

**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,

v.

QWEST COMMUNICATIONS INTERNATIONAL, INC.,  
QWEST SERVICES CORPORATION,  
QWEST CORPORATION,  
QWEST COMMUNICATIONS CORPORATION, and  
QWEST BROADBAND SERVICES, INC.,

Defendants.

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**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR RELIEF FROM  
COURT'S ORDER GRANTING DEFENDANTS' MOTION TO STAY**

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Qwest Communications International Inc., Qwest Services Corp., Qwest Corp., Qwest Communications Corporation, (now Qwest Communications Company, LLC), and Qwest Broadband Services, Inc. (collectively "Defendants" or "Qwest"), through their undersigned attorneys, submit the following Opposition to the Plaintiffs' Motion for Relief from the Court's Order Granting Defendants' Motion to Stay.

1. On September 15, 2009, in response to the Plaintiffs' class action complaint, Defendants moved to compel arbitration ("Motion to Compel") [Dkt. # 26] pursuant to the

mandatory arbitration clause contained within Qwest's High Speed Internet Services agreement, to which the Plaintiffs agreed as part of using the Defendants' services. The Motion to Compel and its related pleadings argue, among other things, that the arbitration clause is enforceable as a matter of consent under the FAA, and that federal and Colorado law preclude a finding of unconscionability based on the arbitration clause's class action ban standing alone.

2. On September 8, 2010, Qwest moved to stay its Motion to Compel ("Motion to Stay") [Dkt. # 109] pending the resolution of *AT&T Mobility, LLC v. Concepcion*<sup>1</sup> by the United States Supreme Court in this Fall term. As Qwest explained in its Motion to Stay, since filing its Motion to Compel, the Supreme Court has issued two opinions concerning arbitration requirements under the Federal Arbitration Act ("FAA"), *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*<sup>2</sup> and *Rent-A-Center, West, Inc. v. Jackson*<sup>3</sup>, and has granted certiorari in *Concepcion* to address whether the FAA preempts states from invalidating arbitration clauses on the basis that they ban class actions.

3. On September 29, 2010, the Court granted Qwest's Motion to Stay pending the resolution of the *Concepcion* ("Order") [Dkt. # 110]. The Court found that these Supreme Court cases had not been addressed in the Motion to Compel, should be taken into account, struck the Motion to Compel, and ordered briefs to be re-filed addressing the cases once the *Concepcion* opinion was issued.

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<sup>1</sup> -- U.S. --, 130 S. Ct. 3322 (May 24, 2010).

<sup>2</sup> -- U.S. --, 130 S. Ct. 1758 (April 27, 2010).

<sup>3</sup> -- U.S. --, 130 S. Ct. 2772 (June 21, 2010).

4. The Plaintiffs have moved for relief of the Court's Order on the ground that the Order was issued before their Opposition was filed and ask the Court to vacate the Order so that the Court has an opportunity to review the Plaintiffs' Opposition.

5. A motion for reconsideration under Rule 60(b) is limited to a narrow set of circumstances. "[A] motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law." *Servants of the Paraclete v. John Does, I-XVI*, 204 F.3d 1005, 1012 (10th Cir. 2000). "Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Id.* (citing *Brumark Corp. v. Samson Resources Corp.*, 57 F.3d 941, 948 (10th Cir. 1995)). Furthermore, "[r]elief under Rule 60(b) is extraordinary and may only be granted in exceptional circumstances." *Bud Brooks Trucking, Inc. v. Bill Hodges Trucking Co.*, 909 F.2d 1437, 1440 (10th Cir. 1990).

6. The Plaintiffs' motion does not justify vacating the Court's Order. Plaintiffs present no new evidence, nor do the Plaintiffs demonstrate that the Court misapprehended the facts or the issues. To the contrary, the Court's Order indicates that it understood the issues and ordered relief different from that requested by Qwest (vacating of all of the motions) to effectuate its reasoning.

7. The mere fact that the Court ruled on Qwest's Motion before the Plaintiffs' Opposition was filed is of no moment, let alone one of the limited enumerated reasons that justify a motion for reconsideration under Rule 60. Indeed, the Local Rules for the United States District Court for the District of Colorado make clear that the Court need not wait for the filing

of an opposition before issuing an order. Local Rule 7.1(C) provides the deadlines for filing oppositions and expressly provides that "Nothing in this Rule precludes a judicial officer from ruling on a motion at any time after it is filed."

