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 REPLY BRIEF OF APPELLANT

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I. CENTURYLINK'S APPEAL WAS TIMELY BECAUSE CENTURYLINK FILED ITS NOTICE OF APPEAL WITHIN FORTY DAYS (THIRTY PLUS TEN) OF THE TRIAL COURT'S ORDER DENYING CENTURYLINK'S MOTION TO COMPEL ARBITRATION.

The notice of appeal filed by Defendant CenturyTel of Missouri, LLC d/b/a CenturyLink ("CenturyLink") concerning the denial of its motion to compel arbitration was timely. There is no rule, statute, or decision of this Court that requires parties seeking an interlocutory appeal of an order denying a motion compel arbitration to file a notice of appeal within ten days of a trial court's entry of such an order. Therefore, the Court of Appeals erred in dismissing CenturyLink's appeal, and this Court should consider this appeal on the merits.

A. The Plain Language of Rules 74.01, 81.04, 81.05, and R.S. Mo. § 435.440 Provide That Parties Have Forty Days to Appeal Orders Denying Motions to Compel Arbitration.

CenturyLink has presented a point-by-point analysis of the relevant statutory provisions and Missouri Rules of Civil Procedure, which together provide that CenturyLink had forty days to file its notice of appeal following the trial court's docket entry denying CenturyLink's motion to compel arbitration:

- The trial court's interlocutory order denying CenturyLink's motion to compel arbitration is appealable under § 435.440.1;

- Appeals taken 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" under § 435.440.2;
- Under the Missouri Rules of Civil Procedure, an appealable order is a "judgment" under Rule 74.01(a), which provides that "'[j]udgment' as used in these rules includes … any order from which an appeal lies";
- A "judgment" (*i.e.*, an "order from which an appeal lies") becomes final thirty days after its entry under Rule 81.05(a)(1); and
- CenturyLink's notice of appeal was due within ten days of the "judgment" becoming final under Rule 81.04(a).

Sanford does not attempt to dispute this step-by-step analysis. Sanford concedes that "[i]f Rule 74.01 applies to orders appealed under section 435.440, then the orders do not become final and appealable until thirty days after entry." Respondent's Br. 5.

In light of this concession, Sanford never *once* recites the language of Rule 74.01(a) in his brief. This is because the definition of "judgment" under Rule 74.01(a) specifically includes "order[s] from which an appeal lies." As a result, the 30-day finality Rule for judgments applies to the appealable order denying CenturyLink's motion to compel arbitration. Sanford points to no Rule that provides a different timeframe for appealable orders in civil actions, and there is nothing in § 435.440 that provides a different timeframe in the specific context of arbitration-related orders. Therefore, the plain language of Rules 74.01(a), 81.04(a), and 81.05(a)(1) encompasses the procedure for appealing the trial court's order, and because there is no conflict between these Rules

and any other Rules or statutes, the familiar 30+10 timeframe must control the manner of pursuing an interlocutory appeal of an order denying a motion to compel arbitration. This is dispositive.

Rather than confront the plain language of the applicable Rules head-on, Sanford's argument rests upon irrelevant matters. Sanford repeatedly observes that orders denying motions to compel arbitration are not "final judgments." *See, e.g.*, Respondent's Br. 4. CenturyLink agrees. First, these orders are not "final judgments" under R.S. Mo. § 512.020 (the context in which courts generally employ that phrase), because that term describes a ruling that "resolves all issues in a case, leaving nothing for future determination." *Buemi v. Kerckhoff*, 359 S.W.3d 16, 20 (Mo. banc 2011). But the trial court's order here is being appealed under § 435.440.1, and not § 512.020.

Next, Sanford points out cases stating that § 435.440 authorizes an "immediate appeal" of an order denying a motion to compel arbitration. Respondent's Br. 4. CenturyLink again agrees, because the law is clear that parties need not wait until a "final judgment" under R.S. Mo. § 512.020, *see Buemi*, 359 S.W.3d at 20, to pursue an immediate interlocutory appeal of an order denying a motion to compel arbitration in light of § 435.440's express authorization of an appeal.

At the next step Sanford wholly departs from the language of any Rule or statute by asserting that an order for which an appeal is immediately available – *i.e.*, in advance of a final judgment resolving all issues – becomes *final* immediately for purposes of appeal. Nothing in § 435.440 (or any of this Court's Rules) supports this conclusion. The Rule that controls the timing of finality is Rule 81.05(a)(1), which provides that

"judgments" under Rule 74.01 become "final" thirty days after entry. The notice of appeal is due within ten days thereafter. Rule 81.04(a).

Sanford next argues that Rules Rule 74.01(a), 81.05(a)(1), and 81.04(a) may be ignored because § 435.440.1 "takes precedence" over the Missouri Rules. Respondent's Br. 4. But, even if Sanford were correct, nothing in § 435.440 states that parties must file a notice of appeal within ten days or that an order denying a motion to compel arbitration is final immediately upon entry. The conflict on which Sanford's argument is founded is imaginary. Indeed, § 435.440.2 states that appeals must be taken "in the same manner and to the same extent as from orders or judgments in a civil action." The legislature unambiguously intended for no distinction to be drawn, and the Rules unambiguously provide for the customary 30+10 day period to apply.

