

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

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

ROBIN VERNON, et al.,

Plaintiffs,

v.

QWEST COMMUNICATIONS
INTERNATIONAL INC., et al.,

Defendants.

**DEFENDANTS' REPLY IN SUPPORT OF THEIR
MOTION TO COMPEL ARBITRATION**

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Pursuant to Fed. R. Civ. P. 12(b)(1) and 9 U.S.C. §§ 3, 4, the Qwest Defendants (collectively “Defendants” or “Qwest”) hereby submit their Reply in Support of their Motion to Compel Arbitration (“Motion”).

INTRODUCTION

The Plaintiffs’ Response is contrary to state and federal law enforcing arbitration clauses, and the Plaintiffs’ “evidence” and arguments come nowhere near their burden of overcoming the presumption in favor of arbitration. Ignoring their heavy burden under the Federal Arbitration Act (“FAA”) and the governing law applying it, the Plaintiffs argue that the Arbitration Clause in Qwest’s High Speed Internet (“HSI”) Subscriber Agreement (“Agreement”) is unenforceable because they do not “remember” agreeing to it and because it precludes them from vindicating their rights entirely by virtue of their unsupported assertion that attorneys are not sufficiently incentivized to take their individual cases.

The Arbitration Clause is binding on the parties, squarely covers the present dispute, and provides the Plaintiffs with fair, meaningful, efficient, and procedurally sound avenues to vindicate their rights. First, the Plaintiffs agreed to the Arbitration clause. Qwest notified each of the Plaintiffs of the Agreement when they purchased the HSI service, and the Plaintiffs each accepted those terms using the “click-to-accept” or verbal acceptance procedures that were required to activate their service. Qwest followed practical and customary business practices to form the Agreement, and Plaintiffs cannot now avoid the Agreement by claiming, conveniently, no recall.

Second, the Arbitration Clause does not preclude the Plaintiffs from vindicating their rights; to the contrary, it channels the dispute resolution pursuant to the public policy of the FAA

and allows the Plaintiffs to vindicate their rights under the state consumer protection acts, including the recovery of attorneys' fees, statutory damages, and costs. The Arbitration Clause provides the parties with alternative low-cost, speedy forums for the resolution of disputes with far less costs, risks, investment, and time than a class action. To deny arbitration here would run counter to the Colorado Consumer Protection Act ("CCPA") is encouragement of individual litigation, usurp the roles of the state legislatures, and ignore mandated federal policy favoring arbitration, as well as Colorado law.

Finally, the Arbitration Clause is conscionable. The procedure employed to create the Agreement was fair and reasonable, the substance of the Arbitration Clause is appropriate and consistent with public policy, and the Plaintiffs cannot avoid the dispute resolution procedures mandated by the Agreement.

ARGUMENT

I. QWEST DID NOT WAIVE ITS RIGHT TO ARBITRATION.

Plaintiffs' argument that Qwest waived its right to arbitration is just baseless. No waiver can exist where, as here, a party unambiguously asserts its right to arbitration in a first responsive pleading under Rule 12. *See, e.g., McWilliams v. Logicon, Inc.*, 143 F.3d 573, 577-78 (10th Cir. 1998); *Gratzer v. Yellow Corp.*, 316 F. Supp. 2d 1099, 1105-06 (D. Kan. 2004); *Benjamin-Coleman v. Praxair, Inc.*, 216 F. Supp. 2d 750, 753 (N.D. Ill. 2002). Any other result would be inconsistent with Rule 12 itself, which requires that certain defenses, including improper venue, be presented in a first responsive pleading, and also requires that most other Rule 12(b) motions be filed at the same time. *See Fed. R. Civ. P. 12(g)(2), (h); Conrad v. Phone Directories Co.*,

Inc., 585 F.3d 1376, 1383 n.2 (10th Cir. 2009); *Legal Additions LLC v. Kowalski*, No. C-08-2754, 2010 WL 335789, at *1 (N.D. Cal. Jan. 22, 2010).

Here, Qwest timely moved to compel arbitration in its first responsive pleadings filed in the Washington court and later in this Court. In the Washington court, Qwest filed Rule 12 motions to compel arbitration, to transfer, and to dismiss all at the same time to preserve its rights. [Wash. Dkt. Nos. 36, 33 and 34]. After Plaintiffs filed an amended complaint, the parties stipulated to a new briefing schedule on Qwest's motions. (*See* Stip. and Proposed Order [Wash. Dkt. No. 54].) On the day that Qwest was prepared to refile its motion to compel arbitration, however, the Washington court ordered the parties not to file any additional pleadings or motions, including any motion to compel arbitration, until after the court ruled on Qwest's motions to dismiss and/or transfer. (*See* Minute Order [Wash. Dkt. No. 60].) After the case was transferred to this Court, and in response to another amended complaint, Qwest timely filed the pending Motion to Compel Arbitration. [Colo. Dkt. No. 26.] To find waiver under these circumstances would undermine the Rule 12 filing deadlines and constitute the divestiture of the right to move for arbitration before the Motion was due under the rules.¹

Regardless, even under the *Metz* factors, the Plaintiffs have no basis for their waiver argument and cannot bear their "heavy burden" of proving waiver. *Peterson v. Shearson/Am. Express, Inc.*, 849 F.2d 464, 466 (10th Cir. 1988). Plaintiffs completely ignore at least three of these factors: whether Qwest requested arbitration close to the trial date or delayed for a long

¹ Even the cases relied upon by Plaintiffs contradict their suggestion that waiver can exist under these circumstances. In both of those cases, the defendants not only sought, but also obtained, a decision on the merits before seeking arbitration. *See Hooper v. Advance Am., Cash Advance Ctrs. of Mo., Inc.*, 589 F.3d 917, 922 (8th Cir. 2009) ("Not every motion to dismiss is inconsistent with the right to arbitration."); *St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 589 (7th Cir. 1992). By contrast, Qwest immediately asserted its right to arbitration without waiting for a ruling on its other motions.

period before seeking a stay, whether Qwest filed a counterclaim without seeking arbitration, and whether important intervening steps have taken place. *See Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1489 (10th Cir. 1994). No trial date has been set in this case, Qwest filed its initial motion to compel contemporaneously with its other initial Rule 12(b) motions as required by law, Qwest has not filed a counterclaim, and there has been no discovery in this case other than that related to Qwest's motion to compel arbitration.

Similarly, Qwest's simultaneous filing of motions to compel arbitration, to transfer and to dismiss cannot lead to the conclusion that "litigation machinery has been substantially invoked," nor can it be suggested that "the parties 'were well into preparation of a lawsuit' before" Qwest notified the Plaintiffs of an intent to arbitrate.² *See id.* Moreover, Qwest's actions are consistent with Qwest's right to arbitrate. The contract is governed by Colorado law, and Qwest sought to have its rights, including its right to arbitrate, enforced in this jurisdiction without waiving venue or the legal deficiencies in the complaint.

