No. 16-1903

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DAVID W. NOBLE, individually and on behalf of others similarly situated,

Plaintiff-Appellee,

v.

SAMSUNG ELECTRONICS AMERICA, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR APPELLEE DAVID W. NOBLE

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September 9, 2016

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

Appellee David W. Noble concurs in the Statement of Jurisdiction of appellant Samsung Electronics America.

STATEMENT OF THE ISSUE

Whether a reasonable purchaser has assented to an arbitration provision located in a product user manual found inside the product's packaging, where the first and only indication that the provision exists is the text of the provision itself on the 105th page of the 143-page user manual.

This issue was raised in Samsung's Motion to Stay and to Compel Arbitration and Dismiss Plaintiff's Class Claims, Dist. Ct. Dkt. No. 12, addressed in Noble's Opposition to Defendant's Motion to Compel Arbitration, Dist. Ct. Dkt. No. 16, and in Samsung's Reply, Dist. Ct. Dkt. No. 17, and ruled on by the district court's opinion dated March 15, 2016, JA4-JA13.

RELATED CASES AND PROCEEDINGS

This case has not previously been before this Court. Noble is not aware of any related cases or proceedings.

STATEMENT OF THE CASE

Samsung's Smartwatch

The Samsung Galaxy Gear S Smartwatch ("Smartwatch") was the first broadly marketed watch that could also function as an independent phone. JA24 (¶ 19). Samsung marketed its Smartwatch as having a battery that would last 24 to 48 hours with "typical" use. JA25 (¶¶ 21-24). Relying on Samsung's statements about the Smartwatch battery life, plaintiff-appellee David Noble purchased a Smartwatch from an AT&T store. JA22 (¶¶ 12-13). Noble started using the Smartwatch but discovered that its battery lasted only 4 hours. JA23 (¶ 14). Noble exchanged the Smartwatch at the AT&T store a week after buying it, and after experiencing the same short battery life issue again, *id.* (¶ 15), he complained to Samsung, which sent him a replacement Smartwatch. *Id.* (¶ 16). The battery of this third Smartwatch was no better, dying after 3 to 4 hours of use. *Id.*

The Guide Book

Inside the packaging for the Samsung Smartwatch was a 143-page

"Health and Safety and Warranty Guide" ("Guide Book").[1] JA51-JA194. Samsung has not presented any evidence that the outside of the packaging gave any indication that a Guide Book or any proposed contractual terms were inside. JA10. The Guide Book's table of contents starts on the ninth page. JA60. The bulk of the Guide Book describes "Health/Safety Information": Eighteen subsections give information on topics such as "Smart Practices While Driving," "Battery Use and Safety," and "Display/Touch-Screen." JA60-61. The last part of the Guide Book is entitled "Warranty Information." JA61. It starts on page 86 of the Guide Book, and contains two subsections: "Standard Limited Warranty" and "End User License Agreement for Software." JA61, JA145-JA190. The table of contents does not make any reference to an arbitration provision, and the index does not mention one either. JA60-JA61, JA192-JA194.

Flipping through 85 pages on health and safety information brings one to "Section 2: Warranty Information." JA145. The first subsection, Standard Limited Warranty, proceeds through a series of questions in bold text: "**What is covered and for how long?**" JA146, "**What is not**

[1] The Warranty Guide has 135 paginated pages, but 143 total pages, not counting the cover.

covered?" JA146-JA149, "**What are Samsung's obligations?**" JA149-JA151, "**What must you do to obtain warranty service?**" JA151-JA152, "**What are the limits on SAMSUNG's liability?**" JA152-JA156, and finally, on page 97—actually the 105th page of the Guide Book—"**What is the procedure for resolving disputes?**" JA156. None of these questions appears in the table of contents. JA62. The text that follows the last question about resolving disputes states:

> ALL DISPUTES WITH SAMSUNG ARISING IN ANY WAY FROM THIS LIMITED WARRANTY OR THE SALE, CONDITION OR PERFORMANCE OF THE PRODUCTS SHALL BE RESOLVED EXCLUSIVELY THROUGH FINAL AND BINDING ARBITRATION, AND NOT BY A COURT OR JURY.

Id. Three pages later, the Guide states that the consumer "may opt out of this dispute resolution procedure" within 30 days of purchase. JA159. Noble did not read, and was not aware of, the arbitration provision. JA7; JA196 (¶ 8).

Proceedings Below

On June 2, 2015, plaintiff-appellee Noble filed a class action complaint on behalf of himself and other consumers who purchased a Smartwatch, asserting claims based on Samsung's misrepresentations of the Smartwatch's battery life. JA18-JA42. Samsung moved to compel

arbitration of Noble's claims, dismiss his class claims, and stay the litigation. JA46.

The district court denied Samsung's Motion to Compel. *See* JA3-JA13. Applying ordinary principles of New Jersey contract law, the court held that Noble never entered into an agreement to arbitrate because he did not assent to the terms of the arbitration clause buried in the Guide Book. JA8. Assent, the court held, requires that a purchaser have either "actual notice" or "reasonable notice" of the terms to which he is being asked to agree. While recognizing that parties can be bound to agreements inside product packaging, the court concluded that here, Noble did not have "actual notice" or "reasonable notice" of the arbitration agreement. JA10. Nothing on the outside of the packaging alerted purchasers about the important information inside, the Guide "does not readily identify itself as a document that would contain waivers of legal rights," and the table of contents does not mention anything about arbitration or dispute resolution. JA10-JA11. The court determined that "purchasers would have to read through almost every page of the 135-page Guide Book until they reached the Arbitration Agreement on page ninety-seven. Only then could they discover the

relevant terms." JA11. The court concluded that "[p]urchasers are not reasonably expected to perform such an investigation in order to understand the terms of an agreement." *Id.*

SUMMARY OF ARGUMENT

The fundamental requisite of a contract is mutual assent to terms. No mutual assent exists if a manufacturer does not put a purchaser on notice that he is being asked to agree to terms, let alone notice of what the terms of the purported agreement might be. In this case, no reasonable purchaser in Noble's position would have notice that Samsung's Guide Book contained a proposal to agree to arbitration. Accordingly, the district court correctly held that no agreement to arbitrate was ever formed between Samsung and Noble.

Samsung tries to turn this state-law question of contract formation into a question of federal preemption by claiming that the district court applied a special notice standard to the arbitration provision. But the district court applied general contract law rules, the same rules that courts apply to all contract provisions. Indeed, its holding relies on a case addressing the validity of another type of contract, a forum selection clause. *Hoffman v. Supplements Togo Mgmt., LLC*, 18 A.3d 210 (N.J.