Finally, Sanford confuses the difference between the substantive right of appeal and the procedural method of appeal. Timing is procedural, not substantive. The substantive right to an appeal is conferred by § 435.440 and 9 U.S.C. § 16(a)(1)(B), which authorize appeals before a final judgment under § 512.020. By following the timing provided by the relevant rules and statutes, the parties and a trial court do not somehow "convert" an appealable order into a final judgment under § 512.020.

B. <u>Sanford's Reliance Upon Probate Cases Is Mistaken.</u>

As stated, Sanford cites no decision of this Court providing that interlocutory appeals must be filed within ten days of entry of an order. Instead, Sanford cites cases from the Court of Appeals holding that, *in probate proceedings*, certain interlocutory orders are final upon entry. Respondent's Br. 9-10. These arguments fail for the simple

reason that Rule 74, which defines appealable orders as "judgments" for purposes of the Missouri Rules, does not apply to probate proceedings. *State ex rel. Baldwin v. Dandurand*, 785 S.W.2d 547 (Mo. banc 1990); Rule 41.01(b) (listing the specific rules that apply to probate proceedings, which do not include Rule 74).

Citing Rule 41.01(a)(1), Sanford argues that the probate cases are relevant because the same Rules "absolutely apply" to probate and civil actions before *this* Court and the court of appeals (Respondent's Br. 10), but ignores the fact that the same Rules for civil actions do *not* apply to circuit courts in "actions governed by the probate code." Rule 41.01(a)(2). The issues of finality and timing for filing a notice of appeal in circuit court concern circuit court proceedings, not appellate proceedings. Sanford's probate cases are irrelevant here.

C. Sanford Does Not Dispute That the FAA Preempts the Denomination Requirement of Rule 74.01(a).

In its opening brief, CenturyLink explained that the "denomination" requirement in Rule 74.01 does not apply to orders denying motion to compel arbitration and that, in any event, the FAA's grant of a substantive right to pursue interlocutory appeals preempts the imposition of this requirement as a barrier to pursuing such an appeal. Appellant's Br. 23-24. Sanford does not disagree with the preemption analysis, and agrees that the denomination requirement does not apply under Missouri law. *See* Respondent's Br. 6-7. Therefore, the Court should address CenturyLink's appeal on the merits notwithstanding the absence of the word "judgment."

II. THIS DISPUTE FALLS WITHIN THE SCOPE OF THE ARBITRATION CLAUSE, WHICH ENCOMPASSES "ANY AND ALL CLAIMS, CONTROVERSIES OR DISPUTES OF ANY KIND [] AGAINST EACH OTHER," AND ALSO SPECIFICALLY REFERENCES "BILLING."

"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." *Dunn Indus. Group v. City of Sugar Creek*, 112 S.W.3d 421, 429 (Mo. banc 2003). Sanford presents his entire argument concerning the scope of the arbitration clause without ever turning attention to the language in the Internet Services Agreement. In particular, the arbitration clause states:

> 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 (emphasis added). The clause continues:

> 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 … [AND] APPLIES TO ALL CLAIMS THAT COMPANY MAY BRING AGAINST YOU….

Id. (emphasis added).

The scope of the clause, on its face, encompasses any and all claims, controversies or disputes of any kind between the parties. Sanford offers no counterargument that his lawsuit does not qualify as a "claim, controversy or dispute of any kind."

Moreover, the essence of Sanford's claim arises from a "billing" dispute. Sanford alleges that CenturyLink improperly charged him a Universal Services Fund ("USF") surcharge. Sanford cannot contend that his lawsuit does not "arise out of or relate to" billing.

Sanford therefore asserts instead that CenturyLink's services were not "services" as defined in the Internet Services Agreement and attempts to draw a comparison to *Riley v. Lucas Lofts Investors, LLC*, 412 S.W.3d 285 (Mo. App. E.D. 2013). *Riley* is distinguishable. In that case, the dispute at issue arose from allegations regarding false representations made by the defendants about water leaking into condominium units from the roof of the building and the repairs to the roof that the defendants promised to make.

The arbitration agreement between the parties covered disputes or disagreements between Seller and Purchaser "with respect to the construction of Unit [sic] sold hereunder and/or this Contract…." 412 S.W.3d at 291 (alteration in original). The term "Unit" was defined to include only the "physical portion of the Condominium designated for separate ownership and occupancy," with the "upper physical boundary" of the Unit established as the "undecorated surfaces of the ceiling facing the interior of the Unit." *Id.* at 288. The roof of the condominium building, on the other hand, was defined as a "common element" of the condominium building. *Id.* Applying these definitions, the parties had agreed to arbitrate disputes arising with respect to "(1) the construction of the

Units sold to Plaintiff; and (2) the contract," but the definition of "Unit" did not include the condominium's roof. *Id.* at 291. Further, the plaintiff "did not rely on any provision of the contract as a basis for liability." *Id.* Therefore, the court held that the plaintiff's false representations claims fell outside of the scope of the arbitration agreement.

