IN THE SUPREME COURT OF MISSOURI

No. SC95465

KYLE SANFORD,

Plaintiff/Respondent,

v.

CENTURYTEL OF MISSOURI, LLC d/b/a CENTURYLINK,

Defendant/Appellant.

Appeal from the Circuit Court of Boone County
Hon. Christine Carpenter

SUBSTITUTE BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

Plaintiff Kyle Sanford ("Sanford") filed this putative class action lawsuit in the Circuit Court of Boone County, Missouri. Sanford alleges that Defendant CenturyTel of Missouri, LLC d/b/a CenturyLink ("CenturyLink") violated the Missouri Merchandising Practices Act by assessing a Universal Services Fund Surcharge on high-speed Internet services. (L.F. 8, 12-14.)

CenturyLink moved to dismiss or stay the court proceedings and to compel arbitration based on the parties' Internet Services Agreement, which provides that "INSTEAD OF SUING IN COURT, YOU AND COMPANY AGREE TO ARBITRATE, ANY AND ALL CLAIMS, CONTROVERSIES OR DISPUTES OF ANY KIND ('CLAIMS') AGAINST EACH OTHER." (L.F. 93.) The trial court preliminarily overruled CenturyLink's motion to compel arbitration and ordered the parties to conduct discovery into the issue of arbitrability. (L.F. 3.)

Following discovery, Sanford filed a Motion for Partial Summary Judgment Limited to the Issues of Consideration and Scope of the Alleged Agreements to Arbitrate. In this Motion, Sanford asked the trial court to deny CenturyLink's motion to compel arbitration. (L.F. 358.) After argument, the trial court made a July 10, 2014, docket entry indicating that Sanford's motion was granted. (L.F. 4-5.) On July 14, 2014, however, the trial court made a second docket entry indicating that the matter instead remained under advisement. (L.F. 5.)

The July 10 order became final thirty days after its entry. Rule 81.05(a)(1). CenturyLink filed its notice of appeal pursuant to R.S. Mo. § 435.440 and 9 U.S.C. § 16

on August 18, 2014, within ten days of the date the order became final. Rule 81.04(a). This Court has jurisdiction under article V, section 10, of the Missouri Constitution. *Ellis v. JF Enterprises, LLC*, --- S.W.3d ---, 2016 WL 143281, at *2 n.3 (Mo. banc Jan. 12, 2016). This Court granted transfer on March 1, 2016.

STATEMENT OF FACTS

I. Sanford and CenturyLink Entered Into an Internet Services Agreement.

A. Sanford Agreed to Purchase a Package of Services From CenturyLink in January 2012 and Used Those Services Until August 2012.

On or around January 27, 2012, Sanford agreed to purchase certain services from CenturyLink, and CenturyLink agreed to provide those services to Sanford. (L.F. 8, 22, 36-37.) Specifically, Sanford purchased CenturyLink's "Pure Broadband Package." (L.F. 37, 42, 47, 53, 59, 65, 71.) This package includes high-speed Internet service, an access line, 911 service, outbound call block, toll restriction, a subscriber line charge, and a non-published number. (L.F. 37, 42, 47, 53, 59, 65, 71.) Sanford's use of these services was governed by CenturyLink's High Speed Internet and Internet Access Services Residential Terms and Conditions ("Internet Services Agreement"). (L.F. 37-38, 42, 48, 53, 60, 65, 71-72, 78.)

Sanford used CenturyLink's Pure Broadband services for approximately six months, from February 2012 until August 2012. (L.F. 42, 48, 53, 60, 65, 71-72.) Bills sent to Sanford dated February 23 and March 23, 2012, include a section entitled "Important Notices and Information." (L.F. 42, 48.) This section of the bills references and provides a link to the Internet Services Agreement:

> For more information you may access Terms and Conditions, and Tariff materials at http://about.centurylink.com/legal/rates_conditions.html, or call CenturyLink customer service at the phone number indicated on this bill.

(L.F. 42, 48.) Bills from CenturyLink to Sanford dated April 23, May 23, June 23, and July 23, 2012, also contain a section entitled "Important Notices and Information" that references and provides a link to the Internet Services Agreement:

> For more information you may access Terms and Conditions, and Tariff materials at http://www.centurylink.com/Pages/AboutUs/Legal/Tariffs/displayTariffLandingPage.html?rid=tariffs, or call CenturyLink customer service at the phone number indicated on this bill.

(L.F. 53, 60, 65, 71-72.) These links were operational at the time Sanford received the bills and directed customers to the Internet Services Agreement. (L.F. 78.)

The first paragraph on the first page of the Internet Services Agreement provides the mode of acceptance for the agreement:

> We are pleased to provide you with the Services herein described, subject to these terms and conditions (the "Agreement"). PLEASE READ THIS AGREEMENT IN FULL BEFORE USING THE SERVICES. ACCEPTANCE OF THIS AGREEMENT OCCURS WHEN YOU: (1) AFFIRMATIVELY ACCEPT THIS AGREEMENT, (2) USE THE SERVICES, OR (3) RETAIN SOFTWARE OR EQUIPMENT WE PROVIDE BEYOND 30 DAYS FOLLOWING DELIVERY. BY ACCEPTING THIS AGREEMENT, YOU ACKNOWLEDGE THAT YOU HAVE READ, UNDERSTOOD, AND AGREE TO ABIDE BY THE TERMS AND CONDITIONS SET FORTH IN THIS AGREEMENT. IF YOU DO NOT AGREE TO THIS AGREEMENT, DO NOT USE THE

SERVICES AND CONTACT US IMMEDIATELY TO TERMINATE IT.

You should carefully read all terms in this Agreement, including a Mandatory Arbitration of disputes provision.

(L.F. 81 (emphasis in original).)

B. The Internet Services Agreement Requires Mandatory Arbitration of "Any and All Claims, Controversies or Disputes of Any Kind."

Section 15 of the Internet Services Agreement contains a provision binding both parties to mandatory arbitration under the Federal Arbitration Act:

DISPUTE RESOLUTION . . .

B. MANDATORY ARBITRATION OF DISPUTES. INSTEAD OF SUING IN COURT, YOU AND COMPANY AGREE TO ARBITRATE ANY AND ALL CLAIMS, CONTROVERSIES OR DISPUTES OF ANY KIND ("CLAIMS") AGAINST EACH OTHER. THIS INCLUDES BUT IS NOT LIMITED TO CLAIMS ARISING OUT OF OR RELATING TO THIS AGREEMENT, AS WELL AS CLAIMS ARISING OUT OF OR RELATING TO COMPANY'S SERVICES OR SOFTWARE, BILLING OR ADVERTISING, OR ARISING OUT OF OR RELATING TO EQUIPMENT YOU OR COMPANY MAY USE IN CONNECTION WITH COMPANY'S SERVICES. THE REQUIREMENT TO ARBITRATE APPLIES EVEN IF A CLAIM ARISES AFTER YOUR SERVICES HAVE TERMINATED, APPLIES TO ALL CLAIMS YOU MAY BRING

> AGAINST COMPANY'S EMPLOYEES, AGENTS, AFFILIATES OR OTHER REPRESENTATIVES, AND APPLIES TO ALL CLAIMS THAT COMPANY MAY BRING AGAINST YOU. . . .

(L.F. 93 (emphasis in original).)

