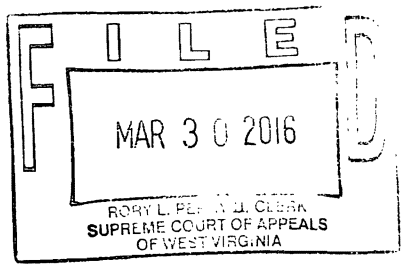
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 16-0005



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

Petitioners

v.

MICHAEL SHERIDAN, APRIL MORGAN, TRISHA COOKE, and RICHARD BENNIS,

Respondents

On Petition for Appeal from an order of the Circuit Court of Lincoln County (14-C-115)

PETITIONERS' BRIEF

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INTRODUCTION

The Federal Arbitration Act, 9 U.S.C. §§ 1–16 ("FAA"), requires Plaintiffs to honor their agreements to arbitrate their claims regarding the Internet service provided by Frontier West Virginia Inc. and Citizens Telecommunications Company of West Virginia d/b/a Frontier Communications of West Virginia (collectively, "Frontier"). In denying Frontier's Motion to Compel Arbitration, the Order adopted by the Circuit Court of Lincoln County below demonstrated unremitting hostility towards arbitration. The FAA was enacted to prevent exactly this type of hostile treatment of arbitration. To enforce that mandate, the Supreme Court of the United States has repeatedly intervened to remedy state court decisions that run afoul of the FAA. *See DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Nitro-Lift Techs, L.L.C. v. Howard*, 133 S. Ct. 500 (2012) (per curiam); *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam); *KPMG LLP v. Cocchi*, 132 S. Ct. 23 (2012) (per curiam); *see also Schumacher Homes, Inc. v. Spencer*, 2016 WL 763198 (U.S. Feb. 29, 2016) (granting petition for certiorari and vacating the judgment below for further consideration of light of *Imburgia*); *Ritz-Carlton Dev. Co. v. Narayan*, 136 S. Ct. 800 (2016) (mem.) (same).

This Court cannot allow such hostility to stand, and the decision below should be reversed. Indeed, the case for reversal is straightforward. Plaintiffs had no meaningful challenge to the fairness of Frontier's consumer-friendly arbitration provision—which is fundamentally similar to the AT&T arbitration provision upheld by this Court in *Shorts v. AT&T Mobility*, 2013 WL 2995944 (W. Va. June 17, 2013) (mem.) and by the U.S. Supreme Court in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). Rather, Plaintiffs principally argued below that they are not bound by the arbitration provision at all. But that argument was fundamentally flawed—and the Circuit Court therefore erred in adopting it—because of two key facts that remain undisputed. First, each Plaintiff received a ***paper*** copy of ***all*** of Frontier's Terms—which

included the relevant arbitration provision—in November 2012, nearly ***two years*** before they filed suit. Second, each Plaintiff has continued to use and pay for Frontier Internet service after receiving and having an opportunity to review those Terms—actions that the Terms themselves specified would constitute acceptance.

These two facts—standing alone—are dispositive. They show that, well before Plaintiffs filed suit, Frontier notified Plaintiffs of the Terms governing their Frontier service, including the requirement that they resolve any disputes by arbitration, and Plaintiffs assented to those Terms. And the remainder of Plaintiffs' arguments are meritless.

ASSIGNMENTS OF ERROR

1. The Circuit Court erred in concluding that no arbitration agreement was formed when each Plaintiff continued to use and pay for Frontier's services after undisputedly receiving notice of Frontier's Terms containing an arbitration provision, including receiving a hard copy of Frontier's Terms in November 2012.

2. The Circuit Court erred in concluding that Frontier's arbitration provision is illusory and lacks consideration.

3. The Circuit Court erred in ruling that Frontier's arbitration provision does not cover preexisting claims.

4. The Circuit Court erred in holding that Frontier's arbitration provision is unenforceable because of its prohibition on class-wide injunctive relief.

STATEMENT OF THE CASE

A. Plaintiffs' Acceptance Of Frontier's Terms.

Plaintiffs Michael Sheridan, April Morgan, Trisha Cooke, and Richard Bennis (collectively, "Plaintiffs") are each West Virginia residents who subscribe to Frontier's residential Internet service. Mr. Sheridan has paid for and received that service since August

2007, Ms. Cooke since June 2010, Mr. Bennis since February 2008, and Ms. Morgan since August 2008. A.R. 119–123.

Plaintiffs' contractual rights and obligations are defined by Frontier's Residential Internet Service Terms and Conditions ("Terms"). Since at least 2011, Frontier has posted and continues to post these Terms on its website (at www.frontier.com/terms). A.R. 247–248. The Terms state that "**BY USING FRONTIER HIGH SPEED INTERNET SERVICES OR EQUIPMENT, YOU ARE AGREEING TO THESE TERMS AND CONDITIONS.**" A.R. 265 (boldface and capitalization in original); A.R. 269 (same); *see also* A.R. 251 ("BY USING OR PAYING FOR FRONTIER INTERNET SERVICES OR EQUIPMENT, YOU ARE AGREEING TO THESE TERMS AND CONDITIONS") (capitalization in original); A.R. 259 (same).

Those Terms further provide that Frontier may propose changes by giving customers at least 30 days' notice of the revision. The version of this clause that was in effect between July 21, 2011 and March 7, 2013 provided:

> **OUR RIGHT TO MAKE CHANGES**
>
> **UNLESS OTHERWISE PROHIBITED BY LAW, FRONTIER MAY CHANGE PRICES, TERMS AND CONDITIONS AT ANY TIME BY GIVING YOU 30 DAYS NOTICE BY BILL MESSAGE, E-MAIL, OR OTHER NOTICE, INCLUDING POSTING NOTICE OF SUCH CHANGES ON THIS WEBSITE, UNLESS THE PRICES, TERMS AND CONDITIONS ARE GUARANTEED BY CONTRACT. YOU ACCEPT THE CHANGES IF YOU USE THE SERVICES AFTER NOTICE IS PROVIDED.**

A.R. 248, 267, 271 (boldface and capitalization in original). The current version, which has been in effect since March 2013, is materially similar. A.R. 248, 256, 263.

Pursuant to that clause, Frontier revised its Terms in September 2011, adding an arbitration provision. A.R. 248, 270–271. Frontier again revised its Terms in January 2012 to make the arbitration provision even more consumer-friendly. *Compare* A.R. 271 *with* A.R. 267.

Frontier informed all of its customers, including Plaintiffs, of its revised Terms containing the arbitration provision. Most notably, in November 2012 Frontier enclosed a ***printed hard copy*** of the Terms, as revised in January 2012, with the bill of each customer who receives a paper bill—***including all four Plaintiffs***. A.R. 277–278, 281–282. Plaintiffs' November 2012 mailings also included the following message, printed directly on the bill itself, notifying them of the enclosure and its contents:

> Frontier has made revisions to the Terms and Conditions that apply to your Residential Frontier Internet service. The revised Terms and Conditions are posted at www.frontier.com/terms/ and are included as a special insert in this bill. By using and paying for Frontier Internet services, you are agreeing to these revised Terms and Conditions and the requirement that disputes be resolved by individual arbitration instead of class actions and/or jury trials. You may opt out of the revised Terms and Conditions and instead remain subject to your previously applicable terms by calling 1-866-606-2849 . . . within 30 days from the date of this bill.

A.R. 278; *see also* A.R. 140–143, 171–174, 203–207, 233–236.

Even before November 2012, Frontier notified Plaintiffs of the Terms through a notice on their September 2011 bills informing them that the Terms had had been revised to include an arbitration provision. That notice stated:

> As part of our Terms and Conditions of service, Frontier has recently instituted a binding arbitration provision to resolve customer disputes. This provision will become effective 45 days from the date of this bill. Please refer to www.frontier.com or call Frontier 1-800-426-7320, option 3 for more information.

A.R. 130–133, 160–163, 193–196, 223–226. Similarly, Frontier notified Plaintiffs in their January 2012 bills that it had revised the arbitration provision. A.R. 120–123, 135–138, 165–169, 198–201, 228–231, 277.

