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ARKANSAS COURT OF APPEALS

DIVISION II
No. CV-21-31

ALTICE USA, INC., D/B/A SUDDENLINK COMMUNICATIONS APPELLANT	Opinion Delivered March 1, 2023 APPEAL FROM THE CLARK COUNTY CIRCUIT COURT [NO. 10CV-20-94]
V.	HONORABLE C.A. BLAKE BATSON, JUDGE
TINA JOHNSON APPELLEE	REVERSED AND REMANDED

WENDY SCHOLTENS WOOD, Judge

The appellant, Altice USA, Inc., does business in Arkansas as Suddenlink Communications (Suddenlink). Suddenlink provides cable television, internet, and telephone services to subscribing customers throughout Arkansas. Appellee Tina Johnson filed a complaint in the Clark County Circuit Court alleging that she suffered significant service interruptions and unexplained charges at the hands of Suddenlink. The complaint principally claimed breach of contract and violations of the Arkansas Deceptive Trade Practices Act.

Suddenlink unsuccessfully moved to compel arbitration in circuit court, and pursuant to Arkansas Code Annotated section 16-108-228 (Repl. 2016) and Rule 2(a)(12) of the Arkansas

Rules of Appellate Procedure–Civil, it now takes this appeal. As we do in four other cases that we decide today on similar facts, we reverse and remand.[1]

I. *Factual Background*

Johnson subscribed to Suddenlink's phone, television, and internet services. On July 24, 2020, she filed a complaint alleging, inter alia, that she "has had consistent internet service problems and has experienced multiple internet outages." She further alleged that she "has never received a credit to her account for the days and hours that she was without internet, phone, or television service" and "has received bills with multiple, unexplained charges." On the basis of these and other factual allegations, Johnson claimed that she should be awarded damages because Suddenlink violated the Arkansas Deceptive Trade Practices Act and "breached its agreement with [her]" by failing to fulfill its promise "to provide reliable television, telephone, and internet services[.]"

Suddenlink moved to compel arbitration on August 31, 2020, arguing that the complaint should be dismissed because the parties had a valid agreement to settle their disputes through arbitration. The motion alleged that Johnson "began contracting with Suddenlink for broadband telephone, internet, and cable services in or around July 2014," and according to Suddenlink's standard practice at the time, agreed to be bound by the Residential Services Agreement (RSA), which contained a provision for binding arbitration. Suddenlink also argued that Johnson "received a monthly billing statement for her Suddenlink services," and "the

[1]*See Altice USA, Inc. v. Peterson*, 2023 Ark. App. 116; *Altice USA, Inc. v. Francis*, 2023 Ark. App. 117; *Altice USA, Inc. v. Campbell*, 2023 Ark. App. 123; *Altice USA, Inc. v. Runyan*, 2023 Ark. App. 124.

statements make clear that [p]ayment of your bill confirms your acceptance of the [RSA], viewable at suddenlink.com/terms-policy." "Once on the website," Suddenlink said, "customers may view Suddenlink's terms and conditions and the [RSA], which also include a mandatory, binding arbitration provision, as well as instructions for opting out of the provision if the customer wishes." Suddenlink added that Johnson also received emails confirming various changes to her Suddenlink services, and those emails also directed her to the company's website and the RSA.

Attached to the motion was an affidavit from David Coutts, an operations manager for Altice USA, who was "familiar with Suddenlink's standard practices for the installation of services for residential customers." According to Coutts, "it was Suddenlink's standard practice and procedure to require that customers sign Suddenlink's [RSA] at the time of installation[.]" Daniel Fitzgibbon, a vice president in Altice USA's legal department, also testified via affidavit that the RSA "details the terms of Suddenlink's residential services, including a statement in paragraph 1 that by accepting, installing, or ordering Suddenlink's services, customers agree to be bound by the terms of the [RSA]." Fitzgibbon further testified that the 2014 version of the RSA contained an arbitration provision.

