IN THE CIRCUIT COURT OF LINCOLN COUNTY, WEST VIRGINIA

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

Plaintiffs,

v. **Case No. 14-C-115**

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

Defendants.

Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Compel Arbitration and Dismiss, or in the Alternative to Stay

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Table of Contents

Plaintiffs Michael Sheridan, April Morgan, Trisha Cooke and Richard Bennis (collectively "Plaintiffs") cannot be compelled to submit their claims to arbitration because they did not agree to arbitrate their disputes with Defendants Citizens Telecommunications Company of West Virginia d/b/a Frontier Communications of West Virginia and Frontier West Virginia Inc. (collectively "Frontier"). Discovery produced by Frontier confirms that there was no meeting of the minds or acceptance by Plaintiffs or putative class members of Frontier's arbitration clause. Frontier's attempts to alter its original agreements with Plaintiffs and class members and procure that acceptance via browsewrap agreements or bills mailed or emailed to Frontier's customers – while at the same time Frontier overtly and repeatedly advertised that Frontier in fact requires "NO CONTRACT" for the use of its services – fail as a matter of law.

Background

A. Frontier's deceptive scheme to increase its profits and deny West Virginia consumers access to high-speed broadband internet

Plaintiffs filed this putative class action against 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. 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. As set forth in detail in Plaintiffs' First Amended Class Action Complaint and Jury Demand, Frontier deliberately throttled or "provisioned" its customers to 5 or 10% of its advertised internet speeds, thus saving a fortune in the data it purchases from its own internet backbone providers and allowing it to pocket the monthly charges it extracts from customers. 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. 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.

B. Frontier relied on numerous "NO CONTRACT" advertisements to solicit customers

Beginning in February 2013 and continuing until the present day, Frontier has advertised that "no contract" is required to use its services. (Frontier Resp. to Interrog. No. 11). Specifically, Frontier admitted in discovery that the following statements have appeared in various advertisements and on their 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]

FREE from Contracts[7]

NO CONTRACT[8]

Frontier is now in the unenviable position of trying to enforce hidden terms in the very contracts they repeatedly represented did not exist.

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[1] Resp. to RFA No. 1
[2] Resp. to RFA No. 2
[3] Resp. to RFA No. 3
[4] Resp. to RFA No. 4
[5] Resp. to RPD No. 4; FRONTIER-00000112-124, 131-135.
[6] Resp. to RPD No. 4; FRONTIER-00000125-130
[7] Resp. to RPD No. 5; FRONTIER-00000147, 150-1, 153, 155.
[8] Resp. to RPD No. 5; FRONTIER-00000154, 157-8.

C. Frontier's attempts to bind Plaintiffs to individual arbitration

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

Frontier has stated 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. (McCall Aff. ¶¶ 4, 10, 13, 16). Plaintiffs do not dispute Frontier's records on this point. The parties further agree that no Plaintiff ever signed any document containing an arbitration agreement. (Exhibit A, Resps. to RFA Nos. 5-8; Exhibits B, C, D, E, Plaintiffs' Affidavits, at ¶ 2.)[9]

ii. 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. (Resps. to RFA Nos. 23-26). All Plaintiffs allege that they "never received" internet services at a satisfactory speed. (FAC at ¶¶ 40, 62, 75, 91.) All Plaintiffs therefore allege pre-arbitration clause conduct, even if the arbitration clause were somehow binding. Frontier further admitted in discovery that it was permitted to change its terms and conditions "at any time" and that customers could not alter those terms and conditions. (Resp. to RFA Nos. 17, 18.)

Beginning in September 2011, Frontier added an arbitration provision to its Terms and Conditions on a page of its website. (Resp. to RFA No. 4). Customers can only access those Terms and Conditions by navigating through Frontier's website as follows:

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[9] Frontier produced certain documents that it states "evidenc[e] Plaintiffs' acceptance of the Frontier Terms of Service." (Ex. A, Resp. to RPD No. 42 (FRONTIER00000287-385, 389-400). Those documents include bills and payment stubs (287-385), as well as Frontier's internal notes about Plaintiffs' individual billing inquiries (389-400).