With respect to the final *Metz* factor, Plaintiffs have not suffered any prejudice. Whatever costs Plaintiffs have incurred have resulted from their filing in an improper forum, from their consistently deficient pleadings, from their insistence on seeking discovery to oppose Qwest's motion to compel arbitration, and from the Washington court's decision to order its docket by taking up Qwest's motions to transfer and to dismiss (for which Plaintiffs did not seek discovery) before ruling on a motion to compel arbitration. *See Adams v. Merrill Lynch, Pierce,*

² Indeed, the Plaintiffs were on notice of Qwest's intent to seek arbitration before Qwest filed its motions to compel and to dismiss, or any other response to the Complaint. (*See* Joint Status Rep. [Wash. Dkt. No. 41] at 3; Defs.' Mot. for Leave to File Overlength Br. [Wash. Dkt. No. 24].)

Fenner & Smith, 888 F.2d 696, 701 (10th Cir. 1989); *see also Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F. Supp. 1359, 1366-67 (N.D. Ill. 1990).³

II. PLAINTIFFS ACCEPTED THE AGREEMENT.

The Plaintiffs assert that Qwest’s business practices and protocols for providing the Agreement to its customers cannot establish the existence of a contract because, conveniently, they cannot “recall” the Agreement. The Plaintiffs misconstrue the evidence and the law.

A. Plaintiffs Agreed to the Terms of the Agreement by Electronic Signature According to Well-Established Practices.

Contrary to the Plaintiffs’ assertions, the direct evidence demonstrates that the Plaintiffs followed Qwest’s procedures that notified them of the Agreement and required them to take affirmative steps to accept the Agreement when they ordered their HSI service and configured their computers for the service. Moreover, Qwest has actual records of electronic signatures for two of the four Plaintiffs (the Mrs. Vernon and Mr. Sandquist).

It is well established under Colorado law⁴ that the only requirements for the formation of a contract are (1) a manifestation of mutual assent to the exchange and (2) consideration. *I.M.A., Inc. v. Rocky Mountain Airways, Inc.*, 713 P.2d 882, 888 (Colo. 1986); Restatement (Second) of Contracts § 17(1) (1981). A “click-to-accept” process, where customers computer “click” to accept standard terms, demonstrates mutual assent and consideration, and is therefore a valid

³ Plaintiffs point to a single statement included in a footnote in Qwest’s motion to compel arbitration as evidence of “representations . . . inconsistent with the right to arbitrate” (*see Resp.* at 7-8). But Plaintiffs fail to explain what action Qwest has taken that is inconsistent with its right to arbitrate and what is “inconsistent” about Qwest’s desire to pursue arbitration pursuant to the full Arbitration Clause. Plaintiffs rely on *Belcourt v. Grivel, S.L.R.*, but unlike Qwest, the defendant in that case expressed a willingness to proceed in court even if its motion to compel arbitration were granted. *Belcourt v. Grivel, S.L.R.*, No. 2:08-cv-902-TC, 2009 WL 3764085, *4 (D. Utah Nov. 9, 2009).

⁴ This contract, including the validity of the Arbitration Clause, is governed by Colorado law as required by the governing law provision in the Agreement. (Leo Aff. Ex. B; Agreement § 17(a)(i). [Dkt. No. 27-3])

method of contract formation. *See* 15 U.S.C. § 7001 (electronic signatures); *Treiber & Straub, Inc., v. United Parcel Serv. Inc.*, 474 F.3d 379, 382 (7th Cir. 2007) (“As is common in Internet commerce, one signifies agreement by clicking on a box on the screen.”); *Siebert v. Amateur Athletic Union of the U.S., Inc.*, 422 F. Supp. 2d 1033, 1040 (D. Minn. 2006) (“click-wrap” arbitration agreement); *Recursion Software, Inc. v. Interactive Intelligence, Inc.*, 425 F. Supp. 2d 756, 782-83 (N.D. Tex. 2006) (clicking “yes” constituted acceptance); *Hugger-Mugger, L.L.C. v. Netsuite, Inc.*, No. 2:04-CV-592TC, 2005 WL 2206128, at *3-6 (D. Utah Sept. 12, 2005) (clickwrap forum-selection clause).

Similarly, due to the practical time constraints on modern telephone and retail sales, it is widely accepted that when a customer is informed that use of a service is subject to certain terms, the customer’s subsequent use of that service constitutes acceptance of the terms and conditions regardless of a signature. *See, e.g., Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004) (the use of a service constitutes an acceptance of the terms); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 - 50 (7th Cir. 1997) (terms included in shipping box became enforceable when the consumer kept the goods longer than the 30-day look-back period).⁵

Finally, evidence of a company’s practices and procedures of notifying its customers of the existence of contract terms establishes that a customer was aware of and then assented to such terms. *See, e.g., Garrison v. Transunion*, No. 08-10859, 2010 U.S. Dist. LEXIS 26501, at *3-10 (E.D. Mich. Feb. 26, 2010) (binding customer to arbitration agreement where customers received the terms and conditions upon activation of the service and in the “Welcome Guide”).

⁵ Courts follow this line of reasoning in enforcing agreements with class action bars in arbitration clauses where the plaintiff was presented with and then failed to opt-out of the contract. *See, e.g., Davidson v. Cingular Wireless, LC*, No. 2:06-cv- 00133, 2007 WL 896349, at *6 (E.D. Ark. Mar. 23, 2007); *Fonte v. AT&T Wireless*, 903 So.2d 1019 (Fla. 2005); *Sherr v. Dell, Inc.*, No. 05 CV 10097 (GBD), 2006 WL 2109436, at *2 (S.D.N.Y. July 27, 2006).

Here, the facts demonstrate that the Plaintiffs (1) received more than reasonable notice of the Agreement, (2) manifested their assent to the terms through the click-to-accept or oral agreement procedures combined with the use of the HSI service, and (3) received the consideration of the service itself.

First, Plaintiffs Mrs. Vernon, Mr. Durkin, and Mr. Moore were informed of the Agreement in December of 2005, when Qwest's HSI was deregulated. At that time, as required by the FCC, Qwest notified these customers of the deregulation order, directed the customers to the new contract that would govern the service in the future, and provided these Plaintiffs with the right to opt-out when the non-regulated Agreement came into force. (Kohler Aff. ¶ 4; Leo Aff. ¶¶ 7-9 [Colo. Dkt. No. 27].) None of these Plaintiffs opted out, and indeed each expanded service under the terms of the new Agreement.