Here, the arbitration provision expressly encompasses any and all claims, controversies or disputes of any kind between the parties. Moreover, it specifically extends to "billing" disputes such as Sanford has alleged. Sanford fails to cite any contractual provision to support his contention that the term "billing" does not include disputes with respect to CenturyLink's billing of USF surcharges to customers. billing customers for USF charges. *Cf. Ruhl v. Lee's Summit Honda*, 322 S.W.3d 136, 139 (Mo. banc 2010) (finding that MMPA claim fell within arbitration clause because "any damages for Ruhl's claims are based on refunding the charged fee, which is a component of the total purchase price listed in the contract").

CenturyLink has demonstrated that this dispute falls within the plain language of the arbitration clause, and Sanford has failed to provide "the most forceful evidence of a purpose to exclude the claim from arbitration…." *Dunn Indus. Group,* 112 S.W.3d at 429. Therefore, Sanford's dispute should be submitted to arbitration.

III. THIS COURT'S DECISION IN *ELLIS* INSTRUCTS THAT AN ARBITRATOR, AND NOT THIS COURT, SHOULD DECIDE THE ISSUE OF ARBITRABILITY WITH RESPECT TO SANFORD'S ARGUMENT THAT THE ENTIRE INTERNET SERVICES AGREEMENT IS ILLUSORY.

In *Ellis v. JF Enters., LLC*, --- S.W.3d ---, 2016 WL 143281, *6 (Mo. banc Jan. 12, 2016), this Court instructed that, when a party challenges the entire agreement (and not just the arbitration clause within that agreement), it is for an arbitrator and not a court to decide whether the agreement fails for lack of consideration. This decision was issued after the Court of Appeals dismissed CenturyLink's appeal, and made a substantial change in governing Missouri precedent. *Ellis* should be followed here.

A. CenturyLink Has Properly Directed the Court's Attention to *Ellis* as Intervening Authority.

Sanford asks the Court to ignore legal developments that occur in the normal course of a case. However, Missouri courts properly consider intervening decisions that signal a change in the law. *See, e.g., Geran v. Xerox Education Servs., Inc.*, 469 S.W.3d 459, 465 (Mo. App. W.D. 2015) (quoting *Sumners v. Sumners*, 701 S.W.2d 720, 723 (Mo. banc 1985); *Jones v. Wyrick*, 557 S.W.2d 250, 252 (Mo. banc 1977) (applying intervening appellate decision to judgment on appeal).

Moreover, no one disputes that *Ellis* had not yet been handed down, and was therefore not available to the trial court or throughout the pendency of prior appellate proceedings. *See* Respondent's Br. 30. Indeed, Sanford cites five decision of the Missouri Court of Appeals, Western District prior to the *Ellis* decision that, he argues, stand for the proposition that a court must decide the lack of consideration issue, not an arbitrator. *See* Respondent's Br. 37-39, 42. For the same reason, when arguing to the trial court that the question of enforceability of the arbitration provision must be submitted to an arbitrator, CenturyLink was forced to rely primarily on U.S. Supreme

Court cases. L.F. 489-90. In *Ellis*, this Court overruled the reasoning of the contrary cases from the Missouri Court of Appeals, Western District, and CenturyLink should not be further prejudiced by these erroneous decisions after this Court has already corrected those errors.

The Court should be especially receptive to addressing this argument now considering that this is an interlocutory appeal. If this Court declines to address the argument now (and otherwise declines to overrule the denial of CenturyLink's motion to compel arbitration), CenturyLink will have to raise *Ellis* with the trial court on remand as an intervening change in the law. In the interest of efficiency, the Court should address the issue now rather than sending the parties back to the trial court for another potential round of interlocutory appeals, which have already been underway for nearly two years.

B. This Court's Decision in *Brewer* Does Not Impact the Rule That Challenges to the Entire Agreement Are for an Arbitrator to Decide.

A party's challenge that another party's contractual promises were illusory concerns a lack of contractual consideration. *See Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 776 (Mo. banc 2014). Therefore, under *Ellis*, Sanford's current challenge is for an arbitrator and not the courts. 2016 WL 143281, at *6.

Sanford nevertheless relies upon this Court's decision in *Brewer v. Missouri Title Loans*, 364 S.W.3d 486 (Mo. banc 2012), to argue that contract formation issues are for the courts and *not* an arbitrator to decide. This argument is erroneous.

