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**COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2008-SC-000789-D**

**MICHAEL SCHNUERLE, AMY GILBERT,
LANCE GILBERT and ROBIN WOLFF,**

APPELLANTS

v.

**INSIGHT COMMUNICATIONS COMPANY, L.P.
and INSIGHT COMMUNICATIONS MIDWEST, LLC,**

APPELLEES

**APPEAL FROM THE KENTUCKY COURT OF APPEALS
NO. 2006-CA-002121-MR
AFFIRMING THE JUDGMENT OF THE JEFFERSON CIRCUIT COURT
ACTION NO. 06-CI-4267**

APPELLANTS' REPLY BRIEF AND RESPONSE TO CROSS-APPEAL

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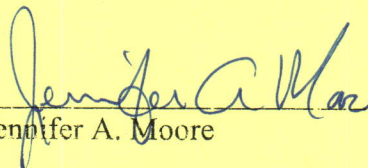
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CERTIFICATE OF SERVICE

The undersigned certifies that copies of this Brief were served upon the following named individuals by U.S. Mail on February 12, 2010: Clerk, Supreme Court, Room 209, Capitol Building, 700 Capital Avenue, Frankfort, KY 40601; Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. McKay Chauvin, Jefferson Circuit Court, Jefferson County Judicial Center, 700 W. Jefferson Street, Louisville, KY 40292; Laurence J. Zielke, Zielke Law Firm, PLLC, 1250 Meidinger Tower, 462 South 4th Street, Louisville, KY 40202; Byron E. Leet, Wyatt Tarrant & Combs, LLP, Suite 2800, PNC Plaza, 500 W. Jefferson Street, Louisville, KY 40202; Deborah J. LaFeira, Pacific Legal Foundation, 3900 Lomane Drive, Suite 200, Sacramento, CA 95834; John E. Spainhour and Susan Shimp Torok, Suite One, Professional Bldg., 200 South Buckman Street, Shepherdsville, KY 40165, Kenneth W Zeller and Julie Nepveu, AARP, Foundation Litigation, 601 East Street, NW, Washington, DC 20049; and Attorney General Jack Conway, Tad Thomas, and Craig F. Newbern, Jr., Office of the Attorney General, 700 Capitol Avenue, Ste. 118, Frankfort, KY 40601. The undersigned does also certify that the record on appeal has not been removed from the Kentucky Supreme Court.


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INTRODUCTION

In their opening brief, Plaintiffs Michael Schnuerle, Amy Gilbert, Lance Gilbert, and Robin Wolff (collectively, "Plaintiffs") established that under clear Kentucky contract law, the class action ban and secrecy clause imposed by Insight Communications Company, L.P., and Insight Communications Midwest, LLC (collectively, "Insight") are unconscionable and unenforceable, and that as a result, Insight's entire arbitration clause cannot be enforced. Insight has no persuasive response. Instead, its argument consists of an attempt to avoid Kentucky law entirely and pretend that this appeal is some kind of general attack on arbitration. This Court should reject Insight's meritless arguments.

First, under Kentucky law, which indisputably governs this case, Insight's class action ban is substantively unconscionable. The ability to call a customer service representative and the hypothetical availability of proceeding in small claims court do not provide customers with an adequate remedy, because the small dollar value of each claim precludes the vast majority of individuals from vindicating their rights. Moreover, without the class action mechanism, Insight would be exculpated from liability and could retain almost all of the fruits of its wrongdoing, which is prohibited by Kentucky law.

Second, Insight does not refute Plaintiffs' demonstration that its arbitration clause is procedurally unconscionable as (a) a contract of adhesion that is (b) imposed by a party with far greater bargaining power (c) in a situation where there is an absence of other alternatives.

Third, Insight offers no meaningful response to Plaintiffs' argument that, because the class action ban and secrecy provisions are unconscionable and unenforceable, the entire arbitration provision should be held unenforceable.

