

16-0005

IN THE CIRCUIT COURT
OF LINCOLN COUNTY,
WEST VIRGINIA:

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CITIZENS TELECOMMUNICATIONS
COMPANY OF WEST VIRGINIA

MICHAEL SHERIDAN, APRIL MORGAN,
TRISHA COOKE, and RICHARD BENNIS,
individually, and on behalf of other similarly-situated
individuals,

Plaintiffs,

v.

Civil Action No. 14-C-115

CITIZENS TELECOMMUNICATIONS
COMPANY OF WEST VIRGINIA d.b.a.
FRONTIER COMMUNICATIONS OF WEST VIRGINIA,
FRONTIER WEST VIRGINIA, INC.,

Defendants.

PROCEDURAL ORDER:

Denying Defendants' Motion to Dismiss and/or Compel Arbitration
But
Granting of Stay
Procedural Posture

On the 19th day of August, 2015, this matter came on for hearing in the above-styled matter, with arguments of counsel in support of, and in opposition to, the Defendants' Motion to Dismiss or, in the alternative, Motion to Compel Arbitration. The Defendants' Motion(s) were brought to dismiss, or at least stay, this action within the context of Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, as reinforced by recent decisions by our State Supreme Court on the issue of compulsory arbitration, as such are set out and discussed hereinafter. As

originally filed, the Plaintiffs' case has been brought as a class action within the parameters of Rule 23 of the West Virginia Rules of Civil Procedure, with their authorities cited on the issue of compulsory arbitration in response, as such are set out and discussed herein. On behalf of the Defendants, as counsel for the moving parties, were Thomas R. Goodwin, Esq., David Fenwick, Esq., and Johnny M. Knisely, Esq., all of Goodwin & Goodwin, together with Archis A. Parasharami, Esq., corporate counsel for the Defendants. On behalf of the Plaintiffs, with the named Plaintiffs appearing to be present in person, as counsel for the opposing parties were Jonathan R. Marshall, Esq., and Patricia M. Kipnis, Esq., of Bailey Glasser, LLP, together with Benjamin Sheridan, Esq., and Mitchell Lee Klein, Esq., of Klein and Sheridan, LC.

WHEREUPON, the Court entertained the Defendants' Motion(s), and the grounds and reasoning argued in support thereof. After which, the Court entertained the Plaintiffs' responses to said Motion(s), and the grounds and reasoning argued in opposition thereto. Following the Court's consideration thereof, the Court directed that proposed Orders be submitted by the respective parties. These proposed Orders have now been so received and this matter is now mature for the Court's issuance of a decision, which is set forth hereinafter.

Discussion of Facts and Law

The Defendants, Citizens Telecommunications Company of West Virginia d/b/a Frontier Communications of West Virginia and Frontier West Virginia (collectively "Defendants" or "Frontier"), have moved to compel arbitration and to dismiss, or in the alternative stay, this action. While there has been little discovery in this matter, the Court has determined that there is a record developed sufficiently to rule upon these Motions, after considering the pleadings; the memoranda of law and all exhibits thereto; and the arguments of counsel, the Court hereby directs that the Defendants' Motion(s) to Dismiss, or to Compel Arbitration be DENIED. The

Plaintiffs, Michael Sheridan, April Morgan, Trisha Cooke and Richard Bennis (collectively "Plaintiffs") are not compelled to submit their claims to arbitration because, under West Virginia law as well as the majority rule nationwide, they did not agree to arbitrate their disputes with Frontier.

Correspondingly, the Defendants' Rule 12 Motion to Dismiss is predicated on the viability of their claim, resulting in a motion, to compel arbitration. Traditionally, Rule 12(b)(6) motions brought by a defendant rise or fall on the issue of whether the trial court, in appraising the sufficiency of a complaint, should dismiss the complaint, in that it appears beyond all doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. [Especially note Cantley, et al. v. Lincoln County Commission, 221 W. Va. 468, 470 (2007)], wherein the Supreme Court of West Virginia reversed and remanded this Court summarily citing the two following syllabus points:

1. "Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syllabus Point 2, State ex rel. McGraw v. Scott Runyan Pontiac- Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995).
2. "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syllabus Point 3, Chapman v. Kane Transfer Company, 160 W.Va. 530, 236 S.E.2d 207 (1977) quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957).

At the same time, however, under these particular facts and circumstances, the Court recognizes the arguments raised by the Defendants at this juncture in the litigation regarding compulsory arbitration are primarily legal in nature; and, are deserving of some opportunity for further judicial review by a *Writ of Prohibition* {see McFoy v. Amerigas, Inc. 170 W. Va. 526 (1982)}, or appeal {see McFoy, op cit, and see also Mitchem v. Melton, 167 W. Va. 21 (1981)}, or

otherwise, as such, in the interests of justice, as well as judicial economy, the Court has correspondingly determined that it is just and reasonable to grant a *Stay* of further discovery or any other proceedings in this matter for a period of thirty (30) business days, in accordance with the provisions of Rule 62(i) of the West Virginia Rules of Civil Procedure. At the conclusion of said thirty (30) business days, should the Supreme Court not have docketed the requested relief that may be prayed for the Defendants, or has expressly refused to grant said requested relief, the *Stay* shall be dissolved and further discovery, or any other proceedings in this matter, shall commence once more, unless or until the Supreme Court of Appeals should grant some other or further relief affecting this matter.

