

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

ROBIN VERNON, et al.,

vs.

QWEST COMMUNICATIONS
INTERNATIONAL, INC., et al.

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

Pursuant to the Court's October 16, 2009 Courtroom Minutes/Minute Order (Dckt. No. 46), Plaintiff makes the following supplemental submission relating to discovery necessary to respond to Defendants' Motion to Compel Arbitration (Dckt. No. 26).

I. INTRODUCTION

To support its claim that the arbitration clause in its Subscriber Agreement should be enforced, thereby requiring all Qwest customers and former customers who wish to challenge Qwest's unlawful Early Termination Fee to either file costly, individual arbitration demands with the American Arbitration Association, or go it alone in small claims court, Qwest has submitted documentary evidence and testimony. Yet, Qwest has urged the Court to determine

that Plaintiffs need no additional evidence to oppose Qwest's motion to compel arbitration, claiming the text of the arbitration clause itself is sufficient and that the Court's only task is to interpret that contract language.

Qwest is wrong. First, fundamental notions of fairness and equal justice support granting Plaintiffs the opportunity to conduct discovery on issues relating to the enforceability and unconscionability of Qwest's form arbitration clause. Indeed, the leading Colorado Supreme Court decision on unconscionability makes clear that the factors the Court must weigh require factual findings supported by evidence. Second, as the Court recognized at the October 16 scheduling conference, issues of contract formation cannot be assessed with respect to the language of the arbitration clause alone. Third, the relevant case law on motions to compel arbitration – including opinions from this Court and other courts in the Tenth Circuit – makes clear that a motion to compel arbitration requires the Court to weigh evidence and make factual determinations as well as enter conclusions of law.

Pursuant to the Court's request at the October 16 hearing, Plaintiffs respectfully submit this supplemental brief to address issues relating to arbitration discovery.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs bring this alleged multi-state consumer class action on behalf of Qwest Internet service customers who are subject to a \$200 Early Termination Fee ("ETF") if they cancel their Internet service before the end of a purported contractual commitment, in most cases, two years. Plaintiffs allege they have no contractual obligation to continue their Internet services for a specified period and that the ETF is an unenforceable penalty clause. Plaintiffs seek class action status, damages and declaratory relief on behalf of the proposed class.

This case was originally filed in the Western District of Washington. The parties had agreed, and the Honorable Thomas S. Zilly had ordered, to limit discovery in this matter to whether Defendants' arbitration clause is enforceable until the Court ruled on Defendants' Motion to Compel Arbitration. On July 16, 2009, Judge Zilly entered an Order transferring the

case to the Colorado District Court and granting in part and denying in part Defendants' Motion to Dismiss. The case was assigned to Judge Wiley Y. Daniel on August 7, 2009. On September 2, 2009, Plaintiffs filed their Second Amended Complaint. On September 15, 2009, Defendants filed a new motion to dismiss, seeking dismissal of some, but not all, of Plaintiffs' claims. Plaintiffs have sought leave to further amend their Complaint to cure some of the issues raised by Defendants. On September 15, 2009, Qwest also filed a Motion to Compel Arbitration under Fed. R. Civ. P. 12(b)(1). (Dckt. No. 26.) On October 8, 2009, this Court granted the parties' joint motion to extend the deadlines regarding briefing of Qwest's Motion to Compel Arbitration and ordered the parties to prepare a scheduling order to be presented at a hearing on October 16, 2009. (Dckt. No. 37). At that hearing, this Court ordered Plaintiffs to submit information regarding proposed discovery and proposed depositions on or before October 23, 2009. This submission sets forth that information. (Dckt. No. 46).