In addition to those affidavits, Suddenlink offered proof that Johnson paid for her phone, television, and internet service between May 2019 and August 2020. Each invoice provided, just below the "Total Amount Due" for that billing period, that "payment of [Johnson's] bill confirms [her] acceptance of the Residential Services Agreement, viewable at suddenlink.com." At that time, paragraph 24 of the RSA provided, in pertinent part, as follows:

Binding Arbitration. **Please read this section carefully. It affects your rights**.

Any and all disputes arising between You and Suddenlink, including its respective parents, subsidiaries, affiliates, officers, directors, employees, agents, predecessors, and successors, shall be resolved by binding arbitration on an individual basis in accordance with this arbitration provision. This agreement to arbitrate is intended to be broadly interpreted. It includes, but is not limited to:

- Claims that arose before this or any prior Agreement,

- Claims that may arise after the termination of this Agreement.

Notwithstanding the foregoing, either You or Suddenlink may bring claims in small claims court in Your jurisdiction, if that court has jurisdiction over the parties and the action and the claim complies with prohibitions on class, representative, and private attorney general proceedings and non-individualized relief discussed below. You may also bring issues to the attention of federal, state, or local administrative agencies.

Resolving Your dispute with Suddenlink through arbitration means You will have a fair hearing before a neutral arbitrator instead of in a court before a judge or jury. **YOU AGREE THAT BY ENTERING INTO THIS AGREEMENT, YOU AND SUDDENLINK EACH WAIVE THE RIGHT TO A TRIAL BY JURY AND THE RIGHT TO PARTICIPATE IN A CLASS, REPRESENTATIVE, OR PRIVATE ATTORNEY GENERAL ACTION.**

a. Opting Out of Arbitration. **IF YOU HAVE BEEN AN EXISTING CUSTOMER FOR AT LEAST 30 DAYS BEFORE THE EFFECTIVE DATE OF THIS AGREEMENT AND HAVE PREVIOUSLY ENTERED INTO AN ARBITRATION AGREEMENT WITH SUDDENLINK OR A PREDECESSOR COMPANY, THIS OPT-OUT PROVISION DOES NOT APPLY TO YOU. IF YOU BECAME A CUSTOMER ON OR WITHIN 30 DAYS OF THE EFFECTIVE DATE OF THIS AGREEMENT, AND DO NOT WISH TO BE BOUND BY THIS ARBITRATION PROVISION, YOU MUST NOTIFY SUDDENLINK IN WRITING WITHIN 30 DAYS OF THE EFFECTIVE DATE OF THIS AGREEMENT BY EMAILING US AT NOARBITRATION@ALTICEUSA.COM OR BY MAIL TO ALTICE SHARED SERVICES, 200 JERICHO QUADRANGLE, JERICHO, NY 11753 ATTN. ARBITRATION. YOUR WRITTEN NOTIFICATION TO SUDDENLINK MUST INCLUDE YOUR NAME, ADDRESS, AND SUDDENLINK ACCOUNT NUMBER AS WELL AS A CLEAR STATEMENT THAT YOU DO NOT WISH TO RESOLVE DISPUTES WITH SUDDENLINK THROUGH ARBITRATION, YOUR DECISION TO OPT OUT OF THIS ARBITRATION PROVISION WILL HAVE NO ADVERSE EFFECT ON YOUR RELATIONSHIP WITH SUDDENLINK OR THE DELIVERY OF SUDDENLINK SERVICES TO YOU. OPTING OUT OF THIS ARBITRATION PROVISION HAS NO EFFECT ON ANY OTHER OR FUTURE ARBITRATION AGREEMENTS THAT YOU MAY HAVE WITH SUDDENLINK.**

Johnson responded to the motion to compel arbitration on September 4, 2020, declaring that she "never agreed to arbitrate anything with Suddenlink." She maintained that Suddenlink regularly represented that theirs was a "no contract" arrangement, and "[h]er only agreement with Suddenlink was that if she paid for the services, Suddenlink would properly provide them." Johnson further asserted that "Suddenlink fails to demonstrate the most important element needed for demonstrating an agreement to arbitrate—a written contract between the parties." In fact, "despite Suddenlink's claim about a company policy, it has not produced *any document* that was allegedly signed by Johnson." (Emphasis in the original.) Johnson also insisted that the RSA and the monthly invoices were not contracts themselves, but even if they were, the invoices' reference to Suddenlink's website did not clearly and unequivocally incorporate the terms of the RSA. Johnson attached an affidavit to her response in which she testified that she had "never received any contract or agreement from Suddenlink," and had "never seen any contract or agreement for Suddenlink services."