ARGUMENT

I. INSIGHT DOES NOT PERSUASIVELY REFUTE PLAINTIFFS' SHOWING THAT ITS CLASS ACTION BAN IS SUBSTANTIVELY UNCONSCIONABLE.

A. Kentucky Law Will Not Enforce Unconscionable Terms in Arbitration Clauses.

As Plaintiffs established at pages 10–11 of their opening brief, Kentucky law indisputably governs here. Under Kentucky law—as recently demonstrated by the Court of Appeals in *Mortgage Electronic Registration Systems, Inc. v. Abner*, 260 S.W.3d 351, 355 (Ky. App. 2008)¹—arbitration provisions that are unconscionable are unenforceable. Instead of refuting Plaintiffs' demonstration that the class action ban in this case is substantively unconscionable, Insight clings to Kentucky's general policy favoring arbitration. Insight's Br. 9, 14.² Insight's theory appears to be that because it has embedded its exculpatory class action in an arbitration clause, it is automatically enforceable. But as *Abner* demonstrates, Kentucky's policy favoring arbitration does not exempt arbitration clauses—or terms embedded in them—from compliance with state law.

¹ The Court of Appeals also recently refused to enforce an unconscionable arbitration clause in *Valued Services of Kentucky, LLC v. Watkins*, --- S.W.3d ---, No. 2008-CA-001204-MR, at *8, 2009 WL 1705696 (Ky. App. June 19, 2009). The arbitration clause at issue in *Watkins* required the plaintiff to arbitrate a claim for an intentional tort. The court held that the arbitration clause was unconscionable because Watkins could not have foreseen, when he signed the contract, that he would be forced to arbitrate claims with so little connection to the underlying agreement. *Id.* Because *Watkins* is currently before this Court on a motion for discretionary review, the opinion below is not yet final, and Plaintiffs therefore refrain from discussing the case more fully.

² Insight also states, out of the blue, that “Kentucky law also does not countenance appeals from an order compelling arbitration.” Insight's Br. 9 (citing *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451, 454 (Ky. 2009)). But because the trial court in this case designated its decision as a final and appealable order, *see* App. 2 at 4, this appeal is proper.

References to the Appendix in this brief refer to the Appendix in Plaintiffs' Opening Brief. Plaintiffs include no new documents in an Appendix to this Reply Brief.

Kentucky law explicitly states that arbitration clauses will be struck down if they are invalid “upon such grounds as exist at law for the revocation of any contract.” KRS 417.050; *see also Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (under federal arbitration act, arbitration clauses may be found invalid under state law “govern[ing] issues concerning the validity, revocability, and enforceability of contracts generally”). Insight has no response to Plaintiffs’ demonstration that such ordinary contract principles include the doctrine of unconscionability and the prohibition of exculpatory contracts. *See* Pls.’ Opening Br. 12–15; *Abner*, 260 S.W.3d at 355. *Cf. Floss v. Ryan’s Family Steak Houses, Inc.*, 211 F.3d 306, 316 (6th Cir. 2000) (refusing to enforce arbitration clause that violated Kentucky contract law by providing no mutuality of obligation). As this Court recently confirmed in *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451, 457 (Ky. 2009), arbitration clauses must comply with state law, notwithstanding the general policy favoring arbitration. In response, Insight ignores the clear principles of these cases and contends instead that its arbitration clause is necessarily enforceable because it does not prohibit damage awards, as in *Abner*, or call for arbitration to take place out of state, as in *Ally Cat*. This argument does nothing to refute Plaintiffs’ demonstration that Insight’s class action ban is unconscionable because it prevents individuals from vindicating their rights and exculpates Insight from liability. *See* Pls.’ Opening Br. 14–15.

As Plaintiffs’ opening brief made clear, Plaintiffs seek only to apply Kentucky contract law to the facts of their case. *See, e.g.,* Pls.’ Opening Br. 16 (“The record *in this case* demonstrates that Insight’s class action ban is unenforceable.”) (emphasis added), 17 (experienced consumer attorneys testified that Plaintiffs would be unable to find attorneys based upon “their review of the *specific claims in this case and Insight’s*

arbitration clause”) (emphasis added), 18 (“[T]he only evidence on the question establishes that, *given the small claims involved in this case*, Insight’s class action ban exculpates Insight from liability and prohibits Plaintiffs from vindicating their rights.”) (emphasis added). Plaintiffs do not, as Insight and its *amicus* contend, seek any *per se* rule that arbitration clauses in general are not enforceable. See Insight’s Br. 2; Br. of *Amicus Curiae* Pac. Legal Found. 2. As Plaintiffs have made clear, Insight is free to draft a fair arbitration contract that would allow its customers to vindicate its rights and would not exculpate it from liability. But Insight has not drafted such a clause. Instead, it has drafted an arbitration clause that violates longstanding principles of Kentucky law, and as such, under ordinary Kentucky law, it cannot be enforced.

