

**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' RENEWED MOTION TO COMPEL ARBITRATION

TABLE OF CONTENTS

	Page
INTRODUCTION.....	1
STATEMENT OF FACTS.....	3
Background	3
The Ordering Process	4
The Welcome Letters	5
The Installation Process.....	7
The Arbitration Agreement	8
ARGUMENT	9
I. THE CLAUSE IS VALID AND ENFORCEABLE.....	9
A. Under <i>Concepcion</i> And <i>Stolt-Nielsen</i> , The Class Action Waiver Cannot Invalidate The Arbitration Clause	10
B. The Colorado And Washington Statutes Ensure That The Plaintiffs Can Vindicate Their Rights Regardless Of The Class Action Waiver.	11
C. The Arbitration And Small Claims Court Filing Fees Do Not Render The Clause Unconscionable.	13
D. The “Take It Or Leave It” And Adhesive Nature Of The Agreement Does Not Render The Clause Unconscionable Under Colorado Law.....	16
E. The Agreement Does Not Lack Mutuality.....	17
II. PLAINTIFFS ACCEPTED THE SUBSCRIBER AGREEMENT	17
A. E-Commerce Law Recognizes That Notice Of Terms Creates A Binding Contract Under These Circumstances.	17
B. The Plaintiffs Were Notified Of The Agreement And Manifested Their Consent.....	19
C. Qwest’s Evidence Creates A Presumption Of Formation.....	22
CONCLUSION	25

TABLE OF AUTHORITIES

Page

FEDERAL CASES

<i>AT&T Mobility, LLC v. Concepcion</i> , 563 U.S. ___, 2011 WL 1561956 (Apr. 27, 2011)	<i>passim</i>
<i>Anderson v. AB Painting & Sandblasting Inc.</i> , 578 F.3d 542 (7th Cir. 2009)	12
<i>Bischoff v. DirecTV, Inc.</i> , 180 F. Supp. 2d 1097 (C.D. Cal. 2002)	18
<i>Bonanno v. Quizno’s Franchise Co., LLC</i> , No. 06-cv-02358-CMA-KLM, 2009 U.S. Dist. LEXIS 37702 (D. Colo. Apr. 20, 2009)	13
<i>Boomer v. AT&T Corp.</i> , 309 F.3d 404 (7th Cir. 2002)	21, 22
<i>City of Riverside v. Rivera</i> , 477 U.S. 561 (1986)	12
<i>Davidson v. Cingular Wireless, LC</i> , No. 2:06-cv-00133, 2007 WL 896349 (E.D. Ark. Mar. 23, 2007)	18
<i>Feldman v. Google, Inc.</i> , 513 F. Supp. 2d 229 (E.D. Pa. 2007)	18
<i>Garrison v. Transunion</i> , No. 08-10859, 2010 U.S. Dist. LEXIS 26501 (E.D. Mich. Feb. 26, 2010)	18, 24
<i>Gilmer v. Interstate/Johnson Lane Corp.</i> , 500 U.S. 20 (1991)	9, 16
<i>Hill v. Gateway 2000, Inc.</i> , 105 F.3d 1147 (7th Cir. 1997)	18
<i>Honig v. Comcast of Ga. I, LLC</i> , 537 F. Supp. 2d 1277 (N.D. Ga. 2008)	22, 24
<i>Hugger-Mugger, L.L.C. v. Netsuite, Inc.</i> , No. 2:04-CV-592TC, 2005 WL 2206128 (D. Utah Sept. 12, 2005)	19
<i>Jenkins v. First Am. Cash Advance of Georgia, LLC</i> , 400 F.3d 868 (11th Cir. 2005)	12

TABLE OF AUTHORITIES

(continued)

	Page
<i>Losapio v. Comcast Corp.</i> , No. 1:10-cv-3438-RWS, 2011 U.S. Dist. LEXIS 42257 (N.D. Ga. Apr. 18, 2011).....	22
<i>Marsh v. First USA Bank, N.A.</i> , 103 F. Supp. 2d 909 (N.D. Tex. 2000)	24, 25
<i>Mullan v. Quickie Aircraft Corp.</i> , 797 F.2d 845 (10th Cir. 1986)	16
<i>Ornelas v. Sonic-Denver T, Inc.</i> , No. 06-cv-00253-PSF-MJW, 2007 WL 274738 (D. Colo. Jan. 29, 2007).....	13
<i>Pentecostal Temple Church v. Streaming Faith, LLC</i> , No. 08-554, 2008 WL 4279842 (W.D. Pa. Sept. 16, 2008).....	19
<i>Pleasants v. Am. Express Co.</i> , 541 F.3d 853 (8th Cir. 2008)	24
<i>Recursion Software, Inc. v. Interactive Intelligence, Inc.</i> , 425 F. Supp. 2d 756 (N.D. Tex. 2006)	19
<i>Register.com, Inc. v. Verio, Inc.</i> , 356 F.3d 393 (2d Cir. 2004).....	18
<i>Schwartz v. Comcast Corp.</i> , 256 F. App'x 515 (3d Cir. 2007)	18
<i>Siebert v. Amateur Athletic Union of the U.S., Inc.</i> , 422 F. Supp. 2d 1033 (D. Minn. 2006).....	19
<i>Sherr v. Dell, Inc.</i> , No. 05 CV 10097 (GBD), 2006 WL 2109436 (S.D.N.Y. July 27, 2006).....	18
<i>Snowden v. CheckPoint Check Cashing</i> , 290 F.3d 631 (4th Cir. 2002)	12
<i>Southland Corp. v. Keating</i> , 465 U.S. 1 (1984).....	9
<i>Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.</i> , 559 U.S. ___, 130 S. Ct. 1758 (2010).....	1, 2, 10, 11

TABLE OF AUTHORITIES
(continued)

	Page
<i>Strand v. U.S. Bank Nat’l Ass’n ND</i> , 693 N.W.2d 918 (N.D. 2005)	13
<i>Treiber & Straub, Inc. v. United Parcel Serv. Inc.</i> , 474 F.3d 379 (7th Cir. 2007)	19

STATE CASES

<i>Briceno v. Sprint Spectrum</i> , 911 So. 2d 176 (Fla. 3d Dist. Ct. App. 2005)	19, 22
<i>Comvest, L.L.C. v. Corporate Secs. Grp., Inc.</i> , 507 S.E.2d 21 (Ga. Ct. App. 1998)	24
<i>Discover Bank v. Sup. Ct.</i> , 113 P.3d 1100 (Cal. 2005)	11
<i>Fonte v. AT&T Wireless</i> , 903 So. 2d 1019 (Fla. 2005)	18
<i>I.M.A., Inc. v. Rocky Mountain Airways, Inc.</i> , 713 P.2d 882 (Colo. 1986)	18
<i>Leverage Leasing Co. v. Smith</i> , 143 P.3d 1164 (Colo. App. 2006)	25
<i>Lincoln Gen. Life Ins. Co. v. Bailey</i> , 224 P.3d 336 (Colo. App. 2009)	9
<i>Rains v. Found. Health Sys. Life & Health</i> , 23 P.3d 1249 (Colo. App. 2001)	9

