No. 11-6233

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GAYEN HANCOCK, *et al.*,
Plaintiffs – Appellants,

v.

AMERICAN TELEPHONE &
TELEGRAPH COMPANY, INC., *et al.*,
Defendants – Appellees.

Appeal from Orders of the United States District Court
for the Western District of Oklahoma, The Honorable Lee R. West,
No. 5:10-CV-00822-W

BRIEF OF APPELLEES

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APPELLEES DO NOT REQUEST ORAL ARGUMENT

CORPORATE DISCLOSURE STATEMENT

AT&T Operations, Inc. is a non-governmental corporate entity whose assets and liabilities were transferred to a wholly-owned subsidiary of AT&T Operations Inc., which in turn merged into AT&T Services, Inc. as a result of a corporate reorganization effective December 31, 2010. AT&T Services, Inc., the successor to AT&T Operations, Inc., is a non-governmental corporate entity that is jointly owned by AT&T Inc. and other wholly-owned subsidiaries of AT&T Inc.

Southwestern Bell Telephone Company is a non-governmental corporate entity and a wholly-owned subsidiary of Southwestern Bell Texas Holdings, Inc., which in turn is a wholly-owned subsidiary of AT&T Inc.

BellSouth Telecommunications, Inc. is a non-governmental corporate entity and a wholly-owned subsidiary of BellSouth Corp., which in turn is a wholly-owned subsidiary of AT&T Inc.

Illinois Bell Telephone Co., Indiana Bell Telephone Co., Inc., Michigan Bell Telephone Co., Nevada Bell Telephone Co., Ohio Bell Telephone Co., Pacific Bell Telephone Co., Wisconsin Bell, Inc., and the Southern New England Telephone Co. are non-governmental corporate entities and wholly-owned subsidiaries of AT&T Teleholdings, Inc., which in turn is a wholly-owned subsidiary of AT&T Inc.

AT&T Inc. is a publicly held corporation and the only publicly held company with a 10 percent or greater ownership stake in the defendants listed

above. American Telephone & Telegraph Company, Inc. does not exist, and AT&T Southeast, Inc. was dissolved on March 24, 1993.

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INTRODUCTION

Plaintiffs are customers who receive television, voice, and Internet services under the AT&T U-verse brand. The district court concluded that these plaintiffs are bound by two contracts—one for television and voice services, which includes a forum-selection clause, and another for Internet service, which includes an arbitration provision. In appealing the district court's orders enforcing the forum-selection and arbitration provisions, plaintiffs do not challenge the substantive fairness of those clauses. Instead, they argue that the district court erred in concluding that they receive service subject to the respective sets of terms of service at all. But the district court reached that conclusion after determining that the dispositive facts are not in dispute: Defendants submitted extensive evidence demonstrating that plaintiffs assented to their contracts, and plaintiffs failed to meet their burden of contradicting that evidence.

According to plaintiffs, the district court erred because—they say—"[t]he transactions in this case were so byzantine and confusing that Plaintiffs could not possibly have knowingly consented" to the terms of the service agreements. Appellants' Opening Brief ("Br.") 2. But their argument depends on characterizations of the contracting process that are contrary to the record below. Stripped of rhetoric and baseless assertions, plaintiffs' argument boils down to the theory that, as a matter of law, contract acceptance is nullified when there is more

than one contract governing different aspects of a bundled package of services. That argument is deeply at odds with well-established principles of contract law.

Plaintiffs also complain that the district court should have given them a second chance to submit evidence concerning whether they accepted their contracts. Br. 3. But the district court afforded them an ample opportunity to furnish evidence that would have contradicted defendants' showing; they were not entitled to additional bites at the apple.

At bottom, this appeal presents nothing more than the straightforward question whether standard form contracts that are a condition of receiving services must be enforced. The answer is clear: The district court's orders should be affirmed.

ISSUE PRESENTED

Whether the district court correctly held that the undisputed facts show that plaintiffs assented to both contracts for U-verse services.

STATEMENT OF FACTS

A. AT&T U-verse Customers Obtain Bundled Services By Accepting Separate Sets Of Terms And Conditions Governing The Respective Services.

The AT&T "U-verse" brand consists of a customizable package of digital television, high-speed Internet, and home-phone voice services. At the time that plaintiffs signed up for U-verse, they had the option of purchasing stand-alone television service or, at a discount, bundling it with voice service, Internet service,

or both. (IX:1680, 1684). Some customers, including plaintiffs Hancock and Mutzig, placed orders for their U-verse services with a salesperson who filled in the details of their requests on an order form and scheduled an installation to take place at their homes at a later time. (I:34; IX:1680-81, 1683-84).[1]

When the technician came to install the selected services, customers who signed up for either a television plan or a bundled television/voice package were required to agree to a set of contract terms applicable to those services ("TV/Voice terms"). (VI:996). Those terms include, *inter alia*, a choice-of-law and forum-selection provision stating: "These [terms] and the relationship between you and AT&T will be governed by the laws of the State of Texas without regard to its conflict of law provisions, and you and AT&T agree to submit to the personal and exclusive jurisdiction of the courts located within the county of Bexar County, Texas." (VI:1007, 1022, 1037).

Customers who added Internet service also were required to accept a separate set of terms applicable to Internet service alone ("Internet terms"). (V:730). Those terms include a provision requiring both parties to resolve "all

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[1] References to the Appendix in this brief are to the volume number followed by the page number—*i.e.*, "([volume]:[page])." References to district court documents not included in the Appendix follow the convention outlined in Tenth Circuit Rule 28.1(B)—*i.e.*, the title of the document, date of filing, docket number, and page number.

disputes and claims . . . based in whole or in part on" the customer's Internet service by arbitration on an individual basis. (V:731, 778-79, 801-02).[2]

Customers accept each set of contract terms in a standardized process that is "uniform and mandatory" (VI:997; *see also* V:730):

TV/Voice terms. When a technician arrives at a new customer's home to install U-verse television and voice services, the technician is required to provide the customer with a welcome kit that includes a printed copy of the TV/Voice terms. (VI:996). Before the technician installs those services, the customer must assent to the terms, either by electronically indicating his or her acceptance on a form displayed on the technician's laptop or by signing a written acceptance form. *Id*. If the customer chooses the first method (*id.*), the laptop displays a form with a checkbox for "Terms of Service" and a button labeled "I Acknowledge" under a statement indicating that "[b]y selecting 'I acknowledge' below, you are acknowledging that you have read, understand, and agree to the content of the documents checked above." (V:878-79, 883).

Internet terms. When a customer first subscribes to U-verse Internet service, he or she cannot access the Internet before completing an online activation process. (V:730). Specifically, a customer who seeks to access the Internet has his

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[2] The arbitration provision was not in Mutzig's initial agreement, but was e-mailed to her when added to the standard terms in October 2008. *See* pages 10-11, *infra*.

or her web browser redirected to a registration page to complete the activation process. *Id.* During that process, the customer is presented with the complete Internet Terms of Service in a scrolling text box followed by a button labeled "I agree." (V:730, 735, 737). The customer must click his or her acceptance to complete the activation. (V:730).

B. Plaintiffs File Suit In The U.S. District Court For The Western District Of Oklahoma.

Plaintiffs Hancock, Mutzig, and Cross are AT&T U-verse customers who reside in Oklahoma, and plaintiff Bollinger is a former U-verse customer who resides in Florida. (I:27, 34-35; V:730-31). Alleging dissatisfaction with the quality of U-verse television, voice, and Internet services, they filed suit on July 30, 2010 in the Western District of Oklahoma, seeking to represent a nationwide class. (I:25-26, 29, 34-35). Plaintiffs named as defendants thirteen affiliated AT&T entities:

AT&T Operations, Inc.[3] ("AT&T Operations") "is the entity ultimately responsible for AT&T U-verse" in the states in which plaintiffs reside (VI:1051) and uses regional affiliates to effectuate service installation in any particular state. (VI:997, 1051; *see also* III:326, 332-33, 431-33, 438, 450-51, 505; X:2064). Although plaintiffs contend that "[d]efendants submitted no evidence that AT&T

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[3] As part of a corporate reorganization, AT&T Operations merged into AT&T Services, Inc. effective December 31, 2010. *See* Notice of Corporate Reorg. and Merger, dated Feb. 3, 2011, Dkt. No. 88, at 1-2.

Operations has any continuing involvement in the day-to-day retail sales or installation of U-verse services" (Br. 10-11), they are mistaken.[4] In addition to the evidence that AT&T Operations is responsible for plaintiffs' AT&T U-verse service (VI:1051), defendants submitted declarations from AT&T Operations employees who discussed their past and present involvement in "develop[ing] the methods and procedures for Premises Technicians to install U-verse services" (VI:995; *see also* V:729-30; VI:1051), "support[ing]" the software system "used by Premises Technicians in connection with the installation of U-verse services" (V:878), and accessing "corporate and business records" used by and in conjunction with the technicians (VI:995; *see also* V:730-32, 878-80).

Southwestern Bell Telephone Company[5] ("Southwestern Bell") and **BellSouth Telecommunications, Inc.** ("BellSouth") are the regional affiliates that

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[4] By selectively quoting from the record, plaintiffs mischaracterize a declaration submitted by defendants as suggesting that AT&T Operations was involved only in the "commercial introduction" of U-verse service. Br. 10. But the full quote reveals that the declarant actually said that certain aspects of the commercial introduction of U-verse service "occurred primarily in Texas" and that "[m]any of the [related] documents and individuals . . . are located in San Antonio, Texas." (VI:1051).

Plaintiffs also contend that, in the same declaration, AT&T Operations said "in its own words" that it "only 'contributed to' the planning and design of the U-verse Service." Br. 13. Again, this is a distortion; the quoted words "contributed to" don't even appear in the declaration; nor does anything along the lines of the purported quote.