Each of the Plaintiffs could have cancelled his or her Frontier service at any point without penalty, including after he or she was notified that the arbitration provision would become effective within 45 days. A.R. 130–132, 135–138, 160–163, 165–168, 193–196, 198–201, 223–

226, 228–231. None did so. A.R. 121–123. Instead, each of the Plaintiffs continued to pay for and receive Frontier's service.

B. The Consumer-Friendly Arbitration Provisions.

The second sentence of the Terms sent to each Plaintiff in November 2012 states, on the first page of the document, that "**THIS AGREEMENT REQUIRES THAT ANY DISPUTE BE RESOLVED BY BINDING ARBITRATION ON AN INDIVIDUAL BASIS[.]**" A.R. 281 (boldface and capitalization in original). And the arbitration provision itself—under the heading "**DISPUTE RESOLUTION BY BINDING ARBITRATION**"—provides that "You and Frontier agree to arbitrate all disputes and claims between us including, but not limited to, all claims arising out of or relating to any aspect of our relationship, whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory, that arose either before or during this or any prior Agreement, or that may arise after termination of this Agreement." A.R. 282 (boldface and capitalization in original). The arbitration provision further provides that "**you and Frontier agree to each unconditionally waive the right to a trial by jury or to participate in a class action, representative proceeding or private attorney general action**" (*id.* (boldface in original)), and that "**You and Frontier agree that we each may bring claims against the other only in an individual capacity and not as a plaintiff or class member in any purported class, representative or private attorney general proceeding**" (A.R. 281 (boldface in original)).

Frontier's arbitration provision is substantially similar to the one that was lauded by the U.S. Supreme Court in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) and that this Court upheld in *Shorts v. AT&T Mobility*, 2013 WL 2995944 (W. Va. June 17, 2013) (mem.). The key features of Frontier's arbitration provision include:

- **Cost-free arbitration:** For claims for damages up to $10,000 (or non-monetary relief of value up to $10,000), Frontier will pay *all* American Arbitration Association ("AAA") filing, administration, and arbitrator fees, unless the arbitrator finds that the claim or the relief sought is frivolous or improper under the standards of Federal Rule of Civil Procedure 11(b);
- **Double recovery up to $5,000 if arbitral award exceeds Frontier's settlement offer:** If the arbitrator awards a customer an amount of money greater than any settlement offer made by Frontier before the appointment of the arbitrator, but less than $5,000 (or if Frontier makes no settlement offer and the arbitrator awards the customer any monetary relief less than $5,000), "Frontier agrees to pay [the customer] double the arbitrator's award up to, but not more than, $5,000," or the arbitral award itself if it is greater than $5,000;
- **Frontier disclaims right to seek attorneys' fees:** "Although Frontier may have a right to an award of attorneys' fees and expenses if it prevails, Frontier agrees that it will not seek such an award [from the customer]";
- **Small claims court option:** Either party may bring a claim in small claims court;
- **No confidentiality requirement:** The customer and his or her attorney need not keep the arbitration confidential;
- **Full remedies available:** The arbitrator may award the consumer any form of individual relief (including punitive damages, statutory damages, attorneys' fees, and individualized injunctions) that a court could award;
- **Flexible consumer procedures:** Arbitration will be conducted under the AAA's Consumer Arbitration Rules, which the AAA designed with consumers in mind;

- **Conveniently located hearing:** Arbitration will take place "at a location that the AAA selects in the state of your primary residence unless [the customer] and Frontier agree otherwise";
- **Choice of in-person, telephonic, or no hearing:** For claims of $10,000 or less, customers have the exclusive right to choose whether the arbitrator will conduct an in-person hearing, a hearing by telephone, or a desk arbitration in which "the arbitration will be conducted solely on the basis of documents submitted to the arbitrator"; and
- **Right to a written decision:** "Regardless of the manner in which the arbitration is conducted, the arbitrator shall issue a reasoned written decision sufficient to explain the essential findings and conclusions on which the award is based."

A.R. 281–282.

C. Plaintiffs Sue Despite The Arbitration Provisions.

Notwithstanding their assent to arbitration, Plaintiffs Sheridan, Morgan, and Cooke filed this putative class action on October 14, 2014 in the Circuit Court of Lincoln County and amended their complaint to add Plaintiff Bennis on November 21, 2014 (A.R. 30–51). In the First Amended Complaint, Plaintiffs allege that Frontier advertises that it provides customers with Internet service at certain speeds, but that Frontier improperly "throttles" its service and therefore provides Internet service at speeds that are not as fast as advertised. *E.g.*, A.R. 32, 34–35, 37, 40, 42, 44. They seek to represent a putative statewide class of Frontier customers who receive high-speed Internet access or broadband services. A.R. 45.

Frontier timely moved to compel arbitration. A.R. 52–53. The Circuit Court held a hearing on the motion on August 19, 2015. A.R. 563–591. Following the hearing, the Circuit

Court directed the parties to submit proposed orders on the motion, with Frontier submitting its order first and then Plaintiffs submitting their proposed order 30 days later. A.R. 551–562, 588–589.

D. The Opinion Below.

On November 30, 2015, the Circuit Court entered an order denying Frontier's Motion to Compel Arbitration. A.R. 1–24. The court adopted, often verbatim, virtually all of the Plaintiffs' arguments. In incorporating those arguments, the Circuit Court appeared to offer four reasons for denying arbitration—each of which are mistaken, for the reasons explained in this brief. First, the court concluded that Plaintiffs never agreed to the arbitration provision in Frontier's Terms. A.R. 13–20. Second, the court held that Frontier's arbitration provision is "illusory" and lacks consideration. A.R. 21–22. Third, the court held that the arbitration provision does not apply to preexisting disputes. A.R. 23–24. And fourth, the court held that the arbitration provision is unenforceable because it precludes Plaintiffs from obtaining class-wide injunctive relief. A.R. 20–21.

Frontier timely filed this Petition for Appeal. This Court has jurisdiction, because "[a]n order denying a motion to compel arbitration is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine." Syl. Pt. 1, *Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 745 S.E.2d 556 (2013).

SUMMARY OF ARGUMENT

The Circuit Court's denial of Frontier's Motion to Compel Arbitration is wrong at nearly every turn. The Circuit Court ignored or minimized both the undisputed facts and the considerable weight of authority supporting the enforcement of Frontier's consumer-friendly arbitration provision.

I. The principal debate in this case is whether Plaintiffs are bound by the arbitration provision. They are, for two basic reasons. First, it is undisputed that all four Plaintiffs received a physical copy of Frontier's Terms in November 2012—nearly two years before this lawsuit was filed. And second, Plaintiffs, by their conduct, manifested acceptance of those Terms—including the arbitration clause—in the manner specifically provided for in the Terms. Settled West Virginia law establishes that ***Frontier's offer and Plaintiffs' acceptance formed a unilateral contract.***

The Circuit Court brushed aside these critical points, instead dedicating much of its Order to a digression on so-called "browsewrap" contracts and concluding that Plaintiffs are not bound by the Terms Frontier made available to them on Frontier's web site. But that analysis tries to force a square peg into a round hole: The Circuit Court's discussion of browsewrap contracts, which involve agreements formed ***online***, does not fit the situation here, in which Plaintiffs each received a ***physical, printed copy*** of the Terms governing their use of Frontier's service and then continued to pay for and use Frontier's services after receiving those Terms.

The remaining obstacles to contract formation that the Circuit Court raised topple over at the slightest examination. The Circuit Court's conclusion that Frontier was required to place extra emphasis on the arbitration provision accompanying its customers' November 2012 bills squarely conflicts with the FAA and *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), which held that the FAA does not permit courts to impose special notice requirements on arbitration provisions. In any event, Frontier's Terms repeatedly highlighted the arbitration provision. Furthermore, the Circuit Court's conclusion that Frontier could not revise the Terms by sending them as accompaniments to a customer's monthly bill is contrary to the holdings of numerous courts across the country—all of which were ignored by the court below. Instead, the

Circuit Court repeated Plaintiffs' list of stale cases that rest on judicial suspicion of arbitration—despite the Supreme Court's repeated pronouncements that such suspicion is out of step with the strong federal policy in favor of arbitration embodied by the FAA.