FEDERAL STATUTES

15 U.S.C. § 7001	19
Fed. R. Civ. P. 12(b)(1)	1
Federal Arbitration Act, 9 U.S.C. § 1 <i>et. seq.</i>	1

TABLE OF AUTHORITIES
(continued)

Page

STATE STATUTES

Colo. R.P. for Small C. Cts. 510(a)	14
Colo. R.P. for Small C. Cts. 513	14
Colo. Rev. Stat. § 6-1-113(2)(a)	12
Colo. Rev. Stat. § 13-6-401	14
Colo. Rev. Stat. § 13-6-409	14
Minn. Conc. Ct. Rules 412(a)	14
Minn. Conc. Ct. Rules 506	14
Minn. Conc. Ct. Rules 512(d)	14
Minn. Stat. § 491A.02(1)	14
Wash. Rev. Code § 12.40.080(3).....	14
Wash. Rev. Code § 19.86.090.....	12

MISCELLANEOUS

Restatement (Second) of Contracts § 17(1) (1981)	17
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14853 (2005).....	3

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 submit the following Renewed Motion to Compel Arbitration as ordered by this Court in light of the recent decision rendered by the United States Supreme Court in *AT&T Mobility, LLC v. Concepcion*, 563 U.S. ___, 2011 WL 1561956 (Apr. 27, 2011).

INTRODUCTION

The Plaintiffs seek to litigate their claims on a class basis in federal court, despite having agreed to an arbitration clause that precludes class actions. They argue that the clause is unconscionable and unenforceable because it contains a class action waiver and that, regardless, they did not agree to the arbitration clause. Defendants have moved to compel arbitration pursuant to the parties’ agreement and the Federal Arbitration Act, 9 U.S.C. § 1 *et. seq.* (“FAA”), and now renew that motion in light of the discovery conducted by the parties and the Supreme Court’s controlling decisions in *AT&T Mobility, LLC v. Concepcion* and *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. ___, 130 S. Ct. 1758 (2010).

First, the Supreme Court’s recent decisions in *Concepcion* and *Stolt-Nielsen* foreclose the Plaintiffs’ unconscionability arguments in their entirety. In *Concepcion*, the Supreme Court made clear that consumer plaintiffs such as the Plaintiffs here cannot avoid arbitration agreements that preclude class actions through state law unconscionability arguments. The FAA requires that arbitration clauses be enforced and preempts state law unconscionability arguments

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

based on class action waivers because of the disproportionate impact on arbitration clauses as a whole. Similarly, in *Stolt-Nielsen*, the Court held that parties to an arbitration agreement cannot be ordered to arbitrate their claims on a class basis unless the parties expressly agreed to incorporate class procedures in the arbitration clause itself, which the parties clearly did not do here.

In light of these decisions, the Plaintiffs cannot invalidate the Qwest arbitration clause based on their claims of unconscionability. They cannot circumvent *Concepcion*'s mandate that class action waivers do not invalidate arbitration clauses, even when those clauses are in consumer contracts involving predictably low-value claims. And they cannot prosecute their claims against Qwest on a class basis under *Stolt-Nielsen*, because the clause here expressly precludes class litigation.

Moreover, the Plaintiffs cannot invalidate the arbitration clause based on some other unconscionability argument. *Concepcion* rejected the additional grounds the Plaintiffs have asserted – such as the alleged difficulty in finding legal representation given the dollar value of the claims – and, regardless, the clause is not unconscionable. Rather, it was freely entered into by the parties, is fair, and provides the Plaintiffs with reasonable, cost-effective alternatives to pursue their claims.

Second, Qwest's routine processes and established procedures create a presumption that the Plaintiffs were notified of the terms of the Subscriber Agreement and that a binding contract was created once the Plaintiffs used the service for 30 days and did not object to the terms of use through the look-back provision. Having received notice of the contract and using the service

under the terms of the contract, the Plaintiffs cannot now avoid the fact that a contract was formed simply because they cannot “remember” seeing it.²

STATEMENT OF FACTS

Background

Prior to 2006, Qwest was a “facilities-based wireline broadband Internet access service provider,”³ 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 industry. (Dkt. #27, Affidavit of Travis Leo in Support of Defendants’ Motion to Compel Arbitration (“Leo Aff.”) ¶ 7.) This deregulation became effective for Qwest on January 28, 2006. (*Id.*)

As part of the deregulation process, in December of 2005, Qwest sent letters to all of its internet subscribers, explaining that the service would soon be deregulated and that subscribers who maintained their service would be governed by the Subscriber Agreement. (*Id.* ¶ 8.) Such letters were sent to Plaintiffs Vernon, Durkin, and Moore. (Third Am. Compl. ¶¶ 18, 25; Dkt. #82-1 to 82-3, Affidavit of Jesse Kohler In Support of Defendants’ Motion to Compel Arbitration (“Kohler Aff.”) ¶ 4.) Existing customers who made no changes to their service

² Plaintiffs cite to the terms of the Subscriber Agreement throughout the Third Amended Complaint; affirmatively allege that the terms of the Subscriber Agreement provide for a month to month arrangement that cannot be varied (Third Am. Compl. ¶¶ 14, 15, 53); and ask the Court to, among other things, amend the Subscriber Agreement to require its execution by customers if Qwest seeks to enforce term commitments over one year. (*Id.* at Prayer for Relief (E).) It is disingenuous for Plaintiffs to base their claims on alleged omissions in the Subscriber Agreement, but also to argue that they are not bound by the same Agreement.

³ At various times, Qwest has called the service now known as “high speed internet” service “broadband” service, thus certain documents referring to “broadband” service relate to the same Qwest high speed internet service at issue in this litigation.

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* Dkt. #27, Leo Aff., Ex. A (Sample Letter to Customers December 2005).)

