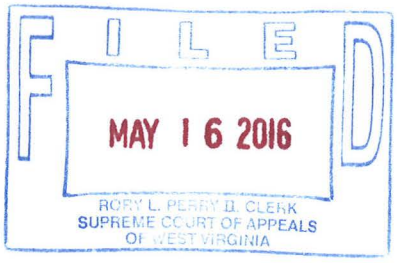
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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)

RESPONDENTS' BRIEF

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INTRODUCTION

According to Frontier, judicial insistence on adherence to basic principles of contract law amounts to hostility to arbitration. That just isn't true. Precedent from the United States Supreme Court, this Court, and very recent precedent from federal circuit courts all reaffirm the notion that a contract to arbitrate requires just that: a contract. Cases from all over the country establish that a simple notation on a website cannot form an agreement to arbitrate, a line item at the tail end of a bill that does not even state the specifics of the agreement cannot form an agreement to arbitrate, and a bill stuffer purporting to unilaterally amend an existing contractual relationship does not form an agreement to arbitrate. Indeed here, Frontier plainly relied on the (apparently false) claim that it was not forcing customers into an onerous contract to lure them into agreeing to pay for Frontier's services:

"There's no contract. Yep, that's right, No contract."

"The best part? You don't even need to sign a contract."

"NO CONTRACTS, NO PROBLEM."

But for purposes of arbitration, Frontier completely reverses course. Rather than have customers sign a binding contract that includes an agreement to arbitrate, Frontier finesses its way around that apparent marketing debacle by sending its customers – who signed up under the ruse of "no contract" – a six-page folded insert containing an arbitration provision among its many terms, on one occasion. Frontier did not even send this insert in the first bill. It stuffed this document into its customers' bills in November 2012 – sometimes years after a customer signed up for service. Beyond that, Frontier only makes passing reference to arbitration at the end of a multi-page bill, and makes an inconspicuous posting on its corporate website purporting to inform customers that arbitration is a binding contractual obligation to receive its "NO CONTRACT" services.

Nothing the Circuit Court did, and none of the precedent upon which it relied, amounts to "hostility to arbitration." Instead, Frontier exhibits hostility to contract, disclaiming the existence of one until it is needed to prop up its insistence on arbitration. Frontier's position is that consumers are obliged to be on alert at all times – diligently reviewing the fine print on each and every page of promotional material received – for the possibility that they may be waiving their rights by doing nothing at all.

As the Circuit Court agreed, Frontier cannot do that. The Circuit Court's entire decision was guided by the fundamental rule that "[a]rbitration is a matter of contract, and a party cannot be required to arbitrate a dispute that it has not agreed to arbitrate." *U-Haul Co. of W. Va. v. Zakaib,* 232 W. Va. 432, 439, 752 S.E.2d 586, 593 (2013). In other words, for there to be a contract governing the relationship, both parties must know about the contract: it does not suffice for one party to hide its offer and expect a contract to form without any indication that the other party has agreed to that offer. No such agreement was reached here, and the Circuit Court's determination that Plaintiffs cannot be bound by a non-existent contract should be affirmed.

STATEMENT OF THE CASE

While it is eager to tout its supposedly "consumer-friendly" arbitration provision, Frontier's Statement of the Case does not provide a full picture of the allegations in this case, which reveal Frontier's policies and practices as anything but "friendly" to West Virginians.

I. NATURE OF THE LITIGATION AND FRONTIER'S "NO CONTRACT" ADVERTISEMENTS

Plaintiffs Michael Sheridan, April Morgan, Trisha Cooke, and Richard Bennis (collectively "Plaintiffs") filed this putative class action against Frontier West Virginia Inc. and Citizens Telecommunications Company of West Virginia d/b/a Frontier Communications of West Virginia (collectively, "Frontier"), the sole internet service provider to most rural West

Virginians, because Frontier's practice of overcharging and simultaneously failing to provide the high-speed, broadband level of service it advertises has created high profits for Frontier but left West Virginia internet users in the digital dark age. A.R. 30. Frontier's deceptive scheme is compounded by the fact that it has used enormous sums of public money to promote its own ends without regard to the needs of its customers, the citizens of West Virginia. A.R. 30-31. Plaintiffs bring claims for violations of the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-6-104 as defined by § 46A-6-102 (7) (G), (I), (J), (L) and (M); and unjust enrichment. A.R. 30-50. Plaintiffs further seek a declaratory judgment that 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. A.R. 49-50.

Beginning in February 2013 and continuing until the present day, Frontier has advertised that "no contract" is required to use its services. A.R. 321-322. Specifically, Frontier admitted in discovery that the following statements have appeared in various advertisements and on its website:

There's no contract. Yep, that's right, No contract[1]

The best part? You don't even need to sign a contract.[2]

NO CONTRACTS, NO PROBLEM[3]

No contract. No signatures. No worries.[4]

No contract with 3-year price guarantee[5]

No contract and 3-year price guarantee[6]

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[1] A.R. 323.
[2] A.R. 323-324.
[3] A.R. 324-325.
[4] A.R. 325-326.
[5] A.R. 354-366, 373-377.

FREE from Contracts[7]

NO CONTRACT[8]

In recent months, Frontier has gone even further, advertising the potential for its customers to "lock in your Price for Life" – notwithstanding Frontier's ongoing practice of constantly changing terms.[9] Will these same customers need to be constantly vigilant to the risk that their "lifetime" price lock will be modified via an obscure reference at the end of a bill or buried in promotional material? If Frontier has its way, then yes.

II. FRONTIER'S LIMITED ATTEMPTS TO PROCURE PLAINTIFFS' ASSENT TO ARBITRATION

A. Frontier and Plaintiffs agree that no Plaintiff ever signed any document establishing assent to an arbitration agreement.

The Circuit Court correctly found that Plaintiff Michael Sheridan signed up for Frontier internet service in August 2007; Plaintiff Cooke in June 2010; Plaintiff Bennis in February 2008; and Plaintiff Morgan in August 2008. A.R. 5. It also correctly noted the parties' agreement that no Plaintiff ever signed any document containing an arbitration agreement. A.R. 5, 326-327, 497-508.

B. After Plaintiffs signed up for Frontier's internet services, Frontier changed its Terms and Conditions to include an arbitration clause in a browsewrap agreement not clearly and conspicuously disclosed to Plaintiffs, and subject to frequent change at Frontier's whim.

Frontier admitted that all four Plaintiffs obtained high speed internet from Frontier before Frontier first introduced its arbitration provision. A.R. 28-30. All Plaintiffs never received internet services at a satisfactory speed. A.R. 37, 41, 42, 44. All Plaintiffs therefore have claims

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[6] A.R. 367-372.
[7] A.R. 378-381, 383.
[8] A.R. 382, 384-385.
[9] *See* http://investor.frontier.com/releasedetail.cfm?ReleaseID=940387.

that arise prior to the existence of any arbitration clause. Frontier further states that it was permitted to change its terms and conditions "at any time" and that customers could not alter those terms and conditions. A.R. 331-332.

Beginning in September 2011, Frontier added an arbitration provision to its Terms and Conditions on a page of its website. A.R. 315. Customers can only access those 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.

