

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 09-cv-01840-WYD-CBS

ROBIN VERNON,
RORY PATRICK DURKIN,
BRYAN SANDQUIST, and
TED MOORE, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

QWEST COMMUNICATIONS INTERNATIONAL, INC., a Delaware corporation,
QWEST SERVICES CORPORATION, a Colorado corporation,
QWEST CORPORATION, a Colorado corporation,
QWEST COMMUNICATIONS CORPORATION, a Delaware corporation, and
QWEST BROADBAND SERVICES, INC., a Delaware corporation,

Defendants.

**PLAINTIFFS' MOTION FOR RELIEF FROM COURT'S ORDER GRANTING
DEFENDANTS' MOTION TO STAY AND REQUESTING LEAVE TO RESPOND TO
DEFENDANTS' MOTION TO STAY**

I. INTRODUCTION AND RELIEF REQUESTED

Defendant Qwest Communications International, Inc., and its affiliated defendants (collectively "Qwest") filed a Motion to Stay Ruling on Defendants' Motion to Compel Arbitration and Notice of Supplemental Authority on September 8, 2010 ("Motion to Stay"). *See* Dkt. No. 109. As detailed below, based on a review of this Court's Local Rules, the Federal

Rules of Civil Procedure and this Court's Practice Standards, and on consultation with local counsel, Plaintiffs calculated the deadline for their response as Friday, October 1, 2010. On September 29, 2010, however, before Plaintiffs filed their response, the Court ruled on Qwest's Motion to Stay, indicating that "Plaintiffs did not respond to the Defendants' Motion" and granting the Motion ("Order on Motion to Stay"). *See* Dkt. No. 110.¹

Pursuant to Fed. R. Civ. P. 60(b)(6), Plaintiffs respectfully request the Court vacate the Order on Motion to Stay and grant Plaintiffs leave to respond to Defendants' Motion to Stay, so that the Court may review Plaintiffs' response before ruling on the Motion to Stay. A copy of the brief Plaintiffs intend to file, if the Court grants Plaintiffs leave to do so, is attached hereto as Exhibit A. Plaintiffs also note that Judge Miller, in another class action case against Qwest which is pending in this District, has just entered an order denying Qwest's motion to compel arbitration and Qwest's motion to stay pending the United States Supreme Court's ruling in *Concepcion*. A copy of Judge Miller's ruling is attached hereto as Exhibit B.

II. STATEMENT OF FACTS

Qwest initially filed its Motion to Stay on September 7, 2010, captioned as "Defendants' Notice of Supplemental Authority in Support of Their Motion to Compel Arbitration and Motion for Stay." *See* Dkt. No. 107. Qwest re-filed the motion the following day, pursuant to the Court's docket entry indicating that the motion "will need to be refiled as a Motion to Stay with a Notice of Supplemental Authority." *See* Dkt. No. 108 (Docket Annotation); Dkt. No. 109 (Motion to Stay).

After receiving Qwest's initial motion, Plaintiffs' counsel calculated the response deadline based on a review of the Court's Local Rules, the Federal Rules of Civil Procedure and this Court's Practice Standards, consulted with local counsel, and concluded the deadline for a

¹ The Court's order is dated September 29, 2010 but was served on the parties via the ECF system on the morning of September 30, 2010.

response was October 1, 2010. This conclusion was based on the following analysis. Under D.C.COLO.LCivR 7.1C, “[t]he responding party shall have 21 days after the date of service of a motion” to file its response. The “date of service” of a motion which is electronically filed is determined in accordance with D.C.COLO.LCivR 5.2E, which states that “[i]f a document is electronically filed and thereby electronically served, the time to respond or reply shall be calculated from the date of electronic service[.]” D.C.COLO.L.Civ.R 5.6C then states that nothing in the Court’s Electronic Case Filing Procedures “alters the rules governing the computation of the deadlines for filing and service of documents that are set forth in Fed. R. Civ. P. 6.” Indeed, this Court’s “Practice Standards” also indicate that “Fed. R. Civ. P. 6 controls the computation of all time requirements[.]” *See* Practice Standards at II.F.1. Turning to Fed. R. Civ. P 6, that rule provides in pertinent part that “3 days are added after the period would otherwise expire” when a party may or must act “after service” and service is made under Fed. R. Civ. P 5(b)(2)(E), which governs transmission by electronic means. *See* Fed. R. Civ. P. 6(d).

Thus, adding 3 days to the 21 day response period, Plaintiffs calculated that their response would be due 24 days after Qwest initially filed its motion – 24 days after September 7, 2010, which placed the deadline at October 1, 2010.² Plaintiffs have used this same method of calculating deadlines since this case was transferred to this Court, over a year ago.

When Plaintiffs were preparing their response brief, which they planned on filing October 1, 2010, they received the Court’s electronic notice of the Order on Motion to Stay, which was entered September 29, 2010 and transmitted to the parties on September 30, 2010 (Dkt. No. 110). The same day, Plaintiffs received electronic notice that Judge Walker of this District, who is assigned to *Grosvenor v. Qwest Communications International, Inc.*, No. 09-cv-

² While Qwest re-filed its motion on September 8, 2010, pursuant to the Court’s docket entry, in an abundance of caution, Plaintiffs calculated the deadline from the initial filing date, September 7, 2010.

2848-WDM-KMT (“*Grosvenor*”), has denied Qwest’s motion to compel arbitration in that case and also denied Qwest’s motion to stay. *See* September 30, 2010 Order in *Grosvenor*, attached hereto as Exhibit B.

III. CERTIFICATION

In accordance with D.C.COLO.L.Civ.R 7.1A, Plaintiffs’ counsel certifies that before filing this motion, she conferred with Defendants’ counsel. Defendants’ counsel indicated that Defendants oppose this motion.

IV. ARGUMENT

Rule 60 provides that a court may grant relief from a judgment or order on several grounds, including “any other reason that justifies relief.” Fed. R. Civ. P. 60(b)(6). Moreover, the Court has discretion to consider a late-filed brief where there is no prejudice to the opposing party. *See Clyne v. Walters*, 2009 WL 189956, at *2 (D. Colo. Jan. 27, 2009) (citing *Hutchinson v. Pfeil*, 211 F.3d 515, 517 n.1 (10th Cir. 2000)). Here, Plaintiffs’ failure to file a response before the Court ruled on Qwest’s Motion to Stay was based on Plaintiffs’ reading of the local rules in conjunction with the Federal Rules of Civil Procedure and on consultation with local counsel. Plaintiffs respectfully request the Court exercise its discretion and vacate the Order on Motion to Stay and grant Plaintiffs leave to respond to Defendants’ Motion to Stay, so that the Court may review Plaintiffs’ response before ruling on the Motion to Stay. Doing so will not prejudice Defendants nor will it unnecessarily delay this proceeding.

An additional reason for the Court’s vacation of its Order on Motion to Stay is Judge Miller’s ruling, issued today, in *Grosvenor*. *See Exhibit B*. In addition to denying Qwest’s motion to compel arbitration in that case, Judge Miller denied Qwest’s motion to stay pending the United States Supreme Court’s decision in *Concepcion*, noting that “[the Court’s] review of the Petition for Certiorari [in *Concepcion*] reveals that the outcome of *Concepcion* is not likely to affect [the Court’s] decision on the Motion to Compel Arbitration.” *Id.* at 19.

V. CONCLUSION

For the aforementioned reasons, Plaintiffs respectfully request the Court grant Plaintiffs' Motion for Relief From Court's Order Granting Defendants' Motion to Stay and Requesting Leave to Respond to Defendants' Motion to Stay. A copy of Plaintiffs' response is attached hereto as Exhibit A.

DATED this 30th day of September, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kimberlee L. Gunning, hereby certify that on September 30, 2010, I caused the foregoing **PLAINTIFFS' MOTION FOR RELIEF FROM COURT'S ORDER GRANTING DEFENDANTS' MOTION TO STAY AND REQUESTING LEAVE TO RESPOND TO DEFENDANTS' MOTION TO STAY** to be electronically filed with the Clerk of the Court via the CM/ECF system, which will send notification of such filing to the e-mail addresses denoted on the Court's Electronic Mail Notice List.

DATED at Seattle, Washington, this 30th day of September, 2010.