B. Insight Has Failed to Rebut Plaintiffs’ Showing that Its Class Action Ban Is Substantively Unconscionable and Unenforceable Under Kentucky Law.

Under well-established principles of Kentucky contract law, Insight’s class action ban is substantively unconscionable for two related reasons: (1) it denies Plaintiffs the ability to vindicate their rights; and (2) it allows Insight to escape liability for its misconduct. Insight has offered no meaningful response to either of these points.

1. Insight’s class action ban denies Plaintiffs a remedy.

As Plaintiffs explained in their opening brief, Pls.’ Opening Br. 14–15, Kentucky law will not enforce an arbitration clause if that clause operates to deny one party a remedy. See *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 344 (Ky. App. 2001) (court will uphold arbitration clause only if arbitration would allow the plaintiffs to “meaningfully present[] their case”). In this case, the uncontradicted factual record shows that Insight’s class action ban prevents its customers from meaningfully presenting

their claims. As Plaintiffs showed in their opening brief, only one Insight customer has ever filed an arbitration action against Insight, and no customers have ever brought an action against it in small claims court. Pls.' Opening Br. 27, 29. Insight concedes this critical fact but insists that the reason for the paucity of small claims or arbitrations is because of its exemplary customer service. The more common-sense explanation, however, is that the small number of customers who realized they had legal claims considered the claims' small dollar value against the time and effort required to take on a large company on an individual basis, and they were dissuaded from proceeding. *See Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.") (emphasis in original).

Unable to argue with the factual record in this case, Insight suggests that Plaintiffs simply have no need for a class action, because they could call customer service or proceed to small claims court. Insight's reliance on its customer service representatives as evidence that its arbitration clause enables its customers to vindicate their rights is both legally irrelevant and factually unsupported. As a legal matter, Insight has cited no cases holding that customer service is as an adequate replacement for enforcement of consumer protection laws or for proceeding as a class under those laws. The reason for the dearth of such cases is self-evident: it would be bizarre to conclude that a company's own employee is a fair and neutral arbiter of a dispute between that company and one of its customers. Indeed, many courts have struck down class action bans notwithstanding that the company, like Insight, gave its customers the option to contact customer service. *See,*

e.g., Kristian v. Comcast Corp., 446 F.3d 25, 31 (1st Cir. 2006) (class action ban unenforceable despite requirement of attempting informal resolution).

Insight's reliance on its customer service representatives as a way for Plaintiffs to vindicate their rights is also not supported by the record. Insight argues that because it has already taken matters into its own hands and issued "credits" to deserving customers, a consumer protection lawsuit is unnecessary. The only evidence in the record of these credits—the affidavit of Gregg Graff—is notable for how much critical information is not included. Insight's Br., App. 4, Graff Aff. ¶ 16. The affidavit notes that Insight issued credits before Plaintiffs' suit but says *nothing* about these credits having been issued pursuant to Insight's much-touted Dispute Resolution Procedure, the time period during which these credits were issued, or what proportion of its customers received credits. As a result, the issuance of credits cannot be stretched into evidence that Insight's Dispute Resolution Procedure actually works, especially in light of the testimony of several Insight customers that they *tried and failed* to reach Insight's customer service representatives when they began experiencing service interruptions. (App. 5, Schnuerle Aff. ¶ 10 ("I tried calling Insight Communications for over an hour but was unable to speak with anyone."); App. 10, Straub Aff. ¶ 10 ("I tried to call Insight Communications several times but was unable to speak to a customer service representative because the telephone lines were busy. After several attempts at contacting Insight Communications, my call was answered by an automated service that only provided a message from Insight communications and did not give me the option of speaking to a customer service representative.").)