Findings and Conclusions

UPON MATURE CONSIDERATION OF ALL OF WHICH, including the pleadings, the Defendants' Motions and the responses thereto, as both filed and argued, within the limited record thusfar generated by the respective parties, the Court does hereby make the following findings of fact and conclusions of law:

[1] That for purposes of these Defendants' Motion(s) brought and responded to by the respective parties, this Court has statutory and Rule-based jurisdiction and venue over the subject matter, as well as the respective parties hereto, in accordance with the plethora of points and authorities cited, relied upon and applied hereinafter; and,

[2] That from the record, it appears that the Plaintiffs filed their original complaint on October 14, 2014, and their First Amended Class Action Complaint and Jury Demand ("FAC") on November 19, 2014. Frontier filed their motion to compel arbitration and dismiss, or in the alternative to stay, on January 30, 2015, with extensive discovery regarding the issue of compulsory arbitration, being conducted thereafter; and,

[3] That while the Court notes the above, the Court correspondingly has determined that there has been a limited record by discovery thusfar produced in the matter; and, as a result thereof, this Court makes the subsequent findings of fact for the very limited purposes of making these determinations as this time for the peculiar purposes of this Procedural Order, and with the express understanding by the Court that such findings may be subject to revision as the case evolves; and,

[4] That with the parameters as established above, the Court has determined that there is clearly a sufficient basis to determine that the Plaintiffs are each West Virginia residents who subscribe to residential high-speed Digital Subscriber Line (“DSL”) Internet service provided by Frontier. Mr. Sheridan signed up for Frontier internet service in August 2007; Ms. Cooke in June 2010; Mr. Bennis in February 2008; and Ms. Morgan in August 2008. (McCall Aff. ¶¶ 4, 10, 13, 16.); and,

[5] That the parties agree that no Plaintiff ever signed any document containing an arbitration agreement. (Resps. to RFA Nos. 5-8; Exhibits B, C, D, E, Plaintiffs’ Affidavits, at ¶ 2.); and,

[6] That the Plaintiffs filed this putative class action against Frontier, the alleged sole internet service provider to most rural West Virginians, alleging that Frontier’s practice of overcharging and simultaneously failing to provide the high-speed, broadband level of service that it advertises, has created comparatively high profits for Frontier but has failed to provide West Virginia consumers with the internet access that they were promised and for which they pay. According to Plaintiffs’ First Amended Class Action Complaint and Jury Demand (“FAC”), Frontier’s practice, (alleged by the Plaintiffs to be a “dceptive scheme”) is compounded by the

fact that it has apparently used enormous sums of public money to promote its own corporate ends without regard to the needs of its customers; and,

[7] That in 2010, the State of West Virginia's Department of Treasury, part of the State's Department of Commerce, granted Frontier \$42 million to lay the necessary fiber optic cables in order to bring broadband internet to West Virginia. (FAC at ¶10.); and,

[8] That the Plaintiffs allege that Frontier advertises "high speed internet" to West Virginians, but "throttles down" its customers' internet speeds to save costs. (FAC at ¶¶ 13, 14.) The Plaintiffs allege that only twelve percent (12%) of Frontier's West Virginia customers paying for "high speed internet" or broadband, are in actuality receiving true broadband. (FAC at ¶14.); and,

[9] That the Plaintiffs bring claims for violations of the "West Virginia Consumer Credit and Protection Act", codified as, West Virginia Code § 46A-6-104, as defined by Code§ 46A-6-102 (7) (G), (I), (J), (L) and (M); and "unjust enrichment". Plaintiffs further seek a declaratory judgment that the Plaintiffs did not agree to arbitrate any claims arising from any services provided by Frontier and that the claims brought in this lawsuit are not subject to arbitration; and,

[10] That in addition to the legal money damages for actual and statutory damages, together with attorneys' fees and costs, the Plaintiffs are seeking injunctive relief, as a result of the equitable claims that they are pursuing as well; and,

[11] That beginning in February 2013, and continuing until the present day, Frontier has advertised that "no contract" is required to use its services. (Frontier Resp. to Interrog. No. 11.) ; and,

[12] That all four (4) of these Plaintiffs obtained high speed internet from Frontier prior to Frontier's attempt to add an arbitration provision. (Resps. to RFA Nos. 23-26.); and,[12] That one of these Plaintiffs remember agreeing to an arbitration clause or having one explained to them; and,

[13] That all of these Plaintiffs allege that they "never received" internet services at a satisfactory speed. (FAC at ¶¶ 40, 62, 75, 91.); and, as a result, all of these Plaintiffs therefore allege pre-arbitration clause conduct; and,

[14] That by its own terms and conditions of service, Frontier was permitted to unilaterally change its terms and conditions "at any time", and customers could not alter those terms and conditions. (Resp. to RFA Nos. 17, 18.); and,

