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PROTECTING YOUR ECOMMERCE COMPANY WITH ENFORCEABLE ONLINE CONTRACTS AND CLASS ACTION WAIVERS

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SECTION 01

INTRODUCTION AND ROADMAP



Electronic Contracting and Class Action Litigation

- Recent surge in the adoption of electronic contracting
 - Ecommerce sales accounted for 57% of overall retail growth in 2019
 - As of the end of April, ecommerce transactions increased 45% since start of crisis
- Class action litigation is growing
 - 54% of US companies are facing class action lawsuits
 - Uptick in consumer class actions in the wake of COVID-19
- Careful use of online contracts with consumers can help mitigate and avoid risk
 - Dispute resolution provisions requiring arbitration and class waiver can protect companies from many class actions

(Sources: Digital Commerce 360, Contentsquare, Carlton Fields Class Action Survey)

Presentation Roadmap

- Ensuring you have an enforceable agreement
- Taking a closer look at online consumer contracts
- How to get the language right
- Recent litigation trends



SECTION 02

ENSURING YOU HAVE AN ENFORCEABLE AGREEMENT

Online Contracting – Background

- Electronic contracting is on the rise
- In the United States, electronic signatures are generally enforceable
 - “**Electronic signature**” = “an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.” 15 U.S.C. § 7006(5).
 - “**Digital signature**” = a type of electronic signature intended to alleviate the issues regarding genuineness, identity, and document modification with electronic signatures. Typically incorporates key encryption to identify the signer and has a function to verify the document being signed.

Online Contracting – Background

- Two laws generally govern the use of electronic signatures in the United States:
 - **Electronic Signatures in Global and National Commerce Act** (“E-Sign”)
 - **Uniform Electronic Transactions Act** (“UETA”)
- Each establishes the general rule that electronic signatures are valid and enforceable and set certain requirements for and exceptions to the general rule
- Key exceptions

Online Contracting – E-Sign Act

- Equates electronic signatures and other records with those penned in ink
- Not limited to parties who agree to transact business by electronic means
- Requirements
 - Intent to sign
 - Attribution
 - Association
 - Retention
 - Consumer protection issues



Online Contracting – UETA

- Adopted by all states except three (IL, NY & WA)
- All parties to an agreement or transaction must agree to conduct the transaction using electronic means
- Requirements similar to E-Sign:
 - Intent to sign
 - Association of signature with the record
 - Attribution
 - Retention
- If the contract cannot be stored or printed, it is not enforceable
- Some documents require wet ink signatures, such as negotiable instruments

Traditional Contract Principles Apply Online

- **Offer:**
 - Manifestation of willingness to contract
- **Acceptance:**
 - Consistent with the “mailbox rule,” a contract is effective upon act or acceptance rather than acknowledgment or receipt
 - What acts are required to indicate acceptance is a matter of significant litigation (e.g., clickthrough, clickwrap, browsewrap, etc.)
- **Mutual Assent:** Manifestation by both parties to be bound
 - Objective standard applies: What would a reasonable person conclude about the outward expressions of the parties?

Traditional Contract Principles Apply Online

- Common contract problems:
 - Lack of mutual assent
 - Substantive unconscionability
 - Procedural unconscionability and adhesion
 - Statute of frauds
 - Proving it exists!



