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Arbitration—It Does Not Matter if You Read the Terms and Conditions: They Do Not Apply Anyway—Berman v. Freedom Financial Network, LLC, 30 F.4th 849 (9th Cir. 2022)

Ian McReynolds
Suffolk University

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**ARBITRATION—IT DOES NOT MATTER IF YOU
READ THE TERMS AND CONDITIONS: THEY DO
NOT APPLY ANYWAY—*BERMAN V. FREEDOM
FIN. NETWORK, LLC*, 30 F.4TH 849 (9TH CIR. 2022).**

Ian McReynolds

An overwhelming majority of Americans have told the massive white lie that “[they] have read and agree to the Terms and Conditions.”¹ Within those unread terms and conditions, most consumers bind themselves to at least one arbitration clause.² Under the United States Arbitration Act, commonly known as the Federal Arbitration Act (“FAA”), when a contracting party agrees to an arbitration clause, that clause shall be enforceable.³ In *Berman v. Freedom Financial Network, LLC*,⁴ the Ninth Circuit held an arbitration clause contained in a website’s “browsewrap” agreement was unenforceable, as the website’s consumers never “saw or read” the clause.⁵ By declaring the arbitration clause unenforceable, the Ninth Circuit ignored the

¹ See Craig Wigginton, et al., *2017 Global Mobile Consumer Survey: US Edition*, DELOITTE (2017), [<https://perma.cc/NY8U-82K6>] [hereinafter “DELOITTE”] (outlining data on terms and conditions acceptance). A 2017 study conducted by Deloitte found that ninety-one percent of consumers overall “willingly accept legal terms and conditions without reading them” when signing up for online services, downloading apps, or accepting updates. See *id.* at 12. That percentage jumps to ninety-seven percent for users between the age of eighteen and thirty-four. See *id.*; see also Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALL’s “Principles of the Law of Software Contracts,”* 78 U. CHI. L. REV. 165, 179 (2011) (finding less than 0.1 percent of internet users access terms and conditions, regardless of presentation).

² See Marotta-Wurgler, *supra* note 1, at 179 (acknowledging consumers do not read terms and conditions); see also *Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act*, CONSUMER FIN. PROT. BUREAU 29 (Mar. 2015), [<https://perma.cc/X62E-3W53>] [hereinafter *Arbitration Study*] (highlighting prevalence of arbitration clauses). Fifty-three percent of credit card holders are subject to an arbitration clause, while 99.9 percent of consumers using mobile wireless services were subject to an arbitration clause. See *Arbitration Study, supra*, at 31.

³ See 9 U.S.C. § 2 (“A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . shall be valid, irrevocable, and enforceable, save for such grounds as exist at law or in equity”); see also *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (acknowledging FAA creates liberal federal policy favoring arbitration).

⁴ 30 F.4th 849 (9th Cir. 2022).

⁵ See *id.* at 853 (reasoning plaintiffs did not unambiguously manifest assent to arbitration clause).

reality of internet-based consumer contracting: most consumers do not read the terms and conditions, regardless of their form of presentation.⁶

Fluent, Inc. (“Fluent”) is an online digital marketing company that offers consumers gift cards and free product samples as an incentive to supply their contact information and answer survey questions.⁷ In exchange for the proffered goods, consumers agree that their data may be sold to various clients for targeted marketing and advertisement campaigns.⁸ Consumers must provide personal information when they sign up for Fluent’s services, including geographical location and shipping information.⁹ After entering all the required information, Fluent directs consumers to click a “Continue” button to begin using their services.¹⁰ Above the “Continue” button, a line of text states “I understand and agree to the Terms and Conditions which includes mandatory arbitration.”¹¹

Fluent sells the information gathered from consumers to clients who conduct telemarketing campaigns.¹² In *Berman*, Fluent sold the information it gathered on plaintiffs Stephanie Hernandez and Erica Russell to Freedom Financial Network, LLC and Freedom Debt Relief, LLC (collectively, “Freedom”) to facilitate their telemarketing scheme.¹³ Freedom used this information to engage in an unsolicited telemarketing campaign, involving

⁶ See *id.* at 856-58 (analyzing “reasonably conspicuous notice” and “unambiguous manifestation of assent”); see also DOC, *Quarterly Retail E-Commerce Sales, 4th Quarter 2022*, U.S. CENSUS BUREAU NEWS 1 (Feb. 17, 2023), [https://perma.cc/D2H4-T65S] (outlining volume of internet commerce in Fourth Quarter 2022); DELOITTE, *supra* note 1, at 12 (highlighting failure to read terms and conditions). In *Berman*, the court primarily analyzed whether the plaintiffs truly assented to the terms and conditions of the defendants’ website. See *Berman*, 30 F.4th at 856-58 (addressing whether plaintiff meaningfully assented to terms). However, the court did not consider that, even if consumers had a fair opportunity to read and assent to terms and conditions, they would not do so. See DELOITTE, *supra* note 1, at 12 (outlining finding that overwhelming majority of internet users fail to read terms). Even when unambiguously presented, more than ninety percent of consumers do not read the terms and conditions. See *id.* Furthermore, research indicates that increased visibility and opportunity for assent does not lead to increased readership of terms and conditions. See Marotta-Wurgler, *supra* note 1, at 168 (noting “an increase in contract accessibility does not result in an economically significant increase in readership”).