Second, when Mr. Durkin, Mr. Sandquist, and Mr. Moore upgraded their HSI services in 2007, they were directed to the on-phone automated acceptance process for their orders, which informed them of the Agreement and required that they accept the terms to continue with their orders. (Kohler Aff. ¶ 2; Leo Aff. ¶¶ 17-19; Ex. 10,⁶ O'Brien Dep. at 14:12-25.)

Third, when Mr. Moore upgraded his HSI service in 2006, he was sent a paper copy of the *entire* Agreement, and was notified that the Agreement would be binding upon him for his service. (Beardsley Aff. ¶ 18.)

Fourth, when the Vernons upgraded their internet service online in April of 2007, they affirmatively clicked "I accept" indicating acceptance of the Agreement. (Kohler Aff. ¶ 6, Leo Aff. ¶ 19.) Under the online ordering process, HSI customers, like Mrs. Vernon, are required to

⁶ The exhibit numbering continues from Qwest's opening brief.

click acceptance to the Agreement before the order can be processed. By completing the order, the Vernons necessarily clicked to accept the terms.

Fifth, after each of the Plaintiffs upgraded their HSI service, they were sent Welcome Letters informing them that their service was subject to the Agreement, that the Agreement contained an arbitration clause, that they had 30 days to opt out, and that the Agreement contained a termination provision. (Beardsley Aff. ¶¶ 6-20, Exs. A-E, G.)

Sixth, and perhaps most importantly, Plaintiffs were again notified of the Agreement and its Arbitration Clause and were required to click-to-accept those terms when they configured their computers with the Qwest QuickConnect CD. (Kohler Aff. ¶¶ 7-12, Exs. A and B; Leo Aff. ¶ 20.) Under the software's protocol, the Plaintiffs could not use the CD to complete the configuration and use Qwest's HSI service without clicking to accept the terms of the Agreement. (Kohler Aff. ¶ 12.) Qwest records verify that the Vernons and Mr. Sandquist affirmatively accepted the Agreement by clicking "I accept" while configuring their computers for Qwest's service (Kohler Aff. ¶¶ 7, 13-14)⁷, and Mr. Durkin admits that he used the Qwest QuickConnect CD to configure his computer. (Ex. 12, Durkin Dep. at 21:15-23:25, 92:1-18; Kohler Aff. ¶ 7.) Indeed, the Plaintiffs themselves are familiar with this type of click-to-accept process and recognize that a "click-to-accept" is binding upon them. (Ex. 12, Durkin Dep. at 43:13-19 ("[I]f you click, by virtue of your clicking, you accept . . ."); Ex. 11, Moore Dep. at 102:19-103:18; Ex. 13, Sandquist Dep. at 19:10-20:1.)⁸

⁷ Qwest currently has click-to-accept records dating back to October 2007. Even prior to that time, however, the click-to-accept process was required for configuration.

⁸ Plaintiffs' speculation that the click-to-accept process on the QuickConnect CD might be confusing is unsupported. The language of the Legal Agreements page from the QuickConnect CD repeatedly makes clear that acceptance of

Finally, each of the Plaintiffs actually *used* the HSI service for a substantial period. All of the Plaintiffs used the service for between eight to seventeen months after they placed their order for an upgrade, and none of the Plaintiffs requested that the Agreement be rescinded within the 30-day look-back period under the contract. (Agreement ¶ 12(c); McKown Aff. ¶ 9.) Plaintiffs' assertion that they did not have the benefit of the 30-day opt out is wrong. (Pls.' Response to Qwest's Motion to Compel ("Resp.") at 2, 12.) When each of the Plaintiffs signed up for a term commitment in 2007 or 2008, whether they were an existing or a new customer, they had the option to cancel their term commitment for 30 days after placing the order and such cancellation would not have subjected them to a termination liability. (Agreement § 12(c); McKown Aff. ¶ 9); *see also Boomer v. AT&T Corp.*, 309 F.3d 404, 414-417 (7th Cir 2002) (notice of terms was an offer and use of service beyond lookback period was an acceptance).

B. Qwest's Evidence Creates a Presumption of Formation.

Qwest's evidence combines direct evidence of the Plaintiffs' acceptance and expectations with evidence of the commercial procedures that required the Plaintiffs to accept the terms of the Agreement to use the HSI service and evidence of the customary practices that assured notice to the Plaintiffs of the terms and an opt-out provided if they objected.

Qwest's procedures are directed to each HSI customer so that he or she would (1) receive notice of the Agreement, the Arbitration Clause, and the opt-out, and (2) take affirmative steps to accept the Agreement regardless of whether the customer ordered his or her service on-line or by telephone, or was a new or legacy customer. For the Vernons and Mr. Sandquist, Qwest has the

the terms includes acceptance of the Agreement (including its explicitly referenced Arbitration Clause) and a software license agreement. (Kohler Aff. ¶¶ 8-11.) In any event, none of the Plaintiffs have any specific memory of being confused by the QuickConnect CD – and Mr. Durkin admitted that although he likely did not read the Legal Agreements page at the time, having read it now he fully understood the language. (Ex. 12, Durkin Def/ at 92:1-18.)

actual records that these Plaintiffs clicked “I accept” while configuring their computers for Qwest’s service. (Kohler Aff. ¶¶ 13-14.) Customers who ordered by phone (R. Durkin, T. Moore, B. Sandquist) were required to accept through the automated telephone system to complete the order and then received a Welcome Letter. (Kohler Aff. ¶ 5; Beardsley Aff. ¶¶ 11-20.) For online purchases (Ms. Vernon), the customer was required to click-to-accept the terms to complete the order and then received a Welcome Letter. (Kohler Aff. ¶ 6, Beardsley Aff. ¶¶ 9-10.) All customers were required to click-to-accept the terms to configure their computers to use the service (R. Vernon, B. Sandquist, and R. Durkin) or received a paper agreement (T. Moore) if their computer was already configured. (Kohler Aff. ¶¶ 7-8; Beardsley Aff. ¶ 18.) And, all the customers were given the option to opt-out of the Agreement within 30 days which they rejected by continued use of the service. (Agreement § 12(c).)

Far from being unreliable and insufficient, this is precisely the type of evidence that creates a presumption that the procedures were followed in the case at hand and that a contract was formed. Indeed, based on these multiple instances in which Qwest provided these customers the terms and conditions of the Agreement in its ordinary course of business, any claim that the Plaintiffs did not receive these documents or follow these automated acceptance procedures is “simply not plausible.” *Garrison*, 2010 U.S. Dist. LEXIS 26501, at *12; *Honig v. Comcast of Ga. I, LLC*, 537 F. Supp. 2d 1277, 1283-1284 (N.D. Ga. 2008) (finding agreement to arbitrate enforceable based on standard practices); *Comvest, L.L.C. v. Corporate Secs. Group, Inc.*, 507 S.E.2d 21, 23 (Ga. App. 1998) (arbitration clause enforceable based on company practice); *Pleasants v. Am. Express Co.*, 541 F.3d 853 (8th Cir. 2008) (presumption of notice); *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909, 918 (N.D. Tex. 2000) (presumption of receipt).