C. The Internet Services Agreement Provides That the Agreement Is Governed by Louisiana Law.

Section 16C of the Internet Services Agreement provides that it is to be governed by Louisiana law:

> **You and Company agree that the substantive laws of the State of Louisiana, without reference to its principles and conflicts of laws, will be applied to govern, construe and enforce all of the rights and duties of the parties arising from or relating in any way to the subject matter of this Agreement. . . .**

(L.F. 94 (emphasis in original).)

D. The Internet Services Agreement Provides That CenturyLink Can Revise the Agreement Prospectively Upon 30 Days' Notice, But the Customer Can Decline to Accept Any Revisions.

Section 2 of the Internet Services Agreement authorizes CenturyLink to revise material terms of the agreement upon 30 days' notice, but allows the customer to decline to accept any proposed revisions by discontinuing services:

2. REVISIONS TO THIS AGREEMENT.

From time to time, Company will make revisions to this Agreement and the policies relating to the Services. We will provide notice of such revisions by posting revisions to www.centurylink.com or www.centurylink.net (collectively, the "Company Website"), or sending an email to your primary embarqmail.com, centurytel.net, or centurylink.com email address. You agree to visit the Company Website periodically to review any such revisions. ***Material changes and increases to the monthly price of the Services shall be effective thirty (30) days after we provide notice to you*** via any of the following methods: bill messages, bill inserts, separate mailings to you, email notification, recorded announcement, posting to the Company Website, or any other reasonable method of notice at our sole discretion; revisions to any other terms and conditions shall be effective on the date noted in the posting and/or email we send you. ***By continuing to use the Services after revisions are effective, you accept and agree to abide by the terms and conditions set forth in such revisions***….

(L.F. 81-82 (emphasis added).)

E. <u>Sanford Terminated His CenturyLink Services in August 2012.</u>

Sanford does not allege that CenturyLink changed the terms of the Internet Services Agreement during the time he received CenturyLink's services. (*See* L.F. 7-15.) He also does not allege that CenturyLink ever disrupted or disconnected his services.

(*See* L.F. 7-15.) Instead, in August 2012, Sanford terminated his relationship with CenturyLink, and CenturyLink transferred the account to another customer at Sanford's request. (L.F. 37.)

II. The Trial Court Proceedings.

On December 3, 2012, Sanford filed a Petition in the Circuit Court of Boone County, Missouri. (L.F. 7.) In the Petition, Sanford alleged that CenturyLink violated the Missouri Merchandising Practices Act, R.S. Mo. § 407.020.1, by billing a Universal Services Fund Surcharge on Internet services, because, he alleges, the surcharge applies only to "telecommunications" services and not information-only services. (L.F. 9-14.) Sanford seeks to represent a putative class of "[a]ll persons in the State of Missouri who agreed to purchase information-only services, including but not limited to internet-only services, or internet and cable-only services from CenturyLink, and were assessed a Universal Services Fund Surcharge." (L.F. 9.)

On February 3, 2013, CenturyLink filed a Motion to Dismiss or Stay and to Compel Arbitration. (L.F. 21-119.) In the motion, CenturyLink directed the trial court to the arbitration clause in Section 15 of the Internet Services Agreement and the Louisiana choice-of-law clause in Paragraph 16 of the agreement. (L.F. 24-25, 27.) CenturyLink argued that the arbitration clause is enforceable under both Louisiana law, which was selected in the Internet Services Agreement, and Missouri law, the law of the forum. The trial court preliminarily overruled CenturyLink's motion on July 29, 2013, and ordered the parties to conduct discovery limited to the issue of arbitrability. (L.F. 27-30.) Thereafter, the parties conducted limited discovery.

On February 21, 2014, Sanford filed a Motion for Partial Summary Judgment Limited to the Issues of Consideration and Scope of the Alleged Agreements to Arbitrate, asking the court to deny CenturyLink's Motion to Compel Arbitration. (L.F. 358.) Sanford argued that the Internet Services Agreement contained "illusory" promises that were, "as a matter of law, insufficient consideration to form a contract." (L.F. 344.) In particular, he asserted that "CenturyLink has not agreed to be bound by any of these 'terms and conditions' and instead has reserved the right to unilaterally modify the agreement[ ] at any time CenturyLink sees fit." (L.F. 344.) Sanford also argued that the Internet Services Agreement's arbitration clause did not apply to the claims in his lawsuit because this is not "a dispute in internet services." (L.F. 344.)

The trial court held a hearing on Sanford's motion on July 10, 2014. Later that day, the trial court entered the following docket entry:

> After hearing and review of the pleadings the Court finds there is no genuine issue of material fact on the issue of consideration and the issue of arbitrability and the Movant is entitled to Partial Summary Judgment as a matter of law. Partial Summary Judgment is entered in favor of the Plaintiff as prayed.

(L.F. 5.) Four days later, however, on July 14, 2014, the trial court made an additional docket entry indicating that the matter instead was under advisement:

> Plaintiff by McClain and Soper. Defendant by Leadlove and Prefrement [sic]. Argument heard on Plaintiff's Motion for Partial Summary Judgment. Motion taken under advisement.

(L.F. 5.) Notwithstanding this second docket entry, the trial court did not issue a subsequent ruling or otherwise explain or modify its July 10, 2014 order. Therefore, thirty-nine days after the first order, on August 18, 2014, CenturyLink filed a notice of appeal pursuant to R.S. Mo. § 435.440 and 9 U.S.C. § 16. (Notice of Appeal, at 1.)

III. The Court of Appeals Proceedings.

The Court of Appeals initially dismissed CenturyLink's appeal *sua sponte*, stating that the appeal "lack[ed] a judgment that is final and appealable pursuant to section 512.020 RSMo. 2000 and rule 74.01(a)." (Order dated Sept. 12, 2014.) CenturyLink moved for rehearing, explaining that its notice of appeal was brought under R.S. Mo. § 435.440.1 and 9 U.S.C. § 16 (a)(1)(B), not pursuant to R.S. Mo. § 512.020. (Appellant's Motion for Rehearing and/or Transfer and Suggestions in Support of Motion, at 2-4.) The Court of Appeals reinstated CenturyLink's appeal. (Order dated Jan. 6, 2015.)

Sanford then moved to dismiss CenturyLink's appeal for lack of jurisdiction, arguing that the notice of appeal was untimely. (Respondent's Motion to Dismiss the Appeal as Being Untimely and Suggestions in Support.) After the parties briefed the timeliness issue, the Court of Appeals indicated that it would take Sanford's motion to dismiss along with the case. (Order dated Feb. 23, 2015.)

The parties submitted briefs on the merits, in which they also addressed the timeliness issues. Oral argument was held on September 17, 2015.

The Court of Appeals issued an opinion on October 28, 2015. It declined to reach the merits of CenturyLink's appeal and dismissed CenturyLink's appeal as untimely. This Court granted transfer on March 1, 2016.

POINTS RELIED ON

I. THE COURT OF APPEALS ERRED IN DISMISSING CENTURYLINK'S APPEAL AS UNTIMELY, BECAUSE THE NOTICE OF APPEAL WAS FILED WITHIN TEN DAYS OF THE DATE THAT THE ORDER DENYING CENTURYLINK'S MOTION TO COMPEL ARBITRATION AND GRANTING SANFORD'S MOTION FOR PARTIAL SUMMARY JUDGMENT BECAME FINAL, IN THAT AN ORDER FROM WHICH AN APPEAL LIES BECOMES FINAL AT THE EXPIRATION OF THIRTY DAYS AFTER ITS ENTRY.