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— EXHIBIT A —

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FOR THE DISTRICT OF COLORADO

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ROBIN VERNON,
RORY PATRICK DURKIN,
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QWEST COMMUNICATIONS INTERNATIONAL, INC., a Delaware corporation,
QWEST SERVICES CORPORATION, a Colorado corporation,
QWEST CORPORATION, a Colorado corporation,
QWEST COMMUNICATIONS CORPORATION, a Delaware corporation, and
QWEST BROADBAND SERVICES, INC., a Delaware corporation,

Defendants.

**RESPONSE TO DEFENDANTS' MOTION TO STAY RULING ON DEFENDANTS'
MOTION TO COMPEL ARBITRATION AND NOTICE OF SUPPLEMENTAL
AUTHORITY**

I. INTRODUCTION

Defendant Qwest Communications International, Inc. and its affiliated defendants (collectively "Qwest") claim two recent Supreme Court decisions, and the Supreme Court's

grant of certiorari in a third case (and the expected decision in that matter), “are central to how this Court will address and evaluate the pending Motion to Compel Arbitration.” Defendants’ Motion to Stay Ruling of Defendants’ Motion to Compel Arbitration and Notice of Supplemental Authority (“Defs.’ Mot.”) (Dkt. No. 109) at 4. Qwest is wrong. As detailed below, Qwest misstates the Supreme Court’s holdings in *Stolt-Nielsen S.A. v. AnimalFeeds Int’l. Corp.*, ___ U.S. ___, 130 S. Ct. 1758 (2010) and *Rent-a-Center, West, Inc. v. Jackson*, ___ U.S. ___, 130 S. Ct., and their relevance to this case. Qwest similarly mischaracterizes the issues raised the Supreme Court’s recent grant of certiorari in *AT&T Mobility LLC v. Concepcion*, ___ U.S. ___, 130 S. Ct. 3322 (2010).

Moreover, as it has done throughout its briefing on the motion to compel arbitration – pending in this Court for over a year – Qwest distorts Plaintiffs’ position with respect to arbitration and the class action waiver contained within the “Dispute Resolution Provision” in Qwest’s form Subscriber Agreement. Plaintiffs have never taken the position that arbitration clauses and class action waivers are *per se* unenforceable. Nor do Plaintiffs argue that Colorado law favors or disfavors class actions *per se*. Rather, Qwest’s Dispute Resolution Provision is unconscionable under generally applicable Colorado law based on the evidence in the record. Plaintiffs do not ask the Court to subject Qwest’s arbitration provision to special scrutiny but rather to apply the unconscionability doctrine as set out in the Colorado Supreme Court’s decision in *Davis v. M.L.G. Corp.*, 712 P.2d 985, 991 (Colo. 1986). This general unconscionability law applies to all contractual provisions, and thus does not run afoul of the Federal Arbitration Act (“FAA”).

Claiming that the Supreme Court’s eventual ruling in *Concepcion* “will likely be directly on point with the matters at issue in this case,” Qwest moves for a stay of this Court’s ruling on the Motion to Compel Arbitration until the *Concepcion* decision is issued. Defs.’ Mot. at 4. But, as discussed below, Supreme Court and Tenth Circuit case law make clear that a stay is granted

only in rare circumstances, and that a pending Supreme Court decision on a similar legal issue is not automatic grounds for a stay. Here, *Concepcion* does not even qualify as raising a similar issue. The only similarity is that this case and *Concepcion* concern class action waivers in the context of an arbitration provision. Otherwise, *Concepcion* presents different issues of law and turns on very different facts than those present here. The Supreme Court's decision almost certainly will not affect the Court's ruling in this case. For these reasons, the Court should deny Qwest's motion to stay. In addition, the "supplemental authorities" Qwest presents in its motion should not have any bearing on this case.

II. STATEMENT OF FACTS

The facts relevant to the Court's consideration of Qwest's Motion to Stay and submission of supplemental authority are set out in Plaintiffs' Response to Defendants' Motion to Compel Arbitration. (Dkt. No. 74) at 1-6. A copy of Qwest's Subscriber Agreement, which contains the "Dispute Resolution and Arbitration; Governing Law" provision at ¶ 17, is found in the record as Exhibit B to the Affidavit of Travis Leo in Support of Defendants' Motion to Compel Arbitration (Dkt. No. 27-3). Plaintiffs will refer to ¶ 17 of the Subscriber Agreement as the "Dispute Resolution Provision."

III. ARGUMENT

A. **The Court Should Deny Qwest's Motion to Stay Pending the Supreme Court's Decision in *Concepcion***

1. Qwest Has Not Met Its Burden to Show a Stay Is Warranted

While a court has the inherent power to stay proceedings pending before it, the court must "weigh competing interests and maintain an even balance" when ruling on a motion to stay. *Landis v. N. Amer. Co.*, 299 U.S. 248, 254-55 (1936) (citations omitted). The party seeking a stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else." *Id.* at 256. "Only in rare circumstances will a litigant in one cause be compelled to stand aside while

a litigant in another settles the rule of law that will define the rights of both.” *Id.* (emphasis added). The Tenth Circuit has underscored that “[t]he right to proceed in court should not be denied except under the most extreme circumstances.” *Commodity Futures Trading Comm’n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.3d 1477, 1484 (10th Cir. 1983) (internal citations and marks omitted).

A pending Supreme Court decision on a related but distinguishable legal issue is not automatic grounds for a stay. *See Werner v. Colorado State Univ.*, 135 F. Supp. 2d 1137, 1139 (D. Colo. 2000) (declining to stay proceedings in case where defendant raised issue of Eleventh Amendment immunity from suit despite Supreme Court’s grant of certiorari in another case to address same issue). As another Tenth Circuit district court explained, “[t]he mere possibility that the Supreme Court may clarify the legal standards which apply to [plaintiff’s claims] does not justify the potential prejudice of a delay to plaintiff.” *Klaver Constr. Co., Inc. v. Kansas Dep’t of Transp.*, No. CIV.A.9902510 KHV, 2001 WL 1000679, at *3 (D. Kan. Aug. 23, 2001) (emphasis added) (denying motion to stay pending Supreme Court’s disposition of case on related, but not identical, legal issue).

Here, Qwest has failed to demonstrate “a clear case of hardship or inequity in being required to go forward” if its request for a stay of proceedings is not granted. Indeed, it has not identified any prejudice that it will suffer in the absence of a stay. In contrast, a stay will harm Plaintiffs and members of the putative class, notwithstanding Qwest’s assertion that “an additional stay of proceedings... will not prejudice any litigant.” Defs.’ Mot. at 9. Plaintiffs have been waiting nearly two years to determine whether this case will be permitted to proceed in court.¹ The longer Plaintiffs must wait for the Court to determine whether they may jointly

¹ This case was filed in the U.S. District Court, Western District of Washington, on October 15, 2008 and transferred to this Court on August 4, 2009. (Dkt. No. 1). On September 15, 2009, Qwest filed the motion to compel arbitration (which had been filed in the Washington court the year before but had not been ruled upon by that court). Motion to Compel Arbitration (Dkt. No. 26).

proceed in this Court, the more likely it is that witnesses' memories will become stale and relevant documents will not be retained. In addition, because Plaintiffs are seeking injunctive relief as well as damages, *see* Third Amended Class Action Complaint (Dkt. 54) at 17, granting the stay will harm Plaintiffs and similarly situated individuals by extending the time in which Qwest will continue to enforce the unlawful early termination fee in its Subscriber Agreements and collect money unfairly from class members.

More importantly, however, “the rule of law” at issue in *Concepcion* is not the “rule of law that will define the rights of” Plaintiffs here. As detailed below, *Concepcion* involves the application of a different legal standard than the motion pending before this Court, and the AT&T Mobility arbitration agreement at issue in *Concepcion* is significantly different from Qwest’s Dispute Resolution Provision.

