



1 **BACKGROUND**

2 Samsung manufactured the Galaxy S4 cell phone that Mr. Norcia owns and uses on  
3 Verizon’s wireless network. The class action complaint alleges that Samsung<sup>1</sup> engaged in  
4 manipulative acts and misrepresentations relating to the Galaxy S4’s speed, performance and  
5 memory capacity. Dkt. No. 1. Among other things, the complaint alleges that Samsung  
6 “intentionally programmed the Galaxy S4 to fool benchmark apps and to create false perceptions  
7 regarding the speed and performance of these devices.” *Id.* ¶ 2.

8 In lieu of an answer, Samsung moved to compel arbitration of the dispute, invoking an  
9 arbitration provision contained in its own warranty for the phone. Dkt. No. 18. Mr. Norcia  
10 claimed in opposition that he had never seen nor been made aware of the arbitration provision and  
11 had not agreed to it, and that he should therefore not be bound by it. Dkt. No. 20. Finding “the  
12 making of the arbitration agreement . . . [to] be in issue,” the Court summarily proceeded to a  
13 bench trial on this issue as directed by the Federal Arbitration Act, 9 U.S.C. § 4. Dkt. No. 33.

14 The Court now makes the following findings of fact and conclusions of law based on the  
15 bench trial, and denies defendants’ motion to compel arbitration for lack of contract formation.

16 **FINDINGS OF FACT**

17 The following facts that are relevant to this order were established at the bench trial:<sup>2</sup>

18 1. Mr. Norcia purchased his Galaxy S4 phone from a Verizon store in San Francisco,  
19 California on May 23, 2013. He stopped in the store on his way to work in the morning, and he  
20 knew exactly which phone he wanted to buy -- *i.e.*, the Galaxy S4 (“S4”). Mr. Norcia had been a  
21 long-time Verizon customer, and he purchased the S4 as an “upgrade.”

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23  
24  
25 <sup>1</sup> There are two named defendants -- Samsung Telecommunications America, LLC and Samsung  
26 Electronics America, Inc. -- but the parties have not drawn any distinctions between the two in  
27 connection with the pending motion to compel arbitration. The Court consequently treats them as  
28 singular and refers to them together as “Samsung” in this order.

<sup>2</sup> This order will not cite to the record, finding it unnecessary and cumbersome to do so, except in  
instances where citation may be of particular utility. *See N. Cal. River Watch v. City of  
Healdsburg*, No. C01-04686WHA, 2004 WL 201502, at \*1 n.1 (N.D. Cal. Jan. 23, 2004).

1           2.       Mr. Norcia’s time in the store was brief -- about ten minutes -- and he interacted  
2 with just two Verizon employees. First, there was a greeter at the door, to whom Mr. Norcia  
3 stated his desire to purchase an S4 phone.

4           3.       Another Verizon employee then got the phone and brought it to Mr. Norcia. She  
5 unpacked the phone, and helped Mr. Norcia transfer his contacts, among other things. Transcript,  
6 Dkt. No. 34 (“Tr.”) at 73:17-74:4. She also operated the cash register to complete the transaction.  
7 *Id.* at 66:13-67:5.

8           4.       At the end of the transaction -- after the phone had already been unpacked by the  
9 second Verizon employee -- Mr. Norcia “picked up the phone charger, the headphones, and the  
10 earbuds that came with it, and then [he] left.” *Id.* at 74:7-8.

11          5.       The Verizon employee offered to give Mr. Norcia the box that his phone had come  
12 in, but he “declined.” *Id.* at 74:9-10. He felt that he knew how to use this kind of phone (an  
13 “Android” phone), and he was in a hurry to get to work. *Id.* at 96:8-15, 101:14-19.

14          6.       The outside of the box for the S4 indicates that the “Package Contains” a “Product  
15 Safety & Warranty Brochure.” Trial Exhibit (“Tr. Ex.”) 101.

