

**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' REPLY IN SUPPORT OF THEIR
RENEWED MOTION TO COMPEL ARBITRATION**

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

I. PLAINTIFFS ACCEPTED THE SUBSCRIBER AGREEMENT 2

 A. Notice of the Subscriber Agreement Together With Offering Continual
 Access to the Agreement is Sufficient As a Matter of Law to Form a
 Contract..... 2

 B. Qwest Provided Plaintiffs Adequate Notice That the Subscriber
 Agreement Governed Their HSI Service..... 4

II. THE SUBSCRIBER AGREEMENT IS NOT ILLUSORY 7

III. QWEST DID NOT WAIVE ITS RIGHT TO ARBITRATION 10

IV. THE PLAINTIFFS’ UNCONSCIONABILITY CLAIM IS BARRED BY
CONCEPCION 12

V. THE ARBITRATION CLAUSE IS CONSCIONABLE AND ENFORCEABLE 16

 A. The Arbitration Clause Is Not Procedurally Unconscionable Under
 Colorado Law..... 16

 B. The Arbitration Clause Is Not Substantively Unconscionable
 Under Colorado Law..... 17

CONCLUSION..... 20

TABLE OF AUTHORITIES

FEDERAL CASES

ACE Am. Ins. Co. v Wendt, LLP,
724 F. Supp. 2d 899 (N.D. Ill. 2010)3, 4

Arellano v. T-Mobile USA, Inc.,
No. C 10-05663 WHA, 2011 WL 1842712 (N.D. Cal. May 16, 2011).....13, 15

AT&T Mobility v. Concepcion,
563 U.S. ___, 131 S. Ct. 1740 (Apr. 27, 2011).....1, 2, 12, 13, 14, 15, 16

Axis Venture Grp., LLC v. 1111 Tower, LLC,
No. 09-cv-01636-PAB-KMT, 2010 WL 1278306 (D. Colo. Mar. 30, 2010).....14

Bates v. Dep’t of Correction,
81 F.3d 1008 (10th Cir. 1996)14

Belcourt v. Grivel, S.L.R.,
No. 2:08-cv-902-TC, 2009 WL 3764085 (D. Utah Nov. 9, 2009)11

Bellows v. Midland Credit Mgmt., Inc.,
No. 09CV1951-LAB (NMc), 2011 WL 1691323 (S.D. Cal. May 4, 2011).....13

Bonanno v. Quizno’s Franchise Co., LLC,
No. 06-cv-02358-CMA-KLM, 2009 WL 1068744
(D. Colo. Apr. 20, 2009)14, 15, 16

Bradford v. Rockwell Semiconductor Sys. Inc.,
238 F.3d 549 (4th Cir. 2001)19

Cicle v. Chase Bank USA,
583 F.3d 549 (8th Cir. 2009)18

Conrad v. Phone Directories Co.,
585 F.3d 1376 (10th Cir. 2009)10

Crawford v. U. S. Auto. Assoc.,
No. 06-cv-00380-EWN-BNB, 2006 U.S. Dist. LEXIS 46433
(D. Colo. July 7, 2006).....10

D’Antuono v. Serv. Rd. Corp.,
No. 3:11cv33 (MRK), 2011 WL 2175932 (D. Conn. May 25, 2011)13

Dale v. Comcast Corp.,
498 F.3d 1216 (11th Cir. 2007).....15

Day v. Persels & Assoc.,
No. 8:10cv2463-T-33TGW, 2011 WL 1770300 (M.D. Fla. May 9, 2011).....13

Drelles v. Metro. Life Ins. Co.,
357 F.3d 344 (3d Cir. 2003).....13

Dumais v. Am. Golf Corp.,
299 F.3d 1216 (10th Cir. 2002)8

Feldman v. Jobson Public, LLC,
No. 04-cv-1185-WDM-PAC, 2005 WL 2396938 (D. Colo. Sept. 28, 2005).....8

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991).....14, 16

Green Tree Fin. Corp.-Ala. v. Randolph,
531 U.S. 79 (2000).....18

H&H Transformer, Inc. v. Battelle Energy Alliance, LLC,
09-cv-00442-WYDBNB, U.S. Dist. LEXIS 105753 (D. Colo. Oct. 23, 2009).....3, 7

Hardin v. First Cash Fin. Servs., Inc.,
465 F.3d 470 (10th Cir. 2006)9

Harris v. Green Tree Fin. Corp.,
183 F.3d 173 (3rd Cir. 1999)7

Hill v. Ricoh Ams. Corp.,
603 F.3d 766 (10th Cir. 2010)11

Hirschi v. Newcastle Props., Inc.,
No. 06-cv-01424-PSF-MJW, 2006 WL 2927493 (D. Colo. Oct. 12, 2006).....8