A.R. 313. Frontier admits that the word "arbitration" does not appear on the page displayed upon visiting http://www.frontier.com/residential. A.R. 330.

Frontier admits that customers are not required to visit Frontier's website to use Frontier's high-speed internet service, and that it has no records to demonstrate that the Plaintiffs or any class member ever visited Frontier's website. A.R. 316-317, 329. Frontier further concedes that it does not maintain records showing that any Plaintiff viewed the terms and conditions on Frontier's website. A.R. 327-329.

Frontier also admits it cannot determine whether *any* customer, let alone these four Plaintiffs, *ever* opted out of Frontier's Terms and Conditions due to the arbitration clause. A.R. 510-511.

C. Frontier only referred to its "terms and conditions" at the end of certain monthly bills after a wealth of other information and promotional material was provided, and only once provided the entire content of the arbitration provision, in a folded insert in Plaintiffs' bills.

Frontier claims to have notified Plaintiffs of the terms and conditions, including the September 2011 addition of the arbitration clause, on their monthly bills. A.R. 313-316. However, with one exception in November 2012, Frontier does not claim to have actually *provided* Plaintiffs with the Terms and Conditions, or the text of the arbitration clause, on or with those monthly bills. (*Id.*) Indeed, Frontier carefully states that "each of the Plaintiffs was *furnished with information that directed them* to the terms and conditions." (*Id.* (emphasis added)). Frontier has further stated that its bills *reference* "Terms and Conditions".

In fact, the terms and conditions are only mentioned on the third or fourth page of a customer's bill statement, after the material portion of the bill (the payment amount) and instructions regarding bill payment on the prior two pages. A.R. 390-392. For example, with respect to the first bill relied on by Frontier, the July 2011 bill, the first page contains all the information the consumer needs to pay the bill: the amount of the charge. A.R. 390. The second page contains more details about the charges. A.R. 391. The third page of the bill contains a multitude of information. It first provides a warning as to what collection and 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, it provides further information about how to ensure the customer is only being 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. *Id.*

Finally, 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.*[10]

Frontier also contends it provided further notice of its arbitration provision in its September 2011 bill. The first page of that bill includes the amount of the last bill, payments received, balance, and current amount due. This information (likely the only information of interest to most customers) is followed by an advertisement for "frontiersecure", a "Nest Learning Thermostat program". The first page of the September 2011 bill concludes with the payment stub. A.R. 394.

The second page of the September 2011 bill begins with an additional promotion, this time for the "Frontier Yahoo Toolbar" which apparently allows users to "customize it", "stay connected" and "search faster". It then provides customers with a phone number for billing and service questions, instructions on how to pay the bill, information on past due balance, and warnings about late payments and returned check fees. A.R. 395. The final section of page two of the September 2011 lists several "IMPORTANT CONSUMER MESSAGES," including risks of being disconnected for failure to pay, potential charges from non-Frontier companies, tariffs and price lists, and a potential "treatment charge" for delinquent accounts.

The third page of the September 2011 bill again lists all of the monthly service charges, other service charges and credits, taxes and other charges, as well as the total. It also includes instructions for enrollment in Frontier's Auto-Pay program. A.R. 396.

[10] The exemplar produced by Frontier in discovery is not an exact replica of the bill, although the others produced by it were replicas.

The fourth page of the September 2011 bill presents a wealth of information. Further details of federal and state taxes and charges are provided first. A.R. 397. The customer is then warned again about the importance of paying all current and past due charges. Frontier then informs the customer that an internet surcharge will increase by $.50 next month if the customer is not on a high-speed internet price protection plan. Only after providing these four 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.*

Similarly, in January 2012, Frontier sent customers another four 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. A.R. 398-401.

There is no dispute that the actual Terms and Conditions, let alone the arbitration clause specifically, were never stated on any monthly bill sent to Plaintiffs or any customer. With respect to all of the exemplar bills, the bill stub appears on the first page. Therefore, in order to ascertain the amount due for the bill or pay it, 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 their right to a jury trial.

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. A.R. 313-316, 513-514. Those Terms and Conditions are stated in minuscule font, single spaced over six pages. The Dispute Resolution by Binding Arbitration is stated

beginning at the bottom of page 4 and continues to the top of page 6. *Id.* Each Plaintiff has sworn that he or she never saw or read the Terms and Conditions. A.R. 497-508.

D. Frontier's "consumer friendly" arbitration provision forecloses any possibility of relief for these Plaintiffs.

Frontier congratulates itself on its "consumer-friendly" arbitration provision, noting that, *inter alia,* Frontier will pay the costs for arbitration for damages up to $10,000 (with some exceptions), and that the procedures are "flexible". Pet. Br. at 5-7. Frontier fails to note, however, the extreme limitations it places on the ability to recover relief that might affect others (such as other West Virginia Frontier customers):

> You and Frontier agree to seek only such relief—whether in the form of damages, an injunction, or other non-monetary relief—as is necessary to resolve any individual injury that either you or Frontier have suffered or may suffer. In particular, if either you or Frontier seek non-monetary relief, such relief must be individualized and may not affect individuals or entities other than you or Frontier. 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. The arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a class, representative, or private attorney general proceeding.

A.R. 281-282 (emphasis in original). In other words, the very relief Plaintiffs seek here – improvement to Frontier's high-speed, broadband service in West Virginia – is expressly forbidden by the arbitration clause because it would "affect individuals or entities other than [Plaintiffs]". Frontier has raised legal arguments regarding this conclusion, Pet. Br. at 32-34, but has never denied the practical reality that this language would foreclose Plaintiffs' right to individual relief.

III. PROCEEDINGS BELOW

Plaintiffs filed their original complaint on October 14, 2014 and their First Amended Class Action Complaint and Jury Demand ("FAC") on November 19, 2014. A.R. 30-51. Injunctive relief is a material and significant portion of the relief Plaintiffs are seeking. A.R. 51.

Frontier filed their motion to compel arbitration and dismiss, or in the alternative to stay, on January 30, 2015. The parties subsequently engaged in arbitration discovery by agreement.

The Circuit Court held a hearing on Defendants' motion to compel arbitration and dismiss, or in the alternative to stay, on August 19, 2015. A.R. 563-591. In addition to legal argument, Plaintiffs relied on a PowerPoint presentation which highlighted Frontier's website for the Court and included a slide on Plaintiffs' argument regarding the preclusion of injunctive relief. A.R. 617-629.

IV. THE CIRCUIT COURT OPINION

The Circuit Court issued its "Procedural Order Denying Defendants' Motion to Dismiss and/or Compel Arbitration But Granting of Stay" on November 23, 2015. A.R. 1-24. Chief Judge Hoke found that Plaintiffs would not be 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 claims with Frontier. A.R. 3.

The Circuit Court made findings of fact consistent with Plaintiffs' Statement of the Case above. A.R. 5-12. It then recognized that, in determining whether an arbitration clause is enforceable, a court must first look to Section 2 of the FAA, which requires arbitration agreements be enforced unless a party has not agreed to submit a claim to arbitration. A.R. 12. The Court went on to apply West Virginia contract law to the inquiry, and found that neither Frontier's "browse-wrap" agreement nor its "bill stuffers" obtained Plaintiffs' or class members' assent to those terms and conditions. A.R. 13-20. The Court further found that the arbitration clause, even if enforceable, could not be applied so as to require arbitration of pre-clause disputes. A.R. 21-23.