Qwest began offering a two-year contract in the spring of 2006 in an offer known as “Price for Life.” (*Id.* ¶ 16.) Qwest guaranteed Price for Life subscribers a discounted rate for as long as they maintained their HSI service without change. (*Id.*) By contrast, a subscriber who took monthly service without a two-year commitment was subject to potential rate increases. (*Id.*) In exchange for receiving the permanent Price for Life discounts, Price for Life subscribers agreed to purchase the HSI service for at least two years. (*Id.*, and Ex. B thereto ¶ 12(c).) The Price for Life subscribers also agreed that if they terminate the contract before two years had expired, they would pay a \$200 Termination Liability Assessment (“TLA”). (*Id.*) Term contract and month-to-month HSI subscribers are all bound by the Subscriber Agreement. (Third Am. Compl. ¶¶ 13, 29; Dkt. #27, Leo Aff. ¶ 16, and Ex. B thereto.)

The Ordering Process

When a customer elected the Price for Life offer for HSI service over the phone, he or she typically was required to agree to accept the terms and conditions of service set forth in the Subscriber Agreement. (Dkt. #27, Leo Aff. ¶¶ 17-18, and Ex. C thereto (Consumer Aspect, Project: HSI Service Agreement IVR) (the customer is sent to a voice prompt system that advises the customer of the Subscriber Agreement).) Plaintiffs Durkin, Sandquist and Moore ordered Qwest’s Price for Life service by telephone. (Dkt. #82-1, Kohler Aff. ¶ 5.)

If a customer enrolled in or upgraded HSI service via the internet, during the “checkout” process, the customer had to click “I agree” to a box of “Terms and Conditions” before the enrollment process could be completed. (Dkt. #27, Leo Aff. ¶ 19.) The immediately visible text of the terms and conditions and a portion of the “checkout” page advise the customer that his internet service is offered under terms “found at www.qwest.com/legal/” and that they should “click ‘Qwest Broadband (High-Speed Internet) Subscriber Agreement,’” and review the terms, including the arbitration provision. (*Id.* ¶ 19, and Ex. D thereto (Checkout page in IOT) at 2.) Plaintiff Vernon’s service was upgraded via this internet process. (Dkt. #82-1, Kohler Aff. ¶ 6.)

The Welcome Letters

Regardless of how their order was placed, after ordering Qwest HSI service, each Plaintiff again had an opportunity to reject the Subscriber Agreement if he or she did not assent to the Arbitration Clause. Each Plaintiff received at least one Welcome Letter expressly informing them that their Qwest HSI service was governed by the Subscriber Agreement, which was “located at www.qwest.com/legal/,”⁴ and, in particular, its Arbitration Clause, (Dkt. #82-5 to 82-12, Affidavit of Lucia Beardsley In Support of Defendants’ Motion to Compel Arbitration (“Beardsley Aff.”), and Exs. A-G thereto at 2.), and that they would be bound by such terms if they failed to cancel service within thirty (30) days. (*Id.*) Some Welcome Letters, such as the one sent to Plaintiff Moore, contained a copy of the entire Subscriber Agreement. (*Id.* ¶ 8.)

Qwest has well-established, quality-controlled procedures for generating and mailing Welcome Letters to each customer who has placed an order for Qwest Service. All Qwest customer orders placed over the telephone or via the internet are entered into Qwest’s Service

⁴ At all relevant times, the Subscriber Agreement could be accessed at www.qwest.com/legal/. (Dkt. # 82-1, Kohler Aff. ¶ 3.)

Order Processing Software with a universal service order code (“USOC”) corresponding to the service or product ordered. (*Id.* ¶ 5.) Qwest then employs a mechanized process for generating a Welcome Letter conforming to the customer’s specific order for mailing within one business day. (*Id.* ¶¶ 6-8.) Every business day during 2006, 2007, and 2008, Qwest posted information concerning its residential orders to a secure internet accessible site, which a third party, ISO 9001:2000-certified⁵ vendor, RR Donnelley Business Communications Services (“BCS”), retrieved using file transfer protocols. (Dkt. #82-5, Beardsley Aff. ¶ 8; Affidavit of Brian Bennett in Support of Defendants’ Motion for Summary Judgment (“Bennett Aff.”), attached hereto as Exhibit 12, ¶¶ 6-8, 10-12.) Qwest posted and BCS retrieved multiple files each morning and would verify file counts to ensure that each file provided by Qwest was complete. (Ex. 12, Bennett Aff. ¶¶ 10-12.) BCS would then process the Qwest Welcome Letters using the template and instructions provided by Qwest, including data processing, printing, and inserting the Letters into the envelopes and mailing. (*Id.*) BCS had numerous quality assurance procedures to ensure that each customer file posted by Qwest resulted in the mailing of a Welcome Letter. (*Id.* ¶¶ 14-15.) BCS’s records for the relevant dates on which Plaintiffs’ orders would have been processed by BCS indicate that all orders for Qwest service placed by customers in the relevant states were processed and Welcome Letters sent in compliance with Qwest’s instructions. (Exs. 6-11.)

⁵ ISO 9001:2000 is a standard published by the International Organization for Standardization relating to quality management systems designed to help organizations ensure that they meet the needs of customers. Companies are audited by an external certification body in order to be registered for the standard, and internal staff must be trained to audit the companies’ processes as well. BCS is currently ISO 9001:2008 certified. (Ex. 12, Bennett Aff. ¶ 7.) This is the current version of the old ISO 9001:2000.

The Installation Process

Subscribers also manifest assent to the Subscriber Agreement by clicking-to-accept the Agreement during the installation and configuration of Qwest HSI service using the Qwest QuickConnect CD.⁶ When the QuickConnect CD is loaded into a computer, a window appears on the screen stating:

Please read the Qwest High-Speed Internet (also called Qwest Broadband) Subscriber Agreement terms, ***including arbitration and limits on Qwest liability***, at ww.qwest.com/legal (“Qwest Agreement”) that govern your use and Qwest provision of the service(s) and equipment you ordered from the list below.

- Qwest High-Speed Internet service . . .

((Dkt. #82-1, Kohler Aff. ¶ 9; Dkt. #27, Leo Aff., Ex. E.) (emphasis in original).) As the bolded text makes clear, Qwest highlighted the Arbitration Clause of the Subscriber Agreement during the installation process and directed subscribers to the Subscriber Agreement.

Moreover, under the software’s protocol, the Plaintiffs could not use the CD to complete the configuration without clicking to accept the terms of the Agreement. (Dkt. #82-1, Kohler Aff. ¶ 12.) Qwest records verify that the Vernons and Mr. Sandquist affirmatively accepted the Agreement by clicking “I accept” while configuring their computers for Qwest’s service, (*id.* ¶¶ 7, 13-14),⁷ and Mr. Durkin admits that he used the Qwest QuickConnect CD to configure his computer. (Ex. 2, Durkin Dep. at 21:15-23:25, 92:1-18; Dkt. #82-1, Kohler Aff. ¶ 7.) Indeed, the Plaintiffs themselves are familiar with this type of click-to-accept process and recognize that a “click-to-accept” is binding upon them. (Ex. 2, Durkin Dep. at 43:13-19 (“[I]f you click, by

⁶ Qwest has actual records of electronic signatures for Mrs. Vernon and Mr. Sandquist. (Dkt. #82-1, Kohler Aff., and Exs. C and D thereto.)

