

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.

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

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I. INTRODUCTION

This case involves a complex consumer claim challenging the validity of the early termination fee (“ETF”) that Defendant Qwest Communications International, Inc. and its affiliated entities (collectively “Qwest”) imposes on customers whose high-speed Internet (“HSI”) service is terminated before the end of the supposed term. Consumers’ individual damages are small (\$200 or less). Relying largely on the Supreme Court’s recent decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740 (2011), Qwest insists in its Renewed Motion to Compel Arbitration (Dkt. # 132) that Plaintiffs must pursue their claims against Qwest on an individual basis in arbitration, under the “Dispute Resolution” provision in Qwest’s form Subscriber Agreement, which includes an arbitration clause and class action waiver.

Qwest is wrong for four reasons. First, Plaintiffs never agreed to the Subscriber Agreement and its “Dispute Resolution” provision. As the findings of the Honorable Walker Miller issued last year in another case make clear, Plaintiffs did not assent to the Subscriber Agreement; Qwest did not present it to them and they never saw it. Second, the “Dispute Resolution” provision is illusory and hence unenforceable because Qwest reserved the unfettered right to amend the Subscriber Agreement at any time. Third, even if the Court finds that the Subscriber Agreement was part of the contract between Qwest and Plaintiffs, Qwest has waived the right to enforce the arbitration clause. Finally, the Dispute Resolution provision is unconscionable, and the Federal Arbitration Act does not preempt its invalidation under Colorado law. The facts here are distinguishable from *Concepcion*. Unlike AT&T’s arbitration clause, Qwest’s Dispute Resolution Provision requires customers to pay arbitration fees which are at least 40 percent, and may well exceed, the amount in dispute. AT&T’s arbitration clause provides other incentives which increase the likelihood that consumers will be afforded relief in individual arbitration, none of which are included in Qwest’s Dispute Resolution provision: AT&T may not seek reimbursement of its attorney fees; AT&T must pay

all costs for non-frivolous claims; and, instead of a damages cap, as in the Qwest agreement, AT&T's clause provides for a minimum recovery of \$7,500 and twice the amount of plaintiff's attorney fees if the arbitration award exceeds AT&T's last settlement offer. *See Concepcion*, 131 S. Ct. at 1744. Here, unlike the *Concepcion* plaintiffs, Plaintiffs have provided admissible evidence – including testimony of consumer attorneys and Qwest's admissions about the lack of individual arbitrations – that the complexity of Plaintiffs' claims and the lack of a financial upside demonstrate that no reasonable consumer would pursue a claim challenging Qwest's ETF. The Court should deny Qwest's motion.

II. STATEMENT OF FACTS

In 2006, Qwest implemented a "Subscriber Agreement" to replace government tariffs that formerly had governed its provision of HSI service. Defendants' Renewed Motion to Compel Arbitration ("Defs.' Mot.") at 3-4. Section 17 of the Subscriber Agreement, captioned "Dispute Resolution and Arbitration; Governing Law," includes a mandatory arbitration provision as well as a class action waiver. *See* Leo. Aff. (Dkt. #27), Ex. B (Subscriber Agreement) § 17. (A copy of the Subscriber Agreement is also attached to the Declaration of Beth E. Terrell in Support of Plaintiffs' Response to Defendants' Renewed Motion to Compel Arbitration ("Terrell Decl.") as Ex. A). 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). Rather, Qwest made the Subscriber Agreement available to those who went to the appropriate page on Qwest's website (www.qwest.com/legal) and successfully found it there amid numerous other agreements and information. Leo Aff., Ex. C at 2; *id.*, Ex. D at 2 (providing link to website). While Qwest claims customers had 30 days to cancel HSI service if they did not like the Subscriber Agreement's terms, *see* Defs.' Mot. at 5, this claim is inconsistent with the terms of the Subscriber Agreement, which provide that existing Qwest customers switching to a different service do not have a cancellation right, while new customers could only cancel within 30 days

if they paid a myriad of charges, including an ETF if they used the service at all. Subscriber Agreement § 12(a).

Qwest also mentioned the Subscriber Agreement in a form Welcome Letter which indicated the website on which customers could find the agreement. *See* Defs.’ Mot. at 5. But Qwest admits it did not send the Subscriber Agreement with the Welcome Letter to three Plaintiffs, and cannot prove, as it claims, that it sent a copy to Plaintiff Moore with his Welcome Letter. *Id.* at 5 (citing Beardsley Aff., which includes no such testimony). None of the Plaintiffs remembers receipt of either the Welcome Letter or the Subscriber Agreement. Terrell Decl., Ex. P (Vernon Dep. 68:22-69:20); *id.*, Ex. Q (Sandquist Dep. 23:6-22); *id.*, Ex. R (Durkin Dep. 51:13-15); Moore Decl. ¶ 2.

After ordering service, new customers and many existing customers received an installation disc. Leo Aff. ¶ 20. The disc repeated the assurances about a 30-day cancellation period but also contained the entire text of a license agreement which, unlike the Subscriber Agreement, did not contain an arbitration clause or class action waiver, but rather, provided for actions to be brought in this court. *Id.*, Ex. E at ¶ 7.2(c). Nor did the disc 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).

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; Maier Aff. ¶¶ 3–10; Terrell Decl., Ex. B (Treinen Rep.), at 1–4; *Id.*, Ex. C (Villanueva Rep, at 1. These experts opine that small amounts in controversy make cases against large corporations such as Qwest impractical to pursue on an individual basis. As Mr. 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. Mr. 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 Mr. 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. B (Treinen Rep.), at 8. 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 filed against Qwest buttresses these experts’ conclusions. Since January 1, 2006, AAA has conducted no consumer arbitrations involving Qwest. Terrell Decl. ¶ 9; *id.*, Ex. G (excerpt from AAA report). Qwest can provide only one example of consumers who attempted to pursue arbitration regarding claims arising under Qwest’s 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. *Id.* Exs. H-N (correspondence documenting consumers Barry and Irina Crouse’s attempt to initiate arbitration). Only 19 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. ¶¶ 7 and Ex. E (Qwest’s supplemental response to Plaintiffs’ Interrogatory No. 5).

