

**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' RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEF ON
DISCOVERY RELATING TO ARBITRATION**

Pursuant to Fed. R. Civ. P. 26(b) and the Court's October 16, 2009 Order, Qwest Communications International Inc., Qwest Services Corp., Qwest Corp., Qwest Communications Company, LLC, and Qwest Broadband Services, Inc. (collectively "Defendants" or "Qwest")¹ hereby respond to Plaintiffs' Supplemental Brief on Discovery Relating to Arbitration as follows.

INTRODUCTION

During the scheduling conference on October 9, 2009, the Court requested that the parties identify what factual issues are raised by Defendants' Motion to Compel Arbitration, what discovery the parties propose to undertake relevant to such issues, and why such discovery is required. To provide a very brief response to those questions, the allegations in the Plaintiffs' Complaint and the Motion to Compel Arbitration raise the question of contract formation. The parties have already exchanged written discovery and documents related to this discrete topic.

¹ Several entities are not proper Defendants. Additionally, the entity formerly known as Qwest Communications Corp. is now Qwest Communications Company, LLC.

The only remaining discovery to be completed consists of limited depositions. As explained in greater detail below, Qwest is willing to provide a witness or witnesses to explain the various ways that Qwest discloses, and that Qwest subscribers, including the Plaintiffs, accept, the Qwest High Speed Internet Subscriber Agreement, which includes an Arbitration Clause. Qwest also requests a three hour deposition of each named plaintiff, of Mr. Robert Vernon (Plaintiff Vernon's husband) who actually ordered Qwest services, and of any other fact witness Plaintiffs are permitted to present on the question of contract formation. This evidence is necessary to prove the existence of an agreement to arbitration. *See Ernest v. Lockheed Martin Corp.*, No. 07-cv-02038-WYD-KLM, 2008 WL 2958964, at *3 (D. Colo. July 29, 2008) (permitting limited discovery to address a Rule 12(b)(1) motion to compel arbitration and stating that “[t]he defendant bears the initial burden of setting forth sufficient evidence to demonstrate that an enforceable arbitration agreement exists.”)

Plaintiffs have asserted that the Arbitration Clause in the Subscriber Agreement is unconscionable and use this allegation as an excuse to seek and present a wide array of evidence beyond the issue of contract formation. As explained in greater detail below, Qwest has already provided and will provide evidence concerning contract formation and the terms of the Subscriber Agreement. Plaintiffs' requests for additional broad discovery ignore the United States Supreme Court's mandate that the parties engage in only a “restricted inquiry” with respect to the enforceability of the Arbitration Clause, the presumption of validity that the Arbitration Clause enjoys, and Colorado law enforcing class action waivers. As an example of Plaintiffs' overreaching, Plaintiffs seek evidence of “all circumstances” surrounding Qwest's formation, the “purpose” and “effect” of the Arbitration Clause, including drafting documents and related internal discussions, and all small stakes litigation by or against Qwest. Plaintiffs

also seek leave to provide “expert” testimony from an unspecified number of plaintiffs’ attorneys to testify about Plaintiffs’ ability to obtain and pay for counsel—evidence that has already been rejected by Colorado courts and this district as irrelevant. They also seek “expert” testimony from an unspecified number of unidentified state regulators to testify about their views on the importance of class actions, even though the only relevant state is Colorado, and there is no evidence of a congressional intent in Colorado to use class actions to prosecute consumer protection claims. There is no basis for allowing Plaintiffs to pursue their blatant fishing expedition.

**FACTUAL BACKGROUND RELATED TO CONTRACT FORMATION
AND THE ARBITRATION CLAUSE**

Plaintiffs’ claims all arise out of and are subject to the parties’ High Speed Internet Subscriber Agreement (“Agreement” or “Subscriber Agreement”) and its mandatory arbitration clause. Each of the Plaintiffs were “Price for Life” subscribers, meaning that they received a reduced rate on their service for as long as they maintained the service without change. In exchange for that benefit, Plaintiffs agreed to maintain their service for at least two years.

