

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2011

4 (Argued: April 4, 2012 Decided: September 7, 2012)

5
6 Docket No. 11-1311-cv

7 -----
8 LUCY SCHNABEL, EDWARD SCHNABEL, & BRIAN SCHNABEL,
9 o/b/o Themselves and All Others Similarly Situated

10 Plaintiffs-Appellee,

11 - v -

12 TRILEGIANT CORPORATION, AFFINION, INC.,

13 Defendants-Appellants.

14 -----
15 Before: McLAUGHLIN, SACK, and LIVINGSTON, Circuit Judges.

16 Appeal from an order of the United States District
17 Court for the District of Connecticut (Janet C. Hall, Judge)
18 denying the defendants' motion to compel arbitration. The
19 defendants argue on appeal, inter alia, that the district court
20 erred in concluding as a matter of law that the parties had not
21 mutually assented to a valid arbitration provision and that this
22 Court should remand the case to the district court directing the
23 court to enter an order compelling arbitration. We conclude that
24 there is no genuine issue of material fact which, if decided in
25 the defendants' favor, would be sufficient to support a fact-

1 finder's determination that the parties agreed to arbitrate the
2 dispute.

3 Affirmed.

4 PATRICK A. KLINGMAN (James E. Miller,
5 Karen M. Leser-Grenon, James C. Shah,
6 Nathan C. Zipperian, Rose F. Luzon
7 Shepherd, Finkelman, Miller & Shah LLP,
8 Media, PA, Chester, CT, San Diego, CA
9 David A. Burkhalter, Burkhalter, Rayson
10 & Assoc. P.C., Knoxville, TN, on the
11 brief) for Plaintiffs-Appellees.

12 KENNETH M. KLIEBARD (Gregory T. Fouts,
13 Morgan Lewis & Bockius LLP, Chicago, IL
14 James H. Bicks, Wiggin and Dana LLP,
15 Stamford, CT, on the brief) for
16 Defendants-Appellants.

17 SACK, Circuit Judge:

18 The question presented to us on this appeal is whether
19 the plaintiffs are bound to arbitrate their dispute with the
20 defendants as a consequence of an arbitration provision that the
21 defendants assert was part of a contract between the parties.
22 Neither of the plaintiffs acknowledge being aware of the
23 existence of the arbitration provision when their contractual
24 relationships with the defendants were formed. But, according to
25 the defendants, the provision was made available to the
26 plaintiffs through a hyperlink appearing on the page the
27 plaintiffs would have seen before enrolling in a service offered
28 by the defendants and an email sent to the plaintiffs after their
29 enrollment.

30 We conclude that despite some limited availability of
31 the arbitration provision to the plaintiffs, they are not bound

1 to arbitrate this dispute. As regards the email, under the
2 contract law of Connecticut or California -- either of which may
3 apply to this dispute -- the email did not provide sufficient
4 notice to the plaintiffs of the arbitration provision, and the
5 plaintiffs therefore could not have assented to it solely as a
6 result of their failure to cancel their enrollment in the
7 defendants' service. As regards the hyperlink, we conclude that
8 the defendants forfeited the argument that the plaintiffs were on
9 notice of the arbitration provision through the hyperlink by
10 failing to raise it in the district court.

11 **BACKGROUND**

12 Because this appeal comes to us from the district
13 court's denial of the defendants' motion to compel arbitration,
14 we accept as true for purposes of this appeal factual allegations
15 in the plaintiffs' complaint that relate to the underlying
16 dispute between the parties. Fensterstock v. Educ. Fin.
17 Partners, 611 F.3d 124, 127-28 (2d Cir. 2010), vacated on other
18 grounds by Affiliated Computer Servs., Inc. v. Fensterstock, 131
19 S. Ct. 2989 (2011). Allegations related to the question of
20 whether the parties formed a valid arbitration agreement -- a
21 question the district court answered in the negative -- are
22 evaluated to determine whether they raise a genuine issue of
23 material fact that must be resolved by a fact-finder at trial.
24 See Bensadoun v. Jobe-Riat, 316 F.3d 171, 175 (2d Cir. 2003) ("In
25 the context of motions to compel arbitration brought under the

1 Federal Arbitration Act . . . , the court applies a standard
2 similar to that applicable for a motion for summary judgment. If
3 there is an issue of fact as to the making of the agreement for
4 arbitration, then a trial is necessary." (citations omitted));
5 Specht v. Netscape Commc'n Corp., 306 F.3d 17, 27 n.12 (2d Cir.
6 2002) (similar). As it relates to the question of whether an
7 arbitration agreement was formed, we interpret the record as a
8 whole in the light most favorable to the defendants, the party
9 against whom the district court resolved the motion to compel
10 arbitration. Cf., e.g., Wachovia Bank, Nat'l Ass'n v. VCG
11 Special Opportunities Master Fund, Ltd., 661 F.3d 164, 171 (2d
12 Cir. 2011) (observing that the district court's decision to grant
13 summary judgment is reviewed de novo, "construing the evidence in
14 the light most favorable to the party against which summary
15 judgment was granted").

16 Underlying Dispute

17 Lucy Schnabel, Edward Schnabel, and Brian Schnabel, are
18 the named plaintiffs in this putative class action. Lucy and
19 Edward are married to one another. Brian is their son. All
20 three are residents of Pleasant Hill, California.

21 The defendants Affinion Group, LLC, and its wholly
22 owned subsidiary Trilegiant Corp., are incorporated in the State
23 of Delaware with their principal places of business in
24 Connecticut. Trilegiant is in the business of marketing and
25 selling online programs that offer discounts on goods and
26 services in exchange for a "membership fee." The plaintiffs

1 allege that the fee ranges from \$8.99 monthly (about \$108
2 annually) to \$480 annually. See Class Action Compl. at ¶ 22,
3 Schnabel v. Trilegiant Corp., 10-cv-00957 (D. Conn. June 17,
4 2010), ECF No. 1 ("Compl.").

5 "Great Fun" is the name of one of Trilegiant's
6 services.¹ By paying a monthly membership fee to Trilegiant,
7 Great Fun members are eligible to receive discounts on a wide
8 variety of products and services including dining, retail
9 shopping, car repair, and travel.

10 In 2007, Brian Schnabel was enrolled in Great Fun after
11 making a purchase on the online travel site Priceline.com. In
12 2009, his father, Edward Schnabel, was enrolled in Great Fun
13 after making a purchase on the sports memorabilia site
14 Beckett.com.² Neither Edward nor Brian acknowledges

¹ The Schnabels bring this suit on behalf of all persons who, after February 15, 2008, were charged for one or more Trilegiant services. See Compl. at ¶ 33-34. In addition to Great Fun, these services include Shoppers Advantage, a "catalog and on-line shopping membership"; Travelers Advantage, a "travel services membership"; AutoVantage, an "automobile purchasing information, dealer referral, and discount auto repair membership"; Buyers Advantage, a "retail product warranty extension/product repair membership"; Privacy Guard, a "credit report and credit monitoring membership"; Health Saver, a "dentist referral and discount prescription drug/medical services membership"; and Netmarket.com, a "catalog and online shopping membership." See id. at ¶ 22.

² A "screenshot" of an order confirmation page similar to the Beckett Internet page that Brian saw when completing his purchase on Beckett, including the Great Fun solicitation "10% Cash Back" is publicly available at http://www.ca2.uscourts.gov/Docs/Video_files/11_1311/Becket_ord_c_onf.pdf. See also Ex. A to Mallozzi Aff., Ex. 1 to Mot. to Dismiss or Stay and Compel Arbitration, Schnabel v. Trilegiant Corp., 10-cv-00957 (D. Conn. Sept. 29, 2010), ECF No. 23

1 intentionally or knowingly enrolling in the service. Trilegiant
2 asserts, and we accept for the purposes of this appeal, however,
3 that in the process of completing purchases from Priceline.com
4 and Beckett.com, respectively, both Edward and Brian were
5 enrolled in Great Fun when they were presented with separate
6 "enrollment offer" pages and entered personal information into
7 fields on those pages.³ See Appellant's Brief 6-7.

8 The initial Great Fun solicitation, which appears on
9 the merchant's order confirmation page confirming that the user

("Mallozzi Aff.").