App. Div. 2011). Under those general contract rules, a purchaser cannot be deemed to have assented to a hidden offer that he is unlikely ever to notice, like the arbitration provision here. Samsung provided no statement, no prompt, and no signal—on the Smartwatch's packaging or anywhere in the Guide Book's first 100 pages—that hinted at the arbitration proposal's existence. The Guide Book portrays itself as a product reference manual, not a contractual document, so no purchaser would expect to be bound by contractual terms buried inside. The only way a purchaser could discover the existence of the offer to arbitrate is by undertaking to read a document that gives no indication that it sets forth terms to which the purchaser's agreement is required and then stumbling upon the provision itself, which first appears 105 pages into the Guide Book.

Samsung disguises the arbitration provision as a term within the Standard Limited Warranty, but a purchaser does not expect to find in a warranty a rights-altering term that has nothing to do with the condition of a product. A "warranty" explains the scope of the manufacturer's promise as to the goods; the consumer only has to purchase the product to accept the warranty, and the validity of the warranty does not hinge

on an inquiry into mutual assent. Because of the distinct nature of warranty provisions, the district court correctly held that a purchaser does not have reasonable notice of contractual terms that a manufacturer camouflages as warranty terms by tacking them onto the end of a warranty. And Noble did nothing to manifest assent to a concealed proposal to arbitrate disputes that Samsung unilaterally imposed on the purchaser. Finally, although the issue need not be reached in order to decide this case in favor of Noble, the language of the arbitration provision does not adequately give notice that it waives the purchaser's statutory and common-law claims.

Accordingly, the district court's order denying the Motion to Compel should be affirmed.

STANDARD OF REVIEW

To the extent the issue of mutual assent does not turn on the district court's trial of a disputed issue of material fact, this Court exercises plenary review over the district court's decision not to compel arbitration. *Trippe Mfg. Co. v. Niles Audio Corp.*, 401 F.3d 529, 531 (3d Cir. 2005).

ARGUMENT

I. Legal Standards

A. Motion to compel arbitration

The determination of whether to compel arbitration proceeds in two steps. The court first determines "whether a valid agreement to arbitrate exists," and if so, the court turns to "whether the particular dispute falls within the scope of that agreement." *Trippe Mfg. Co.*, 401 F.3d at 532. In deciding whether a valid agreement to arbitrate exists, the Court applies "'ordinary state-law principles that govern the formation of contracts.'" *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156, 160 (3d Cir. 2009) (quoting *First Options of Chi., Inc. v. Kaplan,* 514 U.S. 938, 944 (1995)). Here, the district court properly applied New Jersey law. JA9; Samsung Br. 11 n.4.

The Federal Arbitration Act ("FAA") provides that an arbitration provision "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "This text reflects the overarching principle that arbitration is a matter of contract." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013). The FAA "was designed to promote arbitration."

AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 345 (2011). However, the presumption in favor of arbitration applies "only when interpreting the scope of an arbitration agreement, and not when deciding whether a valid agreement exists." *Flintkote Co. v. Aviva PLC*, 769 F.3d 215, 223 n.3 (3d Cir. 2014) (citing *Century Indem. Co. v. Certain Underwriters at Lloyd's, London,* 584 F.3d 513, 527 (3d Cir. 2009)).

B. New Jersey law on contract formation

"Because '[a]rbitration is a matter of contract between the parties,' a judicial mandate to arbitrate must be predicated upon the parties' consent." *Guidotti v. Legal Helpers Debt Resolution, LLC*, 716 F.3d 764, 771 (3d Cir. 2013) (quoting *Par–Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.,* 636 F.2d 51, 54 (3d Cir. 1980)). New Jersey law recognizes an "enforceable contract" where the parties "agree on essential terms and manifest an intention to be bound by those terms." *Weichert Co. Realtors v. Ryan*, 608 A.2d 280, 284 (N.J. 1992). "Mutual assent requires that the parties have an understanding of the terms to which they have agreed." *Atalese v. U.S. Legal Servs. Grp., L.P.*, 99 A.3d 306, 313 (N.J. 2014). A consumer's "reasonable notice" of terms, *Atalese*, 99 A.3d at 316, is thus a "predicate to enforceability" of those terms. *Hoffman*, 18 A.3d at 218.

Only if there is such notice does the question whether a party engaged in some conduct that could constitute acceptance even arise. In short, "each party to the contract must have been fairly informed of the contract's terms before entering into the agreement." *Hoffman*, 18 A.3d at 216; *see also Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 124 (2d Cir. 2012) ("[T]he touchstone of the analysis is whether reasonable people in the position of the parties would have known about the terms and the conduct that would be required to assent to them.").

Samsung has not contested Noble's sworn declaration that he had no actual notice of the arbitration provision. Samsung Br. 8 n.2. Therefore, the parties could have formed an agreement to arbitrate only if a reasonable purchaser would have had "fair notice" of the arbitration provision and of the conduct that would constitute consent to them. *Hoffman*, 18 A.3d at 217.

II. The district court correctly held that no arbitration agreement was formed because Noble had no constructive notice of the arbitration provision.

The district court evaluated the Smartwatch's packaging and Guide Book and correctly concluded that neither gives a purchaser a fair opportunity to know that the arbitration provision exists, or indeed, that

the purchaser is being asked to agree to any terms. JA10-JA12. Because Samsung and Noble lack the required "meeting of the minds based on a common understanding of the contract terms," they did not agree to arbitration. *Morgan v. Sanford Brown Inst.*, 137 A.3d 1168, 1180 (N.J. 2016).

A. The packaging provides no reasonable notice that it contains binding contract terms.

Samsung presented no evidence of any writing on the outside of the Smartwatch package that would inform a reasonable purchaser that he would be bound by terms located inside the packaging.[2] JA10. The packaging does not alert the purchaser that important information is inside. Nor is the Smartwatch's packaging sealed with a sticker informing the purchaser about the arbitration provision in the document included in the box or stating that opening the package or retaining the product constitutes agreement to any set of terms proposed by Samsung.

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[2] In moving to compel arbitration, Samsung argued that the Court should only consider the complaint and the arbitration clause, because it contended that the arbitrability of the claims was apparent on the face of the complaint. Mem. of Law in Supp. of Mot. To Compel Arbitration (Dist. Ct. Dkt. No. 12) at 3 n.1. In fact, however, the complaint did not reference the arbitration clause, so Samsung relied on evidence outside the pleadings (namely, the Guide Book and the affidavit attesting to its authenticity), but elected not to introduce any other evidence, such as the product packaging, to support its motion to compel.

See Herron v. Best Buy Stores, L.P., No. 12-CV-02103, 2014 WL 2462973, at *1 (E.D. Cal. June 2, 2014) (upholding arbitration provision in a warranty document where a warning about the arbitration provision appeared on a sticker sealing the product's packaging). In this case, nothing on the outside of the Smartwatch packaging would alert a purchaser that a proposal to arbitrate appeared inside a thick booklet inside the box.

