irrevocable, and enforceable." 9 U.S.C. § 2. The FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Dasher v. RBC Bank (USA)*, 745 F.3d 1111, 1115 (11th Cir. 2014) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)). But because "arbitration is simply a matter of contract," the Court should apply state-law contract principles to determine whether the parties intended to submit to arbitration. *Id.* at 1116 (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)).

Thus, the presumption favoring arbitrability "does not apply to disputes concerning whether an agreement to arbitrate has been made." *Id.* (quoting *Applied Energetics, Inc. v. NewOak Capital Mkts., LLC*, 645 F.3d 522, 526 (2d Cir. 2011)); *see also AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986) ("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." (quoting *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960))).

III. DISCUSSION

The Court will address Sixt's arguments in four parts: (A) whether the delegation clause precludes the Court from analyzing formation of the contract; (B) whether the California rental documents are relevant at this stage of the litigation; (C) whether the

parties agreed to arbitrate; and (D) whether questions of arbitrability must be delegated.

A. The Delegation Clause Does Not End the Analysis on This Motion.

First, Sixt argues that the Court should compel arbitration of Charnis's claims because the general and Florida Rental Jackets contain a valid delegation clause within the arbitration provision, which "ends the analysis" of the Motion to Compel. Mot. to Compel 16 (DE [101]). It is true that the general Rental Jacket provides that gateway questions of "interpretation, applicability, enforceability or formation" of the agreement shall be decided by the arbitrator, not the Court. *See* Ex. 1 to 1st Boehringer Decl. (DE [102-1], at 21). Such delegation provisions are enforceable by the Court. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019) ("Applying the [FAA], we have held that parties may agree to have an arbitrator decide not only the merits of a particular dispute but also 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." (quoting *Rent–A–Center, W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010))); *Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1264 (11th Cir. 2017) ("[T]he parties may agree to arbitrate gateway questions of arbitrability including the enforceability, scope, applicability, and interpretation of the arbitration agreement." (citing Rent–A–Center, 561 U.S. at 68–69)).

But "[a]rbitration is a matter of contract and of consent." *JPay, Inc. v. Kobel*, 904 F.3d 923, 928 (11th Cir. 2018). "[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *Id.* (alteration in original) (quoting *AT&T Techs.*, 475 U.S. at 648–49). Where, like here, the parties disagree about whether they *entered into* a binding contract in the first place, the Court must determine the threshold question of whether the parties agreed

to submit their dispute—even the arbitrability issues—to the arbitrator. *See Henry Schein*, 139 S. Ct. at 530 ("To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists. *See* 9 U.S.C. § 2. But if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue."); *Wiand v. Schneiderman*, 778 F.3d 917, 924 (11th Cir. 2015) ("[C]hallenges to the validity of the arbitration clause in particular or to the very existence of the contract must be resolved by the court before deciding a motion to compel arbitration." (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444–45 n.1 (2006))).

Here, Charnis is not simply challenging the validity or enforceability of the arbitration provision; he is disputing that he ever entered into a contract. Thus, the Court agrees with Charnis that it must determine the question of contract formation before reaching the delegation clause in the arbitration provision. *See, e.g.*, *Plazas Rocha v. Telemundo Network Grp. LLC*, 2020 WL 6679190, at *2 (S.D. Fla. Nov. 12, 2020) ("[W]here the parties dispute whether an agreement to arbitrate exists at all, the Court must begin by making a threshold determination as to whether a contract has been formed before assessing any delegation clause."); *Bell v. Royal Seas Cruises, Inc.*, 2020 WL 5742189, at *4 (S.D. Fla. May 13, 2020), *report and recommendation adopted*, 2020 WL 5639947 (S.D. Fla. Sept. 21, 2020) ("[I]t is clear that the Court, not an arbitrator, should decide whether the parties entered into the arbitration agreement in the first instance.").

B. The California Rentals Have No Bearing on This Motion.

Next, Sixt argues that this Court has no authority to determine whether the parties entered into an arbitration agreement because Charnis rented another car from Sixt in

California in July 2019, that rental also falls within this putative class action because it allegedly resulted in illegally imposed fees, and the California rental agreement contains a provision delegating questions of contract formation to an arbitrator. Mot. to Compel 7, 8–10, 17–19 (DE [101]); Reply 4, 5–6 (DE [115]); *see also* Emery Decl. ¶¶ 4–5 (Sixt's counsel attesting that Plaintiff Calderon sought discovery in this suit concerning Charnis's California rental). The Court is unpersuaded by this argument. Aside from the delegation argument just discussed, as Charnis points out, *see* Resp. in Opp'n 2 (DE [106]), nowhere does the First Amended Complaint allege any facts about the California rental or the contract governing that rental. At this stage—before the Court has decided whether to certify any classes—any claim allegedly relating to Charnis's unrelated California rental is not at issue. Thus, the Court finds that only the Florida rental in November 2019 is at issue, and Charnis's claims in the First Amended Complaint stemming from that rental are governed by the contracts Charnis entered into, if at all, when booking the reservation online in California or picking up his rental in Florida.