2. *Concepcion* Presents Different Legal and Factual Issues and the Supreme Court’s Eventual Ruling Almost Certainly Will Have No Impact on the Issues Pending Here

The issue pending before the Supreme Court in *Concepcion* is “[w]hether the Federal Arbitration Act preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures – here, class-wide arbitration – when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims.” *Concepcion* Petition for a Writ of Certiorari (“Cert. Pet.”) at i.² Qwest misstates the sweep of the Supreme Court’s potential ruling when it claims that in *Concepcion*, “the Supreme Court will determine whether state unconscionability challenges to arbitration clauses governed by the FAA... are preempted by Federal law.” Defs.’ Mot. at 3. It ignores the key language of the issue presented in that case: “when those procedures [*e.g.*, class-wide

² Qwest has included a copy of the *Concepcion* Petition for a Writ of Certiorari as Exhibit A to its brief (Dkt. No. 109-1).

arbitration] are not necessary to ensure the parties to the arbitration agreement are able to vindicate their claims.” Cert. Pet. at i (emphasis added).

Thus, the issue Qwest identifies – whether the FAA preempts state law unconscionability challenges to arbitration clauses – is not before the Supreme Court in *Concepcion*. That issue is foreclosed by language in the FAA which provides that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (emphasis added). While courts must enforce arbitration agreements, they, like other contracts, may be invalidated by “generally applicable contract defenses, such as fraud, duress, or unconscionability.” *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Instead, what is before the Supreme Court is whether California, the laws of which were at issue in *Concepcion*,³ has adopted unconscionability defenses that are preempted by the FAA because, rather than applying generally, they apply only to arbitration provisions, even if those provisions purportedly create procedures under which parties “are able to vindicate their claims.” Cert. Pet. at i (emphasis added).

As a result, *Concepcion* almost certainly will not address the types of protections that are necessary to ensure that an arbitration agreement is not unconscionable. The very statement of the issue in *Concepcion* precludes the Supreme Court’s decision shedding any light on the issue before this Court. Indeed, the Supreme Court almost certainly will never address that issue because it is a matter of state law to be resolved by state courts or by federal courts exercising diversity jurisdiction and following the guidance of the state courts.

³ See *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 855 (9th Cir. 2009) (holding that “AT&T’s class action waiver is unconscionable under California law”); *Laster v. T-Mobile USA, Inc.*, No. 05cv1167DMS, 2008 WL 5216255, at *14 (holding “Plaintiffs have met their burden of establishing that the provision is unconscionable as applied to them under California law”). The “unconscionability” test AT&T Mobility challenges in *Concepcion* is based on the California Supreme Court’s ruling in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005). The elements of the *Discover Bank* test, which AT&T specifically calls into question in its Petition for Certiorari, are distinct from the *Davis* factors this Court must apply to Qwest’s agreement. See Cert. Pet. at 5-6 (discussing *Discover Bank* test).

Finally, even if the Supreme Court had been asked to address whether AT&T Mobility's arbitration agreement was unconscionable because it did not permit consumers to vindicate their claims, a ruling upholding the agreement would have shed little light on this case because of the dramatic differences between that agreement and Qwest's Dispute Resolution Provision.

First, Plaintiffs challenge Qwest's Dispute Resolution Provision not only because of the class action waiver, but also because of the other restrictions on remedies in the Dispute Resolution Provision. *See* Plaintiffs' Response to Defendants' Motion to Compel Arbitration (Dkt. No. 74) at 14-18 (discussing class action waiver); *id.* at 18-21 (discussing restrictions on remedies). Second, Qwest's agreement does not provide for "special incentives to pursue claims through individual arbitration" as does the AT&T Mobility agreement at issue in *Concepcion*. Cert. Pet. at 8-9. Such "special incentives" include a \$7,5000 minimum recovery if the arbitrator's award is greater than AT&T Mobility's "last written settlement offer made before an arbitrator was selected but less than \$7,500," and double attorneys' fees if the arbitrator's award is more than AT&T Mobility's last written settlement offer. *Id.* at 9.

Plaintiffs have never taken the position that a *per se* rule of unenforceability applies to arbitration clauses or class action waivers. Indeed, Plaintiffs sought, and obtained, discovery regarding the Dispute Resolution Provision because the Court's determination as to its enforceability is fact-specific and requires the Court to weigh evidence. *See* Plaintiffs' Supplemental Brief on Discovery Relating to Arbitration (Dkt. No. 47) (citing cases). The Supreme Court in *Concepcion* is not being asked to weigh evidence to determine whether a class action waiver is unconscionable, and even if it were, the facts are so different as to make any outcome non-determinative in this case.

For all these reasons, the Court should reject Qwest's contention that the facts and legal issues here are "similar" to those in *Concepcion* and that the Supreme Court's decision in that case "will very likely provide guidance" to this Court. *See* Defs.' Mot. at 8.

B. The Supreme Court’s Decision in *Stolt-Nielsen* Addresses Neither Unconscionability Nor FAA Preemption and Has No Bearing on the Issues Here

The issue before the Supreme Court in *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, decided in April 2010, was whether parties could be compelled to arbitrate a dispute on a classwide basis in the absence of an agreement to do so. *Stolt-Nielsen*, 130 S. Ct. at 1764 (explaining certiorari granted “to decide whether imposing class arbitration on parties whose arbitration clauses are ‘silent’ on that issue is consistent with the Federal Arbitration Act”). The Supreme Court rejected the position that “the parties’ mere silence on the issue of class-action arbitration constitutes consent to resolve their dispute in class proceedings.” *Id.* at 1776.

In contrast, here there is no dispute that the express terms of Qwest’s Dispute Resolution Provision bar all “class or consolidated” proceedings. *See* Dispute Resolution Provision ¶ 17(b) (stating both consumer and Qwest “waive any right to pursue any claims on a class or consolidated basis or in a representative capacity”). The issue before this Court is not whether Plaintiffs may be compelled to participate in classwide arbitration under an agreement that does not authorize such a proceeding, but instead, whether the Dispute Resolution Provision may be held invalid under general principles of state contract law. *See* 9 U.S.C. § 2 (arbitration agreements are valid and enforceable “save upon such grounds as exist in law or equity for the revocation of any contract”).

Notwithstanding the limited holding in *Stolt-Nielsen*, Qwest concludes that the Supreme Court’s “reasoning” somehow “indicates that an arbitration clause with an explicit class action bar... is every bit as enforceable as an arbitration provision such as the clause at issue in *Stolt-Nielsen* that prohibits class arbitration because it is silent on the issue.” Defs.’ Mot. at 3. Plaintiffs do not dispute that an arbitration agreement can be drafted to allow for individual claims only, but any such agreement is still subject to the same state-law contract defenses as any other term in an arbitration agreement. *See* 9 U.S.C. § 2. Because general principles of state contract law, including unconscionability, were not at issue in *Stolt-Nielsen*, the Supreme Court

did not touch on whether the FAA preempts such general principles, including state law regarding unconscionability. *See Stolt-Nielsen*, 130 S. Ct. at 1768 (noting that party seeking class arbitration did so on several grounds, including that “the [parties’ arbitration] clause would be unconscionable and unenforceable if it forbade class arbitration” but that arbitration panel below “said nothing” about this argument and therefore, the Court would not consider it). Indeed, to do so would be to rewrite the text of the FAA itself, which expressly provides that contract law principles are used to determine whether an arbitration agreement is enforceable. *See* 9 U.S.C. § 2. The fact that the *Stolt-Nielsen* Court held that an otherwise valid arbitration clause may not be construed to impose class arbitration on a party that never agreed to engage in such a procedure does not suggest that any arbitration clause that precludes class arbitration is always valid or that declining to enforce such a clause based on general principles of contract law would violate the FAA. In sum, *Stolt-Nielsen* has no relevance to the issues pending before this Court.⁴ Indeed, the issue of class arbitration is irrelevant here, where Qwest has made clear that it “is not asking the Court to sever the class action waiver from the Arbitration clause” and that “[i]f the Court determines that the class action waiver is unconscionable, then Qwest will litigate the issues in Court.” Defendants’ Motion to Compel Arbitration (Dkt. No. 26) at 17 n.4.

