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Browsewrap Terms Enforced Due to Customer Knowledge of Existence of Terms

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Last month, a California district court granted a web-based service's motion to compel arbitration of a putative class action brought by a user whose personal information was allegedly accessed in a massive 2016 data breach that involved 339 million user accounts. ([Gutierrez v. FriendFinder Networks Inc.](#), No. 18-05918 (N.D. Cal. May 3, 2019)). While the opinion noted that courts in the Ninth Circuit are traditionally "reluctant to enforce browsewrap agreements against individual consumers," the outcome of the case suggests that enforcement of website terms is not just a straight up-or-down analysis of the method used to present the terms to the user but may involve tangential, yet important interactions between the user and the site outside the initial registration process.

The plaintiff, a user of the adult-oriented dating service [adultfriendfinder.com](#), brought negligence and privacy-related claims against its operator, Friendfinder Network (FFN), following the 2016 data breach. FFN moved to compel arbitration based on the website terms, which the site asserted the user assented to when he opened an account and used the site and later when he "confirmed the terms" by making credit card transactions on the site. In response, the plaintiff principally contended that the site's terms were only presented as a browsewrap agreement and that he was able to use the website without expressly agreeing to the site's terms and therefore never agreed to the arbitration provision. As the court noted, the determination of the validity of the purported browsewrap agreement depends on whether the user has actual or constructive knowledge of a website's terms.

The pertinent post-registration interaction with the site occurred in 2013 after the plaintiff apparently lost access to parts of the site due to a violation of the site terms during online chats with other users. To restore access, he had to telephone a site representative who explained that the plaintiff had been banned from the site's chatroom because he violated the site's terms and then reiterated that he would have to abide by the terms in the future if he wanted to use the site (as per the call transcript, the phone rep stated: "Because we set restrictions on the website so you need to follow our rules and regulations"). According to the court, the call with the customer service representative in 2013 gave the plaintiff "at least inquiry notice of the Terms" and that the customer service representative informed the plaintiff multiple times that if he wanted to use the site, he needed to comply with the terms. The court further stated that given his knowledge of the existence of the terms and their easy availability on the site, the plaintiff's failure to read them, despite knowing he was bound by them, could not absolve him of his need to comply with them.

"Regardless whether Plaintiff assented to the Terms to restore his access, he continued to use the website knowing that his use of the site was governed by the Terms. This use of the site, in light of the Terms' provisions regarding acceptance by use, constituted acceptance of the Terms."

"Thus, because Plaintiff had at least inquiry notice of his need to comply with the Terms in using the website, and he continued to use the site knowing he was bound by the Terms, the Court holds that Plaintiff accepted the Terms by using the site."

As a result, the court granted the defendant's motion to compel arbitration. The case stands for an important proposition that enforceability of website terms may, in some cases, be contingent on instances of actual notice of the terms that occur outside the registration process (such as in the [Nicosia case in 2017](#), when the user was



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deemed to have had constructive notice of the site's terms based upon repeated purchases).

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