First, *Brewer* considered a challenge to the arbitration clause itself, and not the entire agreement. Sanford, on the other hand, challenges the entire Internet Services

Agreement as illusory, not just the arbitration clause. *Ellis* recognizes that arbitration clauses are severable so that courts may consider challenges to a clause itself, but that challenges to the entire agreement are for the arbitrator. 2016 WL 143281, at *3.

Second, *Brewer* dealt with unconscionability, not lack of consideration. Sanford attempts to conflate the issues, Respondent's Br. 39-43, but unconscionability was outside the scope of the issues considered by the trial court in granting his Motion for Partial Summary Judgment Limited to the Issues of Consideration and Scope of the Alleged Agreement to Arbitrate. CenturyLink addresses unconscionability in Section V, *infra.*

Finally, *Brewer* predates the U.S. Supreme Court's intervening decision in *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500 (2012), which this Court heavily relied upon in *Ellis*. To the extent that there is any conflict, this Court should consider *Brewer* overruled by both *Nitro-Lift* and *Ellis*.

Therefore, this Court should reverse the trial court's order granting Sanford's Motion for Partial Summary Judgment and remand with instructions to send the parties to arbitration.

IV. THE INTERNET SERVICES AGREEMENT DOES NOT FAIL FOR LACK OF CONSIDERATION BECAUSE LOUISIANA LAW DOES NOT CONTEMPLATE CONSIDERATION AS AN ELEMENT OF CONTRACT FORMATION AND BECAUSE MISSOURI LAW RECOGNIZES THE EXISTENCE OF LEGALLY ENFORCEABLE CONSIDERATION IF ANY CONTRACTUAL AMENDMENTS ARE MADE ON A PROSPECTIVE BASIS WITH REASONABLE ADVANCE NOTICE.

Sanford's brief is noteworthy in the fact that it does not address any of the primary authorities relied upon by CenturyLink for explaining why the Internet Services Agreement is not illusory. Sanford makes no attempt to distinguish Louisiana precedent, does not even mention this Court's recent decision in *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770 (Mo. banc 2014), and never addresses the applicability of the general rule laid down by the *Restatement (Second) of Contracts* § 77. *See* Appellant's Br. 30-39.

A. CenturyLink Did Not Waive Its Argument That Louisiana Law Applies Because That Argument Is Directly Within CenturyLink's Motion to Compel Arbitration.

As CenturyLink has explained, the Internet Services Agreement is governed by Louisiana law, and Louisiana's civil code regime does not recognize the common-law concept of consideration. *See* Appellant's Br. 31-32 (citing *Aaron & Turner, L.L.C. v. Perret*, 22 So. 3d 910, 915 (La. Ct. App. 2009); La. Civ. Code art. 1927; La. Civ. Code art. 1967, cmt. (c)). Therefore, Sanford's challenge based on lack of consideration, which is a familiar concept under Missouri law, does not translate into Louisiana law.

Further, under the Louisiana Supreme Court's decision in *Aguillard v. Auction Mgmt. Corp.*, 908 So. 2d 1, 17 (La. 2005), parties are free to contract in a way such that one party may unilaterally modify the agreement by amendments that take precedence over the parties' previously executed materials. *See* Appellant's Br. 33-34. These principles control the resolution of this case, and instruct that the contract is not only enforceable, but that Sanford cannot properly challenge "lack of consideration" as an issue barring contract formation for a contract governed by Louisiana law.

Sanford contends that CenturyLink "Waived This Claim of Error by Not Presenting It to the Trial Court." Respondent's Br. 46. This is incorrect. CenturyLink's Motion to Dismiss or Stay and Compel Arbitration – *i.e.*, the very motion whose denial serves as the basis for this entire appeal (*see* Respondent's Br. 1 & n. 1) – argues unequivocally that the Internet Services Agreement was governed by Louisiana law. *See* L.F. 27-31. In essence, Sanford argues that CenturyLink cannot assert arguments raised in its motion to compel arbitration in an appeal arising from the denial of its motion to compel arbitration. This defies logic.

B. <u>The Louisiana Choice-of-Law Provision Is Valid.</u>

Sanford contends that it requires "circular logic" and a "cart-before-the-horse argument" to give effect to a choice-of-law provision in a contract without first viewing whether the contract is valid under the laws of another state (Missouri). *See* Respondent's Br. 49. But this is exactly the logic employed by the court in *State ex rel. St. Joseph Light & Power Co. v. Donelson*, 631 S.W.2d 887, 891-92 (Mo. App. W.D. 1982) (cited in Appellant's Br. 39), where the court applied the *Restatement (Second) of*

Conflicts of Laws § 187 to explain that, to give effect to the presumed intention of the parties that their contract will be binding, "when courts have a choice of law, they will apply the law which upholds the contract." This principle only recognizes that courts should default to honoring contracts instead of nullifying them.

The case Sanford cites in support of his position, *Citibank (South Dakota), N.A. v. Wilson*, 160 S.W.3d 810 (Mo. App. W.D. 2005), relied on no authorities to reach the opposite conclusion, before deciding the choice of law question was actually moot. *Id.* at 813. The court's reasoning has not been endorsed by any other Missouri court.

