2016

Online Contracting

Nancy Kim
California Western School of Law, nsk@cwsl.edu

Online Contracting

*By Nancy S. Kim**

I. Introduction

Cases addressing contract formation in the online environment have generally held that there was assent to contract if there was "reasonable notice" and a "manifestation of assent."[1] "Reasonable notice" could be actual notice or constructive notice, the latter meaning that the notice was conspicuous enough that a "reasonably prudent offeree"[2] would have been alerted to it. A "manifestation of assent" means either that the user affirmatively agreed to the terms, such as by clicking to indicate agreement (typically referred to as a "clickwrap" or "click-through" agreement), or that the user continued to engage with the website after receiving notice that terms applied to website activity (typically referred to as a "browsewrap" agreement).

The recent cases do not change the standards for assent to online contracts. They do, however, provide more guidance as to how these standards are applied. Significantly, in these cases, the courts engaged in a more nuanced analysis of notice. Continuing the trend seen in *Berkson v. Gogo LLC*[3] and *Nguyen v. Barnes & Noble Inc.*,[4] these cases focused on *how* the terms were presented to the user. Generally, the courts are taking a more sophisticated approach to assess what conspicuous notice means in the online context.

This shift in wrap contracting doctrine should not be surprising. Unlike in the early days of the Internet, when the first online contract cases were decided, likely all of the judges deciding these most recent cases have had personal experience with online contracts and are familiar with the way users encounter and interact with online contracts. These courts are applying existing contract rules in a way that recognizes the burdens that wrap contracting formats place on consumers. Consequently, they are paying attention to website design, presentation of terms, and the process by which consumers must manifest assent to determine whether a contract was formed.

* ProFlowers Distinguished Professor of Internet Studies and Professor of Law, California Western School of Law.

1. *See* Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 35 (2d Cir. 2002) ("Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility.").
2. *Id.* at 30.
3. 97 F. Supp. 3d 359 (E.D.N.Y. 2015).
4. 763 F.3d 1171 (9th Cir. 2014).

Consistent with a more sophisticated understanding of online contracts, several courts seem to be acknowledging the folly of blanket assent to online terms and rejecting the view that notice that contract terms apply to the transaction means notice of (and assent to) *all* of the terms. Concordant with the notion that notice of a contract does not equal notice of *specific* terms, courts seem to be paying more attention to the potential for altering digital terms. For example, even if a business proves that a user clicked to proceed on a website, the court may require the business to prove that the user clicked to a particular version of the terms of use, which may require that it provide evidence that there were safeguards to prevent fraudulent alterations to agreements. Accordingly, courts may start to move away from the notion that a click on an icon is the same as a signature on a page.

II. Analysis of Cases

A. Importance of Recordkeeping and Proper Procedures

The court, in *Dillon v. BMO Harris Bank, N.A.*,[5] focused on both issues of proof and the potential for fraud. The plaintiff in that case, James Dillon, applied online for loans from USFastCash and VIN Capital, two payday lenders. He clicked through various terms and conditions which, other than the loan amount, he did not read.[6] The two lenders accepted his online applications and provided him with the money. The defendant, Bay Cities Bank, facilitated the transaction by providing access to the Automated Clearing House Network. Dillon alleged that the lenders charged usurious interest rates, and he sued Bay Cities, asserting violations of the Racketeer Influenced and Corrupt Organizations Act.[7] Bay Cities moved to compel arbitration based on the agreements between Dillon and the payday loan lenders.[8]

Although there was "no dispute" that Dillon entered into contracts with the lenders, this was not enough to establish that "the lenders presented and Mr. Dillon accepted an arbitration provision as part of the loan agreement."[9] The court stated that the relevant questions were "whether the lenders presented the arbitration provisions in the proffered documents to Mr. Dillon during the online loan process" and "whether the proffered documents accurately reflect the terms to which Dillon and the lenders mutually agreed."[10]

Applying North Carolina law, the court first analyzed the contract between Dillon and USFastCash. In support of its argument that there was an agreement to arbitrate, Bay Cities offered a declaration from Christopher Muir, an employee of an entity that provided various services to USFastCash. Muir stated that he