SECTION 03

ONLINE CONSUMER CONTRACTS



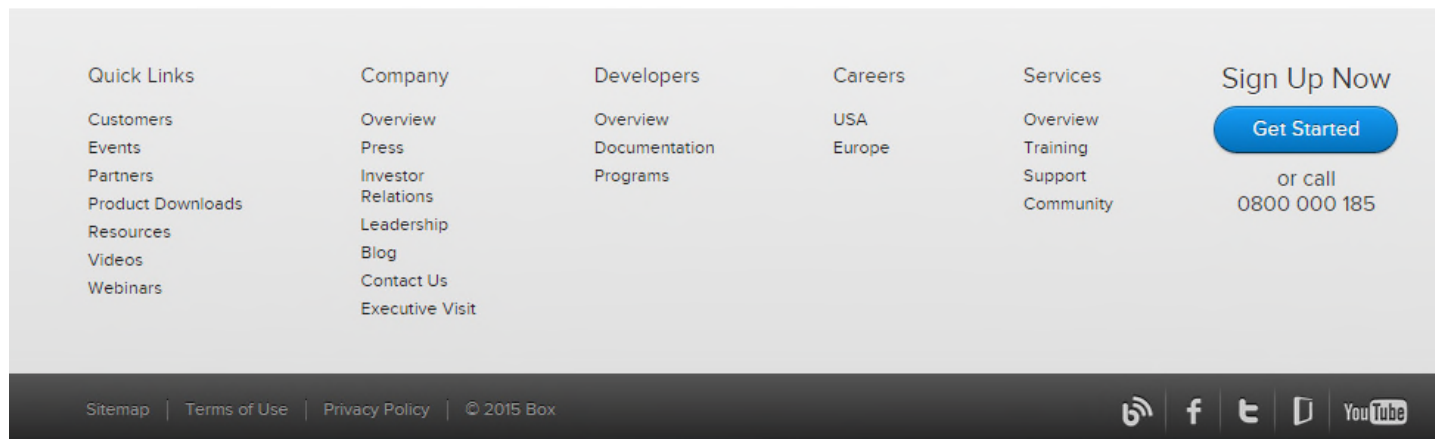
Common Types of Online Consumer Contracts

- Scrollwrap: Requires users to review and affirmatively assent to the terms of use before they can access the website and its services



Common Types of Online Consumer Contracts

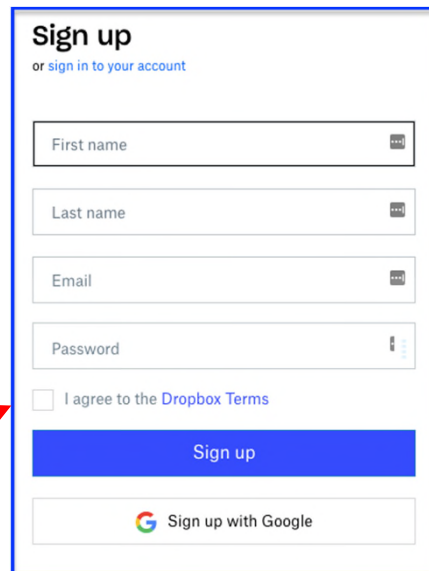
- Browsewrap: Does not require the user to take any affirmative action to assent to the terms



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Common Types of Online Consumer Contracts

- Clickwrap / modified clickwrap: Terms are only visible via a hyperlink; user clicks a button to assent to the hyperlinked terms



Sign up
or sign in to your account

First name


Last name

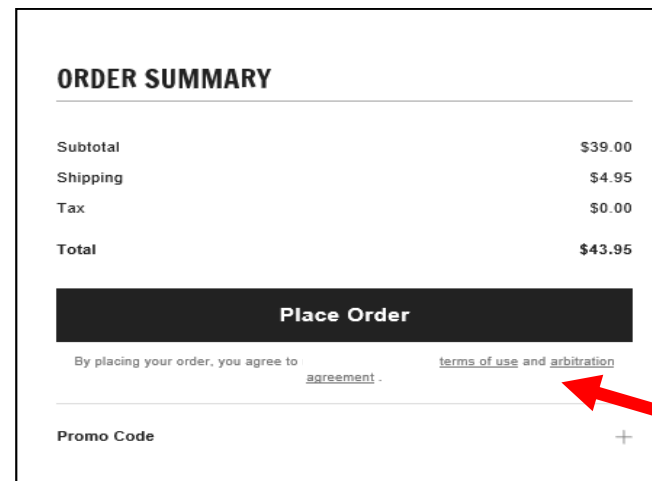
Email

Password

I agree to the [Dropbox Terms](#)

