**IN THE SUPREME COURT OF MISSOURI**

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**No. SC95465**

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**KYLE SANFORD,**

**Plaintiff/Respondent,**

**v.**

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

**Defendant/Appellant.**

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

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# SUBSTITUTE BRIEF OF RESPONDENT

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## JURISDICTIONAL STATEMENT

### A. This Court Does Not Have Jurisdiction To Hear This Appeal Because It Is Untimely

CenturyLink did not file a timely appeal. This Court cannot exercise jurisdiction and must dismiss this case. "The timely filing of a notice of appeal is a jurisdictional requirement. Thus, if a notice of appeal is untimely, an appellate court lacks jurisdiction and must dismiss. Whether this court has jurisdiction is a question of law that we review *de novo*." *Lenz v. Lenz*, 412 S.W.3d 487 at 489 (Mo. App. S.D. 2013) (quoting *Thorp v. Thorp*, 390 S.W.3d 871, 875 (Mo.App.E.D.2013) and *Dunkle v. Dunkle*, 158 S.W.3d 823, 827 (Mo. App. E.D. 2005)).

The trial court entered its order denying CenturyLink's motion to compel arbitration on July 10, 2014.[1] (LF 4-5). This order is not a judgment under Rule 74.01 and instead is simply an interlocutory order. Interlocutory orders are hardly ever subject to appeal under Missouri law. Instead, most appeals are authorized by § 512.020 which requires that a party be "aggrieved by a judgment" before it has a right to appeal. *See*,

[1] The docket entry is styled as an Order granting Partial Summary Judgment "in favor of the Plaintiff as prayed." LF. 5. In his Motion for Summary Judgment, Mr. Sanford asked the court to "enter Summary Judgment on the issues of consideration and/or scope of the alleged agreements and to issue an order denying Defendants' Motion to Dismiss or Stay and Compel Arbitration and allow this case to proceed towards class certification." LF. 343, 358, 543.

*Manchester Enterprises, Inc. v. Sharma*, 805 S.W.2d 186 (Mo. App. W.D. 1991) ("The right of appeal is statutory and it is fundamental that in order to appeal a party must be aggrieved by the judgment from which he appeals"). In this case, however, section 435.440.1 grants CenturyLink a special right to appeal the trial court's interlocutory order denying arbitration. This statute provides that: "An appeal may be taken from . . . an order denying an application to compel arbitration." Because the trial court's order is being appealed under § 435.440.1, and not § 512.020, it is not a "judgment" subject to the requirements of Rule 74.01 and 81.05. Instead, it is immediately appealable upon entry. Under Rule 81.04, CenturyLink was required to file its notice of appeal within ten days.

### B. Section 435.440 Is A Special Statute Which Takes Precedence Over The Requirements Of Section 512.020 And Rule 74.01

The courts of Missouri have repeatedly held that because § 435.440 is a special statute, it takes precedence over the more general § 512.020. In *Madden v. Ellspermann*, 813 S.W.2d 51 (Mo. App. W.D. 1991), the trial court denied the defendant's motion to compel arbitration. The defendant appealed and the plaintiff argued that the appellate court lacked jurisdiction because § 512.020 "only allows an appeal from a final judgment and the order refusing to submit the dispute to arbitration is not a final judgment." *Madden*, 813 S.W.2d at 52. The Western District rejected this argument and explained that an order denying a motion to compel arbitration could be appealed despite being an interlocutory order and not a judgment because § 435.440 took precedence over § 512.020:

> There is a conflict between § 435.440 and § 512.020 because the

> former allows an appeal from an order which does not constitute a final judgment while the latter requires a final judgment before an appeal is allowed. When there is a conflict between two statutes, one of which deals with a subject in a general way and the second treats a part of the same subject in a more detailed way, the specific statute will govern. *O'Flaherty v. State Tax Com*, 680 S.W.2d 153, 154[2] (Mo. banc 1984). Section 512.020 deals with appeals in a general way but § 435.440 deals specifically with an appeal from an order denying an application to compel arbitration. In that instance the special statute allowing an appeal from an order denying arbitration will prevail and the order denying arbitration in this case is appealable.

*Madden*, at 53.

In *Young v. Prudential Securities, Inc.*, 891 S.W.2d 842 (Mo. App. E.D. 1995), the Eastern District was faced with an argument similar to the one made by the plaintiff in *Madden.* In *Young,* the plaintiff claimed that the order denying arbitration could not be appealed because it did not meet the requirements of Rule 74.01. After reciting with favor the entire quote form *Madden* given above, the court held that: "The same conflict exists between Rule 74.01 and § 435.440 and the reasoning applied in *Madden* is equally applicable. The order is appealable." *Young*, 891 S.W.2d at 844, *See, also Jackson County v. McClain Enterprises, Inc.*, 190 S.W.3d 633, 638 (Mo. Ct. App. 2006) ("Section 435.440.1 is a 'special statute' that takes precedence over the requirements in Rule 74.01").

This Court has also recognized that orders denying motions to compel arbitration

are immediately appealable and there is no requirement that they first be converted into a judgment. In *Lawrence v. Beverly Manor*, this Court held: "This Court recognizes the appealability of orders denying arbitration despite the fact that *such orders are not final judgments*, under the influence, if not the command of provisions of the Federal Arbitration Act and the Missouri Uniform Arbitration Act relating to appealability of such orders." *Lawrence v. Beverly Manor*, 273 S.W.3d 525, at 527 n.2 (Mo. 2009) (emphasis added). Likewise, in *Triarch Indus., Inc. v. Crabtree*, this Court was faced with an appeal from a motion denying arbitration and held that: "The FAA also provides that an order denying a motion to compel arbitration under such a contract is subject to *immediate* appellate review." *Triarch Indus., Inc. v. Crabtree*, 158 S.W.3d 772, 774 (Mo. 2005) (emphasis added), *See, also Sennet v. National Healthcare Corp.*, 272 S.W.3d 237, 240 (Mo. App. S.D. 2008) ("Both the Federal Arbitration Act ("FAA"), 9 U.S.C. section 16(a)(1)(B), and section 435.440.1 authorize *immediate appeal* and *de novo* review of a denial of a motion to compel arbitration") (emphasis added); *Dunn v. Security Financial Advisors. Inc.*, 151 S.W.3d 140, 143 (Mo. App. W.D. 2004) ("We have appellate jurisdiction because the trial court's denial of the motion to compel arbitration is subject to *immediate appeal* under Section 435.440") (emphasis added).

Section 435.440 takes precedence over both section 512.020 and Rule 74.01. The special right that it grants to appeal an interlocutory order cannot be usurped by their requirement that only a judgment can be appealed. The order in this case was immediately appealable upon entry.

### C. The Court In *Motormax* Wrongly Interpreted This Court's Ruling In *Spiece*

While both the Southern District Court of Appeals and now the Western District Court of Appeals have followed the logic of the holdings discussed above and held that appeals of interlocutory orders denying motions to compel arbitration are final and appealable immediately upon entry, the Eastern District recently disagreed. *Motormax Fin. Servs. Corp. v. Knight*, 474 S.W.3d 164 (Mo. App. E.D. 2015). The court in *Motormax* recognized, as do the other districts of the Court of Appeals, that the time within which to file an appeal hinges on whether the requirements of Rule 74.01 apply to orders denying motions to compel arbitration. If 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. If the Rule does not apply, then they are immediately appealable. Unlike the other districts, however, the Eastern District interpreted this Court's holding in *Spiece v. Garland*, 197 S.W.3d 594 (Mo. 2006) to be controlling on this question. This was error.

In *Spiece*, this Court held that an order appealed under section 512.020 must be denominated a "judgment" pursuant to Rule 74.01 before an appeal can lie. Unlike § 435.440, however, § 512.020 only allows a party to appeal if it is "aggrieved by a judgment." Rule 74.01 and § 512.020 are in harmony therefore because both hold that a party can only appeal a judgment. Section 435.440 does not share this harmony because it specifically grants the substantive right to appeal an order. As a result, this Court's holding in *Spiece* cannot be extended to apply to orders denying a motion for arbitration

for two reasons. First, Rule 74.01 cannot take substantive rights away from a party. A party appealing under § 435.440 enjoys the right to appeal an order without first being aggrieved by a judgment. As such, Rule 74.01 cannot first force that party to become aggrieved by a judgment before it can enjoy this right. A party cannot be compelled to choose between converting an interlocutory order denying arbitration into a "judgment," with all that comes from that designation under the Missouri Supreme Court Rules and forgoing their right to immediate appeal.

Second, the purpose of Rule 74.01 is not satisfied if applied to § 435.440. In *Nicholson v. Surrey Vacation Resorts, Inc.*, the Southern District explained why it was error to extend this Court's holding in *Spiece* to appeals taken under section 435.440:

> We note that the eastern district of our court has declined to follow *Jackson Cnty*. and has stated that Rule 74.01 applies to section 435.440 such that failure to denominate an order as a judgment can be an obstacle to review. *Robinson v. Advance Loans II, L.L.C.*, 290 S.W.3d 751, 755 (Mo.App.2009). The Eastern District declined to follow *Jackson Cnty*. because it preceded *Spiece v. Garland*, 197 S.W.3d 594 (Mo. banc 2006). *Robinson*, 290 S.W.3d at 755 n.4. In *Spiece*, the Supreme Court of Missouri held that Rule 74.01 applies to appealable orders listed in section 512.020 because section 512.020 does not address the procedural requirements for the appeal and Rule 74.01 is applicable to any order from which an appeal lies. 197 S.W.3d at 595–96.
>
> The purpose of requiring a judgment to be denominated as a judgment is to create a bright-line test to eliminate the confusion as to when a writing is

a judgment for purposes of appeal, *Hamby v. City of Liberty*, 970 S.W.2d 382, 383 (Mo.App.1998), and to "assist the litigants and the appellate courts by clearly distinguishing between when orders and rulings of the trial court are intended to be final and appealable and when the trial court seeks to retain jurisdiction over the issue[,]" *City of St. Louis v. Hughes*, 950 S.W.2d 850, 853 (Mo. banc 1997). The purpose of Rule 74.01 is fulfilled when applied to section 512.020 because section 512.020 applies to orders constituting a final judgment and section 435.440 does not. *Madden v. Ellspermann*, 813 S.W.2d 51, 53 (Mo.App.1991). Section 435.400 has redefined the parameters of appealability in the context of an interlocutory appeal as opposed to an appeal of a final judgment such that *Spiece* is dissimilar and does not affect this district's view of *Jackson Cnty.*

*Nicholson v. Surrey Vacation Rentals, Inc.*, 463 S.W.3d 358, 366 n.6 (Mo. App. S.D. 2015). The Southern District's reasoning is sound and should be approved by this Court in this case. The appeal is untimely.

**D. The Missouri Supreme Court Rules Cannot Take Away A Substantive Right**

CenturyLink argues that when there is a conflict between the Rules of Civil Procedure and a statute enacted by the legislature, the Rules of Civil Procedure take precedence. In support, CenturyLink provides a quote from *State ex rel. Collector of Winchester v. Jamison*, 357 S.W.3d 589 (Mo. 2012) wherein this Court held that the Rules of Civil Procedure "promulgated pursuant to article V, section 5 of the constitution,

'supersede all statutes and existing court rules inconsistent therewith.'" *Jamison*, 357 S.W.3d at 592. Using this quote in this manner is misleading. The Rules of this Court only supersede statutes to the extent that they apply to practice, procedure, and pleading. Article V, section 5 of the Missouri Constitution prohibits the Supreme Court from changing substantive rights via its power to enact rules of procedure, including the right to an appeal: "The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, ***or the right of appeal***." (emphasis added). As explained above, a party has a right under § 435.440 to enjoy an appeal from an order denying arbitration without first changing that order to a final judgment. Contrary to CenturyLink's assertions, this is not a matter of mere procedure. There are significant substantive rights to both parties that attach to an order once it has been converted into a final judgment. For instance, while orders are always interlocutory in nature, the trial court loses jurisdiction over a judgment after thirty days. Rule 75.01.

CenturyLink ignores the substantive differences between an order and a judgment. Instead, it argues that because § 435.440.2 provides that "the appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action," Rule 74.01 must apply to convert the order into a judgment before an appeal can be taken. This ignores the plain-language of the statute. Section 435.440.1 grants the right to appeal from several types of rulings that involve arbitration. Specifically, it identifies five orders than can be appealed from as well as any judgment "entered pursuant to the provisions of sections 435.350 to 435.470." When read in context with § 435.440.1, §

435.440.2's provision that these appeals are to be taken "in the manner and to the same extent as from orders or judgments in a civil action" means that judgments should be appealed as judgments and orders should be appealed as order. If not, the section would have only provided that any appeal be taken in the manner and extent as a judgment. Rule 74.01 and Rule 85.01 therefore provide no guidance to the manner in which an appeal from an order is to be taken under this section because those rules specifically limit themselves to appeals from judgments.