8. Further, a motion to stay is within the Court's discretion, and the Court properly found that the interests of justice were served with vacating the Motion to Compel and ordering a re-briefing upon the conclusion of *Conception*. The Supreme Court cases all impact matters relating to the Motion to Compel, and the briefing on these cases will provide clarity on the issues raised by the arbitration clause and class action ban at issue in this case, as described in detail in Qwest's Motion to Stay.

9. Moreover, the Plaintiffs have not established any prejudice. The Plaintiffs argue that the Supreme Court cases do not, and will not, impact the resolution of this case. The language of the cases and the issue on certiorari in *Conception* plainly suggest otherwise; the fact of the matter, however, is that a full briefing of these important Supreme Court precedents should be completed to determine what impact, if any, the cases will have on the issues at hand. This can only be completed once *Conception* is resolved. If the case is not stayed, and if the plaintiffs are successful in defeating the Motion to Compel but *Conception* subsequently impacts the case once a ruling is issued, then the parties and Court will likely need to start over. Thus, it is in the interests of justice to wait for the ruling from this Supreme Court term and to then complete the briefing in an orderly and straightforward fashion.<sup>4</sup>

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<sup>4</sup> The Plaintiffs also argue that the Court should reconsider its ruling because Judge Walker denied a motion to stay in *Grosvenor v. Qwest Communications*, United States District Court for the District of Colorado, Case Number 09-cv-02848 WDM-KMT. Unlike in this case, no discovery has occurred in *Grosvenor* on the arbitration clause and the court there denied the motion in lieu of a hearing on whether the parties entered into an arbitration agreement in

WHEREFORE, Qwest requests that the Plaintiffs' Motion be denied or, in the alternative, the Court set a briefing schedule for the Opposition and Reply briefs on the Motion to Stay.

Respectfully submitted this 25th day of October, 2010.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

*s/ Peter J. Korneffel*

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Peter J. Korneffel  
Zhonette M. Brown  
Kathryn R. Rothman  
410 Seventeenth Street, Suite 2200  
Denver, CO 80202-4432  
Phone: 303.233.1100  
Fax: 303.223.1111  
Email: tbeyer@bhfs.com  
pkorneffel@bhfs.com  
zbrown@bhfs.com  
krothman@bhfs.com

*Attorneys for Defendants Qwest Communications International Inc., Qwest Services Corp., Qwest Corp., Qwest Communications Corporation (now Qwest Communications Company, LLC), and Qwest Broadband Services, Inc.*

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the first place. Once that issue is resolved, then the parties and court will presumably re-address the Supreme Court precedent concerning the FAA.

**CERTIFICATE OF SERVICE**

I hereby certify that on October 25, 2010, I served the foregoing **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR RELIEF FROM COURT'S ORDER GRANTING DEFENDANTS' MOTION TO STAY** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following email addresses:

Jeffrey A. Berens  
Darby K. Kennedy  
Kristin A. Martinez  
**Dyer & Berens LLP**  
303 East 17<sup>th</sup> Avenue, Suite 300  
Denver, CO 80203  
Phone: 303.861.1764  
Fax: 303.395.0393  
[jeff@dyerberens.com](mailto:jeff@dyerberens.com)  
[darby@dyerberens.com](mailto:darby@dyerberens.com)  
[kristin@dyerberens.com](mailto:kristin@dyerberens.com)

Michael D. Lieder  
**Sprenger & Lang PLLC – D.C.**  
1400 Eye Street, N.W., Suite 500  
Washington, DC 20005  
Phone: 202.265.8010  
Fax: 202.332.6652  
[mlieder@sprengerlang.com](mailto:mlieder@sprengerlang.com)

William M. Sweetnam  
**Sweetnam LLC**  
5 Revere Drive, #200  
Northbrook, Illinois 60062  
Phone: 847.498.7500  
Fax: 847.919.4399  
[wms@sweetnamllc.com](mailto:wms@sweetnamllc.com)

Kimberlee L. Gunning  
**Terrell, Marshall & Daudt PLLC**  
3600 Fremont Avenue North  
Seattle, WA 98103  
[kgunning@gunninglegal.com](mailto:kgunning@gunninglegal.com)

Beth E. Terrell  
**Terrell, Marshall & Daudt PLLC**  
3600 Fremont Avenue North  
Seattle, WA 98103  
Phone: 206.350.6603  
Fax: 206.350.3528  
[bterrell@tmdlegal.com](mailto:bterrell@tmdlegal.com)

*s/ Cynthia A. Smith*  
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Cynthia A. Smith, paralegal