Sign up

 Sign up with Google



ORDER SUMMARY

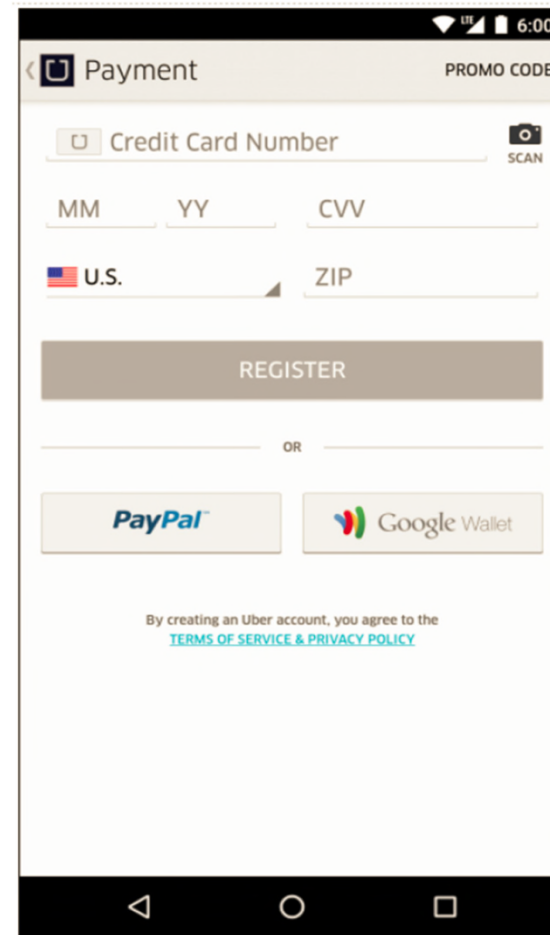
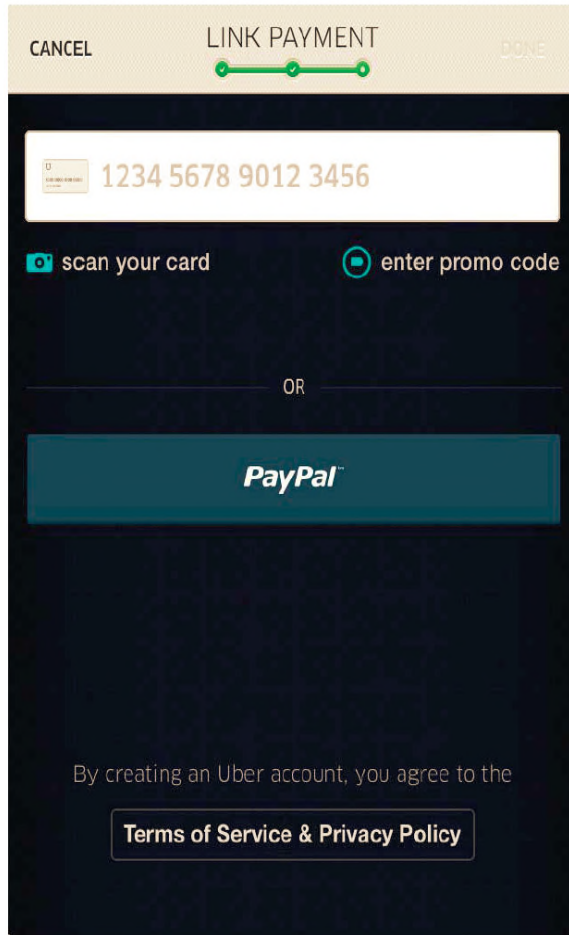
Subtotal	\$39.00
Shipping	\$4.95
Tax	\$0.00
Total	\$43.95

Place Order

By placing your order, you agree to [agreement](#) . [terms of use](#) and [arbitration](#)

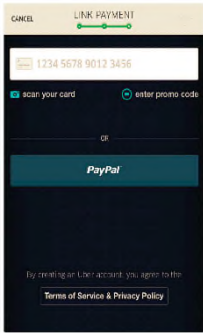
Promo Code

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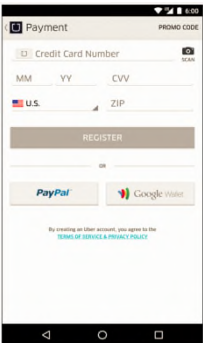