5. No. 1:13-CV-897, 2016 WL 1175193 (M.D.N.C. Mar. 23, 2016), *appeal docketed*, No. 16-1373 (4th Cir. Apr. 5, 2016).
6. *Id.* at *2.
7. *Id.* at *1.
8. *Id.*
9. *Id.* at *1, *2.
10. *Id.* at *2.

had personal knowledge of USFastCash's online loan application process and that applicants agreed to an arbitration provision in their application and in their loan note and disclosure. He also affirmed that he reviewed Dillon's records, which contained the loan application and loan agreement.[11]

The court expressed skepticism, given USFastCash's "history of dishonesty in court proceedings,"[12] and found Muir's declaration insufficient to establish that an arbitration provision was presented to Dillon in the loan application process. The court noted that Muir's declaration did not explain how the electronic document that purportedly memorialized the loan agreement was created, nor did he affirm that the document which was presented to the court was presented to Dillon in the same format.[13] In addition, his declaration did not explain how USFastCash maintained its electronic records or preserved its documents so they could not be altered. Furthermore, the court stated that the screenshots of the USFastCash homepage, which were attached to Muir's declaration, did not bear Dillon's name or personal information, or the relevant dates.[14]

Bay Cities also offered as evidence what it claimed to be the loan agreement, but the court found this too failed to prove that Dillon agreed to an arbitration clause. The court explained that "[c]lick-wrap contracts like the one at issue here pose special risks of fraud and error."[15] With online transactions, one of the parties has exclusive control of the electronic record, which means that it could fraudulently alter the document.[16] Even absent fraud, the court noted that there was a risk of error in the production of the document that could include agreements where the click-through process varied over time.[17] Finally, the court noted that the risk of error was even higher when, as here, the party maintaining the record was not the party who produced the records.[18] For similar reasons, including the witness's lack of familiarity with the lender's online record creation and retention practices, the court found that there was no agreement to arbitrate between Dillon and VIN Capital.

The court indicated that a click did not have the same evidentiary weight as a signature on a page, noting that there was no evidence that the document was created accurately or maintained without alteration, "[n]or does the document contain a physical signature, which often is circumstantial evidence of agreement."[19]

This case indicates that courts will not necessarily accept, without adequate proof, a vendor's claim that an electronic document it submits as evidence is the document to which the consumer assented during an online contracting

11. *Id.* at *3.
12. *Id.*
13. *Id.*
14. *Id.* at *4.
15. *Id.*
16. For example, the court explained, "an unscrupulous lender could add an arbitration provision if it was sued by the borrower, but delete the arbitration provision if the lender filed suit claiming a default." *Id.* at *4 n.5.
17. *Id.* at *4.
18. *Id.*
19. *Id.* at *9.

session.[20] *Dillon v. BMO Harris Bank, N.A.* highlights the importance of good recordkeeping practices on the part of companies who seek to enforce online contract terms. It also conforms to a trend seen in several recent cases of distinguishing notice and assent to a *contract* from notice and assent to particular *terms*.

B. Notice of Contract vs. Notice of Terms

Handy v. LogMeIn, Inc.[21] does not involve a dispute about contract formation, but is illustrative of this trend of distinguishing types of notice. The plaintiff, Darren Handy, obtained LogMeIn Free, a product that the defendant provided free of charge, which allowed access to a remote desktop computer from another computer. The plaintiff subsequently purchased a companion product from the defendant, called Ignition, for $29.99. Four years later, the defendant discontinued LogMeIn Free and began offering a subscription-based premium product, LogMeIn Pro. Handy sued under California's False Advertising Law and Unfair Competition Law, claiming that he would not have purchased Ignition if he had known that LogMeIn Free would be discontinued.[22] Accordingly, Handy had to show that the defendant fraudulently omitted informing its users that LogMeIn Free could be discontinued.[23]

The defendant introduced the "Terms and Conditions of Use" (the "Terms") that applied when the plaintiff purchased Ignition and which users had to click to accept when they signed up for LogMeIn Free. The Terms stated that the defendant could "modify or discontinue any Product for any reason or no reason with or without notice to You or the Contracting Party. [LogMeIn] shall not be liable to You or the Contracting Party or any third party should [LogMeIn] exercise its right to revise these Terms or modify or discontinue a Product."[24]