### E. The Western District's Holding Correctly Requires That The Order Appealed From Be Taken In The Same Manner And Extent As Other Orders In A Civil Action

Section 435.440 is not the only statute that grants special permission to appeal an interlocutory order. For instance, § 472.160 grants special permission for a party to appeal certain interlocutory orders issued by a probate court. Like § 435.440, § 472.160 does not require a final judgment. The court of appeals has consistently held that appeals pursued under § 472.160 are final and appealable when entered. Because the appeal in this case is required to be taken in the same manner as appeals from other orders in civil cases, the result must be the same.

In *Wahlgren v. Wahlgren*, the court recognized that section 472.160, like section 435.440, "creates an expedited right to permissively appeal from certain interlocutory orders." *Wahlgren v. Wahlgren*, 446 S.W.3d 695, 698 (Mo. App. W.D. 2014), citing *In re Estate of Ginn*, 323 S.W.3d 860, 862 (Mo. App. W.D.2010). In *Estate of Ginn*, the court held that: "[I]f an order falls within the enumerated exceptions set forth in section

472.160.1, ... ***it is deemed final for purposes of appeal***, and any interested and aggrieved person has the right to appeal." *Ginn*, 323 S.W.3d 862-3 (emphasis added). *See, also In the Estate of Straszynzki*, 265 S.W.3d 394 (Mo. App. S.D. 2008) and *Standley v. Standley (In the Estate of Standley)*, 204 S.W.3d 745, 748 (Mo.App.2006) .

Both *Standley* and *Straszynzki* hold that orders appealable pursuant to section 472.160 are final for the purposes of appeal when entered: "An interlocutory order that is permissively appealable pursuant to § 472.160.1 is final upon entry." *In re Straszynzki*, 265 S.W.3d at 396. "It follows that because an appeal from one of the orders listed in [section] 472.160 is permitted while the estate is still open, such orders are immediately appealable upon entry. The orders listed in section 472.160 are ready for appeal when made." *Standley*, 204 S.W.3d 748-9. Both § 472.160 and § 435.440 create an expedited right to appeal certain interlocutory orders. These orders are final when entered and an appeal must be taken within ten days.

In this case, the court below rightfully cited to *Standley* as an example of an order being immediately appealable upon entry. CenturyLink takes issue with this and insists that *Standley* cannot support the court of appeals' decision in this case because "the provisions of Rules 74 are not applicable to probate proceedings." Appellant's Brief, at 21 (quoting *State ex rel. Baldwin v. Dandurand*, 785 S.W.2d 547, 549 (Mo. banc 1990)). At issue in *Dandurand*, however, was what options were available to a litigant in probate proceedings pending before the circuit court. While it is true that some of the Rules of Civil Procedure do not apply to probate cases while they are in the circuit courts, the Rules absolutely apply to all "civil actions pending in this Court and court of appeals,"

regardless of if they are governed by the probate code or not. Rule 41.01. As such, this Court cannot find CenturyLink's appeal timely without first overruling this long line of probate cases holding that orders are appealable upon entry.

**F. Conclusion**

CenturyLink has been granted special permission to appeal an order by section 435.440.1. To the extent Rule 74.01 purports to deny CenturyLink the right to appeal an order and not a judgment, it conflicts with section 435.440 and section 435.440 must take precedence. Because Rule 85.01 provides that only judgments and not orders must wait thirty days before they become final, it does not apply in this case to extend CenturyLink's time to appeal. Rule 84.01 expressly applies to both judgments and orders and provides that if an appeal is permitted by law "a party may appeal from a ***judgment or order*** . . . not later than 10 days after the ***judgment or order*** appealed from becomes final." (emphasis added). The order CenturyLink seeks to appeal from was final when entered. CenturyLink had ten days from July 10, 2014 to file its notice of appeal. CenturyLink waited until August 18, 2014 to file its notice of appeal and it is untimely. Jurisdiction does not exist.

## STATEMENT OF FACTS

### A. Mr. Sanford Objects To CenturyLink's Statement of Facts

Rule 84.04(c) requires that the statement of facts be a "fair and concise statement of the facts relevant to the questions presented for determination without argument." Rule 84.04(c). Compliance with Rule 84.04 is mandatory, and failure to do so is grounds for dismissal of an appeal. *Studt v. Fastenal Co.*, 326 S.W.3d 507, 507-08 (Mo. App. E.D. 2010). A party on appeal "may not simply recount his or her version of the events, but is required to provide a statement of the evidence." *In re Marriage of Smith*, 283 S.W.3d 271, 273 (Mo.App. E.D. 2009). This requirement ensures judicial impartiality, judicial economy, fairness to all parties, and protects the appellate court from becoming "an advocate for the appellant by speculating on facts and on arguments that have not been made." *BBCB, LLC v. City of Independence*, 201 S.W.3d 520, 530 (Mo. App. W.D. 2006); *Studt* at 508.

In violation of Rule 84.04, CenturyLink has used the statement of facts as an opportunity to masquerade legal arguments previously rejected by the trial court as truth. As an example, CenturyLink declares as a fact that "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")." Appellant's Brief, at 3. The trial court, however, never found that these terms and conditions applied to Mr. Sanford's use of the internet services. In support of this legal conclusion, CenturyLink cites to the bills it mailed to Mr. Sanford and claims that these bills include a section entitled "Important Notices and Information" which "provides a link to the Internet Services

Agreement" and that in the "first paragraph on the first page" of this link are block letters notifying Mr. Sanford that he accepts these terms and conditions by using the service. Appellant's Brief, at 4. Again, not true. As explained below, the bills do not state that the services being provided are governed by terms and conditions and the link provided does not take Sanford directly to these terms and conditions, as CenturyLink would have this Court believe. (A-012 – A-047).

CenturyLink should stick to a fair and concise statement of the evidence as opposed to the legal conclusion it wishes this Court to draw from the evidence. By including these argumentative and misleading statements as facts, CenturyLink is hoping to convert this Court into its advocate. Mr. Sanford objects to the statement of facts, and asks for such relief as this Court deems appropriate.

### B. Facts Relating To Whether Or Not CenturyLink Provided Notice to Mr. Sanford Of The Terms And Conditions

CenturyLink never sent a single bill or any other mailing to Mr. Sanford that contained the terms and conditions at issue. (A-014, A-020, A-025, A-032, A-037, A-043-044). CenturyLink never sent a single bill or any other mailing to Mr. Sanford containing language that clearly stated that his use of the services were subject to CenturyLink's terms and conditions. *Id.* CenturyLink never sent a single bill or any other mailing to Mr. Sanford that included a link which took him directly to the terms and conditions. *Id.*

Instead, on Mr. Sanford's February and March bills, under a section labeled "LATE FEE REMINDER," the following language appears:

> Late fees may be charged each month for any eligible unpaid balances not paid in full by the due date listed on your bill. The methods for calculating late fee amounts vary by state and product. 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.

(A-014, A-020).

This link does not lead directly to the terms and conditions. It simply links to a page from CenturyLink's website that does not contain or display these terms and conditions. (A-048 – A-050). In order to find the terms and conditions from this page, a customer must navigate successfully through two more pages on the CenturyLink website. *Id.* First, a customer must somehow know to click on a link labeled "Personal/Residential." *Id.* Clicking on this link does not take the customer to a page displaying the terms and conditions. *Id.* Instead, this link brings the customer to a page containing another variety of links to choose from. *Id.* The customer must then somehow know that she should click on the words "High-Speed Internet and Internet Access Services Residential Terms and Conditions" in order to finally be taken to the terms and conditions. *Id.*

Likewise, on Mr. Sanford's April, May, June and July bills, under a section labeled "LATE FEE REMINDER," the following language appears:

> Late fees may be charged each month for any eligible unpaid balances not paid in full by the due date listed on your bill. The methods for

> calculating late fee amounts vary by state and product. 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.

(A-025, A-032, A-037, A-043-044). Again, this link does not lead directly to the terms and conditions but instead links to a page from CenturyLink's website entitled "Tariffs Library." (A-048 – A-050). This page does not display the terms and conditions. *Id.* In order to find the terms and conditions, the customer must navigate successfully through three more pages of the CenturyLink website. *Id.* First, a customer must somehow know to click on a link labeled "Terms & Conditions." *Id.* Clicking on this link does not display the terms and conditions but instead takes the customer to a separate page of CenturyLink's website. *Id.* The customer must then click on a link labeled "Personal/Residential" which, again, does not display the terms and conditions. *Id.* Instead, it brings up yet another page within the CenturyLink website that contains a variety of links. *Id.* Out of these links, the customer must now locate and click on the one labeled "High-Speed Internet and Internet Access Services Residential Terms and Conditions" before he is finally taken to the terms and conditions. *Id.*

### C. Facts Relating To The Relevant Language Of The Terms and Conditions

The top of the first page of the terms and conditions provides: "PLEASE READ THIS AGREEMENT IN FULL BEFORE USING THE SERVICES. ACCEPTANCE

OF THIS AGREEMENT OCCURS WHEN YOU: . . . (2) USE THE SERVICES . . . BY ACCEPTING THIS AGREEMENT, YOU ACKNOWLEDGE THAT YOU HAVE READ, UNDERSTOOD, AND AGREE TO ABIDE BY THE TERMS AND CONDIITONS SET FORTH IN THIS AGREEMENT. IF YOU DO NOT AGREE TO THIS AGREEMENT, DO NOT USE THE SERVICES." (A-051).

The terms and conditions do not contain any language that allows a customer to negotiate any term or condition and instead states, prior to Section 1, that "IF YOU DO NOT AGREE TO THIS AGREEMENT, DO NOT USE THE SERVICES AND CONTACT US IMMEDIATELY TO TERMINATE IT." (A-051). One sentence later, the terms and conditions state: "If you have agreed to keep the services for a one or two-year term period and you terminate the Services before the end of that term period, you will be responsible for all charges related to the Services, including an early termination fee described further in Section 9 of this Agreement." *Id.*

Section 9, Paragraph A(3) is entitled "Termination and/or Suspension by Company" and provides: "Company reserves the right to change, limit, terminate, modify or temporarily or permanently cease providing the Service or any part of it with or without prior notice if we elect to change the Service or a part thereof or if you violate the terms of this Agreement. If Company terminates your service under this Section 9(A)(3), you must immediately stop using the Service and you will be responsible for the applicable fees and/or Equipment charges set forth in Sections 8, 9(A)(1), and/or 9(A)(2). If your service is reconnected, a reconnection fee may apply." (A-059).

Section 9, Paragraph (A)(2) provides that: "IF YOUR BROADBAND SERVICE

OR PURE BROADBAND SERVICE IS TERMINATED BY YOU OR BY US BEFORE COMPLETING YOUR TERM PLAN, THEN YOU AGREE TO PAY COMPANY THE FOLLOWING EARLY TERMINATION FEE: for all Broadband Services under a Term, an amount equal to the monthly recurring Service charge multiplied by the number of months remaining in the then-current Term, up to a maximum of $200.00." (A-059).

Section 2 of the terms and conditions provide that: "From time to time, Company will make revisions to this Agreement and the policies relating to the Services." (A-051 – A-052). This section allows CenturyLink to provide notice of material changes in a variety of ways, including "posting to the Company Website, or any other reasonable method of notice at our sole discretion." *Id*.

Section 4, paragraph B of the terms and conditions states that CenturyLink "in our sole discretion, may place restrictions on use of your Services, and immediately disrupt, suspend, or terminate your Services without notice for violations, suspected violations, or to prevent violations of this Agreement." (A-052). In contrast, Section 8, Paragraph E of the terms and conditions states that the customer "shall have no right to withhold, set off, or reduce any invoiced amount - whether disputed or undisputed." (A-058).

Section 1, Paragraph G of the terms and conditions explicitly limits its scope to cover internet services only and states that "The Services do not include voice telephony services." (A-051).

Section 8, Paragraph C of the terms and conditions is entitled "Payment" and includes language stating that: "If we don't receive your payment before the next billing

cycle, you agree to pay any costs and expenses associated with our collection efforts, including attorneys' fees." (A-057). Section 8, Paragraph F of the terms and conditions is entitled "Late Fees" and includes language stating that: "If Company uses a collection agency or initiates any legal action to recover amounts due, you agree to reimburse us for all expenses we incur to recover such monies, including attorneys' fees." (A-057).