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Battle of the Screens

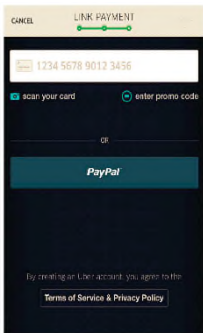


- *Cullinane v. Uber Techs., Inc.*, 2016 WL 3751652 (D. Mass. 2016)
 - Held agreement enforceable
 - Screen gave plaintiffs reasonable notice that their agreement was subject to the terms
 - Signified assent by clicking “done” and using the service

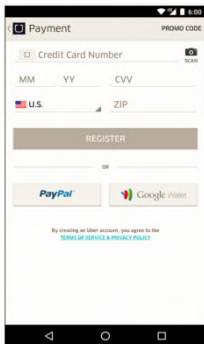


- *Meyer v. Kalanick*, 200 F. Supp. 3d 408 (S.D.N.Y. 2016)
 - Held no agreement formed
 - No “I agree” box and terms of service not prominently displayed = plaintiffs lacked “reasonably conspicuous notice”

Both Circuits Reversed

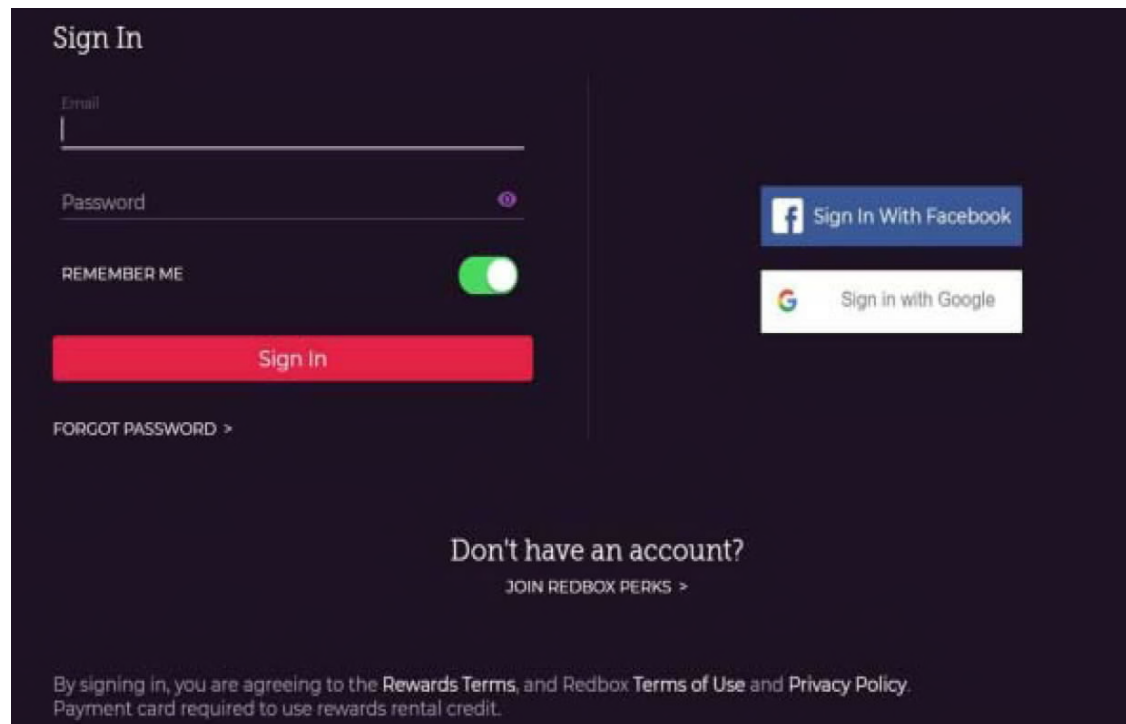


- *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53 (1st Cir. 2018)
 - Held unenforceable
 - Terms only accessible through a hyperlink, but nothing indicated to the consumer that the text was indeed a working hyperlink
 - Hyperlink and accompanying language were not conspicuous enough



- *Meyer v. Uber Techs., Inc.*, 868 F.3d 66 (2d Cir. 2017)
 - Reasonable notice found
 - Screen uncluttered, no scrolling needed to find link to terms
 - Notice of terms along with the mechanism for accepting them were “temporally coupled”

Enforceable or unenforceable?