Plaintiffs' reliance on *Burgess v. Qwest Corp.*, 546 F. Supp. 2d 1117, 1121 (D. Or. 2008), is misplaced. The *Burgess* Court did not, as Plaintiffs imply, hold that evidence of standard business practice could not establish the formation of a contract. Rather, in *Burgess*, the court addressed only the argument that the Agreement by its terms states that use of the service constitutes acceptance. *Id.* at 1120-21. The *Burgess* Court was not presented with and did not analyze all of the methods by which the plaintiff was informed of, or accepted, the Agreement.⁹ Similarly, in *Chase Bank USA, N.A. v. Leggio*, 997 So. 2d 887 (La. App. 2. Cir. 2008), another case relied upon by the Plaintiffs, the party attempting to enforce arbitration offered no evidence of the contract sent to the plaintiff and offered no other evidence that the plaintiff was made aware of an arbitration agreement. Here, however, Qwest has presented evidence that each of the Plaintiffs was informed of the Agreement on no less than three occasions and that the Plaintiffs each took affirmative actions to enable and use the service.

The Plaintiffs cannot overcome the evidence and presumption of contract formation by simply denying memory of the Agreement. *See Pleasants*, 541 F.3d at 856 n.3 (presumption of contract acceptance was not overcome by plaintiff denying recall of the terms); *Marsh*, 103 F. Supp. 2d at 919 (plaintiffs' denials could not rebut presumption of delivery); *Leverage Leasing Co. v. Smith*, 143 P.3d 1164, 1168 (Colo. App. 2006) (failure to read contract is not a defense to enforcement). Indeed, if this type of evidence were insufficient, parties could always avoid their

⁹ Additionally, in *Burgess*, the plaintiff had exercised her right to cancel her contract within 30 days and the Court found that her debt collection claim was outside the scope of the Arbitration Clause. *Burgess*, 546 F.Supp. at 1121. Moreover, the *Burgess* Court's comments concerning standard business practices related to a wireless contract rather than the HSI Agreement. *Id.* at 1121-22. With respect to the wireless contract, the court observed that, unlike here, the evidence presented did not include the materials provided to the plaintiff. *Id.* at 1122.

contractual obligations by claiming poor memory and it would be impossible for companies to establish contracts in modern business transactions.¹⁰

III. THERE IS NO SPECIAL TREATMENT FOR CONSUMERS UNDER THE FAA.

Relying on case law interpreting the Supreme Court’s seminal decision *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) and its progeny, the Plaintiffs claim that the Arbitration Clause with the class action bar “effectively eliminates the possibility of Plaintiffs and similarly situated consumers with small damages claims from vindicating their statutory rights under applicable consumer laws.” (Resp. at 14.) Although they appear to recognize that this “vindication of rights” analysis is narrowly tailored to their statutory claims alone, they conflate all of their claims – declaratory judgment, unjust enrichment, and CCPA/Washington Consumer Protection Act (“WCPA”)¹¹ – in their analysis to suggest that if there is any one claim they are unable to pursue, the Arbitration Clause should be invalidated. (See Resp. at 4, 14-16.) This is not the law.

Under the FAA, claims must be arbitrated even if the statute gives rise to a public interest or involves complex litigation. *Shearson/Am. Express., Inc. v. McMahon*, 482 U.S. 220, 242 (1987) (rejecting the argument that the public interest in the enforcement of RICO precludes its submission to arbitration); *Mitsubishi*, 437 U.S. at 632 (holding that potential complexity of the litigation does not “suffice to ward off arbitration” and compelling arbitration of antitrust claims). This includes low value consumer claims. *Litman v. Cellco P’ship*, No. 07-CV-4886

¹⁰ The Plaintiffs’ lack of memory demonstrates only that they have no evidence to offer to rebut the existence of a contract. (Ex. 12, Durkin Dep. at 39:14-18, 45:1-15; 55:24-56:12; Ex. 13, Sandquist Dep. at 10:10-11:16, 20:6-14; Ex. 14, Vernon Dep. at 26:9-17, 36:10-14, 47:7-10, 51:3-8, 54:13-19.)

¹¹ The WCPA claim only arguably applies to Mr. Sandquist, and described in Qwest’s Motion to Dismiss [Dkt # 25], even that application is questionable.

(FLW), 2008 WL 4507573, at *4 (D.N.J. Sept. 29, 2008) (citing *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007) (“[A] state law determination that precludes, on unconscionability grounds, enforcement of an agreement to arbitrate low value consumer claims on an individual basis is preempted by the FAA.”) Indeed, arbitration’s procedural simplicity, informality and expedition are “characteristics that generally make arbitration an attractive vehicle for the resolution of low value claims.” *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174 (5th Cir. 2004) (citing *Gilmer v. Interstate/Johnson Line Corp.*, 500 US 20, 31 (1991); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (“Congress, when enacting [the FAA], had the needs of consumers, as well as others, in mind.”) (citations omitted).¹² (*See also* Rothman Aff., Ex. A (Consumer Due Process Protocol); Ex. B (Consumer-Related Disputes Supp. Procs.) (AAA procedures ensure fairness).)

In light of the federal policy in favor of arbitration, *Mitsubishi* requires arbitration clauses to preserve substantive *statutory* rights only, not every common-law claim a plaintiff may have. *Mitsubishi*, 473 U.S. at 628, 637. Accordingly, the Arbitration Clause may be invalidated only if (1) application of the clause would eliminate a substantive statutory right; or (2) state-law contract defenses would otherwise invalidate the contract, such as “well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that

¹² Plaintiffs assert that the Arbitration Clause must dissuade claims against Qwest because there are “widespread consumer complaints” and yet there are few claims made. (Resp. at 13.) As explained in the Motion in Limine to Exclude The Declaration of Deborah Toms [Dkt. #79], which is incorporated herein by reference, the “evidence” of “widespread complaints” and “dissatisfaction” consists of: (1) unscientific internet searches of postings from a handful of alleged but anonymous customers; and (2) some sort of print out allegedly from the Better Business Bureau (“BBB”) that in no way on its face indicates that it relates to Qwest at all. (Deborah Toms Aff, ¶¶ 3-4, 6 [Dkt. # 74-26].) These internet postings and the BBB report have no indicia of reliability or probative value, and do not substantiate the Plaintiffs’ propositions.

would provide grounds ‘for the revocation of any contract.’” *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 483-84 (1989) (quoting *Mitsubishi*, 473 U.S. at 627).