Section 15, Paragraph B of the terms and conditions relates to arbitration and contains no language allowing the customer to collect attorneys' fees or receive a multiplier if he is awarded more than CenturyLink's last offer through arbitration. (A-063). This section requires the customer to pay her own costs of arbitration. *Id.*

Section 16, Paragraph C of the terms and conditions provides that: "any cause of action or claim you may have with respect to the Services must be commenced within one (1) year after the claim or cause of action arises or such claim or cause of action is barred." (A-064).

# ARGUMENT

## I. INTRODUCTION

This Court does not have jurisdiction to hear this appeal because CenturyLink filed an untimely notice of appeal. CenturyLink is not pursuing this appeal under section 512.020 which grants the right to an appeal only to a party "aggrieved by a judgment." Instead, CenturyLink pursues this appeal pursuant to section 435.440 which is a special statute granting the right to appeal certain interlocutory orders. Orders appealed by permission of this statute are not "judgments" and do not need to comply with the requirements of Rule 74.01(a). Likewise, Rule 85.01(a) which provides that judgments do not become final until 30 days after entry does not apply to these orders. Interlocutory orders that can be appealed by special statutory permission are final and appealable when entered. The trial court's order denying arbitration was entered on July 10, 2014. CenturyLink had ten days to appeal. CenturyLink's notice of appeal was filed on August 18, 2014 and is untimely. This appeal must be dismissed for lack of jurisdiction.

Assuming this appeal is timely, which it is not, Mr. Sanford is entitled to prevail on the merits. CenturyLink claims that the terms and conditions at issue contain an arbitration clause applicable to Mr. Sanford's claims and represent a valid contract that Mr. Sanford accepted by using CenturyLink's internet services. CenturyLink is wrong for four reasons. First, CenturyLink gave no consideration. CenturyLink reserved the right to modify, limit, or change the services it provided without notice. CenturyLink also reserved the right to change all other material terms of the contract with wholly

inadequate notice. As a result, all of the obligations undertaken by CenturyLink are illusory and cannot amount to valid consideration.

Next, the claims in this case are outside the scope of the arbitration clause. This case involves CenturyLink's admitted practice of agreeing to provide customers such as Mr. Sanford "Pure Broadband" service and instead providing them with a bundled package that includes a phone line with an unlisted number and the inability to make outgoing calls. CenturyLink then charges these customers fees and surcharges that it cannot charge to customers receiving only internet services under the guise that it is also providing a telephone line. The scope of the terms and conditions, however, specifically limit themselves to internet services and state: "The Services do not include voice telephony services." The claims in this case relate to improper charges for telephone services and are outside the scope of the purported arbitration agreement.

The trial court also did not err in refusing to force Mr. Sanford into arbitration because he did not agree to the terms and conditions. CenturyLink made it impossible for Mr. Sanford to accept the terms and conditions by failing to provide him with any notice of their existence. CenturyLink never provided him with a copy of the terms and conditions, nor did CenturyLink provide him with any notice that the services he received were subject to terms and conditions. The only evidence concerning Mr. Sanford's alleged notice is the small print on his monthly bills which discuss how late fees are calculated and provides a link he can go to for more information. This link does not take him to the terms and conditions but instead takes him to a page on CenturyLink's website where he must successfully navigate through two or three additional pages before he can

find the terms and conditions, and in them notice that they govern the services being provided. Without notice of the terms of a proposed contract, there can be no offer and no acceptance.

Finally, the trial court did not err in declining to compel arbitration because the terms and condition are unconscionable and therefore cannot form the basis of a contract between the parties. CenturyLink used its position of superior bargaining power to unconscionably force the non-negotiable and one-sided terms and conditions onto Mr. Sanford. CenturyLink can change the terms and services at will and unilaterally terminate service and charge a fee of up to $200.00 if it merely suspects Mr. Sanford of violating a term of service. In contrast, Mr. Sanford is required to promptly pay any amount CenturyLink invoices him even if he disputes the bill. CenturyLink is also entitled to initiate legal action to collect any past-due charges and requires Mr. Sanford to reimburse CenturyLink for its expenses and attorneys' fees in doing so. Mr. Sanford, however, is bound to arbitration and must pay his own way, even if he receives more that CenturyLink's last offer. CenturyLink has also, in defiance of Missouri law, unilaterally placed a one year statute of limitations within which Mr. Sanford can pursue his claims. CenturyLink also admits in its brief filed with this Court that it drafted the arbitration provision to be so broad as to bar any present or former customer of CenturyLink from forever accessing the courts to redress any harm caused by CenturyLink at any point in the future even in cases where the harm and conduct are wholly unrelated to the services provided by CenturyLink. Finally, CenturyLink has forced Mr. Sanford to accept the terms and conditions before he can even review them by making them accessible only on

its website and at the same time mandating acceptance upon his first use of the internet services. He cannot view the terms and conditions without first accepting them. Taken together, the language of the terms and conditions along with the method of acceptance render them, including the arbitration provision, unconscionable. The trial court was right to deny CenturyLink's Motion to Compel Arbitration.

## II. APPELLANT'S APPEAL IS NOT TIMELY – RESPONSE TO FIRST POINT RELIED ON

### A. Standard of Review

"The timely filing of a notice of appeal is a jurisdictional requirement. Thus, if a notice of appeal is untimely, an appellate court lacks jurisdiction and must dismiss. Whether this court has jurisdiction is a question of law that we review *de novo.*" *Lenz v. Lenz*, 412 S.W.3d 487 at 489 (Mo. App. S.D. 2013), quoting *Thorp v. Thorp*, 390 S.W.3d 871, 875 (Mo.App.E.D.2013) and *Dunkle v. Dunkle*, 158 S.W.3d 823, 827 (Mo. App. E.D. 2005).

### B. Argument

As fully briefed above, CenturyLink is pursuing an appeal of an interlocutory order, not a judgment. Such appeals are only allowable by special statute, separate and independent of section 512.020's requirement that a party must first be aggrieved by a judgment before it has the right to appeal. These special statutes grant permission to appeal from interlocutory orders and do not require these orders to also be a "judgment" under Rule 74.01(a). In fact, these orders are not judgments. Rule 85.01(a)'s provision

that judgments are not final until thirty days after they are entered does not apply. The order was final when entered. CenturyLink's appeal is untimely.

CenturyLink's reliance on the holding in *Tudor* is misplaced. *Tudor v. Behrend-Uhls*, 844 S.W.2d 26 (Mo. App. W.D. 1992). In *Tudor*, the defendant asserted that the trial court did not retain jurisdiction over a judgment entered pursuant to Rule 74.01(b) for thirty days and instead such judgments became immediately final when entered. The court disagreed: "[T]here 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, '[t]he trial court retains control over judgments during the thirty-day period after entry of judgment . . .'" *Tudor*, 844 S.W.2d at 27. Because Rule 75.01 applies to both judgments entered pursuant to 74.01(b) and those entered pursuant to 74.01(a): "a judgment entered under Rule 74.01(b) is a judgment over which the court retains control for thirty days and becomes final at the end of that time." *Tudor* 844 S.W.2d at 27-8. In contrast to *Tudor*, this case does not involve a judgment under either 74.01(a) or 74.01(b). It involves an interlocutory order, only appealable by permission from a special statute which "takes precedence over the requirements in Rule 74.01." *McClain Enterprises*, at 632-3.

CenturyLink also wrongly insists that a ten-day period in which to take an appeal from an order denying a motion to compel arbitration is against public policy because it "restricts the traditional right the Rules grant to trial courts to control and modify their rulings." Appellant's Brief, at 21. An interlocutory order, however, is generally not appealable because it is not a final judgment and instead a trial court is always "free to

open, amend, reverse or vacate an interlocutory order," up until a final judgment is entered. *D'Agostino v. D'Agostino*, 54 S.W.3d 191, 198 (Mo. App. W.D. 2001). CenturyLink's argument ignores the fact that the statutes like the one at issue grant special permission to appeal a decision that is not final, and therefore in some ways is still "uncertain." The legislature has nonetheless determined that a handful of these interlocutory orders warrant the right to an expedited appeal. As the Western District explained below, this is particularly true when the trial court has denied a motion to compel arbitration. The right to an immediate appeal in this case "will advance the interests promoted by arbitration, which include allowing 'for efficient, streamlined procedures' and the speedy resolution of disputes." Opinion Filed October 28, 2015 at 8, *quoting AT&T Mobility LLC v. Conception*¸131 S. Ct. 1740, 1749 (2011).

This Court should not depart from the Southern District's holding in *Hershewe v. Alexander*, 264 S.W.3d 717 (Mo. App. 2008), and the Western District's holdings in this case as well as *McClain Enterprises*, *Standley*, and *Straszynzki* and create jurisdiction where it does not exist. Such a departure would step beyond the bounds of Article V, Section 5 of the Missouri Constitution by taking away the substantive rights of parties to appeal certain interlocutory orders. Instead, interlocutory orders appealable by special statute would only be appealable upon converting to a "judgment" for all purposes, including Rule 75.01's requirement that the trial court's jurisdiction over such orders expires after thirty days. The distinction between orders appealable pursuant to § 512.020 and interlocutory orders appealable independent of a judgment by special statute cannot be destroyed absent legislative action. The order appealed from in this case is not

a judgment and was appealable the moment it was entered. CenturyLink's appeal is untimely and must be dismissed for lack of jurisdiction.

## III. THE TRIAL COURT DID NOT ERR IN DENYING CENTURYLINK'S MOTION TO COMPEL ARBITRATION BECAUSE THE DISPUTE FALLS OUTSIDE THE SCOPE OF THE INTERNET SERVICES AGREEMENT'S ARBITRATION CLAUSE – RESPONSE TO POINT II

### A. Standard of Review

Before the parties can be compelled into arbitration, a court must analyze the specific dispute at issue and determine that it is within the scope of the arbitration agreement. *M & I Marshall & Illsley Bank v. Sader & Garvin, L.L.C.*, 318 S.W.3d 772, 776 (Mo. App. W.D. 2010) ("if a valid arbitration agreement exists, we must determine 'whether the specific dispute falls within the scope of the arbitration agreement.'") (quoting *Nitro Distrib., Inc. v. Dunn*, 194 S.W.3d 399, 345 (Mo. banc 2006)). An appellate court reviews *de novo* the issue of whether an agreement to arbitrate exists. *Withworth*, 344 S.W.3d at 736, *Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429, 435 (Mo.App. W.D.2010).

### B. Argument

Mr. Sanford seeks class certification and alleges that CenturyLink is improperly charging and/or providing telephone services to certain customers (LF 6-15). Specifically, Mr. Sanford seeks class action status on behalf of all customers who agreed to purchase "Pure Broadband" service but instead were provided a bundled package that includes a telephone line. *Id.* CenturyLink then charged these customers a Universal

Services Fund Surcharge which cannot be charged to customers receiving internet-only services. *Id.* CenturyLink has already conceded these allegations. It confirmed that it engaged in this practice with Mr. Sanford and other similarly situated customers by admitting in an affidavit filed with the trial court that despite its name, customers who agree to purchase "Pure Broadband" services from CenturyLink instead receive a bundled service including a telephone line. (LF 398). These customers are not given a listed number and are not able to make outgoing calls yet CenturyLink nonetheless charges fees and taxes applicable only to phone services. (LF 398, 405). Mr. Sanford believes that based on these facts CenturyLink is engaging in unfair business practices as prohibited by the Missouri Merchandising Practices Act. (LF 6-15).

Because the charge at issue in this case is one that can only be applied to customers who receive telephone services, these charges fall outside the scope of the terms and conditions. Assuming, arguendo, that the arbitration clause at issue is valid, which it is not, Mr. Sanford's claim is outside the scope of the clause because the terms and conditions at issue specifically hold that "The Services do not include voice telephony services." (A-051).

**i. A Party Cannot Be Compelled To Arbitrate A Claim Beyond The Scope Of The Agreement**

In *Riley v. Lucas Lofts Investors, LLC.*, 412 S.W.3d 285 (Mo. App. E.D. 2013), the court affirmed the trial court's denial of a motion to compel arbitration despite the existence of a valid arbitration agreement. The plaintiff brought claims stemming from his purchase of condominium units from the defendants. Specifically, plaintiff alleged

claims based on fraud, negligence and Missouri Merchandising Practices Act arising out of a leak in the roof. The existence of a valid arbitration agreement was not dispositive. The court was also required to determine "whether the trial court erred in concluding that the dispute does not fall within the scope of the arbitration agreement." *Riley* at 290. The court recognized that although public policy favored the enforcement of arbitration agreement, "policies favoring arbitration are not enough, standing alone, to extend an arbitration agreement beyond its intended scope because arbitration is a matter of contract." *Id*. (citing *Manfredi v. Blue Cross*, 340 S.W.3d at 131).