A. Plaintiffs' Allegations Regarding the Arbitration Clause and Class Action Waiver

In their Second Amended Class Action Complaint (the "SAC"), Plaintiffs specifically address the factual and legal issues that render Qwest's arbitration clause unenforceable. *See* SAC at ¶¶ 38-40. (Dckt. No. 20) In particular, Plaintiffs allege that the "so-called agreement is drafted entirely by Qwest on a take-it-or-leave-it basis" and that the "disputes between Qwest and its subscribers predictably involve small amounts of damages." *Id.* ¶ 38. Plaintiffs also allege they lacked "the bargaining power or ability to change the contractual terms." *Id.* Finally, Plaintiffs allege the "Subscriber Agreement is not mutual" because "Qwest is not required to arbitrate" collection disputes with its customers but customers are "required to arbitrate" their disputes with Qwest, including the claims contained within the SAC. *Id.* ¶ 39.

Plaintiffs also specifically plead facts relating to contract formation, including: (1) they did not agree to the contract which Qwest attempts to enforce in its Motion to Compel Arbitration; and (2) they never signed a written contract containing the terms Qwest seeks to enforce. SAC ¶¶ 2, 13, 18-23, 25, 31, 34, 36.

With regard to the class action waiver embedded in the arbitration clause, Plaintiffs allege that enforcement of that waiver would “immuniz[e] Qwest from responsibility for its wrongful conduct” due to the modest amounts at issue. *Id.* ¶ 40. “Since approximately \$200 is at stake for any particular customer, the expense associated with pursuing an individual arbitration is prohibitive.” *Id.* Indeed, the class action waiver “is designed to make it impossible for customers to vindicate rights that are monetarily insufficient to justify individual litigation,” such as the claims pled in the SAC. *Id.* As a result, Plaintiffs allege that the class action waiver is unenforceable because it is unconscionable and violates public policy.” *Id.*

The facts alleged in the SAC go to the heart of why Qwest’s motion to compel arbitration should be denied and highlight many of the areas in which parties often conduct discovery in connection with briefing a motion to compel arbitration.

B. Defendants’ Motion to Compel Arbitration

On September 15, 2009, Qwest filed a Motion to Compel Arbitration pursuant to Fed. R. Civ. P. 12(b)(1). (Dckt. No. 26) In support of its motion, Qwest refers to and relies upon an Affidavit of Travis Leo in Support of Defendants’ Motion to Compel Arbitration. (Dckt. No. 27) Mr. Leo is the Director of Broadband Product Management at Qwest. Mr. Leo’s Affidavit contains many factual statements about Qwest’s purported Subscriber Agreement, correspondence between Qwest and its customers, Qwest’s marketing plan for the “Price for Life” plan, and the purported methods by which a customer generally subscribes to Qwest Internet service. (Dckt. No. 27 at ¶¶ 8, 16 – 24. Mr. Leo relies upon and attaches six exhibits to his Affidavit. (Dckt. Nos. 27-2 through 27-7) The exhibits to the Leo Affidavit include sample letters to consumers (Ex. A), the 2006 version of the “Qwest High-Speed Internet Subscriber Agreement” (Ex. B), a flow chart of the alleged telephone prompt system customers purportedly use when ordering service over the phone (Ex. C), an alleged “Checkout Page” that customers purportedly use when ordering service over the Internet (Ex. D), an undated and unsigned “High-Speed Internet Modem Installation, Legal Agreements” document (Ex. E), and

a sample “Welcome Letter” Qwest claims it sent to customers (Ex. F). None of the documents attached to the Leo Affidavit are specific to Plaintiffs and many, if not all, of the documents will require at least some deposition testimony in order for Plaintiffs to fully understand their relevance to this matter, as well as to test their sufficiency.