16          7.       Inside of the box, there is a 101-page booklet entitled “Product Safety & Warranty  
17 Information.” Tr. Ex. 102 (“warranty booklet”). Information on the phone’s warranty begins on  
18 page 70 of the booklet, and includes the following language:

19                   **Standard Limited Warranty**

20                   **What is covered and for how long?**  
21                   SAMSUNG TELECOMMUNICATIONS AMERICA, LLC  
22                   (“SAMSUNG”) warrants that SAMSUNG’s handsets and  
23                   accessories (“Products”) are free from defects in material and  
24                   workmanship under normal use and service for the period  
25                   commencing upon the date of purchase by the first consumer  
26                   purchaser and continuing for the following specified period of time  
27                   after that date:

28                   Phone	1 Year
...	

**What is the procedure for resolving disputes?**  
ALL DISPUTES WITH SAMSUNG ARISING IN ANY WAY  
FROM THIS LIMITED WARRANTY OR THE SALE,  
CONDITION OR PERFORMANCE OF THE PRODUCTS SHALL

1 BE RESOLVED EXCLUSIVELY THROUGH FINAL AND  
2 BINDING ARBITRATION, AND NOT BY A COURT OR JURY.

3 . . .

4 **You may opt out of this dispute resolution procedure by**  
5 **providing notice to SAMSUNG no later than 30 calendar days**  
6 **from the date of the first consumer purchaser’s purchase of the**  
7 **Product. To opt out, you must send notice by e-mail . . . .**  
8 **Alternatively, you may opt out by calling . . . . These are the**  
9 **only two forms of notice that will be effective to opt out of this**  
10 **dispute resolution procedure. Opting out of this dispute**  
11 **resolution procedure will not affect the coverage of the Limited**  
12 **Warranty in any way, and you will continue to enjoy the**  
13 **benefits of the Limited Warranty.**

14 8. Mr. Norcia saw the box, but he did not see the warranty booklet at the time of  
15 purchase. Tr. at 97:14-17, 97:21-98:1.

16 9. No Verizon employee informed Mr. Norcia about Samsung’s product warranty or  
17 that it contained an arbitration provision. Tr. at 111:21-112:15.

18 10. Mr. Norcia signed two receipts provided by Verizon: one entitled a “Customer  
19 Agreement” and the other an “Equipment Receipt,” both of which were e-mailed to him shortly  
20 after his purchase. Tr. Exs. 113 & 1; Tr. at 103:3-6. The Customer Agreement references a  
21 “1 YR. MFG. WARRANTY” as an “Item,” but neither receipt makes express reference to  
22 Samsung’s warranty, Samsung’s Product Safety & Warranty Information booklet, or to the  
23 arbitration provision contained in it.

24 11. The Verizon receipt that is labeled as the “Customer Agreement” identifies an  
25 arbitration provision proposed by Verizon itself in capitalized letters in a section captioned  
26 “Agreement” that appears above a blank line for the customer to sign. Tr. Ex. 113 (“I AGREE TO  
27 THE CURRENT VERIZON WIRELESS CUSTOMER AGREEMENT . . . . I UNDERSTAND  
28 THAT I AM AGREEING TO . . . SETTLEMENT OF DISPUTES BY ARBITRATION AND  
OTHER MEANS INSTEAD OF JURY TRIALS, AND OTHER IMPORTANT TERMS IN THE  
CUSTOMER AGREEMENT.”). Under the line provided for the “Account Owner Signature”  
(which Mr. Norcia signed), the receipt states: “Contract Acceptance Date: 5/23/2013[.] Thank  
You!” *Id.* The receipts do not refer to or mention the Samsung arbitration provision.



1 arbitration or the failure to comply therewith is not in issue, the court shall make an order directing  
2 the parties to proceed to arbitration in accordance with the terms of the agreement.” *Id.* If the  
3 making of the arbitration agreement is in issue, then “the court shall proceed summarily to the trial  
4 thereof.” *Id.*

5 The Supreme Court has made crystal clear in recent years that it is “beyond dispute that the  
6 FAA was designed to promote arbitration” and “embod[ies] [a] national policy favoring  
7 arbitration.” *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745-49 (2011) (internal  
8 quotation marks omitted). But it has made equally clear -- as does the FAA itself -- that the  
9 existence of an agreement to arbitrate is the essential condition that must be satisfied before the  
10 rest of the FAA comes into play. *See id.* at 1748 (“The ‘principal purpose’ of the FAA is to  
11 ‘ensur[e] that private arbitration agreements are enforced according to their terms.’”); *see also*  
12 *AT&T Techs., Inc. v. Commc’ns. Workers of Am.*, 475 U.S. 643, 648 (1986) (“[A]rbitration is a  
13 matter of contract and a party cannot be required to submit to arbitration any dispute which he has  
14 not agreed so to submit.”) (internal quotation marks omitted).