Handy argued that the Terms were not binding as a browsewrap. The court stated that whether the Terms constituted an enforceable contract was "irrelevant" to whether they provided notice to prospective purchasers that LogMeIn Free could be discontinued.[25] By posting the information to its website, the defendant published the fact that it reserved the right to terminate LogMeIn Free.[26] In a footnote, the court noted that there was no effort by the defendant to bind

20. *Id.* ("The state and federal policies favoring arbitration do not excuse proponents of such agreements from producing reliable and credible evidence that the parties mutually agreed to arbitration. Documents created by entities of questionable credibility, produced second- or third-hand, and purportedly authenticated by witnesses who are unfamiliar with the lender's online record creation and retention practices are insufficient.").

21. No. 1:14-cv-01355-JLT, 2015 WL 4508669 (E.D. Cal. July 24, 2015).

22. *Id.* at *1–2.

23. *Id.* at *5–6.

24. *Id.* at *3 (quoting the Terms).

25. *Id.* at *9.

26. *Id.*

plaintiff to the Terms, but that they were used to "demonstrate merely that it posted notice of their policies."[27]

Handy v. LogMeIn is another case recognizing that notice serves different purposes and that a higher standard of "notice" is required for purposes of establishing assent. Although the availability of terms on LogMeIn's website was sufficient to show that LogMeIn did not violate California's False Advertising and Unfair Competition statutes (because it showed that the company was not intentionally concealing that it could discontinue its products), the court's language indicates that the notice in this case would have been insufficient to constitute contractual assent.

C. Website Design and Contract Presentation

1. *Resorb Networks, Inc. v. YouNow.com*

A New York trial court recently looked to *Berkson v. Gogo LLC* to determine the enforceability of online agreements. In *Resorb Networks, Inc. v. YouNow.com*,[28] the plaintiff, Robert Ianuale, was a user and a partner broadcaster of YouNow, a live video platform, until the defendants deactivated his account. He sued, claiming defamation, commercial disparagement, trade libel, and breach of contract. The defendants, maintaining that he entered into an online agreement to arbitrate his claims, moved to compel arbitration.[29]

The YouNow sign-in page gave users the option to sign in using their social media account. Underneath the sign-in options, the screen states: "By signing in you agree to our **terms of use**."[30] Adi Sideman, the CEO of the YouNow companies, stated in an affidavit that the bolded words were a hyperlink, but the affidavit was ambiguous as to whether the hyperlink led to the YouNow Terms of Use, which contained an arbitration provision, or to the License Agreement, which did not.

A button at the bottom of the partner page included a hyperlink labeled "Apply Now" which took the user to the partner broadcast application form. The user would then click "Submit" to submit its application form. YouNow sent acceptance notifications to eligible users that requested that the application be completed by clicking "Continue." Clicking on the "Continue" button took the user to a page with the heading "Partner Agreement." At the bottom of that page was a white box next to the words "'I also agree to the *Partner Agreement & Terms and Conditions*'." Sideman said that the words "Terms and Conditions" were a hyperlink to YouNow's Terms of Use, which contained an arbitration clause. (The Partner Agreement did not contain an arbitration clause.) Underneath the white box, which the user had to check, was a blue box that stated "Yes, I agree," which the user also had to click in order to proceed.

27. *Id.* at *9 n.4.
28. 30 N.Y.S.3d 506 (Sup. Ct. 2016).
29. *Id.* at 507–08.
30. *Id.* at 508 (quoting YouNow website).

After the user checked the white checkbox and clicked the blue "Yes, I agree" button, the next screen stated, "You're In!" Each time a user signed in, the user was presented with a statement that, by signing in, the user agreed to the Terms of Use.[31]

The court stated that where "the supposed assent to terms is mostly passive, as it usually is online, courts seek to know 'whether a reasonably prudent offeree would be on notice of the term at issue' and whether the terms of the agreement were 'reasonably communicated' to the user."[32] To determine whether this standard was met, the court looked to the three general principles set forth in *Berkson v. Gogo LLC*:

> First, the website must be designed such that a "reasonably prudent user" will be placed on "inquiry notice" of the terms of using the website. Second, the design and content of the website must encourage the user to examine the terms "clearly available through hyperlinkage." Third, agreements will not be enforced where the link to the agreement is "buried at the bottom of a webpage or tucked away in obscure corners of the website."[33]

