

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 17 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DULCE ALONDRA VELASQUEZ-
REYES, on behalf of herself and others
similarly situated,

Plaintiff-Appellee,

v.

SAMSUNG ELECTRONICS AMERICA,
INC., New Jersey corporation,

Defendant-Appellant.

No. 17-56556

D.C. No.

5:16-cv-01953-DMG-KK

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

Argued and Submitted August 29, 2019
Seattle, Washington

Before: McKEOWN and BYBEE, Circuit Judges, and GAITAN,** District Judge.

Samsung Electronics America, Inc., appeals the district court's denial of its
motion to compel arbitration of Dulce Velasquez-Reyes's claims stemming from

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable Fernando J. Gaitan, Jr., United States District Judge
for the Western District of Missouri, sitting by designation.

Samsung's alleged false advertising. Because the parties are familiar with the facts, we do not recite them here. We have jurisdiction under 9 U.S.C. § 16, and because the factual findings are undisputed, we review de novo the district court's ruling. *Davis v. Nordstrom, Inc.*, 755 F.3d 1089, 1091 (9th Cir. 2014). We affirm.

Under California law, silence or inaction generally does not constitute acceptance of a contract. *See Norcia v. Samsung Telecomms. Am., LLC*, 845 F.3d 1279, 1287 (9th Cir. 2017). An offeree may demonstrate acceptance through conduct, but not where, as here, the contractual provisions are “inconspicuous” and “contained in a document whose contractual nature is not obvious.” *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 993 (1972). We conclude that the inaptly titled booklet containing the terms and conditions and the smartphone packaging's vague reference to terms and conditions are insufficient to put a reasonable consumer (or a reasonably prudent smartphone user) on notice of the arbitration provision that Samsung seeks to enforce. *See Norcia*, 845 F.3d at 1284–86.

Norcia also forecloses Samsung's arguments that California courts have adopted the “in-the box” theory of assent and that the “in-the-box” theory would apply in these circumstances. *Id.* at 1287–90 (citing *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997)). Two non-precedential decisions from California's intermediate court of appeals, both of which address *Hill* only in

passing, do not undermine this conclusion. *See Schuldner v. ITC Fin. Licenses, Inc.*, No. A150522, 2018 WL 416839, at *7 (Cal. Ct. App. Jan. 16, 2018) (unpublished); *Chau v. Pre-Paid Legal Servs., Inc.*, No. B270277, 2017 WL 604721, at *3 (Cal. Ct. App. Feb. 15, 2017) (unpublished).

AFFIRMED.