C. There Is No Delegation Clause in the Qwest Dispute Resolution Provision and Thus, *Rent-a-Center* Has No Bearing on the Issues Raised in Qwest’s Motion to Compel Arbitration

Citing the Supreme Court’s decision in *Rent-a-Center*, Qwest claims that “Plaintiffs’ challenge to the enforceability of Qwest’s arbitration clause should be resolved by an arbitrator, not this Court.” Defs.’ Mot. at 9. Qwest is incorrect. As explained below, the Supreme Court’s

⁴ Relying on the Court’s order granting certiorari, vacating and remanding in light of *Stolt-Nielsen* in *Am. Express Co. v. Italian Colors Rest.*, ___ U.S. ___, 130 S. Ct. 2401 (May 3, 2010), Qwest claims the Supreme Court “believes that *Stolt-Nielsen* renders class action waivers in arbitration clauses enforceable despite public policy and other challenges.” Defs.’ Mot. at 5-6. But, in the underlying case, *In re Am. Express Merchs. Litig.*, 554 F.3d 300 (2d Cir. 2009), the Second Circuit did not address preemption of state law providing generally applicable contract defenses. *See In re Am. Express*, 554 F.3d at 320 (stating court relied “on a vindication of statutory rights analysis”).

holding in *Rent-a-Center* concerned an arbitration agreement which contained a “delegation provision,” described by the *Rent-a-Center* Court as “an agreement to arbitrate threshold issues concerning the arbitration agreement.” 130 S. Ct. at 2777. Qwest’s Dispute Resolution Provision does not include a “delegation provision” and thus, *Rent-a-Center* is of little relevance here.

In *Rent-a-Center*, the employment agreement at issue “provided for arbitration of all past, present or future disputes arising out of [the plaintiff’s] employment with Rent-a-Center[.]” 130 S. Ct. at 2775 (internal marks omitted). The employment agreement also included a delegation provision, which stated that “the Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement, including, but not limited to any claim that all or any part of this Agreement is void or voidable.” *Id.* (internal marks omitted; emphasis added). In other words, the *Rent-a-Center* arbitration agreement contained both a provision regarding the scope of claims governed by the arbitration clause and a delegation provision. 130 S. Ct. at 2777. The question before the Supreme Court was whether the delegation provision was valid under § 2 of the FAA. *Id.* at 2778. In a 5-4 decision, the Supreme Court held the delegation provision in the *Rent-a-Center* employment agreement was valid under § 2 of the FAA and enforceable, “unless [the plaintiff] challenged the delegation provision specifically,” which he did not. *Id.* at 2779. The *Rent-a-Center* Court noted that the plaintiff “did not dispute that the text of the Agreement was clear and unmistakable” as to whether the arbitration agreement “provides the arbitrator with the exclusive authority to decide whether the Agreement to Arbitrate is enforceable.” *Id.* at 2777 n.1 (internal marks and citations omitted).

In contrast, the Qwest Dispute Resolution Provision contains no “clear and unmistakable” language delegating authority to the arbitrator to decide threshold issues as to the enforceability of the Dispute Resolution Provision, which includes an arbitration agreement and class action

waiver. Rather, the agreement contains terms which purport to describe the scope of claims governed by the Dispute Resolution Provision:

You agree that any dispute or claim arising out of or relating to the Services, Equipment, Software, or this Agreement (whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory) will be resolved by binding arbitration.

Dispute Resolution Provision ¶17(a). Rather than provide an arbitrator with “exclusive authority” to resolve “any dispute relating to the interpretation, applicability, enforceability or formation” of the arbitration agreement, as did the delegation provision in *Rent-a-Center*, the language Qwest terms a delegation provision (the language quoted above) only governs the scope of claims potentially subject to arbitration. Indeed, in Qwest’s motion to compel arbitration, Qwest itself characterized this language as that used to determine whether “the dispute falls within the scope of th[e] [arbitration] agreement.” *See* Defendants’ Motion to Compel Arbitration (Dkt. 26) at 8-9 (emphasis added) (arguing, based on the same language it now claims qualifies as a delegation provision, that “[t]he arbitration agreement encompasses Plaintiffs’ claims”).

Perhaps in acknowledgment that the Dispute Resolution Provision does not contain a “clear and unmistakable” delegation provision, Qwest also argues that the parties’ purported agreement that any arbitration shall be conducted by the American Arbitration Association (“AAA”) necessarily invokes a AAA “Rule of Commercial Arbitration” which provides an arbitrator with “the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement.” *Defs.’ Mot.* at 11 (citing Rule 7 of the AAA Rules of Commercial Arbitration). According to Qwest, “[t]his constitutes a clear and unmistakable delegation of matters relating to the enforceability of the arbitration agreement to the arbitrator.” *Id.* (citing *Pikes Peak Nephrology Assocs., P.C. v. Total Renal Care, Inc.*, No. C09-cv-00928-CMA-MEH, 2010 WL 1348326, at *6-7 (D. Colo. Mar. 30, 2010)).

The Dispute Resolution Provision, however, contains no language calling for application of the AAA Rules of Commercial Arbitration or any other AAA Rules. *See* Dispute Resolution Provision. Moreover, even assuming the AAA Commercial Rules applied to this consumer matter – and they do not – the AAA Commercial Rules’ grant of authority to the arbitrator to “rule on his or her own jurisdiction” does not strip this Court of its jurisdiction in the absence of a valid delegation clause in Qwest’s agreement. United States Supreme Court and Tenth Circuit precedent make clear that whether a dispute is arbitrable “is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise.” *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (internal citations and marks omitted); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) (holding that “[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clear and unmistakable evidence that they did so’”) (citing *AT&T Technologies, Inc. v. Comm’n Workers of Am.*, 475 U.S. 643, 649 (1986)). As the Tenth Circuit has explained, “broad provisions to arbitrate all disputes arising out of or relating to the overall contract... do not provide the requisite clear and unmistakable evidence ‘within the four corners of the... [a]greement that the parties intended to submit the question of whether an agreement to arbitrate exists to an arbitrator.’” *Spahr v. Secco*, 330 F.3d 1266, 1270 (10th Cir. 2003) (citing *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 780 (10th Cir. 1998)). Nothing “within the four corners” of the Qwest Dispute Resolution Provision indicates that the parties “agreed to arbitrate arbitrability.” Under *Spahr* and *Rent-a-Center*, language in the Qwest agreement indicating disputes or claims “arising out of or relating to” the Subscriber Agreement is not “clear and unmistakable evidence” of a delegation clause.

Qwest also relies on Judge Arguello’s unpublished opinion in *Pikes Peak*, which pre-dates *Rent-a-Center*, to support its claim that “Plaintiffs’ challenge to the enforceability of the arbitration clause should be resolved by an arbitrator, not this Court.” Defs.’ Mot. at 9. Qwest

characterizes *Pikes Peak* as holding that where “an arbitration agreement is governed by the AAA Rules, the parties ‘acquiesce[]’ to the arbitrator’s jurisdiction on matters of arbitrability or scope [of the arbitration agreement].” *Id.* at 11 (citing *Pikes Peak*, 2010 WL 1348326 at *6-7). In *Pikes Peak*, however, a commercial dispute involving alleged breaches of non-competition and non-solicitation provisions in medical director agreements, the arbitration clause at issue included specific language delegating the issue of arbitrability to the arbitrator: “[a]ny controversy, dispute or claim arising out of or in connection with this Agreement, or the breach, termination or validity hereof, shall be settled by final and binding arbitration[.]” *Pikes Peak*, 2010 WL 1348326 at *1 (emphasis in original). In addition, Judge Arguello’s determination that the “parties acquiesced to the arbitrator’s jurisdiction on matters of arbitrability or scope” was based on the parties’ express “incorporat[ion], by reference, [of] then-existing AAA Rules” in their arbitration agreement. *Id.* at *7. Specifically, the *Pikes Peak* agreement stated that the arbitration would be conducted “in accordance with the Commercial Arbitration Rules of the American Arbitration Association[.]” *Id.* at *2. No such language appears in Qwest’s Dispute Resolution Provision.

Because there is no delegation clause in the Dispute Resolution Provision, neither *Rent-a-Center* nor *Pikes Peak* has any bearing on the issues pending before the Court on Qwest’s motion to compel arbitration and the Court should decline Qwest’s invitation to delegate “matters relating to the enforceability of the arbitration clause, including the Plaintiffs’ unconscionability challenge,” to an arbitrator. *See* Defs.’ Mot. at 11-12. Qwest’s interpretation of its Dispute Resolution Clause as containing an unequivocal and enforceable delegation clause is at odds with its actions in this litigation to date. Qwest provides no explanation as to why it did not raise this issue nearly two years ago, when it filed its first motion to compel arbitration in this proceeding. The existence and enforceability of delegation clauses in arbitration agreements is not a phenomenon that began with the Supreme Court’s decision in *Rent-a-Center*. Indeed,

Qwest could easily have raised this issue in its motion to compel arbitration, citing then-available Supreme Court and Tenth Circuit authority, including *First Options*, *AT&T Technologies*, and *Spahr*. Qwest provides the Court with no explanation as to why it waited over two years to raise the issues of (1) whether the parties agreed to arbitrate arbitrability; and (2) if such agreement exists, whether such delegation of jurisdiction to an arbitrator is itself enforceable.