– *State ex rel. Collector of Winchester v. Jamison*, 357 S.W.3d 589 (Mo. banc 2012)

– *Spiece v. Garland*, 197 S.W.3d 594 (Mo. banc 2006)

– *Motormax Fin. Servs. Corp. v. Knight*, 474 S.W.3d 164 (Mo. App. E.D. 2015)

– *Tudor v. Behrend-Uhis*, 844 S.W.2d 26 (Mo. App. W.D. 1992)

– R.S. Mo. § 435.440.1

– R.S. Mo. § 435.440.2

– 9 U.S.C. § 16

– Mo. Rule Civ. P. 74.01(a)

– Mo. Rule Civ. P. 75.01

– Mo. Rule Civ. P. 81.04(a)

– Mo. Rule Civ. P. 81.05(a)

II. THE TRIAL COURT ERRED IN DENYING CENTURYLINK'S MOTION TO COMPEL ARBITRATION, BECAUSE THIS DISPUTE FALLS

WITHIN THE INTERNET SERVICES AGREEMENT'S ARBITRATION CLAUSE, IN THAT THE CLAUSE PROVIDES FOR ARBITRATION OF "ANY AND ALL CLAIMS, CONTROVERSIES OR DISPUTES OF ANY KIND [ ] AGAINST EACH OTHER."

– *Volt Informational Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr., Univ.*, 489 U.S. 468 (1989)

– *Dunn Indus. Group v. City of Sugar Creek*, 112 S.W.3d 421 (Mo. banc 2003)

III. THE TRIAL COURT ERRED IN DENYING CENTURYLINK'S MOTION TO COMPEL ARBITRATION, BECAUSE THE ARBITRATOR AND NOT A COURT MUST DECIDE WHETHER THE INTERNET SERVICES AGREEMENT IS UNENFORCEABLE FOR FAILURE OF CONSIDERATION, IN THAT THE ARBITRATION CLAUSE WITHIN THE INTERNET SERVICES AGREEMENT IS SEVERABLE AND SHOULD BE ENFORCED INDEPENDENTLY SO THAT THE ENFORCEABILITY OF THE UNDERLYING AGREEMENT IS PRESENTED TO AN ARBITRATOR IN THE FIRST INSTANCE.

– *Ellis v. JF Enters., LLC*, --- S.W.3d ----, 2016 WL 143281 (Mo. banc Jan. 12, 2016)

– *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500 (2012)

– *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006)

– *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)

IV. THE TRIAL COURT ERRED IN DENYING CENTURYLINK'S MOTION TO COMPEL ARBITRATION, BECAUSE THE INTERNET SERVICES AGREEMENT IS ENFORCEABLE UNDER LOUISIANA LAW, IN THAT LOUISIANA LAW DOES NOT REQUIRE BARGAINED-FOR CONSIDERATION AND PERMITS CONTRACTING PARTIES TO AGREE THAT ONE PARTY WILL HAVE THE RIGHT TO MODIFY THE CONTRACT, AND IN ANY EVENT, THE INTERNET SERVICES AGREEMENT STILL REQUIRES CENTURYLINK TO PROVIDE "REASONABLE NOTICE" TO SANFORD AND TO WAIT 30 DAYS BEFORE PROSPECTIVELY MAKING MATERIAL CHANGES OR INCREASING ITS MONTHLY PRICES.

– *Aguillard v. Auction Mgmt. Corp.*, 908 So. 2d 1 (La. 2005)

– *Aaron & Turner, L.L.C. v. Perret*, 22 So. 3d 910 (La. Ct. App. 2009)

– *State ex rel. McKeage v. Cordonnier*, 357 S.W.3d 597 (Mo. banc 2012)

– *State ex rel. St. Joseph Light & Power Co. v. Donelson*, 631 S.W.2d 887 (Mo. App. W.D. 1982)

– 9 U.S.C. § 2

– La. Civ. Code art. 1927

– La. Civ. Code art. 1971

V. THE TRIAL COURT ERRED IN DENYING CENTURYLINK'S MOTION TO COMPEL ARBITRATION, BECAUSE THE INTERNET SERVICES AGREEMENT WAS ENFORCEABLE UNDER MISSOURI LAW, IN

THAT THE AGREEMENT REQUIRED CENTURYLINK TO PROVIDE "REASONABLE NOTICE" OF MATERIAL CHANGES OR INCREASES TO MONTHLY PRICES, ONLY PERMITTED PROSPECTIVE CHANGES AFTER 30 DAYS, AND ALLOWED SANFORD TO REJECT ANY PROPOSED CHANGES BY TERMINATING HIS SERVICES FROM CENTURYLINK.

– *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770 (Mo. banc 2014)

– *Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429 (Mo. App. W.D. 2010)

– *Holloman v. Circuit City Stores, Inc.*, 162 Md. App. 332 (2006)

– *Pierce v. Kellogg, Brown & Root, Inc.*, 245 F. Supp. 2d 1212 (E.D. Okla. 2003)

ARGUMENT

Standard of Review

On appeal, the trial court's denial of a motion to compel arbitration is subject to *de novo* review. *Johnson v. JV Enters., LLC*, 400 S.W.3d 763, 766 (Mo. banc 2013). Similarly, an order granting partial summary judgment is subject to *de novo* review. *Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818, 826 (Mo. banc 2014).

I. THE COURT OF APPEALS ERRED IN DISMISSING CENTURYLINK'S APPEAL AS UNTIMELY, BECAUSE THE NOTICE OF APPEAL WAS FILED WITHIN TEN DAYS OF THE DATE THAT THE ORDER DENYING CENTURYLINK'S MOTION TO COMPEL ARBITRATION AND GRANTING SANFORD'S MOTION FOR PARTIAL SUMMARY JUDGMENT BECAME FINAL, IN THAT AN ORDER FROM WHICH AN APPEAL LIES BECOMES FINAL AT THE EXPIRATION OF THIRTY DAYS AFTER ITS ENTRY.

The Court of Appeals dismissed CenturyLink's appeal as untimely despite the fact that CenturyLink followed the well-settled 30-plus-10-day timeframe for filing a notice of appeal in civil actions that is familiar to Missouri practitioners. The court's reasoning ignored the plain language of the Missouri Rules of Civil Procedure and the relationship between the Missouri Rules and R.S. Mo. § 435.440.1.

A. CenturyLink's Appeal Was Timely.

Under § 435.440.1, "[a]n appeal may be taken from: (1) [a]n order denying an application to compel arbitration. . . ." *See also* 9 U.S.C. § 16 (a)(1)(B). Such an appeal

"shall be taken in the manner and to the same extent as from orders or judgments in a civil action." R.S. Mo. § 435.440.2. Therefore, § 435.440.1 confers the "substantive right to appeal," while the Missouri Rules govern the "procedural requirements" for the appeal. *Spiece v. Garland*, 197 S.W.3d 594, 595-96 (Mo. banc 2006).

The Missouri Rules governing the timing of civil appeals are Rules 74.01, 81.04, and 81.05. Rule 74.01(a) provides that the term "'[j]udgment' as used in these rules includes a decree and ***any order from which an appeal lies***." (Emphasis added). An order denying a motion to compel arbitration is an order from which "[a]n appeal may be taken," R.S. Mo. § 435.440.1, so the order is a "judgment" under the Missouri Rules. *Motormax Fin. Servs. Corp. v. Knight*, 474 S.W.3d 164, 167-68 (Mo. App. E.D. 2015).