As part of the free-market system, contract law requires parties to weight the value of their contracts and the benefit of pursuing contract claims against the cost of the proceedings. Parties understand that if there is a breach that arises, it may or may not be economically rational to litigate their claims, and they conduct a cost-benefit analysis in determining whether to pursue them or not. This is not only fundamental to the free-market system, but this economic decision-making serves as an appropriate gate-keeping function for the judicial system.

Thus, the question here is whether the Arbitration Clause prohibits the Plaintiffs from pursuing their statutory claims; not the declaratory and unjust enrichment claims. The Plaintiffs’ statutory claims (the CCPA and the WCPA), are premised entirely and narrowly on the simple allegation that Qwest “failed to disclose” potential Termination Liability Assessments (“TLA”) at outset. (Third Amend. Compl. (“TAC”) ¶¶ 63-75.) These claims do not relate to the fairness of the TLA itself or Qwest’s benefits from the TLA; they relate only to the disclosure of the TLA. By contrast, the Plaintiffs’ declaratory judgment claim seeks a declaration that term commitments are unenforceable under the Agreement and that the liability for violating a term commitment is an unlawful penalty. (TAC ¶¶ 50-54.) Similarly, the Plaintiffs’ unjust enrichment claim alleges that Qwest inequitably retained benefits arising from invalid TLA payments. (TAC ¶¶ 55-59.)

IV. THE ARBITRATION CLAUSE DOES NOT PREVENT THE PLAINTIFFS FROM PURSUING THEIR CLAIMS.

Focusing on the statutory claims alone, the Plaintiffs argue that they cannot vindicate their rights because the Agreement prohibits statutory damages, the costs of the claims are too

high, and they cannot find legal representation on an individual basis. The Plaintiffs ignore the plain language and legislative intent of the CCPA and WCPA, the facts of this case, and the costs of the case.¹³

A. The Agreement Preserves the Plaintiffs’ Substantive Rights Under the CCPA and the WCPA.

The Arbitration Clause provides for arbitration of *any* claim, controversy or dispute, and it provides that an arbitrator “may award any relief or damages that a court could award.” (Agreement § 17(a), 17(a)(1).) Statutory or treble damages, attorneys’ fees and costs are available under the CCPA or WCPA. Colo. Rev. Stat. §6-1-113(2); Wash. Rev. Code § 19.86.090. Thus, the arbitrator is imbued with authority to award those available attorneys’ fees, costs, and damages. *See In re Universal Serv. Fund Tel. Billing Practices Litig.*, 300 F. Supp. 2d 1107, 1127 (D. Kan. 2003) (clause providing for arbitration of any claim authorizes arbitrator to award statutory fees).

The Arbitration Clause does not ban statutory treble damages, attorneys’ fees or costs, as the Plaintiffs suggest, nor does it prevent an arbitrator (or a small claims court) from assessing statutory damages. Rather, a separate section of the Agreement, the Limitation of Liability section, provides that Qwest will not be liable for “incidental, indirect, special, reliance, punitive, or consequential damages.” (Agreement § 13(b).) This language prohibits punitive damages; it does not prohibit an arbitrator from awarding statutory treble damages, which are remedial. *See PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003) (antitrust treble damages and

¹³ In support of this argument, the Plaintiffs rely on four attorney-affiants (“Attorney Reports”) to claim that they cannot obtain legal representation in their individual capacity. The attorneys’ personal opinions are nothing more than their own business desires, are irrelevant here, and are contrary to the law. Qwest is filing concurrently with its reply a Motion in Limine to exclude the Attorney Reports.

attorneys' fees are regarded as remedial rather than punitive); *see also Inv. Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314, 316-17 (5th Cir. 2002) (arbitration prohibition against punitive damages does not extend to statutory damages).

For the same reasons, the provision in the Arbitration Clause stating that each party bears its own expenses, (Agreement ¶ 17(a)(ii)), is not meant to, and could not, overcome the statutory fee and cost shifting provisions of the CCPA. *See In re Universal Serv. Fund*, 300 F. Supp. 2d at 1127.¹⁴

B. The Legislatures Have Specifically Ensured That The Plaintiffs Are Able To Pursue Their Statutory Claims By Including the Availability of Attorneys' Fees.

Under the CCPA, the Colorado Legislature specifically incentivized consumers to pursue even low value claims individually by awarding at least \$500 in minimum damages as well as attorneys' fees and costs, but only for plaintiffs pursuing their claims individually, not through a class action. Colo. Rev. Stat. §6-1-113(2)(a); §6-1-113(2)(b). Colorado courts recognize that these damages provisions under the CCPA are "intended to promote private enforcement." *Hall v. Walter*, 969 P.2d 224, 233 (Colo. 1998); *Lexton-Ancira Real Estate Fund, 1972 v. Heller*, 826 P.2d 819, 822 (Colo. 1992).

Where attorneys' fees are available for low value individual claims, such as here under the CCPA/WCPA, the legislature has already determined that the claims are "worth" pursuing as a matter of law. The Supreme Court recognizes that legislatures include fee-shifting provisions

¹⁴ If there is any question about whether the Arbitration Clause prohibits statutory treble damages or attorneys' fees, the contractual interpretation must be first resolved by the arbitrator, not the Court. *See, e.g., Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *In re Universal Serv. Fund*, 300 F. Supp. 2d at 1127 (arbitrator must resolve issue of whether limitation on putative damages bans statutory treble damages).

specifically to enable parties to pursue meritorious claims even if the cost of litigating may exceed the claim's economic value. *See, e.g., City of Riverside v. Rivera*, 477 U.S. 561, 578 (1986) (the function of statutory attorneys' fees awards "is to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel") (quotation marks and citation omitted); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 753 (1987) (In awarding "statutory fees, courts must ensure that the fees are 'reasonable' - *i.e.*, that the fees properly compensate an attorney for the risks assumed.").

As such it is not proper for the Plaintiffs to contend that they cannot obtain legal representation under the CCPA and WCPA without a class action vehicle since the Colorado and Washington legislatures have spoken to the contrary. *See Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 878 (11th Cir. 2005) (The "contention that consumers would likely be unable to obtain legal representation without the class action vehicle is unfounded" where statute sued under provides attorney fees); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (same); *Anderson v. AB Painting & Sandblasting, Inc.*, 578 F.3d 542, 546 (7th Cir. 2009) ("Reasonableness has nothing to do with whether the district court thinks a small claim was 'worth' pursuing at great cost. Fee-shifting statutes remove this normative decision from the court.").