⁷ Qwest currently has some click-to-accept records dating back to October 2007.

virtue of your clicking, you accept . . .); Ex. 3, Moore Dep. at 102:19-103:18; Ex. 4, Sandquist Dep. at 19:10-20:1.)⁸

The Arbitration Agreement

The Subscriber Agreement 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

⁸ Plaintiffs’ speculation that the click-to-accept process on the QuickConnect CD might be confusing is unsupported. The language of the Legal Agreements page from the QuickConnect CD repeatedly makes clear that acceptance of the terms includes acceptance of the Agreement (including its explicitly referenced Arbitration Clause) and a software license agreement. (Dkt. #82-1, Kohler Aff. ¶¶ 8-11.) In any event, none of the Plaintiffs have any specific memory of being confused by the QuickConnect CD – and Mr. Durkin admitted that although he likely did not read the Legal Agreements page at the time, having read it now he fully understood the language. (Ex. 2, Durkin Dep. at 92:1-18.)

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 Dkt. #27, Leo Aff., and Ex. B thereto at 12.)

Despite this clause, the Plaintiffs now seek to litigate this action in court on a class basis. The Plaintiffs should be compelled to individual arbitration, pursuant to their agreement.

ARGUMENT

There is no doubt or dispute that arbitration clauses are to be liberally enforced under the FAA, are favored as an effective and efficient means for alternative dispute resolution, and are as enforceable in consumer contracts as in any other contract. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1251 (Colo. App. 2001). Moreover, to invalidate the Agreement as unconscionable, the Plaintiffs must show far more than that the contract is inconvenient for them – they must demonstrate that the contract evokes a “profound sense of injustice.” See *Lincoln Gen. Life Ins. Co. v. Bailey*, 224 P.3d 336, 341 (Colo. App. 2009).

Here, the clause is conscionable, valid, and should be enforced under federal law. Having agreed to the clause, the Plaintiffs are bound by it, and in accordance with the FAA’s mandate to enforce arbitration clauses as written, the Plaintiffs should be compelled to individual arbitration.

I. THE CLAUSE IS VALID AND ENFORCEABLE.

The Plaintiffs claim that the arbitration clause is unconscionable and should not be enforced against them because (1) the clause imposes a class action waiver that precludes consumers from vindicating their rights, reasoning that consumers would either be unwilling to

bring the claims given their low dollar value or unable to secure legal representation given the value of the claims; (2) the agreement limits rights – such as obtaining injunctive relief and discovery – that the Plaintiffs otherwise would have in court, and would require the Plaintiff to pay certain filing fees either to arbitrate or proceed in small claims court; (3) the agreement is a contract of adhesion drafted “entirely by Qwest on a take-it-or-leave-it basis;” and (4) the agreement lacks mutuality because the clause allows claims to be brought in court if they relate solely to the collection of any debts owed to Qwest. (Third Am. Compl. ¶¶ 39-41.)

None of these reasons are legal grounds for voiding the arbitration clause, particularly in light of the recent Supreme Court case law reiterating the FAA’s mandate to resolve any doubts in favor of arbitration.

A. Under *Concepcion* And *Stolt-Nielsen*, The Class Action Waiver Cannot Invalidate The Arbitration Clause.

First, *Concepcion* and *Stolt-Nielsen* dismiss the Plaintiffs’ arguments that the class action bar invalidates the arbitration clause. (See Third Am. Compl. ¶ 40.) *Stolt-Nielsen* teaches that “the foundational FAA principle [is] that arbitration is a matter of consent,” and therefore, class arbitration cannot be imposed without consent. 130 S. Ct. at 1769, 1775. The Court thus held that when an arbitration clause is silent on the issue of class arbitration, class arbitration cannot be compelled because the parties did not agree to it. *See id.*

Plaintiffs’ argument that arbitration clauses prohibiting class mechanisms are unconscionable and therefore unenforceable would invalidate not only arbitration clauses with express class action bars, but also every consumer arbitration clause implicating low-value claims that is *silent* on the availability of class mechanisms. This is not the law. *Stolt-Nielsen* itself recognized the validity of an arbitration clause that necessarily precludes class relief

because it is silent on the issue. Invalidating swaths of arbitration clauses because they are silent on the availability of class mechanisms does not comport with the FAA's mandate to treat arbitration clauses like any other contract.

More recently, in *Concepcion*, the Supreme Court reinforced and expanded *Stolt-Nielsen* when it held that a class arbitration waiver will not be invalidated merely because it is in a consumer contract of adhesion involving low value claims. *Concepcion* held that state unconscionability law that purports to invalidate such waivers is preempted by the FAA because “nothing in [the FAA's saving clause] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives.” *Concepcion*, 2011 WL 1561956 at *5-7 (quoting *Discover Bank v. Sup. Ct.*, 113 P.3d 1100, 1110 (Cal. 2005)).

Concepcion also rejected the dissent's arguments (and the arguments the Plaintiffs make here) that small-dollar claimants will abandon their claims rather than litigate when faced with individual arbitration and that no “rational lawyer would [] sign[] on to represent” a consumer litigating over a small amount of damages. *See id.* at *21 (dissent); *see also id.* at *13 (majority). In dismissing these arguments as insufficient to void the arbitration clause, the *Concepcion* Court stated that “states cannot require a procedure that is inconsistent with the FAA, even if it is desirable for other reasons.” *Id.* at *13.

B. The Colorado And Washington Statutes Ensure That The Plaintiffs Can Vindicate Their Rights Regardless Of The Class Action Waiver.

Regardless of the impact of *Concepcion* and *Stolt-Nielsen*, the Colorado and Washington Legislatures have already ensured that consumers can adequately vindicate their rights without a class action process. The Colorado Consumer Protection Act (“CCPA”) and Washington Consumer Protection Act (“WCPA”) are crafted to ensure that individual consumers with low-

value claims can secure legal representation by providing for the award of attorneys' fees. The CCPA also provides \$500 in minimum statutory damages for successful individual claimants (Colo. Rev. Stat. § 6-1-113(2)(a)), while the WCPA allows the Court to award treble damages (Wash. Rev. Code § 19.86.090). Neither of these statutory remedies requires any additional burden of proof or showing of bad faith, and both reflect added compensation due to the low value of the claims.