The court concluded that the defendants' presentation of the arbitration clause did not adhere to these requirements.[34] Sideman's affidavit failed to state unambiguously that the hyperlink labeled "terms of use" actually led to the Terms of Use, which contained the arbitration clause.[35] Furthermore, defendants' statement that the Terms of Use were accessible somewhere on the website did not establish that a "reasonably prudent offeree" would have noticed the terms, because they did not state *where* on the website the terms appeared.[36]

The defendants argued that their tracking system showed that the plaintiff had spent 1,162 minutes on its website in a category called "Policy," which included the Terms of Use. The plaintiff argued that there were alternative explanations, including that there was no evidence that he was the one viewing the relevant pages. The court agreed, finding that there was insufficient foundation for finding that it reflected activity by the plaintiff.[37]

Finally, the defendants argued that they sent an e-mail to all partners that stated that partners should adhere to the company's Terms of Service. The court found that it was not clear that the Terms of Service referenced the same document as the Terms of Use or that it was a hyperlink to the Terms of Use page.[38]

31. *Id.*
32. *Id.* at 511 (quoting, in the first instance, Schnabel v. Trilegiant Corp., 697 F.3d 110, 120 (2d Cir. 2012), and, in the second instance, Starke v. Gilt Groupe, Inc., No. 13 Civ. 5497 (LLS), 2014 WL 1652225, at *2 (S.D.N.Y. Apr. 24, 2014); Fteja v. Facebook, Inc., 841 F. Supp. 2d 829, 833, 835 (S.D.N.Y. 2012); Jerez v. JD Closeouts, LLC, 943 N.Y.S.2d 392, 397 (Sup. Ct. 2012)).
33. *Id.* (citations omitted) (quoting Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 401–02 (E.D.N.Y. 2015)).
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 512.
38. *Id.*

2. *Long v. Provide Commerce, Inc.*

In *Long v. Provide Commerce, Inc.*,[39] the California Court of Appeal likewise carefully examined website design and contract presentation and concluded that there was no conspicuous notice of terms on a website and in an order confirmation e-mail. The plaintiff, Brett Long, purchased a flower arrangement via Provide's website, ProFlowers.com. Long alleged that the goods were not as described, and he brought claims against Provide under the state's Unfair Competition Law and the Consumer Legal Remedies Act. The defendant moved to compel arbitration, arguing that the plaintiff was bound by its website Terms of Use.[40]

When Long placed his order, the Terms of Use were accessible through a capitalized and underlined hyperlink, TERMS OF USE, located at the bottom of each webpage. The hyperlink was in light green typeface on the website's lime green background along with fourteen other capitalized and underlined hyperlinks of the same color, font, and size.[41]

To complete his order, Long was required to enter information and click through a multi-page "checkout flow." The information fields and the click-through buttons were in a bright white box set against the website's lime green background. At the bottom of the white box were the words "Your order is safe and secure." Below the white box was a dark green bar with a hyperlink "SITE FEEDBACK" in light green typeface. Below the dark green bar at the bottom of each page of the checkout flow were two hyperlinks, "PRIVACY POLICY" and "TERMS OF USE." These two hyperlinks were in the same light green typeface displayed against the website's lime green background.[42]

After Long placed his order, Provide sent him an e-mail confirmation. The e-mail message included multiple lines of information, including: the ProFlowers logo alongside the words "order confirmation"; a dark green bar with several hyperlinks to other product offerings for different occasions, such as "Birthday"; a light green bar thanking the customer for the order; a summary of the order; two banner advertisements; a notification regarding online account management services; yet another dark green bar with the words "Our Family of Brands" and six different brand logos; and a paragraph listing customer service information in small grey type. There followed, in the same small grey type, two hyperlinks labeled "Privacy Policy" and "Terms," and finally the company's corporate address in the same small grey type.[43]

The arbitration clause on which the defendant relied appeared in the website's Terms of Use. Provide argued that the plaintiff was on "inquiry notice" of the clause because the Terms of Use hyperlink was immediately visible on the checkout flow, was viewable without scrolling, and was located next to fields that the user had to complete.[44]

39. 200 Cal. Rptr. 3d 117 (Ct. App. 2016).
40. *Id.* at 120.
41. *Id.*
42. *Id.* at 120–21.
43. *Id.* at 121 (quoting e-mail).
44. *Id.* at 125.