II. The Circuit Court disregarded well-settled principles of contract law in concluding that Frontier's arbitration provision is illusory and lacking in consideration. The plain text of the arbitration provision makes clear that Frontier's agreement to arbitrate is not an "illusory promise"—i.e., a promise that "does not actually bind or obligate the promisor to anything." *Toney v. EQT Corp.*, 2014 WL 2681091, at *4 (W. Va. June 13, 2014) (mem.) (quoting *Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 543 (4th Cir. 2005)). Rather, Frontier's provision allows the customer to ***reject*** any further changes Frontier might make to the arbitration provision and instead require Frontier to arbitrate under the existing Terms as written. Courts have repeatedly rejected arguments that such an arbitration provision is illusory. In addition, Frontier's mutual agreement to arbitrate disputes constitutes sufficient consideration for the arbitration provision. As this Court recently put it, "mutual commitments to arbitrate alone constitute sufficient consideration to support the contract." *Toney*, 2014 WL 2681091, at *3; *accord Captain D's LLC v. McClenathan*, 2006 WL 3409757, at *5 (S.D. W. Va. Nov. 27, 2006) (holding that for arbitration agreements to be supported by mutual consideration under West Virginia law, "the parties need only be mutually bound by the arbitration process"). That conclusion is in accord with numerous cases from across the country.

III. The Circuit Court's conclusion that Frontier's arbitration provision does not apply to disputes arising out of conduct that pre-dates the arbitration agreement squarely conflicts with both the language of the provision and the FAA. Frontier's arbitration provision broadly includes "all disputes and claims between us, including, but not limited to, all claims arising out

of or relating to any aspect of our relationship . . . that arose either ***before*** or during this or any prior Agreement, or that may arise after termination of this Agreement" (emphasis added). And the FAA itself explicitly provides that parties may agree to arbitrate "an ***existing*** controversy." 9 U.S.C. § 2 (emphasis added). As such, courts have held that parties may agree to arbitrate disputes that arose before the parties entered into the arbitration agreement. Indeed, in *Concepcion* itself, the Supreme Court applied the version of AT&T's arbitration provision "reflect[ing] revisions made in December 2006" to a dispute arising out of the plaintiffs' February 2005 cell phone purchases. 563 U.S. at 336; *see also* First Amended Complaint (Dkt. No. 4) ¶¶ 4, 8, *Concepcion v. Cingular Wireless LLC*, No. 06-cv-00675 (S.D. Cal. May 2, 2006) (describing the underlying phone purchases).

IV. Finally, the Circuit Court's conclusion that Frontier's arbitration provision is unenforceable because it prohibits Plaintiffs from pursuing class-wide injunctive relief is foreclosed by the FAA. That holding blatantly disregards the Supreme Court's decision in *Concepcion*, which itself involved claims for class-wide injunctive relief. As the Court explained in *Concepcion*, "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 563 U.S. at 344. The Court further explained that public policy arguments in favor of a different state-law rule—such as one requiring the availability in arbitration of broad injunctive relief on behalf of a putative class or the public at large—must be rejected, because "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 351. Courts in other jurisdictions have overwhelmingly rejected analogous arguments in the wake of *Concepcion*. Moreover, Plaintiffs waived the argument by failing to

develop it below (apart from a throwaway phrase in their opposition), instead raising it only at oral argument on Frontier's Motion to Compel Arbitration.

STATEMENT REGARDING ORAL ARGUMENT

Frontier respectfully requests oral argument. Oral argument is warranted under Rule 19(a)(1) of the West Virginia Rules of Appellate Procedure because the Circuit Court erred in its interpretation and "application of settled law," including state-law principles of contract formation as well as the FAA.

STANDARD OF REVIEW

This Court's "review of whether Petitioner[s'] [arbitration] Agreement represents a valid and enforceable contract is de novo." *State ex rel. Saylor v. Wilkes*, 216 W. Va. 766, 772, 613 S.E.2d 914, 920 (2005). Likewise, "[i]nterpreting a statute," such as the FAA, "presents a purely legal question subject to *de novo* review." Syl. Pt. 1, *Fountain Place Cinema 8, LLC v. Morris*, 227 W. Va. 249, 707 S.E.2d 859 (2011) (quotation marks omitted).

To the extent that disputed questions of fact are at issue, "[g]enerally, this Court reviews findings of fact for clear error . . . ." *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 213, 470 S.E.2d 162, 167 (1996). "However, ostensible 'findings of fact,' which entail the application of law or constitute legal judgments which transcend ordinary factual determinations, must be reviewed *de novo*." *Id.*

ARGUMENT

I. THE CIRCUIT COURT ERRED IN CONCLUDING THAT NO ARBITRATION AGREEMENT WAS EVER FORMED BETWEEN PLAINTIFFS AND FRONTIER.

It should have been straightforward for the Circuit Court to conclude that Plaintiffs assented to Frontier's Terms, including the consumer-friendly arbitration provision. The physical, printed copy of the Terms that was sent to each of the Plaintiffs in November 2012

constituted an offer to contract. More specifically, the Terms constituted an offer to modify the existing contractual relationship between the parties, which is governed by the same rules as offers to contract generally. *See, e.g.* Syl. Pt. 2, *Wheeling Downs Racing Ass'n v. W. Va. Sportservice, Inc.*, 157 W. Va. 93, 199 S.E.2d 308 (1973). Plaintiffs accepted that offer by the very method provided for by the Terms: It is undisputed that Plaintiffs each received Frontier's Terms and continued to use and pay for Frontier's services after receiving those Terms. *See also* Restatement (Second) of Contracts § 29 cmt. a (1981) ("The offeror is the master of his offer."). It "is well established," this Court has instructed, "[t]hat an acceptance may be effected by silence accompanied by an act of the offeree which constitutes a performance of that requested by the offeror." *First Nat'l Bank of Gallipolis v. Marietta Mfg. Co.*, 151 W. Va. 636, 641–42, 153 S.E.2d 172, 176–77 (1967).

The Circuit Court ignored these principles and instead adopted nearly wholesale Plaintiffs' submissions that they are not bound by Frontier's Terms. In reaching that conclusion, the Circuit Court erroneously minimized at every turn the significance of the fact that ***Plaintiffs received a physical, hard copy of Frontier's Terms in November 2012***—nearly two years before Plaintiffs filed this lawsuit. As further detailed below, the Circuit Court should be reversed, and arbitration should be ordered.

A. It Is Undisputed That Frontier Sent, And Plaintiffs Received, A Paper Copy Of Frontier's Terms, Including The Operative Arbitration Provision.

The Order below stated that "there is no evidence that the Plaintiffs ever ***received*** or read" Frontier's Terms (A.R. 20 (Order ¶ 57) (emphasis added)); that "Frontier chose not to actually present the Terms to consumers, including these Plaintiffs" (A.R. 17 (Order ¶ 52)); and that "the actual Terms and Conditions, let alone the text of the arbitration clause . . . were never stated on any monthly bill sent to Plaintiffs or any customer" (A.R. 11 (Order ¶ 34)).

Those characterizations are misleading and clear error. In particular, it is undisputed that Frontier enclosed a printed copy of its then-current Terms—which included the arbitration provision—with the November 2012 bill of each customer (including all four named plaintiffs) who receives paper bills. A.R. 277–278, 281–282. Those Terms stated at the outset that "BY USING OR PAYING FOR FRONTIER INTERNET SERVICES OR EQUIPMENT, YOU ARE AGREEING TO THESE TERMS AND CONDITIONS." A.R. 281. Frontier also showed that Plaintiffs' November 2012 bills themselves stated the following:

> Frontier has made revisions to the Terms and Conditions that apply to your Residential Frontier Internet service. The revised Terms and Conditions are posted at www.frontier.com/terms/ ***and are included as a special insert in this bill.*** By using and paying for Frontier Internet services, you are agreeing to these revised Terms and Conditions and the requirement that disputes be resolved by individual arbitration instead of class actions and/or jury trials. You may opt out of the revised Terms and Conditions and instead remain subject to your previously applicable terms by calling 1-866-606-2849 . . . within 30 days from the date of this bill.