For this reason, Qwest's complaint that Plaintiffs have failed to "contest the validity 'of the precise agreement to arbitrate at issue'" but rather, have challenged "the arbitration agreement as a whole[,]'" should be rejected. *See* Defs.' Mot. at 11. There is no delegation clause in Qwest's Dispute Resolution Provision and as noted above, the language Qwest now claims constitutes a delegation clause Qwest previously characterized as language regarding the scope of the arbitration agreement.

IV. CONCLUSION

For the aforementioned reasons, Plaintiffs respectfully request the Court deny Defendants' Motion to Stay Ruling on Defendants' Motion to Compel Arbitration.

DATED this 30th day of September, 2010.

Respectfully submitted,

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— **EXHIBIT B** —

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Walker D. Miller

Civil Action No. 09-cv-2848-WDM-KMT

RICK GROSVENOR, on behalf of himself and all others similarly situated,

Plaintiffs,

v.

QWEST COMMUNICATIONS INTERNATIONAL, INC., a Delaware corporation,
QWEST SERVICES CORPORATION, a Colorado corporation,
QWEST CORPORATION, a Colorado corporation,
QWEST COMMUNICATIONS CORPORATION, a Delaware corporation, and
QWEST BROADBAND SERVICES, INC., a Delaware corporation.

Defendants.

ORDER

Miller, J.

This case is before me on Defendants Qwest Communications International, Inc., Qwest Services Corporation, Qwest Corporation, Qwest Communications Corporation, and Qwest Broadband Services, Inc.'s ("Qwest") Motion to Compel Arbitration (ECF No. 13) and Motion for Stay (ECF No. 62). I have reviewed the parties' written arguments and conclude that oral argument is not required. For the reasons that follow, the Motion to Compel Arbitration (ECF No. 13) will be denied. The Motion to Stay (ECF No. 62) will be denied.

BACKGROUND

Grosvenor claims that Qwest enticed him and other Qwest customers to purchase high-speed Internet service by promising a "Price for Life Guarantee" ("Price

for Life”) but, after the customers agreed to subscribe to the service, Qwest routinely raised their monthly rates. Qwest contends that when Grosvenor subscribed to high speed Internet services, he agreed to its Subscriber Agreement, which requires arbitration of disputes, precluding Grosvenor’s lawsuit in this forum.

The Subscriber Agreement “governs [the consumer’s] use and Qwest’s provision of Service, Software and Equipment.” Subscriber Agreement at 1, ECF No. 13-1. The Subscriber Agreement is available to consumers at www.Qwest.com/legal. It provides that Qwest will supply equipment and services to provide a high speed Internet connection for the customer and the customer will pay Qwest for them. *See id.* In addition, it describes the consumer’s responsibilities connected with the use of email, a website, web hosting services, web design services, and equipment. It notifies the consumer that he may not modify the software, that Qwest and third-party licensors are the owners of the intellectual property, that there are limitations on the use of the service, billing, and termination. *See id.* The Subscriber Agreement limits Qwest’s liability. *See id.* Most importantly for this Motion, it requires that all disputes concerning the Subscriber Agreement be resolved by arbitration or in small claims court and not in a class action:

17. Dispute Resolution and Arbitration; Governing Law. PLEASE READ THIS SECTION CAREFULLY. IT AFFECTS RIGHTS THAT YOU MAY OTHERWISE HAVE. IT PROVIDES FOR RESOLUTION OF DISPUTES THROUGH MANDATORY ARBITRATION WITH A FAIR HEARING BEFORE A NEUTRAL ARBITRATOR INSTEAD OF IN A COURT BY A JUDGE OR JURY OR THROUGH A CLASS ACTION.

(a) Arbitration Terms. You agree that any dispute or claim arising out of or relating to the Services, Equipment, Software, or this Agreement (whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory) will be resolved by binding arbitration. The sole exceptions to arbitration are that either

party may pursue claims: (1) in small claims court that are within the scope of its jurisdiction, provided the matter remains in such court and advances only individual (non-class, non-representative, nonconsolidated) claims; and (2) in court if they relate solely to the collection of any debts you owe to Qwest.

Id. at ¶17 (“Arbitration Clause”).

Grosvenor’s Initial Subscription to High Speed Internet Service in 2006

Grosvenor subscribed to Qwest high-speed Internet service in 2006. Qwest claims that a clickwrap agreement was presented when Grosvenor installed the High Speed Internet Services (“Clickwrap Agreement”) from a compact disk (“QuickConnect CD”) at that time, which bound him under the Subscriber Agreement.

A clickwrap license (or “click-to-accept”) is a common tool used by Internet merchants to obtain electronic signatures as agreement to terms of licensing contracts. *See Mortg. Plus, Inc. v. DocMagic, Inc.*, 2004 WL 2331918 (D. Kan. 2004). Clickwraps generally display a screen containing terms and conditions that the user must accept to continue to install or use the product. As a rule, a clickwrap is valid where the terms of the agreement appear on the same screen with the button the user must click to accept the terms and proceed with the installation of the product. *Id.* Typically, the user is asked whether he accepts all of the terms of the preceding agreement and is told that choosing “no” or “decline” will end set-up of the product. *Id.*

The Clickwrap Agreement, here, contains pages entitled “High-Speed Internet Modem Installation Legal Agreements” (“Legal Agreements Pages”). In pertinent part it states:

Please read the terms ***including arbitration and limits on Qwest liability*** at www.qwest.com/legal (“Qwest

Agreement”)¹ that govern your use and Qwest’s provision of the service(s) and equipment you ordered from the list below. [Emphasis in the original].

- Qwest High-Speed Internet Service
- Qwest Choice™ Office Plus or Office Basic service
- Qwest-provided modem
- Qwest Home Network Backer™ or Office Network Backer™ service
- Microsoft Internet Software

Please also read the (1) information on term and early termination fee, and (2) disclaimers and end user license agreement related to this installation and software you receive during it (“Install Agreements”) in the scroll box below.

IMPORTANT, BINDING LEGAL INFORMATION.

Your click below on “I Accept” is an electronic signature and acknowledges: (1) you agree the Qwest Agreement contains the terms under which service and equipment are offered and provided to you, (2) you understand and agree to such terms (even if you don’t read them), and (3) you understand and agree to the Install Agreements.

Sur-reply at 2, ECF No. 53-1²; see *also*, Kohler Aff. ¶ 8; Ex. A at 2 (ECF No. 53-1).

The Legal Agreements Pages of the Clickwrap Agreement continue for ten pages of “Important, Binding Legal Information,” which include Install Agreements, Temporary Internet Connection Disclaimer, End User License Agreement, Software Product License, Limitation of Liability, and other General Provisions such as the Basis of

¹ “Qwest Agreement” is the Subscriber Agreement.

² While not expressly authorized by federal or local rules, a sur-reply is not improper where it addresses facts or law newly raised in the reply. See *Tnaib v. Document Techs. LLC*, 450 F. Supp. 2d 87 (D.D.C. 2006). Although Grosvenor did not file a motion for leave to file a sur-reply, I find that the Sur-reply (ECF No. 53) addresses issues and facts raised for the first time in the Reply (ECF No. 34). Accordingly, I shall consider the argument and evidence presented in the Sur-reply.

Bargain (Ex. A at 2–6, ECF No. 53-1), and Remedies and Legal Actions (*id.* at 6–7, § 7.2).

The Clickwrap Agreement section entitled, “Remedies and Legal Actions” (Section 7.2(b)), provides exclusive jurisdiction in the courts of San Mateo County, California or the United States District Court for the Northern District of California for disputes with SupportSoft, Inc. [a Qwest vendor]. *Id.* Section 7.2(c) provides exclusive jurisdiction in the courts of Denver County, Colorado or the United States District Court for the District of Colorado for all other disputes concerning “this Agreement.” Section 7.2(d) provides a one-year limitation for bringing an action related to “this Agreement.”