15 Our Circuit has also instructed that “whether a valid agreement to arbitrate exists” is the  
16 first question the Court should ask when deciding a motion to compel arbitration brought under  
17 the FAA. *Kilgore v. KeyBank, Nat’l Ass’n*, 718 F.3d 1052, 1058 (9th Cir. 2013). In making this  
18 threshold inquiry, there is no thumb on the scale in favor of finding an arbitration agreement to  
19 exist. The “liberal federal policy regarding the scope of arbitrable issues is inapposite” when the  
20 question is “whether a particular party is bound by the arbitration agreement.” *Comer v. Micor,*  
21 *Inc.*, 436 F.3d 1098, 1104 n.11 (9th Cir. 2006) (further citing *Fleetwood Enters., Inc. v. Gaskamp,*  
22 *280 F.3d 1069, 1073 (5th Cir. 2002)* for the principle that “[the] federal policy favoring arbitration  
23 does not apply to the determination of whether there is a valid agreement to arbitrate between the  
24 parties; instead ‘[o]rdinary contract principles determine who is bound.’”). *See also Chiron Corp.*  
25 *v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000) (“We begin our analysis by  
26 recognizing that an agreement to arbitrate is a matter of contract: ‘it is a way to resolve those  
27 disputes -- but only those disputes -- that the parties have agreed to submit to arbitration.’” )  
28 (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)).

1           The parties here agree that Samsung, as the party seeking to compel arbitration, bears the  
2 burden of establishing the existence of a valid agreement to arbitrate. *See* Dkt. No. 18 at 7; Tr. at  
3 3:16-18.

4           **II. GOVERNING PRINCIPLES OF CALIFORNIA CONTRACT LAW**

5           As our Circuit recently confirmed, “[i]n determining whether a valid arbitration agreement  
6 exists, federal courts ‘apply ordinary state-law principles that govern the formation of contracts.’”  
7 *Nguyen v. Barnes & Noble Inc.*, No. 12-56628, 2014 WL 4056549, at \*3 (9th Cir. Aug. 18, 2014).  
8 “Federal courts sitting in diversity look to the law of the forum state -- here, California -- when  
9 making choice of law determinations.” *Id.*

10           The Court sits in diversity in this case. *See* Dkt. No. 1 ¶ 11 (invoking 28 U.S.C.  
11 § 1332(d)(2) as basis of jurisdiction). And although the arbitration provision at issue itself  
12 contains a Texas choice-of-law provision, both sides have addressed contract formation as an issue  
13 of California law. Moreover, Samsung states that “the result would be the same under other  
14 states’ laws, including Texas law,” Dkt. No. 18 at 11 n.6, which plaintiff does not dispute.  
15 Consequently, the Court applies California law to the question of whether a valid agreement to  
16 arbitrate was formed between Samsung and Mr. Norcia.

17           Under California law, “[t]here is no contract until there is mutual consent of the parties.  
18 The manifestation of mutual consent is generally achieved through the process of offer and  
19 acceptance.” *Deleon v. Verizon Wireless, LLC*, 207 Cal. App. 4th 800, 813 (2012) (internal  
20 citations omitted). The mutual consent necessary to form a contract “is determined under an  
21 objective standard applied to the outward manifestations or expressions of the parties, *i.e.*, the  
22 reasonable meaning of their words and acts, and not their unexpressed intentions or  
23 understandings. Although mutual consent is a question of fact, whether a certain or undisputed  
24 state of facts establishes a contract is a question of law for the court.” *Id.* (internal quotation  
25 marks and citations omitted).