Under Rule 81.04 (a), a notice of appeal "shall be filed not later than 10 days after the judgment or order appealed from becomes final." Rule 81.05(a) in turn provides that, "[f]or the purpose of ascertaining the time within which an appeal may be taken: (1) a judgment becomes final at the expiration of thirty days after its entry if no timely authorized after-trial motion is filed." These two Rules are the source of the "traditional '30+10' time frame" referenced by the Court of Appeals below. Opinion, at 7 n.12.

Thus, the applicable statutes and Rules collectively provide as follows:

- The trial court's order denying CenturyLink's motion to compel arbitration was appealable, R.S. Mo. § 435.440.1;
- Appeals from an order denying a motion to compel arbitration are to be taken "in the manner and to the same extent as from orders or judgments in a civil action," R.S. Mo. § 435.440.2.

- An appealable order is a "judgment," Rule 74.01 (a);
- A judgment becomes final thirty days after its entry, 81.05(a)(1); and
- Once the judgment became final, CenturyLink had 10 days to file a notice of appeal, Rule 81.04 (a).

CenturyLink filed its notice of appeal 39 days after the trial court entered its order denying CenturyLink's motion to compel arbitration, meeting the timeline established by the Rules. This straightforward approach, which promotes uniformity in the jurisdictional process of civil appeals for practitioners, was recently adopted and endorsed by the Eastern District. *See Motormax*, 474 S.W.3d at 167-68.

The Western District below reached the contrary conclusion that only Rule 81.04 (a) applies, holding that CenturyLink's notice of appeal was due 10 days after the entry of the trial court's ruling. Opinion, at 5. This requires courts to disregard the definition of "judgment" in Rule 74.01 (a) and instead to fashion a rule – found nowhere in the Missouri Rules or the Missouri Arbitration Act ("MAA") – that appealable orders become final "immediately upon entry." That is incorrect for several reasons.

First, courts may not selectively disregard the definition of "judgment" in Rule 74.01 (a) in favor of fashioning their own procedural rules. The Missouri Rules of Civil Procedure, "promulgated pursuant to article V, section 5 of the constitution, 'supersede all statutes and existing court rules inconsistent therewith.'" *See State ex rel. Collector of Winchester v. Jamison*, 357 S.W.3d 589, 592 (Mo. banc 2012) (quoting Rule 41.02). The Missouri Rules, which are controlling, define the term "judgment" to include "orders from which an appeal lies," which includes orders denying motions to compel arbitration.

Second, there is no "opposing" Rule in tension with Rules 74.01(a) and 81.05(a) with respect to finality. No Rule states that appealable orders become final "immediately upon entry." Rules 74.01(a) and 81.05(a) are the sole guidance in the Missouri Rules of Civil Procedure concerning when an appealable order becomes final, and those Rules unambiguously state that "judgments," including "orders from which an appeal lies," become final after thirty days. Until then, the trial court retains jurisdiction and may "vacate, reopen, correct, amend, or modify its judgment within that time." Rule 75.01.

Third, neither § 435.440 nor any other provision of the MAA purports to establish a separate procedure or other rules governing interlocutory appeals. *See* R.S. Mo. ch. 435; *see also Spiece*, 197 S.W.3d at 595-96. To the contrary, § 435.440.2 provides that appeals from an order denying a motion to compel arbitration "shall be taken in the manner and to the same extent as from orders or judgments in a civil action." Indeed, it is doubtful that any special statutory procedure ***could*** be substituted for the schedule for finality of judgments and appeals provided in the Missouri Rules. *See Collector of Winchester*, 357 S.W.3d at 592 (holding that the Missouri Rules of Civil Procedure, supersede all statutes inconsistent with them); Rule 41.02.

Finally, there is no provision in the MAA or the Missouri Rules indicating that orders denying a motion to compel are final immediately upon entry.

In short, there is no statute or Missouri Rule that supports the argument that CenturyLink's appeal was untimely. The statute- and Rule-based analysis mandates the conclusion that CenturyLink's appeal was timely.

As a result, the Court of Appeals never offered a proper justification for departing from the plain language of the Missouri Rules. The court misplaced reliance on *Hershewe v. Alexander*, 264 S.W.3d 717 (Mo. App. S.D. 2008), where the court had reached its holding without the benefit of adversarial briefing. The error in *Hershewe* can be traced to the court's reading of § 435.440 that "orders denying motions to compel arbitration are final and appealable immediately after the order has been issued…." 264 S.W.3d at 718. However, there is no language in that statute suggesting this is the case. *See Motormax*, 474 S.W.3d at 168 n.4 ("In our view, § 435.440.1 does not dictate when such an order becomes final for purposes of calculating the date for filing a notice of appeal."). The statute merely provides that "[a]n appeal may be taken from . . . [a]n order denying an application to compel arbitration. . . ." R.S. Mo. § 435.440.1. It says nothing about the timing for such an appeal.

Beyond deferring to the Southern District's holding, the Western District offered no reasoning that could override the plain language of the Missouri Rules and § 435.440. For example, the Court of Appeals observed that this Court has acknowledged that orders denying arbitration are not "final judgments." Opinion, at 5 (citing *Lawrence v. Beverly Manor*, 273 S.W.3d 525, 527 n.2 (Mo. banc 2009)). This is true, but only in the common sense in which the *Lawrence* court intended to employ that phrase. As this Court has explained: "Generally, a final judgment is defined as one that resolves all issues in a case, leaving nothing for future determination. The converse of a final judgment is an interlocutory order, which is an order that is not final and decides some point or matter between the commencement and the end of a suit but does not resolve the entire

controversy." *Buemi v. Kerckhoff*, 359 S.W.3d 16, 20 (Mo. banc 2011) (internal quotation and citation omitted). The *Lawrence* court merely recognized that interlocutory orders, which are not *usually* appealable, are not final judgments. It did not purport to overrule the meaning of the term "judgment" under Rule 74.01(a).

The Court of Appeals also observed that orders denying a motion to compel are "immediately appealable." Opinion, at 5-6. This is true, but only in the sense that litigants need not wait for a "final judgment" disposing of all issues, as defined in *Lawrence*, before bringing an appeal. *See, e.g., Transit Cas. Co. ex rel. Pulitzer Publishing Co. v. Transit Cas. Co. ex rel. Intervening Employees*, 43 S.W.3d 293, 298-99 (Mo. banc 2001). Acknowledging that an appeal is available "immediately," *i.e.* before final judgment disposing of all issues, does not support disregarding the Missouri Rules, which state that the order is not "final" for purposes of an interlocutory appeal until thirty days after its entry.

The Court of Appeals also attempted to identify other instances where a 10-day timeframe would apply to appeals from interlocutory orders. Opinion, at 6-7. Respectfully, the Court of Appeals failed to do so.

The court cited this Court's decision in *Taylor v. United Parcel Serv., Inc.*, 854 S.W.2d 390 (Mo. banc 1993), where, according to the Court of Appeals, this Court "held that an appeal from an interlocutory order granting a motion for a new trial (appealable under section 512.020(1)) must be filed within ten days of its entry." Opinion, at 6-7. This misreads the *Taylor* decision. In that case, the trial court had *denied* a motion for a new trial, a decision that was *not* immediately appealable under R.S. Mo. § 512.020(1).

Taylor did not establish a 10-day rule for interlocutory orders "declared by law to be final for purposes of appeal," Opinion at 6, but acknowledged that trial courts can expedite the timing for an appeal of a final judgment by denying a motion for a new trial before the expiration of 90 days.