These arguments also ignore the Agreement's small claims court option. Plaintiffs have access to informal document exchange in small claims courts¹⁵ and likely subpoenas for trial

¹⁵ The State of Washington does not appear to have separate rules of procedure or evidence for actions in small claims court. Presumably, then, Plaintiffs in Washington could conduct pre-trial discovery.

purposes. *See* Colo. R. P. for Sm. Cl. Cts. 510(a); Minn. Conc. Ct. Rule 412(a). Moreover, proving bad faith does not necessitate elaborate discovery, and even so, the Plaintiffs here do not need to prove bad faith to recover minimum statutory damages of \$500 under the CCPA. Colo. Rev. Stat. § 6-1-113(2). Likewise, the WCPA allows treble damages at the judge’s discretion, without any heightened showing by Plaintiffs. Wash. Rev. Code § 19.86.090. In addition to the attorneys’ fees allowed under the CCPA and WCPA, expert fees can be recoverable costs in small claims courts. *See, e.g.*, Colo. R. P. for Sm. Cl. Cts. 516; Minn. Conc. Ct. Rule 412(a), 516; Wash. Rev. Code § 12.40.045.

The assertion by the Plaintiffs’ attorneys that it would be uneconomical and unethical for them to represent the Plaintiffs on an individual basis is absurd. This business model would be far from “unethical”; the economic reality is that the Plaintiffs in this case, if successful, would make *more* money pursuing their claims individually under the Arbitration Clause while receiving a much faster ruling and facing far less risk and cost. Indeed, in a class action setting under the CCPA, the most each Plaintiff can recover is the actual damages of \$200, while in an individual claim he or she can recover the \$500 statutory minimum. Assuming the WCPA applies, Plaintiff Sandquist can recover treble damages of as much as \$600 as an individual or as a member of a class. But, in the class action setting, the Plaintiffs will only recover their damages after many years of litigation, submitting to extensive procedures, and being responsible for Federal Court costs and notices to the class.

Thus, just because these particular attorneys believe that nothing short of a class action is “practical” for their pocket book does not mean that consumers – who could receive more, faster,

cheaper and with less risk in an individual capacity under the Arbitration Clause than as a class plaintiff – could not find legal representation.

C. The Plaintiffs Are Not Deterred From Vindicating Their Substantive Statutory Rights Based on the “Risk” of Costs to Individually Arbitrate Their Claims.

The Plaintiffs have not, and cannot, demonstrate that the cost of individual arbitration precludes them from vindicating their substantive statutory rights. To individually arbitrate their consumer protection claims, the plaintiffs must show only that Qwest failed to disclose the existence or amount of the TLA at the time the customer ordered service and at the time that the customer cancelled the service. (TAC ¶¶ 61-65.) Presumably, the plaintiff would present evidence of what Qwest told him or her, including any evidence from Qwest of those communications, and Qwest would present evidence in rebuttal.¹⁶ This would not be a complicated or expensive claim to litigate, but is instead a claim perfectly suited for the streamlined procedure of arbitration.

Yet, the Plaintiffs claim the costs to individually arbitrate these issues are prohibitive because: (1) they would have to pay the \$125.00 filing fee; (2) they would be responsible for their own attorneys’ fees and costs; (3) obtaining injunctive relief would cost approximately \$5,000.00; and (4) that individually arbitrating the reasonableness of the amount of the TLA fee would be expensive based on *Ayyad v. Sprint Spectrum, L.P.* (“Ayyad”), No. RG03-121510 (S. Ct. Alameda Cty. Cal, Dec. 4, 2008). (*See Resp.* at 20-21.)

¹⁶ The fact pattern is actually simpler than this – the Plaintiffs are suing Qwest based on claims that Qwest deceived them about the TLA when they ordered their service, yet they do not remember what Qwest told them when they ordered the service. (Ex. 12, Durkin Dep. at 39:14-18, 45:1-15; 55:24-56:12; Ex. 13, Sandquist Dep. at 10:10-11:16, 20:6-14; Ex. 14, Vernon Dep. at 26:9-17, 36:10-14, 47:7-10, 51:3-8, 54:13-19.)

These unsupported assertions of “high” costs do not satisfy the Plaintiffs’ burden. *Green Tree*, 531 U.S. at 92 (unsupported assertions of “high” costs and inability to pay them “too speculative to justify the invalidation of the arbitration agreement.”). They have not demonstrated that they cannot pay the \$125.00 filing fee.¹⁷ *See id.* They likewise “ha[ve] not provided the evidence necessary to estimate the length of the arbitration and the corresponding amount of arbitrators’ fees (e.g., sophistication of issues, average daily or hourly arbitration costs in the region’ for an individual arbitration).” *Cicle v. Chase Bank USA*, 583 F.3d 549, 556 (8th Cir. 2009) (quoting *Faber v. Menard, Inc.*, 367 F.3d 1048, 1054 (8th Cir. 2004)). Moreover, they ignore the fee-shifting waiver provisions in the CCPA and WCPA, as discussed in Section IV(B), *supra*, as well as the AAA’s Consumer Due Process Protocols, which mandate reasonable costs for consumers, subsidized if necessary, regardless of any other potential costs incurred. (*See also* Rothman Aff., Ex. A (Consumer Due Process Protocol, Principle 6); Ex. B (Consumer-Related Disputes Supp. Procs., Procedure C-8).)

The Plaintiffs also have not made any showing that the cost differential to pursue their statutory claims individually in arbitration so greatly exceeds the cost of litigating their claims in Court that they would effectively be precluded from vindicating their rights, as *Green Tree* and its progeny require. *Rains*, 23 P.3d at 1253 (“[A]n individual cannot reasonably claim to be ‘deterred from pursuing their statutory rights in arbitration simply by the fact that their fees would be paid to the arbitrator where the overall cost of arbitration is otherwise equal to or less than the cost of litigation in court.’”) (quoting *Bradford v. Rockwell Semiconductor Sys. Inc.*, 238

¹⁷ Although the Plaintiffs have submitted no evidence that they lack the financial wherewithal to pay the initial \$125 filing fee, Qwest is willing to pay even the \$125 filing fee or the applicable small claims court filing fees should the Plaintiffs choose to file in one of those venues.

F.3d 549, 556 (4th Cir. 2001)); *James v. McDonald's Corp.*, 417 F.3d 672, 680 (7th Cir. 2005) (In demonstrating that arbitration would be prohibitively expensive, such that the plaintiff's ability to vindicate statutory rights would be eliminated, "[t]he cost differential between arbitration and litigation is evidence highly probative . . ."). Like any plaintiff in Federal Court, the Plaintiffs are responsible for the up-front costs in this case, including the \$350 filing fee and possible experts, as well as the cost of individual notice to every proposed member of the class. *See, e.g., Michaels v. Ambassador Group Inc.*, 110 F.R.D. 84, 90–91 (E.D.N.Y. 1986).