[15] That commencing in September 2011, after all these Plaintiffs had begun receiving service from the Defendant, Frontier added an arbitration provision to its Terms and Conditions on a page of its website. (Resp. to RFA No. 4); and,

[16] That the arbitration provision states, among other things, that an arbitrator may award relief "on an individual basis only, and may not award relief that affects individuals or entities other than you or Frontier." In other words, the arbitration provision forecloses any class-wide injunctive relief, which would presumably include relief that actually repairs or improves the infrastructure providing these Plaintiffs' and the Class Members' broadband service; and,

[17] That as a whole, the Defendants' customers can only access Frontier's Terms and Conditions by navigating through Frontier's website as follows:

Frontier's website is located at <http://www.frontier.com>. There is a link to the "Terms and Conditions" at the bottom of that page. That link leads to a page called 'General Terms and Conditions,' which includes links to the "Arbitration Provision" and the "Frontier Residential General Terms and Conditions." A customer who clicks either of the "Arbitration Provision" or "Frontier Residential

General Terms and Conditions” links will be able to view the terms of Frontier’s consumer arbitration agreement.

(Frontier Resp. to Interrog. No. 3). The word “arbitration” does not appear on the page displayed upon visiting <http://www.frontier.com/residential>. (Resp. to RFA No. 15.); and,

[18] That as a whole, the Defendants’ customers are not required to visit Frontier’s website to use Frontier’s high-speed internet service, and Frontier has **no records** that these Plaintiffs, or any prospective class member, has ever visited Frontier’s website. (Resp. to Interrog. No. 5; Resp. to RFA No. 13.); and,

[19] That as a whole, the Defendants’ customers are **not** prompted to agree to the terms and conditions in order to use the service, or the service’s website. There is **no written agreement** between these Plaintiffs, or any prospective class member, regarding arbitration on the website; and,

[20] That it appears that Frontier does not maintain records, or have any evidence, establishing that any of these Plaintiffs, or any prospective class member ever viewed the terms and conditions on Frontier’s website. (Response to RFA Nos. 9-12.); and,

[21] That it appears that Frontier cannot determine whether any customer ever opted out of Frontier’s Terms and Conditions due to the arbitration clause. (Letter from D. Fenwick to B. Sheridan re: supplemental discovery responses (July 8, 2015).); and,

[22] That it appears from the record that Frontier claims to have notified these Plaintiffs, and any prospective class member, of the terms and conditions, including the September 2011 addition of the arbitration clause, on their monthly bills. (Frontier Resp. to Interrog. No. 4.); and,

[23] That with one exception in November 2012, however, Frontier does not claim to have actually provided these Plaintiffs, or any prospective class member with the Terms and Conditions, or the text of the arbitration clause, on or with those monthly bills. (*Id.*); and,

[24] That Frontier states that these Plaintiffs- Sheridan, Cooke, and Bennis- received monthly bills in July 2011, referencing the terms and conditions. However, from the Court's review of the bill it seems that the actual terms and conditions were not stated on the "bills" themselves; and, were not even referenced on the page where the customer's actual payment amount was stated. To the contrary, it seems instead that the first page of the bill lists the amount of the last bill, payments received, current charges, taxes, surcharges and other costs. (FRONTIER_291.); and,

[25] That the second page of the bill provides further details of Frontier's service charges, including subtotal minutes. (FRONTIER_292.); and,

[26] That the terms and conditions are only mentioned on the third page of a customer's statement, after the material portion of the "bill" (e. g. the payment amount) and instructions regarding bill's payment on the prior two pages. (FRONTIER_293.) The third page of the customer's statement contains a multitude of information. It first provides a **warning** as to what (a) collection and (b) disconnection activities will occur, if the bill is not paid. Next, it provides a **further breakdown** of current charges. After the breakdown, it provides the consumer with information about how Frontier can help **if the customer is moving**. After that information, it provides further information about how to ensure the customer is only being **properly charged** for authorized services, and **how to dispute charges**. After the dispute information, the bill informs customers about a **decrease in the Federal Universal Service Fund Recovery Charge** from 14.9% to 14.4% of interstate retail revenues, and describes the purpose of the charge; and,

[27] That after providing all of the details set forth above, at the bottom of the third page of the July 2011 bill, Frontier states that "Frontier is providing High-Speed Internet Service to its end user customers pursuant to the Terms and Conditions described at

<http://www.frontier.com/terms>” and then informs the customer as to how that information had been filed in the past. (*Id.*); and,

[28] That Frontier also contends it provided further notice of its arbitration provision in its September 2011 bill; and,

[29] That following the same method of analysis, the Court notes that the first page of that customer statement includes: (a) the amount of the last bill; (b), customer payments received; (c) account balance; and, (d) current amount due. This information is followed by an advertisement for “frontier secure”, a “Nest Learning Thermostat program”. The first page of the September 2011 customer statement concludes with the payment stub. (FRONTIER_295.); and,