Qwest further relies on the American Arbitration Association’s website for facts relating to the purported costs of individual arbitration. Defs.’ Mot. to Compel Arbitration at 14-15. Qwest also refers to and relies on a website that sets forth the cost of small claims court. *Id.*

C. Discovery Completed to Date

The parties have already engaged in some discovery relating to the enforceability of Qwest’s arbitration clause and class action waiver. Declaration of Beth E. Terrell in Support of Plaintiffs’ Supplemental Brief on Discovery Relating to Arbitration (“Terrell Decl.”) ¶ 2. On January 30, 2009, the parties exchanged Initial Disclosures. *Id.* On October 9, 2009, the parties exchanged Supplemental Initial Disclosures. *Id.* The parties have also responded to each other’s limited interrogatories and requests for production of documents, including supplemental responses. *Id.* Plaintiffs have propounded six interrogatories and ten requests for production of documents directed at arbitration issues. *Id.*; Exs. A & B. The parties have also produced responsive documents. *Id.* Plaintiffs have agreed to provide written responses and responsive documents for Plaintiffs Sandquist and Moore by November 8, 2009. *Id.* To date, Plaintiffs have not received all responsive documents from Qwest, Qwest has refused to search for responsive email *at all*, and Plaintiffs have not yet received Qwest’s privilege log. *Id.* ¶ 3.

III. ARGUMENT

A. Standard of Review for a Rule 12(b)(1) Motion to Compel Arbitration

Qwest’s motion to compel arbitration was brought pursuant to Fed. R. Civ. P. 12(b)(1), which governs motions to dismiss for lack of subject-matter jurisdiction. Defs.’ Mot. to Compel Arbitration (Dkt. No. 26) at 1. The standard of review for a motion to dismiss for lack of subject-matter jurisdiction is distinct from that of a Rule 12(b)(6) motion to dismiss.

Compare Dolin v. Contemporary Fin. Solutions, Inc., 622 F. Supp. 2d 1077, 1082 (D. Colo. 2009) (noting that when ruling on a Rule 12(b)(6) motion to dismiss, “the Court assume[s] the truth of the plaintiff’s well-pleaded factual allegations and view[s] them in the light most favorable to the plaintiff”) (internal citation and marks omitted) and *Ernest v. Lockheed Martin Corp.*, 2008 WL 2958964 at *2 (D. Colo. July 28, 2008) (noting that for purposes of a Rule 12(b)(1) motion, “the trial court may proceed as it never could under 12(b)(6)...”) (internal citation and marks omitted).

In *Ernest*, which discussed the Rule 12(b)(1) standard in the context of the defendant’s motion to compel arbitration in an individual employment lawsuit, Judge Daniel distinguished between a Rule 12(b)(1) “facial attack to the allegations of the complaint” and a “factual attack.” 2008 WL 2958964 at *2. With regard to a “factual attack,” because the district court’s jurisdiction is at issue – “its very power to hear the case” – Judge Daniel noted “there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.” *Id.* at *3. (internal citation and marks omitted).

Judge Daniel’s description of the standard of review applicable to a Rule 12(b)(1) motion to compel arbitration which is a “factual attack” is akin to the standard relied upon by courts, including those in the Tenth Circuit, which apply a Rule 56 summary judgment standard to motions to compel arbitration. See *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 300 F. Supp. 2d 1107, 1117-18 (D. Kan. 2003) (applying summary judgment standard to motion to compel arbitration; noting “[a]lthough the Tenth Circuit has not precisely addressed this issue, there is no reason to believe it would apply a different legal standard”). In *Universal Serv. Fund*, the Kansas federal district court relied upon Tenth Circuit precedent and explained that to establish a genuine issue of material fact as to the making of the arbitration agreement, “the facts must be identified by reference to an affidavit, a deposition transcript, or a specific exhibit incorporated therein.” *Id.* at 1117 (internal citation and marks omitted).