26           Because “the outward manifestation or expression of assent is the controlling factor,” an  
27 offeree, “knowing that an offer has been made to him but not knowing all of its terms, may be held  
28 to have accepted, by his conduct, whatever terms the offer contains.” *Windsor Mills, Inc. v.*

1 *Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 992-93 (1972) (internal citations omitted). But  
2 contracts cannot be formed on the basis of stealth drafting: “when the offeree does not know that  
3 a proposal has been made to him this objective standard does not apply. Hence, an offeree,  
4 regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual  
5 provisions of which he was unaware, contained in a document whose contractual nature is not  
6 obvious.” *Id.*; see also *Specht v. Netscape Commc’ns. Corp.*, 306 F.3d 17, 29-30 (2d Cir. 2002)  
7 (applying California law and quoting *Windsor Mills*).

8 “Arbitration agreements are no exception to the requirement of manifestation of assent,”  
9 and “[c]larity and conspicuousness of arbitration terms are important in securing informed assent.”  
10 *Specht*, 306 F.3d at 30. “If a party wishes to bind in writing another to an agreement to arbitrate  
11 future disputes, such purpose should be accomplished in a way that each party to the arrangement  
12 will fully and clearly comprehend that the agreement to arbitrate exists and binds the parties  
13 thereto.” *Id.* (quoting *Commercial Factors Corp v. Kurtzman Bros.*, 131 Cal. App. 2d 133, 134-35  
14 (1955)).<sup>3</sup>

15 **III. MR. NORCIA DID NOT RECEIVE ACTUAL NOTICE**

16 As an initial matter, here, as in *Specht*, plaintiff “testified, and defendants did not refute,  
17 that plaintiff [was] in fact unaware” of the arbitration provision in Samsung’s warranty. 306 F.3d  
18 at 32. Mr. Norcia represented that he did not see -- let alone read -- the warranty booklet  
19 containing the arbitration provision at the time he purchased his phone. Samsung has not adduced  
20

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<sup>3</sup> The Court is mindful of the Supreme Court’s instruction in *Concepcion* that “courts must place  
23 arbitration agreements on an equal footing with other contracts, and enforce them according to  
24 their terms,” and that even doctrines that are thought to be generally applicable can be invalid if  
25 they are “applied in a fashion that disfavors arbitration.” 131 S. Ct. at 1745, 1747. Neither  
26 *Windsor Mills* nor *Specht* turn on any heightened anti-arbitration motivations; nor has *Windsor*  
27 *Mills* been applied in a way that disfavors arbitration. The continued validity of the *Windsor Mills*  
28 rule that the Court applies in this order has been affirmed by state and federal courts alike post-  
*Concepcion*. See, e.g., *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 123 (2d Cir. 2012), *Knutson v.*  
*Sirius XM Radio Inc.*, Civil No. 12cv418 AJB (NLS), 2012 WL 1965337, at \*3 (S.D. Cal. May 31,  
2012), and *Rodriguez v. Citigroup Global Markets, Inc.*, No. B230310, 2012 WL 2354637, at \*6  
(Cal. Ct. App. July 18, 2012) (unpublished case distinguishing *Windsor Mills* because respondents  
had signed the operative document and document contained express acknowledgements, including  
of receipt of operative document and its inclusion of an arbitration provision).



1 any evidence challenging this statement. Consequently, the Court finds Mr. Norcia did not have  
2 actual notice of the arbitration terms.

3 **IV. MR. NORCIA DID NOT RECEIVE INQUIRY NOTICE**

4 **A. BECAUSE HE DECLINED TO TAKE THE BOX WITH HIM,**  
5 **MR. NORCIA MUST BE TREATED AS THOUGH HE RECEIVED**  
6 **THE BOX**

7 In its motion to compel arbitration, Samsung argued that because “the phone was packaged  
8 in a box that contained a booklet of important terms, including a Standard Limited Warranty  
9 [which] contained an arbitration provision,” and because he thereafter failed to opt out within the  
10 30 days provided, Mr. Norcia “manifested his assent to be bound by the arbitration provision.”  
11 Dkt. No. 18 at 2-3. In response, Mr. Norcia argued that he could not be held to have assented,  
12 because he “did not receive the arbitration terms Samsung now seeks to enforce.” Dkt. No. 20 at  
13 1. This was because, he said, the Verizon salesperson “unboxed the phone,” “handed the phone  
14 to” Mr. Norcia, and “did not give [to Mr. Norcia] the box.” Dkt. No. 20-1 at 2. Although  
15 Samsung argued in reply that this was because Mr. Norcia had voluntarily left the box behind at  
16 the store, *see* Dkt. No. 21 at 1, it was impossible to tell from the papers.