⁷ See *Berman*, 30 F.4th at 853 (describing Fluent’s services).

⁸ See *id.* (explaining how Fluent generates revenue by selling consumer information).

⁹ See *id.* (detailing information Fluent requires from consumers to sign up for services).

¹⁰ See *id.* (noting consumers must confirm entered information is correct by clicking button stating, “This is correct, Continue!”). This button contrasts with the background of the page which makes it easy to read. See *id.*

¹¹ See *Berman*, 30 F.4th at 854 (presenting arbitration clause as “two lines of text in tiny grey font”). The Ninth Circuit took issue with the fact that the presentation of the arbitration clause visually differs drastically from the “Continue” button. See *id.*

¹² See *id.* at 853 (explaining what Fluent does with collected consumer data).

¹³ See *id.* at 854 (introducing business relationship between Fluent and Freedom).

both phone calls and text messages to promote their debt-relief services.¹⁴ Hernandez and Russell filed a class action suit in the United States District Court for the Northern District of California, alleging that Freedom, and Fluent by extension, violated the Telephone Consumer Protection Act (“TCPA”).¹⁵ Fluent moved to compel arbitration pursuant to the terms and conditions for use of their websites.¹⁶ The court held that Fluent’s website did not conspicuously inform users that by clicking “Continue,” they agreed to Fluent’s terms.¹⁷

Before 1924, judges nationwide strongly disliked arbitration and hesitated to enforce agreed-upon arbitration clauses.¹⁸ In passing the FAA, Congress intended to enforce arbitration clauses as readily as any other clause in a contract, “reversing centuries of judicial hostility to arbitration”¹⁹ Congress, by passing the FAA, mandated that courts uphold and

¹⁴ See *id.* (detailing factual basis for alleged Telephone Consumer Protection Act violation).

¹⁵ See *id.* at 854-55 (outlining procedural history of plaintiffs’ claim); see also 47 U.S.C. § 227(b) (stating under Telephone Consumer Protection Act (“TCPA”), “it shall be unlawful . . . to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service”)

¹⁶ *Berman*, 30 F.4th at 854 (noting Fluent’s motion to compel arbitration pursuant to contract terms).

¹⁷ *Id.* (stating lower court denial of motion to compel arbitration); see also *Berman v. Freedom Fin. Network, LLC*, No. CIV. 18-01060, 2020 WL 5210912, at *4 (N.D. Cal. Sept. 1, 2020) (denying motion to compel arbitration), *reh’g denied*, 2020 WL 6684838 (N.D. Cal. Nov. 12, 2020) (refusing rehearing on motion to compel). In denying Fluent’s motion to compel arbitration, the United States District Court for the Northern District of California found Fluent’s websites did not create reasonably conspicuous notice of the terms and conditions because the text was much smaller and more difficult to read than the fonts on the rest of the page. *Berman*, 2020 WL 5210912, at *8-9. The court denied Fluent’s subsequent motion for reconsideration of its motion to compel arbitration, as the information disclosed in requesting rehearing was available at the time of the initial decision on the motion to compel arbitration. *Berman*, 2020 WL 6684838, at *4. Fluent sought to introduce the deposition testimony of the two plaintiffs at rehearing, in which both plaintiffs said they had actual knowledge of existence of the terms and conditions. Appellant’s Opening Brief at 24, *Berman*, 30 F.4th 849 (9th Cir. 2021) (No. 20-16900) (“At their depositions, Plaintiffs were presented with Fluent’s websites. They admitted that they understood that by continuing on such websites, they would be agreeing to the Terms and Conditions, and that the ‘Terms and Conditions’ phrase was a hyperlink.”)

¹⁸ See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974) (detailing traditional judicial hostility to arbitration). Traditionally, “English courts . . . considered irrevocable arbitration agreements as ‘ousting’ the courts of jurisdiction This view was adopted by American courts as part of the common law up to the time of the adoption of the [FAA].” See *id.* at 510 n.4.

¹⁹ *Id.* at 510-11 (stating Congressional purpose of FAA). See also 65 CONG. REC. 11080- (1924) (statement of Rep. Ogden Mills) (“[H.R. 646, the Bill creating the FAA] provides that where there are commercial contracts and there is disagreement . . . the court can force an arbitration agreement in the same way as other portions of the contract.”); *Wilko v. Swan*, 346 U.S. 427, 433 (1953), *overruled on other grounds by* *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477 (1989) (“The [FAA] establishes by statute the desirability of arbitration as an alternative to the

enforce arbitration clauses, save for grounds that would be permitted to revoke any contract.²⁰ Courts must resolve doubts in favor of arbitration when deciding whether the arbitration clause is enforceable or whether the controversy falls within the subject matter of the clause.²¹ The FAA preempts state law and deems invalid any state statute or decision that reduces the effectiveness of arbitration clauses.²² The FAA applies to consumer contracts, even if those contracts only involve intrastate commerce.²³

When two parties agree to enter into a contract, that contract should be enforced according to its terms.²⁴ As a general rule, a party that does not

complications of litigation.”); *see also* *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (noting courts apply “liberal federal policy favoring arbitration agreements”).