Similarly, Plaintiffs’ experiences reinforce the conclusion that by barring consumers from bringing class actions, Qwest has left consumers with no ability to vindicate their right to

challenge Qwest's ETF. 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., Ex. Q (Sandquist Dep. 28:10-12); *id.*, Ex.S (Moore Dep. 89:10-17). The Plaintiffs also concluded that small claims court would not be feasible for their claims. *Id.*, Ex. Q (Sandquist Dep. 29:13-25); Ex. P (Vernon Dep. 10:20-22, 13:17-24); Ex. R (Durkin Dep. 74:18-24, 63:18-64:1, 103:4-14). Nor would arbitration be feasible, especially considering the inexperience most consumers have with arbitration. *Id.*, Ex. Q (Sandquist Dep. 27:13-14); Ex. P (Vernon Dep. 8:1-2). Even Mr. Durkin, a practicing attorney, testified he "[doesn't] even really know how arbitration works[.]" *Id.*, Ex. R (Durkin Dep. 83:12-16). Class members similarly do not consider small claims court and arbitration to be viable options for them. Cleveland Decl., ¶¶ 6-8; Horne Decl., ¶¶ 7-9; Webber Decl., ¶¶ 5-7; Stearns Decl., ¶¶ 8-9.

III. ARGUMENT

A. **Qwest Fails to Prove the Dispute Resolution Provision Is Not Part of the Contract Between Qwest and the Plaintiffs**

The party seeking to compel arbitration must present evidence "sufficient to demonstrate an enforceable agreement to arbitrate." *Goodwin v. H.M. Brown & Assocs., Inc.*, Civ. Act. No. 10-cv-01205 PAH-MEH, 2011 WL 820025, at *3 (D. Colo. Mar. 2, 2011); *see also Granite Rock Co. v. Int'l Bhd. Of Teamsters*, ___ U.S. ___, 130 S. Ct. 2847, 2856 (2010) ("A court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to mediate that dispute. To satisfy itself that such agreement exists, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce"). State law principles of contract formation govern whether an enforceable agreement exists. *See Stein v. Burt-Kuni One, LLC*, 396 F. Supp. 2d 1211, 1213 (D. Colo. 2005). Here, as detailed below, Qwest did not present the Subscriber Agreement and its Dispute Resolution Provision to several Plaintiffs and they have not assented to terms that were never presented to them.

Qwest admits that to establish that the Dispute Resolution Provision is enforceable, it first must show that a contract including those provisions was formed between Qwest and Plaintiffs. *See* Defs.’ Mot. at 17-18. But Qwest never mentions that last year in *Grosvenor v. Qwest Commc’ns Int’l, Inc.*, the Honorable Walker Miller issued a decision concerning the formation of a contract on nearly identical facts. *See Grosvenor*, Civ. Act. 09-cv-2848-WDM-KMT, 2010 WL 3906253 (D. Colo. Sept. 30, 2010). In *Grosvenor*, a former Qwest HSI customer asserts a small claim on behalf of himself and a proposed class of Qwest customers and, as in this case, Qwest has interposed the Dispute Resolution provision to try to limit customers to individual claims in small claims court or arbitration. Qwest filed a Motion to Compel Arbitration (*Grosvenor* Dkt. # 13), the parties raised many of the same legal issues and presented much of the same evidence as in this case, and on September 30, 2010, Judge Miller issued his decision. As Judge Miller correctly assessed, after reviewing the process by which Qwest purportedly presented the Subscriber Agreement to customers, “[i]n order to read the Subscriber Agreement, [a customer] would have had to exit the installation program, log onto the Internet (to which [s/he] did not yet have access), and navigate to the specific pages containing the Subscriber Agreement. Having read the Subscriber Agreement, [s/he] would have had to reinsert the QuickConnect CD into his[/her] computer, read the remaining ten pages of the Legal Agreements Pages, and determine whether he [or she] would accept or decline the terms of the agreements.” *Grosvenor*, 2010 WL 3906253 at *3. Judge Miller also distinguished Qwest’s cited cases regarding the enforceability of electronic agreements formed by the “click-to-accept” process (so-called “clickwrap agreements”), noting that “Qwest’s Clickwrap Agreement is unlike any of the clickwraps described above [in Qwest’s cited cases]. The Qwest Subscriber Agreement and the Arbitration Clause do not appear on the same scroll down box or page as the ‘I Accept’ and the ‘I Do Not Accept’ buttons....[T]he Subscriber Agreement is referenced by the Legal Agreements page but it is not expressly incorporated into the Clickwrap Agreement.” *Id.* at *8. In summary, Qwest did not have a practice of presenting

the Subscriber Agreement to customers during the ordering, welcoming and installation process.

Here, Qwest contends it presented the agreement to one of the four Plaintiffs, a fact that is in dispute. The only agreement that Qwest actually presented to Plaintiffs – the license agreement - permitted class action lawsuits in this very court. Only very sophisticated and attentive customers would understand the scroll box on the QuickConnect CD did not contain all agreements to which consumers purportedly had become subject and that they had to go to Qwest’s website and find the Subscriber Agreement. If they did so, only customers with legal training would be able to determine which types of disputes were governed by the License Agreement and which types were governed by the Subscriber Agreement and its Dispute Resolution provision.

Nor has Qwest met its burden to show Plaintiffs assented to terms of the Subscriber Agreement that were never presented to them, including the Dispute Resolution provision. Under long-established principles of contract law, a party is bound by a contract that s/he chooses not to read, but the contract must at least have been delivered or presented to that party for him/her to be bound. “A binding contract inter partes can undoubtedly be made *by the delivery* of a memorandum expressing its terms, if it be accepted by the other and acted on by both. ... When once the memorandum is proven *to have been delivered*, the burden is cast on the receiver to establish those facts which shall release him from the liability which the law otherwise casts upon him.” *Lindsey v. Flebbe*, 38 P. 397, 398-99 (Colo. App. 1894) (emphasis added); *see also Axis Venture Group, LLC v. 1111 Tower, LLC.*, Civ. Act. 09-cv-01636-PAB-KMT, 2010 WL 1278306, at *3-4 (D. Colo. Mar. 30, 2010) (holding party’s failure to read alternative dispute resolution provision was unavailing when party acknowledged receipt of provision). This principle has been extended to modern electronic contracts. In the great majority of decisions dealing with the enforceability of consumer contracts, including the decisions on which Qwest relies, the contract is presented to the consumer. Indeed, Qwest

summarizes those decisions as “enforcing agreements with class action bars in arbitration clauses where the plaintiff *was presented with* and then failed to opt-out of the contract.” Defs.’ Mot. at 18 n.12 (emphasis added).