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

(Frontier Resp. to Interrog. No. 3 (describing the process by which a customer can access information about arbitration "today").) Frontier admits that the word "arbitration" does not appear on the page displayed upon visiting http://www.frontier.com/residential. (Resp. to RFA No. 15.)

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. (Resp. to Interrog. No. 5; Resp. to RFA No. 13) Frontier further admitted that it does not maintain records showing that any Plaintiff viewed the terms and conditions on Frontier's website. (Resps. to RFA Nos. 9-12).

Frontier also admitted 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. (Exhibit F, Ltr. from D. Fenwick to B. Sheridan re: supplemental discovery responses (July 8, 2015)).

iii. Bill stuffers

Frontier claims to have notified Plaintiffs of the terms and conditions, including the September 2011 addition of the arbitration clause, on their monthly bills. (Frontier Resp. to Interrog. No. 4). 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 in discovery that its bills *reference* "Terms and Conditions". For example, Frontier states that Plaintiffs Sheridan, Cooke, and Bennis received monthly bills, including in July 2011, stating:

> ATTENTION FRONTIER HIGH SPEED INTERNET USERS
>
> 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. In the past, Frontier, filed this information with the Federal Communications Commission (FCC). As a result of recent FCC rulings, we are now providing High-Speed Internet service per these Terms and Conditions. If you have any questions, please call the customer service number on your bill.

(*Id.*) There is no dispute, however, 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.

On one occasion, in November 2012, Frontier distributed a printed copy of its then-current Residential Internet Service Terms and Conditions with the monthly bill as a "special insert" to the bill. (Resp. to Interrog. No. 4; *see also* Exhibit G, Residential Internet Service Terms and Conditions.)[10] 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. (Plaintiffs' Affidavits, Exhibit Nos. B, C, D, E at ¶¶ 6, 7.)

Procedural Posture

Plaintiffs filed their original complaint on October 14, 2014 and their First Amended Class Action Complaint and Jury Demand ("FAC") on November 19, 2014. Injunctive relief is a material and significant portion of the relief Plaintiffs are seeking. *See* FAC at p. 22. Frontier

[10] FRONTIER-424-425.

filed their motion to compel arbitration and dismiss, or in the alternative to stay, on January 30, 2015.

Plaintiffs moved for discovery on the issue of arbitration on March 24, 2015. That motion is now moot as the parties reached a compromise whereby Frontier provided limited arbitration discovery.

A hearing has been scheduled on Defendants' motion to compel arbitration and dismiss, or in the alternative to stay, for August 19, 2015.

Argument

A. Applicable Legal Standards

West Virginia law recognizes a fundamental constitutional right to use West Virginia's court system to seek justice. W. Va. Const. Art. 3, § 17 (protecting the right of the people to open access to the courts to seek justice); W. Va. Const. Art. 3, § 13 (preserving the right of the people to a jury trial over any controversy); *see also Brown ex rel. Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 666, 724 S.E.2d 250, 270 (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)). The West Virginia Supreme Court of Appeals has accordingly 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 I,* 724 S.E.2d at 271 (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.

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. 2, *Schumacher Homes of Circleville, Inc. v. Spencer,* No. 14-0441, 2015 WL 1880234 (W. Va. Apr. 24, 2015) (quoting Syl. Pt. 6, *Brown I*).