The Circuit Court acknowledged Plaintiffs' other arguments, but did not rely on them to reach its dispositive holding as to assent. Specifically, the Circuit Court (i) stated that it was "not

necessary to reach the novel question of whether Frontier's 'no contract' advertisements mean what they say" because the manifest assent issue is "clear"; and (ii) "noted" that the outcome of the dispute materially affects Plaintiffs' rights to injunctive relief, which is "significant and troubling". A.R. 13, 20-21.

SUMMARY OF ARGUMENT

Plaintiffs agree with Frontier on one point: that the principle debate in this case is whether a contract was formed sufficient to bind Plaintiffs to Frontier's arbitration provision. The parties sharply diverge on whether Frontier obtained Plaintiffs' assent to arbitrate its disputes by either (i) burying an arbitration provision among other terms and conditions on a website no Plaintiff ever visited; or (ii) referring to an arbitration provision (without providing its full text) at the end of certain bills, or including the arbitration provision within a one-time, six page folded insert to Plaintiffs' bills. The Circuit Court correctly applied the FAA and West Virginia contract law to determine that no agreement to arbitrate was reached through these means.

First, Frontier criticizes the Circuit Court for trying to "force a square peg into a round hole" by even discussing the significance of the online terms. Pet. Br. at 9. However, the Circuit Court's discussion was directly provoked by Frontier's own arguments below, where before even describing the mailers on which it now apparently exclusively relies, it argued for formation based on the fact that the terms it believes governs its relationship with the Plaintiffs "are and have been posted on Frontier's web site". A.R. 56. Frontier went on to quote and describe those terms in its memorandum of law before turning to the mailers. A.R. 56-57.

Although Frontier has now changed course and does not point to its online terms as a means of obtaining consent to arbitration, the Circuit Court's conclusion that those terms present

only a classic unenforceable browsewrap agreement was sound and should be affirmed. A "browsewrap" agreement is an agreement posted on a website which "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. The Circuit Court correctly found that a nationwide rule has emerged holding that, for an internet browsewrap 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). Courts have consistently declined to enforce the terms of browsewrap agreements, finding that no unambiguous assent is achieved through these means.

The Circuit Court also correctly found that Frontier did not obtain Plaintiffs' assent to arbitration through language buried at the end of monthly bills, pages after the material information (i.e. the amount of the bill) was provided, or by a one-time bill stuffer notice containing the provision within a six-page folded insert. Again, the Circuit Court recognized a nationwide rule, consistent with West Virginia contract law, holding that such means of obtaining assent are insufficient. Unable to distinguish any of these cases on the facts, Frontier instead accuses these diverse courts of hostility to arbitration, despite their adherence to basic contract principles. And more tellingly, Frontier is unable to point to any contrary body of case law supporting its position.

Next, Frontier devotes two separate assignments of error to a single conclusion the Circuit Court reached regarding whether Frontier's subsequent modification to the agreement the parties entered into at the inception of their relationship made the contract illusory such that pre-arbitration conduct was not subject to the arbitration provision. The Circuit Court's recitation of West Virginia law on illusory promises and the need for consideration when subsequent

modifications occur was sound. Moreover, Plaintiffs do not disagree that parties may contract to arbitrate pre-arbitration clause disputes; here, however, they did not agree to arbitrate any disputes.

Finally, Frontier finds fault in the Circuit Court's supposed "holding" that the arbitration provision is unenforceable because of the limits it imposes on Plaintiffs' right to injunctive relief. The Circuit Court made no such conclusion as a matter of law, but simply observed this troubling fact, which Frontier does not itself deny.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rule of Appellate Procedure 19(a), Plaintiffs respectfully request oral argument as the Circuit Court here appropriately applied settled law, including state law principles of contract formation as well as the FAA, to the facts below.

STANDARD OF REVIEW

Plaintiffs agree that this Court's review of the Circuit Court's legal determinations regarding whether Petitioner's agreement represents a valid and enforceable contract is de novo. *McGraw v. American Tobacco Co.*, 224 W. Va. 211, 222, 681 S.E.2d 96, 107 (2009) (citing *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 556, 567 S.E.2d 265, 272 (2002)). Plaintiffs further agree that, 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).

ARGUMENT

I. THE CIRCUIT COURT WAS CORRECT TO FIND THAT PLAINTIFFS DID NOT MANIFEST ASSENT TO FRONTIER'S ARBITRATON CLAUSE.

A. The Circuit Court correctly recited the applicable FAA provisions, the role of state contract law in analyzing formation, and the requirement of mutuality of assent.

The Circuit Court first properly stated the roles of the FAA and state contract law here. Specifically, in determining whether an arbitration clause is enforceable, the Court first looks to Section 2 of the Federal Arbitration Act ("the FAA"), and West Virginia courts have 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. 4, *Parsons v. Halliburton Energy Services, Inc.*, -- S.E.2d – (2016), 2016 WL 1564376 (Apr. 11, 2016) (quoting Syl. Pt. 6, *Brown I*); *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).) In *Parsons*, the West Virginia Supreme Court of Appeals recognized the merits of arbitration but held that "[n]othing in the Federal Arbitration Act, 9 U.S.C. § 2, overrides normal rules of contract interpretation." *Id.*, syl. pt. 5. The Court further confirmed that a "state court may assess whether an arbitration agreement is unenforceable under general principles of state law" including "mutuality of assent". *Id.* (citing 9 U.S.C. § 2 and *Brown I, supra.*); *see also Lorenzo v. Prime Communications*, 806 F.3d 777, 781 (4th Cir. 2015) ("While the Supreme Court has acknowledged a liberal federal policy favoring arbitration, it has also consistently held that § 2 of the FAA reflects the fundamental principle that arbitration is a matter of contract. Thus, a court

may order arbitration only when it is satisfied that the parties agreed to arbitrate... [which is] resolved by application of state contract law." (citations omitted))

The Circuit Court's recitation of well settled West Virginia law on assent was also sound. 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) ("to be valid, an arbitration agreement must conform to the rules governing contracts, generally.... [T]he subject Arbitration Agreement must have (1) competent parties; (2) legal subject matter; (3) valuable consideration; *and* (4) mutual assent.... Absent any one of these elements, the Arbitration Agreement is invalid."); *see also New v. GameStop, Inc.*, 232 W. Va. 564, 573, 753 S.E.2d 62, 71 (W. Va. 2013) (finding of mutual assent when petitioner employee signed an acknowledgement of unambiguous contractual language and continued employment with defendant); *cf.* Restatement (Second) of Contracts § 19(2) (1981).

Therefore, 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; *see also Mercury Constr. Corp. v. Moses H. Cone Mem'l Hosp.*, 656 F.2d 933, 939 (4th Cir. 1981) (to prevail on a motion to compel arbitration, the party seeking to arbitrate bears the burden of showing: "(1) [t]he making of the agreement and (2) the breach of the agreement to arbitrate.") In other words, contract formation requires that both parties must know about the contract: it does not suffice for one party to hide its offer and expect a contract to form without any indication that the other party has agreed to that offer.