The screenshots in the record, and made available on the Court's website, see id. & infra note 3, were created by Trilegiant and are substantially similar to the Internet pages that Edward and Brian would have seen when enrolling in Great Fun. See Mallozzi Aff. ¶¶ 6, 10. All of the screenshots posted to the Court's website refer to "Daniel J Eid" as the purchaser of Beckett goods and the person enrolling in Great Fun. Although Trilegiant does not explain Mr. Eid's relationship with Trilegiant, he appears to be a Trilegiant or Affinion employee inasmuch as his email address (disclosed in the record in an example email allegedly similar to one received by Edward and Brian after their enrollments in Great Fun, Mallozzi Aff. ¶ 15) has an "affinion.com" domain. See Mallozzi Aff. Ex. E.

³ Screenshots similar to the enrollment offers to Edward and Brian are publicly available at http://www.ca2.uscourts.gov/Docs/Video_files/11_1311/Priceline_enrol_offer.pdf, see also Mallozzi Aff. Ex. A., and http://www.ca2.uscourts.gov/Docs/Video_files/11_1311/Becket_enrol_offer.pdf, respectively; see also Mallozzi Aff. Ex. C.

Both Edward and Brian dispute that they in fact completed all the steps said to be necessary to enroll in Great Fun when they were making their respective purchase. Edward asserts that at the time, he thought that Beckett.com was collecting his information and was unaware that any other entity was involved in the transaction. Brian says that, like Edward, he did not realize that this solicitation involved a third-party separate from Priceline. But Trilegiant has a record of Brian subscribing to their service under the username "SCHNABEL22."

1 has completed an online purchase, invites the purchaser to click
2 on a hyperlink in order to receive "Cash Back" on his or her
3 purchase. Although the plaintiffs allege that the order
4 confirmation page does not indicate that this offer involves a
5 party other than the merchant with whom the user is in the
6 process of completing a purchase, a screenshot of a confirmation
7 page allegedly similar to that viewed by Edward does (1) state
8 that "your Online Price Guide subscription has also been sent to
9 [your email address]"; and (2) feature, below the hyperlink
10 "Click here to claim up to \$20.00 Cash Back on this purchase!", a
11 "button" titled "See Details" with a legend beneath reading:
12 "Click above to learn how to get \$20 Back from Great Fun." See
13 Screenshot, citation in footnote 2, supra. "Great Fun" is not
14 further identified on the order confirmation page.

15 According to Trilegiant, Edward would only have been
16 brought to Great Fun's enrollment page after clicking on the
17 hyperlinked invitation to "See Details," and Brian after clicking
18 on a similar invitation to "Learn More," posted on the purchase
19 confirmation pages of the Beckett and Priceline sites,
20 respectively. See Mallozzi Aff., Ex. 1 to Mot. to Dismiss or
21 Stay and Compel Arbitration, Schnabel v. Trilegiant Corp., 10-cv-
22 00957 (D. Conn. Sept. 29, 2010) ("Mallozzi Aff.") ¶¶ 6, 10.⁴

⁴ It is not clear from the record whether Edward and Brian would have had to click on these hyperlinks in order to enroll in Great Fun or whether they could have been enrolled in Great Fun without ever seeing the enrollment pages by, for example, in Edward's case, clicking on the "Click here to claim up to \$20.00 Cash Back on this purchase!" hyperlink. Because we conclude that

1 According to Trilegiant, neither plaintiff could join Great Fun
2 without affirmatively entering personal information into various
3 fields appearing on the enrollment page. This information
4 included the plaintiff's "city of birth," and a password created
5 by the plaintiff. It is undisputed, though, that the plaintiffs
6 were not required to reenter credit-card information when signing
7 up for Great Fun. That information had already been entered in
8 connection with the online purchase of goods and services through
9 Beckett (for Edward) and Priceline (for Brian).

10 The enrollment page, like the original purchase
11 confirmation page, does not plainly indicate that the offer is
12 from a third party -- Trilegiant -- rather than the merchant with
13 whom the user has just completed a purchase -- Beckett or
14 Priceline. Indeed, in the case of the enrollment page for
15 Beckett, there is a statement at the top of the page indicating
16 that the purchaser has received a "Special Award for Beckett
17 Customers." See Mallozzi Aff. Ex. A. Toward the bottom of the
18 page, near an overview of some of the "Benefits" of the program,
19 though, there do appear the logos of several popular brands
20 besides Beckett, suggesting that by accepting the offer, the
21 purchaser will somehow be able to receive discounts when
22 purchasing other goods or services.

even if Edward and Brian did both see the enrollment pages, no
binding arbitration agreement was formed, this question need not
be resolved.

1 The message on the enrollment page also promises "up
2 to" \$20 off on the purchaser's Beckett purchase, along with
3 several benefits for other goods and services, including "10% to
4 50% [savings] at over 40,000 Participating Restaurants" and "10%
5 to 50% [savings] on Top Attractions and Activities." Id. It
6 indicates in relatively small print that Great Fun will email the
7 purchaser "Great Fun membership information so [he or she] can
8 start saving today," but that "[t]here's no obligation to
9 continue . . . Great Fun benefits. . . . [The purchaser can]
10 call us to cancel before the end of . . . [the] FREE trial and
11 owe us nothing[.]" Id.

12 To the left of the fields where a purchaser can enter
13 his or her "City of Birth" and password appears a two paragraph
14 description of some of the general terms of the agreement,
15 including a statement that the first month of membership will be
16 free but that the purchaser's credit card will be charged \$14.99
17 per month if he or she does not cancel the membership by toll-
18 free phone call. Id. The text also states that by entering his
19 "City of Birth" and password and clicking the "Yes" button, the
20 purchaser agrees that the vendor (in this case Beckett) will
21 transmit his or her credit-card information to Great Fun. Id.
22 Further, by clicking the "Yes" button, the purchaser acknowledges
23 that he or she has read the "Terms & Conditions" of the
24 agreement. Id.

25 Below these paragraphs are two hyperlinks. One is to a
26 "Privacy Policy," and the other is to "Terms & Conditions" --

1 apparently referring to those mentioned in the preceding
2 paragraph. Id. Trilegiant suggests, in its briefing to us, that
3 by clicking on the "Terms & Conditions" hyperlink, purchasers
4 such as Edward and Brian would be brought to a page that includes
5 many other terms, including the arbitration provision at issue in
6 this litigation. See Appellant's Br. 36; Appellant's Reply Br.
7 13-14.

8 Trilegiant also asserts that it was its custom and
9 practice, to which it routinely adhered, to email to each newly
10 enrolled member a written document entitled "Great Fun Membership
11 Terms and Conditions" following his or her online enrollment in
12 the service. If the email bounced back, then Trilegiant would
13 send a paper version of the document to the member at his or her
14 billing address.

15 Edward Schnabel acknowledges that after learning of
16 Trilegiant's practice, he reviewed his old emails and determined
17 that in fact he had received "several emails" from Great Fun.
18 Ex. 1 to Opp. to Mot. to Dismiss or Stay and Compel Arbitration,
19 Edward Schnabel Decl. ¶ 7, Schnabel v. Trilegiant Corp., 10-cv-
20 00957 (D. Conn. Oct. 19, 2010), ECF No. 24 ("Edward Schnabel
21 Decl."). Brian, on the other hand, denies ever having received
22 an email from Great Fun. Because we conclude that even if Brian
23 and Edward received the terms and conditions, including the
24 arbitration provision, by email, the terms did not form a part of
25 a binding agreement between the parties, the factual dispute

1 among the parties as to whether these emails were ever received
2 by the plaintiffs is immaterial for present purposes.

3 The arbitration provision states that any dispute
4 between the member and "GF" -- or Great Fun⁵ - can be brought in
5 either "small claims court or by binding arbitration." Edward
6 Schnabel Decl., Ex. A ¶ 5. It also includes a class-arbitration
7 waiver providing that "[a]ll disputes in arbitration will be
8 handled just between the named parties, and not on any
9 representative or class basis." Id. The same provision also
10 requires that all disputes between the parties should be governed
11 by Connecticut law. Id.

12 In early 2010, Edward Schnabel and his wife Lucy
13 Schnabel discovered that Edward's credit card had been charged
14 \$14.99 per month for every month between September 2009 and
15 February 2010 for Edward's membership in Great Fun. He never
16 made any allegedly discounted purchases for which we was
17 qualified as a Great Fun member. Instead, he asked for a full
18 refund of the charges. Trilegiant offered to refund four of the
19 six months of charges, but no more.