The trial court disagreed and ruled that the hyperlinks on the website and in the e-mail were too inconspicuous to put a reasonably prudent Internet consumer on inquiry notice, and the appellate court affirmed.[45] The court noted that the fact that the Terms of Use hyperlinks were visible without scrolling was insufficient to establish an enforceable browsewrap.[46] It quoted with approval the "bright line rule" set forth in *Nguyen v. Barnes & Noble Inc.*:

> [W]here a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice.[47]

The court found that, in view of the "placement, color, size and other qualities" of the hyperlinks "relative to the . . . website's overall design," the presentation of the terms failed to meet the standard of conspicuous notice.[48] In making its determination, the court discussed the screenshots in detail and noted that it was difficult to find the Terms of Use hyperlinks in the checkout flow "*even when one is looking for them* . . . [,] to say nothing of how observant an Internet consumer must be to discover the hyperlinks in the usual circumstance of using ProFlowers.com *to purchase flowers*."[49]

The court further stated that, while the lack of conspicuous notice resolved the matter, it agreed with the Ninth Circuit in *Nguyen v. Barnes & Noble* that "to establish the enforceability of a browsewrap agreement, a textual notice should be required" to alert the user that continued use of the website constitutes assent to the terms.[50] In other words, a conspicuous hyperlink alone "may not be enough to alert a reasonably prudent Internet consumer to click the hyperlink."[51]

3. *Sgouros v. TransUnion Corp.*

The last case for discussion, *Sgouros v. TransUnion Corp.*,[52] comes out of the Seventh Circuit, the circuit that decided the landmark case in this area, *ProCD, Inc. v. Zeidenberg*.[53] Gary Sgouros purchased a credit score report from TransUnion's website. He discovered, however, that the score was useless to him, because the lender he approached with it used a different score calculated using a different formula. Sgouros sued TransUnion alleging violations of credit and consumer protection statutes.[54]

45. *Id.*
46. *Id.*
47. *Id.* (quoting Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1178–79 (9th Cir. 2014)).
48. *Id.* at 125–26.
49. *Id.* at 126.
50. *Id.* (citing *Nguyen*, 763 F.3d at 1178–79).
51. *Id.* at 127.
52. 817 F.3d 1029 (7th Cir. 2016).
53. 86 F.3d 1447 (7th Cir. 1996).
54. *Sgouros*, 817 F.3d at 1030–33.

To purchase the credit score, the plaintiff had to click on a large orange "Click Here" button on the homepage underneath the heading "Get Your Credit Score & Report." This took him to a page with the message "Your FREE credit score & $1 credit report are only moments away." Underneath that were boxes indicating that the user was on Step 1 of 3 required to complete the application process. Step 1 required the user to input various personal information in different fields. The user then had to click on another orange button that contained the words "Submit & Continue to Step 2" and a green arrow. The court included a color copy of a screenshot of the Step 1 page.[55]

The court also included a color copy of a screenshot of the Step 2 page. On this page, the customer created an account user name and password and filled in credit card information. The question "Is your home address the same as your billing address?" requires the customer to fill in either the "Yes" or "No" bubble. Underneath these bubbles was a rectangular scroll window. Appearing at the top of the scroll window were the words "Service Agreement." Underneath that line were two fully visible lines and a third that was still legible but partially obscured. The visible text read: "Welcome to the TransUnion interactive web site, membership.tui.transunion.com (the 'Site'). This Service Agreement ('Agreement') contains the terms and conditions upon which you ('you' or 'the member') may access and use."[56] Underneath the scroll window, in small hyperlinked text, were the words, "Printable Version." Below that was the following paragraph in bold text:

> **You understand that by clicking on the "I Accept & Continue to Step 3" button below, you are providing "written instructions" to TransUnion Interactive, Inc. authorizing TransUnion Interactive, Inc. to obtain information from your personal credit profile from Experian, Equifax and/or TransUnion. You authorize TransUnion Interactive, Inc. to obtain such information solely to confirm your identity and display your credit data to you.**[57]

