

**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' MOTION TO COMPEL ARBITRATION

Pursuant to Fed. R. Civ. P. 12(b)(1), Qwest Communications International Inc., Qwest Services Corp., Qwest Corp., Qwest Communications Company, LLC, and Qwest Broadband Services, Inc. (collectively "Defendants" or "Qwest")¹ hereby move to compel arbitration.

INTRODUCTION

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. Plaintiffs ordered high speed internet service from Qwest either by telephone or via the internet. At the time of ordering, Qwest advised Plaintiffs that the terms and conditions of their service were governed by the Agreement and likewise advised Plaintiffs of the internet address where they could download the Agreement. Moreover, as customers who ordered Qwest's high speed internet for a two-year term, Plaintiffs and the class they seek to represent affirmatively

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

accepted the terms of the Agreement, including the Agreement's Termination Liability Assessment ("TLA") provision and the arbitration clause ("Arbitration Clause"). The Arbitration Clause expressly provides that all claims and disputes arising out of, or relating to, the Agreement will be resolved in arbitration, with certain cost shifting to Qwest, or in small claims court, and not in class or consolidated actions.

The Arbitration Clause is enforceable under the Federal Arbitration Act ("FAA") and under Colorado law. The Arbitration Clause was freely entered into by the parties, is fair, and provides Plaintiffs with reasonable cost-effective alternatives to pursue their claims. The Court should therefore enforce the Arbitration Agreement, stay these proceedings and compel arbitration under the terms of the Agreement.

FACTUAL AND PROCEDURAL BACKGROUND

Qwest Corporation is a Colorado corporation with its principal place of business in Denver, Colorado and the majority of events, witnesses, and documents related to the litigation took place or are located in Colorado. (*See* Travis Leo Affidavit ¶ 3.) When a customer signs up for high speed internet online, the servers housing the transaction are located in Colorado and Nebraska. (*Id.* ¶ 13.) When a customer signs up for high speed internet over the telephone, the customer service representatives who accept telephone calls for internet service and sales are located primarily in Denver, Colorado, but also in Idaho, Utah, South Dakota, Nebraska, Iowa, Arizona, and Minnesota. (*Id.* ¶¶ 11, 12.) No sales call centers are located in Washington. (*Id.* ¶ 11.) Qwest houses the majority of its customer records in Colorado and Nebraska. Colorado also hosts numerous call centers and is the location of numerous Qwest employees that were involved in developing the terms and conditions for high speed internet, and developing the

internet and telephone flow processes for high speed internet ordering – the only way a customer can order such a service from Qwest. (*Id.* ¶¶ 11, 12, 13, 15.)

Qwest provides internet subscribers with ample notice of the Subscriber Agreement. Prior to 2006, Qwest was a "facilities-based wireline broadband Internet access service provider," subject to FCC regulation. *See, e.g.,* Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 F.C.C.R. 14853, ¶ 4 (2005) ("FCC Wireline Broadband Order"). In 2005, the FCC deregulated the high speed internet services. *Id.* This deregulation became effective for Qwest on January 28, 2006. As part of the deregulation process, in December of 2005, Qwest sent letters to every internet subscriber, explaining that the service would soon be deregulated and that subscribers who maintained their service would be governed by the Subscriber Agreement. (Leo Aff. ¶ 8.) Such letters would have been sent to Plaintiffs Vernon and Durkin. (Second Am. Compl. ¶¶ 18, 25.) Existing customers who made no changes to their service became subject to the Subscriber Agreement in November of 2006, while customers who made any changes to their service, such as upgrading to high speed internet, became subject to the Subscriber Agreement at that time. (*See* Sample Letter to Customers December, 2005, Leo Aff., Ex. A.) A customer who did not want to be governed by the Subscriber Agreement could cancel his service without penalty. (Leo Aff. ¶ 9.)