At the bottom of the Legal Agreement Pages, the customer is directed that:

Your click on “I Accept” is an electronic signature to the agreements and contracts set out herein. Please review the material in the above box for important, binding, legal information.

Kohler Aff. ¶ 9; Sur-Reply at 2, ECF No. 53-1 (similar but not identical language). In order to complete installation of the high speed Internet services and configure the computer, Grosvenor would have been required to click on the “I Accept” button. In order to refuse the terms of the Agreement, he would have had to click “Cancel.” *Id.* at ¶¶ 10–11.

The Legal Agreements Pages do not reproduce the Subscriber Agreement. In order to read the Subscriber Agreement, Grosvenor would have had to exit the installation program, log onto the Internet (to which he did not yet have access), and navigate to the specific pages containing the Subscriber Agreement. Having read the Subscriber Agreement, he would have had to reinsert the QuickConnect CD into his computer, read the remaining ten pages of the Legal Agreements Pages, and determine

whether he would accept or decline the terms of the agreements. See Sur-reply, Ex. A at 1, ECF No. 53-1

Qwest asserts its practice is to send a Welcome Letter to each of its new and renewing customers. See Aff. of Lucia Beardsley ¶¶ 1 & 10, ECF No. 34-1. After the closing signature, on the back of the letter, Qwest states:

Qwest High-Speed Internet® Service and related products are offered under the Subscriber Agreement terms, which are located at www.qwest.com/legal (may also be enclosed). Please review the terms, which include arbitration and limits on Qwest liability. If you do not agree, call Qwest to cancel your service within 30 days.

Reply, Ex. B at 3 (emphasis added), ECF No. 34-3.

Qwest also contends that Grosvenor received a Welcome Letter confirming his order when he first subscribed to the Qwest service in 2006, which provided him with sufficient notice of the terms of the Subscriber Agreement, including the Arbitration Clause, by referencing the location of the Subscriber Agreement on the Qwest website (www.qwest.com/legal). See Beardsley Decl. ¶¶ 5–10, ECF No. 34-1. Reply at 5, ECF No. 34.

Grosvenor states that he did not receive such a notice in 2006 and does not recall having received a Welcome Letter. See Grosvenor Decl. ¶ 8, ECF No. 26-23. When Grosvenor first subscribed to Qwest high speed Internet services in 2006, Price for Life was not among the pricing programs offered by Qwest. He states that he is very confident that Qwest never called his attention to the Subscriber Agreement's provision barring consumers from suing in any court other than small claims court or participation in a class action lawsuit. *Id.* at ¶¶ 10–11.

2007 Upgrade and Subscription to Price for Life

Grosvenor switched from his original plan to Price for Life in October 2007. He spoke to a customer service representative by telephone to make the switch. Grosvenor Decl. ¶ 6, ECF No. 26-23. Grosvenor states that, under Price for Life, he locked in the same monthly rate for as long as he maintained his Internet service with Qwest. Compl. ¶ 11, ECF No. 1. After he had signed up for Price for Life, he responded to an offer from Qwest for higher speed Internet services for an additional \$5 per month. Again, he made the change by telephone. Grosvenor Decl. ¶ 6, ECF No. 26-23. In November 2007, he began to pay \$31.99 for the service, which he expected to be the price he would pay “for life.” Compl. ¶ 15, ECF No. 1.

Qwest contends that Grosvenor received a second Welcome Letter confirming his order when he upgraded his service in 2007. Beardsley Aff. ¶ 11, ECF No. 34-1. The 2007 letter is similar to the one Qwest was sending in 2006. See Ex. B to Beardsley Aff., ECF No. 34-3 Grosvenor does not recall having received a Welcome Letter when he changed to Price for Life or upgraded to a higher speed Internet service in 2007. Grosvenor Decl. ¶ 8, ECF No. 26-23. In addition, Grosvenor testifies that he did not have to install new software when he changed to Price for Life. *Id.* at ¶ 7. Qwest does not state that Grosvenor would have received a second QuickConnect CD to install Price for Life. See *id.*; see also, Beardsley Aff., ECF No. 34-1.

2008 Price Increase

In August 2008, Qwest’s invoice to Grosvenor increased to \$49.99 for a month’s Internet service. *Id.* at ¶ 16. He complained to Qwest about the price increase. The customer service representative offered Grosvenor a different promotional offer, which

Grosvenor rejected. *Id.* at ¶ 17. He told the customer service representative that the only offer he had accepted was the \$31.99 Price for Life. *Id.* In response, Qwest reduced Grosvenor's monthly Internet charge from \$49.99 to \$36.99. *Id.* Grosvenor accepted the new, higher price under protest. *Id.* at ¶ 18.

This lawsuit followed. The Complaint claims breach of contract; specifically, that the Price for Life Guarantee is an enforceable term of a contract between Grosvenor and Qwest. Compl. ¶¶ 34–38, ECF No. 1. In the alternative, Grosvenor claims Promissory Estoppel because the Price for Life Guarantee was a promise made by Qwest on which Grosvenor relied to his detriment and suffered damages. *Id.* at ¶¶ 39–44. He claims that Qwest was unjustly enriched by consumers in the Price for Life program who paid more than other customers receiving identical service. *Id.* at ¶¶ 45–49. He further claims violation of the Colorado Consumer Protection Act (Colo. Rev. Stat. § 6-1-101 *et seq.* *Id.* ¶¶ at 50–59.

Qwest has answered and moves the court to dismiss Grosvenor's complaint, to stay Grosvenor's claims, and to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 3³ and Colorado law, or in the alternative, to dismiss the case while Grosvenor pursues his claim individually in small claims court.

STANDARD OF REVIEW

"A motion to compel arbitration under the Federal Arbitration Act is governed by a standard similar to that governing motions for summary judgment." *Stein v. Burt-Kuni*

³ This Court's jurisdiction over the case depends on the arbitration issue. 9 U.S.C. § 4 (motion to compel arbitration under written agreement may be filed in federal district court "which, save for such agreement, would have jurisdiction under Title 28").

One, LLC, 396 F. Supp. 2d 1211, 1213 (D. Colo. 2005) (citing *SmartText Corp. v. Interland, Inc.*, 296 F. Supp.2d 1257, 1262 (D. Kan. 2003)). Accordingly, “in this case, [Qwest] must present evidence sufficient to demonstrate an enforceable arbitration agreement.” *Id.* (citing *SmartText Corp.*, 296 F. Supp.2d at 1263). “If this is shown, the burden shifts to [Grosvenor] to raise a genuine issue of material fact as to the making of the agreement, using evidence comparable to that identified in Fed. R. Civ. P. 56.” *Id.*; see also, 9 U.S.C. § 4. “To accomplish this, the facts ‘must be identified by reference to an affidavit, a deposition transcript, or a specific exhibit incorporated therein.’” *Adams v. Am. Guar. & Lab. Ins. Co.*, 233 F.3d 1242, 1246 (10th Cir. 2000) (quoting *Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022, 1024 (10th Cir. 1992)). If Grosvenor “demonstrates a genuine issue of material fact, then a trial on the existence of the arbitration agreement is required.” *Stein*, 396 F. Supp. 2d at 1213 (citing 9 U.S.C. § 4); see also, *Aedon Eng'g, Inc. v. Seatex*, 126 F.3d 1279, 1283 (10th Cir. 1997) (holding that the district court must hold a jury trial on the existence of the agreement to arbitrate where the parties raise genuine issues of material fact regarding the making of the agreement to arbitrate).

DISCUSSION

Jurisdiction to Determine Validity of Arbitration Agreement.

Initially, I address whether I have jurisdiction to rule on the Motion to Compel Arbitration. Under the Federal Arbitration Act, if a party challenges the validity of an agreement to submit disputes over the agreement to arbitrate at issue, the court must consider the challenge before ordering compliance with that agreement. *Rent-a-Center v. Jackson*, 130 S.Ct. 2772 (June 21, 2010). If a party challenges the enforceability of

the agreement as a whole, the challenge is for the arbitrator. *Id.* “Courts should not assume that the parties agree to arbitrate arbitrability unless there is a clea[r] and unmistakabl[e] evidence that they did so.” *Id.* at 2278 (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); see also, *AT&T Techs., Inc. v. Comm’cns. Workers*, 475 U.S. 643, 649 (1986) (“Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.”).