A.R. 278 (emphasis added); *see also* A.R. 140–143, 171–174, 203–207, 233–236.

Critically, Plaintiffs ***never disputed*** that they actually received the revised Terms. Instead, each Plaintiff submitted to the Circuit Court a virtually identical, cookie-cutter affidavit denying that he or she "saw," "read," or "agree[d] to the Terms and Conditions." A.R. 498–499, 501–502, 504–505, 507–508. But ***not one*** of the Plaintiffs denied (a) that he or she received the November 2012 bill; (b) that the bill contained a message specifically disclosing that the revised Terms were enclosed and that they contained an arbitration provision; or (c) that a printed copy of the Terms was actually enclosed with their bill. *See id.* Thus, there is no legitimate factual dispute that each Plaintiff received his or her November 2012 bill along with a copy of the Terms containing Frontier's arbitration provision.

Plaintiffs' alleged failure to ***read*** contractual terms available to them does not relieve them of their obligations under those terms. Under West Virginia law, "[a] court can assume that

a party to a contract has read and assented to its terms." *New v. GameStop, Inc.*, 232 W. Va. 564, 578, 753 S.E.2d 62, 76 (2013) (per curiam); *see also Sedlock v. Moyle*, 222 W. Va. 547, 551, 668 S.E.2d 176, 180 (2008) (per curiam) ("[I]n the absence of extraordinary circumstances, the failure to read a contract before signing it does not excuse a person from being bound by its terms."). And absent "fraud, misrepresentation, duress, or the like"—grounds that neither Plaintiffs nor the Circuit Court have contended exist here—"the court can assume that the parties intended to enforce the contract as drafted." *GameStop*, 232 W. Va. at 578, 753 S.E.2d at 76. In *GameStop*, for example, this Court rejected the argument that an arbitration agreement could not be enforced because the plaintiff "claim[ed] that she was not advised that she was agreeing to arbitrate future claims," reasoning that such a claim was not enough "to rebut the presumption" under West Virginia law "that a party to a contract is charged with knowledge of its terms." *Id.* *GameStop* compels rejection of the Circuit Court's reasoning here.

Moreover, this well-established principle of West Virginia law is fully in accord with black-letter law across the country. The U.S. Court of Appeals for the Ninth Circuit has explained that the "failure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract." *Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171, 1179 (9th Cir. 2014) (citing *Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 11 (1988)); *see also, e.g.*, *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1200 (9th Cir. 2002) ("[O]ne who signs a contract is bound by its provisions and cannot complain of unfamiliarity with the language of the instrument.") (quoting *Madden v. Kaiser Found. Hosps.*, 17 Cal. 3d 699 (1976)); *Safadi v. Citibank, N.A.*, 2012 WL 471875, at *4 (N.D. Cal. Oct. 2, 2012). Likewise, the Seventh Circuit has explained that "[c]ompetent adults are bound by [contractual form] documents, read ***or unread***." *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997) (emphasis added). In

sum, as the Fourth Circuit long-ago held, "[o]ne cannot enter into a contract and, when called upon to abide by its conditions, say that he did not read it, when he signed it, or did not know what it contained." *G.L. Webster Co. v. Trinidad Bean & Elevator Co.*, 92 F.2d 177, 179 (4th Cir. 1937).

Notably, Plaintiffs never testified that they do not recall receiving Frontier's Terms. But even if they had, courts have repeatedly held that a plaintiff may not avoid arbitration or create a material factual dispute by claiming not to recall seeing the agreement containing an arbitration provision. In *Blau v. AT&T Mobility*, 2012 WL 10546 (N.D. Cal. Jan. 3, 2012), for example, a federal court rejected the plaintiffs' attempt to avoid their arbitration agreements by submitting declarations stating "that they 'do not recall' seeing the terms of service at the time they agreed." *Id.* at *4. Such statements "do not rise to the level of unequivocal denials of having agreed to those terms," the court explained; what is more, "[i]f a party could get out of a contract by arguing that he did not recall making it, contracts would be meaningless." *Id.*; *see also Vernon v. Qwest Commc'ns Int'l, Inc.*, 857 F. Supp. 2d 1135, 1152 (D. Colo. 2012) (rejecting the plaintiffs' attempt to avoid arbitration by asserting that they "could not recall whether or not they received the Welcome Letter" containing notice of the subscriber agreement containing the arbitration provision and informing them where to find the subscriber agreement on the defendant's website). As these cases underscore, Plaintiffs' effort to cast doubt on whether they assented to arbitration must be rejected when they have not denied—nor could they—that they actually received Frontier's Terms and the arbitration provision they contain.

B. Frontier's Terms Are Not A Browsewrap Agreement, But Rather A Fully Enforceable Unilateral Contract.

1. The hard copy version of Frontier's Terms sent to Plaintiffs in November 2012 is fully enforceable.

Because Plaintiffs each received in November 2012 a physical, hard copy version of the Terms governing their use of Frontier's services, the Circuit Court further erred in concluding that Frontier's Terms are an unenforceable "browsewrap" agreement. As this Court has recognized, the theory behind browsewrap is that "[a] party . . . gives his assent [to such agreements] simply by using the website." *State ex rel. U-Haul Co. v. Zakaib*, 232 W. Va. 432, 440 n.7, 752 S.E.2d 586, 594 n.7 (2013) (quoting *Sw. Airlines Co. v. BoardFirst, L.L.C.*, 2007 WL 4823761, at *4 (N.D. Tex. Sept. 12, 2007)); *see also Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171, 1176 (9th Cir. 2014) (describing browsewrap agreements as those where the terms are "not listed on the site itself but available only by clicking a hyperlink" (internal quotation marks omitted)).

While courts have, in some circumstances, been reluctant to enforce browsewrap agreements, Frontier's arbitration agreements in this case ***are not browsewrap agreements***. Most importantly, the Circuit Court's analogy to ***online*** browsewrap agreements fails for the simple reason that Frontier gave Plaintiffs ***physical, hard copies of the Terms***. While the Circuit Court stated that "Defendants' customers can ***only*** access Frontier's Terms and Conditions by navigating through Frontier's website" (A.R. 7–8 (Order ¶ 17) (emphasis added)), that is clearly erroneous in light of the undisputed record. Plaintiffs were also free to access the Terms ***by reviewing the printed, physical copy that Frontier mailed to them***. A.R. 277–278, 281–282.

Because Plaintiffs continued to use and pay for Frontier's Internet service after receiving Frontier's Terms, they assented to the "revised Terms and Conditions"—including the specifically mentioned "requirement that disputes be resolved by individual arbitration instead of

class actions and/or jury trials." A.R. 281–282. In this State, as elsewhere, "acceptance may be by word, act or conduct" as long as it "evince[s] the intention of the parties to contract." *GameStop*, 232 W. Va. at 572–73, 753 S.E.2d at 70–71. Thus, "[a]cceptance to enlarge . . . an offer into a contract need not be actual," and "may be inferred from the acts and conduct of the offeree." *First Nat'l Bank of Gallipolis v. Marietta Mfg. Co.*, 151 W. Va. 636, 642, 153 S.E.2d 172, 177 (1967). This Court has explained that West Virginia law "recognize[s]" "unilateral contract[s], where one party makes a promissory offer and the other accepts by performing an act rather than by making a return promise." *Cook v. Hecks Inc.*, 176 W. Va. 368, 373, 342 S.E.2d 453, 458 (1986); *cf. Hamilton v. McCall Drilling Co.*, 131 W.Va. 750, 754, 50 S.E.2d 482, 484–85 (1948) (holding that "[o]ne who has accepted benefits under a contract" is regarded as having "ratifie[d] the agreement").

Here, Plaintiffs' conduct manifested assent to be bound by the Terms. A federal court in this State—applying *Cook*—has held that "by activating and/or ***continuing [to] use***" a service, a plaintiff thereby "accept[s] the terms and conditions associated with that service." *Schultz v. AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 691 (N.D. W. Va. 2005) (emphasis added). The Circuit Court below acknowledged *Schultz* and that the plaintiff in that case had assented to AT&T's terms by continuing to use AT&T's service "after receiving the product's 'Welcome Guide'" containing AT&T's arbitration provision. A.R. 20 (Order ¶ 59). Yet the Circuit Court failed to explain why the outcome here should be any different when the Plaintiffs each received a similar hard copy of Frontier's Terms.