Two decisions out of Florida illustrate the necessity of presentation. In *Briceno v. Sprint Spectrum*, 911 So. 2d 176 (Fla. Dist. Ct. App. 2005), cited by Qwest (Defs.’ Mot. at 19), the plaintiff not only bought a telephone from Sprint, but changed the equipment four times, and on each occasion it was Sprint’s practice to include a copy of the Terms and Conditions of Service, which contained an arbitration provision, in the packaging of the equipment. *Id.* at 178-79. Sprint also provided notice on the front of each monthly invoice of any changes in the Terms and Conditions and the address on its website to access or a telephone number to obtain a copy. *Id.* The Florida District Court of Appeal had no trouble concluding a contract was formed and that the amendments were valid, even though the plaintiff chose not to read them. *Id.* at 180. By contrast, in *General Impact Glass & Windows Corp. v. Rollac Shutter of Texas, Inc.*, 8 So. 3d 1165 (Fla. Dist. Ct. App. 2009), the same court held no agreement to arbitrate had been formed because the arbitration provision had not been presented to the purchaser:

The terms and conditions, which Rollac urges this Court to consider as a part of the contract, were never signed by General Impact, and were never expressly incorporated into or attached to any of the documents that formed the contract between the parties. The provision relating to alternative dispute resolution on Rollac's website and in the Rollac catalog was part of a separate collateral document. Because that separate document was not incorporated into the writings exchanged between the parties, General Impact is not bound by it.

Id. at 1167.

Here, not only did Qwest fail to present the Subscriber Agreement to Plaintiffs, it engaged in two deceptive practices relevant to whether the agreement and its Dispute Resolution provision was incorporated into the contract with the Plaintiffs. First, as discussed above, Qwest presented customers, including Plaintiffs, with a license agreement that did not contain an arbitration provision or a class action waiver. Second, Qwest tried to induce customers to agree to the unseen Subscriber Agreement by mentioning a 30-day cancellation

right at each step of the ordering, welcoming and installation process. It failed, however, to mention the right existed only for new customers, *i.e.*, customers who had not previously had any “Qwest-provided internet access service,” Subscriber Agreement, §§ 1, 12(a).¹ It also failed to mention that even new customers, such as Mr. Sandquist, who cancelled within 30 days would be liable for installation, maintenance and shipping charges. Subscriber Agreement, § 12(a).

The Court should rule that Qwest’s admission that it failed to present the Subscriber Agreement to the Plaintiffs (other than Mr. Moore), combined with its deceptive practices concerning the impact of proceeding with service, establish that the Subscriber Agreement was not part of the contract between Qwest and the Plaintiffs.

B. The Dispute Resolution Provision Is Illusory

In this Circuit, “an arbitration agreement allowing one party the unfettered right to alter the arbitration agreement's existence or its scope is illusory.” *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002). Applying this principle, the Tenth Circuit held an arbitration provision in an employee handbook was illusory and hence unenforceable because the handbook gave the employer “the right to amend, supplement, or revise everything in the Handbook,” including presumably, the arbitration provision. *Id.* at 1217, 1220. Courts in this District have followed *Dumais* by invalidating arbitration provisions in several cases. *See Hirschi v. Newcastle Props., Inc.*, Civ. Act. 06-cv-01424-PSF-MJW, 2006 WL 2927493, at *2 (D. Colo. Oct. 12, 2006) (holding illusory arbitration provision in employee handbook under which employer “retains the right to change these policies, procedures and employee benefits at any time without prior notice”); *Feldman v. Jobson Pub., LLC*, Civ. Act. 04-cv-1185-WDM-PAC, 2005 WL 2396938, at *3 (D. Colo. Sept. 28, 2005) (holding illusory arbitration provision in employee handbook under which employer may “amend, reverse, modify, suspend, interpret or cancel any policy or provision [including the Arbitration Procedure] at any time with or

¹ Thus, Qwest’s assertion that “[i]f the Plaintiffs had cancelled the service, they would have had to pay only for the sunk costs they incurred during their use of the Qwest service” is false. Defs.’ Mot. at 16.

without notice at its own discretion”); *Stein*, 396 F. Supp. 2d at 1214-15 (D. Colo. 2005) (holding illusory arbitration provision in employee handbook under which employer “reserves the right to add, change or delete benefits and policies as it deems appropriate in its sole and absolute discretion”).

The result is different when the drafter agrees to restrictions on its right to amend the arbitration provision. In *Hardin v. First Cash Fin. Servs.*, 465 F.3d 470 (10th Cir. 2006), the Tenth Circuit found an arbitration provision was not illusory because the defendant had agreed to provide ten-days notice of any changes, not amend the agreement if it had actual notice of a potential dispute or claim, and not terminate the agreement as to any claims that arose prior to the date of termination. 465 F.3d at 478. And in *Lumuenemo v. Citigroup Inc.*, Civ. Act. 08-cv-00830-WYD-BNB, 2009 WL 371901 (D. Colo. Feb. 12, 2009), this Court similarly concluded an arbitration provision was not illusory because defendant had agreed that any modification would become effective only upon 30-days notice and would apply only prospectively. 2009 WL 371901 at *5.

Qwest is unwilling to restrict its right to amend in any way. Section 4 of the Subscriber Agreement is entitled “Changes to Service or this Agreement” and provides in relevant part:

Qwest is not obligated to give you notice of changes to this Agreement before it becomes effective. ... Subject to any applicable rules or laws, Qwest may:

(a) at any time, effective upon posting to www.quest.com/legal or any written notice to you, including e-mail: ... (ii) modify ... any of the terms and conditions of this Agreement ... Please check such Web site and your e-mail regularly for changes.