At most, therefore, the *Taylor* decision might support the conclusion that the trial court could accelerate the appeal of an order denying a motion to compel arbitration by affirmatively releasing its jurisdiction to vacate or modify its judgment within the thirty-day period following entry of judgments. Rules 74.01(a), 75.01. Here, however, the trial court did the opposite, affirmatively indicating that Sanford's Motion remained under advisement through its July 14, 2014, docket entry. (L.F. 5.)

The court also cited two Court of Appeals decisions. The first, *Craft v. Philip Morris Companies, Inc.*, 190 S.W.3d 368 (Mo. App. E.D. 2005), involves class certification decision. But the *Craft* decision merely acknowledged that a notice of appeal filed within 10 days of an appealable order was timely (which is always true). The court also cited a probate case, *In re Estate of Standley*, 204 S.W.3d 745 (Mo. App. S.D. 2006). But "the provisions of Rule 74 are not applicable to probate proceedings." *State ex rel. Baldwin v. Dandurand*, 785 S.W.2d 547, 549 (Mo. banc 1990). Therefore, neither case supports the Court of Appeals' decision below.

In the end, limiting interlocutory appeals to a 10-day timeframe impedes the ability of trial courts to correct or modify appealable orders before an appeal is taken. That is, a 10-day deadline restricts the traditional right the Rules grant to trial courts to control and modify their rulings. *See State ex rel. Schweitzer v. Greene*, 438 S.W.2d 229,

232 (Mo. banc 1969); *see also Tudor v. Behrend-Uhis*, 844 S.W.2d 26, 27-28 (Mo. App. W.D. 1992) (applying 40-day timeframe for appeal under Rule 74.01(b), noting "there is nothing in the 74.01(b) language that indicates any difference between the judgment in this case and the judgments addressed in Rule 75.01, which provides that 'the trial court retains control over judgments during the thirty-day period after entry of judgment'"). This restriction on Missouri trial courts increases the burden on appellate courts, who must review orders that a trial court may have wished to modify if given the standard opportunity to take a "second look."

This case presents a clear example of the confusion that can result from the approach required by the Court of Appeals. Here, the trial court initially overruled the motion on a preliminary basis in 2013, ordering additional discovery. (L.F. 27-30.) Next, on July 10, 2014, after the hearing, the trial court made a docket entry indicating that it was ruling in favor of Sanford. (L.F. 5.) Then, four days later the trial court made a contradictory docket entry indicating that the motion was still "under advisement." (L.F. 5.) Afterward, CenturyLink did not know whether the trial court intended to "vacate, reopen, correct, amend, or modify" the original docket entry. Rule 75.01. When the court took no action within 39 days of the first order, CenturyLink filed a notice of appeal. Inexplicably, the Court of Appeals decision below never addressed the implications of the July 14, 2014, docket entry. Indeed, coupled with its failure to denominate the order on arbitration as a "judgment" (*see* Section I.B., *infra*), the second docket entry makes it unclear whether the trial court ever intended the July 10 docket entry to be its final word on the subject.

CenturyLink "acted within the letter and spirit of the governing rules and should be heard on the merits." *Sherrill v. Wilson*, 653 S.W.2d 661, 663 (Mo. banc 1983); *see also Abrams v. Ohio Pacific Exp.*, 819 S.W.2d 338, 341 (Mo. banc 1991) ("[S]tatutes and rules relating to appeals, being remedial, are to be construed liberally in favor of allowing appeals to proceed."). Therefore, this Court should hold that CenturyLink's notice of appeal was timely and hear CenturyLink's appeal on the merits.

B. The Order Need Not Be Denominated as a "Judgment."

Rule 74.01(a) provides that: "'Judgment' as used in these rules includes a decree and any order from which an appeal lies. A judgment is rendered when entered. A judgment is entered when a writing signed by the judge and denominated 'judgment' or 'decree' is filed…." Here, the circuit court failed to denominate its order as a "judgment," which it should have done because both the Federal Arbitration Act ("FAA") and the MAA grant CenturyLink a right to an immediate appeal. However, invoking the circuit court's failure to properly denominate its judgement as a reason not to reach the merits of this appeal would undermine the right granted by these statutes.

Sanford does not dispute that an interlocutory appeal was available to CenturyLink following the trial court's ruling. (Tr. 10:20-21.) The parties also agree that the trial court's interlocutory order need not be denominated a "judgment" under Rule 74.01 to become appealable. (*See* Respondent's Motion to Dismiss the Appeal as Being Untimely and Suggestions in Support, at 4 (citing *Jackson County v. McClain Enters., Inc.*, 190 S.W.3d 633, 638-39 (Mo. App. W.D. 2006).) *See also Nicholson v. Surrey Vacation Resorts, Inc.*, 463 S.W.3d 358, 366 n.6 (Mo. App. S.D. 2015).

Enforcing the "denomination" provision in Rule 74.01 in this fashion would deprive parties of their substantive right to an immediate appeal because of a state procedural rule that operates effectively in most circumstances but conflicts here with "the command" of the FAA that such orders must be immediately appealable. *Lawrence v. Beverly Manor*, 273 S.W.3d 525, 527 n.2 (Mo. banc 2009) (citing 9 U.S.C. § 16(a)(1)(B)); *see also Preston v. Ferrer*, 552 U.S. 346 (2008) (FAA preempts incompatible procedural rules).

Alternatively, the proper action would be to remand this case to the trial court with instructions to denominate the docket entry as a "judgment." Rule 74.01(a) states that a judgment is a decree or an appealable order. The trial court's order in this case is appealable. If the trial court's failure to properly denominate the order as a "judgment" has an effect here, remand is appropriate with instructions to denominate the order as a "judgment" so that the parties may restart the appeals process.

II. THE TRIAL COURT ERRED IN DENYING CENTURYLINK'S MOTION TO COMPEL ARBITRATION, BECAUSE THIS DISPUTE FALLS WITHIN THE INTERNET SERVICES AGREEMENT'S ARBITRATION CLAUSE, IN THAT THE CLAUSE PROVIDES FOR ARBITRATION OF "ANY AND ALL CLAIMS, CONTROVERSIES OR DISPUTES OF ANY KIND [ ] AGAINST EACH OTHER."

When faced with a motion to compel arbitration, the motion court must determine: (1) whether a valid arbitration agreement exists and, if so, (2) whether the specific dispute falls within the scope of the arbitration agreement. *Ellis v. JF Enters., LLC*, ---

S.W.3d ----, 2016 WL 143281, *2 (Mo. banc Jan. 12, 2016) (citing *Nitro Distributing, Inc. v. Dunn*, 194 S.W.3d 339, 345 (Mo. banc 2006)). "[I]n applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the [FAA], due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." *Volt Informational Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr., Univ.*, 489 U.S. 468, 475-76 (1989) .

Where a broad arbitration clause contains no express provision excluding a particular grievance from arbitration, "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Dunn Indus. Group v. City of Sugar Creek*, 112 S.W.3d 421, 429 (Mo. banc 2003). "A motion to compel arbitration of a particular dispute should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute." *Id.*

Here, the arbitration clause states that Sanford and CenturyLink "AGREE TO ARBITRATE ANY AND ALL CLAIMS, CONTROVERSIES OR DISPUTES OF ANY KIND … AGAINST EACH OTHER." (L.F. 93.) This does not limit the scope of the clause to disputes between the parties in any way. *Cf. Kansas City Urology, P.A. v. United Healthcare Servs.*, 261 S.W.3d 7, 11 (Mo. App. W.D. 2008) (compelling arbitration where the agreement "broadly stat[ed] that the parties agreed to arbitrate any disputes between them"). It is difficult to imagine a more broad arbitration provision, or a dispute between the parties that would not be encompassed within it.