A purchaser finds Samsung's Guide Book only after removing the packaging. Samsung's observation (Samsung Br. 14-15) that courts may enforce arbitration agreements found inside a product's packaging—while accurate as far as it goes—does not demonstrate that the district court erred, because the district court agreed that later-provided terms *may* be enforceable. JA10.

Thus, *Rue v. Kohler Corp.*, No. A-4610-04T1, 2006 WL 2051244 (N.J. Super. Ct. App. Div. July 25, 2006), is not in tension with the district court's decision here. *Rue* did not address an arbitration agreement hidden in a large booklet; it addressed the enforceability of a limited warranty that waived the implied warranty of merchantability. The limited waiver was not buried in a larger document, but was

prominently displayed in a document included in the product packaging. The question "was whether the manufacturer was required to bring the disclaimers and limitations to the attention of the buyer by doing more than placing them in the box with the product." *Id.* at *3. Thus, *Rue* addressed only whether it was sufficient for a conspicuously worded warranty disclaimer to be placed in the box with the product, rather than handed directly to the purchaser and specifically accepted by her. *Id.* The court held that placing the disclaimer inside the box with the product was not alone sufficient to render it unenforceable.[3] *Id.* at *4. So too here: the district court acknowledged that, in some circumstances, an arbitration agreement can be binding even if it is first encountered inside the product's packaging. JA10 (citing *In re Samsung Elecs. Am., Inc. Blu-Ray Class Action Litig.*, No. 08-0663, 2008 WL 5451024, at *4 (D.N.J. Dec. 31, 2008)).

Another case involving terms in a box, *Hill v. Gateway 2000, Inc.*, is also distinguishable. 105 F.3d 1147 (7th Cir. 1997). In *Hill*, the court enforced an arbitration clause found in a list of terms included in the box

[3] In addition, *Rue* is not on point because, as explained later, *infra* pp. 22-29, courts evaluating warranty disclaimers focus more on the fairness of imposing the disclaimers on purchasers than on mutual assent to the terms.

with the purchased item. *Id.* at 1150. Unlike the present case, the purchasers in *Hill* "notic[ed] the statement of terms" in the box, and thus knew that they were confronted with contract terms; the manufacturer did not hide the fact that the list of terms was contractual in nature, as Samsung has done with the Guide Book. *Id.* at 1148. *Hill* also involved a direct purchase from the manufacturer, *id.* at 1149, so the box was merely a "shipping carton," not the packaging for the item as it would appear on display in a store. *Id.* at 1150. And the terms included in the box specifically gave the purchaser the "opportunity to return the computer after reading them" if he wished not to be bound by the terms. *Id.* at 1148. Under those circumstances, the commercial practicalities of selling a product remotely made that way of giving notice and assent reasonable. *Id.* at 1149. The purchasers elected not to read the terms "closely enough," but they had adequate notice that the manufacturer had made them an offer to arbitrate and that keeping the item longer than 30 days would constitute their assent to that offer. *Id.* at 1148. Nothing here, however, put the purchaser (whose purchase from the actual seller was already complete) on reasonable notice that he would be

assenting to a contract with another party if he did not take some further action.

B. The cover, table of contents and index do not provide reasonable notice of the arbitration provision.

Nothing on the Guide Book's cover or in the first 104 pages calls a purchaser's attention to Samsung's arbitration provision on the 105th page. JA10-JA11. The title "Health and Safety and Warranty Guide" and the print below the title—"Please read this manual before operating your device and keep it for future reference"—suggest that it is a "manual" with instructions on safely using the Smartwatch, not a document proposing binding contract terms. JA51. The cover says nothing about terms, conditions, or agreements, unlike the document containing an arbitration provision in *Asbell v. Integra Lifesciences Holdings Corp.*, which the plaintiff had *signed* and which was called an "Agreement." No. CIV.A. 14-677, 2014 WL 6992000, at *2 (D.N.J. Dec. 10, 2014) (holding that the arbitration provision was not hidden). Samsung provides no announcement "at the outset" of the Guide Book that contractual terms in the back of the Guide Book govern the purchase. *See James v. Glob. Tel*Link Corp.*, No. CV 13-4989, 2016 WL 589676, at *5 (D.N.J. Feb. 11, 2016) (holding that an audio notice of terms "at the

outset" of the recording, "before customers could proceed to the remainder of the options," afforded sufficient notice); *cf. Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 237 (E.D. Pa. 2007) (upholding a forum selection clause found in an agreement on a website where there was a "prominent admonition in boldface to read the terms and conditions carefully"). *See also Hirsch v. Citibank, N.A.*, 542 F. App'x 35, 37 (2d Cir. 2013) (finding issues of fact as to whether arbitration agreement was formed where the manual containing the arbitration provision "on its face does not state that it is an agreement or that it contains terms and conditions governing" the product).

Nine pages into the Guide Book is the table of contents—a feature whose sole purpose is to notify readers about what information follows—but it likewise does not alert the purchaser that any of the remaining 135 pages addresses dispute resolution or contains terms to which Samsung asks the purchaser to agree. JA60-JA62. The index also fails to give any indication of an arbitration provision or information about dispute resolution. JA192-JA194. With no "statement" on the Guide Book's cover, in the table of contents, the first 96 pages, or the index that would "draw attention" to the fact that it contains proposed contract terms, no

reasonable purchaser could have notice of the arbitration term. *See Holdbrook Pediatric Dental, LLC v. Pro Computer Serv., LLC*, No. CIV. 14-6115, 2015 WL 4476017, at *6 (D.N.J. July 21, 2015) (explaining that court could not conclude that customer had "reasonable notice" of the arbitration clause in the "Terms and Conditions" contained in a hyperlink above the signature line, because there was no "statement to draw attention" to the hyperlink).

C. By burying the arbitration provision on the 105th page of the Guide Book, Samsung failed to give a purchaser reasonable notice of its existence.

The proposal to arbitrate appears on the 105th page of the Guide Book. JA156. By comparison, Samsung's disclaimers of warranty—which Samsung repeatedly, and mistakenly, *see infra* pp. 22-29, analogizes to arbitration provisions (Samsung Br. 14-15, 35-36)—begin on the *third* page of the Guide Book, even before the table of contents. JA54.