The circuit court entered an order denying Suddenlink's motion to compel arbitration on November 12, 2020. The circuit court made three findings in support of its ruling. First, the court found that Suddenlink "failed to produce evidence of a written contract between [Johnson] and [Suddenlink] that binds [Johnson] to arbitration." Second, the circuit court observed that Suddenlink "failed to produce evidence that [Johnson] signed or assented to a contract or agreement with [Suddenlink] that binds [her] to arbitration." Third, the court found that

> [t]here is no proof that [Johnson] received any document that [Suddenlink] asserts is a contract that binds [her] to arbitration. The Residential Services Agreement referenced on a bill that recites [Suddenlink's] terms of service is not a contract. It lacks mutuality of both agreement and obligations.

Suddenlink now appeals this order, arguing that Johnson manifested her agreement to the arbitration provision when she paid monthly invoices referring her to the RSA on its website. We agree.

II. *Standards of Review*

"Arkansas strongly favors arbitration as a matter of public policy" as "a less expensive and more expeditious means of settling litigation and relieving docket congestion." *Jorja Trading, Inc. v. Willis*, 2020 Ark. 133, at 2, 598 S.W.3d 1, 4. We review denials of motions to compel arbitration "de novo on the record." *Id.* at 3, 598 S.W.3d at 4. That generally means that this court "is not bound by the circuit court's decision, but in the absence of a showing that the circuit court erred in its interpretation of the law, this court will accept its decision as correct on appeal." *Erwin-Keith, Inc. v. Stewart*, 2018 Ark. App. 147, at 9, 546 S.W.3d 508, 512.

Arbitration agreements are governed by the Federal Arbitration Act (FAA), which makes them "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Jorja Trading*, 2020 Ark. 133, at 3, 598 S.W.3d at 4 (quoting 9 U.S.C. § 3). "The primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms," and "any doubts and ambiguities will be resolved in favor of arbitration." *Id.* (internal citations and quotation marks omitted).

In deciding whether to grant a motion to compel arbitration, two threshold questions must be answered. *Courtyard Gardens Health & Rehab., LLC v. Arnold*, 2016 Ark. 62, at 7, 485 S.W.3d 669, 674. The first question is whether there is a valid agreement between the parties.

Id. If such an agreement exists, the second question is whether disputes fall within the scope of the agreement. *Id.*

"When deciding whether the parties agreed to arbitrate a certain matter, ordinary state-law principles governing contract formation apply." *Id.* at 3, 598 S.W.3d at 4–5. "In Arkansas, the essential elements of a contract are: (1) competent parties; (2) subject matter; (3) consideration; (4) mutual agreement; and (5) mutual obligations." *Id.* at 4, 598 S.W.3d at 5. In the case at bar, Suddenlink contends that the circuit court erred by finding that Suddenlink could not invoke the binding arbitration clause in the RSA because it failed to (1) demonstrate that Suddenlink and Johnson mutually agreed to arbitration; (2) produce evidence of a written arbitration agreement; and (3) demonstrate that the RSA is supported by mutuality of obligation.

III. *Discussion*

A. Mutual Agreement

Suddenlink first argues that the circuit court erred by ruling that the arbitration provision was not supported by mutual agreement. It says that she manifested her agreement to the terms and conditions in the RSA, including the arbitration provision, when she paid the monthly invoices directing her to the RSA on Suddenlink's website. We agree.

"[I]t is well settled that in order to make a contract there must be a meeting of the minds as to all terms[.]" *Alltel Corp. v. Sumner*, 360 Ark. 573, 576, 203 S.W.3d 77, 80 (2005). That is, "both parties must manifest assent to the particular terms of the contract." *Id.* A party's manifestation of assent to a contract is judged objectively and may be proved by circumstantial

evidence." *Childs v. Adams*, 322 Ark. 424, 433, 909 S.W.2d 641, 645 (1995) (internal citation omitted).