B. The Circuit Court correctly found that Frontier did not obtain Plaintiffs' assent to the arbitration clause via its browsewrap agreement.

Frontier criticizes the Circuit Court's discussion of its online terms because, in Frontier's words, the "situation here" is that Plaintiffs received a hard copy of Frontier's terms in the mail. Putting the mailer issue aside for the moment, Frontier has changed course from its briefing below wherein it presented its online terms as the first method of obtaining assent, even before the mailers. A.R. 56-57. Frontier now acknowledges courts' "reluctan[ce] to enforce browsewrap agreements," Pet. Br. at 17, but contends that its arbitration agreements are not browsewrap agreements because Frontier sent Plaintiffs a copy of the terms one time, in November 2012. Pet. Br. at 17. At the same time, Frontier claims that the online version of its terms "independently constitut[e] a valid contract under West Virginia law," Pet. Br. at 20, suggesting that Frontier has not entirely abandoned its reliance on the presence of its online terms. In any event, Frontier confuses the Circuit Court's analysis, which discussed both the insufficiency of the online agreement and the one-time mailer in obtaining manifest assent.

Frontier cannot establish assent as to any of the arbitration provisions. Regarding the online version, West Virginia courts interpret and apply "the same common law rules that have been applied for hundreds of years to oral and written agreements." *U-Haul*, 232 W. Va. at 441. As the Court explained in *U-Haul*, "[w]ith the rise of internet commerce and electronic recordkeeping, courts have grappled with new electronic formats of contracts, typically called 'clickwrap' or 'browsewrap' agreements." *U-Haul*, 232 W. Va. at 440. A "clickwrap" 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).) Unlike a clickwrap agreement, a "browsewrap" 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)); *see also Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171, 1176 (9th Cir. 2014); Ian Rambarran and Robert Hunt, *Are Browse–Wrap Agreements All They Are Wrapped Up to Be?*, 9 Tul. J. Tech. & Intell. Prop. 173, 174 (2007) ("A click-through agreement is usually conspicuously presented to an offeree and requires that person to click on an acceptance icon, which evidences a manifestation of assent to be bound to the terms of a contract. On the other hand, a browse-wrap agreement is typically presented at the bottom of the Web site where acceptance is based on 'use' of the site.").

For an internet browsewrap 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). Courts have consistently declined to enforce the terms of browsewrap agreements. *See, e.g.*, *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 22 n. 4, 35 (2d Cir. 2002) (J. Sotomayor) (unenforceable provision appeared in a "submerged" portion of the website; "reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility"); *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 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 Nguyen*, 763 F.3d at 1179 ("While failure to read a contract before agreeing to its terms does not relieve a

party of its obligations under the contract, the onus must be on website owners to put users on notice of the terms to which they bind consumers. 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"); *In re Zappos.com Inc., Customer Data Sec. Breach Litig.*, 893 F.Supp. 2d 1058, 1064 (E.D.N.Y. 2013) (where terms of use were inconspicuously located, no manifestation of assent to browsewrap); *Resorb Networks, Inc. v. YouNow.com*, No. 155631/15, 2016 WL 1424474, at *5 (N.Y Sup. Ct. Apr. 8, 2016) (no consent to online terms of use when it was not clear where on the website defendant had posted its terms.)

The Circuit Court correctly found 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. A.R. 313. 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.* This multi-step process certainly gives rise to a finding of an inconspicuously located term.

Further, even if Frontier could show Plaintiffs' or class members' use of the website, 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, courts consistently find browsewrap agreements to be unenforceable. *See, e.g.*, *Nguyen,*

763 F.3d at 1179 (*supra*); *Cvent, Inc.*, 739 F. Supp. 2d at 937; *Specht*, 306 F.3d at 22, n. 4; *Overstock*, 668 F. Supp. 2d at 366.

The circumstances here are virtually identical to those addressed by courts in *Specht*, *Nguyen*, and several other browsewrap cases where courts have refused to find a valid enforceable agreement. Specifically, Frontier chose not to actually present the Terms to consumers, including Plaintiffs, or require them to click on a button that would acknowledge acceptance of the Terms. And while West Virginia courts have not had opportunity to adjudicate the enforceability of a browsewrap agreement specifically, the *U-Haul* decision is 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. *U-Haul*, 232 W. Va. at 444. Under *U-Haul,* Frontier's browsewrap agreement cannot 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.

More generally, Frontier miscasts this case as a simple instance of "failure to read". Pet. Br. at 14-15. But the principle that a "court can assume that a party to a contract has read and assented to its terms," *Gamestop*, 753 S.E.2d at 578, presumes that a party is first sufficiently presented with those terms and has manifested assent to them, typically by signature. This was certainly the case in the cases relied on by Frontier for this proposition. In *Gamestop*, the court rejected plaintiff's procedural unconscionability arguments because plaintiff was not "incapable due to age, literacy or lack of sophistication to understand the clear terms" of the arbitration agreement which she had *signed. Id.* Similarly, in *Sedlock v. Moyle*, 222 W. Va. 547, 668 S.E.2d 176 (2000) (per curiam), the court discussed the "failure to read" maxim in the context of ruling

that plaintiff was not "operating under any disability when she *signed* the contract so as to render her incapable of reading and comprehending its terms before *signing.*" 668 S.E.2d at 180 (emphasis added).[11] In addition to addressing the obligation to read before *signing*, these cases are not helpful to Frontier because they do not stand for the proposition that a consumer must be constantly on the alert for hidden terms that might waive his rights and which need not be affirmatively agreed to. Put simply, this maxim has no application to the situation at hand where the consumer had no reason to know that Frontier had extended an offer to contract in the first place.

C. The Circuit Court correctly found that Frontier did not obtain Plaintiffs' assent to the arbitration provision by way of a one-time bill stuffer or by references to undefined "terms and conditions" buried in Plaintiffs' monthly bills.

1. Plaintiffs did not consent to Frontier's unilateral addition of an arbitration provision by continuing to use Frontier's services after the bills with buried terms merely referencing a separate arbitration provision or the November 2012 bill stuffer.

Frontier argues that Plaintiffs manifested assent to the terms in the one-time bill stuffer by continuing to accept Frontier's services after the insert was sent in November 2012. Pet. Br. at 17-18. Certainly assent *can* be found by acts and conduct of the offeree. But the Circuit Court was correct to find that Plaintiffs' conduct *here* did not constitute assent, and was no different

[11] The principle that a consumer's obligation to read arises only when a contract is formed is also present in the other cases outside of West Virginia cited by Frontier for the "failure to read" proposition. Pet. Br. at 15-16, citing *Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171, 1179 (9th Cir. 2014) ("While failure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract, *the onus must be on website owners to put users on notice of the terms to which they wish to bind consumers.*") (emphasis added); *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1200 (9th Cir. 2002) ("one who *signs a contract* is bound by its provisions") (emphasis added); *Safadi v. Citibank*, No. 12-1356, 2012 WL 4717875, at *4 (N.D. Cal. Oct. 2, 2012) (no dispute that plaintiff signed signature card stating he was bound by terms of agreement); *G.L. Webster Co. v Trinidad Bean & Elevator Co.*, 92 F.2d 177, 179 (4th Cir. 1937) (president of defendant company agreed that he signed written document without notice clause stipulating no warranty.)

than that in the line of bill stuffer cases, discussed below, where defendant companies failed to obtain assent through this supposed means of "notice". Indeed, assent by bill stuffer is really no different than seeking assent via a browsewrap agreement. The terms must be clear and conspicuous and there must be an unambiguous manifestation of the intent to contract or alter an existing contract and clear notice to the consumer of that intent. Otherwise consumers are essentially left at the mercy of the junk mail that is routinely included with bills and must now conduct line by line reviews of each and every bill each and every month to ensure that their contractual terms are not being altered.