⁵ The first provision in the "Terms & Conditions" document begins: [T]he "AGREEMENT [is] made between Trilegiant . . . providing a service called Great Fun, called 'GF,' and the person specified on the GF membership card." Edward Schnabel Decl., Ex. A. The plaintiffs argue that "[b]y its express language, the arbitration provision does not apply to disputes between consumers and Trilegiant, but rather disputes between consumers and GF." Appellees' Br. at 22. Because we conclude that the arbitration agreement would not bind the plaintiffs even if it were to "express[ly]" refer to Trilegiant, we need not address this argument.

1 In March or April of that year, Lucy Schnabel pointed
2 out to her son Brian that he had similarly been charged \$11.99
3 per month since December 2007 by Trilegiant for membership in
4 Great Fun. Brian asserts that he then called Great Fun to
5 complain. In response, he says, Trilegiant offered to refund
6 four of the thirty months of charges.

7 District Court Proceedings

8 On July 17, 2010, the plaintiffs brought suit against
9 Trilegiant and Affinion in the United States District Court for
10 the District of Connecticut on behalf of a class of themselves
11 and similarly situated plaintiffs. They alleged, inter alia,
12 that the defendants had engaged in "unlawful, unfair, and
13 deceptive practices [through] . . . unauthorized enrollment
14 practice[s] [known as] . . . 'post transaction marketing' and
15 'data pass.'" Compl. at ¶ 2-3.

16 According to the plaintiffs, "data pass" occurs when a
17 consumer agrees to pay a third-party service without having to
18 reenter credit card or other payment data initially entered in
19 order to purchase a good or service from a different online
20 merchant. Id. at ¶ 4. "Post transaction marketing" occurs when
21 "(1) 'interstitial sales' offer pages, which appear between the
22 checkout page and the confirmation page of the e-retailer from
23 whom the consumer intends to make a purchase, (2) 'pop-up'
24 windows, which appear on top of the confirmation page, and (3)
25 hyperlinks or 'banners' that are included directly on the
26 confirmation page itself." Id. at ¶ 3. Central to the factual

1 allegations of the plaintiffs' complaint was a United States
2 Senate investigation into these allegedly unfair practices. See
3 Compl. at ¶¶ 3-5.

4 The complaint asserted claims under the Racketeer
5 Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962, the
6 Electronic Communications Privacy Act, 18 U.S.C. § 2510, the
7 Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. Ann.
8 § 42-110a, the California Consumer Legal Remedies Act, Cal. Civ.
9 Code § 1770, the California False Advertising Law, id. at
10 § 17500, and the California Unfair Competition Law, id. at
11 § 17200. Compl. at ¶¶ 43-103. On September 29, 2010, the
12 defendants filed a motion to dismiss and compel arbitration
13 pursuant to the emailed arbitration provision. On February 24,
14 2011, the district court (Janet C. Hall, Judge) denied the motion
15 to compel arbitration, concluding that the parties had never
16 agreed to arbitrate. Schnabel v. Trilegiant Corp, 10-CV-957,
17 2011 WL 797505, at *6, 2011 U.S. Dist. LEXIS 18132, at *20-*21
18 (D. Conn. Feb. 24, 2011).

19 The district court began its analysis by deciding that
20 the court was not required to resolve a complex choice-of-law
21 question -- whether California or Connecticut law applied --
22 because "regardless of the law applied, the result is the same."
23 Id. at *3, 2011 U.S. Dist. LEXIS 18132, at *7-*8. Under either
24 law, the court determined, the defendants had failed to raise a
25 genuine issue of material fact as to whether the plaintiffs had
26 assented to the arbitration provision. Id. at *4, 2011 U.S.

1 Dist. LEXIS 18132, at *15. "Even assuming Edward and Brian read
2 all of th[e] information [on the enrollment screen and in the
3 subsequent email from Great Fun], the contract that they formed
4 with Trilegiant did not include an arbitration clause." Id.,
5 2011 U.S. Dist. LEXIS 18132, at *13. In the district court's
6 view, the contract was formed at the moment the plaintiffs
7 entered their information into the online enrollment screen and
8 "included terms exactly as Trilegiant proposed them in their
9 prompts -- a monthly charge in exchange for online savings." Id.
10 The court concluded that Brian and Edward never expressly or
11 implicitly assented to additional terms, which included the
12 arbitration provision, which were to follow by email. Id.

13 The defendants filed this interlocutory appeal pursuant
14 9 U.S.C. § 16(a)(1)(C)⁶ from the order denying their motion to
15 dismiss and compel arbitration.

16 DISCUSSION

17 I. Standard of Review and Legal Framework

18 The Supreme Court has repeatedly instructed that the
19 Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., first
20 enacted in 1925, "embod[ies] a national policy favoring
21 arbitration." AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740,
22 1749 (2011) (internal quotation marks and brackets omitted).

⁶ 9 U.S.C. § 16(a)(1)(C) provides, inter alia: "An appeal may be taken [to the Court of Appeals] from an order denying an application under section 206 of this title to compel arbitration."

1 But this policy is founded on a desire to preserve the parties'
2 ability to agree to arbitrate, rather than litigate, disputes.
3 With the FAA, Congress sought to counteract an historic judicial
4 hostility toward arbitration, which often trumped the parties'
5 clear intentions. See Allied-Bruce Terminix Cos., Inc. v.
6 Dobson, 513 U.S. 265, 272 (1995). The Act places arbitration
7 agreements "upon the same footing as other contracts." Scherk v.
8 Alberto-Culver Co., 417 U.S. 506, 511 (1974) (internal quotation
9 marks omitted). But it "does not require parties to arbitrate
10 when they have not agreed to do so." Volt Info. Scis., Inc. v.
11 Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 478
12 (1989); accord E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 293
13 (2002).

14 The threshold question facing any court considering a
15 motion to compel arbitration is therefore whether the parties
16 have indeed agreed to arbitrate. Inasmuch as the arbitrator has
17 no authority of any kind with respect to a matter at issue absent
18 an agreement to arbitrate, the question of whether such an
19 agreement exists and is effective is necessarily for the court
20 and not the arbitrator. See AT&T Techs., Inc. v. Commc'ns
21 Workers of Am., 475 U.S. 643, 648-49 (1986); Specht, 306 F.3d at
22 26-27.

23 Under the FAA, "[i]f the making of the arbitration
24 agreement or the failure, neglect, or refusal to perform the same
25 be in issue, the court shall proceed summarily to the trial
26 thereof." 9 U.S.C. § 4. But a trial is warranted only if there

1 exists one or more genuine issues of material fact regarding
2 whether the parties have entered into such an agreement. See
3 Opals on Ice Lingerie v. Bodylines Inc., 320 F.3d 362, 369 (2d
4 Cir. 2003).

5 On appeal, a district court's denial of a motion to
6 compel arbitration is reviewed de novo. Specht, 306 F.3d at 26.
7 The question of whether the parties have agreed to arbitrate is
8 also reviewed de novo to the extent that the district court's
9 conclusion was based on a legal determination, but findings of
10 fact, if any, bearing on this question are reviewed under a
11 "clearly erroneous" standard. Id.⁷

12 II. State Contract Law

13 Whether or not the parties have agreed to arbitrate is
14 a question of state contract law. See Specht, 306 F.3d at 26;
15 Chelsea Square Textiles, Inc. v. Bombay Dyeing & Mfg. Co., 189
16 F.3d 289, 295-96 (2d Cir. 1999) ("[W]hile . . . the FAA preempts
17 state law that treats arbitration agreements differently from any
18 other contracts, it also preserves general principles of state
19 contract law as rules of decision on whether the parties have
20 entered into an agreement to arbitrate.") (internal quotation
21 marks and footnote omitted).

22 The terms and conditions at issue here include a
23 choice-of-law provision, which -- like the arbitration clause --
24 was not shown on the enrollment screen. The provision therefore

⁷ There are no such findings of fact by the district court that we review or rely upon on appeal here.