C. Charnis Agreed to Arbitrate When He Booked the Online Reservation.

Sixt's next argument is two-fold: (1) under California contract law, Charnis agreed to arbitrate because he had an opportunity to review the online terms and conditions—that is, the general Rental Jacket—before clicking "BOOK NOW" to book the reservation; and (2) under Florida contract law, Charnis agreed to arbitrate because the Florida Rental Jacket's terms were incorporated into the Face Page, and Charnis had the opportunity to review the Florida Rental Jacket before completing the transaction. In response, Charnis challenges Boehringer's ability to attest to matters that are not within his personal knowledge, such as what Charnis clicked on when he booked the reservation or picked up the car. Then, Charnis contends that the Face Page does not incorporate by reference

the Rental Jacket under Florida law. The Court disagrees with Charnis's first argument and does not reach Charnis's second argument. As discussed below, because the Court finds that Charnis agreed to Sixt's arbitration provision when he booked his online reservation, the Court need not reach the question of whether the Face Page incorporates by reference the Rental Jacket's terms under Florida law.

A declaration "must be made on personal knowledge" and "set out facts that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4). Charnis dedicates much of his Response to arguing that Boehringer does not have sufficient personal knowledge because he is not a website designer or an IT specialist and therefore cannot attest to exactly how Sixt's website looked and functioned on November 17, 2019, when Charnis booked his online reservation. *See* Resp. in Opp'n 4–9 (DE [106]). The Court is unpersuaded by this argument. Boehringer manages projects for Sixt and tests the reservation process himself for those projects. 1st Boehringer Decl. ¶¶ 3–4 (DE [102]). He personally made reservations on Sixt's website on November 11 and 25, 2019—around the same time as Charnis—and attests that the current website layout and booking process is the same as it was back then. *Id.* ¶¶ 5, 7. The screenshot in Boehringer's declaration shows that, by clicking the "BOOK NOW" button to complete the booking, customers confirm that they have read and accept the "terms and conditions." *Id.* ¶ 8. Clicking the "terms and conditions" hyperlink sends the customer to the general "Terms and Conditions Rental Jacket," a copy of which Boehringer attached to his declaration; that version was in effect in November 2019 and contains an arbitration provision. *Id.* ¶ 7; *see also* Ex. 1 to 1st Boehringer Decl. (DE [102-1], at 21).

Charnis does not adduce any counterevidence revealing a *genuine* factual issue; his conclusory allegations in the First Amended Complaint that he did not agree to

arbitrate, without more, are insufficient in light of Sixt's evidence. *See Deal v. Tugalo Gas Co.*, 2021 WL 1049813, at *7 (11th Cir. Mar. 19, 2021) (stating that once the movant satisfies its initial burden of showing that there is no genuine issue of material fact, then "the burden shifts to the nonmovant to show evidence raising a genuine issue of material fact" (citing *Boyle v. City of Pell City*, 866 F.3d 1280, 1288 (11th Cir. 2017))); *Bazemore*, 827 F.3d at 1333 ("'[C]onclusory allegations without specific supporting facts have no probative value' for a party resisting summary judgment." (quoting *Leigh v. Warner Bros.*, 212 F.3d 1210, 1217 (11th Cir. 2000))). For example, Charnis does not assert that the layout of Sixt's website was not as Boehringer described or that he did not actually click the "BOOK NOW" button. Further, Charnis asserts—with no supporting legal authority—that he did not enter into a binding contract when he booked the online reservation because he did not pay for the rental at that time and it was "freely cancelable at his discretion." Resp. in Opp'n 2 (DE [106]).