The arbitration agreement in *Riley* provided that it applied when: "any disputes or disagreements between Seller and Purchaser arise *with respect to the construction of the Unit [sic] sold hereunder and/or this Contract*." *Riley* at 291, (emphasis in original). The court of appeals used traditional methods of contract interpretation to decide whether or not plaintiff's claims regarding the leaky roof represented a dispute "with respect to the construction of the Unit." *Id.* This included relying upon the definition of "unit" as set forth in the contract containing the arbitration agreement: "The upper horizontal boundary of a Unit is 'the undercoated surfaces of the ceiling facing the interior of the Unit.'" *Riley* at 291. Because the leaky roof is beyond the "undercoated surfaces of the ceiling," the court held that plaintiff's claims were outside the scope of the arbitration agreement: "his claims arise out of the condition of the building's roof rather than construction of the Units he purchased." *Id.*

The court also held that the claims at issue did not arise out of the contract. Plaintiff did not bring claims of breach of contract but instead brought claims of fraud,

negligence and Unfair Merchandising Practices. These claims sounded in tort and were therefore outside the scope of the arbitration agreement: "The relationship between the tort claim and the contract is not satisfied simply because the dispute would not have arisen absent the existence of the contract between the parties." *Id.* A valid arbitration agreement existed between the parties. The arbitration agreement related generally to the subject matter at issue. The claims at issue related to the contract. Nonetheless, because the specific claims brought in the lawsuit were outside the scope of the arbitration agreement, plaintiff had the right to litigate them in court rather than pursue them through arbitration.

**ii. The Scope Of The Agreement Is Limited To Disputes Involving The Internet**

Like *Riley*, the claims in this case are beyond the scope of the terms and conditions containing the arbitration clause at issue. The terms and conditions in this case define "services" to be limited to internet services only and explicitly state: "The Services do not include voice telephony services." (A-051). As *Riley* makes clear, because arbitration agreements are a matter of contract there is no "close enough" rule. The leak in the roof may have been only millimeters from the ceiling in the condominium units but the scope of the arbitration agreement ended abruptly at that ceiling. Likewise, the scope of the arbitration clause at issue in this case ends abruptly at internet services. The claims in this lawsuit are outside the scope of any "agreement" to arbitrate by Mr. Sanford. This is true even if this "dispute would not have arisen absent" Mr. Sanford obtaining internet

services from CenturyLink. *Id.* Even if valid, the arbitration clause cannot be used to force Mr. Sanford to arbitrate the claims brought in this lawsuit.

## IV. CENTURYLINK'S ARGUMENT, RAISED FOR THE FIRST TIME IN ITS BRIEF TO THIS COURT, THAT AN ARBITRATOR AND NOT A COURT MUST DECIDE IF AN AGREEMENT TO ARBITRATE WAS EVER FORMED BETWEEN THE PARTIES IS BOTH UNTIMELY AND INCORRECT - RESPONSE TO POINT III

### A. Standard of Review

This Court cannot review this claim of error under any standard of review. CenturyLink has waived this issue by choosing to not raise it in either the trial court or the court of appeals. This Court has consistently held that points of error cannot be raised for the first time upon transfer to this Court. In *Linzenni v. Hoffman*, 937 S.W.2d 723 (Mo. 1997) this Court, relying on Missouri Supreme Court Rule 83.08, refused to consider claims that were not raised in the court of appeals:

> Wilma seeks to raise other claims here. She attacks the trial court's ruling on the motion to reopen for additional evidence, the propriety of the division of property, and the failure to award her attorney's fees. Those issues were not raised in the brief before the court of appeals. On transfer to this Court, an appellant may not "alter the basis of any claim that was raised in the brief filed in the court of appeals." Rule 83.08. Those claims are denied.

*Linzenni v. Hoffman*, 937 S.W.2d 723, 726-27 (Mo. 1997). *See, also Blackstock v. Kohn*, 994 S.W.2d 947, 953 (Mo. 1999) ("The Blackstocks also claim that Instruction

No. 11 failed to set out the elements of negligent misrepresentation. The Blackstocks did not raise this claim before the court of appeals. This Court, therefore, may not review the claim").

It is expected CenturyLink will try to use this Court's recent holding in *Ellis v. JF Enters.*, LLC, --- S.W.3d ---, 2016 WL 143281 (Mo. banc Jan. 12, 2016) to justify its failure to raise this point of error at any point until after this Court granted transfer. CenturyLink's reliance on this case cannot excuse its refusal to raise this argument until now. First, CenturyLink cites to three Supreme Court cases in support of this point, the latest of which was decided in 2012. As this Court stated, the holding in *Ellis* tackles a situation that the Supreme Court of the United States has addressed "time and time again." *Ellis v. JF Enters.*, LLC, --- S.W.3d ---, 2016 WL 143281, at 1 (Mo. banc Jan. 12, 2016). Nothing prevented CenturyLink from raising this argument previously, just as nothing prevented the defendant in *Ellis* form doing so. This point relied on is untimely and cannot be considered by this Court.

Even if this Court could excuse CenturyLink's failure to raise this argument in the trial court or in the Western District, which it cannot, nothing prevented CenturyLink from raising it as soon as the Western District issued its opinion in *Ellis* on May 5, 2015. In fact, after the Eastern District issued its opinion in *Motormax Fin. Servs. Corp. v. Knight*, 447 S.W.3d 164 (Mo. App. E.D. 2015), CenturyLink filed a letter with the court attaching that decision within the week. If *Ellis* was truly the "intervening controlling precedence" that CenturyLink claims it is, CenturyLink should have filed a similar letter with the Western District once that court issued its opinion in *Ellis* that the arbitration

agreement there was severable and valid. CenturyLink's failure to do so can leave no doubt that it has waived its opportunity to assert this argument for the first time in this Court.

While this Court's holding in *Ellis* is off-point and has no impact on this case even if CenturyLink had preserved the argument, CenturyLink's failure to present this argument in the courts below prevents it from raising it for the first time upon transfer to this Court. This claim of error cannot be reviewed under any standard.

**B. Argument**

**i. *Ellis* And The Cases It Relies Upon Are Factually Distinct Because No Contract To Arbitrate Was Ever Formed Between Mr. Sanford And CenturyLink**

This Court's holding in *Ellis v. JF Enterprises* and the cases from the Supreme Court of the United States it relies upon are off-point and inapplicable to the facts of this case. *Ellis v. JF Enters.*, LLC, --- S.W.3d ---, 2016 WL 143281 (Mo. banc Jan. 12, 2016); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006), *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), Nitro–Lift Techs., FL.C. v. Howard, —— U.S. ——, 133 S.Ct. 500, 503, 184 L.Ed.2d 328 (2012). In all of these cases there was no dispute that a contract to arbitrate had been formed between the parties. The question instead was whether or not the arbitration agreement should be enforced due to the nature or alleged breach of a contemporaneous contract between the parties. Here, Mr. Sanford has consistently argued that due to lack of notice, lack of consideration, or unconscionability,

a contract to arbitrate was never formed between himself and CenturyLink. As such, none of these cases can provide guidance.

In *Ellis*, there was no dispute that an arbitration agreement was entered into. There were two separate contracts: the contract for sale of a vehicle which gave rise to the dispute and a separate arbitration agreement that Ellis agreed to in writing. *Ellis v. JF Enterprises*, 2016 WL 143281, at 1 ("That same day, Ellis also signed an arbitration agreement"). When a dispute rose between the parties, Ellis filed suit and argued that because the contract for sale was fraudulent and void under state law, so too was the arbitration agreement. Specifically, Ellis claimed that JF Enterprises failed to provide her with a title to the vehicle in direct violation of the Missouri Merchandising Practices Act. The trial court agreed with Ellis and held that:

> [N]o title to the 2012 Hyundai Sonata was provided to Plaintiff Lashiya D. Ellis at the time of the sale or since, and therefore, pursuant to Section 301.210 RSMo., the contract is fraudulent and void, and ... the arbitration provision which is to be construed with the other contract documents is subject to [Ellis'] contract defenses of fraud and lack of consideration and is void, and therefore, not enforceable.
>
> *Ellis* at 2.

This Court reversed the trial court's decision, holding that: "time and time again, however, 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.* This

Court explained that even if the contract for sale was fraudulent under Missouri law, it was nonetheless bound by Federal law to analyze the arbitration agreement independently of the fraudulent contract: "[S]uch agreements are enforceable unless the arbitration agreement itself – in isolation – is invalid under generally applicable state law principals. So sayeth the Supreme Court on three separate occasions." *Id.* at 2. This Court concluded that the arbitration agreement, viewed in isolation, was valid and enforceable even if the separate underlying contract was not.

Here, it is undisputed that Mr. Sanford never signed an arbitration agreement. He also never received notice and never received consideration. Likewise, the terms and conditions at issue are unconscionable. All of these arguments go directly to the lack of formation of any arbitration agreement. Unlike *Ellis*, Mr. Sanford is not relying on the invalidity of a separate contract to nullify the arbitration agreement. Instead, he is relying on the fact that an agreement to arbitrate never existed between the parties.

The "three separate occasions" referred to b this Court in *Ellis* where the Supreme Court of the United States held that an arbitration agreement must be viewed in isolation are: *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006), *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), and *Nitro–Lift Techs., FL.C. v. Howard*, —— U.S. – ——, 133 S.Ct. 500, 503, 184 L.Ed.2d 328 (2012). None of these cases are on point and none of them require a finding that Mr. Sanford agreed to arbitrate his claim.

*Buckeye Check Cashing, Inc.* involved deferred-payment transactions where the defendant gave plaintiffs cash up-front in exchange for checks it agreed to deposit later.

*Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006). Like *Ellis*, the plaintiffs had signed an agreement which included an arbitration provision. The agreement to arbitrate included disputes involving: "the validity, enforceability, or scope of this Arbitration provision or the entire Agreement." *Buckeye*, at 442. Despite this language, the plaintiffs attempted to pursue claims in court arguing that because defendant's practices violated various consumer protection and criminal laws, the contracts formed in connection with these practices were illegal and void under Florida law, including the arbitration provisions.

The Florida Supreme Court ruled in favor of the plaintiffs holding that arbitration agreements contained in contracts that are criminal in nature cannot be enforced. The Supreme Court of the United States reversed and held that arbitration provisions are severable from the remainder of the contract, even if the contract is later found to be illegal under state law. Because arbitration provisions are severable, if the arbitration provision standing alone is a valid agreement under state law, then a court cannot refuse to enforce it on the grounds that the remaining subjects of the contract may be illegal or unenforceable. The plaintiffs did not claim that the arbitration provisions that they agreed to on their own were illegal or otherwise void and they were bound by their agreement to arbitrate. This was true even though the law of Florida protected consumers from such deferred check-cashing schemes. The preferences of Florida to prohibit these type of transactions could not trump the federal government's preference to permit parties to agree to arbitrate disputes arising out of a "contract," even if that contract itself is disfavored under state law.

Unlike *Buckeye*, Mr. Sanford has not agreed to an arbitration provision that he seeks to avoid on the grounds that the remainder of the contract is illegal or disfavored by state law. He instead never agreed to arbitrate because no part of the terms of the conditions including the arbitration clause were ever formed into a contract between the parties. *Buckeye* does not apply.

In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 US 395 (1967), the parties entered into a written business agreement which included an arbitration clause. The clause provided that the parties would arbitrate "any controversy or claim arising out of or relating to this Agreement, or the breach thereof." *Prima Paint*, at 398. Shortly after the agreement was executed, Flood & Conklin filed for bankruptcy. Prima Paint filed suit seeking rescission of the entire agreement on the grounds that Flood & Conklin "fraudulently represented that it was solvent and able to perform its contractual obligations, where as it was in fact insolvent." *Id.*

The district court, circuit court of appeals, and the Supreme Court of the United States all held that Prima Paint had agreed to arbitrate this issue when it agreed to arbitrate "any controversy or claim arising out of or relating to this Agreement." *Id.* at 398. In its holding, the Supreme Court of the United States recognized that some circuit courts have "taken the view that the question of 'severability' is one of state law, and that where a State regards such a clause as inseparable a claim of fraud in the inducement must be decided by the court." *Id. at* 403 (citing *Lummus Co. v. Commonwealth Oil Ref. Co.*, 280 F.2d 915, 923—924 (C.A.1st Cir.)). The Supreme Court overruled this line of cases and held that the Federal Arbitration Statute supersedes state law on this issue. As

such, because it was not contested that the arbitration clause of the contract was fraudulently induced, the parties were bound to arbitrate the claims as they agreed even if the defendant had misrepresented its financial position.