(b) upon 30 days notice to you: (ii) change this Agreement ... in a way that directly results in a material and adverse economic impact to you. ...

Subscriber Agreement, § 4 (emphasis in original). Unless Qwest argues a change in the Dispute Resolution provision can constitute “a material and adverse economic impact” to customers – a highly unlikely argument given the implications for the conscionability of the provision – it must admit there are no restrictions, temporal or otherwise, on its ability to

change the existence, scope or terms of the Dispute Resolution provision. Accordingly, under the law of this Circuit and District, the Dispute Resolution provision is illusory.

Indeed, there is more reason to rule Qwest's Dispute Resolution provision is illusory in this case than in any of the cases cited above, all of which involved at-will employees. If those employees did not like changes made to the arbitration provisions, they had the right to leave their employment immediately. Qwest's position, however, is that Plaintiffs and members of the proposed class were locked in for two-year term commitments. They effectively had no recourse if Qwest chose to alter the terms of the Dispute Resolution provision.

C. Qwest Has Waived the Right to Compel Arbitration

The right to arbitration can be waived. *See Metz v. Merrill Lynch, Pierce, Fenner & Smith*, 39 F.3d 1482, 1489 (10th Cir. 1994). The Tenth Circuit weighs six factors in analyzing whether the right to arbitration has been waived: (1) whether the actions of the party seeking to compel arbitration "are inconsistent with the right to arbitrate"; (2) "whether the litigation machinery has been substantially invoked" before the party notified the other party of its intent to arbitrate; (3) "whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay"; (4) "whether a defendant seeking arbitration filed a counterclaim" without moving to stay; (5) "whether important intervening steps (e.g., taking advantage of judicial discovery procedures not available in arbitration) had taken place"; and (6) "whether the delay affected, misled, or prejudiced the opposing party." *Id.* (internal citations and marks omitted). Not every factor need be satisfied for a trial court to find a waiver. *Id.* at 1490.

Here, Qwest twice sought a final decision on the merits from a district court, while simultaneously claiming all claims in this case were subject to arbitration. Qwest filed its renewed motion to compel arbitration in this Court after the judge in the first court where this case was venued – the Western District of Washington – had ruled on Qwest's motion to dismiss and dismissed one of Plaintiffs' claims with prejudice and several other claims without

prejudice. See *Vernon v. Qwest Comm'ns Int'l, Inc.*, 643 F. Supp. 2d 1256, 1266-69 (W.D. Wash. 2009). Qwest also filed a motion to dismiss in this Court, which the Court denied as moot after Plaintiffs filed a substantive response and amended their complaint. See Dkt. # 25 (Defendants' Motion to Dismiss); Dkt. # 43 (Plaintiffs' Response to Defendants' Motion to Dismiss), Dkt. # 58 (Minute Order denying motion to dismiss as moot). In both motions to dismiss, Qwest sought dismissal of Plaintiffs' claims in their entirety. The filing and pursuit of a motion to dismiss waives a defendant's right to arbitration. See, e.g., *Hooper v. Advance America, Cash Advance Ctrs. of Missouri, Inc.*, 589 F.3d 917, 921 (8th Cir. 2009) (holding defendant in consumer class action waived right to arbitrate because its "motion to dismiss was extensive and exhaustive" and defendants "encouraged the district court to resolve the parties' entire dispute in [defendant's] favor"); *St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 589 (7th Cir. 1992) ("Submitting a case to the district court for decision is not consistent with a desire to arbitrate").

Qwest also has made "representations...inconsistent with the right to arbitrate." See *Belcourt v. Grivel., S.L.R.*, 2009 WL 3764085, at *4 (D. Utah Nov. 9, 2009). The district court in *Belcourt* applied the *Metz* factors and held defendants had waived the right to arbitrate, in part because their brief "indicates a willingness to proceed in this court provided Italian law is applied to the claims," a willingness "inconsistent with the right to arbitrate." *Id.* Like the *Belcourt* defendants, Qwest represents that "[i]f the Court determines that the class action waiver is unconscionable, then Qwest will litigate the issues in court" rather than in arbitration. Defs.' Mot. to Compel Arbitration (Dkt. # 26) at 17 n.4. Qwest's admission makes clear Qwest's wish to block class actions, not a supposed desire to arbitrate consumer disputes, is the primary objective of the Dispute Resolution provision. Qwest's admission is inconsistent with the right to arbitrate and the Court should find Qwest has waived this right.

D. The Dispute Resolution Provision Is Unconscionable and Thus Unenforceable

Qwest has used its superior economic power to impose the Dispute Resolution Provision on Plaintiffs and other consumers. It is both procedurally and substantively unconscionable under Colorado law and hence unenforceable.

A party seeking to demonstrate an agreement is unconscionable must provide “evidence of some overreaching on the part of one of the parties such as that which results from an inequality of bargaining power or...an absence of meaningful choice on the part of one of the parties” as well as “contract terms which are unreasonably favorable to that party.” *Davis v. M.L.G. Corp.*, 712 P.2d 985, 991 (Colo. 1986). The *Davis* court identified seven non-exclusive factors relevant to the unconscionability analysis: (1) is the agreement “a standardized agreement executed by parties of unequal bargaining strength”; (2) was there an “opportunity to read or become familiar with the document before signing it”; (3) was the allegedly unconscionable provision buried in “fine print”; (4) was there “evidence that the provision was commercially reasonable or should reasonably have been anticipated”; (5) were the terms of the provision substantively unfair; (6) “the relationship of the parties, including factors of assent, unfair surprise and notice”; and (7) “all the circumstances surrounding the formation of the contract, including its commercial setting, purpose and effect.” *Id.* (internal citations and marks omitted). The first through third and sixth elements are procedural in nature, while the other three are substantive.