The Circuit Court's findings of fact demonstrate its close scrutiny of the facts. In reviewing the bills referencing the terms and conditions, the Circuit Court stated that its own "review of the bill" revealed 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 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." A.R. 9. The Circuit Court went on to observe that the terms and conditions do not appear on the July 2011 bill until the third page, which itself contains a multitude of information, and which even then only refers the customer to the online terms and conditions. A.R. 9-10.[12] The Circuit Court "follow[ed] the same method of analysis" in its review of the other two bills on which Frontier relied, again noting that the customer would have to wade through billing information, details about a thermostat program, advertisements, and other consumer messages to even reach a referral to the online terms. A.R. 9-11. And with respect to all of the exemplar bills, the bill stub appears on the

[12] The bill produced by Frontier in discovery was not an exact replica of the bill sent to Plaintiffs; the actual bill certainly contained the same type of promotional material included in the later bills.

first page and "there is no reason whatsoever for a customer to turn to the last page" where the online terms are referenced. A.R. 12. The Circuit Court also made findings of fact regarding the one time "special insert" to the November 2012 bill, noting that 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. A.R. 11.

The Circuit Court went on to find that these facts do not demonstrate assent. A.R. 18. It rejected Frontier's attempt to cast this as a case where consumers simply did not read a contract; rather, the "purported contracts were insufficiently presented to manifest assent." *Id.* The Circuit Court noted the persuasive effect of 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 information necessary to actually pay a bill" and took note of the decisions around the country "rejecting this so called 'bill stuffer' argument." *Id.*

The Circuit Court's reasoning was correct, and Frontier's argument that Plaintiffs manifested assent fails. Unlike here, where Plaintiffs never affirmatively indicated assent, the acts manifesting acceptance in the cases relied on by Frontier all clearly demonstrated acceptance. *See* Pet. Br. at 18, citing *GameStop*, 232 W. Va. 564, 573, 753 S.E.2d 62, 71 (W. Va. 2013) (employee signed an acknowledgement of unambiguous contractual language and continued employment with defendant); *First Nat'l Bank of Gallilopis v. Marietta Mfg. Co.*, 151 W. Va. 636, 642, 153 S.E.2d 172, 177 (1967) (letter to bank stating intention to make payments on behalf of third party loan applicant was accepted by bank when it issued loan to third party); *Cook v. Hecks Inc.*, 176 W. Va. 368, 374, 342 S.E.2d 43, 459 (1986) (case was not about formation, but noted that employee handbook containing promise of job security constituted offer for unilateral contract and employee's continuing to work constitutes acceptance);

Hamilton v. McCall Drilling Co., 131 W. Va. 750, 754, 50 S.E.2d 482, 484-85 (1948) (record showed that tract owner was "fully informed" of the facts and accepted benefits under verbal contract, including exercising dominion of property acquired).

In reaching this conclusion, the Circuit Court correctly found this Court's decision in *U-Haul* to be "on point and particularly instructive in this matter." A.R. 14. There are no "fundamental differences" between *U'Haul* and this case, Pet. Br. at 19, so as to justify disregarding the law of that case as to contract formation.

In *U-Haul,* customers entered into rental agreements with defendant either on paper or electronically. 232 W. Va. at 436. The Court considered whether customer plaintiffs could be compelled to arbitrate their disputes when they had been 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. Defendant argued that the arbitration clauses had been incorporated by reference; plaintiffs countered that the arbitration agreement had not been clearly and unmistakably extended. *Id.* at 439. The Court agreed with 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 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.

Syl. pt. 2, *U-Haul.*

The *U-Haul* decision is 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. *U-Haul*, 232 W. Va. at 444. Under *U-Haul,* Frontier's arbitration provision cannot 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.

Finally, Frontier's refusal to see the clear distinction between *Schultz v. AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685 (N.D. W. Va. 2005) and this case, Pet. Br. at 18, is perplexing. In *Schultz*, plaintiff continued to use his phone after he was read a statement that he was agreeing to terms and conditions which would be sent to him separately (and which included an arbitration provision), and affirmatively consented to that agreement after the store representative verbally asked him, "do you accept this offer?". 376 F.Supp. 2d at 688. No such colloquy or affirmation occurred here wherein Plaintiffs could be apprised of the terms and conditions, or asked whether they consented to same.

2. *The fact that Plaintiffs did not sign any agreement to arbitrate is relevant evidence of their lack of assent.*

Frontier claims that the Circuit Court's observation that Plaintiffs did not sign any contract with Frontier is "irrelevant". Pet. Br. at 18 (citing A.R. 5.) The FAA may not impose a

bright line rule requiring signatures, but the lack of any affirmative manifestation of assent is, of course, relevant to whether there was a meeting of the minds. After all, the general rule in West Virginia, while subject to certain exceptions, is that a contract is "incomplete" until it is "signed by all of the parties." *Ely v. Phillips*, 89 W. Va. 580, 109 S.E. 808, 810 (1921).

Notably, all of Frontier's cases holding that a signature is not *required* involved knowing manifestation of assent by other means. Pet. Br. at 19, citing *John L. Rowan & Co. v. Hull*, 55 W. Va. 335, 47 S.E. 92, 93-94 (1904) (despite lack of signed contract, evidence proved that realtor party accepted terms of contract by preparing memorandum containing terms and seeking purchasers for property); *Seawright v. Am. Gen. Fin. Servs., Inc.*, 507 F.3d 967, 978 (6th Cir. 2007) (employee knowingly waived her right to sue employer when employer notified employees of dispute resolution program through "a series of announcements and informational meetings" and plaintiff signed an attendance sheet acknowledging she had attended an informational session and received a copy of the dispute resolution pamphlet); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1368 (11th Cir. 2005) (acceptance obtained when notice of dispute resolution policy containing arbitration clause was distributed to workers with an explanatory letter and question form, placed on accessible company intranet, distributed through management newsletter and posted on notices on bulletin boards throughout workplace); *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 736 (7th Cir. 2002) (employee signed form acknowledging that employer had the right to change its policies, and was subsequently sent a color brochure announcing mandatory arbitration program with her paycheck; employer also notified employees of arbitration policy by featuring program on cover of its internal monthly magazine, distributing posters for display in all work sites, and distributing a second payroll notice); *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987) (plaintiff agreed to

arbitrate disputes arising under unsigned sales forms when parties had long standing and on-going relationship and plaintiff was experienced in industry and on notice of widespread use of arbitration clauses in textile industry.)

The Circuit Court's observation that Frontier did not obtain Plaintiffs' consent to arbitration through the traditional means of signature was therefore not error.