Over the course of time Qwest has disclosed the Subscriber Agreement to its customers in at least six ways. First, in late 2005, when the Qwest High Speed Internet service transitioned from a regulated service subject to tariffs to a deregulated contract service, Qwest sent a letter to each of its existing subscribers explaining the change and informing them of the Subscriber Agreement. (Travis Leo Affidavit In Support Of Defendants’ Motion To Compel Arbitration ¶ 8 [Dkt. #27].) Second, Price for Life customers ordering their service over the internet are presented with the Subscriber Agreement and must accept the Agreement before the order is complete. (Leo Aff. ¶ 19.) Twice on the “click to accept” internet ordering page customers are told that the Subscriber Agreement terms include arbitration. (Leo Aff. Ex. D.) Third, existing

customers ordering Price for Life service over the telephone are placed in an interactive voice response system that asks the customers to affirm that they are ordering the service subject to a multi-year term and the Subscriber Agreement. (Leo Aff. ¶¶ 17-18.) Fourth, both new subscribers and existing subscribers ordering new services or products are sent a Welcome Letter that discloses the Subscriber Agreement. (Leo Aff. ¶ 21, Ex. F.) The Welcome Letter notes that the Subscriber Agreement contains an arbitration clause and that maintaining the service beyond 30 days reflects acceptance of the Subscriber Agreement. (*Id.*) Fifth, subscribers are provided with a QuickConnect CD to configure their modem for Qwest's service. During the CD's installation process, subscribers are informed of the Subscriber Agreement and that it includes an arbitration clause. Subscribers must "click to accept" the Subscriber Agreement before the installation is complete. (Leo Aff. ¶ 20.) Finally, the Subscriber Agreement is posted on Qwest's website. *See* www.qwest.com/legal/.

Section 17 of the Subscriber Agreement is titled "**Dispute Resolution and Arbitration, Governing Law.**" The Subscriber Agreement calls attention to the Arbitration Clause with this bold heading, followed by capitalized lettering that states: "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." (*See* Leo Aff. Ex. B, Subscriber Agreement, at 12, Section 17.) The Subscriber Agreement also expressly provides certain cost protections to the subscriber. First, all face-to-face proceedings will be conducted at a location which is reasonably convenient to both parties. (*Id.* at Section 17(a)(i).) Second, the subscriber is obligated to only pay up to \$125 in Arbitrator Fees for claims that do not exceed

\$10,000.00; Qwest pays the rest. (*Id.* at Section 17(a)(ii).) Finally, the Arbitration Clause calls separate attention to the subscriber's agreement to waive rights to litigate their claims before a jury or on a class or representative basis, by underlining the heading entitled "Waiver of Jury and Class Action." (*Id.* at Section 17(b).) Importantly, the Subscriber Agreement does not limit Qwest subscribers to mandatory arbitration. Qwest internet customers may also file claims in small claims courts or, if an action is related solely to the collection of debt owed to Qwest, may proceed individually in court.

I. DISCOVERY RELATED TO CONTRACT FORMATION

Before the Court may compel arbitration, the agreement to arbitrate must be established. To meet its burden related to the formation of the arbitration agreement, Qwest has provided and seeks from Plaintiffs information related to each of the six ways that Qwest informs its subscribers about, and/or records the subscribers' acceptance of, the Subscriber Agreement.

A. Discovery Qwest Seeks

Qwest seeks three-hour depositions from each Plaintiff and from Mr. Vernon. The operative Complaint and Qwest's records indicate that Mr. Vernon was involved in ordering internet services from Qwest. Sec. Am. Compl. ¶ 18. Although Qwest is seeking discovery from Plaintiffs relating to the contract formation based on Plaintiffs' new argument that no contract was ever formed, Plaintiffs' assertion that they did not agree to the Subscriber Agreement is not alleged in their Complaint, and is indeed contrary to the allegations they made in their Complaint. Plaintiffs allege in their Complaint, for example, that "[a]fter [a] customer orders service, Qwest sends the customer a form Subscriber Agreement that purports to govern the terms of Qwest's provision of service." Sec. Am. Compl. ¶ 13. Additionally, Plaintiff Sandquist at least "understood he was on a month-to-month contract." Sec. Am. Compl. ¶ 29.