The *Schumacher* Court further explained:

> The FAA recognizes that an agreement to arbitrate is a contract. The rights and liabilities of the parties are controlled by the state law of contracts. But if the parties have entered into a contract (which is valid under state law) to arbitrate a dispute, then the FAA requires courts to honor parties' expectations and compel arbitration.[4] ***Conversely, a party cannot be forced to submit to arbitration any dispute which he or she has not agreed to submit. A court may submit to arbitration "those disputes—but only those disputes—that the parties have agreed to submit to arbitration.***"

Id. (emphasis added) (quoting *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 943 (1995). *See also State ex rel. Richmond Am. Homes of W. Va. v. Sanders,* 228 W.Va. 125, 129, 717 S.E.2d 909, 913 (2011) (same).)

B. Plaintiffs Did Not Assent to be Bound by Frontier's Illusory Arbitration Clause

i. Frontier cannot employ its "NO CONTRACT" line of representations and advertisements to solicit customers and then seek to enforce hidden and ever-shifting provisions of said "contracts" to deny those customers their right to a jury trial.

Whether Frontier's hidden arbitration clause is enforceable affects Plaintiffs' right to relief in numerous ways, including but not limited to the fact that the clause appears to limit the

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

Here, Frontier repeatedly represented to Plaintiffs and all of their customers that "NO CONTRACT" governed their relationship. (Resp. to RFAs Nos. 1-5.) Frontier's position is that the term "no contract" means only that customers do not need to agree to a minimum service commitment, but does not mean that Frontier provides Internet service without any accompanying terms and conditions. (*Id.*) This self-serving interpretation is certainly not reflected by the actual language of the advertisements. Because the Terms, according to Frontier's own statements, are not part of any contract that binds Plaintiffs and because Plaintiffs never consented to arbitrate their disputes, the Arbitration Clause contained in the Terms is unenforceable.

ii. The Terms Are Not An Enforceable Contract And Therefore The Parties Did Not Agree To Arbitrate

Even if the Court finds that the parties did in fact form a contract, no class member agreed to be bound by the Terms and Conditions containing the arbitration clause because neither Frontier's browsewrap agreement nor its bill stuffers could obtain class members' assent to those Terms.[11]

[11] Frontier's memorandum of law in support of their motion omits any discussion of browsewraps, bill stuffers, or internet agreement assent law generally. Instead, Frontier relies heavily on the District Court of Minnesota's unpublished decision in *Rasschaert v. Frontier Commc'ns Corp.,* No. 12-3108, 2013 WL 1149549 (D. Minn. Mar. 19, 2013). *Rasschaert* is distinguishable on at least two material bases. Like Frontier here, the *Rasschaert* court neglected to engage in any discussion of the guiding legal principles (enforceability of browsewrap agreements,

a. *The Browsewrap Terms and Conditions Frontier seeks to impose on Plaintiffs are not clearly and conspicuously available*

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 *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

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whether bill stuffers provide notice, etc.). 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, *Toney v. EQT Corp.*, 2013 WL 9679888 at *6 (W. Va. Cir. Ct. August 29, 2013) (Trial Order), nor by courts nationwide which have rejected such unilateral attempts to change material terms. *See* cases cited in footnote 13, *infra.*

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.*

Despite the unique facts at play when "contractual terms are presented in an electronic form, or one that is signed electronically," 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); *see also*, 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 (2d Cir. 2002) (J. Sotomayor) (unenforceable provision appeared in a "submerged" portion of the website); *Cvent, Inc. v. Eventbrite, Inc.,* 739 F. Supp. 2d 927, 937 (E.D. Va. 2010); *Hines v. Overstock.com, Inc.,* 668 F.Supp.2d 362, 366 (E.D.N.Y. 2009). This is especially true where there is no evidence that a website prompted visitors to review the Terms and Conditions. *See Specht*, 306 F.3d at 32, n. 4; ("[A] reference to the existence of license terms on a submerged screen is not sufficient to place consumers on

inquiry notice of those terms."); *see also In re Zappos.com Inc., Customer Data Sec. Breach Litig.,* 893 F.Supp. 2d 1058, 1064 (E.D.N.Y. 2013) (where terms of use were inconspicuously located, no manifestation of assent to browsewrap).