Qwest argues that, not only must Grosvenor arbitrate, an arbitrator must make the decision whether the Subscriber Agreement requires arbitration. In support of this contention, Qwest cites *Pikes Peak Nephrology Assocs., P.C. v. Total Renal Care, Inc.*, 2010 WL 1348326 (D. Colo. 2010) (“*PPNA*”). See Defs’. Notice of Supplemental Authority in Support of their Mot. to Compel Arbitration & Mot. for Stay (ECF No. 60). *PPNA* holds that where the parties agree to arbitrate under AAA rules, they agree to the procedural rules of AAA, unless the party indicates otherwise in the contract. See *PPNA*; see also, *P&P Indus., Inc. v. Sutter Corp.*, 179 F.3d 861, 867 (10th Cir. 1999). The parties must still “clearly and unmistakably” give the arbitrator exclusive authority to decide whether the agreement is enforceable. *Rent-a-Center*, 130 S.Ct. at 2275.

In *PPNA*, there are two arbitration agreements at issue (one drafted and executed in 1998 and one drafted and executed in 2005). The *PPNA* 1998 agreement states: “Any controversy, dispute or claim arising out of or in connection with this Agreement, or the *breach*, termination or *validity* hereof, shall be settled by final and binding arbitration” *Id.* at *6 (emphasis in *PPNA*). Further, the parties were required to first negotiate a resolution of “[disputes arising] . . . under [the] Agreement.’ If

negotiation fails, “the dispute [except for alleged breaches of the non-competition and non-solicitation provision] shall be settled by final and binding arbitration . . . in accordance with the Commercial Arbitration Rules of the [AAA].” *Id.* at *6 (emphasis added).

The Qwest Arbitration Procedures are much more general:

(I) *Arbitration Procedures.* Before commencing arbitration you must first present any claim or dispute to Qwest in writing to allow Qwest the opportunity to resolve the dispute. If the claim or dispute is not resolved within 60 days, you may request arbitration. The arbitration shall be conducted by the American Arbitration Association (“AAA”).

Subscriber Agreement ¶ 17(a)(I), ECF No. 13-1. They do not incorporate by reference the specific AAA rules, nor do they state that the validity of the Arbitration Terms shall be decided by the arbitrator, as *PPNA* does.

Having expressly incorporated the AAA Rules by reference in the contract, Rule 7 of the AAA Rules provides: “The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.” *Id.* Accordingly, under these terms, the arbitrator was to decide questions of jurisdiction.

In contrast, Qwest’s Arbitration Procedures do not expressly incorporate specific AAA Rules. Accordingly, the Arbitration Procedures are not a “clear and unmistakable” choice of arbitration of the validity of whether the parties agreed to arbitrate.

Qwest also cites *Rent-a-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010) for the proposition that the arbitrator should decide the validity of the Arbitration Clause contained in the Subscriber Agreement. *Rent-a-Center* is distinguishable for two

reasons. First, in *Rent-a-Center*, Jackson challenged the contract as a whole, not the arbitration clause. Here the challenge is to the arbitration clause, not the Subscriber Agreement as a whole. Grosvenor argues only that the dispute resolution provision is unconscionable pursuant to factors set forth in *Davis v. M.L.G. Corp.*, 712 P.2d 985, 991 (Colo. 1986). See Resp. Part B, ECF No. 26.

Second, the *Rent-a-Center* arbitration clause states expressly: “The Arbitrator . . . shall have exclusive authority to resolve any dispute relating to the . . . enforceability . . . of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.” *Id.* at 2777. In contrast, as noted above, the Arbitration Procedures do not mention the power of the arbitrator to resolve enforceability of the Subscriber Agreement. Accordingly, the Qwest Arbitration Clause does not give clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.⁴

In these circumstances, I find that the Qwest Arbitration Clause does not specify

⁴Qwest also offers *Stolt-Nielson, S.A. v. Animal Feeds Int’l. Corp.*, 130 S.Ct. 1758 (April 27, 2010). *Stolt-Nielson, S.A.* holds that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. Accordingly, where a contract is silent, the court cannot provide a term that would fundamentally change the nature of the proceeding. Here, the Qwest Subscriber Agreement is not silent. Qwest’s Subscriber Agreement requires arbitration and prohibits any court action other than in small claims court and specifically bars class actions. Consequently, the issue is one of formation, not construction. Accordingly, *Stolt-Nielsen* is not relevant to the issue at hand.

In addition, Qwest uses *Stolt-Nielsen* to raise the issue of class arbitration for the first time. The Arbitration Clause clearly differentiates between arbitration on one hand and court actions “by a judge or jury or through a class action” on the other hand. See ECF No. 13-1 ¶ 17. Neither party connected arbitration with a class arbitration prior to Defendants’ Notice of Supplemental Authority in Support of their Mot. to Compel Arbitration and Mot. to Stay (ECF No. 60). Accordingly, class arbitration is not only irrelevant to the issue at hand; it is improperly raised. Grosvenor has no opportunity to respond to the argument that class arbitration would be improper in this matter. I do not consider *Stolt-Nielsen* for this proposition.

that an arbitrator is to determine issues of arbitrability. Accordingly, this court should determine whether a valid arbitration clause exists.

Existence of Valid Arbitration Clause

In its Motion to Compel Arbitration, Qwest relies on the general federal policy favoring arbitration of disputes. The presumption in favor of arbitration falls away, however, “when the parties dispute the existence of a valid arbitration agreement.” *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1220 (10th Cir. 2002). “The existence of an agreement to arbitrate is a threshold matter which must be established before the FAA can be invoked.” *Aedon Eng'g, Inc.*, 126 F.3d at 1287.

The Tenth Circuit relies on state law principles of contract formation to determine whether parties have agreed to arbitrate an issue or claim. *Aedon Eng'g, Inc.*, 126 F.3d at 1287. Colorado applies principles governing contract formation to determine whether parties have agreed to submit a claim to arbitration. *Allen v. Pacheco*, 71 P.3d 375, 378 (Colo. 2003). “A contract is formed when an offer is made and accepted . . . and the agreement is supported by consideration. . . . Acceptance of an offer is generally defined as words or conduct that, when objectively viewed, manifests an intent to accept an offer. *Marquardt v. Perry*, 200 P.3d 1126, 1129 (Colo. App. 2008) (internal citations omitted). I must construe the language of any arbitration agreement to give effect to the parties’ intent as determined from the plain language of the agreement. *Pacheco*, 71 P.3d at 378.

To prevail on its motion, Qwest must show sufficient evidence that an enforceable contract exists. See *SmartText Corp.*, 296 F. Supp. 2d 1257 (D. Kan. 2003). In support of its claim that the Subscriber Agreement and Arbitration Clause are

enforceable, Qwest presents the two pieces of evidence introduced above—the QuickConnect CD that requires an electronic signature and references the Subscriber Agreement and the Welcome Letter which mentions the requirement to arbitrate.

1. Electronic Signature

Qwest claims that Grosvenor signed his electronic signature to Qwest's Clickwrap Agreement when he activated the QuickConnect CD containing the software for Qwest high speed Internet service in 2006, and that it applies to Price for Life as well as the original high speed Internet services. Reply at 5–6, ECF No. 34 (citing Kohler Aff., ECF No. 34-4).

Courts have found clickwrap agreements to be valid and binding. For instance, in *Mortg. Plus, Inc.*, the defendant, DocMagic, Inc., supplied its software on a CD and presented its terms of agreement on a scrollable window on the same page as the acceptance button. The buyer (or user), here Mortgage Plus, Inc., was required to affirmatively click the “Yes” button to assent to the Software Licensing Agreement as a prerequisite to installing the software. *Mortg. Plus*, 2004 WL 2331918 at *5. The court stated that Mortgage Plus, Inc. had “a choice as to whether to download the software and utilize the related services; thus, . . . installation and use of the software with the attached license constituted an affirmative acceptance of the license terms by Mortgage Plus and the licensing agreement became effective upon this affirmative assent.” *Id.* The court found that DocMagic, Inc.'s clickwrap agreement was a valid contract for the enclosed software. *Id.*; see also, *Recursion Software, Inc. v. Interactive Intelligence, Inc.*, 425 F. Supp. 2d 756, 781–83 (N.D. Tex. 2006) (website provided terms in scrollable window on same page as the button to accept those terms); *Caspi v.*

Microsoft Network, L.L.C., 732 A.2d 528, 530 (“I Agree” and “I Don’t Agree” buttons appear on same page as scroll down window containing terms of agreement); *Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200 (Tex. App. 2001) (determining clickwrap contract with forum selection clause valid where plaintiff had to scroll through portion of contract to find clause).