[30] That the second page of the September 2011 customer statement begins with (a) an additional promotion (e. g. “Frontier Yahoo Toolbar” which apparently allows users to “customize it”, “stay connected” and “search faster”); (b). it then provides customers with a phone number for billing and service questions; (c), instructions on how to pay the bill; (d), information on past due balance;, and (e) warnings about late payments and returned check fees. (FRONTIER_296.); (f) the final section of page two of the September 2011 lists several “IMPORTANT CONSUMER MESSAGES,” including: (g) risks of being disconnected for failure to pay; (h), potential charges from non-Frontier companies; (i), tariffs and price lists; and, (j) potential treatment charge; and,

[31] That the third page of the September 2011 customer statement again lists (a) all of the monthly service charges; (b) other service charges and (c) credits, taxes and other charges; together with (d) the total; and (e) instructions for enrollment in Frontier’s Auto-Pay program. (FRONTIER_297.); and,

[32] That the fourth page of the September 2011 customer statement presents: (a) further details of federal and state taxes; (b) other charges (FRONTIER_298.);(c) the customer is warned again about the importance of paying all current and past due charges; (d) the customer is given notice that an internet surcharge will increase by \$.50 next month if the customer is not on a “high-speed internet price protection plan”; and,

[33] That only after providing these four (4) pages of information does Frontier state, two-thirds of the way down the fourth page of the bill, that as “part of our Terms and Conditions of service,” it had “recently instituted a binding arbitration to resolve customer disputes.” (*Id.*); and,

[34] That from the record generated at this stage it seems that the actual Terms and Conditions, let alone the text of the arbitration clause Frontier seeks to enforce here specifically, were never stated on any monthly bill sent to Plaintiffs or any customer; and,

[35] That similarly, in January 2012, Frontier sent customers another four (4) page bill that mentioned new arbitration procedures only after three and a half pages of payment information, advertisements, payment stub, past due information, late fee warnings, numerous other “important consumer messages,” and tax and surcharge information. (FRONTIER_299-302); and,

[36] That on one occasion, in November 2012, Frontier distributed a printed copy of its then-current Residential Internet Service Terms and Conditions with the monthly bill as a “special insert” to the bill. (Resp. to Interrog. No. 4). Those Terms and Conditions are stated in small font, single spaced over six pages. The provisions denoted as “Dispute Resolution by Binding Arbitration” is stated beginning at the bottom of page 4 and continues to the top of page 6. (*Id.*); and,

[37] That with respect to all of the exemplar bills, the bill stub appears on the first page. In order to ascertain the amount due for the bill or pay it, then, there is no reason whatsoever for a customer to turn to the last page. Additionally, the bills contain no prompting that customers should flip to the last page for important information concerning Frontier's desire to alter the customer's right to a jury trial; and,

[38] That each Plaintiff has sworn that he or she never saw or read the Terms and Conditions. (Plaintiffs' Affidavits, Exhibit Nos. B, C, D, E at ¶¶ 6, 7); and,

[39] That while this matter is brought as a West Virginia Rules of Civil Procedure Rule 23 Class Action, the preliminary issue is that of the enforceability of the compulsory arbitration provision, as argued by the Defendants. In determining whether an arbitration clause is enforceable, the Court first looks to Section 2 of the Federal Arbitration Act ("the FAA"), and our West Virginia court has interpreted it as follows:

Under the Federal Arbitration Act, 9 U.S.C. § 2, a written provision to settle by arbitration a controversy arising out of a contract that evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable, unless the provision is found to be invalid, revocable or unenforceable upon a ground that exists at law or in equity for the revocation of any contract. Syl. pt. 2, *Schumacher Homes of Circleville, Inc. v. Spencer*, No. 14-0441, 2015 WL 1880234 (W. Va. Apr. 24, 2015) (quoting Syl. Pt. 6, *Brown I*); and,

[40] The *Schumacher* Court further explained:

The FAA recognizes that an agreement to arbitrate is a contract. The rights and liabilities of the parties are controlled by the state law of contracts. But if the parties have entered into a contract (which is valid under state law) to arbitrate a dispute, then the FAA requires courts to honor parties' expectations and compel arbitration.⁴ *Conversely, a party cannot be forced to submit to arbitration any dispute which he or she has not agreed to submit. A court may submit to arbitration "those disputes—but only those disputes—that the parties have agreed to submit to arbitration."* *Id.* (emphasis added) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)). See also *State ex rel. Richmond Am. Homes of W. Va. v. Sanders*, 228 W.Va. 125, 129, 717 S.E.2d 909, 913 (2011) (same); and,

[41] That in light of the above, this Court must further determine whether Frontier's "Arbitration Clause" is part of a legally enforceable contract to which Plaintiffs are bound. "Arbitration is a matter of contract, and a party cannot be required to arbitrate a dispute that it has not agreed to arbitrate." [See U-Haul Co. of W. Va. v. Zakaib, 232 W. Va. 432, 439, 752 S.E.2d 586, 593 (2013)]. Further, "[a]n agreement to arbitrate will not be extended by construction or implication." *Id.* (quoting syl. pt. 10, *Brown I.*); and,