Insight's repeated invocation of the virtues of small claims court as a way for Plaintiffs to vindicate their rights is similarly unavailing. As Plaintiffs explained in their opening brief at pages 26–28, the theoretical availability of small claims court does not mean that Plaintiffs can vindicate their rights. The uncontradicted factual record in this case demonstrates that few, if any, Insight customers would pursue their claims in small claims court, because the small value of the claim would render it not worth pursuing on an individual basis. (App. 5, Schnuerle Aff. ¶ 12 (“Because of the . . . small amount of money in controversy, I would not pursue this matter individually through arbitration *or small claims court.*”) (emphasis added); App. 6, Gilbert Aff. ¶ 10 (same); App. 7, Johnson Aff. ¶ 10 (same); App. 8, Roddy Aff. ¶ 11 (same); App. 9, Duvall Aff. ¶ 12 (same); App. 10, Straub Aff. ¶ 11 (same).) Indeed, Insight concedes that not a single customer has ever brought a case against it in small claims court. Insight's Br. 4–5. Despite Insight's characterization of small claims court as cheap and efficient, the fact remains that proceeding in small claims court would require a \$20 filing fee and a substantial expenditure of time and effort, all for the potential to recoup damages of just a few dollars in any one case.

As explained in Plaintiffs' opening brief and as demonstrated by the factual record, the class action ban operates to deny Plaintiffs a remedy because individual Insight customers would be unable to find an attorney to represent them. *See, e.g.,* Pls.' Opening Br. 4–5. Insight apparently concedes this fact but proposes instead that its customers' claims are so “obvious” that no attorney is necessary. Insight's Br. 28. But even if consumers were aware of the “obvious” fact that their internet service had gone out, they would not necessarily be aware that they had a legal claim against Insight. *See*

Pls.' Opening Br. 20. Nor does Insight's eleventh-hour concession of liability make its ban on class actions enforceable. Insight's Br. 41. While Plaintiffs will gladly accept Insight's concession that it is liable to them on the merits of their claims, Insight's liability is not at issue in this appeal. The only issue before the Court is whether Insight's class action ban is enforceable. The record shows that it is not, because even though Plaintiffs' claims are valid, they could not bring them at all without the ability to proceed as a class.

Furthermore, Insight's repeated assertion that the attorneys' fee provision of the Kentucky Consumer Protection Act ("KCPA") salvages its class action ban because it would allow individual claimants to find an attorney, *see* Insight's Br. 30–31, is belied by the numerous cases in which courts have found class action bans unenforceable despite the availability of attorneys' fees, either by statute or pursuant to the parties' contract. *See, e.g., Feeney v. Dell*, 908 N.E.2d 753, 764–65 (Mass. 2009) (statutory attorneys' fee provisions "are not sufficient to ensure that a consumer or business with a small-value claim will be able to find an attorney willing to take the case absent the ability to aggregate claims"); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1007 (Wash. 2007) (despite contractual availability of attorney's fees, "practically, attorneys are generally unwilling to take on individual arbitrations to recover trivial amounts of money"). The very case on which Insight relies, *Alexander v. S & M Motors, Inc.*, 28 S.W.3d 303, 306 (Ky. 2000), also undermines Insight's contention that Plaintiffs here would be able to obtain counsel. While the individual plaintiff in *Alexander* was represented by counsel, the value of the claim in that case was substantially higher. In *Alexander*, the jury awarded the plaintiff \$6,748.89 in compensatory damages—a far cry from the few dollars

at stake for each plaintiff in this case. Given the small value of each individual case, the attorneys' fee provision of the KCPA would not help Plaintiffs in this case vindicate their statutory rights.