[5] Plaintiffs incorrectly named "Southwestern Bell Telephone Company, L.P." as defendant. The correct name of the entity is "Southwestern Bell Telephone Company." (III:505).

carry out service installations in Oklahoma and Florida, respectively. (III:431-33, 450-51, 505; VI:997). Accordingly, technicians working for Southwestern Bell would have installed U-verse service for Oklahoma plaintiffs Hancock, Mutzig, and Cross. Technicians working for BellSouth would have installed Bollinger's service in Florida.

AT&T Inc.[6] is a holding company that indirectly owns AT&T Operations, BellSouth, and Southwestern Bell, as well as the other regional entities named as defendants in the complaint.[7] (III:326, 332-33, 431, 438, 450-51, 505). Neither AT&T Inc. nor those other regional entities (collectively, the "Non-Involved Defendants") had any involvement with plaintiffs' U-verse service. (III:327, 334-35, 438-40, 449, 506).

Defendants timely responded to the complaint by filing a number of dispositive motions. First, AT&T Operations and Southwestern Bell moved to compel arbitration of plaintiffs' claims related to Internet service in accordance with the arbitration provision in the Internet terms. (I:89-127). Second, AT&T

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[6] Plaintiffs erroneously identified "American Telephone & Telegraph Company, Inc." as a defendant in the complaint. But that entity does not exist (III:445; *cf.* III:450); plaintiffs presumably intended to sue AT&T Inc., which indirectly owns the entities sued in this case.

[7] Those defendants are Pacific Bell Telephone Co.; Illinois Bell Telephone Co.; Indiana Bell Telephone Co., Inc.; Michigan Bell Telephone Co.; Nevada Bell Telephone Co.; Ohio Bell Telephone Co.; Wisconsin Bell, Inc.; and the Southern New England Telephone Co. (I:25). Another regional defendant, AT&T Southeast, Inc., was dissolved in 1993. (III:449).

Operations and Southwestern Bell sought to enforce the forum-selection clause in the TV/Voice terms by moving to dismiss plaintiffs' claims relating to U-verse television and voice services for improper venue under Rule 12(b)(3), or in the alternative to transfer those claims under 28 U.S.C. § 1404(a). (I:128-57). Third, BellSouth and the Non-Involved Defendants filed separate motions to dismiss for lack of personal jurisdiction, requesting in the alternative that the court compel arbitration of the Internet claims and dismiss or transfer the TV/Voice claims under the forum-selection clause. (I:50-66, 67-81, 82-88).[8]

C. AT&T Presents Both Customer-Specific And Custom-And-Practice Evidence Showing That Each Plaintiff Assented To Both Sets Of Terms.

In support of its motions to enforce the arbitration and forum-selection provisions, AT&T presented substantial evidence showing that each plaintiff agreed to both the TV/Voice and Internet terms.

First, AT&T submitted a declaration from David Chicoine, a Senior Specialist for Network Support in a unit within AT&T Operations, Inc., whose job responsibilities include support of the Global Craft Access System ("GCAS") used by technicians when installing U-verse services. (V:878). Mr. Chicoine testified that he has personal knowledge of the manner in which the GCAS system displays and stores the acceptance form for customers who have assented to the TV/Voice

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[8] Hereafter, for ease of reference, we will refer to all defendants collectively as "AT&T" except when differentiation among the various entities is necessary.

terms. *Id.* He further testified that the relevant GCAS records relating to plaintiffs Mutzig, Bollinger, and Hancock reflect that each of those plaintiffs agreed to the TV/Voice terms by clicking the "I acknowledge" button displayed on the installation technician's laptop. (V:879-80). He also authenticated the customer-specific acceptance form for each of those plaintiffs, which was generated automatically by the GCAS system when they accepted the TV/Voice terms. (V:879-80, 885, 887, 889).

Next, AT&T submitted a declaration from Michael Frias, Senior Product Manager with AT&T Operations, Inc., who testified that he has personal knowledge of the process by which U-verse Internet customers accept the terms for that service and the manner in which the records documenting the customers' acceptance may be accessed. (V:730-31). He testified that, according to those records, plaintiffs Mutzig, Bollinger, and Hancock each completed the online registration process necessary for Internet service and, in the process, clicked the "I Agree" button to confirm assent to the Internet terms. *Id*. Mr. Frias also authenticated the customer-specific records confirming that each of those plaintiffs accepted the Internet terms. (V:730-31, 739-40, 742-43, 745-46).

Although plaintiff Cross alleged in the complaint that he subscribed to U-verse television, voice, and Internet service in late 2009, AT&T was unable to identify Cross's account or associated records because the complaint disclosed nothing more than Cross's name and state of residence. (I:27, 35; VI:996).

Accordingly, AT&T submitted custom-and-practice evidence confirming that Cross—and, indeed, all of the plaintiffs—would have had to accept both the TV/Voice and Internet terms in order to receive those services.

Specifically, David Saigh, an Area Manager for Network Process and Quality in a unit within AT&T Operations, Inc., testified that, as a matter of the "[s]tandard installation practice[s]" employed by the technicians installing service, which are "uniform and mandatory," each plaintiff (including Cross) "necessarily" would have had to complete an acknowledgment form (in electronic or paper format) and agree to the TV/Voice terms before the technician would install the requested television and voice services. (VI:996-97; *see also* V:878-79). Similarly, Mr. Frias testified that, pursuant to the design of the online registration software for Internet activations, each U-verse Internet customer (including Cross) was required to complete the online registration process in order to use that service. (V:730).

Finally, Mr. Frias explained that the Internet terms were revised in October 2008, which was after Mutzig accepted the agreement but before the other plaintiffs did so. (V:730-32). Pursuant to the change-in-terms provision of the Internet terms then in effect (V:748, 764), all existing customers (including Mutzig) were e-mailed a summary of the revised terms, a link to the full text, a notice that the revision included an arbitration provision, and a reminder that "[b]y continuing to use the Service, you signify your continued agreement" to the Terms.

(V:731-32, 815, 818-19). AT&T's records reflect that Mutzig had not terminated her service between the time that notice of the revised Internet terms that included the arbitration provision were e-mailed to her and the time that AT&T moved to compel arbitration. (V:730).

D. Plaintiffs' Response.

Plaintiffs offered no rebuttal evidence to challenge AT&T's showing that they accepted the Internet terms and TV/Voice terms when those respective services were installed. Instead, they argued that the terms that would have been provided "at time of installation" were meaningless and that "the contract relevant to this case was the contract purchasing U-verse" from "the salesperson [who] made a successful pitch" to them to request service in the first place—*i.e.*, the "order form" for U-verse services. (VII:1332-33, 1346, 1350).

In support of that argument, plaintiffs submitted the order forms for two of the plaintiffs and some related marketing materials. (VII:1356-57, 1359-60, 1367-70). Plaintiffs subsequently moved to supplement the record with an affidavit from Hancock addressing his interactions with the ***salesman*** from whom he ordered U-verse service (IX:1797, 1802; *see also* I:34). The affidavit stated: "I did not 'click on' ANY acceptance of U-verse 'Terms of Service' when I bought U-verse, and the salesman never told me about any 'Terms of Service.'" (IX:1802). Hancock also said that he was not aware that different terms applied to his TV/Voice and Internet services. *Id.*

But plaintiffs submitted no evidence—whether by their own affidavits or otherwise—concerning their interactions with the ***technicians*** who installed their U-verse service, as opposed to the salespersons from whom plaintiffs ordered service.

E. The District Court's Rulings.

The district court decided defendants' motions in six orders: (1) an order granting defendants' Rule 12(b)(3) motion and motion to compel arbitration with respect to the claims brought by Bollinger against BellSouth and AT&T Operations (X:2062-89); (2) an order granting defendants' motion to compel arbitration with respect to the claims related to Internet service brought by Mutzig and Cross against Southwestern Bell and AT&T Operations (X:2090-2110); (3) an order granting defendants' Rule 12(b)(3) motion with respect to the claims related to television and voice service brought by Mutzig and Cross against Southwestern Bell and AT&T Operations (X:2111-24); (4) an order granting defendants' Rule 12(b)(3) motion with respect to the claims related to television and voice service brought by Hancock against Southwestern Bell and AT&T Operations (X:2125-37); and (5) two orders granting the Non-Involved Defendants' alternative Rule 12(b)(3) motion and motion to compel arbitration with respect to all of the plaintiffs (X:2138-48).[9]

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[9] Although the order compelling Mutzig and Cross to arbitrate their Internet-

In each order, the district court exhaustively reviewed the evidence and concluded that the undisputed facts showed that each plaintiff accepted both the TV/Voice and Internet terms. Specifically, the court found that AT&T established, through custom-and-practice evidence and customer-specific records, that each plaintiff accepted the TV/Voice and Internet terms during the U-verse installation process. (X:2067-74, 2077, 2084, 2095-2100, 2106, 2117-19, 2130-32). By contrast, the court found that Bollinger, Mutzig, and Cross "provided no evidence, through affidavit or otherwise . . . that conflicts with the defendants' version of the installation process." (X:2070, 2072 n.18, 2095 n.13, 2098 n.14, 2120, 2122 n.18). Moreover, the court found that the affidavit submitted by Hancock was "conclusory and self-serving" and failed to "specifically den[y]" the evidence showing that he accepted the TV/Voice terms during the installation process. (X:2133-34; *see also* X:2135 n.15). As the court explained, Hancock's account of his interaction with the "salesman" from whom he placed the order did not say anything about whether he later "electronically indicat[ed] his acceptance or acknowledgment of the [TV/Voice terms] on the premise technician's laptop." (X:2134).