²⁰ *See* 9 U.S.C. § 2 (“A written provision . . . to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract . . .”); *see also* *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (holding courts “may not . . . construe [an arbitration] agreement in a manner different from that in which it otherwise construes nonarbitration agreements”). Grounds to invalidate an arbitration agreement include “generally applicable contract defenses, such as fraud, duress, or unconscionability . . .” *See Dr.’s Ass’n, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (detailing permissible contract defenses to arbitration agreements). However, if a state law or decision applies only to arbitration provisions, but not contracts generally, it is preempted by the FAA. *See id.*; *see also* *Perry*, 482 U.S. at 492 n.9 (“A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of [the FAA].”).

²¹ *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25 (“The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . .”). Doubts regarding arbitrability and any arbitration-specific defenses, such as waiver or delay, should be resolved in favor of arbitration: the court should compel arbitration and let the arbitrator resolve such issues. *See id.* at 20.

²² *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (deeming state caselaw contrary “to the accomplishment and execution of the full purpose and objectives” of the FAA invalid and preempted (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941))). When state law “frustrates the achievement of congressional objectives” by discouraging conduct that federal law encourages, that state law is preempted. *Wyeth v. Levine*, 555 U.S. 555, 580 (2009) (describing frustration of purpose preemption).

²³ *See Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (ruling FAA applies to transactions “within the flow of interstate commerce,” regardless of interstate effect (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74 (1995))). The FAA applies to contracts that affect commerce broadly, regardless of actual interstate effect. *See id.*; *see also Allied-Bruce Terminix Cos.*, 513 U.S. at 274-75 (holding FAA applies to all contracts “relating to” commerce, “not only the actual physical interstate shipment of goods” (quoting H.R. REP. NO. 96, 68th Cong., 1st Sess., 1 (1924))).

²⁴ *See Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 150-51 (2009) (holding unambiguous private contracts must be enforced according to contract terms); *see also* 11 R. Lord, *Williston on Contracts* § 30:4 (4th ed. 1999) (stating contract must be enforced according to terms if terms of contract are unambiguous); *Register.com v. Verio*, 356 F.3d 393, 401 (2d Cir. 2004) (reasoning acceptance can be implied from actions and acceptance of goods or services). When a user of a website repeatedly utilizes the services, the user cannot claim that they did not see the price of the goods or service, or the terms that accompany it. *See Register.com*, 356 F.3d at 401. (holding implicit acceptance of services is acceptance of price and terms).

read a contract cannot claim that they are not bound by its terms.²⁵ Consumers have a duty to read the contract they agree to when they are provided notice, and failure to do so does not invalidate the contract.²⁶ In internet contracting, a consumer can assent in several ways: “clickwrap” or “point and click” agreements and “browsewrap” agreements are among the most common.²⁷ Browsewrap-agreement websites look to “whether the user had

In our view, however, [user] cannot continue on a daily basis to take apples for free, knowing full well that [company] is offering them only in exchange for 50 cents in compensation, merely because the sign demanding payment is so placed that on each occasion, [user] does not see it until he has bitten into the apple.

Id.; see also Stacy-Ann Elvy, *Contacting in the Age of the Internet of Things: Article 2 of the UCC and Beyond*, 44 HOFSTRA L. REV. 839, 879 (2016) (comparing online transactions to in-store implied contracts); *Stone v. White*, 301 U.S. 532, 534 (1937) (holding equitable relief proper when party is unjustly enriched); 1 WILLISTON ON CONTRACTS § 1:6 (4th ed. 2022) (outlining equitable relief when one party is unjustly enriched).

²⁵ See *Upton v. Tribilcock*, 91 U.S. 45, 50 (1875) (describing how neglecting to read is not defense to breach of contractual obligations). Consequently, “[i]t will not do for a [party] to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained.” *Id.* Failure to read a contract equates to ignorance of the law; if a party does not know of its obligations to a contract, or requirements of the law, “ignorance of law would be alleged” in every case. See *id.* at 50-51. When a party can read terms of a contract, but chooses not to do so, they are nonetheless required to abide by the contract’s obligations. See *id.* at 50; see also 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 4:19 (4th ed. 2023) (“It will not do for a man to enter into a contract and when called upon to respond its obligations, to say he did not read it when he signed it . . .”).