Moreover, the arbitration clause goes on to make clear that the universe of claims encompassed by that clause "INCLUDES BUT IS NOT LIMITED TO CLAIMS ARISING OUT OF OR RELATING TO THIS AGREEMENT, AS WELL AS CLAIMS ARISING OUT OF OR RELATING TO COMPANY'S SERVICES OR SOFTWARE, BILLING OR ADVERTISING…, " (L.F. 93.) Sanford alleges that CenturyLink violated the Missouri Merchandising Practices Act by billing him a Universal Services Fund Surcharge on his high-speed Internet services, based on his contention that Internet services are not subject to the surcharge. (L.F. 8, 12-14.) The arbitration clause encompasses "ANY AND ALL CLAIMS, CONTROVERSIES OR DISPUTES OF ANY KIND"; "IS NOT LIMITED TO CLAIMS ARISING OUT OF OR RELATING TO THIS AGREEMENT"; and specifically includes "CLAIMS ARISING OUT OF OR RELATING TO COMPANY'S SERVICES [or] … BILLING." (L.F. 93.) The essence of Sanford's claim is that he was billed a surcharge on services he either did not request or did not receive, which is both a claim "of any kind" and a claim arising out of or related to CenturyLink's billing.

Moreover, the Internet service that Sanford purchased from CenturyLink was its "Pure Broadband Package." (L.F. 37, 42, 47, 53, 59, 65, 71.) As described in the bills provided to Sanford, this package included high-speed Internet service, an access line (*i.e.* a telephone line), 911 service, outbound call block, toll restriction, a subscriber line charge, and a non-published number. (L.F. 37, 42, 47, 53, 59, 65, 71.) CenturyLink assessed Universal Service Fund Surcharges on the portion of Sanford's Pure Broadband package attributable to the access or telephone line he received as part of the package.

(L.F. 471.) Since that service is included in the Pure Broadband package, it is subject to the Internet Service Agreement's arbitration provision regardless of whether it is a "telephone" charge as Sanford contends. Accordingly, the dispute here falls within the broad scope of the Internet Services Agreement's arbitration provision.

III. THE TRIAL COURT ERRED IN DENYING CENTURYLINK'S MOTION TO COMPEL ARBITRATION, BECAUSE THE ARBITRATOR AND NOT A COURT MUST DECIDE WHETHER THE INTERNET SERVICES AGREEMENT IS UNENFORCEABLE FOR FAILURE OF CONSIDERATION, IN THAT THE ARBITRATION CLAUSE WITHIN THE INTERNET SERVICES AGREEMENT IS SEVERABLE AND SHOULD BE ENFORCED INDEPENDENTLY SO THAT THE ENFORCEABILITY OF THE UNDERLYING AGREEMENT IS PRESENTED TO AN ARBITRATOR IN THE FIRST INSTANCE.

While CenturyLink's application for transfer was pending, this Court issued its opinion in *Ellis v. JF Enters., LLC*, --- S.W.3d ---, 2016 WL 143281 (Mo. banc Jan. 12, 2016). The *Ellis* decision is dispositive of Sanford's challenge to the Internet Services Agreement. In particular, *Ellis* explains that a challenge to a contract containing an arbitration clause on the ground of lack of consideration ***as to the whole contract*** is not a basis for denying a motion to compel arbitration based upon the arbitration clause.

"Time and again … the United States Supreme Court has held that section 2 of the Federal Arbitration Act ('FAA') prohibits state courts from refusing to enforce an arbitration agreement on the ground that the underlying contract was void under state

law." *Id.* at *1. Therefore, "[b]ecause the FAA makes agreements to arbitrate severable from the other agreements of the parties, courts may only refuse to enforce an arbitration agreement if the party opposing arbitration brings a discrete challenge ***to the arbitration agreement***—and not merely to the underlying or other contemporaneous contract—and shows that ***the arbitration agreement*** is invalid under generally applicable state law principles." *Id.* (emphasis added).

In *Ellis*, the plaintiff purchased a new car from the defendant. *Id.* The plaintiff alleged the defendant violated the MMPA by failing to transfer title to the car, rendering the entire sales contract—including its arbitration agreement—void. *Id.* The trial court denied the defendant's motion to compel, and this Court reversed.

The Court explained that arbitration agreements are to be considered separate and apart from any underlying or contemporaneous related agreements. *Id.* at *2. Therefore, arbitration agreements "are enforceable unless the arbitration agreement itself—in isolation—is invalid under generally applicable state law principles." *Id.* After reviewing U.S. Supreme Court precedents *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), and *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500 (2012), this Court explained:

> [N]o matter what state law infirmity the sales contract between Ms. Ellis and JF Enterprises may have, whether it fails for ***lack of consideration***, failure of consideration, fraud in the inducement, unconscionability or being declared "fraudulent and void" under section 301.210, the Supreme

> Court has held—clearly and repeatedly—that such an infirmity is irrelevant to the enforceability of an arbitration agreement contained within or executed contemporaneously. Under *Prima Paint*, *Buckeye*, and *Nitro-Lifts*, only a discrete challenge directed specifically at the arbitration agreement itself—viewed severally and in isolation from its allegedly void context—and showing that it is invalid under generally applicable state law principles will prevent an arbitration agreement's enforcement. Ms. Ellis makes no such claim. Instead, she claims that the arbitration agreement is unenforceable because the underlying contract is void under section 301.210.

Id. at *6 (emphasis added).

Moreover, "it is a mainstay of the [FAA]'s substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself are to be resolved 'by the arbitrator in the first instance, not by a federal or state court." *Ellis*, 2016 WL 143281, at *5 (quoting *Nitro-Lift*, 133 S. Ct. at 503) (emphasis in original). Here, Sanford has brought an MMPA claim concerning CenturyLink's charging of a Universal Services Fund Surcharge. Sanford contends that the entire Internet Services Agreement, not the arbitration clause within that agreement, fails for lack of consideration. Therefore, the trial court erred in denying CenturyLink's motion to compel on this basis.

In light of this intervening controlling precedent, CenturyLink asks the Court to remand this case with instructions to the trial court to order the parties to arbitration.

IV. THE TRIAL COURT ERRED IN DENYING CENTURYLINK'S MOTION TO COMPEL ARBITRATION, BECAUSE THE INTERNET SERVICES AGREEMENT IS ENFORCEABLE UNDER LOUISIANA LAW, IN THAT LOUISIANA LAW DOES NOT REQUIRE BARGAINED-FOR CONSIDERATION AND PERMITS CONTRACTING PARTIES TO AGREE THAT ONE PARTY WILL HAVE THE RIGHT TO MODIFY THE CONTRACT, AND IN ANY EVENT, THE INTERNET SERVICES AGREEMENT STILL REQUIRES CENTURYLINK TO PROVIDE "REASONABLE NOTICE" TO SANFORD AND TO WAIT 30 DAYS BEFORE PROSPECTIVELY CHANGING ITS MONTHLY PRICES.

Although *Ellis* instructs that the Court need not address the merits of Sanford's argument that the Internet Services Agreement fails for lack of consideration, the Internet Services Agreement is enforceable under both Louisiana law (this Section), and Missouri law (next Section).