Again, Mr. Sanford is not claiming that CenturyLink fraudulently induced him to agree to a contract that included an arbitration clause. He claims instead that he never agreed to any contract to arbitrate. *Prima Paint* does not apply.

Finally, in *Nitro-Lift Technologies, L.L.C. v. Howard*, the Supreme Court of the United States once again held that when a party agrees to arbitration, it can be held to that agreement even when the dispute it has agreed to arbitrate arises from a contract disfavored by state law. *Nitro–Lift Techs., FL.C. v. Howard*, —— U.S. ——, 133 S.Ct. 500, 184 L.Ed.2d 328 (2012). In *Nitro-Lift*, the parties signed a confidentiality and noncompetition agreement that included an arbitration clause. In it, they agreed to arbitrate "any dispute, difference or unresolved question." *Id.* at 502. The Supreme Court of Oklahoma held that, despite this arbitration agreement between the parties, the noncompetition agreements were nonetheless "void and unenforceable as against Oklahoma's public policy," and therefore the agreements to arbitrate could not be enforced. *Id.* The Supreme Court of the United States had no difficulty reversing this erroneous declaration of law. Consistent with the above opinions, it held that because there was no dispute that the arbitration clause in the contract itself was valid, the parties had agreed to arbitrate their dispute, and the arbitrator – not the courts – should rightfully decide if non-competition agreements are against Oklahoma public policy.

Again, Mr. Sanford is not seeking to avoid his agreement to arbitrate on the grounds that providing internet services is against public policy. He is seeking to avoid arbitration on the grounds that he never agreed to it. *Nitro-Lift* does not apply.

*Prima Paint*, *Buckeye*, and *Nitro-Lift*, along with this Court's recent holding in *Ellis* all have the same essential facts in common: The parties agreed in writing to arbitrate their claims and it was undisputed that these agreements to arbitrate were validly formed. Thus, it was simply irrelevant whether or not the dispute that the parties agreed to arbitrate arose from a valid contract or not. As such, these cases are not relevant to the analysis in this case because Mr. Sanford never agreed to arbitrate any dispute with CenturyLink. The defendant in *Ellis* did not tuck a link into the "billing information" section of the sales contract and then claim that, unbeknownst to Ellis, she had agreed to arbitrate because this link could be used as a starting point to find terms and conditions containing an arbitration clause. Here, Mr. Sanford was never presented with or even made aware of such an agreement to arbitrate. Even if he had been, which he was not, the terms and conditions still would have never formed a contract because they were unconscionable and CenturyLink did not give any consideration. *Ellis* and the cases it relies upon are easily distinguished and provide no guidance here.

**ii. Mr. Sanford's Claims That A Contract Was Never Formed Do Not Need To Be Aimed Specifically At The Arbitration Provision Of The Terms And Conditions**

The Missouri courts have held that a party does not need to specifically attack the arbitration clause when demonstrating that the entire agreement was never formed. In

*Bellemere v. Cable-Dahmer Chevrolet, Inc.*, 423 S.W.3d 267, 272 (Mo. Ct. App. 2013), the plaintiff brought suit alleging fraud, negligence, and violations of the Missouri Merchandising Practices Act in association with her purchase of an allegedly defective vehicle. The defendant moved to compel arbitration citing a purchasing agreement that the plaintiff had signed containing an arbitration clause. The trial court denied defendant's motion for arbitration on the grounds that the entire purchase agreement was not a contract because it was never agreed to by both sides. Defendant appealed, arguing that because plaintiff's challenge went to the contract as a whole and not specifically the arbitration provision, an arbitrator and not the court, must rule on the issue.

The Western District disagreed and clarified that when the contract as a whole has not been formed, there is no need to attack the arbitration clause specifically because no contract – not one to arbitrate or otherwise – has been reached: "Appellants' point relied on misapprehends the issue before us. The trial court did not find a validly formed contract to be unenforceable. Rather, the trial court found that no written contract was ever formed between Bellemere and Cable–Dahmer." *Bellemere*, at 273. The Western District easily distinguished the case before it from the United States Supreme Court's holdings in *Prima Paint* and *Buckeye* because both of those cases "presuppose that a validly formed contract may be subject to a defense to its enforceability—an issue not presented by the trial court's finding that the absence of Cable–Dahmer's signature on the second purchase agreement negated an essential element of contract formation." *Id.* at 274. Here, likewise, no contract has been formed. Mr. Sanford never received notice and

therefore could not have accepted. Even if he had, the contract is unconscionable and lacked consideration and therefore was never formed as a matter of law.

### iii. Mr. Sanford's Claims Of Unconscionability And Lack Of Consideration Go To The Formation Of The Contract And Not The Enforceability Of A Validly Formed Contract

This Court recently explained that the defense of unconscionability goes to the formation of the contract as opposed to the enforceability of the contract. In *Brewer v. Missouri Title Loans*, this Court recognized that the Supreme Court of the United States' holding in *AT&T v. Conception* permitted a party to avoid arbitration if it demonstrated that an agreement was never formed under state law. *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, FN3 (Mo. 2012) ("*Conception* instead dictates a review that limits the discussion to whether state law defenses such as unconscionability impact the *formation* of a contract.") (citing *AT&T Mobility v. Conception*, 131 S.Ct. 1740 at 1746 (2011) (emphasis by this Court). This Court then clarified that a party will prove that a contract was never formed when that party proves that the contract is unconscionable:

> Accordingly, the analysis in this Court's ruling today—as well as this Court's ruling in *Robinson v. Title Lenders, Inc*.,—no longer focuses on a discussion of procedural unconscionability or substantive unconscionability, but instead is limited to a discussion of facts relating to unconscionability impacting the formation of the contract. Future decisions by Missouri's courts addressing unconscionability likewise shall limit review of the defense of unconscionability to the context of its relevance to contract formation.

*Id*.

As further explained below, the terms and conditions at issue in this case are unconscionable. Pursuant to this Court's holding in *Brewer*, therefore, no agreement – including an agreement to arbitrate – was ever formed. Because an agreement was never formed, any provision in the agreement purporting to be an arbitration clause was also never formed and Mr. Sanford cannot be forced into arbitration having never agreed to do so: "Brewer has established, therefore, that the circumstances under which the agreement was made are unconscionable. The arbitration clause of the agreement is unconscionable and unenforceable." *Id.* at 495-96.

CenturyLink's failure to give valid consideration means that a contract was never formed between the parties. *Bellemere* is directly on point. There, because the defendant did not sign the purchase agreement containing the arbitration clause, the entire agreement – including the arbitration clause – was never formed. Because the entire agreement was never formed, the arbitration clause never came into existence and could not be enforced. As the court explained:

> As such, enforceability under the FAA never comes into play if a contract itself was never formed. To that end, the essential elements of a contract are: "(1) competency of the parties to contract; (2) subject matter; (3) legal consideration; (4) mutuality of agreement; and (5) mutuality of obligation." *Building Erection Servs. Co. v. Plastic Sales & Mfg. Co., Inc.*, 163 S.W.3d 472, 477 (Mo.App.W.D.2005) (citation omitted). *See also Johnson v. Vatterott Educ. Ctrs., Inc.*, 410 S.W.3d 735, 738 (Mo.App.W.D.2013) ("Under ... the

> Federal Arbitration Act, ... whether the parties entered into an enforceable arbitration agreement is a preliminary issue for the court to decide, applying Missouri law."). The trial court expressly found that the second purchase agreement lacked mutuality because it had not been signed by Cable–Dahmer. The trial court thus found that an essential element of contract formation had not been established by Cable–Dahmer. As such, we never reach the issue of the contract's enforceability, either as a whole, or with respect solely to the arbitration provision.

*Id.* at 273.

Because CenturyLink allowed itself to change the provisions of the terms and conditions, its obligations are illusory. As such, a contract was never formed. Therefore there is no need for Mr. Sanford to specifically attack the arbitration clause because it is clear that the entire contract was never created. CenturyLink claims otherwise and insists that Mr. Sanford must be forced into arbitration because he did not say with sufficient specificity that the arbitration clause lacked consideration: "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 the agreement, fails for lack of consideration. Therefore, the trial court erred in denying CenturyLink's motion to compel on this basis." Appellant's Brief, at 29.

CenturyLink's argument on this point suffers from the same legal misunderstanding that the defendant had in *Bellemere*: it assumes that a valid contract

was formed and then was subsequently found to be unenforceable. Instead, because there was no consideration from CenturyLink, no part of the terms and conditions at any point formed a contract between the parties, much less an arbitration clause or any other provision. In other words, because CenturyLink reserved the right to change the terms of the contract including the terms of the arbitration provision, it did not offer valid consideration to support the formation of any provision of the contract, whether the provision is analyzed with the entire contract or separately. As explained below, this is consistent with the opinions in *Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429 at 442 (Mo. App. W.D. 2010); *Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15 (Mo. App. W.D. 2008); *Manfredi v. Blue Cross and Blue Shield of Kansas City*, 340 S.W.3d 126 (Mo. App. W.D. 2011); and *Clemmons v. Kansas City Chiefs Football Club, Inc.*, 397 S.W.3d 503 (Mo. App. W.D. 2013).

CenturyLink ignores these opinions and clings to language from *Ellis* where this court held that even if the sales contract "fails for lack of consideration," the contemporaneously signed arbitration agreement is still valid. The arbitration agreement in *Ellis*, however, was supported by consideration – both sides promised to be bound by it and therefore there was sufficient mutuality of obligation to form a contract. Here, CenturyLink offered only illusory promises to be bound. It reserved the right to make material changes "from time to time" by providing notice that CenturyLink deemed reasonable "at our sole discretion." Nowhere in the terms and conditions did CenturyLink limit its ability to make material changes to only the non-arbitration provisions. As such, CenturyLink did not offer mutual promises and an essential element

of contract formation cannot be established as to the arbitration clause as well as any other part of the terms and conditions.

### iv. Mr. Sanford Has Consistently Argued That He Never Agreed To Arbitrate These Claims

Finally, contrary to CenturyLink's insistence, Mr. Sanford has consistently argued that the arbitration clause within the purported agreement fails for lack of consideration. In his brief in support of his Motion for Partial Summary Judgment, Mr. Sanford made it clear that he was claiming that the arbitration clause at issue was never formed into a contract. His argument began by declaring:

> Agreements to arbitrate are contractual and subject to contract defenses and principles according to the law of Missouri. *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 492 (Mo. 2012) cert. denied, 133 S. Ct. 191, 184 L. Ed. 2d 38 (U.S. 2012) reh'g denied, 133 S. Ct. 684, 184 L. Ed. 2d 484 (U.S. 2012). In order to prove the existence of a contract in Missouri, a party must show three elements: "Offer, acceptance, and bargained for consideration." *Johnson v. McDonnell Douglas Corp*, 745 S.W.2d 661 at 662 (Mo. banc 1988). Mr. Sanford addressed the first two elements of contract formation in his Opposition to Defendant's Motion to Dismiss or Stay and Compel Arbitration and discovery on those issues is ongoing. However, even assuming arguendo that Mr. Sanford somehow accepted these terms and conditions, the third element of contract formation - consideration - does not exist. In the terms and conditions at issue, Defendant explicitly reserved the

right to unilaterally change the conditions of the agreement. (See Facts 3 & 9). All promises made by CenturyLink are therefore illusory because CenturyLink can change or repeal them at any time. As a result, CenturyLink has not given any real consideration and no contract exists.

LF 347-348.

It is clear that Mr. Sanford argued to the trial court that CenturyLink did not give valid consideration to support the arbitration provision found within the terms and conditions. Unlike CenturyLink, Mr. Sanford is not creating a brand new argument at the eleventh hour. He has consistently claimed that no agreement to arbitrate was ever formed between the parties. CenturyLink, now aware that the arguments it made in the trial court and the court of appeals were not persuasive, has for the first time upon transfer to this Court raised this issue. Even if it were permitted to do so at this late hour, which it is not, the argument has no merit. Unlike *Ellis*, an agreement to arbitrate never occurred in this case. The trial court did not err in determining that Sanford never agreed to arbitrate.

