

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

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

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

Plaintiffs,

vs.

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

Defendants.

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**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO COMPEL  
ARBITRATION**

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## I. INTRODUCTION

This case involves a complex consumer claim where individual damages are small. As detailed below, without the ability to proceed on a class basis, Plaintiffs and thousands of other Qwest customers challenging the multi-billion-dollar corporation's unlawful early termination fees ("ETFs") are effectively left without redress for their claims.

Defendant Qwest Communications International Inc. and its affiliated defendants (collectively "Qwest") insist the "Dispute Resolution" provision in its form Subscriber Agreement, which includes a mandatory arbitration clause and class action waiver, is "fair." But where, as here, the cost of pursuit far outweighs the amount of recovery, a class action is the only viable means for Plaintiffs and other consumers to hold Qwest accountable for its wrongdoing. Moreover, while Qwest's motion is styled as a motion to compel arbitration, Qwest admits that it cares little for the arbitration clause itself, noting that if the Court declines to enforce the class action waiver, Qwest "will litigate the issues in court." Qwest's real goal is to prevent consumers from proceeding on a class or consolidated basis, the only practical and effective means of challenging Qwest's ETF. The Court should deny Defendants' Motion to Compel Arbitration.

## II. STATEMENT OF FACTS

On January 28, 2006, Qwest implemented a "Subscriber Agreement" to replace government tariffs that formerly had governed its provision of high speed Internet service. *Leo Aff.* (Dkt. No. 27), ¶¶ 7-8. Section 17, captioned "Dispute Resolution and Arbitration: Governing Law," includes a mandatory arbitration provision and class action waiver. *High Speed Internet Subscriber Agreement, Ex. B to Leo Aff.* ("Subscriber Agreement"), § 17. (Section 17 is also reproduced in the Appendix). Qwest imposes the Subscriber Agreement on customers on a take-it-or-leave-it basis. *Terrell Decl., Ex. C* (Response to Interrogatory No. 6).

Qwest did not provide copies of the Subscriber Agreement to its new customers, except for a few months not applicable to the Plaintiffs, or to its existing customers. *Terrell Decl.,*

Ex. O (Kohler Dep. 19:7-22:23). Instead, Qwest supposedly mentioned the existence of a Subscriber Agreement as customers completed the process of ordering Internet service, and purportedly allowed them to complete that process only if they indicated, either by pressing a phone button if ordering by phone or checking a box if ordering on the Internet, their agreement to the terms of the Subscriber Agreement that they had not even seen. But Qwest did not even provide a link to the document itself to facilitate review. It merely made the Agreement available to those who went to the appropriate page on Qwest's website ([www.qwest.com/legal](http://www.qwest.com/legal)) and successfully found it there amid numerous other agreements, presumably after they completed the ordering process. Ex. C to Leo Aff., at 2 (orally providing address for website page); Ex. D to Leo Aff., at 2 (providing link to website page but not to Subscriber Agreement on that page).

Qwest claims it informed customers they had 30 days to cancel their internet service if they did not like the Subscriber Agreement's terms. Ex. C to Leo Aff.; *id.*, Ex. D at 2. Qwest did not inform customers that under the terms of the Subscriber Agreement, existing Qwest customers switching to different service did not have a cancellation right, while new customers could only cancel within the 30-day period if they paid a myriad of charges, including an ETF if they used the service at all. Subscriber Agreement, ¶ 12(a).

After ordering service, new customers and many existing customers received an installation disc. Leo Aff., ¶ 20. That disc not only repeated the assurances about a 30-day cancellation period, it also contained the entire text of a License Agreement which, unlike the Subscriber Agreement, did not contain an arbitration or class action waiver clause, but rather provided for actions to be brought in this court. Ex. E to Leo Aff, ¶ 7.2(c). Thus, the only agreement that Qwest provided to customers permitted class action lawsuits in court. Nor did the disc clearly distinguish between the License Agreement and the Subscriber Agreement; indeed, the customer supposedly agreed to both by electronically checking a box labeled "I accept the terms of the license agreement." Terrell Decl., Ex. O (Kohler Dep. 59:6-60:22); *see*

*id.* at 58:10-22 (Qwest's 30(b)(6) witness is confused about whether the text in the website is the Subscriber Agreement or the License Agreement).

Each Plaintiff ordered Qwest Internet service, either as a new or as an existing customer seeking to change service, after January 28, 2006. None of them recalls Qwest mentioning the Agreement, let alone the Dispute Resolution provision. Terrell Decl., Ex. P (Vernon Dep. 68:22-69:20), Ex. Q (Sandquist Dep. 23:6-22), Ex. R (Durkin Dep. 51:13-15); Moore Decl., ¶ 2. Persons ordering by phone supposedly indicated acceptance through an Interactive Voice Recording (IVR) process, but Qwest did not record the phone button that customers pushed; instead, a customer representative was supposed to, but often did not, code which button was pushed. Terrell Decl. Ex. S (Pedersen Dep. 8:9-13:14). Qwest did not record the supposed acceptances of the Subscriber Agreement's terms by persons ordering online; the sole record is whether the product or service was delivered. *Id.* 13:15-14:19. Finally, if the checking of a box on the installation disc labeled "I accept the terms of the license agreement" says anything about acceptance of the terms of the Subscriber Agreement, Qwest did not record whether customers checked the box before October 2007. *Id.* 14:20-15:21.