Underneath that paragraph was a button that contained the words "I Accept & Continue to Step 3" followed by a small green arrow. The user was not required to click on or scroll down the scroll window. Furthermore, the court noted that the website did not "in any other way call his attention to any arbitration agreement."[58] The first page of the printable version of the agreement contained a brief statement indicating that it included an arbitration clause and a class action waiver. The arbitration provision itself was on page eight of the ten-page printable version of the agreement.[59]

TransUnion argued that the plaintiff's act of clicking on the "I Accept & Continue to Step 3" button indicated his acceptance of the agreement. The court applied the "reasonable communicativeness" test to determine "whether the web

55. *Id.* at 1031.
56. *Id.* at 1032 (quoting TransUnion's website).
57. *Id.* at 1033 (quoting TransUnion's website).
58. *Id.*
59. *Id.*

pages presented to the consumer adequately communicate all the terms and conditions of the agreement, and whether the circumstances support the assumption that the purchaser receives reasonable notice of those terms."[60]

The court held that this criterion was not met. It noted that the web pages that Sgouros viewed contained "no clear statement that his purchase was subject to *any* terms and conditions of sale."[61] The scroll window contained the words "Service Agreement" but did not indicate what terms it governed. The hyperlink that led to the terms was labeled with the wholly uninformative words "Printable Version," rather than with a phrase, like "Terms of Use" or "Service Agreement," that would have alerted a purchaser to the nature of the document to which it linked.[62]

Most significant, according to the court, was the fact that the website "actively misleads the customer."[63] The bold text immediately underneath the scroll box stated that clicking on the "I Accept & Continue to Step 3" button authorized TransUnion to obtain the customer's personal information, but did not say that it indicated acceptance to contractual terms. The court stated that "[n]o reasonable person would think that hidden within that disclosure was also the message that the same click constituted acceptance of the Service Agreement."[64] Thus, TransUnion "undid whatever notice" might have been furnished by the bold text when it stated in that text that clicking on the button merely constituted assent for TransUnion to obtain personal information.[65]

The court helpfully included in its opinion examples that would likely bind users to an agreement, such as "placing the agreement, or a scroll box containing the agreement, or a clearly labeled hyperlink to the agreement, next to an 'I Accept' button that unambiguously pertains to that agreement."[66]

III. Concluding Observations

These recent cases indicate that, following the recent trend established by *Berkson v. Gogo* and *Nguyen v. Barnes & Noble*, courts are more carefully analyzing the presentation of contract terms in the online environment. As these cases demonstrate, courts are willing to engage in a detailed factual analysis that more accurately reflects the user's experience with online contracts to determine whether terms were reasonably communicated to the user. Accordingly, text font size, website design and color, presentation, hyperlink labeling, and the user experience (including a clear prompt to the terms) will all be relevant in determining whether there was conspicuous notice.

These courts seem to be acknowledging the differences in consumer perception of online and paper contracts. As the court in *Dillon v. BMO Harris Bank,*

60. *Id.* at 1034.
61. *Id.* at 1035.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 1036.
66. *Id.*

N.A. stated: "While it is black letter law that consumers are bound by the fine print whether they read it or not, it is equally obvious that online sellers cannot insert terms and conditions the consumer did not have an opportunity to review."[67] The Seventh Circuit noted in *Sgouros v. TransUnion Corp.* that the online contracting environment is not the same as the offline one:

> [W]e cannot presume that a person who clicks on a box that appears on a computer screen has notice of all contents not only of that page but of other content that requires further action (scrolling, following a link, etc.). Indeed, a person using the Internet may not realize that she is agreeing to a contract at all, whereas a reasonable person signing a physical contract will rarely be unaware of that fact.[68]

Accordingly, businesses should do more than provide notice of the existence of a contract if they want to increase the likelihood that specific terms will be enforced. These cases reveal a subtle shift away from the notion of blanket assent and indicate that conspicuous notice may require notice of specific terms.

67. Dillon v. BMO Harris Bank, N.A., No. 1:13-CV-897, 2016 WL 1175193, at *6 (M.D.N.C. Mar. 23, 2016), *appeal docketed*, No. 16-1373 (4th Cir. Apr. 5, 2016).

68. *Sgouros*, 817 F.3d at 1035.