Another example of an approved clickwrap agreement is *Hugger-Mugger L.L.C. v. Netsuite, Inc.*, 2005 WL 2206128 (D. Utah 2005). In *Hugger-Mugger L.L.C.*, the License Agreement expressly incorporated by reference certain “Terms of Service,” which were posted online by Netsuite, Inc. The “Terms of Service” document was not physically attached to the written License Agreement but its online location was printed in the License Agreement as part of the incorporation clause.

Specifically, the Netsuite, Inc. License Agreement stated:

In consideration of the license fee paid by Customer [Hugger-Mugger] and *subject to the terms of this agreement and the Terms of Service posted at www.NetSuite.com*, or successor Web site, NetSuite grants Customer, its employees, and agents a nonexclusive, nontransferable license to use the Service for internal business purposes. . . .

Id. at *2 (emphasis added in *Hugger-Mugger L.L.C. v. Netsuite, Inc.*).

Qwest’s Clickwrap Agreement is unlike any of the clickwraps described above. The Qwest Subscriber Agreement and the Arbitration Clause do not appear on the same scroll down box or page as the “I Accept” and the “I Do Not Accept” buttons. Unlike the Netsuite, Inc. clickwrap, the Subscriber Agreement is referenced by the Legal Agreements page but it is not expressly incorporated into the Clickwrap Agreement:

Please read the terms ***including arbitration and limits on Qwest liability*** at www.qwest.com/legal ("Qwest Agreement") that govern your use and Qwest's provision of the service(s) and equipment you ordered from the list below.

See Kohler Aff. ¶ 4 (emphasis in the original), ECF No. 34-4. This is the sole reference to the Subscriber Agreement in ten pages of agreements, which include Install Agreements, Temporary Internet Connection Disclaimer, End User License Agreement, Software Product License, Limitation of Liability, and other General Provisions such as the Basis of Bargain (Ex. A at 2–6, ECF No. 53-1), and Remedies and Legal Actions (*id.* at 6–7, § 7.2) (providing exclusive jurisdiction for dispute resolution in the courts of San Mateo County, California or Denver, Colorado, or the United States Districts in which these counties are located and providing a one-year limitation for filing actions).

As presented, the Clickwrap Agreement does not clearly incorporate the Subscriber Agreement by reference and to reach the arbitration clause requires the user to leave the installation program, log onto the Internet (if possible), navigate to the proper page, and read the Subscriber Agreement, then return to the installation program's scroll down window to read the remaining ten pages of the High-Speed Internet Modem Installation Legal Agreement before choosing whether to agree to the terms. In addition, the arbitration issue is confused by the fact that the readily available agreements that provide a forum in the court system for resolution of conflicts springing from the scroll box contracts. This creates an ambiguity regarding recourse in the event of a dispute. These circumstances demonstrate a genuine issue of fact.

2. Welcome Letter

As noted above, after the closing of the Welcome Letters, on the back of the

page, readers are informed:

Qwest High-Speed Internet® Service and related products are offered under the Subscriber Agreement terms, which are located at www.qwest.com/legal (may also be enclosed). Please review the terms, which include arbitration and limits on Qwest liability. If you do not agree, call Qwest to cancel your service within 30 days.

Reply, Ex. B at 3 (emphasis added), ECF No. 34-3. From this language, it is uncertain whether any letter contained an actual copy of the Subscriber Agreement because it may or may not have been enclosed. However, the reader is asked to review the terms of the Subscriber Agreement on the Qwest website and is given thirty days in which to review the terms. *Id.* The thirty-day look-back period is significant because it gives the consumer time to set up his Internet service, log-on to the Qwest website to examine the terms of the Subscription Agreement, and reject the terms by canceling his subscription.

Bischoff v. DirecTV, Inc., 180 F. Supp. 2d 1097, 1103 (C.D. Cal. 2002) presents a similar situation. In *Bischoff*, DirecTV provided the customer with an arbitration agreement after the parties had entered a contract for satellite programming, which was delivered after the customer had purchased the equipment and after DirecTV had activated the service. *Id.* The *Bischoff* court held that the arbitration agreement was valid, noting, “[p]ractical business realities make it unrealistic to expect DirecTV, or any television programming service provider for that matter, to negotiate all of the terms of their customer contracts, including arbitration provisions, with each customer before initiating service.” *Id.* at 1105.

However, Grosvenor has raised material questions of fact as to contract

formation, including: whether he ever received the Subscriber Agreement, and whether he received the Welcome Letters.

Grosvenor also questions whether the Subscription Agreement, containing the Arbitration Clause that Qwest was using at the time Grosvenor subscribed to Price for Life, applies to the program. Resp. at 7–8, ECF No. 26. He argues that a form agreement is part of a contract only if the plaintiff was aware of it and assented to it. *Id.* at 7 (citing *Vasey v. Martin Marietta Corp.*, 29 F.3d 1460, 1465 (10th Cir. 1994) (no implied contract where employee unaware of document prior to termination)).

Grosvenor also contends that he has not alleged that Qwest breached the Subscriber Agreement. Resp. at 7, ECF No. 26. He alleges that Qwest breached its contract to provide Internet services at a set “Price for Life.” Compl. ¶¶ 34–38, ECF No. 1. He reiterates that the Subscriber Agreement was not a part of his agreement with Qwest because Qwest did not inform him of the terms of the Subscriber Agreement when he enrolled in Price for Life. Resp. at 7–8, ECF No. 26; Grosvenor Decl. ¶ 10, ECF No. 26-23.

Qwest counters that Grosvenor cannot state that he never agreed to the Subscriber Agreement because Grosvenor admits that he agreed to the Subscriber Agreement in the Complaint where he stated that customers like him “entered into contracts” for Price for Life [High Speed Internet] service.” (Reply at 9 (citing Compl. ¶ 1, (ECF No. 1)), ECF No. 34) and that the “Price for Life Guarantee is an enforceable term of the contract which Mr. Grosvenor . . . entered with Qwest relating to Qwest’s [I]nternet service.” *Id.* (citing Compl. ¶ 35).

Again, the circumstances present genuine issues of fact as to whether Grosvenor

agreed to arbitrate his claims, precluding a ruling as a matter of law. See *Stein*, 396 F. Supp. 2d at 1213 (citing 9 U.S.C. § 4); see also, *Aedon Eng'g, Inc.*, 126 F.3d at 1283.

C. Motion to Stay

Qwest filed Defendants' Notice of Supplemental Authority in Support of Their Motion to Compel Arbitration and Motion for Stay (ECF No. 62) pending a decision in *AT&T Mobility, LLC v. Concepcion*, 130 S.Ct. 3322 (*cert. granted*, May 24, 2010).

Qwest requests that I stay the Motion pending the United States Supreme Court's decision in *Concepcion*, on the basis that it presents issues similar to those before me on the Motion to Compel Arbitration. The issue raised by AT&T Mobility, LLC is "[w]hether the FAA preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures—here, class-wide arbitration, when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims." *Id.* at 2. *Concepcion* concerns the California unconscionability law and its unique test for contracts requiring that disputes be resolved on an individual basis. Pet. for Cert at 5. My review of the Petition for Certiorari reveals that the outcome of *Concepcion* is not likely to affect my decision on the Motion to Compel Arbitration.

Accordingly, it is ORDERED that:

1. Defendants Qwest Communications International, Inc., Qwest Services Corporation, Qwest Corporation, Qwest Communications Corporation, and Qwest Broadband Services, Inc.'s Motion to Compel Arbitration (ECF No. 13) is denied;
2. The Motion for Stay (ECF No. 62) is denied;

3. The parties shall schedule a trial to determine whether a valid arbitration agreement exists.

DATED at Denver, Colorado on September 30, 2010.

BY THE COURT:



s/ Walker D. Miller
United States Senior District Judge