Courts consistently recognize that legislatures include fee-shifting provisions and minimum statutory damages specifically to enable parties to pursue meritorious claims, even if the cost of litigating may exceed the claim's economic value. *See, e.g., City of Riverside v. Rivera*, 477 U.S. 561, 578 (1986) (noting that "the function of an award of attorney's fees is to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel" (internal quotations and citations omitted)). As one court explained, "[f]ee-shifting statutes remove th[e] normative decision from the court [as to whether a small claim is 'worth' pursuing at great cost]. If a party prevails, and the damages are not nominal, then Congress has already determined that the claim was worth bringing." *Anderson v. AB Painting & Sandblasting Inc.*, 578 F.3d 542, 546 (7th Cir. 2009); *Jenkins v. First Am. Cash Advance of Georgia, LLC*, 400 F.3d 868, 878 (11th Cir. 2005) (noting that the "contention that consumers would likely be unable to obtain legal representation without the class action vehicle is unfounded" where statute sued under provides attorney fees); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (same).

Thus, because the statutes at issue provide various incentives—including attorneys’ fees, treble damages, and minimum statutory damages—for individual claims, the legislatures have already ensured that small but complex claims are “worth” pursuing as a matter of law and the arbitration clause should not be invalidated on that basis. *See Bonanno v. Quizno’s Franchise Co., LLC*, No. 06-cv-02358-CMA-KLM, 2009 U.S. Dist. LEXIS 37702, at *67 (D. Colo. Apr. 20, 2009) (rejecting argument that plaintiff would be unable to obtain competent counsel); *Ornelas v. Sonic-Denver T, Inc.*, No. 06-cv-00253-PSF, MJW, 2007 U.S. Dist. LEXIS 6214, at *15–19 (D. Colo. Jan. 29, 2007) (same); *Strand v. U.S. Bank Nat’l Ass’n ND*, 693 N.W.2d 918, 926–27 (N.D. 2005) (finding that while plaintiff submitted an affidavit from counsel indicating that they would not take the case, the evidence was not empirical and did not establish that no attorney would take the case).

C. The Arbitration And Small Claims Court Filing Fees Do Not Render The Clause Unconscionable.

The Plaintiffs’ suggestion that the arbitration clause is unconscionable because they cannot obtain injunctions or discovery and must pay certain small claims court and arbitration filing fees is equally meritless and contrary to the law. First, the FAA has already recognized that arbitration – even with its associated costs and distinctions – is a fair, efficient, and less costly alternative dispute resolution. To invalidate arbitration clauses *because of* the costs of arbitration or because of arbitration’s other distinguishing characteristics is exactly what the Supreme Court has said is preempted by the FAA. *See Concepcion*, 2011 WL 1561956, at *6 (holding that contractual defenses that have a “disproportionate impact on arbitration agreements” are preempted by the FAA, and noting that “[a]n obvious illustration of this point would be a case finding unconscionable or unenforceable as against public policy consumer

arbitration agreements that fail to provide for judicially monitored discovery.”). To hold otherwise would turn the FAA inside out and would invalidate virtually all consumer arbitration clauses. *See id.* at *7 (the savings clause “cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the [FAA]. In other words, the act cannot be held to destroy itself.”) (citations and internal quotations omitted).

Second, invalidating an arbitration clause simply because it provides consumers the option of filing their claims in small claims court goes against common sense. The entire purpose of small claims court, after all, is to provide a forum that satisfies due process in which claimants with low-value claims can pursue their claims and vindicate their rights.⁹ Small claims courts provide relaxed rules and procedures that benefit individuals like the named Plaintiffs, including fee waiver provisions, appeal rights, limited discovery, and informal rules of procedure, and give the small claims courts latitude to conduct the proceeding to ensure that it is fair and that justice is accomplished. (*See* Colorado Rule of Procedure for Small Claims Courts (“Colo. R. P. for Small Cl. Cts.”) 510(a), 513; Minnesota Conciliation Court Rule (“Minn. Conc. Ct. Rules”) 412(a), 506, 512(d); *see also* Colo. Rev. Stat. § 13-6-409; Minn. Stat. § 491A.02(1); Wash. Rev. Code § 12.40.080(3).) Each of the accommodations is designed to make small claims courts effective for small-dollar claims pursued by individuals. Indeed, the AAA rules

⁹ For example, in creating the small claims court in Colorado, the legislature found that individuals “frequently do not pursue meritorious small civil claims because of the disproportion between the expense and time of counsel and litigation and the amount of money or property involved,” and that “the law and procedures of civil litigation are technical and frequently unknown to persons who are representing themselves.” Colo. Rev. Stat. § 13-6-401. Thus, the legislature created small claims court for the specific purpose of providing “inexpensive, speedy, and informal resolution of small claims in a forum where the rules of substantive law apply, but the rules of procedure and pleading and the technical rules of evidence do not apply.” *Id.* Other states that have provided similar forums for small claims had a similar intent, including Minnesota and Washington. *See* Minn. Stat. § 491A.02(1); Wash. Rev. Code § 12.40.080(3).

suggest and encourage the inclusion of a small claims court option for consumers to have an alternate, less-expensive method of resolving disputes involving small amounts of money.

(See Consumer Due Process Protocol, Principle 5, available at http://www.adr.org/sp.asp?id=22019#PRINCIPLE_5._SMALL_CLAIMS).

Moreover, the reality is that filing claims in arbitration or small claims court is less expensive than filing them in court. Under the cost-shifting provision in the Arbitration Clause, each Plaintiff would incur a maximum filing fee of \$125 to initiate arbitration, (see Dkt. #27, Leo Aff., and Ex. B thereto, § 17(a)(i)(1); see also Consumer-Related Disputes Supplementary Procedures, available at <http://www.adr.org/sp.asp?id=22014#AAA>, Section C-8.), with the possibility of financial assistance from the AAA for those who cannot afford the filing or arbitrator fees. (*Id.*) Additionally, prevailing plaintiffs can obtain statutory treble damages and other remedial damages pursuant to the Arbitration Provision. (Dkt. #27, Leo Aff., and Ex. B thereto, § 13(b).) Likewise, the filing fee for small claims court is only \$31. (See Instructions for Filing a Small Claims Case.¹⁰) Once in small claims court, the prevailing party is entitled to recover costs. Colo. R. Civ. P. 516. By comparison, filing in federal district court would cost each plaintiff a \$350 filing fee. (See <http://www.cod.uscourts.gov/Fees.aspx>).