3. The Circuit Court did not require Frontier to place "extra emphasis" on its arbitration provision.

Frontier devotes an entire preemption argument to the Circuit Court's description of the one-time provision of the arbitration provision as being contained in a "six-page, miniscule-font Terms and Conditions sent to them one time in November 2012." Pet. Br. at 21-23. This Court need not delve into a preemption analysis because the Circuit Court did not reach its conclusion based on this (albeit accurate) description of the insert. Before the descriptive language Frontier finds so offensive, the Court had already expressly found 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 customer's monthly bills." A.R. 18. The Court later stated that was "no evidence that Plaintiffs ever received or read the six-page, miniscule-font Terms and Conditions sent to them one time in November 2012." A.R. 20. The Court did not discuss the significance of the presentation of the insert, nor expressly rely on it to reach its conclusion. Rather, it stated a fact about the inserts. Accordingly, the Court did not invoke any rule subjecting arbitration clauses to "special notice requirements that do not apply generally to all contracts," as Frontier accuses it of doing. Pet. Br. at 22.[13]

[13] Nevertheless, the scope of the Circuit Court's analysis was to determine assent, and an observation as to the length of the insert or the size of its font was not irrelevant.

4. The Circuit Court correctly found that revising terms via an insert to a bill does not constitute formation.

The Circuit Court correctly found 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 its customers' monthly bills. A.R. 18. In reaching this conclusion, the Circuit Court appropriately relied on a line of cases where courts nationwide have refused to enforce terms added in "bill stuffers". A.R. 18-19, citing *Kortum-Managhan v. Herbergers NBGL*, 349 Mont. 475, 204 P.3d 693 (2009); *Martin v. Comcast of California*, 209 Or. App. 82, 146 P.3d 380 (2006); *Sears Roebuck & Co. v. Avery*, 163 N.C. App. 207 (2004); *Discover Bank v. Shea*, 362 N.J. Super. 200, 827 A.2d 358 (2001); *Powertel v. Bexley*, 743 So.2d 570 (Fla. App. 1 Dist. 1999); *Badie v. Bank of America*, 67 Cal.App.4th 779, 79 Cal. Rptr. 2d 273 (1998). Frontier attempts to distinguish these cases by accusing these courts of the same "hostility to arbitration" it ascribes to the Circuit Court's motives, but this criticism cannot hold in light of each of these courts' adherence to the same contract principles applicable here. Moreover, Frontier fails to cite any cases on point to support its own theory that a bill stuffer is an adequate means of notice.

For example, in *Kortum-Managhan*, the court examined the enforceability of an arbitration clause presented to plaintiffs in similar circumstances to those here. Plaintiff signed up for a credit card with defendant and the agreement did not include an arbitration clause, though it did contain a provision allowing defendant to "unilaterally change the agreement as it saw fit and specifying that a cardholder's continued use of their Herbergers' credit card or other services constituted agreement to Herbergers' unilateral change in terms." 249 Mont. at 476. Plaintiff later sued the credit card company for inaccurate credit reporting, and defendant moved to dismiss and compel arbitration, alleging it had mailed out a notice of change in terms along

with her monthly statement. "This "bill stuffer" contained various changed in the terms of the agreement including the addition of [an] arbitration clause." *Id.* at 477. Like Frontier does here, defendant argued that plaintiff had agreed to binding arbitration through her use of her account after being "notified" of the addition of the arbitration agreement. *Id.* at 478. The lower court granted defendant's motion, but the Supreme Court of Montana reversed, holding that "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." *Id.* at 488.

Frontier attempts to distinguish *Kortum-Managhan* by claiming that the "reasonable expectations" rule on which it purportedly relies is preempted by the FAA. Pet. Br. at 25. But while the Montana court was troubled by many aspects of the defendant's conduct, it did not veer from the same rules the Circuit Court below correctly applied here. First, it acknowledged the rule that arbitration agreements between parties are generally valid and enforceable, but that the threshold inquiry is "whether the parties agreed to arbitrate." *Id.* at 480. And, as in West Virginia, Montana law requires "mutual assent or a meeting of the minds on all essential terms to form a binding contract." *Id.* Finally, while the court's observation that plaintiffs did not have a reasonable expectation of an added arbitration clause was valid, in the end, its *holding* was that "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." *Id.* at 485. Thus, the court's emphasis was, as it must be, on notice and intent to be bound. Frontier's attempt to distinguish *Kortum-Managhan* therefore fails.

Frontier goes on to attack all the other courts that have reached this same conclusion regarding bill stuffers, complaining that all of these courts were somehow blinded by their opposition to arbitration. Frontier cites no authority supporting the use of bill stuffers to manifest assent, and the contract formation language in these cases establishes that their rulings were well-founded in basic contract law.

In *Sears Roebuck*, for example, the court expressly rejected any public policy arguments, stating that it must first find that an enforceable arbitration agreement exists. 593 S.E.2d at 428. It then turned to the parallel question the Circuit Court here considered: "whether Sears could, consistent with Arizona law, unilaterally add an arbitration clause to its shareholder (sic) agreement by simply mailing notice to its cardholders." *Id.* The court then applied Arizona contract law as well as "guidance from the Restatement (Second) of Contracts" and law nationwide to "hold 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." *Id.* at 434; *see also Martin*, 209 Or. App. at 97 (discussing trial court's finding that the "communications and overt acts of the parties do not manifest a meeting of the minds with respect to a modification of the subscriber agreements" and finding 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 nonaction did not signify acceptance of the arbitration term"); *Discover Bank*, 362 N.J. Super. at 210 (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"); *Badie*, 67 Cal. App. 4th at 805[14] (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"); *Powertel*, 743 So. 2d at 574-5 (noting the "validity of an arbitration clause is ... an issue of state contract law" and agreeing with trial court that defendant had not provided notice when "the method Powertel employed may have left many customers unaware of the new arbitration clause," a decision "based on general principles that would most certainly apply to any significant modification of a contract"). More recent industry authority likewise recognizes that an arbitration clause "should not be placed in a bill stuffer included in a mailing to the buyer after the deal has been formally executed or approved." Nicole F. Munro & Peter L. Cockrell, *Drafting Arbitration Agreements: A Practitioner's Guide for Consumer Credit Contracts*, 8 J. Bus. & Tech. L. 363, 377 (2013).