Samsung argues that the "number of pages in the Warranty Guide does not accurately reflect its actual size or the relative prominence of the Arbitration Provision," because, according to Samsung, if it were on 8.5 x 11-inch paper, it would be the equivalent of a 12-page document. Samsung Br. 29. But the question is whether a purchaser would have

reasonable notice of *this particular* arbitration provision located in *this particular* Guide Book. Samsung cannot "manufacture notice where there was none." *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1036 (7th Cir. 2016). And Samsung's attempt to refashion the Guide Book as a 12-page document is a tacit acknowledgement that the arbitration provision's actual placement in the Guide Book does not give adequate notice of its existence. It is also an acknowledgment that the total length of the Guide Book affects whether the arbitration provision is conspicuous, and that a provision located 105 pages into a booklet is much less prominent than one located 12 pages into a booklet, regardless of the size of the pages. In any event, a proposed contract term submerged within 12 pages of single-spaced, small-font text would not be prominent.

Additionally, a purchaser would not consult the Guide Book to figure out how to turn the Smartwatch on or off, use wireless data, install apps, adjust brightness, or customize settings, because the Guide Book does not contain operating instructions. JA60-JA62. Rather, the Guide Book informs purchasers about such topics as maintaining water resistance, the risks of exposure to radio frequency signals, and safe

driving practices. *Id.* Because a purchaser does not need to consult the Guide Book before using the watch, Samsung's reliance on *McNamara v. Samsung Telecommunications America, LLC*, No. 14 C 1676, 2014 WL 5543955, at *2 (N.D. Ill. Nov. 3, 2014), is misplaced. JA12 n.6 (district court's opinion noting that *McNamara* "is not a helpful analogy to the instant case"). There, the court concluded that the purchaser had reasonable notice of the arbitration provision in a booklet accompanying a smartphone because those devices "by their nature are extremely complicated" and "a purchaser would be expected to review the product user guide in order to get as much out of the product as he can." 2014 WL 5543955, at *2. Nothing in the record indicates whether the Smartwatch is complicated to operate, and if it were complicated, the Guide Book would be of no help.

This case is more like *Hines v. Overstock.com*, in which the court held that the purchaser was not bound by the forum selection and arbitration clauses in the terms of use, because the terms were only available if the purchaser scrolled to the bottom of the website screen—"an action that was not required to effectuate her purchase." 668 F. Supp. 2d 362, 367 (E.D.N.Y. 2009), *aff'd*, 380 F. App'x 22 (2d Cir. 2010).

Similarly, in this case, Noble would not be expected to review every page of the Guide Book before operating the watch.

Even if a reasonable purchaser experienced problems with the battery and consulted the Guide Book for information, he would find all the information related to battery usage before reaching the arbitration provision. The sections titled "Battery Use and Safety" and "Care and Maintenance" are on pages 38-44 and 59-64, respectively, long before the arbitration provision. JA97-JA103; JA118-JA123. The arbitration provision does not appear until the very end of the Standard Limited Warranty. JA146-JA155.

In sum, a Smartwatch purchaser confronts a Guide Book that appears to contain only information on product safety and warranties, makes no mention of an arbitration provision *anywhere* besides the provision itself, and does not alert the purchaser that anything in the nature of a contractual offer falls within its pages. With nothing to point the purchaser to the proposal to arbitrate, the only way a reasonable purchaser would find it is by reading the Guide Book page-by-page, a project that would take a reasonable adult purchaser between 22 and 45 minutes, based on the approximately 9,177 words that come before the

proposed arbitration term.[4] A provision so concealed in the Guide Book, without any indication of its existence beyond the provision itself, "bar[s] a finding that a valid and enforceable contract to arbitrate was formed." *Norcia v. Samsung Telecomms. Am., LLC*, No. 14-CV-00582-JD, 2014 WL 4652332, at *1 (N.D. Cal. Sept. 18, 2014).

D. Notice that the Guide Book contains a Standard Limited Warranty does not provide notice of the arbitration provision.

The district court rightly determined that the fact that the Guide Book's table of contents lists a section titled "Standard Limited Warranty" does not give purchasers any indication that the Guide Book contains "an imbedded, unannounced Arbitration Agreement that waives their ability to resolve any disputes in a court of law." JA11. Customers "are not bound to unknown terms [that] are beyond the range of reasonable expectation." Restatement (Second) of Contracts § 211 cmt. f (1981). In other words, whether a consumer has reasonable notice of

[4] This estimate is based on the typical reading rate for an educated adult, which is 200 to 400 words per minute. *See* Keith Rayner *et al.*, *So Much to Read, So Little Time: How Do We Read, and Can Speed Reading Help?*, Psychol. Sci. in the Pub. Interest, May 2016, at 5, *available at* http://psi.sagepub.com/content/17/1/4.full.pdf+html.

terms arriving after the purchase of a product is "rooted" "in the reasonable expectations of the parties." *Schnabel*, 697 F.3d at 125.

Warranties are different from most contracts because they attach automatically upon purchase and give rise to unilateral obligations on the part of the manufacturer. Samsung argues that any term it piggybacks onto the warranty stands or falls with the warranty, Samsung Br. 16, and that notice of the warranty gives notice of any and all other contractual terms in the Guide Book. *Id.* 19. However, that argument ignores that warranties operate differently than other contract terms and that a purchaser would not reasonably expect a proposed contract term requiring affirmative assent beyond the purchase of the item to appear within the warranty.

First, a warranty imposes obligations on the offeror—the manufacturer—not the purchaser. "[T]he whole purpose of the law of warranty is to determine what it is that *the seller* has in essence agreed to sell." N.J. Stat. Ann. § 12A:2-313 cmt. 4 (emphasis added). Under New Jersey law, "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the

affirmation or promise." *Gladden v. Cadillac Motor Car Div., Gen. Motors Corp.*, 416 A.2d 394, 396 (N.J. 1980) (quoting N.J. Stat. Ann. 12A:2-313). "[N]o proof of the buyer's reliance on the warranty is necessary other than that the seller's statements were of a kind which naturally would induce the purchase." *Elias v. Ungar's Food Prods., Inc.*, 252 F.R.D. 233, 239 (D.N.J. 2008) (internal quotation marks and citation omitted). Therefore, a manufacturer creates an express warranty by making a promise about the product.

Second, to accept a warranty, "[a]ll that the consumer needs to do … is to buy the product that the seller has made affirmative representations about." *Norcia*, 2014 WL 4652332, at *7. The purchaser "need not prove privity." *Smith v. Merial Ltd.*, No. CIV. 10-439, 2011 WL 2119100, at *7 (D.N.J. May 26, 2011) (internal quotation marks and citation omitted). In contrast, for contracts generally, the parties must "agree on essential terms and manifest an intention to be bound by such terms." *In re The Score Bd., Inc.*, 238 B.R. 585, 590 (D.N.J. 1999). Outside the world of warranties, purchasing a product does not automatically, and unilaterally, make contractual terms proposed by the

manufacturer binding absent notice. In short, for a warranty, the promises flow in one direction: from the manufacturer to the purchaser.