Regardless, invalidating the clause simply because it requires the Plaintiffs to either arbitrate their claims or file them in small claims court would be contrary to the FAA because the only instances in which this defense could possibly apply are in connection with arbitration clauses. See *Concepcion*, 2011 WL 1561956 at *5 (the FAA savings clause does not permit

¹⁰ Available at <http://www.courts.state.co.us/Forms/PDF/JDF%20248%20Small%20Claims%20Instructions.pdf>.

arbitration clauses to be declared unenforceable based on “defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”).

D. The “Take It Or Leave It” And Adhesive Nature Of The Agreement Does Not Render The Clause Unconscionable Under Colorado Law.

The Plaintiffs allege that the clause is unconscionable because it was “take-it-or-leave-it” and a contract of adhesion. (Third Am. Compl. ¶ 39.) Under Colorado law, however, it is settled that neither the “take-it-or-leave-it” nature of a contract nor the inequality of bargaining power makes contractual provisions unconscionable. *Mullan v. Quickie Aircraft Corp.*, 797 F.2d 845, 850-51 (10th Cir. 1986) (holding that under Colorado law, the fact that a contract is offered on a “take-it-or-leave-it” basis does not render it invalid); *Gilmer*, 500 U.S. at 33 (holding that inequality of bargaining power is insufficient to render an arbitration agreement unenforceable). And as *Concepcion* recognized, “the times in which consumer contracts were anything other than adhesive are long past.” *Concepcion*, 2011 WL 1561956, at * 9.

Regardless, the clause was not “take-it-or-leave-it” or a contract of adhesion. Each Plaintiff had 30 days in which to cancel HSI service after receiving a Welcome Letter or activating service using the QuickConnect CD without being subject to the terms of the Subscriber Agreement. (Dkt. #27, Leo Aff., Ex. B § 12(a); Dkt. #82-4, McKown Aff. ¶ 8.). If 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, and could have recovered the full cost of any equipment purchased from Qwest if such equipment is in new condition. (Dkt. # 27, Leo Aff., and Ex. B thereto, § 12(a).).

E. The Agreement Does Not Lack Mutuality.

Finally, the Plaintiffs allege that the arbitration clause is not mutual because, they claim, “Qwest is not required to arbitrate when it seeks to bring an action against a customer for failure to pay a bill,” but a customer is “required to arbitrate any dispute he or she has with Qwest that is not within the jurisdiction of small claims court.” (Third Am. Compl. ¶ 40.) These allegations misstate Qwest’s Subscriber Agreement. The Subscriber Agreement requires all claims to be arbitrated or brought in small claims court, except “if they relate solely to the collection of any debts you owe to Qwest.” (Dkt. #27, Leo Aff., and Ex. B thereto, § 17(a).) Nothing in this provision limits this exception to Qwest. Rather, under the Agreement, either party may bring claims in court if they relate to the collection of any debts owed to Qwest and accordingly, the arbitration clause cannot be invalidated based on lack of mutuality. Qwest’s contracting process was fair, reasonable, and proper, and the Plaintiffs’ memory lapses are irrelevant.

II. PLAINTIFFS ACCEPTED THE SUBSCRIBER AGREEMENT

Plaintiffs also argue that they should not be bound by the arbitration provision in the Subscriber Agreement because they cannot “recall” the Agreement and because the contract formation process used by Qwest to notify them of the Agreement’s terms was somehow deficient.

A. E-Commerce Law Recognizes That Notice Of Terms Creates A Binding Contract Under These Circumstances.

It is well established under Colorado law¹¹ that the only requirements for the formation of a contract are (1) a manifestation of mutual assent to the exchange and (2) consideration.

¹¹ This contract, including the validity of the Arbitration Clause, is governed by Colorado law as required by the governing law provision in the Agreement. (Dkt. #27, Leo Aff., and Ex. B thereto, § 17(a)(i).)

I.M.A., Inc. v. Rocky Mountain Airways, Inc., 713 P.2d 882, 888 (Colo. 1986); Restatement (Second) of Contracts § 17(1) (1981).

Due to the practical time constraints on modern telephone and retail sales, it is widely accepted that when a customer is informed that use of a service is subject to certain terms, the customer's subsequent use of that service constitutes acceptance of the terms and conditions regardless of a signature. *See Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1103-05 (C.D. Cal. 2002) ("Practical business realities make it unrealistic to expect . . . [any] service provider . . . , to negotiate all of the terms of their customer contracts, including arbitration provisions, with each customer before initiating service."); *see also, e.g., Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004) (the use of a service constitutes an acceptance of the terms); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148-50 (7th Cir. 1997) (terms included in shipping box became enforceable when the consumer kept the goods longer than the 30-day look-back period).¹²

As a result, to establish a binding contract, Qwest is not required to demonstrate that the Plaintiffs had "actual knowledge" of the terms. *See Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007) (Failure to read an enforceable online agreement, "as with any binding contract, will not excuse compliance with its terms."). Rather, Plaintiffs need only have been put on notice of the Subscriber Agreement and been provided access to it. *See, e.g., Garrison v. Transunion*, No. 08-10859, 2010 U.S. Dist. LEXIS 26501, at *3-10 (E.D. Mich. Feb. 26, 2010) (binding customer to arbitration agreement where customers received the terms and conditions

¹² Courts follow this line of reasoning in enforcing agreements with class action bars in arbitration clauses where the plaintiff was presented with and then failed to opt-out of the contract. *See, e.g., Davidson v. Cingular Wireless, LC*, No. 2:06-cv-00133, 2007 WL 896349, at *6 (E.D. Ark. Mar. 23, 2007); *Fonte v. AT&T Wireless*, 903 So.2d 1019 (Fla. 2005); *Sherr v. Dell, Inc.*, No. 05 CV 10097 (GBD), 2006 WL 2109436, at *2 (S.D.N.Y. July 27, 2006).

upon activation of the service and in the “Welcome Guide”); *Briceno v. Sprint Spectrum*, 911 So. 2d 176, 177-80 (Fla. 3d Dist. Ct. App. 2005) (holding amendments to subscriber agreement were binding when notice was given in billing statement but text only available at provider’s website or by calling to request a copy); *Schwartz v. Comcast Corp.*, 256 F. App’x 515 (3d Cir. 2007); *Pentecostal Temple Church v. Streaming Faith, LLC*, No. 08-554, 2008 WL 4279842 (W.D. Pa. Sept. 16, 2008).