Term contract and month-to-month high speed internet subscribers are all bound by the Subscriber Agreement. (Second Am. Compl. ¶¶ 13, 29; Leo Aff. ¶ 16, Ex. B.) In the "Term and Termination" section of the Subscriber Agreement, there is one set of terms for subscribers who elect to take services on a month-to-month basis and a different set for those subscribers who

agree to a two-year contract. (Sub. Ag. ¶¶ 12(b)(c), Leo Aff., Ex. B.) Qwest began offering the two-year contract in the spring of 2006 in a promotion known as "Price for Life." (Leo Aff. ¶ 16.) Qwest guarantees Price for Life subscribers a discounted rate for as long as they maintain their service without change. (*Id.*) In contrast, a subscriber who takes monthly service without a two-year commitment is subject to potential rate increases. (*Id.*) In exchange for receiving the permanent Price for Life discounts, a Price for Life subscriber agrees to purchase the high speed internet service for at least two years. (*Id.*; Ex. B ¶ 12(c).) The Price for Life subscribers also agree that if they terminate the contract before two years have expired, they will pay a \$200 TLA. (Ex. B ¶ 12(c).)

Plaintiffs, as Price for Life customers, also affirmatively accept the Subscriber Agreement. All Qwest high speed internet subscribers are informed of and accept the Subscriber Agreement by, among other things, continuing their Qwest service. If a customer enrolls in internet service via the internet, during the "checkout" process, the customer must click "I agree" to a box of "Terms and Conditions" before the enrollment process is complete. (Leo Aff. ¶ 19.) The immediately visible text of the terms and conditions and a portion of the "checkout" page titled "Broadband Subscriber Agreement" advise the customer that his internet service is offered under the Subscriber Agreement and that the Agreement contains an arbitration provision. (*See* Checkout page in IOT, Leo Aff., Ex. D.) The website for locating the Agreement is also provided. (Leo Aff. ¶ 19.) When a customer purchases internet services via telephone and chooses a term contract rather than month-to-month service, the customer is sent to a voice prompt system that advises the customer of the multi-year terms and conditions. (*Id.* ¶ 17; *See*

Consumer Aspect, Project: HSI Service Agreement IVR, Leo Aff., Ex. C.) The Price for Life protection is only provided if the customer affirmatively accepts the terms. (Leo Aff. ¶ 20.)

Once a customer enrolls in Qwest's internet service, they are again informed of the Subscriber Agreement. First, Qwest sends customers an installation disc. (*Id.* ¶¶ 20, 24.) As part of the installation, the customer again is asked to accept the terms of the Agreement. (*Id.*) The software will only install if the customer clicks to accept the terms of the Subscriber Agreement. (*Id.*) Second, customers receive a Welcome Letter. (*Id.* ¶ 21.) On page one of the Welcome Letter, a bolded paragraph directs the customer to read the back of the letter for information about services and terms of use. (*See* Welcome Letter at 1, Leo Aff., Ex. F.) Page two of the Welcome Letter states that the service is "offered under the High-Speed Internet Subscriber Agreement terms, which are located at www.qwest.com/legal/highspeedinternetsubscriberagreement." (*See* Welcome Letter at 2.) The letter advises the customer that the terms of the Agreement include arbitration, and if he does not assent, he must cancel within 30 days. (Leo Aff. ¶ 21.)

The Subscriber Agreement, which was drafted in Colorado (*see id.* ¶ 16), expressly and specifically provides that all disputes other than those related solely to collection of debt shall be resolved in an alternative dispute resolution forum of either individual arbitration with certain cost shifting to Qwest or in small claims court.

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, non-consolidated) claims; and (2) in court if they relate solely to the collection of any debts you owe to Qwest.

(i) Arbitration Procedures. . . . The arbitration shall be conducted by the American Arbitration Association ("AAA"). The Federal Arbitration Act, 9 U.S.C. Sections 1-16, not state law, shall govern the arbitration of the dispute. Colorado state law, without regard to choice of law principles, shall otherwise govern and apply to any and all claims or disputes

(b) Waiver of Jury and Class Action. By this Agreement, both you and Qwest are waiving rights to litigate claims or disputes in court (except small claims court as set forth in paragraph (a) above). Both you and Qwest also waive the right to a jury trial on your respective claims, and waive any right to pursue any claims on a class or consolidated basis or in a representative capacity.

(See Sub. Ag., Leo Aff., Ex. B at 12.)