Indeed, although CenturyLink firmly maintains that there *was* consideration, *see* Section IV.C, if the parties agreed that the contract would be enforceable under Louisiana law, which does not require consideration, and met all other components of making an enforceable contract in that state, courts should not impose additional requirements on the parties. Sanford's argument essentially requests that the Court ignore the comity that should be afforded to Louisiana contract law.

C. The Internet Services Agreement Is Also Enforceable Under Missouri Law.

In its Appellant's Brief, CenturyLink explained that two factors establish that the Internet Services Agreement must be upheld as containing valid consideration under Missouri law as well as Louisiana law: (1) the agreement only allows material changes or increases to monthly prices to be effective *prospectively*; and (2) the agreement requires 30 days' reasonable advance notice of changes. Appellant's Br. 36-39. CenturyLink relies upon the *Restatement (Second) of Contracts* § 77 and this Court's decision in *Baker*

v. Bristol Care, Inc., 450 S.W.3d 770 (Mo. banc 2014), as well as numerous decisions by numerous other courts that uphold this principle. *See* Appellant's Br. 36-37. Sanford does not mention *Baker*, the *Restatement*, or any of these cases in his brief, let alone attempt to distinguish them.

That is because Sanford *did* receive legally enforceable consideration. First, the undisputed material facts establish that CenturyLink did not offer any proposed changes to the Internet Services Agreement during the time Sanford received services, making his consideration arguments speculative. Second, the advance notice and prospective effect requirements establish that CenturyLink was "locked in" to all material terms and prices for at least 30 days. This is valid consideration.

It is also a practical way to manage a large number of consumer accounts in an industry subject to rapid technological, regulatory, and competitive changes. CenturyLink was bound to give "reasonable notice" in advance of any material changes in the parties' relationship so that customers such as Sanford could decide whether to continue using CenturyLink's services, and the agreement gave customers such as Sanford 30 days to make that decision. Until any proposed changes were accepted by continued use of the services after the 30-day notice period, the original terms would remain fully effective and could not be modified retroactively.

Sanford relies entirely upon Court of Appeals cases, all of which are distinguishable. In particular, none of these decisions contradicts the core principle that a contract is valid when the contract grants one party the right, upon reasonable notice, to issue prospective amendments that do not have retroactive effect. *See Restatement*

(Second) of Contracts § 77, illus. 5. To the contrary, the court recognized this principle in *Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429 (Mo. App. W.D. 2010). In that case, the court considered an agreement that the employer was free to amend at any time, and where the employer only needed to provide notice that the amendment had occurred, "meaning Speedway could provide notice of an amendment days, weeks, months, or years after the amendment has taken effect without running afoul of the [agreement's] terms." *Frye*, 321 S.W.3d at 444. Moreover, it was not clear whether amendments would apply only prospectively. *Id.* As a result, the contract failed. Notably, however, the court concluded that Missouri precedent "suggest[s] that the right to amend prospectively, if coupled with advance notice of the amendment, may prevent the right to amend from rendering a mutual promise illusory." *Id.*

Similarly, in *Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15 (Mo. App. W.D. 2008), the court held that an employee was not bound by a policy unilaterally adopted by her employer that imposed an arbitration requirement. Most importantly, the terms of the policy ran entirely in one direction – the employer was "not bound to submit its claims to arbitration, but [it] also is not bound to keep any other so-called 'promise' expressed in the [policy]," which stated that the employer "may at its sole discretion modify or discontinue the [policy] at any time." *Id.* at 25. Thus, the policy allowed the employer a "total and complete escape from any and all commitments at any time." *Id.* Moreover, the matter involved a new policy imposed on an at-will employee after 20 years of employment, and the court noted that "the distinction between terms and

conditions of employment, on the one hand, and legally enforceable contracts, on the other, is crucial for this case." *See Morrow*, 273 S.W.3d at 23.

Furthermore, *Manfredi v. Blue Cross & Blue Shield of Kansas City*, 340 S.W.3d 126 (Mo. App. W.D. 2011), does not even concern the issue of lack of consideration. Rather, *Manfredi* dealt with the unconscionability of allowing a party the right to make unilateral, retroactive modifications to an arbitration agreement to avoid arbitration entirely if that party desired. *Id.* at 134-35. There is no such issue here.

Finally, the court in *Bellemere v. Cable-Dahmer Chevrolet, Inc.*, 423 S.W.3d 267 (Mo. App. W.D. 2013), merely held that a non-signatory to an arbitration agreement cannot compel arbitration under that agreement. *See Bellemere*, 423 S.W.3d at 274. This case also does not concern consideration.