1. Qwest’s Dispute Resolution Provision Is Procedurally Unconscionable

Each of the four procedural factors in the *Davis* formulation supports a finding of unconscionability. First, the Subscriber Agreement is a form contract that Qwest presents to customers on a take-it-or-leave-it basis in that it is non-negotiable. Qwest admits it is unaware of any negotiations with a customer regarding the arbitration clause in the Subscriber Agreement. Terrell Decl., Ex. D (Response to Interrogatory No. 6). Nor can Qwest dispute it had far greater bargaining power than any Plaintiff.

The second (was there an “opportunity to read or become familiar with the document before signing it”) and sixth (“the relationship of the parties, including factors of assent, unfair surprise and notice”) factors overlap in this case. As discussed above, Qwest has not proven it provided Plaintiffs with the Subscriber Agreement. Qwest also obscured the significance of the Subscriber Agreement by conflating it with a license agreement that did not require arbitration or bar class actions and by not mentioning the limitations on the 30-day cancellation policy. *See Trujillo v. Apple Computer, Inc.*, 578 F. Supp. 2d 979, 993 (N.D. Ill. 2008) (holding customer’s inability to recover “100 cents on the dollar” if he tried to return purchase after service agreement became available supports conclusion of procedural unconscionability).

Finally, Qwest wrote the entire Subscriber Agreement in single-spaced 8 point type, making a document filled with “legalese” daunting for a layperson to read. No table of contents guides a reader to the portions of the Agreement of interest. Even if Plaintiffs had been provided the Subscriber Agreement, they would have been unlikely to struggle through to Section 17, located on the next-to-last page of the 13-page agreement. The difference between the Agreement and the contract in *Mullan v. Quickie Aircraft Corp.*, 797 F.2d 845 (10th Cir. 1986), cited by Qwest (Defs.’ Mot. at 16), is “of particular significance.” *Id.* at 851. That contract consisted of a single page with no fine print or “legalese or boiler plate language.” *Id.* at 852. In addition to the readability issues created by the small type and the location at the end of the lengthy agreement, the Dispute Resolution Provision is all but incomprehensible to a layperson, as Mr. Fuller opines. *See Fuller Aff.*, ¶ 31.

Taken as a whole, Qwest argues Plaintiffs waived critical rights based on a document that Qwest, with vastly superior bargaining power, never presented to them, leaving it to Plaintiffs to find the agreement on Qwest’s website. Qwest also confused the Subscriber Agreement with the License Agreement, which did not purport to waive these procedural rights. If, despite all of these obstacles, customers looked for and found the Subscriber Agreement, all of its terms were presented on a take-it-or-leave-it basis. And if they persevered

to Section 17 without help of an index, that section contained sloppily-written, poorly explained language in agonizingly small type. The combination these factors easily satisfies *Davis*' standard of "some overreaching ... such as that which results from an inequality of bargaining power or ... an absence of meaningful choice on the part of one of the parties." 712 P.2d at 991 .

2. Qwest's Dispute Resolution Provision Is Substantively Unconscionable

a. *The Dispute Resolution Provision is Substantively Unfair*

The fifth *Davis* factor – whether Qwest's Dispute Resolution provision is "substantively unfair" – is easily satisfied in this case. The provision provides Plaintiffs with two options. They can proceed with an individual arbitration of their claims or file an individual case in small claims court, if the claim at issue is "within the scope of [the small claims' court's] jurisdiction[.]" Subscriber Agreement, § 17(a). The provision's elimination of "any right to pursue any claims on a class or consolidated basis or in a representative capacity," Subscriber Agreement, § 17(b), forecloses the most viable means for consumers to challenge Qwest's unlawful ETF. Even if Qwest had imposed fair terms for individual arbitrations, the small amounts at stake would make challenges to Qwest's ETF very difficult for consumers. But not content to rely on the economics of individual arbitrations to protect it, Qwest has piled on provision after provision designed to make it impossible for consumers to be successful on an individual basis. The totality of these provisions makes the Dispute Resolution provision substantively unfair.

The Dispute Resolution provision requires that consumers to "pay one-half the arbitrator's fees up to a maximum of \$125 if your claim does not exceed \$10,000." Subscriber Agreement, § 17(a)(ii). There is no reduction for claims below \$125 in amount or that only marginally exceed \$125 – the very type of small value claims for which class actions are ideally suited. There also is no provision for shifting this fee if the consumer wins; thus a Plaintiff in this case would have to incur the time and expense of arbitration for a maximum possible gain of \$75. *See* Terrell Decl., Ex C (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); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) (“The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”).

The Subscriber Agreement also emphasizes that “an arbitrator may not award relief in excess of or contrary to what this Agreement provides.” Subscriber Agreement § 17(a)(i). This is critical because the Subscriber Agreement purports to limit customers' remedies below those permitted by statute and by common law, and Section 17(a)(i) makes clear an arbitrator is supposed to honor such limitations. Even if an arbitrator ultimately might reject the limitations despite the language of the Subscriber Agreement, no rational lawyer would take on the risk of obtaining such a ruling for such a small upside of an individual case.

First, the Subscriber Agreement requires each party to “pay its own expenses of the arbitration, including the expense of its own counsel, witnesses, and presentation of evidence at the arbitration.” Subscriber Agreement § 17(a)(ii). On its face, this sentence bars fee-shifting, which Qwest trumpets as a reason to find consumers can vindicate their rights in arbitration. Defs.' Mot. at 11-12.

Second, the Subscriber Agreement provides that Qwest is not liable for “incidental, indirect, special, reliance, punitive or consequential damages of any kind,” and that its “total aggregate liability arising from or related to this agreement will not exceed the total MRCs [monthly recurring charges] and usage charges paid by you to Qwest under this agreement in the one month immediately preceding the occurrence of the event giving rise to the claim (‘damage cap’).” Subscriber Agreement, §§ 13(b), (c). Qwest claims individual consumers can vindicate their rights because the Colorado and Washington consumer protection acts provide for minimum statutory damages of \$500 (Colorado) or treble damages (Washington). Defs.' Mot. at 11-12. But the Subscriber Agreement blocks such damages as “special” or

“punitive” damages or under the “damage cap.” The damage cap for Plaintiffs was under \$50, the amount of their MRCs and usage charges. If the damage cap applies, a Plaintiff would lose at least \$75 in arbitration, even if Qwest were found liable. And this loss would be before figuring in all of the attorney fees and expenses incurred in the arbitration.²

Finally, Qwest requires “the existence, content and results” of any arbitration be confidential. Subscriber Agreement, § 17(a)(i). This makes it impossible for customers to pool resources and information gained from previous arbitration proceedings.