Moreover, the “click to accept” process utilized by Qwest creates an electronic signature, demonstrates mutual assent and consideration, and is a recognized method of contract formation. *See* 15 U.S.C. § 7001 (electronic signatures); *Treiber & Straub, Inc. v. United Parcel Serv. Inc.*, 474 F.3d 379, 382 (7th Cir. 2007) (“As is common in Internet commerce, one signifies agreement by clicking on a box on the screen.”); *Siebert v. Amateur Athletic Union of the U.S., Inc.*, 422 F. Supp. 2d 1033, 1040 (D. Minn. 2006) (“click-wrap” arbitration agreement); *Recursion Software, Inc. v. Interactive Intelligence, Inc.*, 425 F. Supp. 2d 756, 782-83 (N.D. Tex. 2006) (clicking “yes” constituted acceptance); *Hugger-Mugger, L.L.C. v. Netsuite, Inc.*, No. 2:04-CV-592TC, 2005 WL 2206128, at *3-6 (D. Utah Sept. 12, 2005) (clickwrap forum-selection clause).

B. The Plaintiffs Were Notified Of The Agreement And Manifested Their Consent.

Here, the facts demonstrate that the Plaintiffs (1) received more than reasonable notice of the Agreement, (2) manifested their assent to the terms through the click-to-accept, oral agreement procedures, or continued use of the HSI service, and (3) received the consideration of the service itself.

First, Plaintiffs Mrs. Vernon, Mr. Durkin, and Mr. Moore were informed of the Agreement in December of 2005, when Qwest's HSI was deregulated. At that time, as required by the FCC, Qwest notified these customers of the deregulation order, directed the customers to the new contract that would govern the service in the future, and provided these Plaintiffs with the right to opt-out when the non-regulated Agreement came into force. (Dkt. #82-1, Kohler Aff. ¶ 4; Dkt. #27, Leo Aff. ¶¶ 7-9.) None of these Plaintiffs opted out, and indeed each expanded service under the terms of the new Agreement.

Second, when Mr. Durkin, Mr. Sandquist, and Mr. Moore upgraded their HSI services in 2007, they were directed to the on-phone automated acceptance process for their orders, which informed them of the Agreement and required that they accept the terms to continue with their orders. (Dkt. #82-1, Kohler Aff. ¶ 5; Dkt. #27, Leo Aff. ¶¶ 17-18; Ex. 1, O'Brien Dep. at 14:12-25.)

Third, when Mr. Moore upgraded his HSI service in 2006, he was sent a paper copy of the Agreement, and was notified that the Agreement would be binding upon him for his service. (Dkt. # 82-5, Beardsley Aff. ¶ 18.)

Fourth, when the Vernons upgraded their internet service online in April of 2007, they affirmatively clicked "I accept" indicating acceptance of the Agreement. (Dkt. #82-1, Kohler Aff. ¶ 6; Dkt. #27, Leo Aff. ¶ 19.) Under the online ordering process, HSI customers, like Mrs. Vernon, are required to click acceptance to the Agreement before the order can be processed. By completing the order, the Vernons necessarily clicked to accept the terms.

Fifth, after each of the Plaintiffs upgraded their HSI service, they were sent "Welcome Letters." The Welcome Letters informed the Plaintiffs that their HSI service was "offered under

the Subscriber Agreement terms, which are located at www.qwest.com/legal,” that such terms included an arbitration clause, and that they would be bound by such terms if they failed to cancel service within thirty (30) days. (Dkt. #82-5, Beardsley Aff., Exs. A-G at 1.) At all relevant times, the then-current Subscriber Agreement could be accessed at www.qwest.com/legal. (Dkt. #82-1, Kohler Aff. ¶ 3.)

Sixth, Plaintiffs Vernon, Sandquist, and Durkin were again notified of the Agreement and its Arbitration Clause and were required to click-to-accept those terms when they configured their computers with the Qwest QuickConnect CD. ((Dkt. #82-1, Kohler Aff. ¶¶ 7-14, and Exs. A and B thereto; Dkt. #27, Leo Aff. ¶ 20; Ex. 2, Durkin Dep. at 21:15-23:25, 92:1-8.); *see also supra*, at 7 (describing QuickConnect CD text and protocol).)

Finally, each of the Plaintiffs actually *used* the HSI service for a substantial period. All of the Plaintiffs used the service for between eight to seventeen months after they placed their order, and none of the Plaintiffs requested that the Agreement be rescinded within the 30-day look-back period under the contract. (Dkt. #27, Leo Aff., Ex. B thereto, § 12(c); Dkt. #82-4, McKown Aff. ¶ 9.) When each of the Plaintiffs signed up for a term commitment in 2007 or 2008, whether they were an existing or a new customer, they had the option to cancel their service for 30 days after placing the order and such cancellation would not have bound them to the Subscriber Agreement. (Dkt. #27, Leo Aff., Ex. B thereto, § 12(c); Dkt. #82-4, McKown Aff. ¶ 9); *see also Boomer v. AT&T Corp.*, 309 F.3d 404, 414-417 (7th Cir. 2002) (notice of terms was an offer and use of service beyond lookback period was an acceptance).

Here, the Plaintiffs’ failure to cancel their service within the 30-day look-back period, and their continued use of Qwest’s services and payment of bills for such services without

objection, bind Plaintiffs to the Subscriber Agreement's terms, including the Arbitration Clause. See *Losapio v. Comcast Corp.*, No. 1:10-cv-3438-RWS, 2011 U.S. Dist. LEXIS 42257, *10 (N.D. Ga. Apr. 18, 2011) (citing *Honig v. Comcast of Ga. I, LLC*, 537 F. Supp. 2d 1277, 1283-84 (N.D. Ga. 2008)); see also *Boomer*, 309 F.3d at 415 (holding that continued use of services after reasonable opportunity to reject terms constitutes acceptance). Even though most of the Plaintiffs did not receive a paper copy of the Agreement, these notification processes create a binding contract. *Briceno*, 911 So. 2d at 177-80 (holding amendments to subscriber agreement were binding when notice was given in billing statement but text only available at provider's website or by calling to request a copy).

C. Qwest's Evidence Creates A Presumption Of Formation.

Qwest's evidence combines direct evidence of the Plaintiffs' acceptance and expectations with evidence of the commercial procedures that required the Plaintiffs to accept the terms of the Agreement to use the HSI service and of Qwest's routine practices that assured notice to the Plaintiffs of the terms.