Sign In

Email

Password

REMEMBER ME

Sign In

FORGOT PASSWORD >

Sign In With Facebook

Sign in with Google

Don't have an account?
JOIN REDBOX PERKS >

By signing in, you are agreeing to the [Rewards Terms](#), and [Redbox Terms of Use](#) and [Privacy Policy](#).
Payment card required to use rewards rental credit.

Lessons from the Battle

- Design a contract formation process that makes the agreement clear
- (1) Consider the contracting method itself
 - Written agreement with signature
 - Scrollwrap
 - Browsewrap
 - Clickwrap
- (2) Content of the “call to action” language
- (3) Placement of the “call to action” language
- (4) Don’t forget about font and style

SECTION 04

GETTING THE LANGUAGE RIGHT



Key Agreements and Terms

- Privacy Policies
 - Important to keep current with GDPR, CCPA, and other state and global requirements
 - Uptick in regulation and litigation
 - Though not our focus today, several upcoming May-rathon webinars on privacy
- Terms of Use
 - Warranties
 - Delivery terms
 - Return and refund policies
 - Pricing and payment information
 - Restrictions on use of site
 - Termination of services information
 - IP protections
 - **Dispute resolution** – our focus today

Whether to Use Arbitration and a Class Action Waiver

- Arbitration pros:
 - Less costly
 - Faster
 - Streamlined
 - Private
 - Avoid emotion-fueled jury verdicts
- Arbitration cons:
 - Limited appeal rights
 - Damages can be awarded without rigorous evidentiary proof
 - Harder to get summary judgment or dismissal at the outset
- Class action waivers have their own pros and cons
 - Avoid costly and time-consuming litigation, but can face multiple individual arbitrations that could be more expensive and time intensive than resolving the issue once in a class action

Federal Arbitration Act (FAA)

- Applies in state and federal courts to non-maritime transactions involving interstate commerce
- Section 2 is most important for class action waivers in arbitration agreements
 - Any arbitration provision covered by the FAA “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”
 - Makes any rule or policy hostile to arbitration unenforceable as a matter of federal law
 - Preserves general contract defenses against arbitration agreements, such as:
 - Fraud
 - Duress
 - Unconscionability

AT&T v. Concepcion, 563 U.S. 333 (2011)

- AT&T's arbitration agreement included a class action waiver
- California Supreme Court had invalidated all contractual class action waivers in its *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), decision
- Supreme Court held that state rules precluding class action waivers **do not apply** when those waivers are **in arbitration agreements**
 - However, the savings clause also applies, preserving state law contract defenses
- Impact:
 - Has been called "the decision that has launched a thousand motions"
 - In 2012 alone, courts in at least 76 putative class actions cited *Concepcion* when granting a motion to compel individual arbitration

Make Terms Consumer-Friendly

- Adding consumer-friendly terms to your agreement heads off unconscionability arguments
 - For example, in *Concepcion*, the Court upheld an agreement including terms that:
 - AT&T would pay the entire cost of arbitration
 - The arbitration would take place where the consumer was located or by phone or by written submission
 - The arbitrator was given no limitation on damages

Consider Scope

- Blanket arbitration is an understandable goal
- But consider the consumers, purchases, and actions you want the arbitration agreement to cover
- Making the scope of the agreement as broad as possible could be seen as unfair and even unconscionable (and therefore struck down under the savings clause)
 - Always anticipate scrutiny and publicity following implementation
 - Consumer groups, press, and the plaintiffs' bar are increasingly sophisticated about the use of arbitration provisions and unafraid to criticize companies that implement them
- A reasoned, risk-calculated approach is better than an unenforceable, broad one
 - If you don't need certain categories of individuals to agree to your waivers, don't make them agree