17 The Court consequently held a bench trial, at which it was undisputed as a factual matter  
18 that Mr. Norcia did indeed voluntarily decline the box, even though it had been offered to him.  
19 *See* Findings of Fact ¶ 5.

20 The Court finds that Mr. Norcia should be treated as if he received the box. It is well  
21 established that “[c]ompetent adults are bound by . . . documents, read or unread.” *Bischoff v.*  
22 *DirectTV, Inc.*, 180 F. Supp. 2d 1097, 1105 (C.D. Cal. 2002) (quoting *Hill v. Gateway 2000*, 105  
23 F.3d 1147, 1149 (7th Cir. 1997)); *see also Nguyen*, 2014 WL 4056549, at \*6 (the “failure to read a  
24 contract before agreeing to its terms does not relieve a party of its obligations under the contract”).  
25 A logical extension of that doctrine is that a person who voluntarily declines to take with him a  
26 box containing important materials relating to the product he purchased must be treated as though  
27 he had received the box (and the materials in it). Declining to read a contract in hand is  
28 analytically indistinguishable from declining to take a copy of the contract in the first place, and

1 the legal effect of holding the person accountable should be the same. Here, voluntarily refusing  
2 to accept the box and its contents does not in itself prevent formation of an agreement to arbitrate.

3 **B. THE WARRANTY BOOKLET IS INSUFFICIENT TO GIVE RISE TO**  
4 **INQUIRY NOTICE UNDER *WINDSOR MILLS***

5 But that finding does not establish that a valid and enforceable arbitration contract was  
6 formed. The Court fully accepts and agrees with the general proposition that “receipt of a physical  
7 document containing contract terms or notice thereof is frequently deemed, in the world of paper  
8 transactions, a sufficient circumstance to place the offeree on inquiry notice of those terms.”  
9 *Specht*, 306 F.3d at 31 (citing cases). “Every person who has actual notice of circumstances  
10 sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the  
11 fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact.” *Id.*  
12 (quoting Cal. Civ. Code § 19). Because Mr. Norcia should be treated as though he received the  
13 paper warranty booklet in the box that his phone was packaged in, this would normally be the end  
14 of the inquiry.

15 However, the particular facts here lead the Court to conclude that this is a case in which  
16 *Windsor Mills* requires a different outcome. Even though plaintiff’s physical receipt (or presumed  
17 receipt) of the warranty booklet would ordinarily have placed him on inquiry notice of an offer --  
18 and his subsequent conduct could be deemed an acceptance -- Mr. Norcia “is not bound by  
19 inconspicuous contractual provisions of which he was unaware, contained in a document whose  
20 contractual nature is not obvious.” 25 Cal. App. 3d at 993.

21 These are the facts in evidence after trial: What was included in the box Mr. Norcia  
22 declined was a 101-page booklet entitled “Product Safety & Warranty Information.” At the very  
23 front of the booklet, mostly in all capital letters, is a 5-page section on “Disclaimer of Warranties;  
24 Exclusion of Liability.” Arbitration or dispute resolution are not mentioned there. Next comes the  
25 table of contents; arbitration and dispute resolution are not mentioned there, either. Warranty  
26 information starts on page 70, in a question-and-answer format. The first question is: “What is  
27 covered and for how long?” After four more questions -- “What is not covered?”; “What are  
28 SAMSUNG’s obligations?”; “What must you do to obtain warranty service?”; “What are the

1 limits on SAMSUNG’s liability?” -- at last, on page 76 is the question “What is the procedure for  
2 resolving disputes?”

3 The answer to that question -- which Samsung presents as the “arbitration agreement” --  
4 begins with these words: “ALL DISPUTES WITH SAMSUNG ARISING IN ANY WAY FROM  
5 THIS LIMITED WARRANTY OR THE SALE, CONDITION OR PERFORMANCE OF THE  
6 PRODUCTS SHALL BE RESOLVED EXCLUSIVELY THROUGH FINAL AND BINDING  
7 ARBITRATION, AND NOT BY A COURT OR JURY.” The answer about the procedure for  
8 resolving disputes ends with a notice to consumers about how they may “opt out of this dispute  
9 resolution procedure.” Notice must be provided to Samsung, by e-mail or phone, “no later than 30  
10 calendar days from the date of the first consumer purchaser’s purchase of the Product.”