[42] That on this point, the Defendant repeatedly represented to the Plaintiffs and all of their customers, as well as any potential customers, that "NO CONTRACT" governed their relationship. (Resp. to RFAs Nos. 1-5.) The Defendants' position that the term "no contract" means only that customers do not need to agree to a minimum service commitment, but does not mean that the Defendants provide Internet service without any accompanying terms and conditions, is not reflected by the actual language of the advertisements or communicated by Frontier to its customers or potential customers; and,

[43] That while the Defendants' position may be described as ambiguous, at best, the Court has determined that it is not necessary to reach the novel question of whether Frontier's "no contract" advertisements mean what they say, because it is clear under West Virginia law and the majority rule nationwide that no Plaintiff or prospective class member agreed to be bound by the Terms and Conditions containing the arbitration clause when, as explained below, neither Frontier's "browse-wrap" agreement nor its "bill stuffers" obtained Plaintiffs' or class members' assent to those Terms; and,

[44] That the element of contract enforceability requiring "mutual manifestation of assent" is the touchstone of a valid agreement to arbitrate. [See, e.g., State ex rel. AMFM, LLC v. King, 230 W.Va. 471, 478, 740 S.E.2d 66, 73 (2013)]; and,

[45] That for there to be a valid, binding contract compelling arbitration, the party moving to compel must show a “clear manifestation of an agreement” between the parties. {See U-Haul, 232 W. Va. at 439.} This requires a valid offer and a knowing assent; and,

[46] That on this point, the Court finds the Supreme Court’s decision in U-Haul to be on point and particularly instructive in this matter. In U-Haul, customers entered into rental agreements with a defendant either on paper or electronically, 232 W. Va. at 436. The Court considered whether the customer plaintiffs could be compelled to arbitrate their disputes when they were presented with only a one-page pre-printed rental contract which referenced a separate contract addendum, or, in the case of electronic signing, with the terms of the contract on successive screen pages which did not mention the arbitration clause. 232 W. Va. at 436-7. Only the contract addendum contained the terms of the arbitration provision, but customers were not shown the contract addendum during the contract signing process and did not sign the addendum. *Id.* Instead, the contract addendum was provided in a paper copy, folded into thirds like a letter and slipped into a document folder which also contained instructions and advertisements. *Id.* at 437. The defendant argued that the arbitration clauses had been incorporated by reference; the plaintiffs countered that the arbitration agreement had not been clearly and unmistakably extended. *Id.* at 439. The Court agreed with the plaintiffs, finding that U-Haul had been unsuccessful in its attempts to incorporate the addendum into the rental contract, noting the “quite general” reference to the addendum in the contract. *Id.* at 444. The Court found “most troubling” the fact that U-Haul provided its customers a copy of the addendum only after the rental agreement had been executed. *Id.* The Court held that: To uphold the validity of terms in a document incorporated by reference, (1) the writing must make a clear reference to the other document so that the parties’ assent to the reference is

unmistakable; (2) the writing must describe the other document in such terms that its identity may be ascertained beyond doubt; and (3) it must be certain that the parties to the agreement had knowledge of and assented to the incorporated document so that the incorporation will not result in surprise or hardship. (see Syl. pt. 2, U-Haul); and,

[47] That as the Court explained in its decision in U-Haul, “[w]ith the rise of internet commerce and electronic recordkeeping, courts have grappled with new electronic formats of contracts, typically called ‘click-wrap’ or ‘browse-wrap’ agreements.” U-Haul, 232 W. Va. at 440. A “click-wrap” agreement usually “appears on an internet page and requires that a user consent to any terms or conditions by clicking on a dialog box on the screen in order to proceed...” *Id.* (quoting Feldman v. Google, Inc., 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007)). However, unlike a click-wrap agreement, a “browse-wrap” agreement “does not require the user to manifest assent to the terms and conditions expressly.... A party instead gives his assent simply by using the website.” U-Haul, 232 W. Va. at 449, fn. 7 (quoting Southwest Airlines Co. v. BoardFirst, L.L.C., No. 3:06-cv-0891, 2007 WL 4823761, at *4 (N.D. Tex. Sept. 12, 2007)). “For an internet browse wrap contract to be binding, consumers must have reasonable notice of a company’s “terms of use” and exhibit “unambiguous assent” to those terms. Berkson v. Gogo LLC, No. 14-cv-1199, 2015 WL 1600755, at *26 (E.D.N.Y. Apr. 9, 2015) (noting further that, “[b]ecause of the passive nature of acceptance in browsewrap agreements, courts closely examine the factual circumstances surrounding a consumer’s use.”); and,

[48] That a majority rule has emerged holding that the terms of browse-wrap agreements are unenforceable. Berkson, 2015 WL 1600755, at *27 (“courts generally have enforced “browse-wrap” terms only against knowledgeable accessors, such as corporations, not against individuals”); [*see also* Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 22 n. 4 (2d Cir. 2002)