## V. APPELLANT HAS WAIVED THE ARGUMENT THAT THE CONTRACT IS VALID UNDER LOUISIANA LAW, AND IN ANY EVENT, A CHOICE OF LAW PROVISION CANNOT BE USED TO DETERMINE THE VALIDITY OF A CONTRACT – RESPONSE TO POINT IV

### A. Standard of Review

There is no standard of review that applies to issues raised for the first time on appeal. They are simply not to be considered by this Court under any standard. In

*Salvation Army, Kansas v. Bank of America*, appellants asked the court to overturn the trial court's dismissal of the petition. *Salvation Army, Kansas v. Bank of America*, 435 S.W.3d 661 (Mo. Ap. W.D. 2014). For the first time on appeal, appellants argued that the dismissal was ineffective because the consent of all parties was not obtained. *Salvation Army, Kansas* 435 S.W.3d at 669-70. The court refused to consider this argument, citing to several cases that hold that arguments not raised in the trial court are waived and not subject to review by the appellate court:

> "[I]t has long been stated that this Court will not, on review, convict a lower court of error on an issue which was not put before it to decide." *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 36 (Mo. banc 1982) (citing *Sch. Dist. of Kansas City v. Smith*, 342 Mo. 21, 111 S.W.2d 167, 168 (1937); *Alexander v. Haden*, 2 Mo. 211, 212 (1830)). *See also Jackson Exch. Bank & Trust Co. v. Friedrich (In re Heisserer)*, 797 S.W.2d 864, 874 (Mo.App.S.D.1990) ("An appellate court will not, on review, convict a trial court of error on an issue which was not put before it to decide."); *State ex rel. Mo. Highway & Transp. Comm'n v. Muegge*, 842 S.W.2d 192, 196 (Mo.App.E.D.1992). "[I]ssues that are not raised in the trial court are waived." *State v. Fassero*, 256 S.W.3d 109, 117 (Mo. banc 2008) (citing *Walker v. Owen*, 79 Mo. 563, 568 (Mo.1883)). Accordingly, we refuse to consider this contention as a basis for reversing the trial court's judgment.

*Salvation Army, Kansas v. Bank of Am.*, 435 S.W.3d 661, 670 (Mo. App. W.D. 2014).

In this case, CenturyLink raises the argument that Louisiana does not require consideration for the first time on appeal. Nowhere in its opposition to Plaintiff's Motion for Partial Summary Judgment does this argument appear. (LF. 474-494). There is no applicable standard of review because the argument has been waived.

**B. Argument**

**i. CenturyLink Waived This Claim of Error by Not Presenting It to the Trial Court**

CenturyLink filed an extensive brief in opposition to Mr. Sanford's Motion for Partial Summary Judgment on the issue of arbitrability. (LF 474-496). At no point in its brief did CenturyLink argue that Louisiana law applied to the agreement at issue and that the agreement is therefore valid. *Id.* Nor did CenturyLink argue that Louisiana law, unlike Missouri law, allows contracts without consideration. *Id.* In fact, the word "Louisiana" does not appear even once in CenturyLink's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment Limited to the Issues of Consideration and Scope of the Alleged Agreements to Arbitrate. *Id.* By failing to raise this argument in the trial court, CenturyLink has waived it and this Court may not consider it. *Salvation Army, Kansas v. Bank of Am.*, 435 S.W.3d 661, 670 (Mo. App. W.D. 2014). CenturyLink is bound by its strategic decision not to argue this point in the trial court and must now "stand or fall" only on the theories it advanced in the courts below. *State v. Fassero*, 256 S.W.3d 109, 117 (Mo. 2008), (quoting *Walker v. Owen*, 79 Mo. 563, 568 (Mo.1883)).

### ii. CenturyLink's Decision To Not Raise This Argument In The Trial Court Was Intentional Because It Cut Against The Theory Upon Which CenturyLink Sought To Compel Arbitration

In the trial court, CenturyLink argued that two arbitration agreements existed – one contained in the "Internet Services Agreement," and the second contained in what it termed the "Prism Customer Agreement." (LF 21, 474-494). CenturyLink was never able to tell the trial court which arbitration agreement applied to this case and instead simply argued that one or both compelled arbitration in this case. *Id.* Mr. Sanford consistently attacked this position. First, the fact that CenturyLink was unable to determine which alleged agreement applied to compel arbitration only reinforced Mr. Sanford's argument that neither one did. *Whitworth v. McBride & Son Homes, Inc.*, 344 S.W.3d 730 (Mo. App. W.D. 2011) ("We observe at the outset that our ability to discern whether the Defendants have met their burden to establish the existence of a valid contract to arbitrate is hampered by Defendants' failure to identify exactly which 'agreement' of the several involved in this case constitutes the enforceable arbitration contract.") (LF 358). Second, it was impossible for both of these agreements to apply because they contained contradicting terms. (LF 358). One of these contradictory terms is that the "Internet Services Agreement" was governed by Louisiana law while the "Prism Customer Agreement" was governed by Missouri law.[2] *Id.*

[2] On page 31 of its Brief, CenturyLink claims that Mr. Sanford's counsel conceded that Louisiana law governs this issue and quotes only a small portion of counsel's oral

In the trial court, CenturyLink strategically chose to not pursue the argument that the terms and conditions were valid under Louisiana law because it highlighted the fact that it could not determine which of two mutually exclusive "terms and conditions" Mr. Sanford agreed to. Having failed with its argument in the trial court, CenturyLink cannot now drastically change course and assert a completely different argument to this Court. CenturyLink is bound by the arguments and positions it took with the trial court including its failure to identify exactly which agreement was the basis for compelling arbitration and its related failure to argue that Louisiana law does not require consideration. CenturyLink has waived this claim of error and it cannot be considered by this Court.

### iii. A Choice Of Law Provision Cannot Be Considered As Evidence That A Valid Contract Has Been Formed

Even if CenturyLink had raised this argument in the trial court and this Court is able to consider it on the merits, which it is not, this argument has already been rejected in *Citibank (South Dakota), N.A. v. Wilson*, 160 S.W.3d 810 (Mo. App. W.D. 2005). At issue in *Citibank* was whether or not a revised credit card agreement had been formed

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argument. This is misleading. A reading of the quote in its proper context shows that counsel was simply arguing that the two agreements contain contradicting terms. The full quote is as follows: "Furthermore, they can't both exist and be applied to this plaintiff because they're contradictory. The Internet agreement requires the dispute to be resolved by Louisiana Law, whereas, the TV agreement requires that it -- that Missouri law be applied." Tr. 8:16-20.

between Citibank and Wilson. Citibank argued that because the revised agreement contained a South Dakota choice of law provision, the validity of the contract should be established under South Dakota law. The court rejected this argument as a logical fallacy:

> This court would have to use circular logic to reach Citibank's conclusion that the agreement was valid. Here, Citibank argues that the agreement would be valid if South Dakota law applies. For South Dakota law to apply, the choice of law provision in the revised agreement must be given effect. But the choice of law provision is effective only if the revised agreement is valid. In essence, Citibank is asking that this court use a term from an agreement to determine its validity.

*Citibank* at 812-813.

CenturyLink advances the same cart-before-the-horse argument in this case. CenturyLink concedes that Missouri law requires consideration before a contract can be formed, but argues that Louisiana law does not. Because the terms and conditions contain a Louisiana choice of law provision, CenturyLink argues, a valid contract exists even without consideration.

This Court should refuse to engage in this type of circular logic. The choice of law provision relied upon by CenturyLink cannot begin to have any effect unless and until a valid contract was formed. Under Missouri law, a contract is not formed until three essential elements occur: "Offer, acceptance, and bargained for consideration." *Johnson v. McDonnell Douglas Corp*, 745 S.W.2d 661 at 662 (Mo. banc 1988). The

absence of any one of these three essential elements results in the contract never being formed regardless of what the proposed terms of that contract may have been. If this were not the case, than CenturyLink could simply post on its website terms and conditions that include the statement: "these terms and conditions are a binding contract even if the customer does not accept them." Under CenturyLink's logic, this would create a valid contract even in the absence of acceptance by the customer because the contract says it is valid without such acceptance. This is not the law. Even if CenturyLink had not waived this argument, which it did, it has previously been rejected by the courts of Missouri and should be rejected in this case as well. The Louisiana choice of law provision does not create a valid contract where one otherwise does not exist. Point two should be denied.

## VI. THE TRIAL COURT DID NOT ERR IN DENYING CENTURYLINK'S MOTION TO COMPEL ARBITRATION BECAUSE THE TERMS AND CONDITIONS AT ISSUE GIVES CENTURYLINK THE RIGHT TO UNILATRALLY CHANGE MATERIAL TERMS OF THE CONTRACT AS IT SEES FIT WITHOUT PROVIDING SUFFICIENT NOTICE– RESPONSE TO POINT V

### A. Standard of Review

In order to prevail on its motion to compel arbitration, CenturyLink bears the burden of establishing that Mr. Sanford actually agreed to arbitrate these claims: "It is a firmly established principle that parties can be compelled to arbitrate against their will only pursuant to an agreement whereby they have *agreed* to arbitrate claims. *Whitworth*

*v. McBride & Son Homes, Inc.* 344 S.W.3d 730 at 737 (Mo. App. W.D. 2011) (emphasis in original). Agreements to arbitrate are contractual and subject to contract defenses and principles. *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 492 (Mo. 2012) cert. denied, 133 S. Ct. 191, 184 L. Ed. 2d 38 (U.S. 2012) reh'g denied, 133 S. Ct. 684, 184 L. Ed. 2d 484 (U.S. 2012). An appellate court reviews *de novo* the issue of whether an agreement to arbitrate exists. *Withworth*, 344 S.W.3d at 736, *Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429, 435 (Mo.App. W.D.2010).

**B. Argument**

Section 2 of the terms and conditions at issue grant CenturyLink the unilateral right to revise the terms of the agreement. (A-051 – A-052). The only limitation found in Section 2 is that CenturyLink is required to notify Mr. Sanford of any material changes. This requirement of notice, however, is also illusory because CenturyLink permits itself to choose the method of notice "at our sole discretion." *Id.* In addition, Section 9, Paragraph A(3) also reserves the right for CenturyLink to change material terms but this time without notice. In this section, CenturyLink gives itself permission to change, alter, amend or limit: ". . . the Service or any part of it ***with or without prior notice if we elect to change the Service or a part thereof*** . . ." (A-052) (emphasis added). CenturyLink argues that these terms and conditions constitute a contract for Services yet CenturyLink has reserved the right to change or modify the Services without notice if it elects to do so. CenturyLink has not undertaken any meaningful obligation as to the services it has allegedly agreed to provide. The promises made by CenturyLink to support its end of the contract are illusory. CenturyLink can change or repeal them at any

time. As a result, CenturyLink has not given any real consideration and no contract exists.

### i. Consideration Does Not Exist When One Party Reserves the Right to Change the Terms

"A contract that purports to exchange mutual promises will be construed to lack legal consideration if one party retains the unilateral right to modify or alter the contract as to permit the party to unilaterally divest itself of an obligation to perform the promise initially made." *Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429 at 442 (Mo. App. W.D. 2010). Missouri courts have repeatedly refused to recognize arbitration clauses when, as here, the party with greater bargaining power reserves the right to change or alter the terms of the contract as it sees fit. *Id.*, *See also Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15 (Mo. App. W.D. 2008); *Manfredi v. Blue Cross and Blue Shield of Kansas City*, 340 S.W.3d 126 (Mo. App. W.D. 2011); and *Clemmons v. Kansas City Chiefs Football Club, Inc.*, 397 S.W.3d 503 (Mo. App. W.D. 2013).

In *Frye*, the court affirmed the trial court's denial of the defendant's motion to compel arbitration. *Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429 at 442 (Mo. App. W.D. 2010). Relying on language from *Morrow v. Hallmark Cards, Inc*. the court held that a contract in which one side reserves the right to unilaterally change the terms is not a contract:

> A promise is not good consideration unless there is a mutuality of obligation, so that each party has the right to hold the other to a positive agreement. Mutuality of obligation means that an obligation rests upon each

party to do or permit to be done something in consideration of the act or promise of the other; that is, neither party is bound unless both are bound.

*Frye* at 442 (emphasis in original) (citing *Morrow* 273 at 30 (Mo. App. W.D. 2008)). *See also Am. Laminates, Inc. v. J.S. Latta Co.*, 980 S.W.2d 12, 23 (Mo. App. W.D. 1998) ("Retaining the right to cancel a contract or to avoid one's promise is an unenforceable, illusory promise").

The defendant in *Frye* attempted to distinguish its contract from the illusory one at issue in *Morrow* by arguing that, unlike *Morrow*, the contract at issue placed two restrictions on the defendant's right to amend the contract: "[First,] any amendment to the Program can only be prospective in its application, and [second], Speedway's employees must be advised about an amendment in writing." *Frye* at 443. The court held that these limitations were not enough to render the promises more than illusory under Missouri law: "Speedway cites no authority for the proposition that the limits it has imposed on its power to amend the Program are sufficient to prevent its promise to be bound by the Program's terms from being rendered illusory." *Id.* at 443. The court ultimately concluded that because Speedway reserved the right to change the terms of the contract, no consideration existed and a valid contract was not formed: "The Program is not supported by legal consideration and is not an enforceable contract to arbitrate." *Id.* at 444.