11 (Interestingly, and by way of contrast, the section that immediately follows the warranty section in  
12 the 101-page booklet is the “End User License Agreement for Software.” That agreement starts  
13 by saying, “IMPORTANT. READ CAREFULLY: This End User License Agreement (‘EULA’) is  
14 a legal agreement between you . . . and Samsung Electronics Co., Ltd. . . .” And a little further  
15 down, “BY USING THE DEVICE OR ITS PRELOADED SOFTWARE, YOU ACCEPT THE  
16 TERMS OF THIS EULA. IF YOU DO NOT ACCEPT THESE TERMS, **DO NOT USE THE**  
17 **DEVICE OR THE SOFTWARE. INSTEAD, RETURN THE DEVICE TO THE RETAILER**  
18 **FOR A REFUND OR CREDIT.”)**

19 As these facts show, the arbitration provision is not presented as an *offer* which the  
20 consumer is invited to accept or reject. Instead, the warranty, including the “procedure for  
21 resolving disputes,” is presumed to apply automatically “upon the date of purchase.” Tr. Ex. 102  
22 at 70; *see also* Tr. at 57:12-17 (Samsung witness testifying that Mr. Norcia accepted the arbitration  
23 provision “[w]hen he purchased the phone, the warranty comes with the phone. They’re not  
24 separable. So he accepted the warranty and the terms and conditions of the warranty when he puts  
25 a credit card down to buy the phone.”).

26 The Court does not quarrel with the proposition that the warranty is “contractual” in the  
27 sense that it creates binding, legal obligations on Samsung. It also limits Samsung’s obligations in  
28 important ways. But under California law, “[a]ny affirmation of fact or promise made by the

1 seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates  
2 an express warranty that the goods shall conform to the affirmation or promise.” Cal. Commercial  
3 Code § 2313(1)(a). The consumer need not agree to or accept a warranty in order for it to be  
4 created, nor does the consumer need to have relied on it. *See* Bohn and Williams, California Code  
5 Comment to Commercial Code § 2313 (West 2002) ¶ 2 (“Under Subdivision (1) of this section  
6 ‘no particular reliance on [affirmations of fact] need be shown in order to weave them into the  
7 fabric of agreement.’ Official Comment 3.”). All that the consumer needs to do obtain the benefit  
8 of the warranty is to buy the product that the seller has made affirmative representations about.

9 An agreement to arbitrate, however, is different in nature, and cannot be created as  
10 Samsung has tried to do here -- by stuffing an inconspicuous “Q&A” about the “procedure for  
11 resolving disputes” into a statement about the scope of the warranty. *Windsor Mills* bars contract  
12 formation through such stealth tactics, and California cases distinguishing that holding have taken  
13 pains to point out that the documents they addressed were, unlike here, called a “contract” or  
14 required the counter-party’s signature. *See Marin Storage & Trucking, Inc. v. Benco Contracting  
15 and Engineering, Inc.*, 89 Cal. App. 4th 1042, 1049-50 (2001) (“Here, the document in question is  
16 entitled Work Authorization and Contract. The clause immediately above the customer’s  
17 signature states, ‘This is a contract which includes all terms and conditions stated on the reverse  
18 side.’ . . . There is simply no basis for a conclusion that the document was unrecognizable as a  
19 binding contract.”); *Rodriguez v. Am. Techs., Inc.*, 136 Cal. App. 4th 1110, 1123-24 (2006)  
20 (“*Windsor Mills* involved printed forms entitled ‘Acknowledgement of Order’ that were sent to the  
21 buyer as each order of merchandise was received and did not require the buyer’s signature. . . .  
22 Here, the agreement is titled ‘WORK PROPOSAL AND AUTHORIZATION,’ and is signed by  
23 ATI’s representative and by Kathy Rodriguez underneath a line stating ‘Accepted by Client.’”).