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related claims against Southwestern Bell and AT&T Operations does not refer to Hancock's Internet-related claims, the district court explained in its orders compelling all of the plaintiffs to arbitrate their claims against the Non-Involved Defendants that it "determined" without exception "that the plaintiffs' Internet-related claims asserted against SWB, AT&T Ops and BellSouth are subject to arbitration." (X:2141, 2147).

SUMMARY OF ARGUMENT

1. Plaintiffs' generalized attack on the U-verse contracting process depends in its entirety on material mischaracterizations as to how that process works. Contrary to plaintiffs' claims, the record evidence shows that each customer is presented with the full text of the terms governing each U-verse service and must assent to those terms before service can be installed and/or activated. Those terms are not confusing: the handful of provisions that plaintiffs challenge do not remotely say what plaintiffs suggest, and no reasonable customer could think otherwise.

At bottom, plaintiffs' argument is that it is impermissible as a matter of law to have two sets of terms govern different features within a bundled package of services (and to not affirmatively explain that there are two sets of terms). But that unsupported notion is at odds with a wealth of precedent, including this Court's recognition that "two contracts . . . executed on the same day by the same parties" represent "entirely separate and distinct transaction[s]," and the enforceability of one "therefore is not dependent on the" enforceability of the other. *Koch v. Koch*, 903 F.2d 1333, 1334-35 (10th Cir. 1990).

2. Plaintiffs' attack on the district court's analysis concerning the formation of their contracts is misguided. As the district court recognized, AT&T submitted extensive evidence that plaintiffs accepted both sets of U-verse terms, and plaintiffs submitted no relevant rebuttal evidence. Without any supporting

evidence, plaintiffs failed to create a genuine dispute of material fact concerning their acceptance of the TV/Voice and Internet terms, and thus were not entitled to the discovery and evidentiary hearing that they now request. Nor did the district court impermissibly resolve controverted facts in AT&T's favor. Because there was no competing evidence, none of the facts were adequately controverted.

Given the extensive unrebutted evidence that plaintiffs accepted both sets of terms, it would have been error for the district court to do anything other than enforce the forum-selection clause and arbitration provision in those terms.

ARGUMENT

In this Circuit, "[f]orum selection provisions are 'prima facie valid' and a party resisting enforcement carries a heavy burden of showing that the provision itself is invalid due to fraud or overreaching or that enforcement would be unreasonable and unjust under the circumstances." *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 957 (10th Cir. 1992); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) (forum-selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances"). Similarly, "[w]hen a contract mandates arbitration, courts generally will enforce the arbitration clause" (*Peterson v. Shearson/Am. Express, Inc.*, 849 F.2d 464, 465 (10th Cir. 1988)) because of the Federal Arbitration Act's "presumption in favor of enforcing agreements to

arbitrate" (*Shankle v. B-G Maint. Mgmt. of Col., Inc.*, 163 F.3d 1230, 1234 (10th Cir. 1999)).

In an attempt to avoid these strong presumptions of enforceability, plaintiffs focus on the formation of their contracts, attacking the U-verse contracting process as a whole and the district court's holding that they in particular agreed to U-verse contracts. But because they failed to submit any evidence below to support these arguments—and their arguments instead depend on mischaracterizations of the extensive evidence of contract formation submitted by AT&T—the district court correctly enforced the forum-selection and arbitration provision accepted by each plaintiff.

I. THE PROCESS BY WHICH PLAINTIFFS ASSENTED TO THE U-VERSE SERVICE AGREEMENTS CREATED ENFORCEABLE CONTRACTS.

Plaintiffs contend that the arbitration and forum-selection clauses contained in the Internet and TV/Voice terms are unenforceable because (they say) the manner of contract acceptance is "protracted and confusing." Br. 18-19. Tellingly, plaintiffs submitted no evidence that the U-verse contracting process prevented any of them from knowingly assenting to the TV/Voice or Internet terms. Three of the four plaintiffs did not even submit an affidavit describing their contracting experience, and the plaintiff who did (Hancock) simply professed

unawareness that there were two sets of terms. (IX:1802).[10] It should thus be no surprise that their speculative arguments here are far off the mark.

A. Standard Of Review.

Although plaintiffs cast their first issue as a matter of enforceability, their argument actually appears to be that, as a matter of law, the U-verse contracting process prevents customers from knowingly assenting to their contracts. Typically, "[w]hether parties have entered into a contract is a question of fact" reviewed for "clear error." *S. Col. MRI, Ltd. v. Med-Alliance, Inc.*, 166 F.3d 1094, 1098, 1098 (10th Cir. 1999); *Adams v. Merrill Lynch, Pierce, Fenner & Smith*, 888 F.2d 696, 699-700 (10th Cir. 1989) ("trial court's findings" on whether plaintiffs "executed . . . agreements [that] contained arbitration clauses" are not set aside "on appeal unless they are clearly erroneous"). However, "questions of law," such as the question apparently posed here, are reviewed "de novo." *Jones v. United Parcel Serv., Inc.*, 2012 WL 689269, at *11 (10th Cir. Mar. 5, 2012).

B. The U-verse Contracting Process Involves Simple, Streamlined Transactions That Create Enforceable Clickwrap Agreements.

As we have discussed (*see* pages 2-5, 10, *supra*), the process by which customers accept their contracts for TV/Voice and Internet services, respectively, is simple and streamlined. As a matter of AT&T's routine practices, a customer purchasing all three services (television, voice, and Internet) must first agree to the

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[10] Hancock also discussed his interactions with the salesman from whom he placed an order for service. *See* page 11, *supra*.

TV/Voice and Internet terms before the services are installed (for television and voice) or activated (for Internet). And each set of terms is available to the customer before he or she manifests assent to the terms.

Each transaction results in two fully enforceable clickwrap agreements (so-called because a customer manifests assent by clicking a box or button on a software or web application). As plaintiffs themselves concede (Br. 17), clickwrap agreements are routinely enforced under the same principles that govern traditional contracts. *See, e.g., Carson v. Spinozzi*, 2011 WL 5588932, at *1 (4th Cir. Nov. 17, 2011) (unpublished) (per curiam) (customer "agreed to arbitrate" claims when she "affirmatively checked the box indicating that she agreed to the terms of use, which included the arbitration provision," which "no one prevented her from perusing"); *TradeComet.com LLC v. Google, Inc.*, 435 F. App'x 31, 33-34 (2d Cir. 2011) (unpublished) (enforcing online clickwrap agreements accepted in process "that allowed one user to accept the August 2006 terms and conditions at once for all accounts included under the umbrella (here, the ten accounts that indicated assent)").[11] Likewise, the specific states whose laws apply here—Oklahoma law

[11] *See also, e.g., Treiber & Straub, Inc. v. U.P.S., Inc.*, 474 F.3d 379, 382, 385 (7th Cir. 2007) (enforcing terms of service when, "[a]s is common in Internet commerce," plaintiff "signifie[d] agreement by clicking on a box on the screen"); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004) (recognizing that "[w]hile new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract," and

for Hancock, Mutzig, and Cross, and Florida law for Bollinger—do not break from this settled authority.[12] *See, e.g. Leatherwood v. Cardservice Int'l, Inc.*, 929 So. 2d 616, 617 (Fla. Dist. Ct. App. 2006) (per curiam) ("[s]uch 'click agreements' have been found to be valid and enforceable"); *Rogers v. Dell Computer Corp.*, 138 P.3d 826, 833-34 (Okla. 2005) (disclaiming any intent to cast doubt on the enforceability of "clickwrap agreements where a party must assent to the terms before continuing an on-line purchase or installation of software," while holding under the U.C.C. that separate terms for which such express assent is not required may not be part of a contract for the purchase of goods).[13]

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holding that contract terms on web site were enforceable when offeree who should have been aware of terms accepted services from offeror).

[12] Although the TV/Voice terms include a choice-of-law provision selecting Texas law to govern disputes concerning television or voice services (VI:1007, 1022, 1037), the sole question plaintiffs raise on appeal is one of contract formation—*i.e.*, whether plaintiffs assented to the TV/Voice terms and the Internet terms in the first place. In determining the law applicable to that question, "[a] federal court applies the choice of law rules of the state in which the district court sits." *U.S. Aviation Underwriters, Inc. v. Pilatus Bus. Aircraft, Ltd.*, 582 F.3d 1131, 1143 (10th Cir. 2009). "[I]n Oklahoma, the established choice of law rule in contract actions known as *lex loci contractus* is that, unless the contract terms provide otherwise, the nature, validity, and interpretation of a contract are governed by the law where the contract was made." *Harvell v. Goodyear Tire & Rubber Co.*, 164 P.3d 1028, 1033-34 (Okla. 2006) (citing Okla. Stat. tit. 15 § 162).

[13] *See also TracFone Wireless, Inc. v. Anadisk LLC*, 685 F. Supp. 2d 1304, 1315 (S.D. Fla. 2010) ("In 'Florida and the federal circuits, shrinkwrap agreements are valid and enforceable contracts.'") (quoting *Salco Distribs., LLC v. iCode, Inc.*, 2006 WL 449156, at *2 (M.D. Fla. Feb. 22, 2006)); *Siedle v. Nat'l Ass'n of Sec. Dealers, Inc.*, 248 F. Supp. 2d 1140, 1143 (M.D. Fla. 2002) (collecting cases).