²⁶ See Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 548 (2014) (noting how failure to read contract is not defense). When a party has a reasonable opportunity to read the terms and conditions of a contract, it is unreasonable for them *not* to read it. See *id.* at 548-49; see also *McKenna v. Metro. Life Ins. Co.*, 126 F. App’x 571, 574 (3d Cir. 2005) (describing when face of contract outlines terms, consumer is unreasonable by not reading it); *Jackson ex dem. Russell v. Croy*, 12 Johns. 427, 429-30 (1815) (explaining party who read only part of document was still responsible for all requirements). When a reasonable user is presented with conspicuous notice of contract terms of a website, they would be put on inquiry notice to look further into the terms, and thus, they are nonetheless bound. See Curtis E.A. Karnow, *The Internet and Contract Formation*, 18 BERKELEY BUS. L. J. 135, 137-38 (2021).

²⁷ See BLACK’S LAW DICTIONARY, 1401 (11th ed. 2019) (defining point-and-click agreements as agreements where “a computer user agrees to the terms of an electronically displayed agreement by pointing the cursors to a particular location on the screen and then clicking it Also termed *e-contract*; *clickwrap license*; [or] *clickwrap agreement*”). Clickwrap agreements require users to affirmatively click a box, manifesting their assent to the electronic agreement. See *id.* Conversely, in browsewrap agreements users are assumed to have manifested their assent solely by sustaining their use of a website or clicking a “Continue” button. See *Garcia v. Enter. Holdings, Inc.*, 78 F. Supp. 3d 1125, 1137 (N.D. Cal. 2015) (defining browsewrap). Therefore,

[w]here a browsewrap agreement is at issue, the terms of the agreement are binding, even if the user did not actually review the agreement, provided that the user had actual knowledge of the agreement, or the website put “a reasonably prudent user on notice of the terms of the contract.”

actual or constructive knowledge of the terms and conditions” of the contract when determining that contract’s enforceability.²⁸ For example, when a user is required to affirm their assent to the terms each time they log into a website, those terms are binding.²⁹

In internet-based contracts, websites must provide reasonably conspicuous notice of the terms and conditions of the contract.³⁰ If consumers must scroll past website contract to understand the contractual nature of the terms and conditions of the website, the terms may not be enforced against the consumer.³¹ Additionally, websites must provide a means to unambiguously manifest assent to the website’s terms and conditions.³² Courts

See id. (quoting *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014)) (internal quotations omitted) (noting actual or constructive knowledge makes browsewrap agreement binding). Browsewrap users’ manifest assent simply by continued use. *See Nguyen*, 763 F.3d at 1176 (“The defining feature of browsewrap agreements is that the user can continue to use a website or its services without visiting the page hosting the browsewrap agreement . . .”). When using services with browsewrap agreements, “a browsewrap agreement does not require the user to manifest assent to the terms and conditions expressly . . . [a user] instead gives his assent simply by using the website.” *Id.* (quoting *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 366-67 (E.D.N.Y. 2009)) (noting browsewrap user not required to make any affirmative manifestation of assent). Studies of access to online terms and conditions show that how terms and conditions are presented, whether as clickwrap or browsewrap, has a negligible impact on a user’s decision to continue browsing the website. *See Marotta-Wurgler, supra* note 1, at 179 (reporting data suggests “that increased disclosure may simply be unable to induce shoppers to study terms, even when they are being required to confirm their assent”). A newer form of acceptance is “sign-in wrap,” which presets the terms and conditions to the user each time they go to sign-in, or checkout on a webpage. *See* Colin P. Marks, *Online and “As Is”*, 45 PEPP. L. REV. 1, 11-12 (2018) (defining “sign-in wrap”). Sign-in wrap agreements are more explicit than browsewrap, yet still maintain the efficiency of browsewrap, as they do not require the affirmative step required by a clickwrap agreement. *See id.* at 11-12.

²⁸ *Nguyen*, 763 F.3d at 1176 (reasoning browsewrap validity is determined by reasonable notice of terms). “Because no affirmative action is required by the user to agree to the terms of a contract . . . determination of validity of the browsewrap contract depends on whether the user has actual or constructive knowledge . . .” *Id.* (quoting *Van Tassell v. United Mktg. Grp.*, 795 F. Supp. 2d 770, 790 (N.D. Ill. 2011)).

²⁹ *See Lee v. Ticketmaster L.L.C.*, 817 F. App’x 393, 394-95 (9th Cir. 2020) (reasoning terms are enforceable when user saw them at every sign-in).

³⁰ *See Specht v. Netscape Comm’n Corp.*, 306 F.3d 17, 30-32 (2d Cir. 2002) (requiring conspicuous notice of terms of contract). When an offer to accept a contract does not “carry an immediately visible” notice of the terms, the terms of the contract are unenforceable. *See id.* at 31. The contract terms are not reasonably conspicuous if the user must scroll past the consent or acceptance button to view them. *See id.* at 32.

³¹ *See id.* (holding terms on “submerged screen” insufficient for proper notice). If a reasonably prudent internet user would not have known of or learned of the existence of the terms *prior to accepting the terms*, the consumer is not contractually bound. *See id.* at 35.