Qwest expects that the depositions Qwest requests, together with the written discovery responses the parties have already exchanged and Plaintiffs have promised, the Plaintiffs' document production, and the Plaintiffs' Complaint, will sufficiently establish the contract formation between each of the Plaintiffs and Qwest.²

B. Discovery Qwest Has Provided

Qwest has produced the following categories of documents related to the question of contract formation:

- Qwest's account notes for each of the Plaintiffs;
- all versions of any customer agreement between Qwest and its residential internet service consumers between January 28, 2006 and present;
- a sample of the December 2005 letter sent to Qwest subscribers explaining the transition from tariff-regulated to contract-based service and a corresponding "Frequently Asked Questions" fax sent as a follow-up to specific customer inquiries about the letter;
- a printout of the checkout page and click to accept check box displayed to customers completing an internet order;
- a printout of the interactive voice response logic demonstrating the prompts provided and text read to existing Qwest customers who order a term internet service by calling a Qwest customer service representative, together with the training materials provided to such representatives;
- recreated samples of the Welcome Letters sent to Plaintiffs, along with documents sufficient to show any changes in the Welcome Letter disclosures over time;
- copies of each version of the QuickConnect CDs that configure subscribers' modems and display a "click to accept" box for the Subscriber Agreement; and
- logs created when Plaintiffs Vernon and Sandquist ran the QuickConnect CD and accepted the Subscriber Agreement.

² Plaintiffs' initial disclosures identify a host of witnesses designated on the topic of "acceptance by proposed class members of the High Speed Internet Subscriber Agreement." Qwest asserts that the testimony of such witnesses is not relevant, but to the extent that such testimony is allowed, Qwest requests that the witnesses Plaintiffs actually intend to rely upon be identified and that Qwest be permitted two-hour depositions of each such witness.

C. Remaining Discovery Plaintiffs Request Relating to Contract Formation

Related to the question of contract formation, Plaintiffs request the deposition of Travis Leo, the witness who provided the affidavit in support of Qwest's Motion to Compel Arbitration, and the deposition of a corporate representative to testify concerning Qwest's policies and procedures for providing the Subscriber Agreement to customers during the ordering process or during an upgrade order along with any related training of Qwest's customer care representatives. (Pls.' Supp. Br. at 16-17.) Qwest does not object to short depositions on these limited topics.

II. THE REMAINING DISCOVERY SOUGHT BY PLAINTIFFS IS IRRELEVANT AND OVERLY BURDENSOME

Once an agreement to arbitrate is established, discovery addressing Qwest's Motion to Compel the Arbitration Clause should be sharply circumscribed. This is because "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). With this presumption of validity, this Court's review of the arbitration agreement is limited to an "expeditious and summary hearing" "with only restricted inquiry into factual issues," in order to move cases to arbitration "as quickly and easily as possible." *Id.* at 20-23 n 27. In accordance with this precedent, Defendants seek only very limited discovery concerning the issue of contract formation and Plaintiffs must proffer a "sufficiently compelling reason" to conduct any discovery they seek prior to responding to Qwest's Motion to Compel Arbitration. *Kulpa v. OM Fin. Life Ins. Co.*, No. 07cv1136 HSO-RHW, 2008 WL 351689, at *1 (S.D. Miss. Feb. 6, 2008).

As set forth below, Plaintiffs' broad requests³ fail to comport with the law requiring them to limit the factual inquiry, are not sought for compelling reasons regardless, and should be denied.

A. Unconscionability Allegations Do Not Justify Broad, Burdensome Discovery

Plaintiffs assert the Arbitration Clause in the Subscriber Agreement is unconscionable under Colorado contract law. Pls.' Supp. Br. at 12. An unconscionability inquiry relates in part to the specific negotiation between the parties to the contract, and in part to the terms of the contract; that is, whether the terms are unreasonably favorable to one party. *Davis v. M.L.G. Corp.*, 712 P.2d 985, 991 (Colo. 1986) (In order to support a finding of unconscionability, "there must be evidence of some overreaching on the part of one of the parties such as that which results from inequality of bargaining power or under other circumstances in which there is an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to that party."). In this case Plaintiffs do not assert that they, or any other consumer, made an effort to negotiate the Arbitration Clause of the Subscriber Agreement. In response to one of Plaintiffs' inquiries, Qwest has not identified any subscriber who has ever attempted to negotiate the Subscriber Agreement. Qwest would stipulate that at any given time there is one version of the High Speed Internet Subscriber Agreement that is presented to all residential high speed internet subscribers and Qwest does not and could not negotiate the terms of this contract with every existing and potential consumer. Thus, any further discovery related to the "negotiation" of the Subscriber Agreement is irrelevant. Additionally, the terms of the Subscriber Agreement are clear and Qwest has produced all versions of the agreement.