Otherwise, Sanford's argument largely rests on speculation that CenturyLink would fail to give "reasonable notice," as required by the Internet Services Agreement. Respondent's Br. 55-56. But if courts can simply presume that a contracting party will not abide by its agreement, then every contract is illusory. The fact that the agreement allows CenturyLink to exercise discretion in determining how to give reasonable notice does not eliminate the requirement that the chosen method be "reasonable." As Sanford observes, CenturyLink might send this notice "via bills, email, or any other communication." Respondent's Br. 56. Whether that method is reasonable will depend on the circumstances, and if notice once given is unreasonable, CenturyLink will have breached its obligation. The reasonable notice obligation, as well as the provision of

services in exchange for payment, however, are promises sufficient to comprise consideration.

Sanford also contends that "CenturyLink's *sole* obligation under the contract is to provide Services…." *Id.* at 55 (emphasis added). First, CenturyLink's providing services in exchange for the obligations Sanford assumed under the Internet Services Agreement is consideration for the whole contract. *Eaton v. CMH Homes, Inc*., 461 S.W.3d 426, 434 (Mo. banc 2015).

Second, Sanford's claim is not true. The arbitration agreement itself, for example, equally obligates both CenturyLink and the customer to arbitrate all claims arising between them. This is not the only other obligation imposed upon CenturyLink, but the point is clear: the Internet Services Agreement imposes benefits and obligations on both sides, and those commitments are legal consideration for the contract.

Thus, the Internet Services Agreement constitutes a valid, binding agreement that grants rights to and imposes obligations on both parties. That is all that Missouri law requires as consideration to support a contract.

V. THE COURT SHOULD DISREGARD SANFORD'S "ADDITIONAL ARGUMENTS IN SUPPORT OF THE TRIAL COURT'S DECISION" BECAUSE THEY ARE OUTSIDE THE SCOPE OF THE MOTION FOR PARTIAL SUMMARY JUDGMENT LIMITED TO THE ISSUES OF CONSIDERATION AND SCOPE OF THE ALLEGED AGREEMENTS TO ARBITRATE.

Sanford raises arguments that are plainly outside of the scope of his motion to the trial court. The Court should not address these arguments at all. In any event, these arguments do not support refusing to enforce the arbitration requirement.

A. Sanford's Arguments Concerning Unconscionability and His Alleged Non-Acceptance of the Internet Services Agreement Are Outside the Scope of the Trial Court's Ruling.

Sanford's final section of his brief is entitled "Additional Arguments in Support of the Trial Court's Decision." As the title of the motion granted by the trial court suggests, Sanford's "Motion for Partial Summary Judgment Limited to the Issues of Consideration and Scope of the Alleged Agreements to Arbitrate" was confined to addressing two issues: (1) lack of consideration; and (2) the scope of the arbitration clause. Sanford's attempt to raise issues concerning whether he "accepted" the Internet Services Agreement or whether that agreement was unconscionable are outside the scope of the trial court's ruling. They are also issues for an arbitrator to decide under *Ellis*. Therefore, the Court should disregard them.

B. Sanford Accepted the Internet Services Agreement.

Missouri and Louisiana both recognize that reasonable notice of terms combined with use of a service constitute consent for an arbitration agreement. *See, e.g.*, *Major v. McCallister*, 302 S.W.3d 227, 230 (Mo. App. S.D. 2009); *Citibank (South Dakota), N.A. v. Wilson*, 160 S.W.3d 810, 813-14 (Mo. App. W.D. 2005); *Vigil v. Sears Nat'l Bank*, 205 F. Supp. 2d 566, 568 (E.D. La. 2002); *Bank of Louisiana v. Berry*, 648 So. 2d 991, 993 (La. Ct. App. 1994).

As a result, to establish a binding contract CenturyLink was not required to demonstrate that the Sanford had "actual knowledge" of the terms or acceptance through written assent. *See, e.g., Leny v. Friedman*, 372 So. 2d 721, 723 (La. Ct. App. 1979); *McCallister*, 302 S.W.3d at 230 ("Failure to read an enforceable online agreement, as with any binding contract, will not excuse compliance with its terms."); *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007). Rather, Sanford need only have been put on notice of the Agreement and been provided access to it. *McAllister*, 302 S.W.3d at 230; *see also Garrison v. Transunion*, 2010 U.S. Dist. LEXIS 26501, at *3-10 (E.D. Mich. Feb. 26, 2010); *Briceno v. Sprint Spectrum*, 911 So. 2d 176, 177-80 (Fla. Ct. App. 2005); *Schwartz v. Comcast Corp.*, 256 F. App'x 515 (3d Cir. 2007); *Pentecostal Temple Church v. Streaming Faith, LLC*, 2008 WL 4279842 (W.D. Pa. Sept. 16, 2008).

Here, Sanford received reasonable notice of the terms and conditions of the Internet Services Agreement. Every bill Sanford received for the services provided by CenturyLink advised that he could access CenturyLink's Terms and Conditions of service on the CenturyLink website, where the Internet Services Agreement was available within two clicks of a computer mouse. L.F. 37-38, 42, 48, 53, 60, 65, 71-72, 78. The Agreement stated that Sanford's use of the services constituted acceptance of the terms and conditions, and with this notice, Sanford used and accepted the service. L.F. 81. This is consistent with normal contract formation practices in Internet purchases and the terms of both agreements, including the arbitration clauses, apply here.