1 does not determine the law that the Court should apply to
2 determine whether the arbitration clause was part of any
3 agreement between the parties unless and until it is determined
4 that the parties have agreed to and are bound by it. Applying
5 the choice-of-law clause to resolve the contract formation issue
6 would presume the applicability of a provision before its
7 adoption by the parties has been established. See, e.g., Trans-
8 Tec Asia v. M/V Harmony Container, 518 F.3d 1120, 1124 (9th Cir.
9 2008) ("[W]e cannot rely on the choice of law provision until we
10 have decided, as a matter of law, that such a provision was a
11 valid contractual term and was legitimately incorporated into the
12 parties' contract."); B-S Steel of Kansas, Inc. v. Texas Indus.,
13 Inc., 439 F.3d 653, 661 n.9 (10th Cir. 2006) (referring to "the
14 logical flaw inherent in applying a contractual choice of law
15 provision before determining whether the underlying contract is
16 valid").

17 Considering this matter without deciding whether the
18 choice-of-law provision is binding, then, the law of either
19 California -- where the Schnabels were located when they were
20 enrolled in Great Fun -- or Connecticut, where Trilegiant is
21 located -- may apply to this dispute. But as the district court
22 recognized, neither that court nor this one need resolve this
23 typically thorny choice-of-law question, because both Connecticut
24 and California apply substantially similar rules for determining
25 whether the parties have mutually assented to a contract term.
26 Schnabel, 2011 WL 797505, at *3, 2011 U.S. Dist. LEXIS 18132, at

1 *7-*8. Which state's law applies is therefore without
2 significance.

3 The touchstone of the inquiry under either state's law
4 is the parties' outward manifestations of assent. See, e.g.,
5 Chicago Title Ins. Co. v. AMZ Ins. Servs., Inc., 188 Cal. App.
6 4th 401, 422, 115 Cal. Rptr. 3d 707, 725 (2010) ("Mutual assent
7 is determined under an objective standard applied to the outward
8 manifestations or expressions of the parties.") (internal
9 quotation marks omitted); Binder v. Aetna Life Ins. Co., 75 Cal.
10 App. 4th 832, 850, 89 Cal. Rptr. 2d 540, 551 (1999) ("To form a
11 contract, a manifestation of mutual assent is necessary. . . .
12 Mutual assent may be manifested by written or spoken words, or by
13 conduct.") (citations to Restatement (Second) of Contracts §§ 17,
14 19 (1981) omitted); Ubysz v. DiPietro, 185 Conn. 47, 51, 440 A.2d
15 830, 833-34 (1981) (observing that a contract is formed when
16 parties assent through "written or spoken words or by other acts
17 or by failure to act") (internal quotation marks omitted).

18 The conduct manifesting such assent may be words or
19 silence, action or inaction, but "[t]he conduct of a party is not
20 effective as a manifestation of his assent unless he intends to
21 engage in the conduct and knows or has reason to know^[8] that the

8

A person has reason to know a fact, present or future, if he has information from which a person of ordinary intelligence would infer that the fact in question does or will exist. A person of superior intelligence has reason to know a fact if he has information from which a person of his intelligence would draw the inference. There is also reason to know

1 other party may infer from his conduct that he assents."

2 Restatement (Second) of Contracts § 19(2).

3 In this case, Trilegiant, in the argument it has not
4 forfeited, asserts that the plaintiffs assented to the
5 arbitration provision by enrolling in Great Fun, receiving the
6 emailed terms, and then not cancelling their Great Fun
7 memberships during the free trial period. As we explained at
8 length in Register.com, Inc. v. Verio, Inc., 356 F.3d 393 (2d
9 Cir. 2004), the mere acceptance of a benefit -- and we assume
10 here that membership in Great Fun, without the use of any of its
11 discounts, is a benefit in itself -- may constitute assent, but
12 only where the "offeree makes a decision to take the benefit with
13 knowledge [actual or constructive] of the terms of the
14 offer" Id. at 403. As Professor Williston's treatise
15 observes, "one who accepts the benefit of services rendered may
16 be held to have impliedly made a promise to pay for them . . .
17 [if] the offeree . . . knew or had reason to know that the party
18 performing expected compensation." 2 RICHARD A. LORD, WILLISTON ON
19 CONTRACTS § 6:9 (4th ed. 1991); see also Specht, 306 F.3d at 29-30
20 (citing Windsor Mills, Inc. v. Collins & Aikman Corp., 25 Cal.

if the inference would be that there is such
a substantial chance of the existence of the
fact that, if exercising reasonable care with
reference to the matter in question, the
person would predicate his action upon the
assumption of its possible existence.

Restatement (Second) of Contracts § 19(2), Illus. b.

1 App. 3d 987, 992, 101 Cal. Rptr. 347, 351 (1997) ("[W]hen the
2 offeree does not know that a proposal has been made to him this
3 objective standard does not apply.")).

4 Therefore, in cases such as this, where the purported
5 assent is largely passive, the contract-formation question will
6 often turn on whether a reasonably prudent offeree would be on
7 notice of the term at issue. In other words, where there is no
8 actual notice of the term, an offeree is still bound by the
9 provision if he or she is on inquiry notice of the term and
10 assents to it through the conduct that a reasonable person would
11 understand to constitute assent. "Inquiry notice is actual
12 notice of circumstances sufficient to put a prudent man upon
13 inquiry." Specht, 306 F.3d at 30 n.14 (internal quotation marks
14 omitted). In making this determination, the "[c]larity and
15 conspicuousness [of the term is] important" Id. at 30.

16 Edward and Brian assert that they were not on actual
17 notice of the arbitration provision, and Trilegiant cannot point
18 to any evidence in the record upon which a jury could rely to
19 conclude otherwise. The questions we must address, then, are
20 whether the plaintiffs were on inquiry notice of the arbitration
21 provision through the emails sent after their enrollments and, if
22 so, whether their conduct in enrolling in Great Fun, and then not
23 cancelling their memberships before the free trial period
24 expired, constituted an objective manifestation of their assent
25 to the arbitration provision.

1 III. Analysis

2 Trilegiant does not dispute (as, of course, it cannot)
3 that the arbitration provision does not appear on the pages that
4 either of the plaintiffs would have first encountered during his
5 enrollment in Great Fun. It argues, however, that the plaintiffs
6 were put on notice of the provision, and thus were in a position
7 to assent to it both through the "terms and conditions" hyperlink
8 on the enrollment form available before enrollment, and through
9 the email sent to each plaintiff after his enrollment.

10 A. The Email

11 The issue preserved on appeal⁹ is the second of those:
12 whether the plaintiffs were put on inquiry notice of the
13 arbitration provision through the transmission of the terms by
14 email after the initial enrollment and then assented to this
15 provision by failing to cancel their Great Fun memberships after
16 the expiration of the free-trial period.

17 1. Timing of Contract Formation. "As a general
18 principle, an offeree cannot actually assent to an offer unless
19 the offeree knows of its existence." 1 WILLISTON ON CONTRACTS
20 § 4:16. An offer -- and all of its terms -- therefore ordinarily
21 precede acceptance.

22 Trilegiant nonetheless asserts that the plaintiffs
23 assented to terms emailed to them after the plaintiffs enrolled

⁹ See section III.B, infra, concluding that the defendants argument that the "terms and conditions" hyperlink gave the defendants requisite notice has been forfeited because it was not raised in the district court.

1 in Great Fun. And indeed there are cases -- Trilegiant argues
2 that this is one -- where terms are effectively added to an
3 agreement at the instance of the offeror subsequent to the
4 establishment of a contractual relationship. The conventional
5 chronology of contract-making has become unsettled over recent
6 years by courts' increased acceptance of this so-called
7 "terms-later" contracting. See generally John E. Murray, Jr.,
8 The Dubious Status of the Rolling Contract Formation Theory, 50
9 DUQ. L. REV. 35 (2012) ("Murray"); Eric A. Posner, ProCD v.
10 Zeidenberg and Cognitive Overload in Contractual Bargaining, 77
11 U. CHI. L. REV. 1181, 1184 (2010) ("Posner").

12 There are at least two analytical approaches available
13 to Trilegiant to argue that despite the time sequence here and
14 its divergence from the typical offer-with-all-
15 terms-then-acceptance progression, the parties entered into a
16 contract that included the arbitration provision emailed to each
17 plaintiff after his enrollment.