Both *Morrow* and *Frye* involved the validity of arbitration clauses in the context of an employer-employee dispute but the principals set forth in those opinions are not limited to employment situations. In *Manfredi v. Blue Cross and Blue Shield of Kansas*

*City*, the court upheld the trial court's denial of a motion to compel arbitration in a situation independent of an employment dispute. *Manfredi v. Blue Cross and Blue Shield of Kansas City*, 340 S.W.3d 126 at 134 (Mo. App. W.D. 2011) ("the arbitration mandated by the agreement is purely illusory with regard to disputes involving discretion or medical judgment").

The plaintiff in *Manfredi* was a chiropractor who brought suit against Blue Cross Blue Shield of Kansas City (Blue Cross) on the grounds that Blue Cross improperly eliminated coverage for a certain treatment. Blue Cross filed a motion to compel arbitration arguing that the contract between the two contained an arbitration clause. On appeal from the trial court's denial of Blue Cross' motion, the court focused on language in the contract that allowed Blue Cross to amend the agreement upon ninety (90) days' notice. The court held: "These provisions grant BCBS unfettered discretion to unilaterally create, control, and alter the arbitration." *Manfredi* 340 S.W.2d at 134. Consistent with the holdings in *Morrow* and *Frye*, the court held that the provisions at issue "allow the other party to unilaterally revise the arbitration rules, render the arbitrator powerless to resolve a large class of claims, or fail to provide an adequate remedy for the dispute." *Manfredi* at 135. As such, the agreement was invalid.

**ii. By Offering Only Illusory Promises, CenturyLink Has Not Given Valid Consideration**

These recent holdings are dispositive in this case. CenturyLink has reserved the ability to modify any part of the agreement, including any obligations it may have under the arbitration clause, as it sees fit so long as it gives notice in whatever manner it

chooses to do so at its sole discretion. Furthermore, CenturyLink's sole obligation under the contract is to provide Services, yet CenturyLink has explicitly reserved the right to change, alter or modify the Services with or without notice if it elects to do so. These are one-sided and illusory promises. CenturyLink has not given anything in consideration because it has repeatedly reserved for itself the right to change, modify, amend, limit or terminate its obligations at will. Like the *Frye* and *Morrow* plaintiffs, Mr. Sanford does not have the ability to "hold the other to a positive agreement." Like *Am. Laminates, Inc.*, CenturyLink has retained the right to avoid its promises and thus given only unenforceable, illusory promises. CenturyLink has not committed to any real obligation. Because CenturyLink is not bound, neither party is bound. A contract was not formed and Mr. Sanford did not agree to arbitrate his claims.

As a matter of law, the terms and conditions relied upon by CenturyLink cannot form a contract even if agreed to by the parties. Not a single one of the proposed class members, therefore, has agreed to arbitrate their claims. The terms and conditions lack consideration and are not binding on Mr. Sanford or on any other member of the proposed class.

**iii. CenturyLink's Promise to Give Reasonable Notice Is Also Illusory**

CenturyLink argues that because Section 2 of the terms and conditions mandates that CenturyLink give "reasonable notice" of any material changes, the promises are not illusory and proper consideration exists. As explained above and as held by the court in *Frye*, there are no Missouri cases supporting this argument. Assuming there were,

however, they would be irrelevant to this case because CenturyLink's promise to provide reasonable notice is also unenforceable, illusionary, and meaningless. In the terms and conditions at issue, CenturyLink has reserved itself the right to make material changes so long as it provides notice to its customers through any method it chooses, including simply posting the changes on its website without any notice, or "any other reasonable method of notice ***at our sole discretion***." (A-051 – A-052) (emphasis added). Thus, CenturyLink reserves the right to make material changes while refusing to provide its customers with notice of changes via bills, email, or any other communication. Instead, CenturyLink has declared itself free to hide these changes by posting them on its website without any notice to customers that it has materially changed the terms and conditions. This is not notice in any meaningful sense of the word; it is merely the illusion of notice.

**iv. CenturyLink Has Demonstrated That When Left To Its Own Discretion, It Will Not Provide Reasonable Notice**

CenturyLink has already proven that it has no intention of giving any reasonable or meaningful notice to its customers of the existence of or material changes to the terms and conditions it alleges are binding upon its customers. CenturyLink takes the position in this Court that it gave sufficient notice to Mr. Sanford of the terms and conditions and he should therefore be bound by them. A closer examination of the facts of this case reveals that CenturyLink is stretching its definition of "notice" so thinly that it is no longer recognizable. CenturyLink claims to have given "notice" by:

1) Sending Mr. Sanford a bill that contained small print under a section labeled "LATE FEE REMINDER," which stated that the methods for calculating

late fees may vary and provided a link he could visit "for more information." (A-014, A-020, A-025, A-032, A-037, A-043-044).

2) This link does not lead directly to the terms and conditions page, nor does it lead directly to a page that would inform Mr. Sanford that the services being provided are subject to terms and conditions. *Id.*

3) Instead, after entering this link into a web browser, a customer must successfully navigate through at least two more pages to find the terms and conditions that allegedly apply to his contract. *Id.*

This is not "notice," reasonable or otherwise. In fact, by requiring that its customers use their internet services before they can view the terms and conditions, ***CenturyLink has rigged the system by forcing its customers to agree to the terms and conditions before they ever have a chance to view them***. As soon as a customer enters the link provided by CenturyLink into his web browser, he has already agreed to the terms and conditions. (A-051). This is because the terms and conditions provide that acceptance occurs as soon as "YOU . . . USE THE SERVICES." *Id.* In other words, ***if and when a customer reaches the terms and conditions, he is greeted with a statement in all caps informing him that by using the internet provided by CenturyLink to access the terms and conditions, he has already agreed to be bound by them***. *Id.* To add insult to injury, this statement is preceded by a warning (again in all-caps) that the customer should read the terms carefully *before* agreeing to them. *Id.*

Nothing prevented CenturyLink from simply providing Mr. Sanford with a simple copy of the terms and conditions enclosed in his first bill. Nor did anything prevent

CenturyLink from adding a clear and legible sentence to its bills stating: "The services we are providing you are governed by our terms and conditions. By continuing to accept these services, you are agreeing to those terms and conditions. We make these terms and conditions available on our website at www.centurylink.term_and_conditions." Instead, CenturyLink chose to disguise these terms and conditions as "information" relating to how late fees are calculated.

CenturyLink's definition of "reasonable notice" is well outside the bounds of what a reasonable person would expect. By reserving for itself the right to make material changes to the terms and conditions as long as it provides "reasonable notice" in any manner "at our sole discretion," CenturyLink has reserved the right to change the terms of the contract without notice. CenturyLink's obligation to provide reasonable notice, like every other purported obligation, is illusory.

Finally, CenturyLink also argues that this case is distinguishable from the clear precedent of the court of appeals on the grounds that any changes to the material terms of the contract are prospective as they do not take place until 30 days after notice. Again, the obligation to provide "reasonable advanced notice" in any meaningful way is illusory and therefore so is the appearance that the changes are "prospective in application." *Frye*, 321 S.W.3d at 443. Moreover, Section 9, Paragraph A(3) allows CenturyLink to alter or change the Services "with or without notice if we elect to change the Service or a part thereof." (LF. 369). CenturyLink, therefore, has not promised to provide advanced notice, reasonable or otherwise, of material changes.

### C. Conclusion

CenturyLink has offered only illusory promises as consideration. It has retained the right to change its obligations at any point with or without notice. To the extent that the alleged terms and conditions place any requirement on CenturyLink to give notice, it allows CenturyLink to choose the method of notice at its sole discretion. CenturyLink has proven that its concept of sufficient notice falls terribly short of any reasonable standard. CenturyLink has no real obligations under the purported terms and conditions. CenturyLink has not given any consideration and the terms and conditions do not amount to a contract as a matter of law. Mr. Sanford never agreed to arbitrate these claims and the trial court did not err by denying CenturyLink's motion to compel arbitration.

## VII. ADDITIONAL ARGUMENTS IN SUPPORT OF THE TRIAL COURT'S DECISION

The trial court did not err in finding that a valid agreement never existed between the parties because any promises made by CenturyLink were illusory. Nor did the trial court err in finding that the claims in this lawsuit are outside the scope of the arbitration clause. Even if the trial court had erred in these conclusions, which it did not, its denial of CenturyLink's Motion to Compel Arbitration was still the correct ruling for two reasons. First, CenturyLink never gave Mr. Sanford notice of the terms and conditions that contained the arbitration agreement. A party cannot accept a contract unless he has been given notice of it. Second, the terms and conditions are unconscionable and therefore no contract was formed as a matter of law.

### A. CenturyLink Failed To Provide Any Notice of the Terms and Conditions to Mr. Sanford

Before a party can accept an offer, the party must first have notice that there is an offer to accept. *See, ACF Industries, Inc. v. Industrial Commission* 320 S.W.2d 484 at 492 (Mo. 1959) ("Ordinarily, of course, an offer cannot be accepted until it has been communicated to the offeree"); *Major v. McCallister*, 302 S.W.3d 227 at 230 (Mo. App. S.D. 2010) (holding that it is a standard doctrine of contracts that when a benefit is offered subject to terms and offeree accepts benefits "**with knowledge of the terms of the offer**" that creates acceptance of terms) (emphasis added); *Whitworth*, 344 S.W.3d at 738 (noting ability to discern offer and acceptance "is hampered by the Defendants' failure to identify exactly which 'agreement' of the several involved in this case constitutes the enforceable arbitration contract").

As briefed above, despite CenturyLink's representation in its statement of facts to the contrary, the bills sent to Mr. Sanford did not indicate that the services being provided were subject to terms and conditions and that his continued use of the service constituted acceptance of these terms and conditions. Nor did CenturyLink ever send him a copy of the terms and conditions, a link leading him directly to them, or even a bill that clearly articulated that such terms and conditions existed and governed the services being provided. *Id.* Instead, CenturyLink claims an enforceable contract was formed because in the bills it sent to Mr. Sanford, under the section describing how late fees are calculated, CenturyLink provided a web address Mr. Sanford could visit "for more information." If Mr. Sanford visited this web address and successfully navigated his way

through two or three additional web pages then, and only then, would he be presented with the terms and conditions. Unfortunately for him, he would also have been informed that by using the services to view these terms and conditions, he had already accepted them in full. This, as a matter of law, is not an "offer." Without a valid offer, acceptance could not have occurred.

### i. *Specht v. Netscape* Communications Corp.

In *Specht v. Netscape Communications Corp*., the Second Circuit was asked to determine whether or not language available on a website constituted sufficient notice to bind customers to an arbitration agreement. *Specht v. Netscape Communications Corp*., 306 F.3d 17 (2nd Cir. 2002). Plaintiffs filed a class action lawsuit stemming from their use of "SmartDownload," a computer program they obtained via download from defendants' website. In order to download the program, the plaintiffs went to the website and clicked on a button labeled "Download." *Specht*. 306 F.3d at 22. If customers scrolled down before they clicked "Download," they would have come across the words: "Please review and agree to the terms of the *Netscape SmartDownload software license agreement* before downloading and using the software." *Id*. at 23 (italics in original). The terms didn't actually appear on the screen, rather a link was provided to the terms: "Even for the user who, unlike plaintiffs, did happen to scroll down past the download button, SmartDownload's license terms would not have been immediately displayed . . . instead . . . a hyperlink would have taken the user to a separate web page entitled "License & Support Agreements." *Id.* 23-24.

The Second Circuit rejected defendants' argument that plaintiffs were bound by

the arbitration agreement appearing in the "License & Support Agreement" and held that defendants "neither adequately alerted users to the existence of SmartDownload's license terms nor required users unambiguously to manifest assent to those terms." *Id.* At 25. The court explained: "[R]eference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms. The SmartDownload web page screen was 'printed in such a manner that it tended to conceal the fact that it was an express acceptance of [Netscape's] rules and regulations." *Id*. at 32, (citing *Larrus v. First National Bank*, 266 P.2d 143 at 147 (Cal. 1954)). The court concluded: "Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential." *Id.* At 35.

In this case, Mr. Sanford and other customers had even less of an opportunity to discover the language claiming to set forth the arbitration agreement than the plaintiffs had in *Specht*. In *Specht*, the plaintiffs needed to simply scroll down and click on a link. In this case, in order to even get to the company's website - the starting-point for the plaintiffs in *Specht* - Mr. Sanford would first need to understand that the portion of his bill directing him to a web address "for more information" regarding late fees was meant to inform him that his use of CenturyLink's services was subject to its terms and conditions. Once there, instead of scrolling down and clicking a link that unambiguously identified itself as the terms and conditions he was agreeing to, he had to successfully navigate through two to three more pages, none of which advised him that by using the services he was agreeing to certain terms and conditions. As in *Specht*, Mr. Sanford

"required neither to express unambiguous assent to [the terms and conditions] nor to even view the license terms or become aware of their existence." *Id*. at 23. The "essential element" of "reasonably conspicuous notice" does not exist in this case, and a contract was never formed. *Id.* at 35.