A. Louisiana Law Determines Whether the Internet Services Agreement Binds the Parties, Including the Obligation to Arbitrate.

Under the FAA, principles of state law govern the validity, enforceability, and formation of contracts containing agreements to arbitrate. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). An agreement to arbitrate cannot be invalidated by any defense that is applied in a way that singles out or disfavors arbitration, as *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), instructs that no state-law rule that is an obstacle to the accomplishment of

the FAA's objectives may be applied to invalidate an arbitration agreement. *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 515 (Mo. banc 2012).

One basic principle of contract law is that parties may choose the state whose law will govern the interpretation of their contractual rights and duties. *State ex rel. McKeage v. Cordonnier*, 357 S.W.3d 597, 600 (Mo. banc 2012). That is, a valid choice-of-law provision in a contract binds the parties. *Id.*

Indeed, Sanford's counsel conceded at oral argument before the trial court that the Internet Services Agreement in this case "requires the dispute to be resolved by Louisiana law. . . ." (Tr. 8:18-19.) That is because Section 16 of the Internet Services Agreement provides, in bold text, that "**[y]ou and Company agree that the substantive laws of the State of Louisiana, without reference to its principles and conflicts of laws, will be applied to govern, construe and enforce all of the rights and duties of the parties arising from or relating in any way to the subject matter of this Agreement**." (L.F. 94 (emphasis in original).) The provision governs all of the "rights and duties of the parties" relating to the services provided under the Internet Services Agreement.

B. The Internet Services Agreement Is Valid Under Louisiana Law.

The Louisiana Civil Code "recognizes the right of individuals to freely contract." *Aguillard v. Auction Mgmt. Corp.*, 908 So. 2d 1, 17 (La. 2005) (citing La. Civ. Code art. 1971; La. Const., Art. 1, § 23). "'Freedom of contract' signifies that parties to an agreement have the right and power to construct their own bargains." *Id.* (quoting *La. Smoke Prods., Inc. v. Savoie's Sausage & Food Prods., Inc.*, 696 So. 2d 1373, 1380 (La. 1997)). Contract formation under Louisiana law does not include the concept of

"consideration" that Sanford contends is lacking here. *Aaron & Turner, L.L.C. v. Perret*, 22 So. 3d 910, 915 (La. Ct. App. 2009). Under Louisiana law, a contract is formed by the consent of the parties established through offer and acceptance. *Id.* (citing La. Civ. Code. art. 1927). *Cf. Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 774 (Mo. banc 2014) ("The essential elements of any contract, including one for arbitration, are offer, acceptance, and bargained for consideration.") (internal quotation omitted). The "mere will of the parties will bind them, without what a common law court would consider to be consideration to support a contract, so long as the parties have a lawful 'cause.'" *Aaron & Turner*, 22 So. 3d at 915; *see also* La. Civ. Code art. 1967, cmt. (c) ("Under this Article, 'cause' is not 'consideration.' … An obligor may bind himself by a gratuitous contract, that is, he may obligate himself for the benefit of the other party without obtaining any advantage in return.").

"Unlike the common law analysis of a contract using consideration, which requires something in exchange, the civil law concept of 'cause' can obligate a person by his will only." *Aaron & Turner*, 22 So. 3d at 915. Moreover, "[t]he cause need not have any economic value." *Id.*; *see also Aaron & Turner*, 22 So. 3d at 915 ("In this case, each party had 'cause' to enter into this contract: ABN in furtherance of its business as a money lender, and Ms. Perret in order to accomplish refinancing of her home."). "Therefore, under Louisiana law, a person can be obligated by both a gratuitous or onerous contract." *Id.*; *see also* La. Civ. Code art. 1967, cmt. (c).

Here, the Internet Services Agreement was formed through CenturyLink's offer to provide services and Sanford's acceptance and use of those services. *See* La. Civ. Code.

art. 1927. The agreement itself is an unambiguous offer to provide Internet services, which Sanford accepted through his use of the services for the next six months. (L.F. 8, 22, 36-37.) *See Midland Funding, LLC v. DelCorral*, 126 So. 3d 634, 638 (La. Ct. App. 2013). Sanford cannot deny that he had "cause" under Louisiana law to enter into the agreement to receive Internet services. This is all Louisiana law requires, and the trial court's apparent conclusion that there was no genuine issue of material fact with respect to the issue of consideration was, itself, immaterial.

In addition, CenturyLink and Sanford were free to contract in a manner that would have granted CenturyLink the right to modify the terms of the Internet Services Agreement. *See Aguillard*, 908 So. 2d at 17. In *Aguillard*, for example, the court considered an auction agreement which provided that "[a]ll announcements from the Auction Block will take precedence over all previously printed materials and other oral statements made." *Id.* at 4. This auction agreement also had an arbitration clause. *Id.*

When an auction bidder filed a lawsuit, the defendants moved to stay the court proceedings pending arbitration of the plaintiff's claims. *Id.* at 5. The intermediate appellate court upheld the trial court's denial of the motion to stay, finding that the contract "lacked mutuality" because it gave "the defendants the unilateral power to change any or all parts of the contract, including the arbitration clause, simply by verbal announcement at the auction block." *Id.* at 6. The Louisiana Supreme Court reversed:

> The parties were free to contract to the terms which provided the defendants with the right to make announcements from the Auction Block that would take precedence over all previously printed materials or any

> other oral statements made or that the Auction Agreement for the Purchase and Sale of Real Estate represented the final contracted terms or even that the Auctioneer would resolve any dispute over matters at the auction and could remove a listed property from the auction at any time with the seller's direction.

Id. at 17. As a result, the court ordered the trial court to stay the court proceedings and compel arbitration. *Id.* at 18. Thus, even the absolute right of one party to amend a contract does not invalidate the parties' obligations under Louisiana law.

However, the Internet Services Agreement does not provide CenturyLink the unfettered right to modify any aspect of the contract, as Sanford suggests. Instead, CenturyLink was required to give "reasonable notice" of "[m]aterial changes and increases to the monthly price of the Services. . . ." (L.F. 82.) Any such "changes and increases" would not take effect until 30 days following that notice. (L.F. 82.) During that 30-day period, Sanford had the right to terminate his obligations under the Internet Services Agreement by discontinuing his use of CenturyLink's services. (L.F. 82.) Therefore, just as Sanford's original acceptance of the Internet Services Agreement was conditioned on his using the services in the first instance, Sanford's acceptance of theoretical[1] modified contract terms would be premised on Sanford's "continuing to use the Services after revisions are effective…." (L.F. 82.)

[1] CenturyLink never exercised its right to amend the Internet Services Agreement during the time-period in which Sanford used its services.

In other words, Sanford was not obligated to accept contract changes that he found unacceptable; he had the right to reject any proposed changes by declining to accept further Internet services from CenturyLink (and 30 days to reach that decision). These terms are far more generous than the changes allowed by the Louisiana Supreme Court in *Aguillard*. The Internet Services Agreement is therefore valid and enforceable, and the trial court erred in denying CenturyLink's motion to compel arbitration.