In particular, "a party's manifestation of assent to a contract may be made wholly by spoken words or by conduct." *Id.* "[P]arties may become bound by the terms of the contract even if they do not sign it," in other words, "if their assent is otherwise indicated, such as by the acceptance of benefits under the contract or by the acceptance of the other's performance." *Asbury Auto. Grp., Inc. v. McCain*, 2013 Ark. App. 338, at 6. For a party to assent to a contract, however, "the terms of the contract, including an arbitration agreement, must be effectively communicated." *Erwin-Keith*, 2018 Ark. App. 147, at 10.

The parties agree that Johnson subscribes to Suddenlink services on a "no annual contract" month-to-month basis in which she prepays for the services that Suddenlink offers on the invoice. Her payment and acceptance of Suddenlink's services manifest her agreement to the offer set forth in the invoice.

The question here is whether Johnson's acceptance of Suddenlink's offer also manifested her assent to the terms and conditions of service that are set forth in the RSA, including the arbitration provision. The answer to that question depends on whether the reference to Suddenlink's website effectively communicated those terms.

We believe that it did. While this appears to be an issue of first impression in Arkansas, we find a recent decision from the United States District Court for the Eastern District of California (also involving Suddenlink) to be particularly persuasive. In *Lopez v. Cequel Communications, LLC*, No. 2:20-cv-02242-TLN-JDP, 2021 WL 5112982 (E.D. Cal. Nov. 3, 2021),

the district court granted Suddenlink's motion to compel arbitration because, among other things, the subscriber's "monthly billing statements for [Suddenlink's] services . . . referenced the RSA, stating that payment of the bill 'confirms [the subscriber's] acceptance of the Residential Services Agreement, viewable at suddenlink.com/terms-policy.'" *Id.* at *3. According to the district court, "[t]he billing statements alone arguably [were] enough to put [the subscriber] on inquiry notice of the terms of the RSA, including the arbitration provision." *Id.* at *4.

Lopez is in accord with *Schwartz v. Comcast Corp.*, 256 Fed. App'x 515 (3d Cir. 2007). There, Schwartz sued Comcast in the United States District Court for the Eastern District of Pennsylvania, alleging that the internet provider breached its contract with him by failing to provide high-speed internet services as promised. *Id.* at 516. Comcast filed a motion to compel arbitration, and Schwartz responded that the motion should be denied because, among other reasons, "there was no arbitration agreement." *Id.* at 517. The district court denied Comcast's motion, finding that "Comcast had failed to establish a valid agreement to arbitrate." *Id.*

The Third Circuit reversed. The court was not persuaded by Schwartz's claim that he never received a copy of Comcast's subscriber agreement and therefore could not be bound by its arbitration provision. In addition to noting that Comcast came forward with evidence of its routine practice to provide the agreement at the time of installation, the Third Circuit also observed that "the terms of the subscriber agreement were available to Schwartz at all times because the agreement was posted on Comcast's website," and under Pennsylvania law, "failure to read a contract does not excuse a party from being bound by its terms." *Id.* at 520.

Here, Suddenlink offered copies of the invoices that Johnson paid, along with her payment history. She did not deny paying the invoices. The reference to the RSA and the web address where it may be found appeared directly below the "total amount due" on the invoices she received from Suddenlink prior to September 2019. Later versions of the invoice included a revised format that placed the reference to the RSA and web address in a separate section entitled "payment information" that appeared below an "account details" section that itemized the monthly charges and the total amount due. The proof before the circuit court also indicated that the RSA was available for viewing on the company's website.

Moreover, in boldface lettering, the first page of the RSA warned Johnson that "this agreement contains a binding arbitration agreement that affects [her] rights, including the waiver of class actions and jury trials," and "also contains provisions for opting out of arbitration." The RSA further advised her to "please review [the arbitration agreement] carefully." The arbitration provision itself was also highlighted with boldface lettering advising subscribers to "please read this section carefully" because "it affects [their] rights." That Johnson apparently did not read the RSA before paying her bills, moreover, does not excuse her from the obligations it imposes, including arbitration. *See Lee v. Lee*, 35 Ark. App. 192, 196, 816 S.W.2d 625, 628 (1991). For these reasons, we agree that Johnson manifested her assent to the terms of the RSA—including its arbitration provision—when she paid her monthly invoices.