The Circuit Court's observation (A.R. 5 (Order ¶ 5)) that Plaintiffs did not ***sign*** any contract with Frontier is irrelevant. It has long been an "old basic rule of the law of contract—that, where an offer is made and accepted, a contract has been made," even if one party "did not

sign it." *John L. Rowan & Co. v. Hull*, 55 W. Va. 335, 47 S.E. 92, 93–94 (1904). And that generally applicable rule applies with equal force in the context of arbitration agreements, which, under the FAA, need only be "written," not signed. *See, e.g.*, *Seawright v. Am. Gen. Fin. Servs., Inc.*, 507 F.3d 967, 978 (6th Cir. 2007) ("[A]rbitration agreements under the FAA need to be written, but not necessarily *signed*."); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1368 (11th Cir. 2005) ("[W]hile the FAA requires that the arbitration agreement be in writing, it does not require that it be signed by the parties."); *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 736 (7th Cir. 2002); *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2nd Cir. 1987).

Finally, the Circuit Court relied heavily on *U-Haul*, but completely ignored the ***fundamental differences*** between *U-Haul* and this case. *U-Haul* was not a unilateral contract case involving a customer's manifestation of assent through continued use of a service. Rather, *U-Haul* addressed the "common law doctrine of contracts known as 'incorporation-by-reference'" in the context of a bilateral agreement to rent U-Haul equipment. 232 W. Va. at 435, 752 S.E.2d at 589. In particular, renters of U-Haul equipment signed one document called a "Rental Contract," which attempted to incorporate by reference a separate writing containing an arbitration provision called the "Rental Contract Addendum." *Id.* at 437, 752 S.E.2d at 591. U-Haul's policy, however, was to provide the customer with the addendum containing the arbitration provision "*only after* the Rental Agreement had been executed," so customers had no way of knowing that they were purportedly agreeing to arbitration at the time they signed the rental contract. *Id.* at 444, 752 S.E.2d at 598 (emphasis in original).

Here, by contrast, Frontier has not attempted to introduce an arbitration provision by incorporating a separate document by reference. Rather, the Terms sent to Plaintiffs in November 2012—approximately two years before they brought their claims—***is the very***

agreement that contains the arbitration provision. Frontier's addition of an arbitration provision to its Terms was the paradigm of an enforceable unilateral contract: It was a "promissory offer" sent to Plaintiffs, which each "accept[ed] by performing an act"—namely, continuing to pay for and use Frontier's service after receiving notice of the revised Terms. *Cook*, 176 W. Va. at 373, 342 S.E.2d at 458. And, as discussed below (*see* pp. 23–24, *infra*), the arbitration provision in Frontier's Terms was conspicuously highlighted for its customers—unlike the addendum in *U-Haul*, 232 W. Va. at 444, 752 S.E.2d at 598.

2. The online version of Frontier's Terms independently constitutes a valid contract under West Virginia law.

Even before November 2012, Frontier's customers received far more notice of the provisions governing their service than in the browsewrap context. In addition to receiving a physical copy of Frontier's Terms in November 2012, Plaintiffs were also notified in their January 2012 bills of Frontier's online Terms containing the same consumer-friendly arbitration provision—as well as being informed of an earlier version of the arbitration provision in September 2011. *See* p. 4, *supra*. Thus, assent here did not result from passively visiting a website alone. Instead, Plaintiffs were required to manifest their assent by using and paying for Frontier's Internet service after receiving repeated notice of the provisions—including the arbitration provision—governing their service. The only other case that has specifically addressed the enforceability of these online Terms, *Rasschaert v. Frontier Communications Corp.*, 2013 WL 1149549 (D. Minn. Mar. 19, 2013), upheld Frontier's arbitration agreement based on these notices.

The court in *Rasschaert* held that Frontier's customers, by electing to continue using and paying for Frontier's service after receiving the very same September 2011 and January 2012 notices with their bills, had accepted Frontier's proposed amendments to the parties' contract and

become bound by the arbitration provision. *Id.* at *3, *6–8. The court in *Rasschaert* explained that "most importantly, not only did Frontier provide monthly notice to Plaintiffs that their Internet service was provided 'pursuant to the Terms and Conditions' available online, but Plaintiffs were also given sufficient and explicit notice in their bills that an arbitration clause would be added to those Terms and Conditions of service." *Id.* at *7 (citation omitted). Accordingly, the court held that the plaintiffs' "failure to terminate service despite the notice of the addition of the arbitration provision constituted acceptance of the change in terms—namely the addition of the arbitration clause." *Id.*

The court below tried to distinguish *Rassachert* as resting on a unique interpretation of "Minnesota **employment law**." A.R. 18 (Order ¶ 54) (emphasis in original). But the central point of Minnesota law relied upon in *Rasschaert* was simply that Minnesota recognizes unilateral contracts. *See* 2013 WL 1149549, at *6 (citing *Roberts v. Brunswick Corp.*, 783 N.W.2d 226, 232-33 (Minn. Ct. App. 2010)). As discussed above, the same is true of this State: A party may accept contract terms "by performing an act rather than by making a return promise." *Cook*, 176 W. Va. at 373, 342 S.E.2d at 458. In all events, Plaintiffs here received not only the notices directing them to Frontier's online Terms that were relied upon by the *Rasschaert* court, but (as noted above) also a complete, printed copy of Frontier's Terms. Accordingly, these Plaintiffs' assent to Frontier's arbitration provision through continued use of and payment for Frontier's services ***is even more robust*** than it was for the plaintiffs in *Rasschaert*.

C. The Circuit Court's Conclusion That Frontier Was Required To Place Extra Emphasis On Its Arbitration Provision Is Preempted By The FAA.

The Circuit Court referred to "the six-page, miniscule-font Terms and Conditions sent to" Plaintiffs in November 2012 and concluded that "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." A.R. 18, 20 (Order ¶¶ 54, 57). The Circuit Court's conclusion was wrong, for two reasons.

First, that conclusion runs headlong into Section 2 of the FAA because it constitutes a state-law rule that would require Frontier to place extra emphasis on its arbitration provision. Section 2 provides that "[a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, 'save upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (citation omitted; emphasis by the Court) (quoting 9 U.S.C. § 2). Thus, "[a] court may not . . . in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law." *Id.*; *see also*, *e.g.*, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015) (reiterating that the FAA requires state courts to "place[] arbitration contracts on equal footing with all other contracts" (quotation marks omitted)); *Tominak v. Capoullez*, 2014 WL 123138, at *2 (N.D. W. Va. Jan. 13, 2014) ("State-law principles derived from West Virginia law cannot be used to invalidate [an a]greement based solely on the fact that it contains an arbitration provision.").

As the U.S. Supreme Court has held, Section 2 therefore forbids states from subjecting arbitration clauses to "special notice requirement[s]" that do not apply generally to all contracts. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). In *Casarotto*, the Court held that Section 2 of the FAA preempts a Montana law requiring that arbitration clauses appear "typed in underlined capital letters on the first page" of a contract, because the notice requirement "governs not 'any contract,' but specifically and solely contracts 'subject to arbitration.'" 517

U.S. at 683. Simply put, the FAA does not permit courts to subject arbitration clauses to heightened scrutiny.

Second, even if the FAA did not forbid courts from imposing special notice requirements on arbitration provisions (*but see Casarotto*, 517 U.S. at 687), the Circuit Court still erred because Frontier's Terms are far from inconspicuous. The Terms repeatedly use boldface and capitalization to highlight the presence of the arbitration agreement. To begin with, the document sent to Plaintiffs in November 2012 is titled—in large, boldfaced capital letters—"**RESIDENTIAL INTERNET SERVICE TERMS AND CONDITIONS**." A.R. 281. And the ***second sentence*** of the Terms—on the first page, not the fourth—contains an admonition that "**THIS AGREEMENT REQUIRES THAT ANY DISPUTE BE RESOLVED BY BINDING ARBITRATION ON AN INDIVIDUAL BASIS[.]**" *Id.* (boldface and capitalization in original). This straightforward language informs customers about arbitration from the very outset.