Plaintiffs assert declaratory judgment, unjust enrichment, and consumer protection act claims to challenge the TLA assessed after they cancelled their high speed internet service. (Second Am. Compl. ¶¶ 1, 49-74.) Plaintiff Vernon asserts that, prior to deregulation, in approximately 2005, she ordered internet service through Qwest and upgraded to Price for Life in April, 2007. (*Id.* ¶ 18.) Plaintiff Durkin began subscribing to Qwest's internet service in 2004 prior to deregulation. (*Id.* ¶ 25.) Plaintiff Sandquist subscribed to Qwest's Price for Life internet service beginning in August, 2007. (*Id.* ¶ 29.) Plaintiff Moore subscribed to Qwest's Price for Life internet service beginning in May, 2008. (*Id.* ¶ 33.)

Plaintiffs purport to be suing on behalf of all similarly situated Qwest Price for Life customers who were charged the TLA. (*Id.* ¶ 41.) All of the other Qwest customers whom Plaintiffs will attempt to bring into this class action were also internet subscribers of Qwest who

live in one of fourteen states where Qwest offers service. Each one of these customers purchased internet service by one of the methods discussed above and at the same time accepted the terms and conditions of that service. They also clicked "I accept" when they installed the software and were reminded of the Subscriber Agreement in their Welcome Letters.

ARGUMENT

The Subscriber Agreement states that Qwest provides its high speed internet service pursuant to the Federal Arbitration Act ("FAA") and Colorado law. The Arbitration Clause is enforceable pursuant to both. The Arbitration Clause provides that potential plaintiffs may pursue their actions in arbitration by paying a modest fee of \$125. Moreover, where, as in this case, plaintiffs are alleging violations of the Colorado Consumer Protection Act, prevailing plaintiffs proceeding individually would be entitled to receive the greater of their actual damages, five hundred dollars or three times their actual damages if they prove that a defendant acted in bad faith. In addition, individual plaintiffs prevailing on a consumer protection act claim would be entitled to their costs and reasonable attorneys' fees. The Qwest Arbitration Clause goes further, however, allowing Plaintiffs to choose small claims court rather than arbitration or allowing Plaintiffs to avoid arbitration if they pursue an action related *solely* to the collection of a debt owed to Qwest. Thus, the Arbitration Clause in the Subscriber Agreement provides Plaintiffs with multiple cost effective options to vindicate their rights and is enforceable.

I. PLAINTIFFS SHOULD BE COMPELLED TO ARBITRATE THEIR CLAIMS

A. Federal And State Law Presumptively Favor Arbitration

The Arbitration Clause in the Qwest Subscriber Agreement is enforceable under both federal and Colorado law. Congress enacted the Federal Arbitration Act more than 80 years ago

"to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citations omitted). With the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). Colorado likewise recognizes that "public policy strongly favors the resolution of disputes through arbitration." *See Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1251 (Colo. App. 2001). Under both federal and Colorado law, "questions of arbitrability must be addressed with a healthy regard for the federal" and state "policy favoring arbitration" with "any doubts concerning the scope of arbitrable issues . . . resolved in favor of arbitration." *Bennett v. Liberty Nat'l Fire Ins. Co.*, 968 F.2d 969, 971 (9th Cir. 1992) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)); *see Rains*, 23 P.3d at 1251 ("any doubts about the scope of an arbitration provision are to be resolved in favor of arbitration").

B. The Arbitration Agreement Encompasses Plaintiffs' Claims

A motion to compel arbitration must be granted if (1) there is a valid agreement to arbitrate, and (2) the dispute falls within the scope of that agreement. *See Chiron Corp. v. Ortho Diagnostics Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000) (citations omitted); *Rains*, 23 P.3d at 1251 (citing *Gerge v. High View Homes, LLC*, 996 P.2d 233 (Colo. App. 1999)).

There is a valid agreement to arbitrate. When Plaintiffs ordered internet service from Qwest, they either accepted the Agreement that contained the Arbitration Clause by clicking "I accept" during the checkout process for internet orders, or by responding to voice prompts over