In small claims court, individuals’ chances of success are no better. In their home states of Washington, Colorado and Minnesota, Plaintiffs would have to pay a filing fee of at least \$14-29, \$31, or \$65 respectively. Maier Aff., Ex. 3 (Washington small claims filing fee ranges from \$14 to \$29); Defs.’ Mot. at 15 (citing fee schedule on Colorado court website); Minn. Stat. § 357.022, Minn. Stat. § 491A.02(3) (Minnesota conciliation court filing fee is \$65, plus a “law library fee” which varies by county). Small claims plaintiffs in Washington and Minnesota cannot seek injunctive relief. Maier Aff., Ex. 3 (in Washington, claimants “may bring a small claims suit for recovery of money only”); Minn. Stat. § 491A.01(4) (injunctive relief not available in Minnesota conciliation court). Limited injunctive relief is available in Colorado small claims court, but would not be available to Plaintiffs in these circumstances. Colo. Rev. Stat. § 13-6-403(2)(h). They would have limited or no opportunity for pretrial discovery and thus no chance to obtain any Qwest documents or depose any witnesses. Maier Aff., Ex. 3 (no provision for pretrial discovery in Washington small claims actions); Colo. R. Civ. P. 510(a) (no discovery in Colorado small claims matters); Minn. Gen. R. Prac. § 12, 2007 Adv. Comm. Comments. Nothing in the language of the Subscriber Agreement would prevent the damages cap and limitations on damages discussed above from applying in small claims court as well. Even if a small claims court ignored those restrictions, Plaintiffs would have to

² The Subscriber Agreement also reduces the statute of limitations to only one year, which, while not important to Plaintiffs, would be significant for other consumers. Subscriber Agreement, § 13(g).

“establish by clear and convincing evidence” that Qwest “engaged in bad faith conduct” to obtain such relief under the CCPA, *see* Colo. Rev. Stat. § 6-1-113(2). Without discovery, obtaining such evidence would be impossible.

As a result of Qwest’s numerous one-sided provisions, it is “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. B (Treinen Rep.), at 8. And without an attorney, consumers have no avenue to vindicate their rights. The claim based on the statute of frauds raise complex legal issues, while the claim that the ETF is unfair and an unreasonable penalty not only raises complex legal issues, but also difficult economic issues that would necessitate the use of expert witnesses. The trial in a case raising similar claims (against Sprint Nextel’s imposition of ETFs on its cell phone service) lasted about a month in 2008 in a California superior court and included testimony from several expert witnesses. *See Cellphone Fee Termination Cases*, 122 Cal. Rptr. 3d 726, 733-35 (Cal. Ct. App. 2011) (affirming trial court’s judgment for plaintiffs; discussing extensive expert testimony by both parties). And of course, any claim may need to deal with the defenses in the Subscriber Agreement discussed above. *See* Terrell Aff., Ex. B (Treinen Rep.), at 5–6 (setting forth complicated legal defenses Qwest likely would assert and 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). The cost of AAA arbitration or small claims court is prohibitive for individuals with relatively small damages claims. And perhaps most fundamentally, a company cannot be allowed to mandate that customers proceed against it *pro se* by barring class actions and imposing conditions that make it impossible for customers to obtain representation in individual disputes. As noted in Section II, *supra*, the lack of small claims matters and arbitrations despite widespread dissatisfaction with Qwest’s

ETF demonstrates Qwest has effectively left consumers without recourse. Since January 1, 2006, AAA has conducted no consumer arbitrations involving Qwest. Terrell Decl. ¶ 9; *id.*, Ex. G (excerpt from AAA report). Only once have consumers attempted to pursue arbitration regarding claims arising under Qwest’s High Speed Internet Subscriber Agreement. *Id.* ¶ 7. But Qwest ignored their arbitration demand. *Id.*, Exs. H-N. Only nineteen consumers have pursued small claims (\$500 and under) against Qwest in the last four years. Terrell Decl. ¶ 7 and Ex. E.

Plaintiffs’ experiences reinforce the conclusion that 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., Ex. Q (Sandquist Dep. 28:7-12); *id.*, Ex. S (Moore Dep. 89:10-17). Plaintiffs also testified that without representation, small claims court and individual arbitrations would not be feasible. *Id.*, Ex. Q (Sandquist Dep. 27:13-14, 29:13-25); Ex. P (Vernon Dep. 8:1-2, 10:20-22, 13:17-24); Ex. R (Durkin Dep. 74:18-24, 63:18-64:1, 103:4-14). Even Mr. Durkin, a practicing attorney, testified he “[doesn’t] even really know how arbitration works[.]” *Id.*, Ex. R (Durkin Dep. 83:12-16). Class members similarly do not consider small claims court and arbitration to be viable options for them. Cleveland Decl., ¶¶ 6-8; Horne Decl., ¶¶ 7-9; Webber Decl., ¶¶ 5-7; Stearns Decl., ¶¶ 8-9.

Federal and state courts repeatedly have declared unconscionable arbitration clauses with class action waivers when they are combined with at least one of the additional factors that make Qwest’s Dispute Resolution provision in this case so unconscionable. *See, e.g., Kristian v. Comcast Corp.*, 446 F.3d 25, 29 (1st Cir. 2006) (also barred treble damages and attorneys’ fees and costs); *Dade v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007) (fees and costs not recoverable under federal law and recoverable under state law only if defendant acted in bad faith); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 274 (Ill. 2006) (consumer must pay a \$125 arbitration fee); *Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88, 99

(N.J. 2006) (claim would require proof of complicated financial arrangements that would substantially increase litigation costs); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 372 (N.C. 2008) (individual arbitrations are not viable as shown by fact that no arbitrations initiated for the over 68,000 loans); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161, 1180 (Ohio Ct. App. 2004) (confidentiality provision). None of these cases, however, involved all of the factors that make Qwest's Dispute Resolution provision unconscionable. Qwest's provision is exceptionally, if not uniquely, unfair.