2. Insight's class action ban exculpates Insight from liability.

Insight's class action ban is also unconscionable because, as Plaintiffs explained in their opening brief, *see* Pls.' Opening Br. 14, well-settled Kentucky law prohibits exculpatory contract terms between parties of different bargaining power. *See, e.g., Coughlin v. T.M.H. Int'l Attractions, Inc.*, 895 F. Supp. 159, 161 (W.D. Ky. 1995) ("Well-settled roots of Kentucky law support[] a public policy that disfavors and, indeed, bars exculpatory agreements from enforcement."). Insight pretends that this line of cases, beginning with *Meiman v. Rehabilitation Center, Inc.*, 444 S.W.2d 78 (Ky. App. 1980), simply does not exist. *See also, e.g., Pan-Am. Life Ins. Co. v. Roethke*, 30 S.W.3d 128, 131 (Ky. 2000) (noting "the need to protect consumers from [corporations] who, in drafting contracts of adhesion, attempt to exculpate themselves from liability"). Insight, a sophisticated corporation with 1.3 million customers, has bargaining power far superior to that of any individual consumer, and consumers like Plaintiffs had no choice but to submit to Insight's exculpatory class action ban. Pls.' Opening Br. 2.

In this case, even if a smattering of motivated consumers with time on their hands were willing to take on Insight individually, the fact remains that the vast majority of consumers would not, and Insight therefore remains exculpated from any meaningful liability. *See, e.g., Scott*, 161 P.3d at 1007 ("[T]he class action waiver . . . exculpates Cingular from legal liability for any wrong where the cost of pursuit outweighs the potential amount of recovery."). In enacting the KCPA, the General Assembly

emphasized that the law is primarily a tool for “protect[ing] the public interest,” KRS 367.120. Class action lawsuits, “which successfully vindicate the rights of many individuals,” *Revenue Cabinet v. St. Ledger*, 955 S.W.2d 539, 544 (Ky. App. 1997), further this public interest.³ See also Br. of *Amicus Curiae* Attorney General of Kentucky 4 (private actions are necessary for enforcement of KCPA). Without the class action mechanism, a corporation like Insight can cheat thousands of customers out of a just a few dollars each, secure in the knowledge that only a handful will bother to do anything about it. See *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940, 951 (Or. Ct. App. 2007) (“[T]he class action ban . . . gives defendant a virtual license to commit, with impunity, millions of dollars’ worth of small-scale fraud.”). Insight may grease the squeaky wheels and pass out a few credits here and there, but unless consumers can join together in a class action, Insight will retain the profits it made by taking payments from the remainder of its customers despite failing to provide them with service. This result is contrary to the KCPA and Kentucky public policy.

In a last-ditch effort to rebut Plaintiffs’ demonstration that its class action ban is substantively unconscionable and unenforceable under Kentucky law, Insight relies on case law from some jurisdictions that it asserts have upheld class action bans or otherwise rejected challenges like the one in this case. These authorities are not persuasive. First, as set forth in Plaintiffs’ opening brief at pages 21–24, a large number of jurisdictions have, much more recently than the cases cited by Insight, struck down class action bans

³ Insight’s contention that “[u]nder the facts of this case, class action is not warranted [sic],” Insight’s Br. 56, has no bearing whatsoever on the enforceability of its class action ban. See *Abner*, 260 S.W.3d at 355 (declining to address merits of underlying claims when determining validity of arbitration clause). In any event, this case would be appropriate for class treatment, because the underlying issues of fact and law are identical: Insight’s customers were subject to the same form contract, and they each suffered loss because of Insight’s internet outages in April and May 2006.

that were proven to be exculpatory. Second, several of the cases upon which Insight relies do not even reflect the current law of those jurisdictions with respect to class action bans. For example, Insight states that the U.S. Court of Appeals for the Third Circuit would affirm the Court of Appeals in this case, citing *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007). Insight's Br. 17–18. But in *Homa v. American Express Co.*, 558 F.3d 225, 229–30 (3d Cir. 2009), cited in Plaintiff's opening brief, the Third Circuit soundly rejected, as *dicta*, any language in *Gay* that could be “read as a blanket prohibition on unconscionability challenges to class-arbitration provisions.” Similarly, Insight asserts that the Alabama Supreme Court would affirm the Court of Appeals, Insight's Br. 26, but once again ignores that a later case from that court, cited in Plaintiff's opening brief, refused to enforce a class action ban in a situation similar to that in this case. *Leonard v. Terminix Int'l Co., L.P.*, 854 So. 2d 529, 539 (Ala. 2002). Third, in other situations Insight has simply misread the cases it cites. It contends, for example, that *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306 (6th Cir. 2000), supports the imposition of a class action ban. Not only does *Floss* not involve a class action ban at all, but the outcome in that case clearly supports Plaintiffs' point that an arbitration clause must comply with ordinary state contract law: in *Floss*, the court refused to compel arbitration because the arbitration agreement was promulgated in a manner that violated Kentucky contract law. *Id.* at 316.