In contrast, other contract terms, such as arbitration provisions and forum selection clauses, create promises that flow in both directions, obligating both the manufacturer and the consumer, and are only valid if the parties mutually assent to the terms. Thus, notice of a Standard Limited Warranty may put a purchaser on notice that the manufacturer has limited the scope of its promise to the buyer. But it does not give notice of a proposed contract term that does not concern the scope of the manufacturer's promises and to which the purchaser must assent to be binding. The distinctions between warranties and other contractual terms explain why the district court correctly noted that the nature of the Guide Book, and the fact that it contains warranties, does not give the purchaser a fair opportunity to know that it also contains a proposal to arbitrate. JA11.

Accordingly, "the way that Samsung has structured its arbitration provision within its warranty, no proposal was in fact made to the purchaser." *Norcia*, 2014 WL 4652332, at *7 (holding that an arbitration provision in a similar Samsung warranty booklet was not enforceable,

because the purchaser did not have adequate notice of the provision). Here, Samsung "disguised" the arbitration provision "as merely a 'term' of the warranty," but a warranty, unlike an arbitration provision, "automatically attaches from the moment of purchase without any additional acceptance or reliance on the part of the purchaser." *Id.* As opposed to a warranty, the arbitration provision is an offer—Samsung's "manifestation of willingness to enter into a bargain,"—and such an offer must be "so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Pacitti v. Macy's*, 193 F.3d 766, 773 (3d Cir. 1999) (internal quotation marks and citation omitted). Samsung did not make the offer in way that a reasonable purchaser could learn about it, or understand that Samsung had "invited" his assent to its terms, because Samsung buried the proposal in the Guide Book at the end of the warranty provisions. And the arbitration clause is presented as a flat statement, not a proposal, or a statement that seeks the purchaser's assent. *See* JA156 ("All disputes with Samsung arising in any way from this limited warranty… *shall be resolved* exclusively through final and binding arbitration") (emphasis added) (bold and all capital letters omitted).

Thus, Samsung's reliance on precedents involving the notice required to support enforcement of warranty terms and disclaimers of warranties is mistaken. Samsung Br. 14-16. Courts enter into a different line of inquiry to determine the validity of warranty disclaimers than they do for other contract terms. Courts focus on whether disclaimers of warranties are displayed in a way that "protect[s] the buyer from surprise," N.J. Stat. Ann. § 12A:2-316, cmt. 1, *not* on whether the parties mutually assented to the terms, or whether there was a "definite offer, acceptance of that offer and consideration." *Advanced Drainage Sys., Inc. v. SiteCo Materials, Inc.*, No. 13-CV-1349, 2014 WL 1092809, at *4 (D.N.J. Mar. 18, 2014). In other words, the inquiry into the validity of warranty disclaimers is driven by the policy of protecting buyers from unexpected limitations on manufacturers' standard warranties. Therefore, courts look to whether the limitations "are unreasonably inconsistent with the express warranties that are given," *Peruto v. TimberTech Ltd.*, 126 F. Supp. 3d 447, 456 (D.N.J. 2015) (quoting *Gladden,* 416 A.2d at 399), whether enforcing the disclaimer would be "reasonable," *Advanced Drainage Sys., Inc.*, 2014 WL 1092809, at *3, and whether the disclaimer is sufficiently "clear and conspicuous,"

George Campbell Painting, Corp. v. Tennant Co., No. CIV. A. 94-4498, 1995 WL 224410, at *4 (D.N.J. Apr. 7, 1995) (declining to dismiss breach of warranty claims because the disclaimer was not necessarily conspicuous) (internal quotation marks and citation omitted). *See also Realmuto v. Straub Motors, Inc.*, 322 A.2d 440, 442 n.2 (N.J. 1974) (disclaimer on the back of agreement was "inoperative since to give effect to the disclaimer would be unreasonable in view of the writing on the face" of the agreement).

Consequently, decisions cited by Samsung that deal with the effectiveness of a warranty disclaimer that was located at the end of a document do not support its assertion that an inconspicuously placed offer to enter into a different form of contract creates an obligation enforceable against the purchaser of a product.[5] Samsung Br. 20-21.

[5] To the extent the cases on disclaimers are relevant to the analysis of mutual assent, the cases Samsung cites do not specify the total length of the booklets at issue, which is critical for determining whether mutual assent exists. *See Atl. Health Sys., Inc. v. Cummins Inc.*, No. CIV. 08-3194, 2010 WL 5252018, at *6 (D.N.J. Dec. 17, 2010) (finding that a warranty disclaimer was conspicuous despite its location on the "last page of the warranty information," but not specifying the total number of pages of warranty information, or providing any additional facts about the disclaimer's placement within the other text); *see also Spera v. Samsung Elecs. Am., Inc.*, No. 2:12-CV-05412, 2014 WL 1334256, at *8 (D.N.J. Apr. 2, 2014) (warranty disclaimer appeared "at the end" of the

Because a reasonable purchaser would expect a warranty to contain just that—the scope of, and limitations on, the manufacturer's promise about the condition of the product—and not offers of additional contract terms requiring assent by and imposing obligations on the purchaser, Samsung failed to provide adequate notice of the existence of the proposed arbitration term hidden within the warranty.

E. The California cases cited by Samsung are distinguishable from this case.

In the decision on appeal, the district court declined to rely on any of the California district court cases cited by the parties involving Samsung's booklets, because the cases principally established that those lower courts disagreed over the enforceability of provisions in Samsung booklets under California law. JA12 n.6. To the extent these cases are persuasive, *Norcia v. Samsung Telecommunications America LLC*, 2014 WL 4652332, which Samsung incorrectly dismisses as an "outlier," is the closest factually to this case and lends strong support to the decision below. Samsung Br. 17 n.5.

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user manual, but there is no indication of length of the user manual, and the court addressed only the conspicuousness of the terms of the disclaimer, not its location in the manual).

In *Norcia*, the district court held that the consumer did not have adequate notice of an arbitration provision on page 76 of a 101–page booklet entitled "Product Safety & Warranty Information." *Id.* at *6-*7. *Norcia* recognized the distinction between a warranty term and other contract terms for purposes of contract formation, and concluded "that no reasonable person would know that a proposal has been made to him." *Id.* (internal quotation marks and citation omitted).