Indeed, the U-verse contracting process provides consumers with ***greater*** notice of the terms of service than the process held up as a model by plaintiffs. Br. 22. In *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), the Seventh Circuit held that customers were bound by terms of service that were sealed in a software box and therefore could not be read in advance of purchase. As the court explained, such terms are fully enforceable as long as the customer had notice that there were terms in the box and the opportunity to return the software for a refund if the terms were deemed unacceptable once read. *Id.* at 1452-53. Here, however, the customer must review and accept the TV/Voice terms ***before*** AT&T will install those services, and must review and assent to the Internet terms in order to activate that service. There is thus no need to seek a refund to reject the terms. In any event, plaintiffs acknowledge that a provision in their order forms offers a 30-day money-back guarantee, covering installation costs and the first month of service, if the customer changes his or her mind after accepting the terms and having service installed. Br. 39 (citing IX:1681); *see also* page 24, *infra*.[14]

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[14] Specifically, plaintiffs submitted marketing materials and service order forms stating that some U-verse customers were offered "a 30-day money-back guarantee" under which a customer who "cancel[s] all AT&T U-verse services within 30 days from service activation" is entitled to receive an "[a]djustment" to his or her bill refunding "initial installation charges and one month service charges, if paid." (IX:1677-78, 1681). Excluded from the offer were "additional charges" incurred by the customer for optional services, "including but not limited to On Demand, Pay Per View, International calls, other pay-per-use feature, and non-returned equipment charges," for which the customer would be responsible. *Id.*

C. Plaintiffs' Attacks On Their Agreements Rest On Mischaracterizations Of The Contracting Process.

Although plaintiffs admit that "[c]ourts have upheld clickwrap and shrinkwrap contracts in consumer transactions as an economically efficient means of conducting business," they contend that the U-verse contracting process lacks the "procedural safeguards" typical of those transactions. Br. 17. Their claims are based on mischaracterizations of the U-verse process.

Most egregiously, they contend that "[b]y defendants' own admission, the acceptance process is ***executed by the installer*** on the installer's laptop computer" and that customers "were not asked to take any action to affirmatively manifest their assent." Br. 34-35 (emphasis added); *see also* Br. 19. That is simply not so: Both of the source documents plaintiffs cite say that "***the customer*** must accept the TV/Voice TOS ***by clicking*** on the "I acknowledge" button displayed" on the technician's laptop (V:878-79) (emphasis added) and that the technician "***has the customer*** acknowledge and agree" to those terms (VI:996; *see also* X:2072 n.18, 2122 n.18, 2135 n.15) (emphasis added). Similarly, the record evidence establishes that "***the customer must click*** a button labeled 'I Agree'" below a scrollable box containing the full terms in order to activate and use U-verse Internet service. (V:730) (emphasis added). At no point in the process for accepting either set of terms is anyone but the customer tasked with manifesting

acceptance of the terms—as plaintiffs themselves acknowledge earlier in their brief (Br. 8-9).

Plaintiffs also erroneously speculate that "it is beyond improbable to believe that" the technicians actually follow this process. Br. 33-34 & n.15. Of course, they submitted no evidence that any technician actually deviated from the standard contracting process during their installations or any others. Rather, they argue that such an inference should be drawn because the salespersons who received orders for U-verse service from two of the plaintiffs scheduled their installations for a two-hour period of time, while the order form asks customers to reserve four to six hours in their schedule for the installation process and specifies that the average installation time is four hours. Br. 8-9, 32, 34. But there are good reasons why customers would be asked to set aside more time to be home than the two hours that the salesperson anticipated it would take for the technicians to install the requested service. The need for customers to plan for potential delays and complications is familiar to anyone who has spent time in an airport security line or waiting at the doctor's office. The inference that plaintiffs draw—that a two-hour window did not afford a technician sufficient time to provide a customer with the welcome kit and to present the acknowledgment form on his or her laptop—is not merely speculative; it defies common sense.

Plaintiffs also complain that the TV/Voice terms authorize AT&T to notify them of revisions to the contract in a variety of ways they view as burdensome.

Br. 35-36. But that provision is irrelevant here: This case does not involve a revision of the TV/Voice terms or notice of such a revision through allegedly burdensome means. To the contrary, the only change-in-terms at issue here is the revision of Mutzig's ***Internet*** terms pursuant to a provision in those terms that requires direct notice by "either email or regular mail." (V:764). There is no dispute that AT&T provided Mutzig such notice by e-mail; that the Internet terms Mutzig originally accepted authorized a change in terms through that method of notice; or that Mutzig continued her U-verse service after receiving notice of the change. *See* pages 10-11, *supra*.

Plaintiffs claim that the e-mail to Mutzig was "misleading" and "buried" the newly-added arbitration provision. Br. 36. That claim is easily disproven. The first "important change[]" that is "highlighted" at the beginning of the e-mail, right above a link to the full revised terms on AT&T's website, includes the following language:

> - **Arbitration Agreement.** We have added language that requires customer disputes with AT&T regarding AT&T Internet Services to be submitted to binding arbitration or small claims court.

(V:815, 818).

Finally, plaintiffs speculate that a hypothetical customer could believe that he or she would suffer a financial penalty for rejecting the U-verse terms because the order form says that (i) the customer has three business days to cancel

installation; and (ii) as part of a "30-Day money-back guarantee" (IX:1677-78), an "adjustment will be provided for initial installation charges and one (1) month's service charges, if paid," but not costs incurred for optional pay-per-use features or unreturned equipment. Br. 38-39; IX:1681; *see also* IX:1678; note 20, *supra*. Again, plaintiffs submitted no evidence that they or anyone else had such a belief.

In any event, such a belief would be completely unreasonable. The cancellation-notice provision merely sets out terms for the quick return of any payments made, or equipment provided, when service is ordered and later cancelled. It does not specify any financial penalty for cancellation. (IX:1679, 1681). Moreover, plaintiffs misread the 30-day money-back guarantee provision, which provides terms under which money will be ***refunded***, not charged, to a customer who cancels ***after*** service is installed. (IX:1678, 1681). Far from constituting a financial penalty for declining to accept the terms, the provision actually gives customers an additional thirty days after accepting the terms to change their minds without penalty.

D. The Remaining Aspects Of The U-verse Contracting Process That Plaintiffs Challenge Are Unobjectionable.

Only two of plaintiffs' arguments involve aspects of the U-verse contracting process that are not based on mischaracterizations of the record. Specifically, they object that (i) there are two sets of terms accepted at different times during the same installation (Br. 29-31); and (ii) the terms are not necessarily explained to

each customer by the technician (Br. 30). Neither of these objections is a legitimate ground for refusing to enforce a contract term.

First, there is no basis in the law for plaintiffs' contention that it is impermissible for a company to enter into different contracts for different services at the same time. Indeed, this Court has held that "two contracts . . . executed on the same day by the same parties" represent "entirely separate and distinct transaction[s]" and that the enforceability of one "therefore is not dependent on the" enforceability of the other. *Koch*, 903 F.2d at 1334-35; *see also Adams*, 888 F.2d at 699-701 (rejecting challenge to the enforceability of "form, boilerplate" arbitration agreements accepted by individual investors when they "executed both the Standard Option Agreements and the general Customer Agreements" with a broker, each of which "contained arbitration clauses").[15] Similarly, other courts applying Oklahoma or Florida law routinely enforce separate contracts that were accepted by the same parties on the same day as one or more other contracts.[16]

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[15] *See also, e.g.*, *Langley v. Prudential Mortg. Capital Co.*, 546 F.3d 365, 368-69 (6th Cir. 2008) (per curiam) ("for purposes of deciding the issue concerning the enforcement of the forum selection clauses, both . . . Agreements constitute valid and enforceable contracts"); *Royal Ins. Co. v. Sw. Marine*, 194 F.3d 1009, 1012-15 (9th Cir. 1999) (exculpatory clauses in concurrent rental and repair agreements were enforceable to the extent that they did not limit liability for gross negligence).

[16] *See, e.g.*, *Brennan v. Global Safety Labs, Inc.*, 2008 WL 2234830, at *1, *6 (N.D. Okla. May 29, 2008) (enforcing arbitration agreements in two of "eleven[] contemporaneously executed agreements" between the parties); *CitiFinancial Mortg. Co. v. Frasure*, 2008 WL 2199496, at *1, *6 (N.D. Okla. May 23, 2008) (enforcing two loan agreements "executed" on "the same date"), *aff'd*, 327 F.

The same principle applies here. Each set of terms is self-contained, applies expressly to distinct services, and is the product of a separate transaction in which the customer has separate opportunities to review and accept it. That U-verse itself is marketed as a bundled package of services is irrelevant; AT&T never represented that only one set of terms would govern all services. Moreover, even if there were any overlap or ambiguity, the proper course would not be to void the agreements, but rather simply to construe them together. *See, e.g.*, *Highland Crossing, L.P. v. Ken Laster Co.*, 242 P.3d 567, 571 (Okla. Civ. App. 2010) (where two contracts "refer to the same subject matter and show on their face that one was executed to carry out the intent of the other, it is proper to construe them together as if they were one contract"); *Citicorp Real Estate, Inc. v. Ameripalms 6B GP, Inc.*, 633 So. 2d 47, 49 (Fla. Dist. Ct. App. 1994) (per curiam) (similar rule).