II. INSIGHT DOES NOT EFFECTIVELY REFUTE PLAINTIFFS' DEMONSTRATION THAT ITS ARBITRATION CLAUSE IS PROCEDURALLY UNCONSCIONABLE.

Plaintiffs' opening brief explained why Insight's arbitration clause is procedurally unconscionable. Pls.' Opening Br. 42–44.⁴ In response, Insight merely reiterates that contracts of adhesion—such as its own arbitration clause—are not *per se* unconscionable. Insight's Br. 34. Insight has not responded, however, to Plaintiffs' demonstration that numerous other factors, in addition to the undeniably adhesive nature of Insight's arbitration clause, render *this* contract of adhesion procedurally unconscionable.

First, Insight concedes that its bargaining power is superior to that of the individual consumer. Insight's Br. 34. It has not even attempted to confront the mountain of Kentucky cases emphasizing the force that such a disparity has on a court's analysis. Pls.' Opening Br. 41, 43. *See also, e.g., Buck Run Baptist Church, Inc. v. Cumberland Sur. Ins. Co., Inc.*, 983 S.W.2d 501, 504 (Ky. 1998) (“[T]here is a significant difference between an adhesion contract in which the parties have disparate bargaining power and a contract which voluntarily has been entered into by sophisticated

⁴ As Plaintiffs made plain in their opening brief, Pls.' Opening Br. 38–41, the respective roles of procedural and substantive unconscionability are not clear under Kentucky law. As a result, Plaintiffs respectfully urge the Court to clarify that procedural unconscionability is not required where contract terms prevent plaintiffs from vindicating their rights under consumer protection statutes or exculpate companies from liability under those statutes. *See, e.g., Fiser v. Dell Corp.*, 188 P.3d 1215, 1221 (N.M. 2008) (where class action ban “exculpates company from wrongdoing” such that “enforcing the class action ban would be tantamount to allowing defendant to unilaterally exempt itself from New Mexico consumer protection laws,” the arbitration clause was “unenforceable because there has been such an overwhelming showing of substantive unconscionability,” even if clause was not procedurally unconscionable).

Florida, like Kentucky, is a state whose law on this point is unclear, and as a result, the U.S. Court of Appeals for the Eleventh Circuit recently certified this very question to the Florida Supreme Court. *Pendergast v. Sprint Nextel Corp.*, --- F.3d ---, 2010 WL 6745, at *13–14 (11th Cir. 2010). A Florida appellate court has found that a class action ban is unconscionable and unenforceable based solely on a demonstration that the class action ban would gut consumer protection laws. *See S.D.S. Autos, Inc. v. Chrzanowski*, 976 So. 2d 600, 608 (Fla. Dist. Ct. App. 2007) (“Disallowing class relief effectively prevents consumers with small, individual claims . . . from vindicating their statutory rights.”).

and knowledgeable businessmen concerning a financial transaction of considerable magnitude.”).

Second, Insight contends that Plaintiffs had other alternatives for obtaining high-speed internet access in Louisville but ignores the fact that Insight’s own evidence shows that the only other internet providers in Louisville *also have class action bans in their arbitration clauses*. Pls.’ Opening Br. 3–4, 43. Furthermore, Insight has cited no cases for the proposition that a lack of alternatives is required for a finding of procedural unconscionability. As Plaintiffs explained on page 44 of their opening brief, courts should proceed with caution in mandating the demonstration of a lack of alternatives, as that burden can often be impossible to meet. Given Kentucky’s recurring concern that powerful corporations will cram unfair contract terms down the throats of individuals, it would be inimical to Kentucky law to insist that individuals meet such an insurmountable burden.