Moreover, the arbitration provision itself—introduced by the heading "**DISPUTE RESOLUTION BY BINDING ARBITRATION**" (A.R. 282 (boldface and capitalization in original))—highlights key features in boldface as well:

- "you agree to **resolve all disputes through binding arbitration or a small claims court rather than lawsuits, jury trials, or class actions**";
- "by agreeing to resolve disputes through arbitration, **you and Frontier agree to each unconditionally waive the right to a trial by jury or to participate in a class action, representative proceeding or private attorney general action**";
- "**You and Frontier agree that we each may bring claims against the other only in an individual capacity and not as a plaintiff or class member** . . . ."

A.R. 281–282. In light of these emphasized disclosures, the Circuit Court's holding that Frontier failed to adequately highlight the obligation to arbitrate rings hollow—not to mention that it is preempted by the FAA.

D. The Inclusion Of Revised Terms As An Insert To A Customer's Monthly Bill Is A Valid Method Of Contract Formation.

The Circuit Court also refused to enforce the Terms sent to Plaintiffs in November 2012 by concluding that a business may not revise its terms by sending them as accompaniments to a customer's monthly bill. A.R. 18–19 (Order ¶ 56). That conclusion is not only contrary to *Rasschaert*, discussed above, but also to the majority of courts around the country that have upheld the same method of modification that Frontier used here—including the revised Terms in a mailing to customers, who manifest assent by continuing to use the services at issue. *See, e.g.*, *Hill*, 105 F.3d at 1150 (holding that terms and conditions were enforceable against buyer who received notice that terms were binding unless product was returned, and buyer did not return product); *Hardin v. First Cash Fin. Servs., Inc.*, 465 F.3d 470, 476 (10th Cir. 2006) (holding that employee's "decision to remain on the job" after receiving notice of change of "terms of her at-will employment" thereby "manifested her assent" to the modification); *S. Trust Bank v. Williams*, 775 So. 2d 184, 189–91 (Ala. 2000) (bank customer "assented to be bound by the arbitration provisions by holding open their accounts after [receiving] notice of the amendment").[1]

Ignoring all of this authority, the Circuit Court instead repeated verbatim Plaintiffs' citations to a series of inapposite cases. A.R. 18–19 (Order ¶ 56). For example, the Circuit Court relied on the Montana Supreme Court's opinion in *Kortum-Managhan v. Herbergs NBGL*, 204 P.3d 693 (Mont. 2009). That court criticized a company's use of a bill insert to add an

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[1] *See also, e.g.*, *Jaimez v. MBNA Am. Bank, N.A.*, 2006 WL 470587, at *3 (D. Kan. Feb. 27, 2006); *Johnson v. Chase Manhattan Bank USA, N.A.*, 784 N.Y.S.2d 921 (table), 2004 WL 413213, at *6-7 (Super. Ct. Feb. 27, 2004), *aff'd*, 786 N.Y.S.2d 302 (App. Div. 2004); *Fields v. Howe*, 2002 WL 418011, at *5 (S.D. Ind. Mar. 14, 2002); *Herrington v. Union Planters Bank, N.A.*, 113 F. Supp. 2d 1026, 1032 (S.D. Miss. 2000), *aff'd per curiam*, 265 F.3d 1059 (5th Cir. 2001); *Goetsch v. Shell Oil Co.*, 197 F.R.D. 574, 577 (W.D.N.C. 2000).

arbitration provision to the plaintiff's credit card agreement because, among other things, "the arbitration provision in this agreement is not conspicuous," while other contract provisions were. *Id.* at 699. By contrast, here, Frontier's terms included a boldfaced capitalized sentence in the first paragraph that drew special attention to the arbitration provision, and key portions of the arbitration provision are displayed in boldface as well. *See* p. 23, *supra*.

Moreover, even if Frontier had not emphasized the arbitration provision in that manner, it would make no difference because *Kortum-Managhan*'s rule mandating special notice of arbitration provisions is ***preempted by the FAA*** for the reasons discussed above. In fact, although Plaintiffs failed to disclose it and the Circuit Court failed to mention it, the Ninth Circuit—which supervises the federal courts in Montana—has held that the Montana state-law "reasonable expectations" rule derived from that case is preempted by the FAA. *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1161 (9th Cir. 2013). As the court put it in *Mortensen*:

> The Montana reasonable expectations/fundamental rights rule arose from state court consideration of adhesive arbitration agreements . . . and most of the rule's applications have been to those provisions. . . . Courts, including this one, considering Montana's public policy repeatedly refer to it in arbitration-specific terms. . . . Because of this, ***we conclude that the reasonable expectations/fundamental rights rule runs contrary to the FAA*** as interpreted by *Concepcion* because it disproportionally applies to arbitration agreements, invalidating them at a higher rate than other contract provisions.

Id. (emphasis added; citations omitted).

The Circuit Court's reliance on *Badie v. Bank of America*, 79 Cal. Rptr. 2d 273 (Ct. App. 1998)—and *Sears Roebuck & Co v. Avery*, 593 S.E.2d 424 (N.C. Ct. App. 2004), which follows *Badie*—fails for much the same reason. *Badie* is part of a pattern of California state-court decisions evidencing impermissible hostility to arbitration agreements.[2] In holding that a credit

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[2] As one pre-*Concepcion* empirical study explained, "California courts are clearly biased against arbitration as an alternative means of dispute settlement." Stephen A. Broome, *An*

cardholder agreement could not be modified to add an arbitration agreement, *Badie*'s analysis rested in part on an improper suspicion of arbitration. *See* 79 Cal. Rptr. 2d at 291 ("[T]he right to select a *judicial* forum, whether a bench trial or a jury trial, as distinguished from arbitration or some other method of dispute resolution, is a substantial right not lightly to be deemed waived.") (emphasis in original). But that "generalized attack[] on arbitration 'res[ts] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,' and as such, [it is] 'far out of step with [the Supreme Court's] current strong endorsement of the federal statutes favoring this method of resolving disputes.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991). The Circuit Court's reliance on *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 574–75 (Fla. Dist. Ct. App. 1999), fares no better, for the simple reason that the court in that case ***never addressed*** contract formation.

The remaining cases that the Circuit Court cites similarly rest on the long-discarded notion that arbitration is disadvantageous to consumers. *See Martin v. Comcast of Cal.*, 146 P.3d 380, 385 (Or. Ct. App. 2006) (Oregon law); *Discover Bank v. Shea*, 827 A.2d 358, 360 (N.J. Super Ct. Law Div. 2001) (New Jersey law). But that approach cannot be squared with the Supreme Court's recognition in *Concepcion* that consumers would be "*better off*" in arbitration under a provision analogous to Frontier's than they would be in court. *Concepcion*, 563 U.S. at 352. Nor can it be squared with the Supreme Court's repeated pronouncement that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals" is permitted to "inhibit[] the development of arbitration as an alternative means of dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473

Unconscionable Application Of The Unconscionability Doctrine: How The California Courts Are Circumventing The Federal Arbitration Act, 3 HASTINGS BUS. L.J. 39, 41 (2006). Unsurprisingly, the U.S. Supreme Court has declared that the FAA preempts California law at least four times—most recently in *Concepcion*.

U.S. 614, 626–27 (1985); *accord, e.g.*, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 266 (2009) (same); *Gilmer*, 500 U.S. at 34 n.5 (same).

In any event, as noted above, courts around the country have upheld methods similar to Frontier's here for modifying contracts—by including the revised Terms in a mailing to customers. The Circuit Court offered no reason to conclude that a handful of courts' hostility to that commonplace contracting process should apply here.