³² *See Specht*, 306 F.3d at 29-30 (determining whether notice of assent is required); *see also Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014) (reasoning “explicit textual notice” sufficient to bind user). For example, when express consent via clicking an “I Accept” box is not required, users can unambiguously manifest their assent by clicking “Continue” if the website

determine whether a user had conspicuous notice and manifestation of assent by applying a reasonable user standard; this standard asks if a reasonable *internet user* would understand that they agreed to the terms and conditions.³³ The onus is on the user, as it is their responsibility to check a website's terms and conditions and their duty to periodically confirm that the terms and conditions have not been modified.³⁴

Prior to addressing Fluent's motion to compel arbitration, the Ninth Circuit reviewed the FAA and its applicability to Fluent's motion.³⁵ The court noted that the FAA only requires enforcement of valid arbitration agreements; therefore, the court needed to determine if the Bermans entered into a valid arbitration agreement with Fluent.³⁶ State law determines the validity of a contract; thus, the court acknowledged the parties consented to apply California or New York contract law, which have "substantially similar rules" for determining whether parties assented to a contract.³⁷ The court then stated that internet-based contracts form a valid agreement when (1) the website provides reasonably conspicuous notice of the terms and (2) the consumer takes action that unambiguously manifests their assent to be bound by said terms.³⁸

contains language such as "by creating an account, I agree to the terms." See *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 80 (2d Cir. 2017) (deciding express notice of agreement to terms is sufficient to bind site user).

³³ See *Feld v. Postmates, Inc.*, 442 F. Supp. 3d 825, 830 (S.D.N.Y. 2020) (finding reasonable person in internet context is reasonable internet user). The reasonable person in the internet context is not a luddite; "the Court considers the perspectives of a reasonably prudent smartphone or Internet user, and does not 'presume that the user has never before encountered an app or entered into a contract using a smartphone.'" *Id.* (quoting *Meyer*, 868 F.3d at 77).

³⁴ See Juliet M. Moringiello & William L. Reynolds, *From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting*, 72 MD. L. REV. 452, 473 (2013) (noting when conspicuous terms state continued access constitutes assent, user is bound); see also *Swift v. Zynga Games Network, Inc.*, 805 F. Supp. 2d 904, 912 (N.D. Cal. 2011) (recognizing hyperlink immediately above "Accept" button sufficient presentation of terms). When a user can review the terms of service in the form of a hyperlink, and accepts those terms by using the service, the user is bound whether they read the terms or not. See *Swift*, 805 F. Supp. 2d at 912 (holding express notice of terms sufficient even when "the terms are not presented on the same page as the acceptance button").

³⁵ See *Berman v. Freedom Fin. Network*, 30 F.4th 849, 855 (9th Cir. 2022) (reviewing Federal Arbitration Act).

³⁶ See *id.* (noting validity of arbitration agreement is first inquiry). In addition to being validly formed, an arbitration agreement must also cover the subject matter of the dispute. See *id.* However, in *Berman*, plaintiffs did not contest whether the arbitration agreement covered their TCPA claim. See *id.*

³⁷ See *id.* at 855 (stating similarity of California and New York contract law); see also *Meyer*, 868 F.3d at 74 (asserting controlling state law not at issue since similar rules govern mutual assent in both).

³⁸ See *Berman*, 30 F.4th at 856 ("Thus, if a website offers contractual terms to those who use the site, and a user engages in conduct that manifests her acceptance of those terms, an enforceable

The court first considered whether plaintiffs had reasonably conspicuous notice of Fluent's terms and conditions and, by extension, the arbitration agreement.³⁹ The court found that the notice of terms was not reasonably conspicuous, as it was displayed in small gray font, "barely legible to the naked eye."⁴⁰ Further, while the court acknowledged that a hyperlink may disclose the existence of terms and conditions, that hyperlink must also be reasonably conspicuous.⁴¹ The court held that the first element was not met because

neither the terms nor the hyperlink to the terms were readily apparent, and therefore, the terms were not reasonably conspicuous.⁴²

After determining that the notice of the terms was not reasonably conspicuous, the court then considered whether the plaintiffs had unambiguously manifested their assent.⁴³ The court outlined several ways consumers to categorically demonstrate their assent.⁴⁴ However, the court noted that proximity of the terms and conditions to the "Continue" button is not

agreement can be formed."); *see also* *Specht v. Netscape Commc'n Corp.*, 306 F.3d 17, 35 (2d Cir. 2002) (holding agreement void when "a reasonably prudent offeree in the plaintiffs' position would not have known or learned . . . of the reference to [the services] license terms"); *Meyer*, 868 F.3d at 79-80 (holding when terms conspicuous, "a reasonable user would know that by clicking the registration button, he was agreeing to the terms and conditions accessible via the hyperlink, whether he click on the hyperlink or not").

³⁹ *See Berman*, 30 F.4th at 856 (addressing reasonably conspicuous notice).