Second, the technicians who install service have no obligation to explain the U-verse terms to customers. In Oklahoma and Florida, as everywhere else, a party who enters into a contract is presumed to know its contents. *See, e.g.*, *Addison v. Carballosa*, 48 So. 3d 951, 954 (Fla. Dist. Ct. App. 2010) ("One who signs a contract is presumed to know its contents. That is because it is generally the duty

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App'x 49 (10th Cir. 2009); *Emerald Grande, Inc. v. Junkin*, 2008 WL 2776229, at *4 & n.6 (N.D. Fla. July 15, 2008) (enforcing forum-selection clauses in two contracts for separate condominium purchases that were "executed as part of the same transaction"), *aff'd per curiam*, 334 F. App'x 973 (11th Cir. 2009); *Okeechobee Landfill, Inc. v. Republic Servs. of Fla., L.P.*, 931 So. 2d 942, 943, 946 (Fla. Dist. Ct. App. 2006) (enforcing clause in one of two agreements that were "executed the same day" by the same parties).

of a party to a contract to learn and understand its contents before he signs it.") (citation omitted); *First Nat'l Bank & Trust Co. v. Stinchcomb*, 734 P.2d 852, 854 (Okla. Ct. App. 1987) ("Generally, if a party to a contract can read and has the opportunity to read the contract but fails to do so, he cannot escape its liability. In fact, one has a duty to apprise himself of the contents of a contact.") (citations omitted); *see also Treiber*, 474 F.3d at 385 ("This is basic contract law: one cannot accept a contract and then renege based on one's own failure to read it.").

For that reason, arguing that a contract was "'either not noticed or not explained to" the plaintiffs is "'unpersuasive.'" *Adams*, 888 F.2d at 701 (quoting "correctly" decided district court holding); *see also Silver v. Slusher*, 770 P.2d 878, 883 (Okla. 1998) (defendants "had no contractual duty voluntarily to explain the terms of its offer or the advantages and disadvantages") (italics omitted); 28 WILLISTON ON CONTRACTS § 71:10 (4th ed. 2003) ("one cannot avoid [a] contract's obligations by asserting that it was not read, explained, or understood"). Indeed, the U.S. District Court for the Northern District of Illinois reached precisely this conclusion with respect to AT&T's terms of Internet service, explaining: "AT&T is not required to have its sales representative read the arbitration provision aloud to potential customers in order for them to be bound by it." *Sherman v. AT&T Inc.*, No. 11-cv-5857 (N.D. Ill. Mar. 26, 2012), slip op. at 4 (attached as Exhibit A).

In short, plaintiffs' generalized attack on the U-verse contracting process is without any legal foundation.

II. THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS ASSENTED TO THE SEPARATE INTERNET AND TV/VOICE TERMS BASED ON THE UNCONTROVERTED EVIDENCE SUBMITTED BY AT&T.

The district court correctly held that each plaintiff is bound by both the TV/Voice and Internet terms because AT&T submitted extensive evidence establishing that plaintiffs assented to those terms, and plaintiffs submitted virtually no evidence to rebut that showing.

To divert attention from their paltry evidence below, plaintiffs argue that the district court erred in (i) supposedly giving undue weight to AT&T's evidence; (ii) not ordering discovery into the making of their contracts; and (iii) not holding an evidentiary hearing or jury trial on contract formation. But those contentions ring hollow in light of plaintiffs' failure to submit any evidence of their own that contradicted AT&T's evidence and created a genuine dispute of material fact. Moreover, in the district court, plaintiffs did not request an evidentiary hearing concerning their acceptance of the TV/Voice terms, as they had done on the arbitration issue (Motion for Trial on Issue of Whether an Arbitration Contract Exists, dated June 13, 2011, Dkt. No. 101, at 1), and accordingly "forfeited th[at] argument" on appeal. *TradeComet.com*, 435 F. App'x at 33; *see also Platta v. Janecka*, 387 F. App'x 850, 853 (10th Cir. 2010) (unpublished) ("A litigant who does not argue an issue in the district court normally may not seek appellate relief. Likewise, because Mr. Platta did not request an evidentiary hearing in the district

court [on a habeas petition], he forfeited his right to request one on appeal.") (citation omitted).

A. Standard Of Review.

Plaintiffs' statement of the standard of review is incomplete and incorrect.[17] As a general matter, this Court reviews *de novo* whether "the district court erroneously resolved factual disputes in favor of" the moving party or "failed to view the evidence in the light most favorable to" the non-moving party. *Avila v. Jostens, Inc.*, 316 F. App'x 826, 832 (10th Cir. 2009) (unpublished). This Court "also review[s] de novo a district court's decision to deny a jury trial on the factual question of whether the parties agreed to arbitrate." *Avedon Eng'g, Inc. v. Seatex*, 126 F.3d 1279, 1283 (10th Cir. 1997).

However, in the context of a Rule 12(b)(3) motion to dismiss, "[w]hether to hold a hearing on disputed facts and the scope and method of the hearing is within the sound discretion of the district court." *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1139 (9th Cir. 2004). Similarly, a district court's decision to deny a "request for limited discovery related to . . . venue" is reviewed for "abuse of

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[17] Plaintiffs mistakenly cite the standard of review applicable to questions concerning the "enforceability" of forum-selection and arbitration provisions (*Riley*, 969 F.2d at 956) when based on "matters of contract interpretation" (*Jones v. KP&H LLC*, 288 F. App'x 464, 467 (10th Cir. 2008) (unpublished)). But plaintiffs are challenging the manner in which the district court determined the existence of the forum-selection and arbitration agreements in the first place, not whether those agreements are enforceable.

discretion." *Witte v. Sloan*, 250 F. App'x 250, 255 (10th Cir. 2007) (unpublished). And "the district court's rulings concerning" "pre-arbitration discovery" are reviewed "for an abuse of discretion" as well. *Simula, Inc. v. Autoliv, Inc.* 175 F.3d 716, 726 (9th Cir. 1999).

B. Plaintiffs Had The Burden Of Raising A Genuine Issue Of Material Fact In The District Court.

Plaintiffs' discussion of the applicable burdens of proof is similarly incomplete and incorrect. Specifically, plaintiffs suggest that AT&T had the unqualified "burden of proof" below and that "[i]t is only after holding an evidentiary hearing" that the trial court may decide whether AT&T carried that burden. Br. 42-43. But the very authorities on which they rely explain that (i) defendants' burden was only to make a "prima facie showing that" plaintiffs accepted their contracts (*TradeComet.com LLC v. Google, Inc.*, 693 F. Supp. 2d 370, 378 (S.D.N.Y. Mar. 5, 2010), *aff'd*, 435 F. App'x 31 (2d Cir. 2011)); (ii) plaintiffs were then required to "offer[] . . . evidence to the contrary" to "overcome" that showing (*id.*); and (iii) an evidentiary hearing would be permissible, in the district court's discretion, only "to resolve material disputed facts" raised by that evidence (*Murphy*, 362 F.3d at 1139-40).[18]

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[18] Similarly, plaintiffs rely heavily (Br. 50-51) on the fact that a Utah district court held an evidentiary hearing in *Hugger-Mugger, L.L.C. v. Netsuite, Inc.*, 2005 WL 2206128 (D. Utah. Sept. 12, 2005). But that case undermines all of plaintiffs' arguments: It holds that (i) "[t]he burden lies with [plaintiff], the party challenging

The law in this Circuit is in accord with these principles. This Court has held that, while a plaintiff initially may show that venue is proper based "upon the well pled facts of his complaint," that showing remains adequate "only to the extent that such facts are uncontroverted by defendant's affidavit[s]." *Pierce v. Shorty Small's of Branson Inc.*, 137 F.3d 1190, 1192 (10th Cir. 1998); *accord* 5B WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1352 (3d ed. 2004) ("All well-pleaded allegations in the complaint bearing on the venue question generally are taken as true, unless contradicted by the defendant's affidavits."). Once venue allegations are "controverted" by affidavit (*Pierce*, 137 F.3d at 1192)—as they have been here—the plaintiff then must "present[] sufficient evidence to survive [the] Rule 12(b)(3) motion" and justify "an evidentiary hearing to resolve material disputed facts" (*Murphy*, 362 F.3d at 1140).

Similarly, "a party resisting arbitration cannot obtain a jury trial merely by demanding one; rather, he bears the burden of showing" (*Doctor's Assocs., Inc. v. Jabush*, 89 F.3d 109, 114 (2d Cir. 1996) (internal quotation marks omitted)) that there are "genuine issues of material fact regarding the parties' agreement" (*Avedon Eng'g*, 126 F.3d at 1283). To carry that burden, the party resisting arbitration must at a minimum submit "an unequivocal denial" that he or she

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the enforceability of a forum selection clause"; (ii) "[i]f the defendant provides evidence that controverts the allegations in the complaint, the plaintiff must produce admissible evidence to counter the defendant's evidence"; and (iii) only if that "evidence raises a genuine dispute of material fact" may the court "hold[] an evidentiary hearing." *Id.* at *3-*4.

accepted the arbitration agreement "and some evidence . . . to substantiate the denial." *Jabush*, 89 F.3d at 114 (internal quotation marks omitted). If the district court is "able to resolve [contract formation] on the pleadings and other materials before it . . . no jury or bench trial [i]s necessary." *Hardin v. First Case Fin. Servs., Inc.*, 465 F.3d 470, 475 (10th Cir. 2006).

The district court followed this framework to the letter. (X:2070 n.14, 2075-76 & n.24, 2094-95 n.11, 2120 n.14, 2133).

C. Plaintiffs Failed To Carry Their Burden.

The substantial customer-specific and custom-and-practice evidence submitted by AT&T (*see* pages 8-11, *supra*) is more than enough to carry the initial burden of demonstrating that plaintiffs agreed to the TV/Voice and Internet terms. Indeed, in plaintiffs' leading case, the district court held that Google carried the same burden by "offer[ing] testimony and screenshots . . . to support its contention that [the plaintiff] accepted [an] Agreement and that it had to click through the text of that agreement to do so"—and that the plaintiff did "not overcome Google's prima face showing" because it "neither denie[d] that its representatives agreed to the user agreement . . . nor offer[ed] any evidence to the contrary." *TradeComet.com*, 693 F. Supp. 2d at 377-78, *aff'd*, 435 F. App'x at 33-34 ("as the district court found, [the plaintiff] did not submit any evidence to the contrary," and its "belated demand for an evidentiary hearing is therefore misplaced"); *see also* Br. 43 (citing *TradeComet.com*).