But Sixt points to legal authority to the contrary. Under substantive California contract law,[3] "[m]utual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract." *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171,

[3] Sixt argues that, under the principle of *lex loci contractus*, California law governs Charnis's online reservation of the Florida rental because Charnis accepted Sixt's website's terms and conditions from his home in California when he booked the rental. *See Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1059 (11th Cir. 2007) ("Absent a specific contractual provision to the contrary, Florida conflict of law rules dictate that courts should apply *lex loci contractus*, or the law of the state where the contract was made, to questions of contracts (other than those that deal with contracts for the performance of services)." (citations omitted)); *Rimel v. Uber Techs., Inc.*, 2016 WL 6246812, at *5 (M.D. Fla. Aug. 4, 2016), *report and recommendation adopted*, 246 F. Supp. 3d 1317 (M.D. Fla. 2017) (applying Florida law to Uber's arbitration provision under *lex loci contractus* because plaintiff resided and worked in Florida and "presumably" clicked "Yes, I Agree" to the agreement on the Uber app while he was in Florida).

Charnis does not appear to dispute that California law applies to the online booking, though he does note that Sixt's website contains several different versions of general and state-specific terms and conditions. *See* Resp. in Opp'n 15–16 (DE [106]). The Court agrees with Sixt that California law applies to the online reservation.

1175 (9th Cir. 2014) (alteration in original) (quoting *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 29 (2d Cir. 2002) (applying California law)). California law requires the court to "determine whether the outward manifestations of consent would lead a reasonable person to believe the offeree has assented to the agreement." *Lee v. Ticketmaster L.L.C.*, 817 F. App'x 393, 394 (9th Cir. 2020) (quoting *Knutson v. Sirius XM Radio, Inc.*, 771 F.3d 559, 565 (9th Cir. 2014)); *see also Babcock v. Neutron Holdings, Inc.*, 454 F. Supp. 3d 1222, 1229–30 (S.D. Fla. 2020) ("California contract law 'measures assent by an objective standard that takes into account both what the offeree . . . did and the transactional context in which the offeree . . . acted.'" (omissions in original) (quoting *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 74 (2d Cir. 2017))).

But a party's failure to read a contract's terms before agreeing to them does not relieve the party of its contractual obligations if the party had sufficient notice. *See Norcia v. Samsung Telecomms. Am., LLC*, 845 F.3d 1279, 1284 (9th Cir. 2017) ("A party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing." (quoting *Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc.*, 107 Cal. Rptr. 2d 645 (Ct. App. 2001))); *Nguyen*, 763 F.3d at 1175 ("While failure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract, the onus must be on website owners to put users on notice of the terms to which they wish to bind consumers." (internal citation omitted)).

The Court agrees with Sixt that its online booking process involves a modified or hybrid clickwrap agreement. A pure clickwrap agreement is one "in which website users are required to click on an 'I agree' box after being presented with a list of the terms and conditions of use." *Lee*, 817 F. App'x at 394 (quoting *Nguyen*, 763 F.3d at 1175–76); *see also Babcock*, 454 F. Supp. 3d at 1230 n.4 (describing different types of website

agreements (quoting *Selden v. Airbnb, Inc.*, 2016 WL 6476934, at *4 (D.D.C. Nov. 1, 2016))). The agreement in this case, however, is not a pure clickwrap agreement; it included the Rental Jacket's terms and conditions in the form of a hyperlink that would direct Charnis to *another* page and did not expressly require Charnis to check a box stating that he agreed to the displayed terms. Nevertheless, Charnis manifested his assent by clicking the "BOOK NOW" button, which confirmed that he read and agreed to the Rental Jacket's terms and conditions, as displayed by the hyperlinked text in orange, which stands out against the white background. *See, e.g., Lee*, 817 F. App'x at 394–95 (holding that, under the modified clickwrap agreement, plaintiff "validly assented" to defendant's arbitration provision when plaintiff clicked the "Place Order" button to purchase tickets; directly above the button, the website stated, "By clicking 'Place Order,' you agree to our Terms of Use," and "Terms of Use" was displayed in blue font and contained a hyperlink to defendant's terms).

Here, like in *Lee*, Sixt's website contained an "explicit textual notice" that clicking the "BOOK NOW" button would manifest Charnis's intent to be bound by Sixt's Rental Jacket, including the arbitration provision. *See id.* (quoting *Nguyen*, 763 F.3d at 1177); *see, e.g.*, *Van Den Heuvel v. Expedia Travel*, 2017 WL 5133270, at *3 (E.D. Cal. Nov. 6, 2017), *report and recommendation adopted*, 2017 WL 6512945 (E.D. Cal. Dec. 20, 2017) (finding that "plaintiff manifested his clear agreement to the Expedia arbitration clause when he selected the 'complete booking' button on the 'Review and book your trip' screen during his ticket purchase process" on Expedia's website); *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 912 (N.D. Cal. 2011) (rejecting plaintiff's argument that "she was not provided with sufficient notice of the contractual terms she was assenting to"; finding that plaintiff agreed to arbitration because she "was provided with an opportunity

to review the terms of service in the form of a hyperlink immediately under the 'I accept' button and she admittedly clicked 'Accept'").