Decisions upholding arbitration clauses under Colorado law do not deviate from the law of other jurisdictions. In *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249 (Colo. App. 2001), the plaintiff sought damages in excess of \$9,000, almost 50 times larger than Plaintiffs' damages, and the arbitration clause in *Rains* did not even include a class action waiver. *Id.* at 1252-53. *Bonanno v. Quizno's Franchise Co., LLC*, 2009 WL 1068744 (D. Colo. April 20, 2009), was not a consumer class action involving low-value claims. The franchisees suing their franchisor in *Bonanno* alleged damages "on average of \$60,000 to \$75,000 after trebling[.]" *Id.* at *15. Not surprisingly with such large sums at stake, numerous other franchisees had been able to find counsel and file litigation. Indeed, Judge Arguello's analysis suggests that if severe "economic roadblocks" to individual actions existed, as in this case, she would have invalidated the class action waiver. *Id.* Similarly, *Ornelas v. Sonic-Denver T, Inc.*, No. 06-cv-00253-PSF-MJW, 2007 WL 274738 (D. Colo. Jan. 29, 2007) involved a claim of over \$10,000 after trebling. The contract in *Ornelas* did not contain the unfair provisions in the Subscriber Agreement – there were no prohibitions on trebling or attorneys' fees, no cap on damages and provisions for advancement or reimbursement of costs – and the claims would be simple to try. *Id.* at *6-7

Whether looking at the facts of this case, the infinitesimal number of small claims actions and total absence of consumer arbitrations under the Subscriber Agreement, or judicial decisions involving similar issues, the conclusion is the same: the Dispute Resolution

provision is substantively unconscionable. As Mr. Fuller concludes, “[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.

b. *The Provision Interferes with the Public Policy of Protecting Consumers*

Davis also requires the Court to consider “the commercial setting, purpose and effect” of the Agreement. *Davis*, 712 P.2d at 991. Here, Plaintiffs’ position as consumers entitles them to special protection under Colorado and Washington law.³ The CCPA is a “remedial statute” designed to provide consumers with “readily available” remedies against deceptive and unfair business practices. See *Showpiece Homes Corp. v. Assurance Co. of America*, 38 P.3d 47, 50-51 (Colo. 2001); *Western Food Plan, Inc. v. Dist. Court*, 598 P.2d 1038, 1041 (Colo. 1979). Similarly, the WCPA is to be “liberally construed that its beneficial purposes may be served.” RCW 19.86.920.

Under both states’ consumer protection statutes, plaintiffs must demonstrate the public interest impact of the defendant’s wrongful actions, not just the impact of those actions on them. See *Hall v. Walter*, 969 P.2d 224, 234-35 (Colo. 1998) (CCPA); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 535 (Wash. 1986) (WCPA). As the Washington Supreme Court has explained, “[p]rivate citizens act as private attorneys general in protecting the public’s interest against unfair and deceptive acts and practices in trade and commerce.” *Scott v. Cingular Wireless*, 161 P.3d 1000, 1006 (Wash. 2007). Because they represent the public interest, consumers “may seek injunctive relief even when the injunction would not directly affect their own private interests.” *Id.*⁴ This public purpose of

³ The “special protection” Colorado law extends to consumers is another fact distinguishing this case from *Bonanno*. There, the Court noted “Colorado law does not automatically afford special protection to franchisees in the same manner that it protects consumers” and contrasted the position of the *Bonanno* plaintiffs (franchise purchasers who “were making a major investment involving tens of thousands of dollars in up-front fees and even more than that amount of money over the prospective life of their franchise”) with “uninitiated consumers purchasing a cell phone or signing up for a credit card.” *Bonanno*, 2009 WL 1068744 at *22.

⁴ Colorado courts construing the CCPA rely upon Washington case law construing the WCPA. See *Hall*, 969 P.2d at 233-34 (noting “Washington state has long served as a model for the development of consumer protection

consumer protection statutes, combined with the availability of injunctions as a remedy – a remedy denied in small claims court and discouraged through the fee structure in arbitration – makes clear the likelihood that the alleged misconduct would continue on a widespread basis is a factor as to whether the Dispute Resolution provision is enforceable.

Here, there is no evidence Qwest has altered its practice of imposing ETFs on customers whose service is terminated before the end of the purported term commitment. Upholding the Dispute Resolution provision would permit Qwest’s unfair and deceptive practices to continue and insulate Qwest from liability for the effect of its actions on the public. This supports a finding of substantive unconscionability.

c. *The Dispute Resolution Provision Is Not Commercially Reasonable*

Whether a contract provision is “commercially reasonable” is the final *Davis* factor. It is not “commercially reasonable” to impose a contract without a viable means of obtaining relief upon a breach. *Cf. Leprino v. Intermountain Brick Co.*, 759 P.2d 835, 837 (Col. Ct. App. 1988) (holding contractual provision limiting buyer to cost of bricks installed in house failed of its essential purpose when staining problem in bricks did not become apparent until after they were installed).

Creating a contract without a viable means of relief is precisely what Qwest has done here. It has barred any class actions and actions in this Court, created restrictions that make it economically impossible to arbitrate individually, and forced any consumer determined to proceed despite these obstacles into small claims court where they would be representing themselves against a huge corporation that can refer to the various limitations on recovery in the Subscriber Agreement to block or limit any recovery. The lack of use of arbitration or small claims court by Qwest’s customers shows that they are not viable alternatives to the prohibited class action lawsuits.

legislation”); *Showpiece Homes*, 38 P.3d at 54 (noting the court “find[s] Washington law instructive because the WCPA, like the CCPA, is a broad statute that provides for a private right of action”).