⁴⁰ *See id.* at 856-57 (noting small font size and format not conspicuous). The court highlighted two facts about the notice of terms: the size and color of the font, and its prominence on the rest of the page. *See id.* The notice was not easily visible. *See id.* Further, larger font that surrounded the notice directed users' attention to other parts of the page and away from the notice. *See id.* at 857. Finally, the notice was "deemphasized by the overall design of the webpage," where other elements of the page direct attention elsewhere. *See id.*

⁴¹ *See Berman*, 30 F.4th at 857 (describing visibility issues with hyperlink). The court found the hyperlink to the full terms and conditions inconspicuous, as it did not mirror "customary design elements denoting the existence of a hyperlink." *See id.* Hyperlinks are typically underscored, written in a contrasting font color such as blue, and typed in capital letters to alert users that a link exists. *See id.* Conversely, on Fluent's page, the hyperlink was underlined, lowercased, and written in the same gray font as the rest of the terms. *See id.*; *see also* *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1179 (9th Cir. 2014) (holding users cannot be required to "ferret out hyperlinks to terms and conditions" when using online websites).

⁴² *See Berman*, 30 F.4th at 856-57 (rejecting Fluent's claim that notice of terms was conspicuous). The court found that rather than attracting users' attention to the terms and conditions, Fluent's webpage was designed to "draw the user's attention away from the most important part of the page [the terms and conditions]." *See id.* at 857.

⁴³ *See id.* at 857-58 (analyzing plaintiffs' manifestation of assent).

⁴⁴ *See id.* at 856 (outlining ways offerees may manifest assent). The court noted that clickwrap agreements, which require a user to affirmatively check a box, manifest assent when the user is "explicitly advised that the act of clicking will constitute assent to the terms and conditions of an agreement." *See id.* at 857. Additionally, the court reasoned that explicit notice that a user clicking "Continue" will manifest their assent is critical for the enforceability of clickwrap agreements. *See id.* at 857-58.

sufficient to indicate agreement to the terms and conditions when the user clicks “Continue.”⁴⁵ The court also took issue with the text of the notice although it stated, “I understand and agree to the Terms & Conditions,” it did not signify that users would be bound to the terms and conditions by clicking “Continue.”⁴⁶ Due to the lack of reasonable conspicuousness, absence of a requirement for affirmative acceptance, and failure in clarifying that users were assenting by clicking “Continue,” the court held that Fluent’s terms and conditions did not create a binding arbitration agreement with the plaintiffs.⁴⁷

In *Berman*, the court championed a win for consumers by requiring reasonable notice of terms and unambiguous manifestation of assent to those terms to bind internet users to a website’s arbitration clause.⁴⁸ This decision decreases the binding effects of terms that consumers agree to, but do not actually read.⁴⁹ Companies must provide clear notice and an opportunity for unambiguous assent, which can be obtained through explicit declarations of binding terms or a clickwrap agreement.⁵⁰ However, basic contract law

⁴⁵ See *id.* at 858 (noting proximity not determinative); see also *Nguyen*, 763 F.3d at 1179 (“[E]ven close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient . . .”). But see *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 80 (2d Cir. 2017) (noting proximity of terms and conditions to required input sufficient to manifest parties’ assent).

⁴⁶ See *Berman*, 30 F.4th at 858 (highlighting notice’s inadequate legal significance). The court then suggested that Fluent could have remedied the issue with the notice “[b]y clicking the Continue >> button, you agree to the Terms & Conditions.” See *id.* (quoting *Meyer*, 868 F.3d at 79-80).

⁴⁷ See *Berman*, 30 F.4th at 856-58 (explaining court’s reasons for finding arbitration agreement unenforceable).

⁴⁸ See *id.* at 859 (affirming denial of motion to compel arbitration). By affirming the district court’s denial of Fluent’s motion to compel arbitration, the court enhanced consumer protection by providing consumers with added safeguards against browsewrap agreements. See *id.* at 856 (outlining traditional reluctance to enforce browsewrap agreements); see also *Nguyen*, 763 F.3d at 1178 (keeping courts “traditional reluctance to enforce browsewrap agreements against individual consumers” by denying motion to compel arbitration).

⁴⁹ See *Berman*, 30 F.4th at 858 (holding “I understand and agree to the Terms and Conditions” insufficient to bind users). The court emphasized the difference between the small font used in the notice of terms and conditions and the larger font used on the surrounding page to reason that users could not have been on reasonable notice of the terms. See *id.* at 856-57. But see *Meyer*, 868 F.3d at 78 (finding terms and conditions in small, dark font sufficient to put users on notice).