II. THE CIRCUIT COURT ERRED IN CONCLUDING THAT FRONTIER'S ARBITRATION PROVISION IS ILLUSORY AND LACKS CONSIDERATION.

The Circuit Court's further conclusion that Frontier's arbitration provision is illusory and lacking consideration (A.R. 21–22 (Order ¶¶ 63-64)) is irreconcilable with well-settled principles of contract law. First, the Circuit Court erred in concluding that Frontier's mutual agreement to arbitrate disputes is "illusory," meaning that it "does not actually bind or obligate [Frontier] to anything." *Toney*, 2014 WL 2681091, at *4 (quoting *Peoplesoft USA*, 412 F.3d at 543). That conclusion appears to have resulted from the Circuit Court's clearly mistaken impression that Frontier "retain[ed] an unlimited right to later decide the extent of [its] performance" because of the change-in-terms provision in the Terms (A.R. 21–22 (Order ¶ 63)). The actual text of the arbitration provision specifically allows the customer to ***reject*** any further changes Frontier might make to the arbitration provision and instead require Frontier to arbitrate under the existing terms as written: "Notwithstanding any provision in these Terms and Conditions to the contrary, we agree that if Frontier makes any change to this arbitration provision, ***you may reject that change*** and require Frontier to adhere to the language in this provision." A.R. 281 (emphasis added); *see also, e.g.*, *Hancock v. AT&T Co.*, 2011 WL 3626785, at *6–7 (W.D. Okla. Aug. 11, 2011) (upholding enforceability of substantially similar change-in-terms provision that likewise permitted customers to "reject any change proposed by [defendant] to the arbitration

clause itself"), *aff'd*, 701 F.3d 1248 (10th Cir. 2012). Even aside from the Plaintiffs' right to reject any further changes, numerous courts have held that simply providing the customer with notice of the revision—as Frontier undisputedly did here (*see* pp. 3–5, *supra*)—is itself sufficient to defeat any illusoriness challenge. *See, e.g.*, *Iberia Credit Bureau v. Cingular Wireless, LLC*, 379 F.3d 159, 173–74 (5th Cir. 2004); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 604 (3d Cir. 2002); *Grasso Enters. v. CVS Health Corp.*, 2015 WL 6550548, at *6 (W.D. Tex. Oct. 28, 2015); *Vernon*, 857 F. Supp. 2d at 1153.

Relatedly, the Circuit Court failed to recognize that Frontier's mutual agreement to arbitrate disputes constitutes sufficient consideration for the arbitration provision. As this Court recently put it in rejecting a virtually identical argument to the one Plaintiffs raised below, "mutual commitments to arbitrate alone constitute sufficient consideration to support the contract." *Toney*, 2014 WL 2681091, at *3 (citing Syl. Pt. 1, *Tabler v. Hoult*, 110 W. Va. 542, 158 S.E.2d 782 (1931)). A federal district court applying West Virginia law has likewise held that for arbitration agreements to be supported by mutual consideration, "the parties need only be mutually bound by the arbitration process." *Captain D's LLC v. McClenathan*, 2006 WL 3409757, at *5 (S.D. W. Va. Nov. 27, 2006). The Fourth Circuit is in accord, holding that a defendant's "promise to be bound to arbitration is *a fortiori* adequate consideration because no consideration is required above and beyond the agreement to be bound by the arbitration process for any claims brought by the [plaintiff]." *Am. Gen. Life Ins. Co. v. Wood*, 429 F.3d 83, 91 n.5 (4th Cir. 2005) (quotation marks and alterations omitted). Indeed, courts around the country have routinely held that "[w]hen both parties have agreed to be bound by arbitration, adequate consideration exists and the arbitration agreement should be enforced." *Blair*, 283 F.3d at 603; *see also*, *e.g.*, *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1376 (11th Cir. 2005);

Michalski v. Circuit City Stores, Inc., 177 F.3d 634, 637 (7th Cir. 1999); *Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373, 378 (4th Cir. 1998).

But even if this principle did not apply, adequate consideration still exists for the Terms as a whole. "[S]o long as the overall contract is supported by sufficient consideration, there is no requirement of consideration for each promise within the contract, or of mutuality of obligation, in order for a contract to be formed." *Kirby v. Lion Enters., Inc.*, 233 W. Va. 159, 165, 756 S.E.2d 493, 499 (2014). As this Court similarly observed in *Dan Ryan Builders, Inc. v. Nelson*, 230 W. Va. 281, 737 S.E.2d 550 (2012), "the majority of courts conclude that the parties need not have separate consideration for the arbitration clause, or equivalent, reciprocal duties to arbitrate, so long as the underlying contract as a whole is supported by valuable consideration." *Id.* at 288 & n.10, 737 S.E.2d at 557 & n.10 (collecting a dozen "cases from other jurisdictions"). Frontier's provision of service to Plaintiffs is therefore sufficient consideration for ***all*** of the Terms of that service.

III. THE CIRCUIT COURT ERRED IN RULING THAT FRONTIER'S ARBITRATION PROVISION DOES NOT COVER PREEXISTING CLAIMS.

The Circuit Court also erred in holding that Frontier's arbitration provision could not "require arbitration of pre-clause disputes." A.R. 23 (Order ¶ 67) (emphasis omitted). That holding is contrary to both the text of the arbitration provision and the FAA itself. Frontier's arbitration provision broadly includes "all disputes and claims between us, including, but not limited to, all claims arising out of relating to any aspect of our relationship . . . that arose either ***before*** or during this or any prior Agreement, or that may arise after termination of this Agreement." A.R. 282 (emphasis added). Thus, the arbitration agreement applies on its face to "conduct before September 2011." A.R. 23 (Order ¶ 67).

Moreover, the FAA itself explicitly provides that parties may agree to arbitrate "an ***existing*** controversy." 9 U.S.C. § 2 (emphasis added). In accordance with that rule, numerous courts have held that parties may agree to arbitrate disputes that arose before the parties entered into the arbitration agreement. *See, e.g.*, *Levin v. Alms & Assocs.*, 634 F.3d 260, 268–69 (4th Cir. 2011) (holding that the "broad scope of . . . [an] arbitration clause applying to 'any dispute' between the parties" was "applicable retroactively" to preexisting disputes); *Watson Wyatt & Co. v. SBC Holdings, Inc.*, 513 F.3d 646, 649–52 (6th Cir. 2008) (holding that an "arbitration agreement applied retroactively" under a "broad arbitration clause"); *Zink v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 13 F.3d 330, 332 (10th Cir. 1993) ("Plaintiff's contention that an agreement to arbitrate a dispute must pre-date the actions giving rise to the dispute . . . runs contrary to contract principles which govern arbitration agreements."); *Enderlin v. XM Satellite Radio Holdings, Inc.*, 2008 WL 830262, at *7 (E.D. Ark. Mar. 25, 2008) (holding that broad terms of a revised arbitration agreement "apply retroactively"); *Davidson v. Cingular Wireless LLC*, 2007 WL 896349, at *4 (E.D. Ark. Mar. 23, 2007) (holding that revised terms of arbitration agreement applied to preexisting dispute), *on reconsideration*, 2007 WL 1232160 (Apr. 26, 2007); *Goetsch*, 197 F.R.D. at 577–79 (W.D.N.C. 2000) (holding that a broad arbitration provision "clearly provides for retroactive effect").

This case is entirely unlike the *GameStop* case cited by the Circuit Court. In *Gamestop*, the arbitration agreement at issue ***expressly*** provided that its coverage would "apply[] prospectively only." 232 W. Va. at 580, 753 S.E.2d at 78. The case does not say that parties cannot ***agree*** to arbitrate their preexisting disputes, nor did Plaintiffs or the Circuit Court identify

any other West Virginia case so holding.[3] To the contrary, this very Court has applied arbitration provisions to preexisting claims in telecommunications cases. *See, e.g.*, *Shorts v. AT&T Mobility*, 2013 WL 2995944 (W. Va. June 17, 2013) (mem.); *Wilson*, 226 W. Va. 572, 703 S.E.2d 543 (applying 2005 version of arbitration provision, with 2006 and 2009 modifications, to dispute arising out of 2003 version of plaintiff's contract with AT&T). Moreover, the arbitration agreements at issue in those cases had both a waiver of class-action injunctive relief ***and*** were instituted via unilateral revisions by the telecommunications provider. *See, e.g.*, *Shorts*, 2013 WL 2995944, at *4; *Wilson*, 226 W. Va. at 576 & n.9, 703 S.E.2d at 547 & n.9. Indeed, the same was true in *Concepcion*. In that case, "[t]he agreement authorized AT&T to make unilateral amendments, which it did to the arbitration provision on several occasions." 563 U.S. at 336. And the Supreme Court applied the version "reflect[ing] revisions made in December 2006" (*id.*) even though the Concepcions' dispute arose prior to that time—indeed, the Concepcions' suit was filed "[i]n March 2006" (*id.* at 337), ***prior*** to the applicable revisions. This fact pattern in *Concepcion* itself demonstrates that agreements like Frontier's Terms are nothing new.