E. The Federal Arbitration Act Does Not Preempt this Court’s Ruling that Qwest’s Dispute Resolution Provision Is Unconscionable

Concepcion’s preemption holding should not govern this Court’s decision as to whether Qwest’s Dispute Resolution provision is unconscionable under Colorado law. First, Colorado law, as articulated by the Colorado Supreme Court in *Davis*, is fundamentally different from the California rule invalidated in *Concepcion*. *Concepcion* struck down as preempted by the FAA California’s *Discover Bank* rule, which would invalidate any class action ban and force the parties into non-consensual class arbitration whenever there was (a) a consumer contract of adhesion; (b) predictably small damages; and (c) an allegation the defendant corporation has engaged in a scheme to cheat consumers. 131 S. Ct. at 1750. In contrast, as explained above, Colorado law on unconscionability is guided by seven non-exclusive factors. *See Davis*, 712 P.2d at 991. To be found unconscionable in Colorado, a party must show that the “evidence” before the court in an individual case demonstrates that a contract provision is unconscionable in that particular case, as opposed to a generic category of cases. In that critical way, Colorado law is consistent with the FAA, which the Supreme Court has repeatedly emphasized permits arbitration agreement to be invalidated on grounds that apply to any contract. *See Concepcion*, 131 S. Ct. at 1746 (citing *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652 (1996), *Perry v. Thomas*, 482 U.S. 483, 492-93, n.9, 102 S. Ct. 2520 (1987)).

Here, unlike the *Concepcion* plaintiffs, who argued based upon abstract presumptions along the lines of the *Discover Bank* rule, Plaintiffs have provided evidence (both in terms of the testimony of consumer attorneys and Qwest’s admissions about the lack of individual arbitrations) that the small dollar values at issue in this case would prevent them from being able to vindicate their rights on an individual basis. Terrell Decl., Exs. D, G; Maier Aff.; Fuller Aff. Qwest could provide only one example of a consumer who attempted to pursue arbitration and that arbitration demand was ignored. *Id.* ¶ 7; *id.*, Exs. H-N. This result is not surprising, given Qwest’s ETF is \$200, and AAA’s fee for consumer disputes is \$125, in addition to attorney fees and the investment of time and effort. *See* Section III, D. 2., *supra*. Qwest has

presented no evidence to the contrary. In contrast, the *Concepcion* Court assumed that AT&T's arbitration clause would not prevent the plaintiffs in that case from vindicating their claims. The only "facts" on which the Supreme Court relied was the language of the arbitration clause itself, which on its face, seemed eminently fair given the various "incentives" offered by AT&T. For example, AT&T's arbitration clause "denies AT&T any ability to seek reimbursement of its attorney's fees," shifted "all costs for nonfrivolous claims" to AT&T and, instead of a "damages cap" or other restrictions on relief, as in the Qwest arbitration clause, the AT&T agreement provides for a \$7,500 minimum recovery and twice the amount of a plaintiff's attorney fees if the arbitration award exceeds AT&T's last settlement offer. *See Concepcion*, 131 S. Ct. at 1744.

In sum, *Concepcion* makes clear the Supreme Court was concerned about broad categorical rules of state law. "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: the conflicting rule is displaced by the FAA." 131 S. Ct. at 1747. But this case does not involve a bright-line rule based on abstract reasoning, but rather, a case where there is admissible evidence specific to the facts and circumstances of this particular case. The Colorado law at issue here, which is dependent on the individualized facts of each case, creates nothing like the "class action on demand" rule the *Concepcion* court found frustrated the FAA's purpose.⁵

Similarly, contrary to Qwest's arguments, nothing in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. ___, 130 S. Ct. 1758 (2010) requires this Court to "dismiss the Plaintiffs' arguments that the class action bar invalidates the arbitration clause." Defs.' Mot. at 10. The issue before this Court is not whether Plaintiffs may be compelled to participate in classwide arbitration under an agreement that does not authorize such a proceeding, but instead, whether

⁵ Judge Martinez in this District recently applied *Concepcion* and upheld an arbitration clause, but that case is distinguishable. *See Bernal v. Burnett*, 2011 WL 2182903 (D. Colo. June 6, 2011). The *Bernal* plaintiffs offered no evidence save their own unsupported allegations that they would not be able to pursue their claims without a class proceeding, either in arbitration or in court. *See id.* at *7. Rather, they relied heavily on the claim that the "adhesive nature" of the arbitration agreements in that case rendered the agreements unconscionable. *Id.* at *6.

the Dispute Resolution provision may be held invalid under general principles of state contract law. *See* 9 U.S.C. § 2. *Stolt-Nielsen* did not discuss this issue. 130 S. Ct. at 1768 (noting party seeking class arbitration did so on several grounds, including whether arbitration clause “would be unconscionable and unenforceable if it forbade class arbitration” but that the Court would not consider this issue).

Moreover, based on Qwest’s own admission, the issue of class arbitration is irrelevant here. Qwest affirmatively stated it “is not asking the Court to sever the class action waiver from the Arbitration clause” and that “[i]f the Court determines that the class action waiver is unconscionable, then Qwest will litigate the issues in Court.” Defs.’ Mot. to Compel Arbitration (Dkt. No. 26) at 17 n.4.

For these reasons, nothing in the Supreme Court’s recent decisions in *Concepcion* and *Stolt-Nielsen*, or in the FAA itself, requires the Court to hold that Plaintiffs’ position that the Dispute Resolution provision is unenforceable is “foreclose[d],” as Qwest claims. Defs.’ Mot. at 1. The factual record here, supported by admissible evidence and testimony, distinguishes this case from *Concepcion* and other decisions where Plaintiffs relied solely on the language of the arbitration clause itself and on state laws which *per se* invalidate arbitration clauses with class action bars. The Court should reject Qwest’s sweeping characterization of *Concepcion*.

IV. CONCLUSION

Plaintiffs respectfully request the Court deny Defendants’ Renewed Motion to Compel Arbitration.

DATED this 15th day of June, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Beth E. Terrell, hereby certify that on June 15, 2011, I caused the foregoing to be electronically filed with the Clerk of the Court via the CM/ECF system, which will send notification of such filing to the e-mail addresses denoted on the Court's Electronic Mail Notice List.

DATED at Seattle, Washington, this 15th day of June, 2011.

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