18 First, Trilegiant might contend that the arbitration
19 clause became effective after the plaintiffs received the terms-
20 and-conditions email and then assented to the offer by not
21 cancelling their Great Fun memberships. This conception of the
22 parties' dealing is similar to the theory undergirding
23 conventional shrinkwrap-license cases.

1 In shrinkwrap-license cases, the terms at issue are
2 typically provided inside the packaging of consumer goods.¹⁰
3 Whether or not there is notice to the consumer on the outside of
4 the packaging that terms await him or her on the inside, courts
5 have found such licenses to become enforceable contracts upon the
6 customer's purchase and receipt of the package and the failure to
7 return the product after reading, or at least having a realistic
8 opportunity to read, the terms and conditions of the contract
9 included with the product. See Hill v. Gateway 2000, Inc., 105
10 F.3d 1147, 1150 (7th Cir. 1997); ProCD, Inc. v. Zeidenberg, 86
11 F.3d 1447, 1448-49 (7th Cir. 1996); see also Posner, 77 U. CHI. L.
12 REV. at 1184 ("[T]he 'offer' was not 'you may have the product if
13 you pay now,' but 'you may have the product if you pay now and
14 use it later.'"). As we explained in Register.com, "in the
15 shrinkwrap context, the consumer does not manifest assent to the
16 shrinkwrap terms at the time of purchase; instead, the consumer
17 manifests assent to the terms by later actions." 356 F.3d at
18 428. In this case the "later actions" would be not the failure

¹⁰ "Shrinkwrap licenses" derive their name from the plastic used to seal many consumer products called shrinkwraps. Shrinkwraps are created by stretching polymers out straight and making them into plastic film. When the film is placed around an object and heated, the polymers return to their natural tangled state and the sheet shrinks, sealing in the object. These "shrinkwraps" are considered relatively tamper proof, moisture proof and resistant to light damage. See "How Does Shrink Wrap Work," EHow, http://www.ehow.com/how-does_4659120_shrink-wrap-work.html (last visited July 25, 2012). Shrinkwraps are, of course, ubiquitous.

1 to return goods but the failure to cancel the Great Fun
2 membership after receipt of the email.

3 Alternatively, the plaintiffs' initial enrollment in
4 Great Fun may be seen, as the district court saw it, to be the
5 formation of an agreement for each of them to pay a specified
6 monthly fee in exchange for the membership benefits offered by
7 Great Fun. See Schnabel, 2011 WL 797505, at *4, 2011 U.S. Dist.
8 LEXIS 18132, *13 ("By the time Edward and Brian received an email
9 from Trilegiant, any contract had already been formed."). The
10 arbitration provision and other additional terms contained in the
11 email would then be proposed amendments to that existing
12 contract. According to Trilegiant, the emailed terms would have
13 been accepted by the plaintiffs' acts of continued payments of
14 fees on their credit cards and maintenance of the opportunity to
15 make use of Great Fun -- or, put otherwise, their failure to
16 cancel the service in a timely manner.¹¹

17 The two approaches -- amendment and terms-later
18 contract, like in the shrinkwrap approach -- differ with respect

¹¹ In support of that approach, Trilegiant points to cases in which courts have held that arbitration provisions were added as amendments to pre-existing agreements when the provisions were sent to the offeree after contract formation and the offeree maintained his or her relationship with the offeror. See, e.g., Walters v. Chase Manhattan Bank, No. CV-07-0037, 2008 WL 3200739, at *3, 2008 U.S. Dist. LEXIS 60675, *7-*9 (E.D. Wash. Aug. 6, 2008); Milligan v. Comcast Corp., 06-cv-00809-UWC, 2007 WL 4885492, at *2-*3, 2007 U.S. Dist. LEXIS 96377, at *6-*7 (N.D. Ala. Jan. 22, 2007); Kurz v. Chase Manhattan Bank USA, N.A., 319 F. Supp. 2d 457, 463 (S.D.N.Y. 2004); MBNA Am. Bank N.A. v. Bailey, No. CV044001079S, 2005 WL 1754881, at *2, 2005 Conn. Super. LEXIS 1611, at *4-*6 (Conn. Super. Ct. May 25, 2005).

1 to the timing of contract formation: when the consumer enrolls,
2 using the first approach, and when the consumer receives the
3 terms and fails to cancel the service in the second. But this
4 distinction is ultimately of little importance here.¹² We need
5 not determine when the agreement between the parties was formed,
6 for we conclude that the later-emailed terms, including the
7 arbitration clause, were in any event never accepted by either
8 plaintiff.¹³

¹² The enrollment page does not include an "incorporation clause" incorporating into the contract any terms that may follow by email. Cf. 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 30:25 (4th ed. 1991) ("[T]he parties to a contract may incorporate contractual terms by reference to a separate, noncontemporaneous document . . . including a separate document which is unsigned."); Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela, 991 F.2d 42, 48 (2d Cir. 1993) ("[W]e have held that a broadly-worded arbitration clause which is not restricted to the immediate parties may be effectively incorporated by reference into another agreement."). We therefore need not decide whether such an incorporation clause could indeed bind the offeree to later-communicated terms unknown and effectively unknowable by the offeree at the time the offer was accepted.

¹³ Trilegiant, attempting to use the amendment model, may be required to clear an additional hurdle: the requirement, according to some authorities, that the amendment to a contract be supported by separate and additional consideration. See, e.g., Lamb v. Emhart Corp., 47 F.3d 551, 559 (2d Cir. 1995) (Under Connecticut law, "[a]dditional consideration is required for modifications when the changes constitute a new agreement bargained for by the parties. The additional consideration is required as evidence that the parties have in fact bargained for and agreed upon what is essentially a new contract."). There is, however, some authority for the proposition that arbitration agreements do not require additional consideration because "either party may elect arbitration, [and therefore such] clauses are mutual." Zawikowski v. Beneficial Nat'l Bank, No. 98 C 2178, 1999 WL 35304, at *2, 1999 U.S. Dist. Lexis 514, at *7 (N.D. Ill. Jan. 7, 1999) (discussing whether an arbitration clause in a new agreement could cover disputes arising under an old agreement). "Often, consideration for one party's promise to arbitrate is the

1 2. Notice. A person can assent to terms even if he or
2 she does not actually read them, but the "offer [must
3 nonetheless] make clear to [a reasonable] consumer" both that
4 terms are being presented and that they can be adopted through
5 the conduct that the offeror alleges constituted assent. Specht,
6 306 F.3d at 29; see also, e.g., Guadagno v. E*Trade Bank, 592 F.
7 Supp. 2d 1263, 1271 (C.D. Cal. 2008); Murray, 50 DUQ. L. REV. at
8 49 (citing Hill, 105 F.3d at 1148, for the proposition that
9 "people who accept an offer assume the risk of unread terms that
10 may prove unwelcome"). "[A]n offeree, regardless of apparent
11 manifestation of his consent, is not bound by inconspicuous
12 contractual provisions of which he is unaware, contained in a
13 document whose contractual nature is not obvious." Windsor
14 Mills, Inc. v. Collins & Aikman Corp., 25 Cal. App. 3d 987, 993,
15 101 Cal. Rptr. 347, 351 (1972). We do not think that an
16 unsolicited email from an online consumer business puts
17 recipients on inquiry notice of the terms enclosed in that email
18 and those terms' relationship to a service in which the
19 recipients had already enrolled, and that a failure to act

other party's promise to do the same." Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1131 (7th Cir. 1997). We need not address the question under Connecticut or California law here, however, because even if additional consideration were not required, or it was required but in fact given, the plaintiffs never assented to the emailed terms, as we discuss below.