This case is also distinguishable from *Bazemore v. Jefferson Capital Systems*, on which Charnis relies. *See* 827 F. App'x at 1330–32. There, the plaintiff applied online for a credit card issued by the defendant bank. *Id.* at 1327. In support of its motion to compel arbitration, the bank presented only the affidavit of an employee of another company, Atlanticus, that maintained credit card records on the bank's behalf. *Id.* Unlike in this case, in *Bazemore*, there was no evidence that the website through which the plaintiff applied for the credit card "displayed or referred to any terms or conditions of the credit card she sought, much less that she was required to consent to any such terms in order to obtain her credit card." *Id.* at 1327–28. Instead, the Atlanticus employee attested that a welcome kit containing the credit card agreement "would have been sent" to the plaintiff and that the kit "would have" contained "a form of" the agreement attached to the employee's declaration. *Id.* at 1328. Notably, the Atlanticus employee did not even attest that the agreement the plaintiff would have received contained an arbitration provision, *id.*, and the bank did not provide any evidence of the clickwrap agreement or the actual contract it was seeking to enforce, *id.* at 1332. Thus, the Eleventh Circuit in *Bazemore* concluded that the bank's affidavit was "woefully inadequate," *id.* at 1330, and held that the bank's motion to compel should have been denied as a matter of law because it "offered no competent evidence to demonstrate the existence of a genuine issue of material fact concerning the existence of an arbitration agreement," *id.* at 1334. Such is not the case here, where Sixt has come forth with evidence showing that Charnis had to have agreed to Sixt's terms and conditions—including the arbitration provision—before booking the rental and has provided a copy of the actual Rental Jacket that Charnis

agreed to.

D. The Court Must Delegate Arbitrability Questions to the Arbitrator.

Now—after having found that Charnis did, in fact, agree to the arbitration provision in the Rental Jacket—the Court must turn back to the delegation provision in the agreement to arbitrate. As discussed above, the delegation provision requires an arbitrator, not the Court, to "resolve any and all disputes relating to" the "interpretation" and "applicability" of the "agreement." Ex. 1 to 1st Boehringer Decl. (DE [102-1], at 21). And another provision defines the "agreement" as the terms and conditions of the Rental Jacket *and* the Face Page. *Id.* at 4. Thus, applying the delegation provision, this Court leaves to an arbitrator the question of whether Charnis's specific claims in this putative class action fall within the scope of the arbitration agreement to which Charnis assented by booking his rental on Sixt's website. The Court will also stay litigation of Charnis's claims until arbitration is completed.

IV. CONCLUSION

Under California law, Charnis manifested his assent to be bound by Sixt's terms and conditions in its Rental Jacket—including the arbitration provision—when he booked his online reservation through Sixt's website. Under the summary judgment-like standard applied to a motion to compel arbitration, Sixt has adduced evidence showing that Charnis agreed to the arbitration provision, and Charnis failed to come forth with any counterevidence revealing a factual issue about whether he agreed to arbitrate. *See Deal*, 2021 WL 1049813, at *7. Accordingly, no genuine dispute of material fact exists about the formation of the arbitration agreement, and the Court concludes as a matter of law that the parties agreed to arbitrate. *See Mason*, 815 F. App'x at 328 (quoting *Bazemore*, 827 F.3d at 1333). The Court need not reach the question of whether, under

Florida law, the Face Page incorporates by reference the Rental Jacket's terms. It is therefore

ORDERED AND ADJUDGED that Sixt's Motion to Compel Arbitration and Stay Charnis's Claims (DE [101]) is **GRANTED**, but Sixt's request for a hearing is **DENIED**. The arbitrator shall resolve any disputes about whether Charnis's claims are subject to arbitration, and Charnis's claims in this action are **STAYED**. Charnis and Sixt shall file a Joint Status Report advising the Court of the status of Charnis's claims when arbitration is completed.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 8th day of April 2021.

RAAG SINGHAL
UNITED STATES DISTRICT JUDGE

Copies furnished to counsel via CM/ECF