Finally, the small claims option mitigates any costs. The very purpose of small claims courts is to "secure the just, speedy, informal, and inexpensive determination" of the dispute between the parties for claims that involve small amounts of money by balancing due process with efficiency. Colo. R. P. Sm. Cl. Cts. 501(b). Even if the Plaintiffs had demonstrated an inability to pay the filing fees,¹⁸ the Plaintiffs' small claims courts have filing fee waiver provisions for indigent plaintiffs as well as cost-shifting provisions. *See, e.g., Minn. Conc. Ct. Rules 506, 516; Wash. Rev. Code §§ 36.18.040, 12.40.045; Colo. R. P. Sm. Cl. Cts. 516.*

Although the Plaintiffs attempt to rely on *Ayyad* to try to demonstrate such costs, *Ayyad* is not relevant here. The statutory claims in *Ayyad* case are far different from the statutory claims here. In *Ayyad* the statutory claims were whether a liquidated damages provision under a California consumer protection statute that expressly prohibited the "oppressive" use of such clauses. *Ayyad*, at 19. Thus, the reasonableness of the ETF and how it was calculated was an element of proof of the *Ayyad* plaintiffs' consumer protection claims. Here, determining the

¹⁸ *See, e.g., Durkin Dep.*, attached hereto as Exhibit 12, at 83:5-11 (noting that he is not claiming an inability to pay conciliation court fees or a \$125 filing fee for arbitration).

reasonableness and amount of the TLA is not germane at all to, let alone an element of proof of demonstrating what if anything Qwest told a particular Plaintiff about the existence or amount of the TLA either at the time the service was ordered or at the time they cancelled it.¹⁹

V. THERE IS NO SUBSTANTIVE RIGHT TO CLASS ACTIONS

If adopted, the Plaintiffs' argument that low value consumer claimants cannot find legal representation to pursue their claims individually, and therefore that arbitration clauses with class action bars are invalid, would create a substantive right to class actions. There is nothing in Rule 23 or the legislative history suggesting that Congress intended a substantive right to class actions. To the contrary, Congress itself has enacted statutes barring class actions for certain claims. *See, e.g.*, 15 U.S.C. §§ 77p & 78bb, Securities Litigation Uniform Standards Act ("SLUSA") (requiring the removal and dismissal of certain state law securities class actions).²⁰

This Court should hold no differently. Creating a substantive right to class actions would ignore the Supreme Court, this District, and courts throughout the country, and it would radically modify Rule 23 in violation of the Rules Enabling Act. *See Bonanno v. Quizno's Franchise Co.*, No. 06-cv-02558-CMA-RWM, 2009 WL 1068744, at *11 (D. Colo. Apr. 20, 2009) ("Federal Rule 23 clearly remains a procedural tool, not a substantive or jurisdictional right") (citing *Ortiz*

¹⁹ *Ayyad* also was a class action in California state court, and any application of "costs" to the costs of the relevant proceedings here – individual actions in arbitration – would be speculative at best. There can be no dispute that a class action in state court will take longer and will be more expensive than an individual arbitration, and the *Ayyad* matter is not part of this action in any event. *See id.* (rejecting evidence of costs provided by the plaintiffs that related "to a class, not an individual, arbitration of a different matter" as too speculative).

²⁰ At least four states have enacted legislation prohibiting class actions for certain consumer claims or permitting consumer contracts with class action bars. *See, e.g., Iberia Credit Bureau v. Cingular Wireless, LLC*, 379 F.3d 159, 174–75 (5th Cir. 2004) (the Louisiana Unfair Trade Practices Act does not permit individuals to bring class actions); S.C. Code Ann. § 39-5-140 (consumers may not bring action in representative capacity under South Carolina consumer protection act); Tenn. Code Ann. § 47-18-109(a)(1) (actions brought under the Tennessee Consumer Protection Act may be brought only in their individual capacity); Utah Code Ann. § 70C-4-105(1) (expressly permitting creditors to include class action waiver in credit agreements).

v. Fibreboard Corp., 527 U.S. 815, 845 (1999) (“The Rules Enabling Act [for the 1966 revisions to the Federal Rules] underscores the need for caution [N]o reading of the Rule can ignore the Act’s mandate that rules of procedure ‘shall not abridge, enlarge or modify any substantive right.’”)) (citations omitted); *Deposit Guar Nat’l Bank v. Roper*, 445 U.S. 326, 332 (1980) (“[T]he right of a litigant to employ Rule 23 is a procedural right only” . . .). Indeed, Congress’s statutory class action bars are enforced even if it means that the individual plaintiff would not otherwise pursue his or her claim. *See Blaz v. Belfer*, 368 F.3d 501, 503-04 (5th Cir. 2004) (rejecting argument that retroactive application of SLUSA unfairly deprives meaningful access to courts where potential individual recoveries were small, noting that class actions are a procedural device and do not alter a party’s substantive rights; Rule 23 confers neither the right to “litigate” a claim as a class action nor the right to “seek” certification of a class action).

To that end, there is no “current trend” of invalidating class action bars in consumer arbitration clauses in state and federal courts, as the Plaintiffs maintain. The Supreme Court has enforced an arbitration clause notwithstanding its questions about whether the clause permitted arbitration class actions. *See Gilmer*, 500 U.S. at 32 (enforcing arbitration clause requiring arbitration of ADEA claims “[e]ven if the arbitration could not go forward as a class action.”). Colorado courts have likewise recognized that “arbitration clauses are not unenforceable simply because they might render a class action unavailable.” *Rains*, 23 P.3d at 1253.

This District has enforced a class action bar in an arbitration provision against a consumer. *Ornelas v. Sonic Denver T, Inc.*, No. 06-cv-00253-PSF-MJW, 2007 WL 274738, at *5–7 (D. Colo. Jan. 29, 2007). Five United States Courts of Appeals have enforced arbitration clauses with embedded class action waivers in consumer contracts, rejecting arguments similar

to the ones made here that consumers should somehow be exempt from honoring their agreements containing class action bars. *See, e.g., Lloyd v. MBNA Am. Bank, N.A.*, 27 Fed. Appx. 82, 84-85 (3d Cir. 2002) (“an arbitration agreement barring class-wide relief for claims brought under the TILA is not unconscionable”); *Snowden*, 290 F.3d at 639 (“we reject as meritless Snowden’s unsupported argument that forcing consumers . . . to arbitrate consumer protection claims . . . is against public policy”); *Iberia Credit Bureau*, 379 F.3d at 175–76 (compelling individual consumer arbitration with class action bar); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003) (compelling arbitration with class-action bar); *Jenkins*, 400 F.3d at 877-78 (“[T]he inclusion of a class action bar in [consumer] Arbitration Agreements did not render those Agreements substantively unconscionable.”).²¹

The case law relied upon by the Plaintiffs is distinguishable. *Kristian v. Comcast Corp.*, 446 F.3d 25, 29 (1st Cir. 2006) and *In re Am. Express Merchs. Litig.* (“*American Express*”), 554 F.3d 300, 304 (2d Cir. 2009), for example, involved substantive statutory rights under the federal antitrust acts and are the same cases that Judges Figa and Arguello found inapplicable when evaluating class action bars in consumer and franchise cases because of the extreme complexity that antitrust cases uniquely involve. *See Ornelas*, 2007 WL 274738, at *5-7; *Bonanno*, 2009 WL 1068744, at *13-15; *see also American Express*, 554 F.3d at 316-317 (complex antitrust