1 affirmatively to cancel the membership will, alone, constitute
2 assent.¹⁴

3 **a. Law of effective notice in terms-later contracting**

4 Courts have recognized that in the modern commercial
5 context, there are reasons to allow parties to contract without
6 consideration of, and the possibility to negotiate, every term.
7 "Cashiers cannot be expected to read legal documents to customers
8 before ringing up sales." Hill, 105 F.3d at 1149. But cases
9 applying the "duty to read" principle to terms delivered after a
10 contracting relationship has been initiated do not nullify the
11 requirement that a consumer be on notice of the existence of a
12 term before he or she can be legally held to have assented to it.
13 "While new commerce on the Internet [and elsewhere] has exposed

¹⁴ The email was also unclear, whether deliberately so or otherwise. The subject line reads: "Important information about your membership privileges" without mention of the contract or terms to be included in it. And the body of the email begins with a welcome message, provides a membership number and a username, advises that membership materials will arrive soon by mail, and outlines at some length "your great benefits." It is not until the thirteenth paragraph that the email begins recitation of the "Terms & Conditions" (the arbitration provision following seven paragraphs later). See Mallozzi Aff. Ex. E.; cf. Campbell v. Gen. Dynamics Gov't Sys., 407 F.3d 546, 555 (1st Cir. 2005) ("[A]n e-mail properly couched, can be an appropriate medium for forming an arbitration agreement." (emphasis added)). But even had the email more clearly indicated that it contained an arbitration clause, the fact that it was delivered after enrollment and did not require any affirmative acknowledgment of receipt, see id. ("[i]n many cases, a[party] will be able to satisfy th[e] relatively light [notice] burden by producing evidence demonstrating that the [other party to the agreement] had actual notice of the agreement."), undermines Trilegiant's assertion that the plaintiffs received sufficient notice to bind them to the additional terms through their inaction.

1 courts to many new situations, it has not fundamentally changed
2 the principles of contract." Register.com, 356 F.3d at 403.

3 What constitutes sufficient inquiry notice of a term
4 not actually read by the offeree depends on various factors
5 including, but not limited to, the conspicuousness of the term,
6 the course of dealing between the parties, and industry
7 practices. Cf. L&R Realty v. Conn. Nat'l Bank, 246 Conn. 1, 8
8 n.6, 715 A.2d 748, 752 n.6 (1998) (discussing similar factors in
9 determining whether a party had agreed to a contractual jury
10 trial waiver). Ultimately, however, the touchstone of the
11 analysis is whether reasonable people in the position of the
12 parties would have known about the terms and the conduct that
13 would be required to assent to them.

14 Courts, including this one, have concluded as a matter
15 of law in some circumstances that parties were on inquiry notice
16 of the likely applicability of terms to their contractual
17 relationship even when those terms were delivered after that
18 relationship was initiated. These decisions appear to have in
19 common the fact that in each such case, in light of the history
20 of the parties' dealings with one another, reasonable people in
21 the parties' positions would be on notice of the existence of the
22 additional terms and the type of conduct that would constitute
23 assent to them.

24 In Register.com, we considered whether a website
25 development service provider, Verio, was on "legally enforceable
26 notice" of contractual terms restricting Verio in making certain

1 uses of information supplied by Register.com although the terms
2 were submitted to Verio after it had already downloaded the
3 information from Register.com. Register.com, 356 F.3d at 401.
4 We concluded that Verio was on sufficient notice of the terms
5 because it accessed the information "daily" and was repeatedly
6 confronted with the same terms. Id. Thus, even if the terms
7 applying to any given download of information were transmitted
8 after that download, because of the course of dealing between
9 Verio and Register.com, there was a basis for "imputing . . .
10 knowledge of the terms on which the [information] was offered"
11 each time the download occurred. Id. at 402.

12 Judge Leval, writing for the Court, provided an
13 extended analogy to a situation in which an offeree would be
14 considered to have assented to a term he or she had not actually
15 read before receiving the benefits of the service or goods
16 offered:

17 A visitor, defendant D, takes an apple and
18 bites into it. As D turns to leave, D sees a
19 sign, visible only as one turns to exit,
20 which says "Apples—50 cents apiece." D does
21 not pay for the apple. D believes he has no
22 obligation to pay because he had no notice
23 when he bit into the apple that 50 cents was
24 expected in return. D's view is that he
25 never agreed to pay for the apple.
26 Thereafter, each day, several times a day, D
27 revisits the stand, takes an apple, and eats
28 it. D never leaves money.

29 P sues D in contract for the price of the
30 apples taken. D defends on the ground that
31 on no occasion did he see P's price notice
32 until after he had bitten into the apples. D
33 may well prevail as to the first apple taken.
34 D had no reason to understand upon taking it

1 that P was demanding the payment. In our
2 view, however, D cannot continue on a daily
3 basis to take apples for free, knowing full
4 well that P is offering them only in exchange
5 for 50 cents in compensation, merely because
6 the sign demanding payment is so placed that
7 on each occasion D does not see it until he
8 has bitten into the apple.

9 Id. at 401.¹⁵ It is elementary that in such circumstances, a
10 reasonable browser becomes aware of the existence of additional
11 terms -- in Judge Leval's example, that the apples must be paid
12 for -- even if he or she is not then familiar with their precise
13 contours -- i.e., the then-current price of each apple.

14 Similarly in the shrinkwrap cases, when a purchaser
15 opens the packaging for goods and discovers that they are covered
16 by additional provisions, the reasonable purchaser will
17 understand that unless the goods are returned, he or she takes
18 them subject to those provisions. See Hill, 105 F.3d at 1150
19 ("Competent adults are bound by such documents, read or
20 unread."). The late-arriving terms are necessarily included with
21 the product -- they are inside the shrinkwrap with the item being
22 transferred. See, e.g., M.A. Mortenson Co., Inc. v. Timberline
23 Software Corp., 140 Wash. 2d 568, 575, 998 P. 2d 305, 309 (2000)

¹⁵ The argument may be made that a reasonable purchaser would know, even before biting into the first apple, that it is likely that the store owner expects to be paid for the piece of fruit. "There ain't no such thing as free lunch." See William Safire, ON LANGUAGE; Words Out in the Cold, N.Y. TIMES MAGAZINE (February 14, 1993), available at <http://www.nytimes.com/1993/02/14/magazine/on-language-words-out-in-the-cold.html> (last visited July 11, 2012) (seeking the origin of the expression). But Judge Leval's point clearly holds with respect to subsequent apple bites.

1 (noting that even though offeree had not actually read the
2 shrink-wrapped terms, he had actually opened the packaging within
3 which they were enclosed). The purchaser therefore cannot begin
4 using the product until after he or she has been presented with
5 the terms, whether or not the purchaser actually reads them. See
6 Specht, 306 F.3d at 33 ("[T]he purchaser in ProCD was confronted
7 with conspicuous, mandatory license terms."). "[A] 'terms
8 later' [shrinkwrap] offer . . . gives the consumer the leisure to
9 read the terms, and the consumer who forgoes this opportunity has
10 no right to complain." Posner, 77 U. CHI. L. REV. at 1188.

11 The amendment cases cited by Trilegiant illustrate
12 other ways in which parties may be put on notice of terms that
13 arrive after a contract is formed -- but all of these cases, too,
14 are rooted, expressly or otherwise, in the reasonable
15 expectations of the parties.¹⁶ In many of them, courts observe
16 that the "language of the original agreement expresse[s] the
17 intent of making the separate, future terms and conditions a part
18 of the contract." Schnabel, 2011 WL 797505, at *5, 2011 U.S.
19 Dist. LEXIS 18132, at *18. "Unilateral modification terms" -- so
20 called because the offeror retains the power to add terms to the
21 agreement while the offeree has no power to do the same -- are

¹⁶ Some of the cases Trilegiant cites are not applicable because they rely heavily upon the provisions of specific state statutes that govern credit-card agreements and explicitly allow for the transmission of amendments after initial enrollment. See, e.g., Kurz, 319 F. Supp. 2d at 463 (citing Del Code Ann. tit. 5, § 952(a)); MBNA Am. Bank, N.A., 2005 WL 1754881, at *2, 2005 Conn. Super. LEXIS 1611, at *4-*6 (discussing Connecticut and Delaware law specifically governing credit card agreements).

1 not necessarily effective. See generally, Oren Bar-Gill & Kevin
2 Davis, Empty Promises, 84 S. CAL. L. REV. 1 (2010) (describing,
3 among other things, the legal status of "unilateral modification
4 terms"). But the inclusion of such terms at least helps to
5 bolster the offeror's argument that the offeree is on inquiry
6 notice of later arriving terms, particularly where the
7 modification (or amendment) is itself submitted in such a manner
8 that a reasonable offeree would be likely to see it.