The same holds true here. Plaintiffs submitted absolutely no evidence to dispute that Mutzig, Bollinger, or Cross accepted both sets of terms when the technician installed their service. Instead, they relied only on the bald speculations of their counsel in briefs below, which the district court properly rejected (X:2070, 2119-20). *See, e.g.*, *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664 (10th Cir. 1998) ("bald assertions in briefs that there are genuine issues of material fact are insufficient to merit reversal of summary judgment"); *Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022, 1024 (10th Cir. 1992) ("the nonmovant must do more than refer to allegations of counsel contained in a brief" to create a "genuine issue" of "material fact" for summary judgment).

Perhaps recognizing this fatal omission, plaintiffs belatedly moved in the district court to supplement the record with a declaration from Hancock. But that declaration did not dispute AT&T's showing that Hancock had agreed to the respective terms of Internet and TV/Voice services when those services were ***installed***. Instead of addressing what happened when the technician installed his services, Hancock stated: "I did not 'click on' ANY acceptance of U-Verse 'Terms of Service' ***when I bought*** U-verse, and the ***salesman*** never told me about any 'Terms of Service.'" (IX:1802) (emphasis added).[19] Hancock's reference to

[19] Hancock also professed that he was unaware of the terms. *Id.* ¶ 2. Such allegations, though, are insufficient as a matter of law to create a genuine issue of material fact. *See, e.g.*, *Adams*, 888 F.2d at 700-01 (rejecting as a matter of law

the salesman previously identified in the complaint, rather than the technician, was no accident. (*See* I:34) ("Plaintiff Hancock purchased . . . AT&T's U-verse . . . following solicitation by a door-to-door salesman peddling U-verse."). It was intended to support plaintiffs' (meritless) position in the district court that the U-verse ***order form*** filled in by the salesman represented the only relevant contract, and that nothing that occurred during installation could supersede the order form. *See* page 11, *supra*.

As the district court properly held, however, Hancock failed to "specifically den[y]" or "present any evidence that conflicts with [AT&T's] recitation of the standard installation procedure," because "even if the 'salesman'" did not present him with the terms at the time that he ordered service, AT&T's evidence established that Hancock accepted the terms "on the premises technician's laptop" during the installation of his service. (X:2133-35 & n.15). Indeed, Hancock did not even mention the technician or the installation of his service in his affidavit, and not even the most strained inference in his favor could be made otherwise.

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plaintiffs' argument that they were not "aware of the arbitration provision," because under Oklahoma law "'[i]t is generally presumed that one who executes an instrument has read it and understands its contents'") (quoting district court holding); *Rivero v. Rivero*, 963 So. 2d 934, 938 (Fla. Dist. Ct. App. 2007) (party cannot avoid contract by alleging that she "misunderstood" its terms); 27 WILLISTON ON CONTRACTS § 70:113 (4th ed. 2003) ("One who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them" and "cannot then deny the contractual obligations" by asserting unawareness of the terms).

His "conclusory and self-serving affidavit" (X:2133) is thus woefully insufficient to create a genuine issue of material fact concerning his acceptance of the U-verse terms when his service was installed. *See, e.g.*, *Valley Forge Ins. Co. v. Health Care Mgmt. Partners, Ltd.*, 616 F.3d 1086, 1095 n.2 (10th Cir. 2010) ("a 'conclusory and self-serving' affidavit is insufficient to create a factual dispute"); *Hall v. Bellmon*, 935 F.2d 1106, 1111 (10th Cir. 1991) ("Affidavits or other evidence offered by a nonmovant must create a genuine issue for trial; viewing the evidence in the light most favorable to the nonmovant, it is not enough that the evidence be 'merely colorable' or anything short of 'significantly probative.'").

This Court reached a similar conclusion in *Adams*, holding that the plaintiffs in that case had "failed to meet their burden" of "demonstrat[ing] error" in the district court's conclusion that there was no material factual dispute concerning their acceptance of arbitration agreements when (1) only one of the plaintiffs submitted an affidavit denying that she executed a contract containing an arbitration agreement and (2) that plaintiff was "silent concerning the issue of whether or not [she] executed" at the same time a separate contract containing an arbitration agreement. 888 F.2d at 699-700.

D. Plaintiffs Again Manifested Assent To Their Contracts By Continuing To Receive Internet And TV/Voice Services.

Even if plaintiffs had raised a genuine dispute as to whether they accepted the TV/Voice and Internet terms at the time that service was installed, plaintiffs are

bound by those terms because of their "subsequent conduct" in continuing to accept U-verse service. (*See* V:730-731; *see also* X:2106, 2134).

"Oklahoma follows traditional contract principles in permitting acceptance of an offer by performance." *Hardin*, 465 F.3d at 476. Florida law does as well. *See, e.g.*, *Colony Ins. Co. v. G&E Tires & Serv., Inc.*, 777 So. 2d 1034, 1039 (Fla. Dist. Ct. App. 2000) (citing RESTATEMENT (SECOND) OF CONTRACTS § 69 (1981)). Under those principles, a customer who claimed never to have received a hard copy of an agreement "could not accept services he knew were being tendered on the basis of [such] agreement without becoming bound by that agreement." *Schwartz v. Comcast Corp.*, 256 F. App'x 515, 518 (3d Cir. 2007) (unpublished).[20] Accordingly, both Oklahoma and Florida law provide that "[a] voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it so far as the facts are known, or ought to be known to the person accepting." Okla. Stat. tit. 15 § 75; *see also Colony Ins.*, 777 So. 2d at 1039 ("acceptance of the" service "manifested acceptance of the terms on which" that service "was tendered"); *Stevenson v. Stevenson*, 661 So. 2d 367, 369 (Fla.

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[20] *See also Register.com*, 356 F.3d at 403 ("It is standard contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms, which accordingly become binding on the offeree."); RESTATEMENT (SECOND) OF CONTRACTS § 69 ("silence and inaction operate as an acceptance" of a contract "[w]here an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation").

Dist. Ct. App. 1995) ("by accepting benefits pursuant to contract a party is estopped from questioning the validity and effect of the contract") (citing *Scocozzo v. Gen. Dev. Corp.*, 191 So. 2d 572, 579 (Fla. Dist. Ct. App. 1966)).

There is no question that plaintiffs either knew or should have known about the U-verse terms. Plaintiffs say that they had a "reasonable belief that signing up for U-verse did not bind them to a contract" at all (Br. 7) because they interpreted the phrase "no contract ***term***" in the U-verse marketing materials, and the fact that the order form itself was not a contract, to mean that there was no contract altogether (VII:1378-79, 1380, 1401-03, 1406) (emphasis added)—as opposed to no commitment to maintain service for a given time period. But whatever the truth of this unsupported assertion—and "[e]ven resolving all doubts and inferences in [plaintiffs'] favor"—"it is impossible to infer that a reasonable adult in [plaintiffs'] position would believe that" AT&T was offering to provide television, voice, and Internet service without any contract. *Schwartz*, 256 F. App'x at 519-20; *see also* X:2067 n.10, 2076-77 n.26, 2095 n.13, 2116 n.10, 2130 n.9.[21] Rather, the undisputed evidence shows that AT&T offers those services "under the terms of its [s]ubscriber [a]greement[s], and [that plaintiffs] accepted the service[s], so the terms of the contract[s] are provided by the [s]ubscriber [a]greements." *Schwartz*, 256 F. App'x at 519-20.

[21] Indeed, this assertion contradicts the arguments made by plaintiffs in the district court that "the contract relevant to this case was the contract purchasing U-verse" in the first place. *See* page 11, *supra*.

E. Plaintiffs' Contention That The District Court Afforded Undue Weight To AT&T's Evidence Is Meritless.

Plaintiffs also raise a handful of challenges to the declarations submitted by AT&T, which they contend were given undue weight by the district court. While these challenges are beside the point given plaintiffs' failure to submit rebuttal evidence, they are in any event without merit.

First, plaintiffs erroneously contend that the declarations fail for lack of personal knowledge. Br. 44-45. But each of the declarants expressly stated that his declaration was based on personal knowledge of the facts contained within the declaration. (V:729, 878; VI:995). That representation is unimpeachable: Each of the declarants is employed in a capacity in which he has personal knowledge of the business processes and policies in question, and each has personal access to the records that he authenticated.

Plaintiffs object that the company that employs the declarants (AT&T Operations) is a different corporate entity from the regional AT&T affiliates that carry out the installations—as if closely affiliated entities within the same corporate family (*see* pages 5-7, *supra*) are akin to the completely "separate organization[s]" at issue in the Tennessee case that they cite. Br. 45. But that assumption is disproven by the declarations themselves, which confirm that the declarants have personal access to the plaintiffs' contractual documents and direct involvement in the procedures that guide the technicians. *See* pages 8-10, *supra*.

Plaintiffs' citation to *Trujillo v. Apple Computer, Inc.*, 578 F. Supp. 2d 979 (N.D. Ill. 2008) only underscores their logical fallacy. In *Trujillo*, an in-house lawyer with AT&T Mobility LLC—a wireless services provider that is not involved in this case—submitted a declaration describing the contracting process for first-generation iPhones, which turned out to be incorrect as applied to the Apple store from which the plaintiff had bought his phone. But unlike AT&T and Apple—which are completely separate companies with no common ownership—the entities involved here are corporate affiliates within the AT&T family of companies, and the declarants have attested to highly specific knowledge of the practices of the regional installers. *See* pages 5-6, 8-10, *supra*. As AT&T's evidence demonstrated, AT&T Operations "is the entity ultimately responsible for AT&T U-verse." (VI:1051).