Frontier's argument is essentially that any court applying basic contract law to find that a defendant has not established formation must be hostile to arbitration – despite strict adherence

[14] Frontier cites the Supreme Court of the United States's language in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) as if that decision was actually addressing *Badie* and other courts' "attacks" on *formation* of arbitration clauses. Pet. Br. at 26. To the contrary, *Gilmer* was addressing attacks on the "adequacy of arbitration procedures" and there is no basis to find that a trial court is precluded from simply *acknowledging* that a right to a judicial forum should not lightly be deemed waived. Indeed, the West Virginia Supreme Court of Appeals has recognized that the state "*Constitution* recognizes that factual disputes should be decided by juries of lay citizens rather than paid, professional fact-finders (arbitrators) who may be more interested in their fees than the disputes at hand." *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 666, 724 S.E.2d 250, 271 (2011) ("Brown I") (reversed on other grounds by *Marmet Health Care Ctr., Inc.*, 132 S. Ct. 1201, 1204 (2012); reaffirmed by *Brown v. Genesis Healthcare Corp.*, 229 W. Va. 382, 391, 395, 729 S.E.2d 217, 226, 230 (2012)) (emphasis in original). While the "constitutionally-enshrined and fundamental rights to assert one's claims for justice before a jury in the public court system may be the subject of a legally enforceable waiver," West Virginia courts "indulge every reasonable presumption against waiver of a fundamental constitutional right and will not presume acquiescence in the loss of such fundamental right." *Brown I*, 724 S.E. 2d at 667.

to contract law in each case. Frontier does not distinguish these cases on the facts, nor could it. In contrast, none of the cases on which Frontier relies involve even remotely close facts to those here. *See* Pet. Br. at 24. Specifically, in *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), buyers were sent terms and conditions with the computer they purchased, and the court was persuaded by the fact that the plaintiffs were suing under the very contract containing the arbitration clause, reasoning that the "[t]erms inside Gateway's box stand or fall together. If they constitute the parties' contract because the Hills had an opportunity to return the computer after reading them, then all must be enforced." 105 F.3d at 1148. The court also relied on the "practical consideration" of "allowing vendors to enclose the full legal terms with their products." *Id.* at 1149. Here, Plaintiffs are not suing under any contract, nor did Frontier alert Plaintiffs to an arbitration clause when they signed up for the product.

Hardin v. First Cash Fin. Servs., Inc., 465 F.3d 470 (10th Cir. 2006) is another case cited by Frontier where an employer informed an employee of a new dispute resolution policy. There were no notice issues in *Hardin*, where the plaintiff actually "discussed the [dispute resolution program] with her supervisor" – rather the court considered the question of whether the employee manifested assent to the terms of the dispute resolution policy by continuing to go to work after it went into effect when she had been told that continued employment would constitute acceptance. Finally, in *SouthTrust Bank v. Williams*, 775 So.2d 184 (Ala. 2000), the court found plaintiffs had agreed to a later added arbitration clause when the plaintiffs had twice *signed* agreements indicating they understood that the rules governing the parties' contract might be changed or amended. Importantly, *SouthTrust* is the only "bill stuffer" case on which Frontier relies here, and the plaintiffs there twice affirmatively manifestly assented to a change in terms.

As support for separating these circumstances from the general rule prohibiting browsewraps, Frontier relies exclusively on the District Court of Minnesota's decision in *Rasschaert v. Frontier Commc'ns Corp.*, No. 12-3108, 2013 WL 1149549 (D. Minn. Mar. 19, 2013), wherein the court enforced a similar arbitration clause against Minnesota Frontier customers. However, *Rasschaert* is distinguishable on at least two material bases, and in any event, was wrongly decided.

First, the court neglected to engage in any discussion of the guiding legal principles (enforceability of browsewrap agreements, whether bill stuffers provide notice, etc.) of Frontier's arbitration clause. Second, the Minnesota court applied Minnesota employment law to conclude that Frontier was justified in unilaterally adding an arbitration clause. *Rasschaert*, at *6. This is a unique interpretation of state law and one not shared by West Virginia courts. This perspective has also been rejected by courts nationwide, which have refused to allow such unilateral attempts to change material terms via bill stuffers. *See* discussion, *infra.*

II. THE CIRCUIT COURT'S RECITATION OF WEST VIRGINIA LAW AS TO ILLUSORY AGREEMENTS AND THE NEED FOR CONSIDERATION WHEN AGREEMENTS ARE SUBSEQUENTLY MODIFIED WAS CORRECT, AS WAS ITS CONCLUSION THAT FRONTIER'S ARBITRATION CLAUSE CANNOT BE APPLIED TO COVER PREEXISTING DISPUTES.

In discussing its second assignment of error, Frontier confuses the Circuit Court's observation that Frontier modified the Terms after Plaintiffs had become Frontier customers to *add the initial arbitration clause*, A.R. 21, with an entirely different argument, invented by Frontier as a straw man, that Frontier may make changes to the arbitration provision once that provision was already in effect. Pet. Br. at 27.[15] In support of its argument, Frontier relies on a

[15] Frontier also relies on language in the November 2012 arbitration provision that customers may "reject any further changes Frontier might make to the arbitration provision." Pet. Br. at 27

handful of cases outside of this state. Pet. Br. at 28 (citing cases). But these cases conflict with West Virginia precedent. For instance in *Monto v. Gillooly*, 107 W.Va. 151, 147 S.E. 542, (1929) the West Virginia Supreme Court 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.

Syl. pt. 2, *id.*

Further, to establish a modification of a written contract, there can be no subsequent modification of such contract without consideration. *Bischoff v. Francesa*, 133 W. Va. 474, 489, 56 S.E.2d 865, 873-74 (1949). Frontier again confuses Plaintiffs' simple argument with an invented one of its own. Plaintiffs only argue, and the Circuit Court only found, that a "subsequent modification" of a contract requires consideration. A.R. 22. Frontier instead cites cases for the proposition that an arbitration agreement provides consideration, Pet. Br. at 28 – without discussion of the specific circumstances here, where the parties' initial agreement contained no arbitration provision at all and the drafting party subsequently attempted to modify the agreement. The Circuit Court's findings that Frontier modified the Terms after Plaintiffs had already become Frontier's customers and that modification of a written contract requires consideration, A.R. 21-22, are therefore sound. This conclusion holds true even more strongly today, as Frontier now advertises the potential to "lock in your Price for Life."[16] Frontier consistently attempts to lure its customers into believing that no contract governs their static

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(citing A.R. 281). But this supposed ability to reject rings hollow in light of the fact that the earlier versions of the arbitration provision, i.e. those referenced in the 2011 bills, did not allow for rejection.

[16] http://investor.frontier.com/releasedetail.cfm?ReleaseID=940387

relationship with Frontier, when in fact Frontier is constantly changing material terms behind the scenes without giving customers notice: a hallmark of an illusory promise.

Frontier's third assignment of error is closely tied into its second. Based on its findings as to illusory promises and a lack of consideration with the attempted subsequent modification to the agreement, the Circuit Court found that the arbitration clause could not be invoked to require arbitration of pre-clause disputes. A.R. 23. Again, this makes sense: Plaintiffs did not agree to arbitrate *any* disputes with Frontier, so there is certainly no basis to conclude that they agreed to arbitrate disputes which *pre-dated* the arbitration provision altogether. This conclusion is consistent with this Court's decision in *Gamestop*, wherein mutuality of assent to arbitrate was found when modification of the contract could "only be applied prospectively." *New v. Gamestop*, 232 W. Va. at 580; *see also Powertel*, *supra*, 743 So. 2d at 574 (arbitration clause cannot apply retroactively to later lawsuit).

In sum, Plaintiffs simply did not manifest assent to any modification, and Frontier's attempt to bind them to a subsequent modification to arbitrate not only present disputes but pre-existing ones through hidden terms renders any agreement illusory.[17]

[17] Frontier's reliance on this Court's pair of AT&T cases for the proposition that this Court endorses the application of arbitration provisions to preexisting claims, Pet. Br. at 30-31, is not correct. In both cases cited, the Court noted only that counsel for plaintiff represented during oral argument that he did not object to ruling that subsequent contracts were the controlling provisions with regard to arbitration. *Shorts v. AT&T Mobility*, No. 11–1649, 2013 WL 2995944, at *4 (W. Va. June 17, 2013); *State ex rel. AT&T Mobility, LLC v. Wilson*, 226 W. Va. 572, 703 S.E.2d 543, n. 9 (2010). The Court's acknowledgement of a party's concession on an issue certainly does not constitute endorsement of a position.