9 For example, in many of these cases the amendment is
10 transmitted with a bill or billing statement concerning the
11 offeree's continued use of the service. See, e.g., Milligan,
12 2007 WL 4885492, at *2-*3, 2007 U.S. Dist. LEXIS 96377, at *6-*7
13 (bill); Kurz, 319 F. Supp. 2d 457, 462 (billing statement). Even
14 there, whether such notice would be effective in the absence of a
15 statute specifically allowing transmission of new terms after
16 enrollment, see supra note 16, or a term in the original contract
17 giving notice of the possibility of amendment, the conveyance of
18 the amendment in such a manner, similar to the sending of the
19 terms of a contract with the product in the shrinkwrap cases, may
20 support a conclusion that a reasonable person would be on actual
21 notice of the amendment's applicability to the contractual
22 relationship.

23 **b. Notice in this case**

24 In the case at bar, the plaintiffs were presented with
25 the arbitration provision in an email delivered to each of them

1 after they had enrolled in Great Fun. Trilegiant asserts that
2 the fact that we can assume that the email was received by the
3 plaintiffs is enough to support the conclusion that they were on
4 inquiry notice of its terms. But that someone has received an
5 email does not without more establish that he or she should know
6 that the terms disclosed in the email relate to a service in
7 which he or she had previously enrolled and that a failure
8 affirmatively to opt out of the service amounts to assent to
9 those terms. See Campbell v. Gen. Dynamics Gov't Sys., 407 F.3d
10 546, 555-58 (1st Cir. 2005) (concluding that arbitration clause
11 posted on employer's intranet did not apply to employees even
12 though a link to the site was included in an email because, inter
13 alia, there was no evidence "of any other instance in which the
14 company relied upon either an e-mail or an intranet posting to
15 introduce a contractual term. . . ." (emphasis omitted)). The
16 case law does not support such a "terms later by email"
17 conception of contract formation under these conditions.

18 In this case unlike, for example, Register.com, there
19 was no prior relationship between the parties that would have
20 suggested that terms sent by email after the initial enrollment
21 were to become part of the contract. See Campbell, 407 F.3d at
22 555-58 (addressing the parties' past dealings in order to
23 determine whether there would be an expectation that contractual
24 terms would follow by email). Nor would a reasonable person
25 likely understand in some other way that disputes arising between
26 him or her and Trilegiant were to be resolved by an alternative

1 dispute resolution procedure. Thus, assuming as Trilegiant
2 asserts that the plaintiffs received the emails in question,
3 "[t]here was [still] no basis for imputing [to the plaintiffs]
4 knowledge of the terms on which [Great Fun] was offered."
5 Register.com, 356 F.3d at 402.

6 Unlike shrinkwrap agreements, moreover, the recipient
7 of the terms in this case would not have been confronted with the
8 existence of additional terms before being able to benefit from
9 Great Fun. As noted, even if a purchaser of a shrink-wrapped
10 product is not required to read the shrink-wrapped terms or
11 affirmatively to acknowledge their existence before using the
12 product in order to be bound by the terms, at least he or she
13 necessarily learns of the existence of those terms upon opening
14 the packaging -- or, as is the case in many of the amendment
15 cases cited by Trilegiant, during the course of maintaining and
16 using the service to which the terms apply.

17 By contrast, the arbitration provision here was both
18 temporally and spatially decoupled from the plaintiffs'
19 enrollment in and use of Great Fun; the term was delivered after
20 initial enrollment and Great Fun members such as the plaintiffs
21 would not be forced to confront the terms while enrolling in or
22 using the service or maintaining their memberships. In this way,
23 the transmission of the arbitration provision lacks a critical
24 element of shrinkwrap contracting -- the connection of the terms
25 to the goods (in this case the services) to which they apply.

1 A reasonable person may understand that terms
2 physically attached to a product may effect a change in the legal
3 relationship between him or her and the offeror when the product
4 is used. But a reasonable person would not be expected to
5 connect an email that the recipient may not actually see until
6 long after enrolling in a service (if ever) with the contractual
7 relationship he or she may have with the service provider,
8 especially where the enrollment required as little effort as it
9 did for the plaintiffs here. In this context the email would not
10 have "raise[d] a red flag vivid enough to cause a reasonable
11 [person] to anticipate the imposition of a legally significant
12 alteration to the terms and conditions" of the relationship with
13 Trilegiant. Campbell, 407 F.3d at 557. And there is nothing in
14 the record to suggest that the email to the plaintiffs
15 "'appear[ed] to be a contract [or that] the terms [were] called
16 to the attention of the [plaintiffs].'" Specht, 306 F.3d at 30
17 (quoting Marin Storage & Trucking v. Benco Contractor & Eng'g, 89
18 Cal. App. 4th 1042, 1049-50, 107 Cal. Rptr. 2d 645, 651 (Cal. Ct.
19 App. 2001)).

20 To be sure, the "duty to read" rule combined with the
21 "standardized form" contract makes it unlikely in many contexts
22 that a consumer will actually read such a agreement beyond a
23 quick scan, if that. See Charles L. Knapp, Taking Contracts
24 Private: The Quiet Revolution in Contract Law, 71 FORDHAM L. REV.
25 761, 770 (2002). "A party who makes regular use of a
26 standardized form of agreement does not ordinarily expect his

1 customers to understand or even read the standard terms. One of
2 the purposes of standardization is to eliminate bargaining over
3 details of individual transactions, and that purpose would not be
4 served if a substantial number of customers retained counsel and
5 reviewed the standard terms." Restatement (Second) of Contracts
6 §211 cmt. b (1981). But inasmuch as consumers are regularly and
7 frequently confronted with non-negotiable contract terms,
8 particularly when entering into transactions using the Internet,
9 the presentation of these terms at a place and time that the
10 consumer will associate with the initial purchase or enrollment,
11 or the use of, the goods or services from which the recipient
12 benefits at least indicates to the consumer that he or she is
13 taking such goods or employing such services subject to
14 additional terms and conditions that may one day affect him or
15 her.

16 Here, Trilegiant effectively obscured the details of
17 the terms and conditions and the passive manner in which they
18 could be accepted. The solicitation and enrollment pages, along
19 with the fact that the plaintiffs were not required to reenter
20 their credit-card information, made joining Great Fun fast and
21 simple and made it appear -- falsely -- that being a member
22 imposed virtually no burdens on the consumer besides payment.

23 Courts endorsing the shrinkwrap-contracting framework
24 often sprinkle their analyses of whether a consumer was on notice
25 of the provision with the policies justifying shrinkwrap
26 contracting. See, e.g., Hill, 105 F.3d at 1149; ProCD, 86 F.3d

1 at 1452; Brower v. Gateway 2000, Inc., 246 A.D.2d 246, 251, 676
2 N.Y.S. 2d 569, 572 (1st Dep't 1998). Some commentators have
3 observed that the Seventh Circuit endorsed the model precisely
4 because of the benefits it provides consumers, who can read the
5 terms attached to the packaging of the good at their own leisure.
6 Posner, at 1188. Here, however, there is no policy rationale
7 supporting Trilegiant's approach inasmuch as there are a plethora
8 of other ways -- such as requiring express acknowledgment of
9 receipt of the terms -- through which Trilegiant could have met
10 the minimum requirements of notice. See Campbell, 407 F.3d at
11 556 ("This defect weighs all the more heavily because it could so
12 easily have been remedied."). No court, so far as we are aware
13 -- in Connecticut, California, or elsewhere -- has concluded that
14 the "duty to read" covers situations like this one and, for the
15 foregoing reasons, we decline to do so here.

16 3. Assent. A requirement that the plaintiffs
17 expressly manifest assent to the arbitration provision together
18 with such assent would likely have overcome the email's defects
19 in providing notice. See id. (describing emails including
20 employment terms that call for the employee's express
21 acknowledgment of receipt). Yet Trilegiant argues that the
22 plaintiffs agreed to the provision through far more passive
23 conduct -- continuing to pay their monthly membership fees, which
24 were automatically charged to the plaintiffs' credit cards, after
25 receipt of the emails. It does not follow, however, from the
26 fact that this conduct may, in other situations, be consistent

1 with assent to a contractual term that there was indeed such
2 assent here. In order to constitute acceptance, the failure to
3 act affirmatively must carry a significance that reasonable
4 people in the parties' positions would understand to be assent.
5 See, e.g., Karlin v. Avis, 457 F.2d 57, 61-62 (2d Cir. 1972)
6 (recognizing that under New York law, silence constitutes assent
7 only in particular circumstances, such as where there is a duty
8 to respond or where there is a contemporaneous oral agreement).
9 A party cannot require an evidentiary trial before a trier of
10 fact simply by asserting that the other party assented through a
11 failure to respond to proffered contractual terms. There must be
12 facts in the record to support a finding that the counter-party
13 intended to accept the terms. Such acceptance need not be
14 express, but where it is not, there must be evidence that the
15 offeree knew or should have known of the terms and understood
16 that acceptance of the benefit would be construed by the offeror
17 as an agreement to be bound. See, e.g., Register.com, 356 F.3d
18 at 403. ("It is standard contract doctrine that when a benefit is
19 offered subject to stated conditions, and the offeree makes a
20 decision to take the benefit with knowledge of the terms of the
21 offer, the taking constitutes an acceptance of the terms, which
22 accordingly become binding on the offeree.").