**ii. The Courts Of Missouri Have Embraced The Holding In *Specht***

CenturyLink cited *Major v. McCallister* in the trial court to support its position that it had given adequate notice to Mr. Sanford. *Major v. McCallister*, 302 S.W.3d 227 (Mo. App. S.D. 2010). CenturyLink's reliance on *McCallister* is misplaced. The court in *McCallister* endorsed *Specht* before distinguishing it on the facts. The question presented in *McCallister* was whether an on-line customer had agreed to terms and conditions which included a forum selection clause. Each page on defendants' website contained a link that went directly to the terms and conditions. *McCallister*, 302 S.W.3d. at 228. On top of this, when the plaintiff was ready to complete her transaction, "next to the button was a blue hyperlink to the website terms and this notice: 'By submitting you agree to the Terms of Use.'" *Id*. at 229. On appeal, the plaintiff relied on the holding in *Specht* to support her argument that she did not have notice of, nor had she agreed to, the Terms of Use.

Before reaching its conclusion, the Southern District first endorsed *Specht*, citing with approval the Second Circuit's decision to refuse to enforce the terms because Netscape's website "did not carry an immediately visible notice of the existence of license terms." *McCallister* 302 S.W.3d at 230 (citing *Specht* 306 F.3d at 31). The court then set out the clear differences between *Specht* and the case *sub judice*: "By contrast,

[defendant] did put 'immediately visible notice of existence of license terms' - i.e., 'By submitting you agree to the Terms and Use' and a blue hyperlink - right next to the button that Appellant pushed. A second link to those terms was visible on the same page without scrolling, and similar links were on every other website page." *McCallister* at 230.

The holding in *McCallister* confirms that Mr. Sanford could not have given acceptance in this case because CenturyLink did not provide an "immediately visible notice" of the existence of the terms and conditions. Nowhere in the bill did CenturyLink include any language informing Mr. Sanford that: "By continuing to use these services you agree to the Terms and Conditions." CenturyLink failed to provide notice and a contract was never formed.

The holding in *Citibank (South Dakota), N.A. v. Wilson*, further confirms that CenturyLink failed to provide adequate notice. *Citibank (South Dakota), N.A. v. Wilson*, 160 S.W.3d 810 (Mo. App. W.D. 2005). There, the court held that a plaintiff was bound by the terms of a credit card agreement that was mailed to her along with her credit card statement notifying her that the agreement was enclosed and that the terms were binding unless she terminated her account within thirty days. *Id.* at 813. Unlike *Citibank*, CenturyLink never mailed Mr. Sanford the terms of his agreement nor did it include any language in its bill informing him that certain terms and conditions were binding if he continued to use its services.

**iii. Louisiana Law Offers No Support For CenturyLink's Position**

To the extent CenturyLink argues that the issue of notice should be determined

under Louisiana law, an argument waived by CenturyLink, such a position has been rejected by Missouri courts. Choice of law provisions are not considered when determining whether or not a contract has been formed. Nonetheless, Louisiana law offers no support to CenturyLink.

In *FIA Card Services, N.A. v. Weaver*, the Supreme Court of Louisiana held that a contract does not exist unless a party has proper notice of its terms. *FIA Card Services, N.A. v. Weaver*, 62 So.3d 709 (La. 2011). FIA Card Services brought suit against Weaver, seeking to enforce an arbitration clause in their credit card agreement. *Id.* FIA argued that Weaver received the terms of the agreement and manifested his assent by continuing to use his card. *Id.* FIA could not, however, produce any evidence showing when or even if the terms and conditions were sent to Weaver. *Id.* at 718-719. FIA also argued that Weaver failed to "present evidence in support of his allegation of the non-existence of an agreement to arbitrate." *Id.* at 719. The court rejected this argument, holding that: "It is not [Weaver's] burden to prove the non-existence of an agreement; it is the burden of the party seeking to enforce a contract to show the contract exists . . . FIA did not meet this evidentiary burden." *Id.* See, also *Chase Bank U.S.A., N.A. v. Leggio* 997 So.2d 887 (La. App. 2 Cir 2008) (producing an unsigned and undated generic Cardmember Agreement and claiming that the consumer received a copy was insufficient to show that the consumer agreed to arbitration).

CenturyLink scoured the country for case law to provide to the trial court in support of its position that it gave adequate notice to Mr. Sanford. It failed to find a single case with comparable facts in which a court found sufficient notice to support a

finding of offer and acceptance. Mr. Sanford did not have reasonable notice. He did not have actual notice. He did not have any notice. Without notice he could not and did not give his acceptance to the terms and conditions. The trial court did not err in denying CenturyLink's Motion to Compel Arbitration.

### B. The Contract Is Unconscionable

This Court has held that if a contract containing an arbitration clause is invalid pursuant to "generally applicable contract defenses, such as fraud, duress, or unconscionability," then the entire contract, including the arbitration clause, was never formed to begin with and the plaintiff cannot be compelled to arbitrate. *Brewer v. Missouri Title Loans*, 364 S.W.3d 486 at 490 (Mo. 2012), (citing *AT&T Mobility v. Conception*, 131 S.Ct. 1740 at 1746 (2011)). The question of unconscionability 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." *Brewer* at 489 n.1 (citing *Woods v. QC Financial Services, Inc.*, 280 S.W.3d 90, 96 (Mo. App. 2008)).

#### i. Contracts That Are One-Sided, Oppressive, and Contain Unfair Surprise Such As the Terms and Conditions In This Case Are Unconscionable

In *Brewer*, the plaintiff brought a class action against Missouri Title Loans alleging violation of the Merchandising Practices Act. The defendant claimed that the plaintiff had agreed to a contract that included a class arbitration waiver. This Court held

that because the terms and conditions of the contract were unconscionable, the contract was invalid, including the arbitration clause that it contained.

In finding the terms and conditions unconscionable, this Court first identified three factors which were hallmarks of unconscionability: "There 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." *Brewer*, 364 S.W.3d 486, 493 (Mo. 2012). All three of these factors exist in this case. (A-051 – A064). This Court continued its analysis:

> The evidence also demonstrated that the terms of the agreement are extremely one-sided. Unlike in *Concepcion*, in which AT&T shouldered the costs of arbitration and would pay double the customer's attorney's fees if the customer recovered more than AT&T had offered prior to arbitration, the agreement here provides that the parties are to bear their own costs. In *Concepcion*, the arbitration clause waived AT&T's right to seek reimbursement for attorney's fees incurred in defending against a consumer's claim. In contrast, the title company did not waive its right to seek attorney's fees and, therefore, could seek to recover attorney's fees incurred in defending a claim.

*Id.* at 493.

The terms and conditions in this case are significantly more one-sided than those in *Brewer*. CenturyLink can unilaterally and without notice change, limit, or modify the services it provides if it elects to do so. (A-059). CenturyLink can change any material

terms with essentially zero notice. (A-051 – A-052). CenturyLink can terminate the services without notice for suspected violations. (A-058). The customer, however, has no right to "withhold, set off, or reduce any invoiced amount – whether disputed or undisputed." (A-058). The terms and conditions allow CenturyLink to use a collection agency or initiate legal action to collect amounts due while forcing the customer to reimburse CenturyLink for all expense incurred including attorneys' fees. (A-058). Based on the plain language of this section, this requirement appears to apply regardless of whether CenturyLink prevails in these efforts or not. *Id.* The terms and conditions also purport to limit the statute of limitations within which to bring a claim or dispute to one year. (A-064). This is not only a one-sided and unfair term, but a direct violation of the law of Missouri. Section 431.030 provides in full: "All parts of any contract or agreement hereafter made or entered into which either directly or indirectly limit or tend to limit the time in which any suit or action may be instituted, shall be null and void."

This Court in *Brewer* also held that a contract is unconscionable when it contains unfair surprise which occurs "during the bargaining process or may become evident later." *Id.* at 492-3. In this case, even if a customer somehow successfully became aware of the terms and conditions and wished to view them, she would be met with the unfair surprise that she had not only already accepted them, but that she could now be charged up to $200.00 if she wished to decline them. This is because CenturyLink only makes the terms and conditions available on its website while at the same time mandating that the terms and conditions have been accepted as soon as the customer uses the internet provided by CenturyLink. (A-051). The terms and conditions urge the customer to not

use the services and contact CenturyLink immediately to cancel services if she does not agree to the services. *Id.* One sentence later, however, the terms and conditions warn the customer that if she has agreed to a one or two year term period, she will be charged a termination fee of up to $200.00. (A-051, A-058 – A059). Finally, the terms and conditions assert that the customer consents to exclusive personal jurisdiction in Ouachita Parish, Louisiana. (A-064). It is hard to imagine that such a provision would come as anything less than an unfair surprise to a resident of Missouri purchasing internet services from a Missouri company.

**ii. CenturyLink's Brief in This Court Confirms That the Arbitration Clause Is Unconscionable**

CenturyLink now argues that Mr. Sanford, and by extension, every Missouri customer it has ever had, has agreed to forever arbitrate any disputes it now has or may ever have with CenturyLink: "This does not limit the scope of the clause to disputes between the parties in any way . . . it is difficult to imagine a more broad arbitration provision, *or a dispute between the parties that would not be encompassed within it*." Appellant's Brief at 25 (emphasis added). In other words, ***CenturyLink is now admitting to this Court that it drafted the arbitration agreement to be so broad that any citizen of Missouri who becomes a customer of CenturyLink does so at the expense of forever forfeiting her ability to access the Courts of Missouri to redress any harm CenturyLink ever causes her, now or at any point in the future, under any circumstances***. CenturyLink is using these terms and conditions to declare itself free to commit fraud, negligence, intentional torts, or any other harm against its customers, former or present,

now and forever, without ever having to answer for its conduct in the courts of Missouri. This means that, according to CenturyLink, should Mr. Sanford leave his house tomorrow and be slammed into by a van operated by CenturyLink – whether intentionally or not – he could not file a civil suit.

The terms and conditions at issue in this case are even more unfair, one-sided and oppressive than those in *Brewer.* As in *Brewer,* the terms and conditions represent a "contract that no person 'in his senses and not under delusion would make.'" *Brewer*, at 496, citing *Concepcion*, 131 S.Ct. at 1755 (Thomas, J. concurring) (citing *Hume v. United States,* 132 U.S. 406, 411, 10 S.Ct. 134, 33 L.Ed. 393 (1889)).[3] A right-minded person would not agree to a contract that binds him before he has even had an opportunity to review the terms and conditions and then imposes an immediate penalty of

[3] CenturyLink may argue that unconscionability should be determined under Louisiana law. As explained, this argument has been both waived and previously rejected by the courts of Missouri. Because unconscionability goes to formation of a contract, a choice of law provision within the contract cannot dictate that Missouri law does not apply. Nonetheless, the law on unconscionability in Louisiana is identical to Missouri: "A contract or clause is unconscionable when at the time the contract is entered into it is so onerous, oppressive or one-sided that a reasonable man would not have freely given consent to the contract or clause at issue." *Marshall v. Citicorp Morag. Inc.* 601 So.2d 669, 671 (La. App. 5 Cir 1992), (holding loan contract unconscionable and therefore unenforceable under Louisiana law) (citing La. Rev. Stat. Ann. 9:3516).

up to $200.00 if he decides, after he is first able to review the terms, that he does not accept them. Nor would a right-minded person agree to forever forfeit his right to seek redress in the courts of Missouri simply for the privilege of paying for internet access. This is unconscionable. The trial court did not err when it entered an order declining to compel arbitration.

## VIII. CONCLUSION

Mr. Sanford did not agree to arbitrate this dispute. CenturyLink filed an untimely appeal and this Court does not have jurisdiction. The terms and conditions at issue are unconscionable because they are so one-sided and oppressive that no reasonable person would agree to them. CenturyLink never provided notice to Mr. Sanford that the terms and conditions existed and he therefore could not have accepted them. Even if he accepted them, CenturyLink has not undertaken any binding obligations and its promises are illusory, unenforceable, and lack sufficient consideration. Finally, the dispute at issue in this case involves telephone services and is outside the scope of the agreement.

The trial court did not err in denying CenturyLink's Motion to Compel Arbitration and its ruling should be affirmed by this Court.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21st day of April, 2016, the foregoing brief and accompanying appendix were filed electronically with the Clark 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 19,650 words in the brief (except the cover, signature block, certificate of service and the 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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