Qwest's procedures are directed to each HSI customer so that he or she would (1) receive notice of the Agreement, the Arbitration Clause, and the opt-out, and (2) take affirmative steps to accept the Agreement regardless of whether the customer ordered his or her service on-line or by telephone, or was a new or legacy customer. For the Vernons and Mr. Sandquist, Qwest has records that these Plaintiffs clicked "I accept" while configuring their computers for Qwest's service. (Dkt. #82-1, Kohler Aff. ¶¶ 13-14.) Likewise, Plaintiff Durkin admits to successfully using the Qwest QuickConnect CD, which required acceptance of the Agreement. (Ex. 2, Durkin Dep. at 21:15-23:25, 92:1-8.) Customers who ordered by phone (R. Durkin, T. Moore, B. Sandquist) typically accepted the terms of the Subscriber Agreement through the automated

telephone system to complete the order and then received a Welcome Letter, in accordance with Qwest's best practices. (Dkt. #82-1, Kohler Aff. ¶ 5; Dkt. # 82-5, Beardsley Aff. ¶¶ 11-20.) For online purchases (Ms. Vernon), the customer was required to click-to-accept the terms to complete the order and then received a Welcome Letter. (Dkt. #82-1, Kohler Aff. ¶ 6, Dkt. # 82-5, Beardsley Aff. ¶¶ 9-10.) All Plaintiffs were required to click-to-accept the terms to install the QuickConnect CD and configure their computers to use the service (R. Vernon, B. Sandquist, and R. Durkin), or they received a paper agreement (T. Moore). (Dkt. #82-1, Kohler Aff. ¶¶ 7-8; Dkt. # 82-5, Beardsley Aff. ¶ 18.) And, all of the customers were given the option to opt-out of the Agreement within 30 days which they rejected by continued use of the service. (Dkt. #27, Leo Aff., Ex. B thereto, § 12(c).)

Moreover, Qwest's established practices and procedures demonstrate that the Plaintiffs in this case each received Welcome Letters. All Qwest customer orders are entered into Qwest's Service Order Processing Software with a universal service order code corresponding to the service or product ordered. (Dkt. #82-5, Beardsley Aff. ¶ 5.) Qwest then employs a mechanized process for generating a Welcome Letter conforming to the customer's specific order for mailing within one business day. (*Id.* ¶¶ 6-8.) Throughout the relevant time period, on each business day, Qwest posted information concerning residential customers' orders to a secure internet-accessible site from which BCS, a third-party ISO-certified and SAS 70-compliant vendor, retrieves the information using file transfer protocols. (Ex. 12, Bennett Aff. ¶¶ 6-8, 10-12.) BCS inputs the customer information provided by Qwest into a Qwest-provided template Welcome Letter, then prints and mails the Welcome Letters the same business day. (Dkt. #82-5, Beardsley Aff. ¶¶ 6-8; Bennett Aff. ¶¶ 10-12.) BCS has numerous quality assurance mechanisms,

including the use of bar codes for each individual Letter and the monitoring of machine starts and stops, to ensure that no letter is lost, skipped, or damaged. (Ex. 12, Bennett Aff. ¶¶ 14-15.) BCS's records for the dates upon which each Plaintiff's Price for Life order would have been processed indicate that all orders for Qwest service placed by customers in their respective home states were processed and Welcome Letters sent in compliance with Qwest's instructions. (Exs. 6-11.)

Far from being unreliable and insufficient, this is precisely the type of evidence that creates a presumption that the procedures were followed in the case at hand and that a contract was formed. Indeed, based on these multiple instances in which Qwest provided these customers the terms and conditions of the Agreement in its ordinary course of business, any claim that the Plaintiffs did not receive these documents or follow these automated acceptance procedures is "simply not plausible." *Garrison*, 2010 U.S. Dist. LEXIS 26501, at *12; *Honig*, 537 F. Supp. 2d at 1283-84 (finding agreement to arbitrate enforceable based on standard practices); *Comvest, L.L.C. v. Corporate Secs. Grp., Inc.*, 507 S.E.2d 21, 23 (Ga. Ct. App. 1998) (arbitration clause enforceable based on company practice); *Pleasants v. Am. Express Co.*, 541 F.3d 853 (8th Cir. 2008) (presumption of notice); *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909, 918 (N.D. Tex. 2000) (presumption of receipt).

The Plaintiffs cannot overcome the evidence and presumption of contract formation by simply denying memory of the Agreement.¹³ See *Pleasants*, 541 F.3d at 856 n.3 (presumption of contract acceptance was not overcome by plaintiff denying recall of the terms); *Marsh*,

¹³ The Plaintiffs' lack of memory demonstrates only that they have no evidence to offer to rebut the existence of a contract. (Ex. 2, Durkin Dep. at 39:14-18, 45:1-15; 55:24-56:12; Ex. 4, Sandquist Dep. at 10:10-11:16, 20:6-14; Ex. 5, Vernon Dep. at 26:9-17, 36:10-14, 47:7-10, 51:3-8, 54:13-19.)

103 F. Supp. 2d at 919 (plaintiffs' denials could not rebut presumption of delivery); *Leverage Leasing Co. v. Smith*, 143 P.3d 1164, 1168 (Colo. App. 2006) (failure to read contract is not a defense to enforcement). Indeed, if this type of evidence were insufficient, parties could always avoid their contractual obligations by claiming poor memory and it would be impossible for companies to establish contracts in modern business transactions.

CONCLUSION

For the reasons stated above, Defendants respectfully request this Court stay these proceedings and compel arbitration.

DATED this 25th day of May, 2011.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

s/ Peter J. Korneffel

Peter J. Korneffel, Jr.
Zhonette M. Brown
Kathryn R. DeBord
410 Seventeenth Street, Suite 2200
Denver, CO 80202-4432
Telephone: 303.233.1100
Facsimile: 303.223.1111
Email: pkorneffel@bhfs.com
zbrown@bhfs.com
kdebord@bhfs.com

*Attorneys for Defendants Qwest
Communications International Inc.,
Qwest Services Corp., Qwest Corp.,
Qwest Communications Company, LLC,
and Qwest Broadband Services, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2011, I electronically filed the foregoing **DEFENDANTS RENEWED MOTION TO COMPEL ARBITRATION** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following email addresses:

<p>Jeffrey A. Berens Darby K. Kennedy DYER & BERENS LLP 303 East 17th Avenue, Suite 300 Denver, CO 80203 Phone: 303.861.1764 Fax: 303.395.0393 jeff@dyerberens.com darby@dyerberens.com</p> <p>Michael D. Lieder Sprenger & Lang PLLC - D.C. 1400 Eye Street, N.W., Suite 500 Washington, DC 20005 Phone: 202.265.8010 Fax: 202.332.6652 mlieder@sprengerlang.com</p>	<p>Beth E. Terrell Toby J. Marshall Kimberlee L. Gunning Jennifer Rust Murray Terrell Marshall Daudt & Willie PLLC 936 North 34th Street, Suite 400 Seattle, WA 98103-8869 Phone: 206.350.6603 Fax: 206.350.3528 bterrell@tmdwlaw.com tmarshall@tmdwlaw.com kunning@tmdwlaw.com jmurray@tmdwlaw.com</p>
---	--

s/ Cynthia A. Smith

Cynthia A. Smith