In any event, AT&T's evidence of the "routine practice of an organization" is not only admissible and proper—as Federal Rule of Evidence 406 establishes—it "is particularly persuasive in the business context because of the profit-driven need for regularity." 2 WEINSTEIN'S FEDERAL EVIDENCE § 406.03[1] (1997).[22]

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[22] *Accord, e.g.*, 1 KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 195 (6th ed. 2006) (courts generally accept "evidence of the 'custom' of a business organization," in part because "the need for regularity in business and the organizational sanctions which may exist when employees deviate from the established procedures give extra guarantees that the questioned activity followed the usual custom"); 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 4:48 (3d ed. Supp. 2008) (Evidence of "organizational

Accordingly, federal courts consistently have held that evidence of procedures under which a given customer would accept contract terms, without which he or she "would have been unable to obtain" a service, suffices to prove that a particular customer agreed to those terms. *Edwards v. Blockbuster Inc.*, 400 F. Supp. 2d 1305, 1308 (E.D. Okla. 2005); *TradeComet.com*, 693 F. Supp. 2d at 377-78 (customer's acceptance of agreement with forum-selection clause was established by "testimony and screenshots showing" that customer "had to click through the text of [the] agreement to" accept the terms). As the Third Circuit explained in similar circumstances, "Comcast's evidence of its policy to provide the Subscriber Agreement to new customers was relevant to show that [the customer] did in fact receive a copy," because "under state and federal rules, evidence of the policy does constitute proof of actual notice to" the customer. *Schwartz*, 256 F. App'x at 518-19.[23] Similarly, a plaintiff's denial that he received or reviewed an agreement "is

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routine" is "reliab[le]" because "responsible people perform their tasks to earn a living, and they do similar things over and again. Where the organization is a private business, efficiencies encouraged by competitive pressure enhance the reliability of such proof.").

[23] *See also, e.g.*, *JPMorgan Chase Bank, N.A. v. Lott*, 2007 WL 30271, at *3-*4 (S.D. Miss. Jan. 3, 2007) (finding that contract was proved by affidavit reciting car dealer's practice of requiring "every customer purchasing a vehicle" to sign agreement); *Aliaga v. Cont'l Ins. Co.*, 2006 WL 3290099, at *6-*7 (D.N.J. Nov. 13, 2006) (relying on statement in affidavit that "it was the custom and practice" of the company "to send a copy of" the document to customers as proof that the company "furnished a copy of" the document to the plaintiff); *Salemo v. E*Trade Secs., LLC*, 2005 WL 6124833, at *2-*3 & n.3 (E.D. Cal. May 9, 2005) (holding that company had proven that incorporated terms were sent to customer by

not enough to overcome the presumption" that the technician provided it, when that presumption is established by an employee's declaration concerning routine business practices. *O'Quinn v. Comcast Corp.*, 2010 WL 4932665, at *3 (N.D. Ill. Nov. 29, 2010).

Moreover, the Federal Rules of Evidence expressly permit a "qualified witness" to testify regarding the records of "regularly conducted activity of a business" if—as here—it was "the regular practice of that activity" to make such a record. Fed. R. Evid. 803(6). Thus, the declarants' testimony about their review of regularly generated business records was admissible and competent proof of plaintiffs' agreements.

CONCLUSION

The Court should affirm the orders of the district court.

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submitting employee's declaration that company "policy and practice" was to mail a copy of the terms to each customer upon activation); *Blashka v. Greenway Capital Corp.*, 1995 WL 608284, at *2, *5 (S.D.N.Y. Oct. 17, 1995) (testimony that "regular business practice [is] not to permit trading in a customer's account unless and until the account application and agreement," including its arbitration provision, "have been approved" suffices to prove that the customer "either signed such an agreement or authorized someone else to sign on his behalf").

Respectfully submitted,

March 28, 2012

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C)

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached answering brief is:

☒ Proportionately spaced, has a typeface of 14 points or more and contains 10,362 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

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DATED: March 28, 2012

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 28th day of March 2012, I caused the foregoing brief to be electronically filed with the Clerk of the Court of the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users. I have caused the foregoing brief to be deposited with a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

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I hereby certify that no redactions were necessary; that the hard copies of this brief submitted to the clerk's office are exact copies of the ECF filing; and that the ECF submission was scanned for viruses with Symantec Norton 360 version 6.1.2.10, which was last updated on March 28, 2012. According to the program, the submission is free of viruses.

DATED: March 28, 2012

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Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RICHARD SHERMAN, individually and on behalf of similarly-situated persons, Plaintiff, v. AT&T INC., a Delaware corporation; AT&T TELEHOLDINGS, INC. d/b/a AT&T Midwest, a Delaware corporation; and SBC INTERNET SERVICES, INC. d/b/a AT&T Internet Services, a California corporation, Defendants.	)	11 C 5857 Judge Virginia M. Kendall

MEMORANDUM OPINION AND ORDER

Plaintiff Richard Sherman ("Sherman") filed suit against Defendants AT&T Inc., a Delaware corporation; AT&T Teleholdings Inc. d/b/a AT&T Midwest, a Delaware corporation; and SBC Internet Services Inc. d/b/a AT&T Internet Services, a California corporation (collectively, "AT&T").[1] The suit alleges breach of contract, violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ICLS 505/1, *et seq*, and alternatively, unjust enrichment. AT&T moves to compel arbitration of Sherman's claims and seeks a stay of proceedings in this Court pending the outcome of such arbitration. For the reasons set forth below, AT&T's Motion to Compel Arbitration is granted, and the current judicial proceedings are stayed pending the outcome of arbitration.

[1] AT&T Inc. was voluntarily dismissed without prejudice for lack of personal jurisdiction. (Doc. 20).

BACKGROUND

Sherman resides in Illinois and called AT&T on February 25, 2011, to speak with an AT&T salesperson to order residential internet service. (Doc. 1-1, Complaint ¶16). The internet plan was subject to AT&T's Internet and Conditions ("IT&C") presented on its website, which lists the pricing plans and states that "[o]ther conditions and restrictions apply." (Complaint, Ex. D). Sherman activated his internet service on March 3, 2011. (Doc. 15, Ex. 3, p. 5). To activate his internet service, he was required to complete an online registration process, during which he was asked to check a box labeled "I have read and agree to the AT&T Terms of Service, Acceptable Use Policy, AT&T and Yahoo Privacy Policies, Wi-Fi Terms of Service." On that same screen, "AT&T Terms of Service" linked to the AT&T Terms of Service ("Terms"). (Doc. 15, Ex. 3, p. 7). If Sherman did not check the box, he would not have been able to proceed with the activation process and never would have received service. (Doc. 15, Ex. 3, p. 2-3). The Terms include an arbitration provision that requires its parties to "arbitrate all disputes and claims" between them "based in whole or in part upon" the internet service, on an individual basis. (Doc. 15, Ex. 3, p. 21).

In May 2011, AT&T revised its Terms, and pursuant to the change-in-terms-provision, provided notice to its customers by sending them an email containing information about the revision, a link to the full text of the Terms and a reminder that "[b]y continuing to use the Service, you are agreeing" to the Terms. (Doc. 15, Ex. 3, p. 31-32). The revision changed the dispute resolution provision only by changing the mailing address to where customers could send notices of their disputes. (Doc. 15, Ex. 3, p. 50). On July 26, 2011, Sherman filed suit individually and while seeking to represent a class of similarly-situated persons, alleging that

AT&T systematically overcharged consumers for residential internet service by advertising promotional plans and yet billing customers at standard rates. (Doc. 1-1).

STANDARD OF REVIEW

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides that a written arbitration agreement contained within a commercial contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The FAA evidences a strong federal policy favoring arbitration and "mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985). Arbitration may be compelled by the Court pursuant to the FAA whenever there is a written arbitration agreement, a dispute falling with the agreement's scope, and a refusal by one of the parties to submit to arbitration. *See Zurich American Ins. Co. v. Watts Industries*, Inc., 417 F.3d 682, 687 (7th Cir. 2005). Recently, the Supreme Court reemphasized that Section 2 promotes arbitration so as to "facilitate streamlined proceedings." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1741 (2011). This "liberal federal policy favoring arbitration agreements" applies "notwithstanding any state substantive or procedural policies to the contrary." *Id.* at 1749 (quotations omitted).

DISCUSSION

The contract for internet service at issue here falls within the FAA because its arbitration agreement is "written" and in a contract "evidencing a transaction involving commerce." 9 U.S.C. § 2; *see Utah Lighthouse Ministry v. Found. for Apologetic Info. & Research*, 527 F.3d 1045, 1054 (10th Cir. 2008) ("the Internet is generally an instrumentality of interstate commerce"). Furthermore, the arbitration provision explicitly states that the contract "evidences

a transaction in interstate commerce, and thus the [FAA] governs the interpretation and enforcement of this provision." (Doc. 15, Ex. 3, p. 22). This Court may compel Sherman to arbitrate his dispute with AT&T and stay the current judicial proceedings, because there is a written arbitration agreement, their dispute falls with the agreement's scope, and Sherman refuses to submit to arbitration.

Nevertheless, Sherman argues that he never agreed to arbitrate his dispute because the contract he believes he formed when he ordered internet service is not subject to the Terms to which he agreed when he activated his service. Sherman additionally argues that even if the Terms are valid, they were not expressly incorporated by the IT&C and were unavailable at the time of contract formation, thereby rendering the Terms unconscionable under Illinois law. Finally, Sherman argues that the Terms lack mutuality and are therefore unenforceable under Illinois law.