Here, Qwest's motion to compel arbitration is clearly a "factual attack." Qwest submitted a supporting affidavit from its Director of Broadband Product Management, Travis Leo. (Dkt. No. 27). Mr. Leo's affidavit contains substantive testimony regarding Qwest and its business practices and authenticates several exhibits. *Id.* Qwest's motion to compel arbitration relies extensively on Mr. Leo's affidavit to support its factual allegations. *See generally* Defs' Mot. to Compel Arbitration (Dkt. No. 26). As a "factual attack," Qwest's motion to compel requires the Court to "weigh the evidence[.]" *Ernest*, 2008 WL 2958964 at *3. Moreover, as this Court implicitly recognized in *Ernest*, some discovery is necessary to ensure there will be evidence to "weigh." *See Ernest*, 2008 WL 2958964 at *3-5 (referencing declarations of employee and former employee of defendant, deposition testimony of plaintiff and a former co-worker, and expert reports submitted by both parties). It was only after considering the evidence produced in discovery and submitted by the parties that the *Ernest* court ruled on the motion to compel arbitration. *See id.*

In accordance with the legal principles recently outlined by this Court in *Ernest*, and the legal authority discussed below, Plaintiffs respectfully ask this Court to allow them to pursue additional discovery on the enforceability of the arbitration clause, as specified herein.

B. Federal and State Courts Across the Country, Including Courts in the Tenth Circuit, Consider Evidence When Ruling on a Motion to Compel Arbitration

Federal and state courts across the country, including the United States Supreme Court, routinely treat challenges to the enforceability of an arbitration clause as a factual dispute which involves the weighing of evidence. *See Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90-91 (2000) (noting "[i]t may well be that the existence of large arbitration costs could preclude a litigant such as [plaintiff] from effectively vindicating her federal statutory rights in the arbitral forum" but enforcing the arbitration clause at issue because the plaintiff failed to produce evidence to support this claim); *In re Am. Express Merchants' Litig.*, 554 F.3d 300, 315-16 (2d Cir. 2009) (declining to enforce arbitration agreement with class action waiver; holding "the record abundantly supports the plaintiffs' argument that they would incur

prohibitive costs if compelled to arbitrate” their claims individually and discussing, amongst other evidence, an affidavit submitted by plaintiffs’ expert); *Perez v. Hospitality Ventures-Denver LLC*, 245 F. Supp.2d 1172, 1173 (D. Col. 2003) (holding mandatory arbitration provision in employee handbook was unenforceable; finding “[plaintiff] has presented affidavit [sic] and other evidence demonstrating she cannot afford the[] costs [of arbitration]” and thus, demonstrated she could not “vindicate[e] her statutory rights”); *Coneff v. AT&T Corp.*, 620 F. Supp.2d 1248, 1257-58 (W.D. Wash. 2009) (reviewing evidence, including expert declarations and “declarations of several consumer lawyers across the country” to support finding “that the cost of pursuit significantly outweighs the potential recovery if each of the Plaintiffs was to proceed on an individual basis” and declining to enforce class-action waiver in arbitration clause in consumer agreement).

Accordingly, courts have permitted parties challenging arbitration clauses to pursue discovery related to the issues raised in such challenges. *See, e.g., Blair v. Scott Specialty Gases*, 283 F.3d 595, 609 (3d Cir. 2002) (holding that “[w]ithout some discovery...it is not clear how a claimant could present information on the costs of arbitration as required by *Green Tree*...”); *Toppings v. Meritech Mortgage Servs., Inc.*, 140 F. Supp. 2d 683, 685 (S.D. W. Va. 2001) (holding “[i]n order to discharge its obligation to ensure there is a valid arbitration agreement, the Court agrees discovery is necessary on the [plaintiffs’] challenges to the Agreement. The Court believes additional factual development is warranted particularly, without limitation, on both the issues of unconscionability...”); *Berger v. Cantor Fitzgerald Sec.*, 942 F. Supp. 963, 966 (S.D.N.Y. 1996) (concluding arbitration could not be compelled until plaintiff had opportunity to pursue discovery); *Wrightson v. ITT Fin. Servs.*, 617 So.2d 334, 336 (Fla. Dist. Ct. App. 1993) (remanding to trial court and directing trial court “to afford the parties a reasonable opportunity to conduct discovery for the limited purpose of determining the validity of the arbitration agreements under state law”).