Mutuality

- Make sure the arbitration provision is mutual
 - Must apply to both parties
 - Do not reserve special rights for the company
- Example: real estate development company Toll Brothers
 - Fourth Circuit held its arbitration agreement unenforceable due to lack of mutuality
 - Agreement only discussed buyer's obligations
 - Buyers had to jump through extra hoops, like written notice and opportunity to cure
 - Only the buyer waived the right to a court proceeding
 - Company thought it was getting a great deal; instead, had its agreement struck down and was forced to litigate major class action

Arbitration Location

- Most commercial contracts specify that disputes must be resolved in a location convenient for the company (e.g., where headquartered)
- Consider instead stating that the arbitration will take place where the consumer is located, or providing the option of arbitrating by phone or written submissions
- Example: EZCorp.
 - Class action filed claiming their lending practices were unfair and deceptive
 - EZCorp. moved to compel arbitration and Plaintiff argued unconscionability
 - Court found arbitration agreement enforceable, noting that the buyer was given four choices for the arbitration's location: (1) the county of the consumer's residence, (2) within 30 miles from that county, (3) the county where the consumer submitted the loan application, or (4) "in such other place as shall be ordered by the arbitrator"

Additional Consumer-Friendly Considerations

- Costs
 - Consider having the company agree to pay for the filing and hearing costs
 - Makes it easier for a consumer with a small-dollar claim to pursue it individually
 - Also avoids unconscionability arguments
- Small Claims Court
 - Include an exception to the arbitration agreement for bringing individual claims in small claims court
 - Shows consumers and courts that the company is reasonable and not taking advantage of bargaining power
 - Some arbitration service providers (e.g., the American Arbitration Association) require that you give consumers this option

Put the Waiver in the Arbitration Agreement

- If you are going to use a class action waiver, you **must** put it in the arbitration agreement
 - They cannot be separate provisions
- Failure to integrate the waiver = losing the protection of FAA preemption
- Will instead be left with state law controlling, which often bans class action waivers in consumer contracts
- Result: class action litigation

SECTION 05

RECENT DEVELOPMENTS



Recent Trends in Litigation of Online Contracts

- Litigation of electronic contracts has steadily grown over the last decade
 - Between 2018 and 2019, 15% increase in clickwrap litigation
- Clickwrap agreements had 80% success rate in 2019
- Successful defense of electronic agreements typically involves:
 - Screenshots
 - Affidavits/declarations
 - Records showing date of acceptance

(Source: Pactsafe, Clickwrap Litigation: A year in review)

Recent Trends in Litigation of Online Contracts

- Arbitration clauses and class action waivers more likely to be deemed **enforceable** where:
 - Sign-up box pops up clearly and conspicuously on uncluttered screen
 - Notice of agreement provided in capital letters
 - Hyperlinks are in a darker, bolder font than the rest of the text
 - User required to click box stating he has reviewed agreement and agrees to contract before using website or app

See Capriole v. Uber Techs., Inc., 2020 WL 1536648 (D. Mass. Mar. 31, 2020); *Feld v. Postmates, Inc.*, 2020 WL 1047055, at *7 (S.D.N.Y. Mar. 3, 2020).

Recent Trends in Litigation of Online Contracts

- Arbitration clauses and class action waivers more likely to be deemed **unenforceable** where:
 - Hyperlink not highlighted, underlined, in all caps, or in a separate box
 - Screen cluttered by potentially distracting content
 - Notice buried in other text
 - No express language that consumer agrees to be bound
 - Notice too far from assent button

See Colgate v. JUUL Labs, Inc., 402 F. Supp. 3d 728 (N.D. Cal. Aug. 23, 2019); *Arnaud v. Doctor's Associates Inc.*, 18-CV-3703, 2019 WL 4279268 (E.D.N.Y. Sept. 10, 2019).