By contrast, in *Dang v. Samsung Electronics Co.*, the district court held that the consumer had inquiry notice of the arbitration provision in the booklet inside the packaging titled, "Important Information for the Samsung SPH–L71." No. 14-CV-00530, 2015 WL 4735520, at *1 (N.D. Cal. Aug. 10, 2015). But in *Dang*, unlike *Norcia* and this case, the outside of the packaging warned the consumer about the "Important Information" inside and the arbitration provision was located in the first third of a much shorter booklet. *Id.* at *8 (arbitration provision appeared on page 19 of 63 pages). Moreover, contrary to Samsung's position on page length, the court in *Dang* recognized the importance of the length of the booklet in determining a term's prominence within the booklet, because the court distinguished *Norcia* in part because the booklet in

Norcia had more pages and the arbitration provision was located further into the booklet. *Id.* at *10.

In holding that the consumers had reasonable notice of an arbitration clause in another Samsung information booklet, the court in *McNamara v. Samsung Telecommunications America, LLC*, failed to address the length of the booklet or whether there was any warning anywhere on the packaging about important contractual terms inside. 2014 WL 5543955. Instead, the court focused on the "extremely complicated" nature of the purchased product—a smartphone—in holding that a reasonable consumer would have reviewed the booklet before using the product. *Id.* at *2. However, as discussed, *supra* pp. 19-20, *McNamara* does not help Samsung because the Guide Book here does not contain instructions for use.

The persuasive value of the related cases *Sheffer v. Samsung Telecommunications America, LLC,* No. CV 13-3466, 2014 WL 506556 (C.D. Cal. Jan. 30, 2014), and *Han v. Samsung Telecommunications America, LLC*, No. CV 13-3823, 2014 WL 505999 (C.D. Cal. Jan. 30, 2014) (same opinion), is limited because the court did not engage in meaningful analysis of the prominence of the agreement in relation to

the overall length of the document containing the arbitration provision, stating only that "the fact that the warranty's arbitration clause" is located in a large document "does not *invariably* render that provision unenforceable." *Sheffer*, 2014 WL 506556, at *2; *Han*, 2014 WL 505999 at *2 (emphasis added). Finally, *Carwile v. Samsung Telecommunications America, LLC*, addressed whether a consumer's conduct constituted assent to an arbitration provision, and did not address whether the consumer had constructive notice of the arbitration provision. No. CV1205660CJCJPRX, 2013 WL 11030374, at *3-4 (C.D. Cal. July 9, 2013).

Among these decisions, only *Norcia* grappled with the effect on reasonable notice of masking an arbitration proposal within a lengthy booklet's warranty provisions. Accordingly, to the extent the California district court cases are instructive, *Norcia* is the most similar and reached the correct conclusion.

III. No conduct on Noble's part could reasonably be held to constitute acceptance of the arbitration provision.

The district court correctly held that Noble could not be bound by an opt-out provision contained in an arbitration clause to which he never agreed. JA12. "It is requisite that there be an unqualified acceptance to

conclude the manifestation of assent." *Johnson & Johnson v. Charmley Drug Co.*, 95 A.2d 391, 397 (N.J. 1953). A purchaser may manifest assent by "words or silence, action or inaction," but such conduct constitutes assent only if "he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents." *Schnabel*, 697 F.3d at 120 (quoting Restatement (Second) of Contracts § 19(2) (1981)). Because Samsung never communicated the offer to arbitrate to Noble, no conduct on his part could be deemed acceptance of that offer.

Noble did not sign the Guide Book or any other document acknowledging receipt of and assent to the arbitration provision, nor did he take any other action signifying assent. His purchase of the watch from the AT&T store was complete before he had an opportunity even to see the Guide Book, and his retention of the watch under those circumstances could not be characterized as agreement to anything with Samsung (even if the Guide Book had informed him that retaining the watch constituted agreement to the terms it proposed, which it did not). Samsung does not present the arbitration clause as an agreement or offer to which a purchaser may assent. *See Specht v. Netscape Commc'ns*

Corp., 306 F.3d 17, 29–30 (2d Cir. 2002) ("[A] consumer's clicking … [a] button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking …[the] button would signify assent to those terms."). The absence of an act of assent distinguishes this case from the many cases on which Samsung relies that involve signed agreements or agreements governing internet transactions in which the consumer had to click assent to the terms before proceeding with the transaction (so-called "clickwrap" agreements).

For instance, in *Carbajal v. H & R Block Tax Servs., Inc.*, the court enforced an arbitration provision in a *signed* loan agreement. 372 F.3d 903, 904 (7th Cir. 2004). Having signed the document, the consumer was on notice that he was dealing with an agreement that imposed obligations on both parties, and that by his signature, he accepted its terms. In *Hemberger v. E*Trade Financial Corporation*, cited by the district court, the plaintiff had signed the agreement, and the arbitration provision was only "one clause, within one document," located just above where the plaintiff initialed the document, "with no text between the initials and the agreement." No. CIV.A.07-1621, 2007 WL 4166012, at *4

(D.N.J. Nov. 19, 2007). The arbitration provision in *Hemberger* abutted the plaintiff's initials, and thus the court determined the provision was "conspicuous and sufficient to put Plaintiff on notice that he was agreeing to it." *Id.*[6] *See also Wigfall v. Denholtz Assocs., Inc.*, No. A-0046-09T1, 2010 WL 5173700, at *4 (N.J. Super. Ct. App. Div. Dec. 22, 2010) (deeming arbitration clause "sufficiently clear and prominent" and "not 'difficult to locate'" because it appeared directly above signature line); *Asbell*, 2014 WL 6992000, at *2 (upholding arbitration provision in a signed agreement); *Caspi v. Microsoft Network, LLC*, 732 A.2d 528, 530 (N.J. App. Div. 1999) (enforcing arbitration clause in a clickwrap agreement where plaintiff could proceed with registration only after clicking "I Agree" to the terms of the agreement containing the clause); *Uddin v. Sears, Roebuck & Co.*, No. CIV.A. 13-6504, 2014 WL 1310292, at *2, *6 (D.N.J. Mar. 31, 2014) (plaintiff had to click "yes" and "submit" on the computer screen to acknowledge having read and reviewed an arbitration agreement); *Kowalski v. YellowPages.com, LLC*, No. CIV.A.

[6] *Hemberger* also addressed the separate issue of whether the provision satisfied New Jersey's "high threshold for the language required to constitute a clear and unambiguous waiver," an issue the district court did not reach in this case. 2007 WL 4166012, at *3; Samsung Br. 32.