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[3] The Circuit Court also pointed to two decisions applying Florida and New Jersey law (A.R. 23 (Order ¶ 67)), but those cases also fail to support the contention that an arbitration agreement cannot "require arbitration of pre-clause disputes." *Id.* In *Powertel*, the plaintiff ***filed a lawsuit*** in court the day ***before*** receiving notice of the arbitration provision, and the court concluded that enforcing the arbitration agreement would effect a "voluntary dismissal of a dispute" that had ***already*** "ripened into a lawsuit." 743 So. 2d at 574. Here, by contrast, Plaintiffs did not file their lawsuit until nearly two years ***after*** receiving the November 2012 version of the revised Terms. *See also, e.g.*, *Williams*, 775 So. 2d at 191 (Houston, J., concurring) (distinguishing *Powertel* on the ground that "the lawsuit in that case was pending before Powertel attempted to add the disputed arbitration requirement to the parties' agreement"). And in *Discover Bank*, the court declined to enforce an arbitration agreement in part because it included a class-action waiver provision (an argument now foreclosed by *Concepcion*) and in part because it failed to comply with a New Jersey banking statute that is inapplicable here. 827 A.2d at 360–68. The fact that the arbitration provision covered preexisting claims played no role in the court's analysis.

IV. THE CIRCUIT COURT ERRED IN HOLDING FRONTIER'S ARBITRATION PROVISION UNENFORCEABLE BECAUSE OF ITS PROHIBITION ON CLASSWIDE INJUNCTIVE RELIEF.

Finally, the Circuit Court's conclusion that Frontier's arbitration provision is unenforceable because it prohibits classwide injunctive relief (A.R. 20–21 (Order ¶¶ 61-62)) is foreclosed by the FAA and directly contrary to precedent from the Supreme Court of the United States. In *AT&T Mobility LLC v. Concepcion*, which itself involved claims for class-wide injunctive relief, the U.S. Supreme Court endorsed the use of class-action waivers: "Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 563 U.S. 333, 344 (2011).[4] The Supreme Court further explained that public policy arguments in favor of a different state-law rule—such as one requiring the availability in arbitration of broad injunctive relief on behalf of a putative class or the public at large—must be rejected, because "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 351. Instead, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Id.* at 341; *see also Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201, 1204 (2012) (per curiam) (explaining that the FAA preempts states from adopting "a categorical rule prohibiting arbitration of a particular type of claim").

If a state cannot lawfully exclude an entire type of claim from arbitration, then neither can it exclude part of that claim—or a single form of relief that may be granted for the claim. As

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[4] The operative complaint in *Concepcion* sought both damages and class-wide injunctive relief under Federal Rule of Civil Procedure 23. *See* First Amended Complaint (Dkt. No. 4) ¶¶ 17(g), 22, *Concepcion v. Cingular Wireless LLC*, No. 06-cv-00675 (S.D. Cal. May 2, 2006). Specifically, the plaintiffs sought a broad, class-wide injunction against what they characterized as a "false advertising campaign" (*id.* Prayer for Relief ¶ C) directed at "Plaintiffs and consumers like them" throughout California (*id.* ¶ 47).

the Supreme Court recently emphasized, "[t]he Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it." *Imburgia*, 136 S. Ct. at 468. Other courts have repeatedly rejected a similar argument to the one raised by Plaintiffs, overwhelmingly concluding in light of *Concepcion* that an arbitration exception for injunctive relief claims is preempted by the FAA.[5] As one of those courts has put it, "[a]lthough the agreement does prevent the arbitrator from awarding class-wide injunctive relief, . . . this is permitted by *Concepcion*." *Hendricks*, 823 F. Supp. 2d at 1024 (Breyer, J.); *see also, e.g.*, *Arellano*, 2011 WL 1842712, at *1 (holding that the FAA "preempts California's preclusion of public injunctive relief claims from arbitration"). The Circuit Court's apparent view that Plaintiffs should be able to demand sweeping injunctive relief as a matter of ***state*** public policy is thus preempted by the FAA and foreclosed by *Concepcion*.

In addition, the Circuit Court should have held that this argument is waived because Plaintiffs failed to develop it. The argument was raised for the first time at oral argument below and put in writing for the first time in Plaintiffs' proposed order. A.R. 576–577. Plaintiffs did not challenge the substantive fairness of Frontier's arbitration provision in their opposition brief beyond a single, throw-away phrase that the enforceability of Frontier's arbitration provision "affects Plaintiffs' right to relief in numerous ways, including but not limited to the fact that the

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[5] *See, e.g.*, *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 934–37 (9th Cir. 2013); *Brown v. DIRECTV, LLC*, 2013 WL 3273811, at *11 (C.D. Cal. June 26, 2013); *Miguel v. JPMorgan Chase Bank, N.A.*, 2013 WL 452418, at *10 (C.D. Cal. Feb. 5, 2013); *Meyer v. T-Mobile USA Inc.*, 836 F. Supp. 2d 994, 1005–06 (N.D. Cal. 2011); *Hendricks v. AT&T Mobility LLC*, 823 F. Supp. 2d 1015, 1024 (N.D. Cal. 2011); *Kaltwasser v. AT&T Mobility LLC*, 812 F. Supp. 2d 1042, 1050–51 (N.D. Cal. 2011); *Nelson v. AT&T Mobility LLC*, 2011 WL 3651153, at *1–4 (N.D. Cal. Aug. 18, 2011); *In re Gateway LX6810 Computer Prods. Litig.*, 2011 WL 3099862, at *1–3 (C.D. Cal. July 21, 2011); *In re Apple & AT&T iPad Unlimited Data Plan Litig.*, 2011 WL 2886407, at *4 (N.D. Cal. July 19, 2011); *Arellano v. T-Mobile USA, Inc.*, 2011 WL 1842712, at *1–2 (N.D. Cal. May 16, 2011); *see also, e.g.*, *In re Sprint Premium Data Plan Mktg. & Sales Prac. Litig.*, 2012 WL 847431, at *12 (D.N.J. Mar. 13, 2012).

clause appears to limit the injunctive relief Plaintiffs may obtain." A.R. 291–292. That statement does not actually challenge the enforceability of the requirement that injunctive relief must be individualized rather than class-wide. Even if it did, the argument would still have been insufficiently developed. As this Court has explained, "[t]he general rule of this Court is that 'issues which are . . . mentioned only in passing but are not supported with pertinent authority, are not considered[.]'" *State ex rel. Montpelier U.S. Ins. Co. v. Bloom*, 233 W. Va. 258, 264 n.16, 757 S.E.2d 788, 794 n.16 (2014) (quoting *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996)).

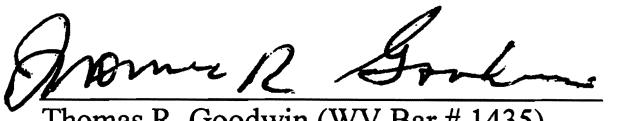
CONCLUSION

For the foregoing reasons, the Circuit Court's order denying arbitration should be reversed, and this matter should be remanded with instructions to compel Plaintiffs to arbitrate their claims on an individual basis.

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

By Counsel,

DATED: March 30, 2016



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CERTIFICATE OF SERVICE

I hereby certify that on this the 30th day of March 2016, true and accurate copies of the foregoing **PETITIONERS' BRIEF** were sent via First Class Mail, postage prepaid, to counsel for all other parties to this appeal, whose names and addresses are as follows:

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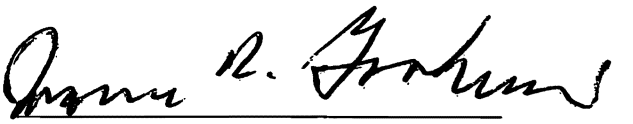

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