Frontier's Terms constitute a classic browsewrap agreement. The only reference to the Terms on Frontier's website is a small, inconspicuous link entitled "Terms & Conditions." To locate this link, a Frontier user would have to scroll all the way to the bottom of an active and busy Frontier website, where the link to the Terms is buried among twenty-five other links. (*See* Frontier Resp. to Interrog. No. 3.) After finding and clicking on "Terms & Conditions," a user must then find and click on "General Terms & Conditions." *Id.* After this second find and click, the user must then click on "Arbitration Provision" or "Frontier Residential General Terms and Conditions" to finally view the terms that would deny him his right to a jury trial. *Id.* 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 ("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"); *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.[12] 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.

It is clear that Frontier's Terms are a "browsewrap" agreement and therefore fail to create a contract between the parties.

b. Frontier did not obtain assent to the contractual modification by referencing its Terms and Conditions in monthly bills or by the one time inclusion of the Terms and Conditions as a "bill stuffer"

Frontier contends that its references to "Terms and Conditions" in its monthly bills to consumers, and/or its one time inclusion of its Terms and Conditions as an insert to Plaintiffs' monthly bills, constitutes assent to the new Terms and Conditions which included the arbitration clause. Courts have rejected this so called "bill stuffer" argument because a plaintiff's failure to respond to such "notice" does not constitute the requisite manifest assent to forego the constitutional right to a jury trial. *See Kortum-Managhan v. Herbergers NBGL,* 349 Mont. 475, 204 P.3d 693 (2009); *Martin v. Comcast of California,* 209 Or. App. 82, 146 P.3d 380 (2006);

[12] Frontier's reliance on *Schultz v. AT&T Wireless Servs., Inc.,* 376 F. Supp. 2d 685 (N.D. W. Va. 2005) for the proposition that continued use of a service constitutes assent, Def. Motion at 13, is misplaced. In *Schultz,* plaintiff was read a statement that he was agreeing to terms and conditions, and affirmatively consented to that agreement. 376 F.Supp. 2d at 688.

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).

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 appellate court 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.

Several other courts have reached this conclusion based on similar or alternative bases, finding changes made to agreements through bill stuffers without any requirement of affirmative assent unenforceable due to consumers' lack of notice, bargaining power or choice. *See Martin,* 209 Or. App. at 97 (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"); *Powertel,* 743 So. 2d at 574-5 ("Powertel prepared the arbitration clause unilaterally and sent it along to its customers as an insert to their monthly telephone bill. The customers did not bargain for the arbitration clause, nor did they have the power to reject it"); *Sears Roebuck,* 163 N.C. App. at 434 (applying Arizona law to find arbitration clause unenforceable, holding that the "parties did not intend that the 'Change of Terms' provision in the original agreement would allow Sears to unilaterally add completely new terms that were outside the universe of the subjects addressed in the original cardholder agreement"); *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 (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").

This case is no different. There is no evidence whatsoever that Plaintiffs ever read the six page, miniscule font Terms and Conditions sent to them one time in November 2012. The other monthly bills sent to Plaintiff referenced an arbitration provision, but did not provide the text of that provision, and certainly did not put any Plaintiff on notice that continuing to use Frontier's services constituted a waiver of the right to a jury trial. Accordingly, Frontier did not obtain Plaintiffs' manifest assent to the new Terms and Conditions by the bill stuffers.

c. *Frontier Retained the Unilateral Right to Modify the "Contract" at Any Time, Rendering Any Potential Agreement Illusory and Unenforceable*