(J. Sotomayor) (unenforceable provision appeared in a “submerged” portion of the website); Cvent, Inc. v. Eventbrite, Inc., 739 F. Supp. 2d 927, 937 (E.D. Va. 2010); Hines v. Overstock.com, Inc., 668 F.Supp.2d 362, 366 (E.D.N.Y. 2009).] This is especially true where, like here, there is no evidence that a website prompted visitors to review the Terms and Conditions. [See Specht, 306 F.3d at 32, n. 4; (“[A] reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry notice of those terms.”); [see also In re Zappos.com Inc., Customer Data Sec. Breach Litig., 893 F.Supp. 2d 1058, 1064 (D. Nev. 2013)] (where terms of use were inconspicuously located, no manifestation of assent to browse-wrap); and,

[49] That subsequent to its review and consideration of the above, the Court hereby concludes that Frontier’s Terms constitute a classic “browsewrap” agreement. The only reference to the Terms on Frontier’s website is a small, inconspicuous link entitled “Terms & Conditions.” To locate this link, a Frontier user would have to scroll all the way to the bottom of an active and busy Frontier website, where the link to the Terms is buried among twenty-five other links. (See Frontier Resp. to Interrog. No. 3.) After finding and clicking on “Terms & Conditions,” a user must then find and click on “General Terms & Conditions.” *Id.* After this second find and click, the user must then click on “Arbitration Provision” or “Frontier Residential General Terms and Conditions” to finally view the terms that would deny him his right to a jury trial. *Id.*; and,

[50] That given these circumstances, particularly noting the impact of this multi-step process, the Court further concludes that this is the prototypical application of an inconspicuously located term; and,

[51] That moreover, should the Defendants be able to establish that the Plaintiffs’ or class members’ used the website generally, it would not result in a valid agreement. (See, e.g., Specht,

306 F.3d at 22, n. 4; Overstock, 668 F. Supp. 2d at 366.) Where a website fails to provide adequate notice of the terms, as is the case here, other courts consistently has determined that “browse-wrap agreements” to be unenforceable. [*See, e.g., Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171, 1179 (9th Cir. 2014)] (“Given the breadth of the range of technological savvy of online purchasers, consumers cannot be expected to ferret out hyperlinks to terms and conditions to which they have no reason to suspect they will be bound”); (*See also Cvent, Inc.*, 739 F. Supp. 2d at 937; Specht, 306 F.3d at 22, n. 4; Overstock, 668 F. Supp. 2d at 366); and,

[52] That the facts and circumstances as presented here are virtually the same to those addressed by courts in Specht, Nguyen, and several other “browse-wrap” cases, where the reviewing courts have refused to find a valid, enforceable agreement. From the record thusfar generated, it appears that Frontier chose not to actually present the Terms to consumers, including these Plaintiffs, or require them to click on a button that would acknowledge acceptance of the Terms; and,

[53] That while West Virginia courts have not had opportunity to adjudicate the enforceability of a “browse-wrap agreement” specifically, the U-Haul decision is helpful as well as readily comparable. In both cases, plaintiff-consumers were not presented with the arbitration clauses at the time of purchase, and the terms were never sufficiently presented to the consumers so as to give rise to an enforceable agreement. (*See U-Haul*, 232 W. Va. at 444.) Under the holdings in U-Haul, Frontier’s “browse-wrap agreement” should not be enforced because it is *far* from “certain that the parties to the agreement had knowledge of and assented to the incorporated document so that the incorporation will not result in surprise or hardship.” (Syl. pt. 2, U-Haul, 232 W. Va. 432.) Notably, it appears that Frontier has acknowledged that consumers would

have no reason whatsoever to use the website, in that it is not necessary to access the website to sign up for service or to pay a bill; and,

[54] That in light of our Supreme Courts' holding in U-Haul, the Court does not find persuasive Frontier's attempt to cast this situation as one where consumers simply did not read their contracts. Rather, this is a case where the purported contracts were insufficiently presented to "manifest assent." Along the same lines, the Court respectfully disagrees with the Minnesota District Court decision in Rasschaert v. Frontier Commc'ns Corp., No. 12-3108, 2013 WL 1149549 (D. Minn. Mar. 19, 2013), enforcing a similar arbitration clause against Minnesota Frontier customers. To this Court, it seems that the Minnesota Court's decision in Rasschaert is distinguishable on, at least two, material bases. First, the Rasschaert decision neglected to engage in any discussion of the guiding legal principles (enforceability of "browse-wrap agreements," whether bill stuffers provide proper notice, etc.) of Frontier's arbitration clause. Second, the Minnesota court appears to have applied Minnesota **employment law** to conclude that Frontier was justified in unilaterally adding an arbitration clause. (*See* Rasschaert, at *6); and,

[55] That this Court further finds that Frontier did not obtain assent to its arbitration provision by referencing its Terms and Conditions in monthly bills, or by the one-time inclusion of the Terms and Conditions as an enclosure, or "bill stuffer" to customers' monthly bills. The Court is further persuaded by the fact that the language Frontier intended to use to bind its customers to arbitration appeared on the fourth and last page of the bills, whereas the first page of the bills contains all of the material information necessary to actually pay a bill; and,