Hooper v. Advance Am., Cash Advance Ctrs. of Mo., Inc.,
589 F.3d 917 (8th Cir. 2009)12

Int’l Star Registry of Ill. v. Omnipoint Mktg., LLC,
510 F. Supp. 2d 1015 (S.D. Fla. 2007)4

Inv. Partners, L.P. v. Glamour Shots Licensing, Inc.,
298 F.3d 314 (5th Cir. 2002)17

James v. McDonald’s Corp.,
 417 F.3d 672 (7th Cir. 2005)19

Jeske v. Brookes,
 875 F.2d 71 (4th Cir. 1989)8

Kristian v. Comcast Corp.,
 446 F.3d 25 (1st Cir. 2006).....15

Lumuenemo v. Citigroup Inc.,
 No. 08-cv-00830-WYD-BNB, 2009 WL 371901 (D. Colo. Feb. 12, 2009)9

Main St. Bank. v. Carlyle Van Lines,
 No. 4:08-cv-0546-DGK, 2010 WL 5099367 (W.D. Mo. Dec. 8, 2010).....4

Marsh v. First USA Bank, N.A.,
 103 F. Supp. 2d 909 (N.D. Tex. 2000)4

McWilliams v. Logicon, Inc.,
 143 F.3d 573 (10th Cir. 1998)10

Metz v. Merrill Lynch, Pierce, Fenner & Smith,
 39 F.3d 1482 (10th Cir. 1994)11

Micrometl Corp. v. Tranzact Techs., Inc.,
 No. 1:08-cv-0321-LJM-WTL, 2008 WL 2356511 (S.D. Ind. June 5, 2008).....4

One Beacon Ins. Co. v. Crowley Marine Servs.,
 No. H-08-2059, 2010 WL 1463451 (S.D. Tex. Apr. 12, 2010).....4

Ornelas v. Sonic-Denver T, Inc.,
 No. 06-cv-00253-PSF-MJW, 2007 WL 274738 (D. Colo. Jan. 29, 2007)15

PacifiCare Health Sys., Inc. v. Book,
 538 U.S. 401 (2003).....17, 18

Pendergast v. Sprint Nextel Corp.,
 592 F.3d 1119 (11th Cir. 2010)15

Perry v. Fleet Boston Fin. Corp.,
 No. 04-507, 2004 U.S. Dist. LEXIS 12616 (E.D. Pa. July 6, 2004).....9

Pleasants v. Am. Express Co.,
541 F.3d 853 (8th Cir. 2008)4

Prima Paint Corp. v. Flood & Conklin Mfg. Co.,
388 U.S. 395 (1967).....8

Schwartz v. Comcast Corp.,
256 Fed. App’x 515 (3d Cir. 2007).....4, 5

Spartech CMD, LLC v. Inter’l Auto. Components Grp. N. Am., Inc.,
No. 08-13234, 2009 WL 440905 (E. D. Mich. Feb. 23, 2009).....4

St. Mary’s Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co.,
969 F.2d 585 (7th Cir. 1992)12

Stein v. Burt-Kuni One, LLC,
396 F. Supp. 2d 1211 (D. Colo. 2005).....8

In re Universal Serv. Fund Telegraph Billing Practices Litig.,
300 F. Supp. 2d 1107 (D. Kan. 2003).....17, 18

Wolf v. Nissan Motor Acceptance Corp.,
No. L 2490939, 2011 WL 2490930 (D.N.J. June 22, 2011).....15, 16

Zarandi v. Alliance Data Sys. Corp.,
Number CV 10-8309, 2011 WL 1827228 (C.D. Cal. May 9, 2011)13

STATE CASES

In re Advance PCS Health L.P.,
172 S.W.3d 603 (Tex. 2005).....8, 9

Briceno v. Sprint Spectrum, L.P.,
911 So. 2d 176 (Fla. 3d Dist. Ct. App. 2005)3

Discover Bank v. Super. Ct.,
113 P.3d 1100 (Cal. 2005)12, 13

Eagle v. Fred Martin Motor Co.,
809 N.E.2d 1161 (Ohio Ct. App. 2004).....16

Gen. Impact Glass & Windows Corp. v. Rollac Shutter of Tex.,
8 So. 3d 1165 (Fla. 3d Dist. Ct. App. 2009)3