Johnson responds that we should still affirm the circuit court's finding that mutual agreement was lacking. The invoices, she argues, were not competent evidence of assent because they were not included among the documents that the RSA's merger clause declared to be the "entire agreement" between Suddenlink and the subscriber. We do not agree.

"A merger clause in a contract, which extinguishes all prior and contemporaneous negotiations, understandings, and verbal agreements, is simply an affirmation of the parol-evidence rule." *Aceva Techs., LLC v. Tyson Foods, Inc.*, 2013 Ark. App. 495, at 10, 429 S.W.3d 355, 363. The parol-evidence rule, moreover, is a substantive rule that "prohibits introduction of extrinsic evidence, parol or otherwise, which is offered to vary the terms of a written agreement." *Shriners Hosps. for Children v. First United Methodist Church of Ozark*, 2016 Ark. App. 103, at 4, 483 S.W.3d 825, 827.

Suddenlink did not offer the invoices and payment records to vary the terms of the RSA but to show that Johnson assented to them in the first instance. For that reason, we reject Johnson's argument based on the RSA's merger clause, and we reverse the circuit court's finding that the arbitration clause lacked mutual agreement.

B. Written Agreement

Suddenlink further asserts that the circuit court erred to the extent it denied the motion to compel arbitration because there was no evidence of a written agreement, as required by the FAA. We agree.

To be sure, the FAA provides that arbitration agreements must be in writing to be enforceable. *See* 9 U.S.C. § 2; *see also Asbury*, 2013 Ark. App. 338, at 5 ("The FAA . . . require[s] the agreement to be written"). The Uniform Electronic Records Transactions Act, however, provides that "a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation." Ark. Code Ann. § 25-32-107(b) (Repl. 2014). It also provides that "[if] a law requires a record to be in writing, an electronic record satisfies the law." Ark. Code Ann. § 25-32-107(c). The RSA, as it appears on Suddenlink's website, is an

"electronic record" within the meaning of the act because it is "a record . . . stored by electronic means." *See* Ark. Code Ann. § 25-32-102(7) (Repl. 2014). Accordingly, we hold that the RSA was a written agreement in compliance with the FAA.

Johnson nonetheless urges us to affirm the order denying the motion to compel arbitration because the RSA—even if it meets the requirements of the FAA—remains an unsigned writing in violation of our statute of frauds. The statute of frauds was amended in 2017 to provide as follows:

> Unless the agreement, promise, or contract or some memorandum or note thereof, upon which an action is brought is made in writing and signed by the party to be charged therewith, or signed by some other person properly authorized by the person sought to be charged, no action shall be brought to charge any:
>
> Person upon a contract, promise, or agreement that results in a waiver of a right protected by the Arkansas Constitution, or the United States Constitution.

Arkansas Code Annotated § 4-59-101(a)(7) (Supp. 2021). Johnson maintains that the statute of frauds renders the arbitration clause unenforceable here because she never signed the RSA or the arbitration provision, which calls for her to waive her right to a jury trial.

While the statute of frauds does require a signature on any agreement calling for a waiver of a constitutional right, we cannot agree that it renders the arbitration provision unenforceable in this case. "The purpose of the statute of frauds," after all, "is to prevent actions based on false claims, not to prevent enforcement of otherwise legitimate transactions." *Dunn v. Womack*, 2011 Ark. App. 393, at 5, 383 S.W.3d 893, 898. Therefore, an agreement that falls within the statute of frauds "can be taken out . . . if the making of the . . . contract and its performance are proven by clear and convincing evidence." *Id.* We believe that the evidence that Johnson paid her bills in exchange for the services that Suddenlink provided, which we discuss above, meets this

threshold. Consequently, we reject Johnson's argument that the statute of frauds prevents enforcement of the arbitration provision, and we agree with Suddenlink that the circuit court erred when it determined that the RSA failed to meet the writing requirement of the FAA.[2]

C. Mutuality of Obligation

In the proceedings in the circuit court, Johnson argued that, notwithstanding her agreement (or not) to arbitrate, the provision was nonetheless unenforceable because it lacks mutuality of obligation. She asserted that the lack of mutuality manifested in both the RSA as a whole and in the arbitration provision itself.