Recent Trends in Litigation of Online Contracts

- Browsewrap agreements deemed **unenforceable**
 - *Wilson v. Huuuge, Inc.*, 944 F.3d 1212 (9th Cir. 2019):
 - Lack of reasonable notice where terms were buried in smartphone app and user was not required to acknowledge or agree to terms
 - *Rushing v. Viacom Inc.*, 2018 WL 4998139 (N.D. Cal. Oct. 15, 2018):
 - No evidence of actual or constructive notice because users had to click on a hyperlink titled “more” to review arbitration provisions
 - Clicking the hyperlink was not required to download the app

SECTION 06

FINAL TAKEAWAYS



Session Takeaways

1. Get the contract process right
2. Get the language right
3. Stay tuned

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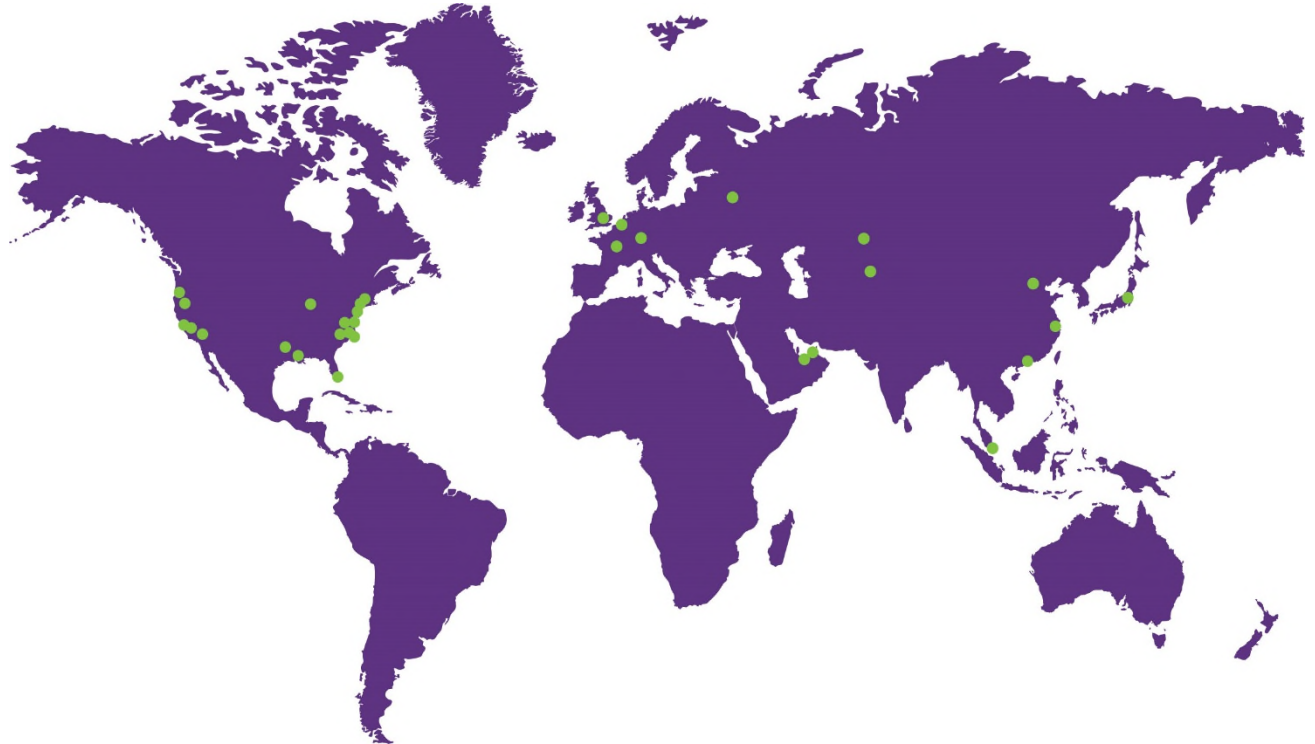
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