C. The Internet Services Agreement Is Not Unconscionable.

Sanford also contends that the Internet Services Agreement is unconscionable, relying primarily on *Brewer v. Missouri Title Loans*, 364 S.W.3d 486 (Mo. banc 2012).

In *Brewer*, the court cited *Hume v. United States*, 132 U.S. 406, 411, 414 (1889), where the Court "describe[ed] an unconscionable contract as one 'such as no man in his senses and not under delusion would make' and suggest[ed] that there may be 'contracts so extortionate and unconscionable on their face as to raise the presumption of fraud in their inception.'" *Brewer*, 364 S.W.3d at 493 n.3 (quoting *Hume*, 132 U.S. at 411, 414 (internal quotation marks omitted)). This Court has similarly described unconscionability as "'an inequality so strong, gross, and manifest that it must be impossible to state it to one with common sense without producing an exclamation at the inequality of it.'" *Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426, 432 (Mo. 2015) (quoting *State v. Brookside Nursing Ctr.*, 50 S.W.3d 273, 277 (Mo. banc 2001)). In *Brewer*, the Court identified some of the common features that bear on unconscionability, including:

> [H]igh pressure sales tactics, unreadable fine print, misrepresentation or unequal bargaining positions all indicate deficiencies in the making of a contract. Courts also consider whether the terms of an arbitration agreement are unduly harsh. This is a fact-specific inquiry focusing on whether the contract terms are so one-sided as to oppress or unfairly surprise an innocent party or which reflect an overall imbalance in the rights and obligations imposed by the contract at issue.

Id. at 489, n.1. The agreement in this case has none of these elements, and bears no resemblance to the contract held to be invalid in *Brewer*.

In *Brewer,* "[t]here was evidence that the entire agreement – including the arbitration clause – was non-negotiable and was difficult for the average consumer to understand and that the title company was in a superior bargaining position." *Id.* at 493. Here, there is no contention that the Internet Services Agreement is difficult to understand or that CenturyLink, an Internet services provider in a competitive marketplace, was in a superior bargaining position. Moreover, the first page of the agreement notes, in bold print in the first page, the inclusion of a "**Mandatory Arbitration of disputes provision**." (L.F. 81 (emphasis in original). The arbitration provision itself is spelled out in all capital letters. (L.F. 93).

To be sure, Internet service providers and their customers do not engage in line-item bargaining over individual terms and conditions (and Sanford does not allege that he attempted to do so, when under the circumstances it would not be practicable). But the Missouri courts have repeatedly held that the fact that a contract is not subject to such line-item bargaining does not render it "inherently sinister and automatically unenforceable." *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 107 (Mo. App. E.D. 2003) (quoting *Hartland Computer Leasing Corp., Inc. v. Ins. Man, Inc.*, 770 S.W.2d 525, 527 (Mo. App. E.D. 1989)). If Sanford did not wish to accept the terms of the Internet Services Agreement, he was free to reject them and take his business to another provider.

Moreover, in holding that the *Brewer* contract was unconscionable, this Court emphasized the context of the bargaining and the radical nature of the contractual

commitment. Specifically, the arbitration provision was contained in a contract for short-term, high-interest loans in significant dollar amounts, with crippling interest payments that rapidly dwarfed the principal owed on the loan. *See* 364 S.W.3d at 487-88. It was in this context that a "non-negotiable" agreement was held to be unconscionable.

Thus, nothing in *Brewer* purported to overrule the Missouri rule, recognized in *Swain*, *Hartland Computer*, and similar cases, that pre-printed consumer contracts containing arbitration clauses are not "inherently sinister and automatically unenforceable." *Swain*, 128 S.W.3d at 107; *see also Hartland Computer*, 770 S.W.2d at 527 ("Such form contracts are a natural concomitant of our mass production-mass consumption society. Therefore, a rule automatically invalidating adhesion contracts would be completely unworkable."). Such agreements are routinely enforced. *See, e.g.*, *Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1105 (C.D. Cal. 2002); *Klein v. Verizon Comm's, Inc.*, 2013 U.S. Dist. LEXIS 14137, at *32-33 (E.D. Va. Jan. 31, 2013); *Sherman v. AT&T Inc.*, 2012 U.S. Dist. LEXIS 40394, at *11-13 (N.D. Ill. Mar. 26, 2012); *see also Vigil*, 205 F. Supp. 2d at 573 (E.D. La. 2002). They are not inherently oppressive.