09-2382, 2010 WL 3323749, at *4 (D.N.J. Aug. 18, 2010) (plaintiffs electronically signed agreements containing forum selection clauses). To the extent Samsung relies on cases involving notice of terms in signed agreements, those are inapplicable, because Noble did not affirmatively assent to the terms in the Guide Book and Samsung did not even ask him to do so.[7]

Samsung cannot point to the arbitration clause's opt-out provision to supply the element of assent. Samsung Br. 29-30. The existence and length of the arbitration clause's opt-out period is "irrelevant" because Noble did not have reasonable notice of the arbitration provision "in the first place." *Barraza v. Cricket Wireless LLC*, No. C 15-02471, 2015 WL 6689396, at *5 (N.D. Cal. Nov. 3, 2015). The opt-out obligation never arises if there is no agreement to arbitrate in the first place. *Id.* The court in *Uddin v. Sears, Roebuck & Co.* did not hold that plaintiff had notice of the arbitration agreement *because of* "the right to opt out within 30 days," as Samsung suggests. Samsung Br. 30. *Uddin* did not deal with a hidden arbitration agreement at all. 2014 WL 1310292, at *2.

[7] These cases are also relevant to the issue of adequate notice of contractual terms, *supra* pp. 12-29, because requiring the purchaser to sign a document or click a button to agree to terms also serves to call the purchaser's attention to the fact that he is faced with an agreement.

Instead, in that case the plaintiff argued that he did not "recollect[]," *id.* at *5, affirmatively agreeing to an arbitration clause covering his employment "by clicking 'Yes' and 'Submit'" buttons on the electronic agreement. *Id.* at *6. The court held that the employee's failure to recall his express agreement did not alter the fact that he "specifically acknowledged receipt of and assented to the terms of the Agreement … and is therefore bound by the arbitration clause contained in the Agreement." *Id*. It was his express assent, not his failure to opt out, that created the agreement in the first place and created the obligation to opt out if he did not wish to be bound. *See id.* at *3. *Uddin* does not suggest that a person who did not assent to an arbitration agreement because he had no reasonable notice that he was being asked to do so is bound by it because he did not exercise a right to opt out of it.

IV. The district court applied fundamental principles of contract formation to the arbitration provision.

Samsung's argument that the district court impermissibly applied a heightened notice requirement to the arbitration provision is an unsuccessful attempt to inject a federal preemption issue into a case that turns only on a state-law question of contract formation. Samsung Br. 22, 35-41. Adequate notice is the foundation of mutual assent, which is a

fundamental principle of contract law "applicable to contracts generally" and *not* "applicable *only* to arbitration provisions." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

In determining whether a reasonable purchaser would have "a fair opportunity to know" that the arbitration provision exists, JA11, the district court properly considered the location of the arbitration provision in the Guide Book. Samsung argues that adequate notice is measured only by the appearance of the provision's text, not the provision's placement in a document, and points specifically to warranty disclaimers and forum selection clauses as instances where courts do not consider location of the terms. Samsung Br. 20-21, 39-40. The case law does not support this position. Indeed, precedents concerning forum selection clauses affirmatively demonstrate that the district court properly applied contract formation principles that New Jersey courts apply even-handedly to arbitration agreements and comparable non-arbitration agreements, while New Jersey case law concerning warranty disclaimers reflects the difference between such provisions and standard contracts such as arbitration agreements.

In New Jersey, if the non-drafting party positions a contract term "in a manner that makes it unlikely that consumers would ever see it at all," such as by plunking it on a "submerged portion of the webpage," that term is not part of the contract. *Hoffman,* 18 A.3d at 219 (holding that a forum selection clause was not enforceable because it was hidden). Courts look to the "style or mode of presentation, or the placement of the provision" to determine whether the provision "was proffered unfairly, or with a design to conceal or de-emphasize its provisions." *Caspi*, 732 A.2d at 532 (holding that plaintiffs had adequate notice of the forum selection clause); *cf. Kamensky v. Home Depot U.S.A., Inc.*, No. A-0930-14T4, 2015 WL 5867357, at *3 (N.J. Super. Ct. App. Div. Sept. 29, 2015) (enforcing arbitration clause located on page 13 of the contract because it was "not concealed or minimized within" the contract). As this Court has explained, any "distinction" between forum selection clauses and arbitration clauses "is irrelevant" when it comes to "reviewing" whether a valid agreement was formed. *Dayhoff Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1298 n.9 (3d Cir. 1996).

Consequently, New Jersey courts hold forum selection clauses to the same notice standard that the district court applied to the arbitration

provision here. Samsung Br. 36. For instance, in *Hoffman*, the court held that a forum selection clause was "unreasonably masked from the view of the prospective purchasers" where it was not visible on the purchaser's computer screen "unless he or she scrolled down to a submerged portion of the webpage where the disclaimer containing the clause appeared." 18 A.3d at 218. The court held that the purchaser did not have fair notice of the forum selection clause "because the website was designed in a manner that makes it unlikely that consumers would ever see it at all." *Id.* Likewise, here, Samsung positioned the arbitration provision in the Guide Book in a way that makes it unlikely a purchaser would ever happen upon it other than by chance. In contrast, a purchaser had adequate notice of the forum selection clause on the reverse side of a sales contract where the clause was "immediately viewable" and "not hidden or otherwise difficult to access on the sales contract." *Carfaro v. Blue Haven Pools Ne., Inc.*, No. A-2803-13T3, 2015 WL 1980705, at *5 (N.J. Super. Ct. App. Div. May 5, 2015).

Samsung's claim that "New Jersey courts enforce forum selection clauses … regardless of location or even conspicuousness," is contradicted by the very cases it cites. Samsung Br. 39. The court in

Caspi explicitly determined that the plaintiffs had adequate notice of the forum selection clause because there was "nothing about . . . the *placement of the provision*" that indicated that the forum selection clause "was proffered unfairly." 732 A.2d at 532 (emphasis added). And importantly, in *Caspi*, the drafting party did not obscure the fact that the other party was being asked to agree to contractual terms: The forum selection clause appeared in an agreement that the consumer was forced to view and assent to before he could proceed with registering for the product. *Id.* at 530; Samsung Br. 39. *Caspi* would be similar to this case only if Noble had been required to review the Guide Book and sign on the dotted line to signify that he agreed to any terms in it before being allowed to purchase the Smartwatch. Samsung also cites *IT Network Solutions, LLC v. Kaseya U.S. Sales, LLC*, but the plaintiff in that case did not challenge the location of the forum selection clause within the contract at all; instead, the plaintiff challenged the term on the grounds that the forum was inconvenient and the contract unconscionable. No. CIV.A. 14-3455, 2015 WL 733710, at *3-*4 (D.N.J. Feb. 20, 2015). Finally, in *Kowalski v. YellowPages.com, LLC*, the plaintiffs electronically signed the agreements with the forum selection clause and

the plaintiffs presented no evidence that they were not on notice of the clause. 2010 WL 3323749, at *4-*5. These cases show that New Jersey courts apply the same principles of contract formation to forum selection clauses, and any other contractual terms, that the district court applied to the arbitration provision here.