V. THE TRIAL COURT ERRED IN DENYING CENTURYLINK'S MOTION TO COMPEL ARBITRATION, BECAUSE THE INTERNET SERVICES AGREEMENT WAS ENFORCEABLE UNDER MISSOURI LAW, IN THAT THE AGREEMENT REQUIRED CENTURYLINK TO PROVIDE "REASONABLE NOTICE" OF MATERIAL CHANGES OR INCREASES TO MONTHLY PRICES, ONLY PERMITTED PROSPECTIVE CHANGES AFTER 30 DAYS, AND ALLOWED SANFORD TO REJECT ANY PROPOSED CHANGES BY TERMINATING HIS SERVICES FROM CENTURYLINK.

The Internet Services Agreement was also enforceable under Missouri law, even absent the authority provided by this Court in *Ellis*. Valid consideration existed because CenturyLink was required to provide reasonable notice of future revisions, they could only be prospective in effect, and all terms were held in place for no less than 30 days.

A. The Internet Services Agreement Only Permits Prospective Modifications on Reasonable Notice.

Under Missouri law, the elements of a valid contract include offer, acceptance, and bargained for consideration. *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661, 662 (Mo. banc 1988). Consideration consists either of a promise (to do or refrain from doing something), or the transfer or giving up of something of value to the other party. *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 774 (Mo. banc 2014). "I]f the least benefit or advantage be received by the promisor from the promise or a third person, or if the promise sustain any, the least, injury or detriment, it will constitute a sufficient consideration to render the agreement valid." *Underwood Typewriter Co. v. Century Realty Co.*, 119 S.W. 400, 401 (Mo. 1909). A contract may grant one party the unilateral right to amend the agreement if the contract gives "reasonable advance notice" to the other party and amendments are "prospective in application." *See Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429, 443-44 (Mo. App. W.D. 2010) (collecting cases); *see also Nabors Drilling USA LP v. Pena*, 385 S.W.3d 103, 107 (Tex. App. 2012); *Hardin v. First Cash Fin. Servs., Inc.*, 465 F.3d 470, 478-79 (10th Cir. 2006); *Pierce v. Kellogg, Brown & Root, Inc.*, 245 F. Supp. 2d 1212, 1215-16 (E.D. Okla. 2003).

The *Restatement (Second) of Contracts* provides an illustration of such prospective amendments (indeed, complete termination of all promises) upon proper notice:

> A promises to act as B's agent for three years on certain terms, starting immediately; B agrees that A may so act, but reserves the power to

terminate the agreement on 30 days' notice. B's agreement is consideration, since he promises to continue the agency for at least 30 days. *Restatement (Second) of Contracts* § 77, illus. 5 (1981); *see also ReadyOne Indus., Inc. v. Casillas*, --- S.W.3d ----, 2015 WL 9284397, at *3 (Tex. App. Dec. 18, 2015); *Bank of America, N.A. v. Jill P. Mitchell Living Trust*, 822 F. Supp. 2d 505, 527 (D. Md. 2011); *Holloman v. Circuit City Stores, Inc.*, 162 Md. App. 332, 340 (2006) (citing *Restatement (Second) of Contracts* § 77, illus. 5); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 667-68 (6th Cir. 2003).

In this respect, this Court held in *Baker* that a contract is only illusory where a party "retains unilateral authority to amend the agreement ***retroactively***…." 450 S.W.3d at 776 (emphasis added). Although *Baker* dealt with a freestanding arbitration agreement and at-will employment, both of which are materially different from the arbitration clause and in a consumer contract at issue here, the case provides guiding principles.

In *Baker*, the freestanding arbitration agreement included a provision stating that the employer "reserves the right to amend, modify or revoke this agreement upon thirty (30) days' prior written notice to the Employee." *Id.* at 773. Because this provision granted the defendant the unfettered ability to amend any aspect of the arbitration agreement retroactively, the Court concluded that there was no consideration for the entirety of arbitration agreement. *Id.* In particular, nothing precluded the employer from giving the employee notice that, effective in thirty days, the employer retroactively was disclaiming a promise made in the arbitration agreement. *Id.* at 777.

That is not the case here. The Internet Services Agreement provides that "[m]aterial changes and increases to the monthly price of the Services shall be effective thirty (30) days ***after*** we provide notice to you. . . ." (L.F. 82.) In this respect, the *Baker* Court expressly distinguished its holding from cases permitting prospective amendments. *See* 450 S.W.3d at 777 ("Unlike this case, the employer in *Pierce* expressly was limited to prospective amendment of the arbitration agreement."). Beyond this limitation to prospective amendments, CenturyLink was also required to provide "reasonable notice" to Sanford in advance of those amendments. (L.F. 82.) *See Restatement (Second) of Contracts* § 77, illus. 5; *Frye*, 321 S.W.3d at 443

The result is that CenturyLink was locked into all material terms of the agreement for no less than 30 days. Although CenturyLink could have adjusted the terms at some point (it did not in this case), no such changes would have been effective until after CenturyLink provided Sanford with reasonable notice, and until after Sanford manifested his consent by continuing to use CenturyLink's services. Thus, CenturyLink's commitments under the Internet Services Agreement were not illusory and served as adequate consideration to support the entire contract, including the arbitration clause. *See State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 858 (Mo. banc 2006) (courts look for "consideration as to the whole agreement," and not just to arbitration clause).

Sanford also retained the right to avoid any changes that CenturyLink proposed by electing to discontinue his use of CenturyLink's services before the proposed revisions went into effect. (L.F. 82.) Sanford's acceptance of any contract changes proposed by CenturyLink was conditioned on his "continuing to use the Services after revisions are

effective. . . ." (L.F. 82.) Sanford was not obligated to accept any new terms CenturyLink proposed, but could opt out by discontinuing CenturyLink's services before those changes took effect, retaining the benefit of the unmodified agreement.

B. If the Court Determines That the Internet Services Agreement Is Enforceable Under Louisiana Law, But Not Enforceable Under Missouri Law, Louisiana Law Controls.

In a dispute over the enforceability of a contract, a choice-of-law provision will be honored where application of that provision results in a valid, enforceable contract. *See State ex rel. St. Joseph Light & Power Co. v. Donelson*, 631 S.W.2d 887, 891-92 (Mo. App. W.D. 1982). When courts apply the law chosen by the parties, they do so for the purpose of giving effect to their intention. In order to give effect to that presumed intention, when courts have a choice of law, they will apply the law which upholds the contract. *Id.* at 891-92 (citing *Restatement (Second) of Conflicts of Laws* § 187 cmt. c).

Therefore, if this Court concluded that the Internet Services Agreement would be enforceable under Louisiana law but not Missouri law, the former should be applied. For the reasons set forth above, however, the Internet Services Agreement is valid and enforceable under the laws of both states.

CONCLUSION

For the reasons stated above, the Court should reverse the trial court's order granting Plaintiff Kyle Sanford's Motion for Partial Summary Judgment and denying Defendant CenturyTel of Missouri, LLC d/b/a CenturyLink's Motion to Dismiss or Stay

and Compel Arbitration, and order the trial court to stay the proceedings below and compel the parties to arbitrate in accordance with the Internet Services Agreement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of April, 2016, the foregoing brief and accompanying appendix were filed electronically with the Clerk of the Court and served by operation of the court's electronic filing system upon the following:

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CERTIFICATE REQUIRED BY RULE 84.06(c)

The undersigned also hereby certifies that the foregoing brief complies with the length limitations contained in Rule 84.06(b) in that there are 10,846 words and 1,039 lines of monospaced type in the brief (except the cover, signature block, certificate of service, and certificate required by Rule 84.06(c)) according to the word count of the Microsoft Word word-processing system used to prepare the brief. An original copy of this brief is signed and in the possession of the undersigned.

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