Regarding the RSA as a whole, Johnson claimed that it lacks mutuality in two ways. First, among other terms, the RSA provides that "Suddenlink may, in its sole discretion, change modify, add, or remove portions of this agreement at any time" after providing notice to the subscriber. According to Johnson, Suddenlink's reservation of the right to change the agreement unilaterally and at any time has not really promised anything at all and should not be permitted to bind her to the terms in the RSA. Second, she suggested that the terms of the RSA fail to provide basic pricing information and binds only subscribers to a laundry list of terms, including early termination fees, limitations on Suddenlink's liability, limitations on refunds, etc. As we indicate above, the circuit court agreed that the RSA lacked mutuality of obligation.

"Mutuality of obligations means an obligation must rest on each party to do or permit to be done something in consideration of the act or promise of the other; thus, neither party is

[2]Johnson also asserts she cannot be taken to have agreed to arbitration when Suddenlink told her that it required "no contract" for its services. We find no merit to this argument for the simple reason that Johnson's breach-of-contract claim affirms that Suddenlink delivered its services under contract.

bound unless both are bound." *Jorja Trading*, 2020 Ark. 133, at 4, 598 S.W.3d at 5 (internal quotation marks omitted). "It requires that the terms of the agreement impose real liability upon both parties." *Id.* "[A] contract that provides one party the option not to perform his promise would not be binding on the other." *Id.*

We agree that the circuit court erred to the extent that it denied Suddenlink's motion on the basis that the RSA as a whole lacked mutuality of obligation. "As a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006). Additionally, "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Id.* at 445–46. Johnson's challenges to mutuality of obligation in the RSA, which went to the validity of the agreement as a whole, were outside the scope of the circuit court's review and, therefore, could not serve as a basis to deny the motion compelling arbitration.

Our supreme court's decision in *Advance America Servicing of Arkansas, Inc. v. McGinnis*, 375 Ark. 24, 35–36, 289 S.W.3d 37, 44–45 (2009), which declines to extend *Buckeye*, does not direct a contrary conclusion. There, the supreme court held that *Buckeye* did not preclude the circuit court from considering a term appearing on the first page of a customer agreement "in conjunction with the arbitration language to determine whether or not the arbitration clause is invalid." *Id.* at 36–37, 289 S.W.3d at 45. That was because "the circuit court . . . clearly stated from the bench that it was not making a ruling on . . . the validity of the contract as a whole" and therefore did "not run afoul of *Buckeye*." *Id.* Here, Johnson attacked the RSA as a whole,

pointing to individual terms as evincing a lack of mutuality themselves, as opposed to shedding light on the mutuality (or lack thereof) in the arbitration provision itself. *See In re Cox Enters., Inc. v. Cox Commc'ns, Inc.*, 835 F.3d 1195, 1211 (2016) (rejecting challenge to clause reserving the right to modify agreement as illusory because it "undeniab[ly] attacks the entire internet-service agreement"). Accordingly, we agree that the circuit court erred when it determined that mutuality of obligation is lacking in the RSA as a whole.

Johnson maintains, however, that we can affirm the circuit court's order because the arbitration agreement itself lacked mutuality of obligation. Pointing to the arbitration agreement that was in effect when she first subscribed in 2014, Johnson contends that mutuality is lacking because that version of the agreement reserved the right only to Suddenlink to pursue relief in small claims court, while subscribers were required to submit all of their disputes to binding arbitration.