³ For ease of reference, Qwest has provided an "Attachment A" to this Response that identifies the additional discovery, deposition testimony, and expert testimony that the Plaintiffs seek and a brief summary of Qwest's objections and responses to those requests.

Plaintiffs, however, seek much more than the negotiation and terms of the Subscriber Agreement. Plaintiffs claim that all evidence related to the “purpose and effect” of the Arbitration Clause is relevant to the issue of unconscionability and should be discoverable. Pls.’ Supp. Br. at 12. In *Davis v. M.L.G. Corp.*, the Colorado Supreme Court identified seven factors that “have been found to be relevant to the unconscionability determination.” 712 P.2d 985, 991. The final factor was identified as “all circumstances surrounding *the formation of the contract*, including its commercial setting, purpose, and effect.” *Id.* There are at least two problems with Plaintiffs’ efforts to turn this factor into a mechanism for Plaintiffs to demand discovery of all documents related to Qwest’s development, drafting and changes to the Subscriber Agreement. First, Plaintiffs have not been able to cite a single Colorado or Tenth Circuit case that held that the language in *Davis* opened the door to examine a party’s subjective intent in drafting a contract. Indeed, despite decades of federal and state litigation concerning the enforceability of arbitration clauses, Plaintiffs are only able to cite a single Ninth Circuit case for the proposition that the Court should allow what would be extensive electronic discovery into *internal*, likely privileged discussions of the “purpose” for an arbitration clause. Pls.’ Supp. Br. at 13. Moreover, it is well established that a contracting party’s purpose or intent is to be established from the unambiguous terms of the contract itself. *See Union Ins. Co. v. Hottenstein*, 83 P.3d 1196, 1203 (Colo. App. 2003).

Second, the cases cited by the *Davis* Court also do not support Plaintiffs’ theory of wide-ranging discovery into Qwest’s subjective intent or inner workings. *See Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (“[T]he primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made. ... The terms are to be considered ‘in the light of the general commercial background and

the commercial needs of the particular trade or case.”). In short, if every challenge to an arbitration clause was going to open the door to a fishing expedition into a corporation’s consumer contract drafting practice and prior litigation experience, the Supreme Court’s directive for an “expeditious and summary hearing,” “with only restricted inquiry into factual issues,” would be overridden.

B. Qwest’s Objections To Specific Discovery Requests

Plaintiffs request a wide range of discovery allegedly related to the “purpose and effect” of the Arbitration Clause in the Subscriber Agreement, including documents and testimony related to: (1) disputes with internet service customers where the amount in controversy was less than \$500 (Pls.’ Interrogatories 4-5; Pls.’ Supp. Br. at 14, 16); (2) all documents that refer or relate to any changes, modifications, or alterations of any kind to the arbitration provisions found in any Qwest customer agreement; and (3) internal discussions regarding the arbitration provisions in any alleged customer agreement (Pls.’ RFPs 3-4, Pls.’ Supp. Br. at 13, 17).

First, Qwest has already identified and provided documents with respect to small claims and arbitration matters filed against Qwest when less than \$500 was at issue. Plaintiffs’ demand for additional documents that “refer” to disputes with customers and related testimony is neither relevant nor necessary, is overly broad, and appears to be an attempt to burden Qwest with the obligation to produce a cumbersome privilege log since most of these communications will necessarily be privileged. Other than vaguely explaining that such discovery is relevant to demonstrating the “effect” of the agreement, Plaintiffs provide no explanation as to why the information already provided by Qwest is insufficient or why they need so much more. Regardless, Plaintiffs miss the point. The *Davis* Court was interested in “circumstances surrounding” and existing at the time of the “*formation* of the contract.” Qwest’s litigation