24 Without any words alerting consumers that Samsung’s arbitration term was a “contract” or  
25 “agreement,” and without anywhere requiring consumers like Mr. Norcia to sign in order to accept  
26 the arbitration provision or at least to acknowledge having received it, the conclusion must be that  
27 no reasonable person would “know that a proposal has been made to him.” *Windsor Mills*, 25 Cal.  
28 App. 3d at 993. Indeed, the way that Samsung has structured its arbitration provision within its

1 warranty, no proposal was in fact made to the purchaser. Instead, the arbitration provision was  
2 disguised as merely a “term” of the warranty, which automatically attaches from the moment of  
3 purchase without any additional acceptance or reliance on the part of the purchaser.

4 Samsung has identified no controlling authority that compels a different result. Although  
5 *Mortensen v. Bresnan Communications, LLC*, 722 F.3d 1151 (9th Cir. 2013), is of course binding  
6 authority on this Court, there, the issue was not contract formation, but rather the preemptive  
7 effect of the FAA on a public policy defense available under Montana state law. In any event, the  
8 facts of that case are different than the ones here because there, the document that contained the  
9 arbitration clause was entitled the “Bresnan OnLine Internet Service Subscriber Agreement and  
10 Acceptable Use Policy.” *See id.* at 1154-55. Moreover, the beginning of the service agreement  
11 “direct[ed] customers to, ‘Please read this Agreement very carefully, because by accepting the  
12 Service, you agree to all of these terms.’” *Id.* Two district court opinions that upheld arbitration  
13 agreements in the absence of a signature can similarly be distinguished. *See Murphy v. DirecTV,*  
14 *Inc.*, No. 2:07-cv-06465-JHN-VBKx, 2011 WL 3319574, at \*2 (C.D. Cal. Aug. 2, 2011)  
15 (document containing the arbitration provision was labeled as “the DirecTV Customer  
16 Agreement”); *Knutson v. Sirius XM Radio Inc.*, Civil No. 12cv418 AJB (NLS), 2012 WL  
17 1965337, at \*3 (S.D. Cal. May 31, 2012) (upholding, and finding *Windsor Mills* exception  
18 inapplicable to, arbitration provision contained in “the Agreement, entitled ‘Customer Agreement  
19 & Website Terms of Use’”).

20 The Court’s lack of formation finding here is not driven by any single fact -- *e.g.*, that this  
21 is a “terms-later” situation, where the terms came inside of the box rather than specifically being  
22 disclosed to the consumer at or prior to purchase; or that the method of acceptance was through  
23 the practice of “accept-or-return” (or in this case, “return-or-opt-out”), rather than specifically  
24 requiring the consumer’s signature. Nor is it driven by the fact that the arbitration provision was  
25 contained in a manufacturer’s warranty. There may be other situations where arbitration  
26 provisions within manufacturer’s warranties may nevertheless give rise to a true agreement to  
27 arbitrate.

28

1           That, however, simply is not the case here. “[T]he ‘whole purpose’ of warranty law is ‘to  
2 determine what it is that the seller has in essence agreed to sell . . . .’ Therefore, in keeping with  
3 this purpose, section 2313 focuses on *the seller’s* behavior and obligation -- his or her  
4 affirmations, promises, and descriptions of the goods -- all of which help define what the seller ‘in  
5 essence’ agreed to sell.” *Weinstat v. Dentsply Int’l, Inc.*, 180 Cal. App. 4th 1213, 1228 (2010)  
6 (emphasis in original and citations omitted; further observing that any descriptions or affirmations  
7 about the product contained in the directions that were sealed in the product package “have  
8 already been made by Dentsply at the time the product is delivered to the customer”). Similarly,  
9 the affirmations Samsung made about its phone that were contained in the warranty booklet (*e.g.*,  
10 that the phone would be “free from defects in material and workmanship under normal use and  
11 service for” one year from the date of purchase) were made at the time the phone was delivered to  
12 Mr. Norcia and gave rise to binding obligations under warranty law.