Additionally, Insight contends that the arbitration clause is not procedurally unconscionable because the trial court made “findings of fact” that the arbitration clause is “clear and concise” and that “the method of referring the reader to a different screen is a common practice in most web sites.” Insight’s Br. 33. Insight is incorrect to characterize these points as “findings of fact” that must be upheld unless clearly erroneous. Indeed, the trial court itself placed this observation under the heading “Conclusions of Law” and made the observation in the course of its unconscionability analysis, App. 2, at 3, a legal analysis subject to *de novo* review. *Conseco*, 47 S.W.3d at 340. Moreover, the only evidence before the trial court on the readability of the arbitration clause showed that Insight subscribers could not see the clause and did not

understand that Insight was forcing them to give up their rights to proceed as a class or go to court. (App. 5, Schnuerle Aff. ¶¶ 6, 14 (“I did not understand that I had given up any rights to go to court or have a jury trial”; “When purchasing Insight Broadband High Speed Internet Service online, I was unable to read the arbitration clause and its ban on class actions because it did not appear within viewing range in the text box.”); App. 6, Gilbert Aff. ¶¶ 5, 12 (same); App. 10, Straub Aff. ¶¶ 6, 13 (same).) Insight offered no evidence to rebut Plaintiffs’ affidavits. As a result, to the extent that the trial court’s characterizations of the arbitration clause as “clear and concise” and the hidden class action ban as a “common practice” are findings of fact, they are clearly erroneous and unsupported by the evidence before the court. The same is true of the trial court’s supposed “finding of fact” with respect to the availability of alternative internet providers. Insight’s Br. 34.

In sum, the combination of a classically adhesive contract with grossly unequal bargaining power and the demonstrated lack of alternatives make Insight’s arbitration clause rife with procedural unconscionability. To the extent that a showing of procedural unconscionability is required under Kentucky law, Plaintiffs have more than met this burden.

III. INSIGHT DOES NOT REFUTE PLAINTIFFS’ SHOWING THAT ITS CLASS ACTION BAN AND SECRECY PROVISIONS RENDER THE ENTIRE ARBITRATION CLAUSE UNCONSCIONABLE AND ENFORCEABLE.

In their opening brief, Plaintiffs established that the unconscionability of the class action ban and secrecy provisions permeates Insight’s arbitration clause and that, as a result, the entire arbitration clause should not be enforced. Pls.’ Opening Br. 45–48. Insight’s only response to this explanation is that Insight’s service agreement contains a

severability clause. Insight's Br. 55. But the presence of this clause is not dispositive; even with a severability clause, severability "is not always an appropriate remedy for an unconscionable provision in an arbitration clause" if "the intent of the parties is best achieved by severing the *arbitration clause in its entirety* rather than 'rewriting' the contract by severing multiple unenforceable provisions." *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 673–74 (S.C. 2007) (emphasis added).

Additionally, Insight's conflation of the severability clause of the contract with the "savings clause" of KRS 417.050—the provision stating that an arbitration agreement is enforceable "save upon such grounds as exist at law for the revocation of any contract," see *Dutschke v. Jim Russell Realtors, Inc.*, 281 S.W.3d 817, 821 & n.4 (Ky. App. 2008)—is based upon a misunderstanding of core legal principles. Insight's Br. 55. Insight appears to have confused the general contract principle of "severability" of terms in contracts with the entirely unrelated principle of the "separability" of arbitration clauses, which concerns whether a court or an arbitrator can hear the dispute. Insight's Br. 55. See *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 855 (Ky. 2004) ("separability" in arbitration "requires courts . . . to separate an otherwise valid arbitration clause from the contract within which it is contained to allow arbitration of all claims not going to the validity of the arbitration clause itself"). As Plaintiffs explained in pages 8–10 of their opening brief, a challenge to the validity of an arbitration clause or terms embedded in it is for the court to decide.

CONCLUSION

For the foregoing reasons, this Court should strike down Insight's class action ban and secrecy clause and reverse the decision of the Court of Appeals.

Respectfully submitted,



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