⁵⁰ See *Berman*, 30 F.4th at 858 (suggesting multiple reasonably conspicuous alternatives to forms of notice that would unambiguously manifest assent). For example, the court noted that Fluent could have included language, such as “[b]y clicking the Continue >> button, you agree to the Terms & Conditions.” See *id.* However, the suggested alternatives would have been futile: increasing visibility or level of assent has a negligible effect on whether users actually read the terms of service. See *Marotta-Wurgler*, *supra* note 1, at 179 (finding assent has negligible impact on users’ viewing of terms). When presented terms in a visible, clickwrap form requiring affirmative consent, the percentage of users who accessed the terms only changed by 0.04 percent. See *id.* at 180. Even if Fluent had adopted the court’s suggestions or converted the agreement into a

requires that when a party agrees to a contract, they are bound by its terms, regardless of whether they read them.⁵¹

The overwhelming majority of consumers admit that they do not read the terms and conditions of a website.⁵² Those same consumers acknowledge their awareness of the terms' existence and their binding nature; however, they simultaneously express indifference towards these terms.⁵³ Even the plaintiffs, on appeal, acknowledged that when they agreed to Fluent's terms, they were bound by said terms.⁵⁴ Browsewrap terms and

clickwrap agreement, those suggestions probably would have had a trivial impact on whether users actually reviewed the terms. *See id.* at 179.

⁵¹ *See* Ayres & Schwartz, *supra* note 26, at 549 (likening duty to read as contract equivalent of tort assumption of risk). "A buyer who could have read [the terms] but did not assume the risk of being bound by any unfavorable terms." *Id.*; *see also* Upton v. Tribilcock, 91 U.S. 45, 50 (1875) ("A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission[s]"). Failure to read equates to ignorance of law, a long-defeated defense. *See Upton*, 91 U.S. at 50 (comparing failure to read to ignorance and mistake of law). If a party were permitted to plead ignorance of law, parties would allege it in "every case . . . and the court would, for the purpose of determining this point, be often compelled to enter upon questions of fact" that are impossible to answer. *Id.* at 51; *see also* Berman, 30 F.4th at 855 (discussing limitations imposed by courts in determining whether arbitration agreement exists). As failure to read is not a defense to contracts generally, it cannot be applied to arbitration agreements governed by the FAA. *See id.*; *see also* Dr.'s Assocs. v. Casarotto, 517 U.S. 681, 687 (1996) (categorizing fraud and duress as permissible exceptions to arbitration enforcement).

⁵² *See* DELOITTE, *supra* note 1, at 12 (finding ninety-one percent of all internet users willingly accept terms without reading them).

⁵³ *See id.* (noting overwhelming majority of users understand websites are using and selling personal data). In a survey of internet users, more than eighty percent of internet users acknowledged that companies were using their personal data, and seventy-eight percent of users understood that companies share their data to third parties. *Id.*; *see also* Marotta-Wurgler, *supra* note 1, at 185 (suggesting buyers will never read terms unless adverse event occurs). Even when terms are presented clearly and unambiguously, users still tend not to read them; improving contract accessibility does not significantly alter users' readership. *See* Marotta-Wurgler, *supra* note 1, at 172-73 (noting research found "reducing the number of mouse clicks it takes to access [contracts] does not affect contract readership"). Users typically only read terms and conditions when an adverse event, such as a breach of contract or other dispute, occurs, long after they have accepted those terms. *See id.* at 185.

⁵⁴ *See* Appellant's Opening Brief, *supra* note 17, at 24 (outlining plaintiffs' deposition testimony). At their deposition, plaintiffs testified that they had actual knowledge of the terms and conditions and that they understood that clicking "Continue" bound them to those terms. *Id.* at 68; *see also* Meyer v. Uber Techs., Inc., 868 F.3d 66, 74 (2d Cir. 2017) (reasoning reasonably prudent notice not determinative when actual or inquiry notice exists). Because plaintiffs had actual knowledge that they were bound by the terms and conditions, including the arbitration clause, the court erred in denying arbitration. *See* Appellant's Opening Brief, *supra* note 17, at 24 (arguing Plaintiff admitted actual knowledge of contract terms); *cf.* Meyer, 868 F.3d at 74 (noting user's notice of terms determinative of enforceability). The plaintiffs further admitted that they knew that the hyperlink was in fact a hyperlink, contradicting the Ninth Circuit's analysis of the reasonably conspicuous notice of the terms. *See* Appellant's Opening Brief, *supra* note 17, at 24 (outlining Plaintiff's admission of knowledge at deposition); *see also* Berman, 30 F.4th at 857 (reasoning hyperlink not readily apparent).

conditions do not require an express manifestation of assent, but when those terms exist directly adjacent to a required button, those terms are conspicuous.⁵⁵ Manifested assent can be inferred from a parties conduct and does not need to be explicit.⁵⁶ Fluent users, including the Plaintiffs, received benefits conveyed by Fluent and accordingly, it is only equitable that those same users be bound by Fluent's terms.⁵⁷

Implied contracts are the backbone of commerce, so even when someone does not explicitly agree to pay for a good or service, they agree to the terms by accepting the good or service.⁵⁸ The Ninth Circuit sets a dangerous precedent in *Berman* by holding that implicit agreements to internet contracts, typically manifested by selecting "I understand and agree," are insufficient.⁵⁹ With consumers and businesses turning to the internet for commerce, the Ninth Circuit's decision in *Berman* threatens society's ability to

⁵⁵ See *Meyer*, 868 F.3d at 80 (analyzing effect of proximity). "[T]he physical proximity of the notice to the register button and the placement of the language in the registration flow make clear to the user that the linked terms pertain to the action to the user is about to take." *Id.* Like the notice of terms in *Meyer*, the notice of Fluent's terms in *Berman* was directly above the registration button, implying a link between that notice and the next action, even though the notice did not expressly state "[b]y clicking 'Continue,'" as the court suggested. *Id.* But see *Berman*, 30 F. at 858 (reasoning proximity is insufficient).