[56] That within this context, the Court takes notice of the decisions around the country rejecting this so called "bill stuffer" argument, and finds, like those courts, that a plaintiff's failure to respond to such "notice" does not constitute the requisite manifest assent to forego the

constitutional right to a jury trial. [*See Kortum-Managhan v. Herbergers NBGL*, 349 Mont. 475, 204 P.3d 693 (2009)] (“making a change in a credit agreement by way of a “bill stuffer” does not provide sufficient notice to the consumer on which acceptance of the unilateral change to a contract can be expressly or implicitly found”); [*See also Martin v. Comcast of California*, 209 Or. App. 82, 146 P.3d 380 (2006)] (bill stuffer evidence supports “the inference that a subscriber could easily have continued using Comcast’s service without ever being aware of the arbitration clause” which “supports the court’s finding that non-action did not signify acceptance of the arbitration term”); [*See also Sears Roebuck & Co. v. Avery*, 163 N.C. App. 207 (2004)] (applying Arizona law to find arbitration clause unenforceable, holding that the “parties did not intend that the ‘Change of Terms’ provision in the original agreement would allow Sears to unilaterally add completely new terms that were outside the universe of the subjects addressed in the original cardholder agreement”); *See also Discover Bank v. Shea*, 362 N.J. Super. 200, 827 A.2d 358 (2001)] (arbitration clause “amendment to the agreement was included with a monthly statement, as a ‘bill stuffer’ and was not seen by Mr. Shea. . . Mr. Shea completed no affirmative act to be bound by the arbitration clause, he never ‘consented’ to it, and it cannot be enforced against him”); [*See also Powertel v. Bexley*, 743 So.2d 570 (Fla. App. 1 Dist. 1999)] (“Powertel prepared the arbitration clause unilaterally and sent it along to its customers as an insert to their monthly telephone bill. The customers did not bargain for the arbitration clause, nor did they have the power to reject it”); [*See also Badie v. Bank of America*, 67 Cal.App.4th 779, 79 Cal. Rptr. 2d 273 (1998)] (bill stuffer sent to customer advising that disputes from that time forward would be resolved by arbitration; court found no “unambiguous and unequivocal waiver in any customer’s failure to close or stop an account immediately after receiving the bill stuffers”); and,

[57] That applying the same rationale to the record as it stand now, it appears that there is no evidence that the Plaintiffs ever received or read the six-page, miniscule-font Terms and Conditions sent to them one time in November 2012. The other monthly bills sent to the Plaintiffs referenced an arbitration provision, but did not provide the text of that provision, and certainly did not put any Plaintiff on notice that continuing to use Frontier's services constituted a waiver of the right to a jury trial; and,

[58] That summarily, it seems that the Plaintiffs were never put on proper notice that Frontier intended to form a binding contract as to arbitration through language on the fourth page of their monthly bills; and,

[59] That as a result of all of the above, the Court has determined that the Defendant's reliance on Schultz v. AT&T Wireless Servs., Inc., 376 F.Supp. 2d 685 (N.D. W. Va. 2005) unpersuasive. In the Schultz case, it appears that the court determined that the plaintiff had accepted the defendant's terms and conditions of service by receiving the product's "Welcome Guide", as well as an oral statement by a store representative, which the Court conformed to be the plaintiff's assent to those terms and conditions, and by choosing to activate and continuing to use the defendant's product thereafter. At this posture of this case, there was no such evidence of notice or assent; and,

[60] That absent such, this Court has concluded that Frontier **did not** obtain Plaintiffs' **manifest assent** to the new Terms and Conditions by way of the bill stuffers; and,

[61] That on the issue of necessary injunctive relief, the Court notes that whether Frontier's arbitration clause is valid and enforceable materially affects Plaintiffs' rights to relief in other ways, including particularly noting that the clause expressly limits the injunctive relief the Plaintiffs may obtain. This broad limitation on Plaintiffs' right to seek injunctive relief is

significant and troubling because it appears likely that only relief “that affects individuals or entities other than [Plaintiffs] or Frontier,” i.e., relief in the form of improvements to Frontier’s broadband infrastructure, will adequately compensate and prevent further injuries to Plaintiffs; and,

[62] That in light of this express restriction, the Defendants’ response to the Plaintiffs’ injunction argument is that AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 563 U.S. 333 (2011) “itself involved claims for injunctive relief in addition to damages.” Plaintiffs are not contending that disallowance of class-wide proceedings is *per se* unconscionable, as argued and rejected in *Concepcion*, but rather that the Defendants are effectively foreclosing any possibility of *individual* relief through its broad sweeping prohibition on injunctions that might “affect other[s].” Moreover, the *Concepcions* sued over the improper charging of sales tax, not the on-going provision of individual as well as class-wide services. 131 S.Ct. at 1741. From the Court’s review, there was no discussion whatsoever in *Concepcion* of a “need for injunctive relief” that might affect others beyond the plaintiffs; and,