I. AT&T's Terms Govern the Parties' Contract

Sherman argues that he formed a contract with AT&T on February 25, 2011, when he spoke with an AT&T representative to order internet service, and that the representative made no mention of an arbitration requirement. However, AT&T is not required to have its sales representative read the arbitration provision aloud to potential customers in order for them to be bound by it. *See, e.g., James v. McDonald's Corp.*, 417 F.3d 672, 678 (7th Cir. 2005) ("To require McDonald's cashiers to recite to each and every customer the fourteen pages of the Official Rules, and then have each customer sign an agreement to be bound by the rules, would be unreasonable and unworkable."). Vendors may enclose the full legal terms within their products rather than reciting them prior to purchase, for practical purposes:

> If the staff at the other end of the phone for direct-sales operations . . . had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten potential buyers. Others would hang up in a rage over the waste of their time. And oral recitation would not avoid customers' assertions (whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it. . . . Competent adults are bound by such agreements, read or unread.

Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1149 (7th Cir. 1997). Consequently, Sherman may be bound by the arbitration provision even if the sales representative did not read him the provision when executing his order.

Sherman also argues that his conversation with the AT&T representative constitutes the meeting of the minds of himself and AT&T, and because the on-screen IT&C neither mention arbitration nor incorporate the Terms explicitly by reference, he never agreed to arbitrate. However, the brief IT&C explicitly state that "other conditions and restrictions apply" to the pricing plans listed on-screen. (Doc. 1-1, Ex. D). Furthermore, Sherman was not billed when he placed his order on February 25, 2011, but rather, when he activated his internet service on March 3, 2011. As part of that activation process, he actively assented to the full terms and conditions when he clicked "I have read and agree to the AT&T Terms of Service [.]" (Doc. 15, Ex. 3, p. 7). The Seventh Circuit has repeatedly upheld such a process of informing a customer of the full terms and conditions of his contract after his initial order. *See Hill, supra* (under Illinois law, computer-purchaser who ordered a computer by phone was bound by the arbitration provision of the purchase contract contained in the computer box because he had an opportunity to return the computer after reading it); s*ee Boomer v. AT&T Corp.*, 309 F.3d 404, 415 (7th Cir. 2002) (under Illinois law, telephone service-customer who received AT&T's mailed notice of new terms—including a new arbitration provision—accepted those terms by continuing to use his AT&T telephone service rather than rejecting the terms); *see also ProCD, Inc. v. Zeidenberg*,

86 F.3d 1447 (7th Cir. 1996) (terms inside a box of software bind consumers who use the software after having an opportunity to read the terms and to reject them by returning the product); *see also Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (a forum-selection clause that was included among three pages of terms attached to a cruise ship ticket was enforceable). Therefore, Sherman's assent when he activated his service constituted acceptance of the Terms, regardless of whether he believes he participated in a "meeting of the minds" when he placed his order with an AT&T sales representative.

Next, Sherman argues that because he has presented a genuine issue of material fact as to whether he had sufficient notice of the Terms when he placed his order, the Court should proceed to a trial on the validity of the Terms. "[S]ignif[ying] agreement by clicking on a box on the screen" is "common in Internet commerce." *Treiber & Straub, Inc. v. UPS*, 474 F.3d 379, 382 (7th Cir. 2007). This type of assent is called clickwrap, in which a webpage user manifests his assent to the terms of a contract by actively clicking an "accept" button in order to proceed. *See Van Tassell v. United Mktg. Group*, LLC, 795 F. Supp. 2d 770, 790 (N.D. Ill. 2011) (describing various means of demonstrating contractual mutual assent on the internet). The clickwrap process of checking a box next to hyperlinked terms generally provides adequate notice. *See Treiber & Straub*, 474 F.3d at 385 (finding a clickwrap process to have "provided adequate notice" to customers when it required clicking assent, the terms repeated the disclaimer of liability several times and referred to the pertinent parts of the contract that was also available on the business's website); *see also DeJohn v. The .TV Corp. Int'l*, 245 F. Supp.2d 913, 919 (N.D. Ill. 2003) (finding internet contract terms enforceable when a webpage user had opportunity to click on hyperlinked terms and "failure to read a contract is not a get out of jail free card"). Here, notice would have come from Sherman's checking a box labeled "I have read

and agree to the AT&T Terms of Service"" where "AT&T Terms of Service" linked to the Terms. (Doc. 15, Ex. 3, p. 7). Sherman does not deny and cannot deny that he actively clicked that he accepted the hyperlinked Terms, because he would have been unable to proceed with the activation process and would never have received his internet service without clicking his assent. The Terms contain clear and reasonable language, in capital letters, that the customer and AT&T agree to waive the right to a trial by jury and to participate in a class action, (Doc. 15, Ex. 3, p.22), and repeat that this binding arbitration agreement affects the customer's rights (p. 21), in capital letters (p. 24). Sherman has not raised a genuine issue of material fact that the Terms do not provide reasonable notice. Consequently, Sherman had adequate notice of the Terms, to which he assented at the time of his activation of internet service.

II. AT&T's Arbitration Provision is Not Unconscionable

Sherman next claims that even if the Terms are valid, they were unavailable at the time of contract formation, and neither bargained for nor expressly incorporated by the IT&C. Relying on factors identified in *Razor v. Hyundai Motor America*, Sherman argues that these aspects of AT&T's process make the Terms procedurally unconscionable under Illinois law. 222 Ill.2d 75 (Ill. 2006). Procedural unconscionability refers to "a situation where a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it, and also takes into account a lack of bargaining power." *Id.* at 100. The facts already establish that Sherman had a full and fair opportunity to review the Terms prior to activating his service and before he had ever been billed for service. What's more, in May 2011, AT&T revised its Terms, and pursuant to its change-in-terms-provision (Doc. 15, Ex. 3, p. 9), provided notice to its customers by sending them an email containing information about the revision, a link to the full text of the Terms and a reminder that "[b]y continuing to use the

Service, you are agreeing" to the Terms. (Doc. 15, Ex. 3, ps. 31-32). The revision changed the dispute resolution provision only by changing the mailing address to where customers could send notices of their disputes. (Doc. 15, Ex. 3, p. 50). The revised Terms repeat thrice in bold capital letters on the front page that the customer should read the agreement carefully and that "paragraph 13 requires arbitration on an individual basis to resolve disputes, rather than jury trials or class actions." (Doc. 15, Ex. 3, p. 37). The Terms are not difficult to find, read or understand, and consequently AT&T's process is not procedurally unconscionable.

Further, it is irrelevant that the Terms were drawn up by AT&T without Sherman's input or bargaining, because even a "whole deal . . . offered on a take-it-or leave-it basis" does not constitute a contract of adhesion under Illinois law, since "few consumer contracts are negotiated one clause at a time." *Carbajal v. H&R Block Tax Servs.*, 372 F.3d 903, 906 (7th Cir. 2004). Finally, that the arbitration provision limits AT&T's class action liability does not diminish its enforceability. *See, e.g.*, *Concepcion*, 131 S. Ct. at 1744 ("the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures"). The Court finds that Sherman agreed to a contract with a change-in-terms-provision and subject to other conditions, was presented readily-accessible Terms prior to activation, and was granted a full and fair opportunity to abort his activation process and later to review the revisions. *Compare Kinkel v. Cingular Wireless, LLC*, 223 Ill.2d 1 (2006) (contract was not procedurally unconscionable because plaintiff-purchaser had terms in her possession and could have read them; however, contract was substantively unconscionable because it failed to provide a cost-effective mechanism for individual remedies in either a judicial or an arbitral forum). Consequently, AT&T's arbitration provision is not procedurally unconscionable.

III. AT&T's Arbitration Provision Does Not Lack Mutuality

Finally, Sherman argues that the Court should not enforce the arbitration provision because it only covers claims *against* AT&T and lacks mutuality under Illinois law. However, so long as Sherman received consideration for the arbitration agreement, Illinois courts will enforce AT&T's arbitration provision. *Bishop v. We Care Hair Dev. Corp.*, 738 N.E.2d 610, 622 (Ill. App. Ct. 2000) ("the proposition that an arbitration agreement is not mutually binding where one party reserves the option to raise and resolve the majority of disputes in a court rather than through arbitration . . . cannot be reconciled with Illinois law" because "mutuality of obligation is not essential if the requirement of consideration has been met"). Sherman does not dispute that he received consideration for the whole contract, but rather, that the arbitration agreement is an "independent contract" that requires independent consideration. Here, AT&T's Terms are not an "independent contract" because AT&T had offered Sherman—prior to his activation and billing—both internet service and advantageous arbitration terms, including AT&T's commitment to pay all arbitration filing, administration and arbitrator fees unless the claim is frivolous; and even if frivolous, so long as the claim is less than $10,000, Sherman's fee would be capped at $125. (Doc. 15, Ex. 3, p. 14). Thus, Sherman has received adequate consideration for AT&T's Terms, including its arbitration provision, as part of the broader agreement of the purchase order and IT&C's subject-to-change clause. *See Tortoriello v. Gerald Nissan of N. Aurora, Inc.*, 379 Ill. App. 3d 214, 238 (Ill. App. Ct. 2d Dist. 2008) ("where the promise to arbitrate is part of a clause within a larger contract" and is supported by consideration, "the arbitration clause does not suffer for lack of mutuality of obligation"); s*ee also Boomer*, 309 F.3d at 419 ("arbitration offers cost-saving benefits" that are "reflected in a lower cost of doing business that in competition are passed along to customers").

CONCLUSION AND ORDER

Sherman has failed to set forth facts to show that AT&T's arbitration provision is invalid, unconscionable or lacking mutuality. Consequently, AT&T's arbitration provision is enforceable, and the Court grants AT&T's Motion to Compel Arbitration. The current judicial proceedings are stayed pending the outcome of arbitration.

Virginia M. Kendall
United States District Court Judge
Northern District of Illinois

Date: March 26, 2012