Lastly, Samsung's argument that courts apply a different notice standard to warranty disclaimers than the standard the district court applied here does not support the conclusion that the district court failed to apply generally applicable principles of contract law within the meaning of the FAA. As discussed above, *see supra* pp. 22-29, because of the difference between warranties and standard contract terms, a court's analysis of whether to enforce a warranty disclaimer focuses on whether the buyer would be surprised by its existence, rather than whether the parties mutually agreed to the disclaimer. Therefore, the cases Samsung cites to support its argument that courts enforce warranty disclaimers "without considering their location," Samsung Br. 36, are not relevant to determining whether, in requiring that a purchaser must have reasonable notice that the Guide Book invited his acceptance to an offer to arbitrate disputes, New Jersey law as applied by the district court

discriminates against arbitration agreements in violation of FAA preemption principles.

V. The district court properly relied on *Atalese v. U.S. Legal Services Group* for the principle of contract law that a valid contract requires mutual assent.

The district court was required to look to New Jersey's contract law to determine if an agreement was formed. In doing so, the court properly relied on *Atalese v. U.S. Legal Services Group*, 99 A.3d 306 (N.J. 2014), for the generally applicable rule that a contract requires mutual assent, which requires that parties have "reasonable notice" of contract provisions. JA9-JA10 (citing and quoting *Atalese*, 99 A.3d at 313 & 316). That principle is applicable to all contracts, and in no way singles out or disfavors arbitration agreements. Indeed, Samsung does not contend that *Atalese* stated the law of contract formation incorrectly.

Atalese also held that when it comes to provisions waiving a party's legal rights, like arbitration agreements, mutual assent requires that the party "have full knowledge of his legal rights and intent to surrender those rights." JA9 (quoting *Atalese*, 99 A.3d at 313). Samsung argues that "to the extent *Atalese*" applied a "heightened notice requirement for waiver-of-rights clauses, that requirement would be preempted as to

arbitration agreements." Samsung Br. 40. But the district court did not rely on that aspect of *Atalese* in concluding that no agreement to arbitrate was ever formed. The district held that "no meeting of the minds could have occurred" because Samsung did not give Noble the opportunity to know of the proposal to arbitrate. JA11-JA12. It thus never reached the question addressed in *Atalese*, whether the language of the arbitration provision was adequate to allow "knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent." JA9 (quoting *Atalese*, 99 A.3d at 313). "[T]he resolution of th[e] question [whether *Atalese*'s holding regarding waiver is preempted] is unnecessary if [the plaintiff] … failed to assent to arbitrate [his] claims." *Guidotti v. Legal Helpers Debt Resolution, LLC*, 639 F. App'x 824 (3d Cir. 2016).

Because Noble never agreed to arbitration, the issue of the sufficiency of the language of the arbitration provision to require arbitration here, and Samsung's argument that the FAA preempts New Jersey's requirement that waivers of rights be clearly established, are not "squarely present[ed] … for [the Court's] resolution." *Id.* at 827. Samsung recognizes as much when it says, "Without stating so directly,

the District Court indicated that it *would be justified* in applying a more stringent notice standard to the Arbitration Provision because it required purchasers 'to waive[ ] their ability to resolve any disputes in a court of law.'" Samsung Br. 36 (emphasis added). Samsung's use of the conditional tense in the sentence acknowledges that the court did not apply a heightened notice standard to the arbitration provision, and thus that issue is not before this Court.

In any event, Samsung's preemption argument falls flat, because New Jersey law places "no greater burden" "on an arbitration agreement than other agreements waiving constitutional or statutory rights." *Morgan*, 137 A.3d at 1180. New Jersey's rule requiring that a party's waiver of statutory rights be clearly and unmistakably established "is not specific to arbitration provisions." *Atalese*, 99 A.3d at 313 (collecting cases). As a result, New Jersey's waiver-of-rights rule "place[s] arbitration agreements on an equal footing with other contracts," and it is not preempted. *AT&T Mobility LLC*, 563 U.S. at 339. Thus, even if Samsung's argument for the existence of a contract did not fail under principles of assent applicable regardless of whether a contract involves a

waiver of legal rights, FAA preemption would not bar application of *Atalese* to require a clear and unambiguous manifestation of assent here.

VI. The arbitration clause does not encompass Noble's statutory or common-law rights.

Moreover, if the Court were to reach the issue, Noble could not have had adequate notice that the arbitration provision, even if it were binding to some extent, purports to waive his right to seek relief in court for violations of statutory rights or common-law rights not based on the limited warranty in the Guide Book. The arbitration provision does "not explain, in broadly worded language or any other manner," that Noble is waiving his "right to seek relief in court for … a statutory violation." *Morgan*, 137 A.3d at 1180-81 ("The meaning of arbitration is not self-evident to the average consumer."). Contrary to Samsung's argument, Samsung Br. 32, the waiver-of-rights rule applies outside the employment context. *See id.* (applying the rule to a student enrollment agreement); *Atalese*, 99 A.3d at 309 (applying the rule to a consumer contract). Here, the arbitration provision's language does not "reflect an unambiguous intention to arbitrate" Consumer Fraud Act claims. *Leodori v. CIGNA Corp.*, 814 A.2d 1098, 1104 (N.J. 2003). Nor does it make clear that it applies to common-law claims not based on the

warranty. At most, it suggests that the provision covers claims under the warranty in the Guide Book. Noble's warranty claims, however, are based on Samsung's misleading statements about the Smartwatch battery life that Samsung made on its website, in press releases, and in its advertisements. JA25 (¶¶ 21-25). "Mutual assent to an agreement requires mutual understanding of its terms." *Atalese*, 99 A.3d at 316. Because the arbitration provision does not make "sufficiently clear to a reasonable consumer" that it seeks to bind the consumer to arbitration on any non-warranty or statutory claims, *id.* at 309, Noble could not give informed assent to arbitrate and to waive his rights to pursue relief in a judicial forum on his claims.[8]

CONCLUSION

For these reasons, the Court should affirm the district court's decision.

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[8] Samsung contends that Noble has no claim under the Consumer Fraud Act, because New Jersey law would not apply to his claims. Samsung Br. 11 n.3. However, the merits of Noble's claims are not properly before the Court. "In resolving the arbitrability of particular claims, however, 'a court is not to rule on the potential merits of the underlying claims ….'" *Painewebber Inc. v. Hofmann*, 984 F.2d 1372, 1377 (3d Cir. 1993) (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)).

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Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP, WORD COUNT, IDENTICAL COMPLIANCE OF BRIEFS, AND VIRUS CHECK

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September 9, 2016

/s/ Rachel M. Clattenburg
Rachel M. Clattenburg

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2016, I caused 7 hard copies of the foregoing brief to be sent by UPS Ground to the Clerk's Office for filing. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished on Samsung Electronics America, Inc. by the appellate CM/ECF system.

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