III. THE CIRCUIT COURT DID NOT ERR IN NOTING THE UNDISPUTED FACT THAT ENFORCING THE ARBITRATION CLAUSE WOULD HAVE A PRECLUSIVE EFFECT ON PLAINTIFFS' RIGHT TO SEEK INJUNCTIVE RELIEF, AND THIS COURT IS FREE TO CONSIDER WHETHER THAT RESULT RENDERS FRONTIER'S ARBITRATION CLAUSE SUBSTANTIVELY UNCONSCIONABLE.

Frontier's final argument is that the Circuit Court erred in "conclu[ding] that Frontier's arbitration provision is unenforceable because it prohibits classwide relief." Pet. Br. at 32, citing A.R. 20-21. Frontier is referring to the Circuit Court's acknowledgement of a very real problem with Frontier's arbitration provision, namely that for all its "friendly" provisions, at the end of the day Plaintiffs would never be able to obtain relief through individual arbitration because the arbitration provision requires that any non-monetary relief obtained "be individualized and may not affect individuals or entities other than you or Frontier."A.R. 281-282 (emphasis in original).

Frontier's argument that this Court may not consider this issue because it was insufficiently raised below is incorrect. Plaintiffs raised this argument in three ways below. First, Plaintiffs noted in their memorandum of law in opposition to the motion to compel arbitration that the arbitration clause would "limit the injunctive relief Plaintiffs may obtain." A.R. 291-292. Second, Plaintiffs' counsel made the following argument at the Circuit Court hearing after explaining how Frontier accepted $42 million in state funds to provide broadband to rural West Virginians:

> Well, today only 12% actually have broadband and they're paying for broadband but not receiving it. And so, this action was brought to hold accountable – Frontier accountable to the promises that it made to the State, as well as its customers. And why that's important is, and this arbitration clause provides that the arbitrator may award, "relief on an individual basis only, and may not award relief that affects individuals or entities other than you or Frontier."
>
> What that means is the people in West Virginia want to fix, they want to fix this problem and the arbitration clause, the enforcement of the arbitration clause will essentially put this thing into a confidential arbitration for which they will not be able to obtain the relief that they want which is the fix. How are you going to fix this

> problem without affecting other people and so forth. And for that reason, under substantive unconscionab[ility], a Court can find that because a remedy, a primary remedy, is not made available in the arbitration clause that that arbitration clause is [un]enforceable.

A.R. 576-577.

Third, Plaintiffs presented the Circuit Court with case law in support of the substantive unconscionability issue through their Powerpoint presentation at the hearing, which is now part of the appellate record. The relevant slide read:

> **If the arbitration clause is enforced, necessary injunctive relief will be precluded**
>
> - Arb clause states arbitrator may award relief "on ***an individual basis only, and may not award relief that affects individuals or entities other than you*** or Frontier."
> - Substantive unconscionability arises when an arbitration process established by the sophisticated, drafting party "***substantially impairs the plaintiffs' right to pursue remedies for their losses***." *Richmond Am. Homes of W. Va. v. Sanders,* 228 W. Va. 125, 128 (2011).

A.R. 619.

Frontier relies only on authority for the proposition that this Court should not consider issues that a party fails to raise in its *briefing before this Court*. Pet. Br. at 34, citing *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) ("Although we *liberally construe briefs* in determining issues presented for review, issues which are not raised, and those mentioned only in passing but are not supported with pertinent authority, are not considered on appeal" (emphasis added)). Frontier cites no authority for the proposition that a party who raises an issue in its briefing below, at argument during a hearing, and in a demonstrative aid presented at hearing that is part of the appellate record, has not preserved the argument.

Nevertheless, Frontier goes too far in its characterization of the Circuit Court's discussion as a "conclusion," let alone a finding that the arbitration provision is "unenforceable" on the basis of the classwide relief issue. The Circuit Court made no such conclusion based upon the unavailability of classwide relief, but was simply stating a fact – indeed, an *undisputed* fact – about the inability to obtain meaningful injunctive relief whether it be for the individual or any putative class. This is clear from the language used by the court. It stated 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." A.R. 20-21. The Circuit Court did not find the agreement unenforceable because the agreement prohibited class wide relief. Indeed, the Circuit Court had already found that Frontier did not obtain assent to its arbitration provision on any of the bases Frontier has presented, i.e. by including the provision on its website, or in references in its monthly bills, or by the one-time inclusion of the Terms and Conditions as an enclosure. A.R. 16, 18, 20. The Circuit Court made an observation of a fact after reaching the necessary conclusions on formation. It did not represent that this conclusion informed its formation holding, and formation was the only issue before the Court.

Notwithstanding the above, the Circuit Court was right to be troubled by the practical implications of Frontier's arbitration provision. Frontier's response to Plaintiffs' injunction argument is that it is "foreclosed by the FAA" and that *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 563 U.S. 333 (2011) "itself involved claims for injunctive relief." Pet. Br. at 32. In addition to failing to recognize the real-world consequences to West Virginians of foreclosing any possibility of effective injunctive relief, this argument misses the mark legally. Plaintiffs are

not contending that disallowance of classwide proceedings is *per se* unconscionable, as argued and rejected in *Concepcion,* but rather that Frontier is effectively foreclosing any possibility of *individual injunctive* relief as well 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 ongoing provision of services. 131 S.Ct. at 1741. There was no discussion whatsoever in *Concepcion* of a need for injunctive relief that might affect others beyond the plaintiffs, and therefore no suggestion that the Court considered these implications.

CONCLUSION

The Circuit Court applied basic principles of contract formation under West Virginia law to find that Frontier did not obtain Plaintiffs' assent to arbitrate their disputes by either posting an arbitration provision on a website Plaintiffs never visited, mentioning the provision in buried terms in bill statements, or including them in a one-time folded bill stuffer. The Circuit Court displayed no hostility to arbitration by doing its job in this straightforward manner. Unable to believe that anyone could find fault with its "friendly" arbitration provision, Frontier nonetheless insists on assigning this nefarious intention to not only the Circuit Court here, but to the judges in most of the cases on which the Circuit Court relied.

This Court need not delve into the general merits of arbitration or whether or not arbitration presents a good deal for Plaintiffs here. It must only consider, like the Circuit Court properly did below, whether Plaintiffs agreed to arbitrate. For all the reasons discussed above, Plaintiffs did not do so, and the Circuit Court's decision should be affirmed.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of May 2016, a copy of the foregoing **Respondents' Brief** was served upon counsel for all other parties to this appeal, via US Mail, addressed as follows:

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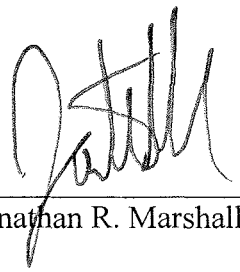

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