the telephone. Additionally, Qwest mailed each customer a Welcome Letter that again advised of the Qwest High-Speed Internet Subscriber Agreement. Subscribers also installed the necessary software via disk at which time they clicked "I accept". The customers were advised with each method of acceptance and in the Welcome Letter that they had 30 days to cancel their service if they did not agree with the terms of the Agreement. Moreover, the internet click-through message and the Welcome Letter specifically advised the customers of the Arbitration Clause. By purchasing, installing, and then continuing to use Qwest's internet service, Plaintiffs accepted the Agreement and the Arbitration Clause it contained. Whether Plaintiffs originally purchased internet services before deregulation and before the creation of the Subscriber Agreement or chose not to read the Agreement is immaterial; they ordered or upgraded to high speed internet, were notified of the Agreement, and accepted it. *See Lutz v. Cont'l Servs., Inc.*, No. C07-974Z, 2007 WL 4165274, at *3 (W.D. Wash. Nov. 16, 2007) (holding employee bound to arbitration agreement when she signs whether she read or negotiated the provisions or not) (citations omitted); *In re RealNetworks, Inc., Privacy Litig.*, No. 00 C 1366, 2000 WL 631341, *4 (N.D Ill. May 8, 2000) (enforcing arbitration clause in click-through agreement), attached as Exs. 1 and 2, respectively.

This dispute challenging the TLA provision of the Agreement falls squarely within the terms of the Arbitration Clause. Arbitration is required for any claim or dispute "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)." (See Sub. Ag. ¶ 17(a), Leo Aff., Ex. B at 12.)

II. THE ARBITRATION CLAUSE IS FAIR AND ENFORCEABLE

Although the parties agreed to arbitrate and this dispute falls within the scope of the Arbitration Clause, Plaintiffs claim that the clause is unconscionable or against public policy. (Second Am. Compl. ¶¶ 38-40.) Plaintiffs' arguments fail. When evaluating a plaintiff's arguments against arbitration, a court may consider general state law contract defenses, but as a result of the FAA, may not apply those defenses in a manner that uniquely burdens arbitration provisions. *See Doctor's Assocs. Inc. v. Casarotto*, 517 US 681, 687 (1996). Here, whether the Arbitration Clause is unconscionable or against public policy must be determined under Colorado law, subject to the strictures of the FAA. The Arbitration Clause provides Plaintiffs with multiple methods to vindicate their legal rights and therefore must be enforced.

A. Colorado Law Applies To The Arbitration Agreement

Colorado law, as chosen by the parties and limited by the Federal Arbitration Act if necessary, applies to the issue of the enforceability of the Arbitration Clause. When a contract contains a choice of law provision and the case is transferred pursuant to 28 U.S.C. § 1404(a), the transferee court applies the law of the transferor court in determining whether to enforce the contract's choice of law provision. *Sauer v. Xerox Corp.*, 938 F. Supp. 155, 162 (W.D.N.Y. 1996). Application of Washington choice of law rules demonstrates that the Agreement's choice of law provision is enforceable as to the claims of all Plaintiffs. *McGinnis v. T-Mobile USA, Inc.*, No. C08-106Z, 2008 WL 2858492, at *1 (W.D. Wash. July 22, 2008), attached as Ex. 3.

Washington applies the Restatement (Second) of the Conflicts of Laws to determine which state's law applies in light of a contractual choice of law provision. *Id.* at *3. The essence of the test is that if there is no actual conflict with another state's law, then Washington law applies. *Id.* at *1. In this case, the parties agreed by contract that Colorado law will apply.

According to the test stated in *McGinnis*, pursuant to Restatement (Second) Conflict of Laws § 187, the Court should first analyze whether there is a conflict between Colorado and Washington law. *Id.* If there is a conflict with the law that would apply pursuant to the contract, a court will enforce the bargained for choice of law, unless another state has a materially greater interest in applying its own law. Section 187 provides that the contractual choice of law will be enforced unless:

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Restatement (Second) Conflicts of Laws § 187 (emphasis added).

There is a conflict between Colorado and Washington law. In *Rains*, the Colorado Court of Appeals held that a strong public policy favoring arbitration requires that arbitration clauses are to be enforced as written, even when they disallow class actions. 23 P.3d at 1253-54 ("We recognize that plaintiff was attempting to bring her claims in court as a class action. However, arbitration clauses are not unenforceable simply because they might render a class action unavailable.") (citing cases). To the extent a class action waiver raises a question of fairness, the Colorado Court of Appeals held that the issue is better addressed by the legislature and not the courts. *Id.* at 1255. In contrast, the Washington Supreme Court has held that arbitration clauses with class action waivers are unconscionable. *See Scott v. Cingular Wireless*, 161 P.3d 1000, 1006 (Wash. 2007).