It is black letter law that a contract cannot stand on an illusory promise. *See, e.g.*, 1 Walter H.E. Jaeger, Williston on Contracts § 43, at 140 (3d ed. 1957). If a promisor enters an agreement, but retains an unlimited right to later decide the extent of his performance, the promise is illusory and the agreement is unenforceable. Applying this contract law maxim, numerous courts unremarkably and correctly have invalidated arbitration agreements where one side retained the unilateral right to modify the agreement. *See, e.g.*, *Howard v. King's Crossing, Inc.*, 264 F. App'x 345, 347 (4th Cir. 2008) (an agreement to arbitrate can be illusory for want of mutual consideration, if one party reserves the right to alter, amend, modify, or revoke the policy at its sole discretion at any time.); *Toney v. EQT Corp.*, No. 2012c834, 2013 WL 9679888 at *6 (W. Va. Cir. Ct. August 29, 2013) (Trial Order) (same).[13]

Under contract law in West Virginia, no legal contract exists if the minds of the parties are not in agreement with the essential elements or contract "fundamentals ... [which include] competent parties, legal subject matter, valuable consideration and mutual assent." *Virginian Export Coal Co. v. Rowland Land Co.,* 100 W.Va. 559, 131 S.E. 253, 262 (1926). Specifically with respect to enforceability challenges to written arbitration clauses, the Supreme Court of Appeals of West Virginia has stated:

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[13] *See also Torres v. S.G.E. Mgmt, LLC*, 2010 WL 3937362, at *4 (5th Cir. Oct. 5, 2010) (arbitration clause which was part of an agreement that could be unilaterally amended by one party upon giving notice was illusory and unenforceable); *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002) ("[A]n arbitration agreement allowing one party the unfettered right to alter the arbitration agreement's existence or its scope is illusory"); *Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753, 759–61 (7th Cir. 2001) (denying motion to compel arbitration where agreement was illusory and unenforceable where one party had "sole, unilateral discretion to modify or amend" rendering the agreement "hopelessly vague and uncertain"); *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 314, 316 (6th Cir. 2000) (finding arbitration agreement to be "fatally indefinite" and illusory because employer "reserved the right to alter the applicable rules and procedures"); *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 939 (4th Cir.1999) (arbitration agreement unenforceable where "Hooters reserves the right to modify the rules, 'in whole or in part,' whenever it wishes and 'without notice' to the employee."); *Gibson v. Neighborhood Health Clinics*, 121 F.3d 1126, 1133 (7th Cir. 1997) (employer's retention of right to change or revoke agreement "at any time and without notice" rendered illusory the promise to arbitrate); *Canales v. Univ. of Phoenix, Inc.*, 2:11-CV-00181-JAW, 2012 WL 1155510, at **3-4 (D. Me. Apr. 5, 2012) (employer's arbitration agreement contains an illusory promise to arbitrate and is unenforceable where it reserves "the right to unilaterally change or eliminate the terms of the [agreement.]")

> [W]here a party alleges that the arbitration provision was unconscionable or was thrust upon him because he was unwary and taken advantage of, or that the contract was one of adhesion, the question of whether an arbitration provision was bargained for and valid is a matter of law for the court to determine by reference to the entire contract, the nature of the contracting parties, and the nature of the undertakings covered by the contract.

Syl. pt. 4, *State ex rel. Saylor v. Wilkes,* 613 S.E.2d 914, 216 W. Va. 766 (2005) (internal citations omitted); *See also Hooters of America, Inc. v. Phillips,* 173 F.3d 933, 940 (4th Cir. 1999) (invalidating arbitration agreement which required employee to unilaterally disclose claims and lists of witnesses and allowed employer to choose arbitration panel and exercise unbridled discretion in changing rules).

Here, Frontier's Terms of Use state it may change the Terms and Conditions of its customers' service at any time after giving a 30 day notice, which may include a posting to Frontier's website. Notwithstanding the fact that Frontier customers may not know of a change within the 30 day period, the notice provides cold comfort to Frontier customers who have few alternatives for internet service. Frontier's customers are given "take it or leave it" modifications, which is especially injurious considering that Frontier's major advertising campaign touts "No Contract" internet services. Further, the Terms and Conditions provide that "Frontier may, in its sole discretion, change or modify the rates you are charged for Services and equipment at any time," thus granting Frontier the unilateral unfettered right of revision to charges for its services and making the purported contract illusory and unenforceable. *See infra* fn. 13. As the Sixth Circuit stated in *Floss*, a defendant cannot "pursue[ ] an acceptable objective in an unacceptable manner." *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 316 (6th Cir. 2000).