The arbitration agreement in *Brewer* also favored the creditor by requiring the consumer to bear the entire costs of the arbitration proceeding, and provided that the title company could seek attorneys' fees against the borrower. 364 S.W.3d at 493. Here, by contrast, the fee-shifting provision applies to either party, and only to fees incurred in moving to compel arbitration; thus, it does not deter arbitration, but encourages it. L.F. 94. Moreover, the agreement delegates to the arbitrator responsibility for providing an

equitable allocation of the costs of arbitration. *Id.* For these reasons, the arbitration agreement at issue here is distinguishable from that in *Brewer*.

The mere presence of a fee-shifting provision, even of costs of arbitration, does not render an agreement unconscionable. *Faber v. Menard, Inc.*, 367 F.3d 1048, 1053 (8th Cir. 2004). In any event, even if the fee-shifting provision were unconscionable, which it is not, it would be severable, allowing the rest of the arbitration agreement to stand. *See, e.g.*, *Powell-Perry v. Branch Banking & Trust Co.*, 485 F. App'x 403, 407 (11th Cir. 2012); *see also Swain*, 128 S.W.3d at 108 (holding that an invalid forum-selection provision should be severed from enforceable arbitration agreement). The Internet Services Agreement expressly provides that "if any portion of this Mandatory Arbitration of Disputes section is determined to be invalid or unenforceable, the remainder of the section remains in full force and effect." L.F. 94.

Brewer also emphasized that "[a] claim such as Brewer's would require significant expertise and discovery," while there was evidence that "it was unlikely that a consumer could retain counsel to pursue individual claims," so that the practical effect of the arbitration clause would be to foreclose all claims by borrowers. 364 S.W.3d at 494. The agreement in this case has no such effect. First, it permits customers to pursue claims against CenturyLink both through informal dispute resolution and in small claims court. *See id.* (contrasting Brewer's contract with that at issue in *Concepcion*, where "the contract provided an informal 30-day dispute resolution procedure"). Unlike *Brewer*, where the customer was effectively left without legal recourse in the face of significant, even crippling, financial liability, the typical telecommunications customer will seldom

have a claim against a telecommunications company exceeding the value that may be litigated as a small claim, and customers have the right to pursue such an action in lieu of arbitration. Moreover, customers opting for arbitration rather than small claims have the prospect of seeking an equitable cost allocation from the arbitrator. For these reasons, the practical barriers to bringing claims present in *Brewer* are absent in this case.

Finally, in *Brewer*, the court found that "[t]he title company requires Brewer to arbitrate all of her claims in the interests of efficient, streamlined dispute resolution," but "when the title company's interests are at stake, the title company is free to disregard the efficiencies of arbitration in favor of litigating a claim against Brewer." *Id.* at 495. This "one-sided" obligation was critical to the court's analysis, which emphasized the inequity of forcing the borrower to arbitrate all claims while exempting "the lender's chief remedies" from the arbitration requirement. *Id.* at 494-95.

Here, by contrast, the arbitration agreement unambiguously provides that both CenturyLink and the customer equally agree to submit all claims against the customer to binding arbitration, with the exception of small claims, which either party may pursue in small claims court. And, if CenturyLink failed to abide by this provision, the agreement provides that Sanford could recover his attorneys' fees for successfully compelling CenturyLink to arbitrate. For all of these reasons, the agreement at issue in this case is distinguishable from the one invalidated in *Brewer*.

VI. SANFORD'S OBJECTION TO CENTURYLINK'S STATEMENT OF FACTS IS SPURIOUS.

As a final matter, Sanford has objected CenturyLink's brief because its statement of facts is purportedly "argumentative." Respondent's Br. 13. CenturyLink's statement contains no improper advocacy or argument. Each statement is concise and supported by a citation to the Legal File or the Transcript for the Court to review for accuracy. *See* Rule 81.04(c).

Nevertheless, Sanford faults CenturyLink's statement that services were "governed" by the Internet Services Agreement, but does not explain what word CenturyLink should have used to indicate the existence of the Internet Services Agreement that indisputably exists. Respondent's Br. 12. Sanford also contends that CenturyLink should not have stated that the bills provided to him include a "link" to the Internet Services Agreement, because the bills do not provide a link "directly" to the terms and conditions. *Id.* at 13. Lost in Sanford's objection is what CenturyLink actually said in the statement of facts:

> 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. CenturyLink's reference to and *quotation* of cited evidence is not improper "advocacy" and is not a proper basis for an objection.

Sanford's objection should be overruled.

CONCLUSION

For the reasons stated above, the Court should reverse the trial court's order denying Defendant CenturyTel of Missouri, LLC d/b/a CenturyLink's Motion to Dismiss or Stay and Compel Arbitration and granting Plaintiff Kyle Sanford's Motion for Partial Summary Judgment, and order the trial court to stay the proceedings below and compel the parties to arbitrate in accordance with the terms of the Internet Services Agreement.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 2nd day of May, 2016, the foregoing Substitute Reply Brief was 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 7,728 words and 710 lines of monospaced type in the brief (except the cover, signature block, certificate of service, certificate required by Rule 84.06(c), and appendix) 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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