Plaintiffs brought this suit to challenge Qwest's imposition of ETFs as invalid and unenforceable penalties. Dkt. No. 52, Third Amended Class Action Complaint ("TAC") ¶¶ 1-2. Qwest imposes the ETF on its Internet service customers who cancel service before the end of a purported term commitment, to which Plaintiffs did not agree, without regard to customers' reasons for cancelling service or the time remaining on their alleged oral term commitments. *Id.* Plaintiffs have brought statutory and common law claims, seeking monetary damages (generally \$200) and declaratory and injunctive relief. *Id.* ¶¶ 50-75; *id.* at 16-17, D.-E. While each putative class member's claim is small, collectively they are likely to amount to millions of dollars given the number of Qwest Internet subscribers and the number of consumer complaints. Toms Decl., ¶¶ 2-6; *id.*, Exs. A and B.

Plaintiffs have submitted testimony from four attorneys whose experience representing individual consumers qualifies them to testify regarding the types of cases consumer lawyers will handle on an individual basis. *See* Fuller Aff. ¶¶ 4–11 (37 years representing consumers in Minnesota); Maier Aff. ¶¶ 3–10 (29 years representing consumers in Washington State); Terrell Decl., Ex. A (Treinen Rep.), at 1–4 (11 years representing consumers in New Mexico); *Id.*, Ex. B (Villanueva Rep, at 1 (31 years representing individuals with small claims in Colorado). These experts opine that small amounts in controversy make cases against large corporations such as Qwest impractical to pursue on an individual basis. As Washington consumer lawyer Peter Maier points out, “the cost of litigation over allegations of overcharging for services, especially against a corporation, is far too high” to allow him to represent consumers, like the Plaintiffs, whose damages are about \$200. Maier Aff. ¶ 15. The fees to perform the tasks required in even the simplest consumer cases (e.g., interviewing the client, sorting through documents, explaining the retainer, opening a file, analyzing and organizing the evidence, and drafting a demand letter), would far exceed the amount at issue, even for a lawyer charging below-market rates. Maier Aff. ¶¶ 19–21. Minnesota attorney Richard J. Fuller echoes Mr. Maier, estimating that a consumer case of minimal complexity “can be expected to result in the expenditure of at least 24 hours” of total time, including “6 to 8 hours of attorney time...and very likely more.” Fuller Aff. ¶ 23–25. As New Mexico attorney Rob Treinen opines, these economic realities make it “highly unlikely that any competent consumer law attorney in his or her right mind would agree to represent a plaintiff that wants to bring the claims in this lawsuit on an individual basis.” Terrell Aff., Ex. A (Treinen Rep.), at 8.

Without an attorney, consumers have no avenue to vindicate their rights. This case involves complex factual and legal issues that take time and expertise to analyze. *See* Maier Aff. ¶ 22 (noting Qwest’s Subscriber Agreement is thirteen pages of closely packed type, “which will require time and effort to read and digest”); Fuller Aff. ¶ 31 (describing the Subscriber Agreement as “long, complex, and ungrammatical”); Terrell Aff., Ex. A (Treinen

Rep.), at 5–6 (setting forth the complicated legal defenses Qwest likely would assert and the need for experts). Both AAA arbitration and small claims court present procedural hurdles that consumers would find difficult to surmount. *See* Maier Aff. ¶ 22 (noting AAA’s procedures “take time to locate and understand”); Fuller Aff. ¶ 33 (testifying that the average consumer “can be expected to have difficulty explaining his or her claim” in small claims court). Perhaps most important, the cost of AAA arbitration or small claims court is prohibitive for individuals with relatively small damages claims. *See* Terrell Decl., Ex B (Villanueva Rep.), at 5 (reporting cost to file an action and effect service of process would amount to half or more of the amount of consumer’s typical claim; noting arbitration costs \$125 even if consumer wins).

In short, without the ability to proceed on a class wide basis, few if any of Qwest’s customers would be able to seek redress for their claims. As Mr. Fuller states, “[i]f Qwest succeeds in its attempt to bar such class actions, it will have effectively insulated itself from liability for the alleged practices as described in the Complaint.” Fuller Aff. ¶ 41.

The lack of small claims matters and arbitrations despite widespread dissatisfaction with Qwest’s ETF buttresses these experts’ conclusions. Toms Decl., ¶¶ 2-6; *id.*, Exs. A and B. Since January 1, 2005, AAA has conducted no consumer arbitrations involving Qwest. Terrell Decl. ¶ 11. Qwest can provide only one example of consumers who attempted to pursue arbitration regarding claims arising under Qwest’s High Speed Internet Subscriber Agreement. Terrell Decl. ¶ 7. But Qwest summarily ignored their arbitration demand and to date, they have not had the opportunity to pursue their claims. Terrell Decl. ¶¶ 12-18 and Exs. E-K. Only 14 consumers have pursued small claims (\$500 and under) against Qwest in the last four years and only three clearly involved a challenge to the Qwest’s ETF. Terrell Decl. ¶¶ 5-9 and Ex. C.

Similarly, Plaintiffs’ experiences reinforce the conclusion that by barring consumers from bringing class actions, Qwest has left consumers with no ability to vindicate their rights. Mr. Sandquist and Mr. Moore contacted attorneys who were not interested in taking the case; in Mr. Moore’s case, the attorney made clear “there was just no cost justification.” Terrell Decl.,