⁵⁶ See *Meyer*, 868 F.3d at 74 (noting California law allows implicit acceptance of terms).

⁵⁷ See *Stone v. White*, 301 U.S. 532, 534 (1937) ("[Quasi-Contract] is used to recover upon rights equitable in nature to avoid unjust enrichment by [one party] at the expense of [another] . . ."). In *Berman*, plaintiffs retained the benefits, gift cards and free samples, but as the Ninth Circuit held, were not bound to the terms and conditions accompanying those benefits. See *Berman*, 30 F.4th at 853, 859 (acknowledging retention of benefit while rejecting enforceability of contract); cf. *Stone*, 301 U.S. at 534 (reasoning party may not unjustly retain benefits).

⁵⁸ See *Register.com v. Verio*, 356 F.3d 393, 401 (2d Cir. 2004) (holding acceptance of terms implied when user accepts services offered). In *Register.com*, the user of the website did not have the opportunity to see the terms of the contract until after accepting the terms and the court nonetheless still held that the user was bound by the terms. See *id.* at 401-02 (deciding users cannot access data without holding up their end of contractual bargain).

⁵⁹ See *Berman*, 30 F.4th at 853 (highlighting plaintiffs agreed to accept benefits of Fluent's services); see also *Register.com*, 356 F.3d at 401 (holding company bound by contract terms when repeatedly using website). In *Berman*, plaintiff Hernandez had used Fluent's services on multiple occasions. See *Berman*, 30 F.4th at 853 ("Because Hernandez had visited a Fluent website before and had previously entered some of her contact information, the webpage she saw stated, in large orange letters across the top of the page, 'Welcome back, [S]tephanie!'"). Similarly, in *Register.com*, defendant Verio repeatedly visited Register's site. See 356 F.3d at 401-02 (highlighting Verio's daily visits to Register.com). Regardless of whether Hernandez and Russell knew of the terms on the first visit, they tacitly agreed to Fluent's terms when they repeatedly returned to the service. See *Berman*, 30 F.4th at 853 (highlighting Plaintiffs' repeated use of Fluent's website); *Register.com*, 356 F.3d at 401 (noting repeated use amounts to tacit acceptance of terms and conditions); see Marotta-Wurgler, *supra* note 1, at 168 (noting increase in contract accessibility does not translate into significant increase in readership); Appellant's Opening Brief, *supra* note 17, at 24 (emphasizing plaintiffs' admission of agreeing to Terms and Conditions in deposition).

participate in online commerce.⁶⁰ Furthermore, the Ninth Circuit ran afoul of the FAA by denying arbitration based on a heightened contractual standard, which is not a defense “in law or in equity” that satisfies the FAA’s exception.⁶¹

Berman v. Freedom Fin. Network, LLC is a win for consumers, but it came at a cost to contract law. Today, an increasing volume of business is conducted on the internet, so consumers and businesses alike must be able to rely on the validity of the agreements into which they enter. The Ninth Circuit modified long-held notions of contract law by eradicating internet-based implicit contracting and requiring a heightened standard. By imposing a different rule for online arbitration agreements versus other agreements and clauses, *Berman* contradicts the very premise of the FAA. Regardless of the effect of arbitration on consumers, the Ninth Circuit and courts that rely on New York and California law offend the FAA by restricting the broad enforcement of arbitration agreements as required by federal law.

⁶⁰ See DOC, *supra* note 6 (noting increased volume of internet revenue). Electronic commerce includes any sale of goods or services where the “buyer places an order, or the price and terms of the sale are negotiated over” the internet or mobile device. *Id.* at Table 1 n.1. In the Fourth Quarter of 2022, businesses generated over \$261 million in revenue from online sales, an increase of 6.5 percent from the year prior. See *id.* at Table 1. The volume of e-commerce increased in each quarter during 2022, and each quarter’s e-commerce revenue increased compared to the respective quarter in 2021. See *id.* (noting indicating Fourth Quarter 2022 e-commerce revenue increased by 6.5 percent from Fourth Quarter 2021). As of the Fourth Quarter of 2022, e-commerce amounted for 14.7 percent of the United States retail economy. *Id.*

⁶¹ See 9 U.S.C. § 2 (“[A]n agreement in writing to submit to arbitration . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract . . .”); see also *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011) (concluding only traditional defenses such as fraud or unconscionability may be asserted to preclude arbitration); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (holding courts may not treat arbitration contracts differently than other contracts); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) (recommending doubts on arbitration-specific defenses, such as waiver or delay, must be resolved by arbitrator).