Kinkel v. Cingular Wireless, LLC,
857 N.E.2d 250 (Ill. 2006).....15

Lindsey v. Flebbe,
38 P. 397 (Colo. App. 1894).....2

Muhammad v. County Bank of Rehoboth Beach,
912 A.2d 88 (N.J. 2006).....15

Rains v. Found. Health Sys. Life & Health,
23 P.3d 1249 (Colo. App. 2001).....7, 14, 18, 19

Sedalia Land Co. v. Robinson Brick & Tile Co.,
475 P.2d 351 (Colo. App. 1970).....7, 8

Tillman v. Commercial Credit Loans, Inc.,
655 S.E.2d 362 (N.C. 2008).....16

Univ. Hills Beauty Acad. v. Mountain States Tel. & Tel. Co.,
554 P.2d 723 (Colo. App. 1976).....14

DOCKETED CASES

Grosvenor v. Qwest Corp., No. 09-cv-2848-WDM-KMT5

FEDERAL STATUTES

9 U.S.C. § 3.....1

9 U.S.C. § 4.....1

Fed. R. Civ. P. 12(b)(1).....1

Fed. R. Civ. P. 12(g)(2).....10

Fed. R. Civ. P. 12(h)10

STATE STATUTES

Colo. Rev. Stat. § 6-1-113(2).....17, 19

Colo. R. P. Sm. Cl. Cts 516.19

Minn. Conc. Ct. Rule 506.....19

Minn. Conc. Ct. Rule 516.....	19
Wash. Rev. Code § 12.40.045.....	19
Wash. Rev. Code § 19.86.090.....	17
Wash. Rev. Code § 36.18.040.....	19

Pursuant to Fed. R. Civ. P. 12(b)(1) and 9 U.S.C. §§ 3, 4, the Qwest Defendants (collectively “Defendants” or “Qwest”) hereby submit their Reply in Support of Their Renewed Motion to Compel Arbitration (“Motion”).

INTRODUCTION

The Plaintiffs’ Response attempts to sustain this action by misstating contract formation, illusory, and waiver law, and improperly marginalizing the scope of *Concepcion*.¹ At root, there are four essential components to this case that the Plaintiffs cannot legitimately contest and that mandate the Plaintiffs bring their claims individually in arbitration.

First, a contract was formed as to each of the Plaintiffs: Qwest’s multiple processes demonstrate that the Plaintiffs received adequate notice of the terms, and, contrary to the Plaintiffs’ assertions, no further delivery of terms is required by Colorado law or any other law. The Plaintiffs’ current lack of memory about the terms is irrelevant to the contract formation analysis.

Second, the contract is not illusory. It was supported by consideration and required Qwest to notify its subscribers in the event of any material changes to the contract.

Third, Qwest never waived its right to arbitrate. For three years now, since the very inception of this case, Qwest has consistently sought to enforce its arbitration rights. Under straightforward Tenth Circuit precedent, no waiver can exist where, as here, a party unambiguously asserts its right to arbitration in its first responsive pleading under Rule 12, as Qwest did.

¹ See *AT&T Mobility, LLC v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740 (Apr. 27, 2011).

Fourth, *Concepcion* conclusively defeats the Plaintiffs' unconscionability claims. And regardless, the Qwest High-Speed Internet Subscriber Agreement ("Subscriber Agreement" or "Agreement") is conscionable under Colorado law.

ARGUMENT

I. PLAINTIFFS ACCEPTED THE SUBSCRIBER AGREEMENT

The Plaintiffs argue that Qwest must physically deliver the written contract, rather than provide notice of the contract's terms and direction to its website location, to form a valid contract. This is not the law of modern e-commerce, and would reverse decades of contract formation law.

A. Notice of the Subscriber Agreement Together With Offering Continual Access to the Agreement is Sufficient As a Matter of Law to Form a Contract.

The Plaintiffs rely on three cases – one Colorado state court case that is 117 years old, and two Florida cases – for the proposition that, for a valid contract to be formed, the contract must be physically delivered to the contracting party. Setting aside their facially dubious precedential weight and authority, none of these cases stands for the proposition that the Plaintiffs claim, and, at best, the Plaintiffs have misread their holdings. Nowhere, for example, does *Lindsey v. Flebbe*, 38 P. 397, 398-99 (Colo. App. 1894) state that a contract "must at least have been delivered or presented" to form a binding contract. Rather, the *Lindsey* case, which has never been cited by a Colorado court for the proposition that delivery of terms is required to form a valid contract, simply stands for the obvious proposition that a binding contract "*can undoubtedly be made* by the delivery of a memorandum expressing its terms." *Lindsey*, 38 P. at 398 (emphasis added).