23 That is not the case here. The plaintiffs were never
24 put on inquiry notice of the arbitration provision, and their
25 continued credit-card payments, which were auto-debited from
26 their credit cards, were too passive for any reasonable fact-

1 finder to conclude that they manifested a subjective
2 understanding of the existence of the arbitration and other
3 emailed provisions and an intent to be bound by them in exchange
4 for the continued benefits Great Fun offered.

5 Both parties, and the district court, see Schnabel,
6 2011 WL 792505, at *6, 2011 U.S. Dist. LEXIS 18132, at *19-*20,
7 analogize this case to the Supreme Court of Alabama's decision in
8 Memberworks Inc. v. Yance, 899 So. 2d 940 (Ala. 2004). There, an
9 arbitration provision was found to be included in an agreement to
10 participate in a membership club even though that provision was
11 only included in an additional terms letter sent to the plaintiff
12 after he had joined the club in an oral agreement over the phone.
13 See id. at 941-44. Like the plaintiffs here, the plaintiff
14 argued that he never assented to the term because "he never
15 engaged in any 'intentional conduct' that would have manifested
16 his assent to the arbitration provision[:]. He . . . never had
17 any contact with [the defendant] subsequent to his initial
18 telephone call to a call center, [and he] never availed himself
19 of any of the services available to participants in the
20 [discount] program." Id. at 943. Nonetheless, an agreement was
21 formed because the plaintiff "paid his credit-card bill for two
22 years without any question as to the legitimacy of the charge."
23 Id.

24 Assuming that Yance did not read the arbitration
25 provision and actually understand that not cancelling his

1 membership would constitute assent to the provision,¹⁷ we think
2 the Alabama court misconstrued the general principle that a party
3 can under certain circumstances assent through silence or a
4 failure to act, see Restatement (Second) of Contracts § 19, by
5 concluding that conduct that is merely consistent with assent is
6 enough to establish a binding agreement as a matter of law.
7 Like the plaintiffs here, Yance was never put on notice of the
8 possibility of future amendments to the contract during his
9 initial interaction with the defendants, see id. at 949 (Houston,
10 J. dissenting), and -- unlike the purchaser in a shrinkwrap case
11 -- he would not have been put on inquiry notice of the
12 arbitration provision through the subsequently submitted terms
13 and would not have understood that his continued enrollment in
14 the service would constitute assent to such a provision. In this
15 context, a merchant "can[not] rely upon the failure of a customer
16 to affirmatively act" to cancel his membership. Id. at 949.

17 B. The Hyperlink

18 The accessibility of the arbitration provision from a
19 hyperlink on the enrollment screen, as appears to have been the
20 case here, might have created a substantial question as to

¹⁷ If Yance was on actual notice -- which is not made clear in the court's opinion, see id. at 943 (majority opinion) ("[The plaintiff] argues that Memberworks at best merely 'proposed arbitration' by later sending him a notice that all disputes would be resolved by arbitration."), then, we think, the Alabama court's analysis is on firmer footing. Even if he was on actual notice of the term, however, he did not assent through his failure to cancel his membership unless a reasonable person in his situation would have understood that his conduct would be interpreted by the offeror as assent.

1 whether the provision was part of a contract between the
2 parties.¹⁸ The issue is not before us, however. Trilegiant
3 forfeited the argument by not raising it in the district court.

¹⁸ In *Specht*, then-Judge Sotomayor wrote at length about the status of what would later be termed "browsewrap" agreements, which disclose terms on a webpage that offers a product or service to an Internet user; the user then assents to the provision merely by visiting the website to purchase the product or enroll in the service. See 306 F.3d at 30-32; *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 429 (2d Cir. 2004) (using the term "browsewrap"). Provisions disclosed solely through browsewrap agreements are typically enforced if "the website user must have had actual or constructive knowledge of the site's terms and conditions, and have manifested assent to them." *Cvent, Inc. v. Eventbrite, Inc.*, 739 F. Supp. 2d 927, 937-38 (E.D. Va. 2010) (emphasis added); accord *Fteja v. Facebook, Inc.*, No. 11 Civ. 918, 2012 WL 183896, at *6, 2012 U.S. Dist. LEXIS 12991, at *14 (S.D.N.Y. Jan. 24, 2012). In *Specht*, we concluded that a provision that a user would not encounter until he or she had scrolled down multiple screens was not enforceable because "a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms." 306 F.3d at 32.

Browsewrap agreements are treated differently under the law than "clickwrap" agreements. The latter "present[] the potential licensee . . . with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon," *Register.com*, 356 F.3d at 429 (internal quotation marks omitted), rather than browsing down through subsequent screens. Users are thus "forced to expressly and unambiguously manifest either assent or rejection prior to being given access to the product." *Id.*

The presentation of terms on the screens in the case before us falls outside both the clickwrap and browsewrap categories. Unlike the paradigmatic browsewrap agreement, in this case there is some indication near the button that a user must "click" in order to subscribe to the service, that the service includes additional terms and that the user assents to these terms by clicking the button. In contrast to the typical clickwrap agreement, however, the button itself does not make explicit reference to these terms in asking the end-user whether he or she assents to them. It only suggests that a user can sign up for the benefits of the membership by clicking "Yes."

1 "'[I]t is a well-established general rule that an
2 appellate court will not consider an issue raised for the first
3 time on appeal.'" Local 377, RWDSU, UCFW v. 1864 Tenants Ass'n,
4 533 F.3d 98, 99 (2d Cir. 2008) (per curiam) (quoting Greene v.
5 United States, 13 F.3d 577, 586 (2d Cir. 1994)). "[W]e may
6 consider a forfeited argument [only] if there is a risk that
7 'manifest injustice' would otherwise result." Katel Ltd. v. AT&T
8 Corp., 607 F.3d 60, 68 (2d Cir. 2010). Trilegiant's inability
9 to raise a possibly meritorious argument as to why it is
10 contractually entitled to arbitration on the plaintiffs claims is
11 not, in our view, a "manifest injustice."

12 In its Memorandum in Support of the Motion to Compel
13 Arbitration, Schnabel v. Trilegiant Corp., 10-cv-00957 (D. Conn.
14 Sept. 29, 2010), ECF No. 23 ("Mot. to Compel"), Trilegiant failed
15 to mention the hyperlink. And accompanying the motion was an
16 affidavit from an employee referring only to the emailed
17 arbitration clause sent to each of the plaintiffs after their
18 enrollment in Great Fun, not the clause that they say was
19 available by clicking "Yes" on the sign-up button. See Mallozzi
20 Aff. ¶ 13.

21 Although the district court record includes the
22 screenshot of the enrollment screen, which displays the
23 hyperlink, Mot. to Compel, Ex. A, under the principle of party
24 presentation, the district court was free to "rely on the parties
25 to frame the issues for decision" Greenlaw v. United
26 States, 554 U.S. 237, 243 (2008). Indeed, it seems likely that

1 the district court not only did not mention the hyperlink, but
2 pointed out the peculiarity of the fact that the enrollment
3 screen did not seem to indicate to the user that he or she would
4 be bound by additional terms, precisely because the issue was not
5 raised. See Schnabel, 2011 WL 797505, at *5 n.8, 2011 U.S. Dist.
6 LEXIS 18132, at *17 n.8 (noting the absence of clickwrap terms).
7 We will not address this argument in the first instance on
8 appeal.

9 **CONCLUSION**

10 For the foregoing reasons, we affirm the order of the
11 district court denying the defendants' motion to compel
12 arbitration, and remand the case to that court for further
13 proceedings.