[63] That in arguing their respective positions, both the Plaintiffs and the Defendants claim to stand on “black letter” law. In that respect, the Court notes that it is black-letter law that a contract cannot stand on an illusory promise. *See, e.g.*, 1 Walter H.E. Jaeger, Williston on Contracts § 43, at 140 (3d ed. 1957). If a promisor enters an agreement, but retains an unlimited right to later decide the extent of his performance, the promise is illusory and the agreement is unenforceable. In this matter it seems clear that the Defendants modified the Terms after the Plaintiffs had already become Frontier’s customers. Frontier inserted the Arbitration Clause into the terms in September 2011, more than a year after any Plaintiff first became a Frontier

customer and **more than a year after** any Plaintiff allegedly suffered inadequate service from Frontier; and,

[64] That in this context, our Court in Monto v. Gillooly, 107 W.Va. 151, 147 S.E. 542, (1929) held:

The party asserting a modification of a contract carries the burden of proof. He must demonstrate that the minds of the parties definitely met on the alteration. This burden is not sustained, as a matter of law, by merely showing that the adverse party failed to protest the change.

(See Syl. pt. 2, *id.*). Further, it is well established that to establish a modification of a written contract, there can be no subsequent modification of such contract without consideration. [*See Bischoff v. Francesa*, 133 W. Va. 474, 489, 56 S.E.2d 865, 873-74 (1949)]; and,

[65] That the Defendants' Rule 12 Motion to Dismiss is predicated on the viability of their claim, resulting in a motion, to compel arbitration. Traditionally, Rule 12(b)(6) motions brought by a defendant rise or fall on the issue of whether the trial court, in appraising the sufficiency of a complaint, should dismiss the complaint, in that it appears beyond all doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. [Especially note Cantley, et al. v. Lincoln County Commission, 221 W. Va. 468, 470 (2007)], wherein the Supreme Court of West Virginia reversed and remanded this Court summarily citing the two following syllabus points:

1. "Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syllabus Point 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995).

2. "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syllabus Point 3, Chapman v. Kane Transfer Company, 160

W.Va. 530, 236 S.E.2d 207 (1977) quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957); and,

[66] That in applying the traditional standard for Rule 12(b)(6) Motions, then, this Court recognizes that the historical standard is not as applicable in determining whether or not the motion should be granted. In particular, this Court in appraising the sufficiency of the complaint concludes that there is a set of facts upon which the Plaintiffs' claims would entitle them to relief. (See Cantley op cit), However, it is not the set of facts that is truly at issue, but the Plaintiffs' claim in light of the Defendants' Motion to Compel Arbitration that is truly at issue; and,

[67] That given these considerations, the Court further concludes that the arbitration clause cannot be applied so as to require arbitration of pre-clause disputes, which would include the Plaintiffs' allegations of conduct before September 2011. [See New v. GameStop, Inc., 232 W. Va. 564, 580, 753 S.E.2d 62, 71 (W. Va. 2013)] (finding mutuality of assent to arbitrate when defendant was required to give employees thirty days' notice of any modification or rescission "*and any such modification or rescission may only be applied prospectively.*") (emphasis added); (see also Powertel, *supra*, 743 So. 2d at 574) (arbitration clause cannot apply retroactively to later lawsuit); (See also Discover Bank, *supra*, 362 N.J. Super. at 201) (defendant could not amend credit card agreements "retroactively by way of a 'bill stuffer' notice which abrogates [plaintiffs'] right to trial and right to bring a class action".); and,

[68] That when viewed synoptically, then, it is just and reasonable for this Court to conclude that the Plaintiffs cannot be compelled to submit to arbitration because they did not agree to arbitrate their disputes with Frontier through either the "browsewrap agreement" presented on Frontier's website, through the one time inclusion of the Terms and Conditions in Plaintiffs' mailed bills, or through any other means; and,

[69] That moreover, the Court has concluded that it is necessary and proper to hold that Frontier's arbitration clause cannot be applied so as to require arbitration of pre-clause disputes, which would include Plaintiffs' allegations of conduct before September 2011; and,

[70] That in light of the record thusfar generated, and given the current posture of the law in the State of West Virginia, the Court further concludes that it is just and equitable to STAY the Court's determinations at this time for a period of thirty (30) business days to allow either or both parties hereto to apply for a Writ of Prohibition, thereby allowing further judicial review by our Supreme Court, all in the interests of justice as well as judicial economy; and,

[71] That given such, the Defendants' Motion to Dismiss is hereby DENIED; that the Defendants' Motion to Compel Arbitration is hereby DENIED; and, that the Defendants' Motion for a Stay is hereby GRANTED for a period of thirty (30) business days, or unless or until an Order affecting such is issued by our Supreme Court of Appeals

[72] That the Court notes of record the OBJECTIONS AND EXCEPTIONS of all parties adversely affected hereby.

All of which is hereby ORDERED, ADJUDGED and DECREED.

It is further so hereby ORDERED, ADJUDGED and DECREED that the Clerk of this Court shall provide notice of the issuance of this Procedural Order, subsequent to its entry, unto all of the respective parties hereto, through counsel as appropriate, all in accordance with the applicable provisions of Rules 10.2-12.06 of the West Virginia Trial Court Rules.

ISSUED on this the 30th day of November, 2015, A. D.

CHIEF JUDGE
ENTERED
NOV 30 2015

TESTE
A TRUE COPY