The unilateral nature of the Terms is further underscored by the fact that Frontier modified the Terms after Plaintiffs had already become Frontier's customers. Frontier inserted the Arbitration Clause into the terms in September 2011, more than a year after any Plaintiff first

became a Frontier customer and more than a year after any Plaintiff suffered inadequate service from Frontier. 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).[14] Therefore, even if there were somehow a finding of mutuality of assent here, the arbitration clause unquestionably cannot be applied so as to require arbitration of pre-clause disputes, which would include Plaintiffs' allegations of conduct before September 2011.[15] *See New v. Gamestop, supra,* 232 W. Va. at 580 (finding mutuality of assent to arbitrate when defendant was required to give employees thirty days notice of any modification or rescission "*and any such modification or rescission may only be applied prospectively.*") (emphasis added); *see also Powertel, supra,* 743 So. 2d at 574 (arbitration clause cannot apply retroactively to later lawsuit); *Discover Bank, supra,* 362 N.J. Super. at 201 (defendant could not amend credit card agreements "retroactively by way of a 'bill stuffer' notice which abrogates [plaintiffs] right to trial and right to bring a class action".)

Indeed, under the Terms, if the roles were reversed and Frontier alleged that one of the Plaintiffs (say Mr. Sheridan) was causing its internet service to be unbearably slow, Frontier

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[14] There can be no question that this unilateral change renders the Terms unenforceable against the Plaintiffs. *See, e.g., Douglas v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 495 F.3d 1062, 1066 (9th Cir. 2007) ("Parties to a contract have no obligation to check the terms on a periodic basis to learn whether they have been changed by the other side. Indeed, a party can't unilaterally change the terms of a contract; it must obtain the other party's consent before doing so"); *Kortum-Managhan v. Herbergers NBGL*, 349 Mont. 475, 480-81, 204 P.3d 693, 697-98 (2009) (collecting cases for the proposition that the unilateral insertion of an arbitration clause into consumer contracts renders the arbitration clauses unenforceable even where the consumers had notice).

[15] All Plaintiffs allege that they "never received" satisfactory internet service since the time they signed up for Frontier services; all Plaintiffs therefore have pre-arbitration clause claims. *See* FAC at ¶¶ 40, 62, 75, 91.

could sue in the court of its choosing and, if Mr. Sheridan tried to compel arbitration, Frontier could modify the Terms by amending the Arbitration Clause so that it still required Plaintiffs to submit their claims to arbitration, but permitted Frontier the right to litigate claims against Mr. Sheridan in whatever other jurisdiction Frontier found most advantageous. Frontier could further modify the Terms to require Plaintiffs to pay Frontier's attorneys' fees or submit to other injustices. Such legal gamesmanship is contrary to the basic tenants of contract law, constituting subsequent modifications for which Frontier has given no consideration and demonstrates forcefully that the Arbitration Clause contained within Frontier's illusory contract is unenforceable.

Conclusion

For all the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' motion to compel arbitration and dismiss, or in the alternative to stay.

Respectfully submitted,
Plaintiffs,
By Counsel.

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IN THE CIRCUIT COURT OF LINCOLN COUNTY, WEST VIRGINIA

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

Plaintiffs,

v. **Case No. 14-C-115**

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

Defendants.

Certificate of Service

I certify that on July 28, 2015, ***Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Compel Arbitration and Dismiss, or in the Alternative to Stay*** was served on counsel of record via email and/or via U.S. Mail, first class, postage prepaid, at the following address:

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