²¹ The Plaintiffs’ arguments suggesting a right to private enforcement are especially rejected by courts where, as here, arbitration will not preclude other enforcement agencies (such as state attorneys general offices) from seeking public remedies. *See, e.g., Gilmer*, 500 U.S. at 32; *Johnson v. W. Suburban Bank*, 225 F.3d 366, 376 (3d Cir. 2000) (“[L]oss of the availability of a class action does not mean the loss of meaningful deterrence to TILA violations, insofar as the public remedies . . . remain”); *Francis v. AT&T Mobility LLC*, No. 07-CV-14921, 2009 WL 416063, at *9 (E.D. Mich. Feb. 18, 2009) (state attorney general provides additional avenue for the enforcement of consumer rights); Colo. Rev. Stat. § 6-1-103 (Colorado attorney general and district attorneys concurrently responsible for public enforcement of the CCPA).

action where the required expert testimony alone was estimated to cost between \$300,000 to more than \$2 million); *Kristian*, 446 F.3d at 57-60 (same, where expert fees ranged allegedly from \$300,000 to \$600,000).

Dale v. Comcast Corp., 498 F.3d 1216, 1224 (11th Cir. 2007), involved a claim where there was no statutory availability of attorneys' fees. *See id.*²² Similarly, in *Kinkel v. Cingular Wireless, LLC*, 857 N.E.2d 250 (Ill. 2006), the arbitration clause was "hidden in a maze of fine print" unlike here, where the Arbitration Clause uses bold and capitalized lettering. *Id.* at 264.²³

These cases are unique to their facts, do not suggest a "modern trend" of invalidating class action bars in arbitration clauses, do not override federal and Colorado policy in favor of arbitration, and should not apply in this case to invalidate the Arbitration Clause.

VI. THE ARBITRATION CLAUSE IS CONSCIONABLE.

To invalidate the Agreement as unconscionable, the Plaintiffs must show far more than that the contract is inconvenient for them – they must demonstrate that the contract evokes a "profound sense of injustice." *See Bonanno*, 2009 WL 1068744, at *17. Colorado courts rarely use the doctrine to invalidate a contract and, indeed, other than *Davis v. M.L.G. Corp.*, 712 P.2d

²² Notably, earlier this year in *Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119 (11th Cir. 2010), the Eleventh Circuit specifically distinguished *Dale* from the case before it on the basis that a small claims option as well as attorneys' fees were available to Pendergast, unlike *Dale*. *See id.* at 1142-43.

²³ The Plaintiff also relies on state court cases that do not apply Colorado law, as well as federal cases where the applicable state has either legislated or held as a matter of law that class action bars are unenforceable as a matter of the public policy of that state. *See, e.g., Fisher v. Dell*, 188 P.3d 1215, 1219 (N.M. 2008) (prohibiting class action bar based on New Mexico legislative enactment); *Homa v. Am. Express, Co.*, 558 F.3d 225, 230 (3d Cir. 2009) (citing *Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 89-101 (N.J. 2006)) (predicting that New Jersey would find that the class action bar violates state's public policy in light of the New Jersey Supreme Court's recent opinion in *Muhammad*). By contrast, there is no Colorado legislation or case prohibiting class action bars as a matter of Colorado's public policy. *See Rains*, 23 P.3d at 1253 ("[A]rbitration clauses are not unenforceable simply because they might render a class action unavailable.").

985 (Colo. 1986), an insurance case, the Plaintiffs have not identified one case in which a Colorado court has found a contract provision unconscionable, nor should the Court so find here.

First, for the reasons stated above in Section IV, *supra*, the Arbitration Clause is fair: it provides effective redress of the Plaintiffs' claims and does not preclude the Plaintiffs from vindicating their substantive statutory rights. Contrary to the Plaintiffs' assertions, the cost of individually arbitrating the reasonableness of the TLA does not render the Arbitration Clause unconscionable. There is no precedent in Colorado for invalidating an arbitration clause as unconscionable based on issues such as length of trial or the estimated expert fees or other costs of litigating a contract claim, which only arise after there is a dispute and litigation commences. Nor could there be. The issue of unconscionability is determined based on the facts and circumstances that existed when the contract was made, not at some subsequent point in time. *Glopak Corp. v. United States*, 851 F.2d 334, 338 (Fed. Cir. 1988) (Alleged unconscionability of clause must be determined at the time the contract was entered into; the fact that the actual application of the clause had an adverse effect on one party would not justify retroactively invalidating it as unconscionable); *see also* Restatement (Second) of Contracts § 208 (1981) (unconscionability measured at the time the contract is made).

Second, as Judge Arguello has already recognized, the class action bar has a commercially reasonable justification because it reduces litigation. *Bonanno*, 2009 WL 1068744, at *20.

Third, it is settled that "take-it-or-leave it" contracts between parties of unequal bargaining power are not unconscionable and do not render contracts unenforceable in Colorado. *Clinic Masters, Inc. v. Dist. Ct. of County of El Paso*, 556 P.2d 473, 475-76 (Colo. 1976).

Regardless, the Agreement here was not offered on a take-it-or-leave-it basis: the Plaintiffs had a 30-day look-back period to reject the Agreement, which also is an accepted method by the courts. *See* Section I, *supra*. Moreover, there was nothing compelling the Plaintiffs to use Qwest's high speed internet. The Plaintiffs have not alleged or presented any evidence that there are no other HSI providers in their area or that all such providers use the same contract terms.

Fourth, the language of an arbitration provision need only be as prominent as the language in the rest of the contract; it need not be more prominent and is not required to be separately executed or initialed, and it is irrelevant where it appears. *See Bonanno*, 2009 WL 1068744, at *19 (the fact that arbitration clause comes towards the end of the agreement does not make it any more difficult to see or understand); *Cicle*, 583 F.3d at 554-555 (approving arbitration clause with a bold faced heading and an all-uppercase paragraph); *Iberia Credit Bureau*, 379 F.3d at 172 (upholding arbitration provision that was same size as rest of contract). And the FAA preempts any heightened typography standards on arbitration clauses in any event. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (Section 2 of the FAA preempts state statute imposing typography requirements on arbitration notices). In this case, the Arbitration Clause is more prominent than the rest of the contract and is not buried in fine print.

CONCLUSION

For the reasons stated above, this Court should stay this case and compel arbitration or dismiss this action if Plaintiffs choose to proceed in small claims court.

DATED this 26th day of March, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2010, I electronically filed the foregoing **DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO COMPEL ARBITRATION** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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