We cannot agree. While arbitration agreements may not be used to shield one party from litigation while allowing the other party relief through the court system, *see, e.g.*, *Asbury Auto. Used Car Ctr. v. Brosh*, 364 Ark. 386, 391, 220 S.W.3d 637, 641 (2005), the 2014 version of the arbitration clause has been superseded by the version that was in effect when Johnson paid her invoices in 2019. The more recent version of the arbitration provision allows both Suddenlink and the subscriber to file their disputes in small claims court in appropriate cases, and each must otherwise submit to arbitration. Therefore, we find no merit to Johnson's argument.

D. Enforceability

Johnson further argues that even if Suddenlink established mutuality of agreement and obligation, the order denying the motion to compel arbitration should be affirmed because the

arbitration provision is unenforceable for other reasons. According to Johnson, the arbitration provision is procedurally and substantively unconscionable. It is substantively unconscionable, she argues, because it prohibits class actions and nonindividualized relief (relief that would affect other subscribers in addition to the subscriber that is a party to the dispute). Johnson contends that the arbitration provision is procedurally unconscionable because the opt-out clause, which may save these provisions, is too difficult to invoke. She also suggests that the provision in the RSA that allows Suddenlink to unilaterally modify its terms makes the RSA as a whole unconscionable (if not also defeating mutuality of obligation). Finally, Johnson argues that we should affirm because Suddenlink has failed to establish that its franchise agreement with the city of Arkadelphia "would allow it to force Arkadelphia citizens into arbitration."

"Unconscionability is not precisely defined in the law," but an unconscionable contract can be described as one that "no man in his senses and not under delusion would make on the one hand . . . and no honest and fair man would accept on the other." GGNC *Holdings, LLC v. Lamb*, 2016 Ark. 101, at 13, 487 S.W.3d 348, 356. "In essence, to be unconscionable, a contract must oppress one party and actuate the sharp practices of the other." *Id.* "Unconscionability" is generally "analyzed in terms of 'procedural unconscionability' and 'substantive unconscionability.'" *Id.* at 13, 487 S.W.3d at 357. "Procedural unconscionability encompasses contracts where there is an absence of meaningful choice on the part of one of the parties together with contract terms that are unreasonably favorable to the other party." *Id.* at 14, 487 S.W.3d at 357. Substantive unconscionability, on the other hand, can include excessive price or

restriction of remedies. *Id.* Finally, the burden of demonstrating unconscionability is on the party asserting the defense. *Id.*

As an initial matter, Johnson's argument that the RSA as a whole is unconscionable must fail for the same reason as her mutuality-of-obligation challenge—*Buckeye* directs that it is outside the scope of our review. Further, class-action waivers are not per se unconscionable, *see generally Quilloin v. Tenet HealthSystem Philadelphia*, 673 F.3d 221, 233 (3rd Cir. 2012), and Johnson does not point to any individualized proof that she has been (or will be) adversely affected by the class-action waiver, the clause prohibiting non individualized relief, or the opt-out clause. Therefore, to the extent Johnson asserts unconscionability as an alternate reason to affirm, we reject her argument as lacking merit.

Moreover, the relevance of the franchise agreement is not readily apparent because Suddenlink sought arbitration pursuant to its RSA with Johnson rather than the franchise agreement that it had with the city. Johnson does little to explain how the franchise agreement applies here or how Ark. Code Ann. § 23-19-208, generally providing that a franchise authority may enforce customer-service standards against cable operators, is relevant to Suddenlink's ability to enforce the arbitration provision in the RSA. Consequently, we cannot agree that the franchise agreement provides a basis to affirm the order denying Suddenlink's motion to compel arbitration.

IV. *Conclusion*

The circuit court erred when it denied Suddenlink's motion to compel arbitration. Johnson's payment of the invoices that she received from Suddenlink, which directed her to the

RSA available on Suddenlink's website, manifested her assent to its terms, and the arbitration provision otherwise appears in writing on Suddenlink's website and is supported by mutuality of obligation. Johnson's arguments urging us to affirm, including her argument that the arbitration agreement is unenforceable because it is unconscionable, because it is not authorized by the franchise agreement with the city of Arkadelphia, and because it contrary to the statute of frauds, lack merit.

Reversed and remanded.

THYER and BROWN, JJ., agree.

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