13           Not so with the arbitration provision that was inconspicuously hidden as an innocuous-  
14 seeming answer to the question “[w]hat is the procedure for resolving disputes?” The FAA  
15 requires a “written agreement for arbitration.” 9 U.S.C. § 4. An agreement requires mutual  
16 assent, generally achieved through an offer and acceptance. An offer that no reasonable person  
17 would recognize as a proposal, *see Windsor Mills*, 25 Cal. App. 3d at 993, does not count.  
18 Consequently, because Mr. Norcia “had insufficient notice” of Samsung’s arbitration provision  
19 contained in its warranty, the Court concludes that he “did not enter into an agreement with”  
20 Samsung to arbitrate his claims. *See Nguyen*, 2014 WL 4056549, at \*7.<sup>4</sup>

21           For the sake of completeness, the Court briefly addresses two other arguments vigorously  
22 raised by Samsung that are mainly off point. Samsung argued that Mr. Norcia must be deemed to  
23 have received notice through Samsung’s website because Mr. Norcia made a binding admission in  
24 his complaint that he looked at Samsung’s website and specifically at Samsung’s product web  
25 page relating to the S4. The web page contained links to both the warranty as a free-standing  
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27 <sup>4</sup> To the extent that the Central District of California court has come to a contrary conclusion in  
28 *Sheffer v. Samsung Telecommunications America, LLC*, Case No. 2:13-cv-03466-GW (AJWx), the  
Court disagrees with it.

1 document as well as a 212-page User Manual that reproduced within it the limited warranty  
2 (including the arbitration provision). Samsung asks for too much. Mr. Norcia testified at the  
3 bench trial that the complaint's reference to the web page was a "mistake." Tr. at 91:18-92:4,  
4 65:12-66:3. "Factual assertions in pleadings and pretrial orders, *unless amended*, are considered  
5 judicial admissions conclusively binding on the party who made them." *Am. Title Ins. Co. v.*  
6 *Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) (emphasis added). The Court concludes that  
7 Mr. Norcia needs to amend his complaint, and that he must make sure that the next iteration of his  
8 complaint is error-free. The Court also concludes that Samsung's product web page is not  
9 sufficient by itself to constitute inquiry notice -- among other things, it is an additional step  
10 removed from the actual limited warranty language, which the Court has already found  
11 insufficient.

12 Samsung also made a point of bringing out at trial the fact that Mr. Norcia works as a  
13 director at a gaming company called BigPoint, and that in that capacity, he is familiar with the  
14 concept of terms of service which contain dispute resolution procedures that are accepted by  
15 conduct -- in BigPoint's case, by playing BigPoint's games. This point, too, is overstated.  
16 Samsung's arbitration provision is contained in a warranty, not "terms of service." Moreover, just  
17 as the Ninth Circuit observed in *Nguyen* where a similar argument was made, "[w]hether Nguyen  
18 has experience with the browsewrap agreements found on other websites such as Facebook,  
19 LinkedIn, MySpace, or Twitter, has no bearing on whether he had constructive notice of Barnes &  
20 Noble's Terms of Use. There is nothing in the record to suggest that those browsewrap terms are  
21 enforceable by or against Nguyen, much less why they should give rise to constructive notice of  
22 Barnes & Noble's browsewrap terms." 2014 WL 4056549, at \*6. Similarly, here, Mr. Norcia's  
23 familiarity with BigPoint's Terms of Service are of no moment. There is nothing in the record  
24 regarding the enforceability of BigPoint's Terms of Service, nor why they should give rise to  
25 constructive notice of *Samsung's* arbitration provision contained in its warranty.

1 **CONCLUSION**

2 For all of these reasons, the Court finds that no agreement to arbitrate was made, and in the  
3 absence of an agreement to arbitrate, the Court denies Samsung's pending motion to compel  
4 arbitration. Dkt. No. 18.

5 Looking forward, the Court notes as mentioned above that Mr. Norcia identified at least  
6 one inaccuracy in his complaint. Plaintiff is directed to file an amended complaint -- the final  
7 draft of which must be reviewed by Mr. Norcia himself and which must be free of further factual  
8 inaccuracies -- within 10 days of this order.

9 Defendants are directed to answer or otherwise respond to that amended complaint within  
10 21 days of its filing.

11 A case management conference is set for November 5, 2014 at 1:30 p.m.

12 **IT IS SO ORDERED.**

13 Dated: September 18, 2014

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16 JAMES DONATO  
17 United States District Judge  
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