The Plaintiffs notably do not cite any other Colorado case for their “delivery required” proposition, because there is none. Instead, they cite Florida’s *Briceno v. Sprint Spectrum, L.P.*, 911 So.2d 176 (Fla. 3d Dist. Ct. App. 2005) and *General Impact Glass & Windows Corp. v. Rollac Shutter of Texas, Inc.*, 8 So. 3d 1165 (Fla. 3d Dist. Ct. App. 2009). But *Briceno* did not, as the Plaintiffs claim, hold that delivery of the contract is required for valid contract formation. Rather, the court held, consistent with Qwest’s arguments, that a valid contract was formed because the plaintiff “had access to the Terms and Conditions and its subsequent amendments via Sprint’s website” and that Sprint provided *notice* of changes to the terms on the invoices mailed to the plaintiff. *Briceno*, 911 So.2d at 178-80. And in *General Impact*, although the terms and conditions requiring arbitration were available on the Defendant’s website, those terms and conditions were never expressly incorporated into any of the documents that formed the contract between the parties, unlike here. *General Impact*, 8 So. 3d at 1167.

Contrary to the Plaintiffs’ arguments, this very Court has observed that failure to receive a copy of terms incorporated by reference does not permit avoidance. *See H&H Transformer, Inc. v. Battelle Energy Alliance, LLC*, No. 09-cv-00442-WYD-BNB, 2009 U.S. Dist. LEXIS 105753, at *19 n.2 (D. Colo. Oct. 23, 2009). And consistent with modern contract formation necessities, courts across the country routinely hold that notice of contract terms hosted on a website or electronically delivered are binding. *See, e.g., ACE Am. Ins. Co. v Wendt, LLP*,

724 F. Supp. 2d 899 (N.D. Ill. 2010) (web-hosted terms provided sufficient notice).²

B. Qwest Provided Plaintiffs Adequate Notice That the Subscriber Agreement Governed Their HSI Service.

Qwest repeatedly notified Plaintiffs that the Agreement governed their Qwest HSI service and could be reviewed at Qwest's website.

First, Qwest has established and the Plaintiffs have not denied that Qwest's custom and practice is to deliver a Welcome Letter to confirm each HSI order, which expressly informs subscribers that their service is governed by the Subscriber Agreement, that the Agreement includes an arbitration provision, and that the Agreement is "located at www.qwest.com/legal." (Dkt. Nos. 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) At all relevant times, the Subscriber Agreement was available at the website. (Defendants' Renewed Motion to Compel Arbitration ("Mot.") at 5 n.4) The Plaintiffs' defense—that they do not recall receipt of the letter—is legally irrelevant. *See Pleasants v. Am. Express Co.*, 541 F.3d 853, 856 n.3 (8th Cir. 2008) (presumption of contract acceptance not overcome by plaintiff denying recall of the terms); *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909, 918-19 (N.D. Tex. 2000) (evidence of mailing creates presumption of receipt); *Schwartz v. Comcast Corp.*, 256 Fed. App'x 515,

² *See also One Beacon Ins. Co. v. Crowley Marine Servs.*, No. H-08-2059, 2010 WL 1463451, at *2, *4-5 (S.D. Tex. Apr. 12, 2010) (notice of terms on URL sufficient); *Spartech CMD, LLC v. Int'l Auto. Components Grp. N. Am, Inc.*, No. 08-13234, 2009 WL 440905, at *1, *5 (E. D. Mich. Feb. 23, 2009) (enforcing arbitration clause at URL and incorporated by reference into purchase order); *Micrometl Corp. v. Tranzact Techs., Inc.*, No. 1:08-cv-0321-LJM-WTL, 2008 WL 2356511, at *1-4 (S.D. Ind. June 5, 2008) (enforcing terms found at URL incorporated by reference into written contract); *Int'l Star Registry of Ill. v. Omnipoint Mktg., LLC*, 510 F. Supp. 2d 1015, 1019, 1021 (S.D. Fla. 2007) (enforcing venue and choice-of-law provisions at URL incorporated into invoice); *Main St. Bank v. Carlyle Van Lines*, No. 4:08-cv-0546-DGK, 2010 WL 5099367, at *3 *8 (W.D. Mo. Dec. 8, 2010) (treating document at referenced website as part of parties' contract).

518-19 (3d Cir. 2007) (evidence of policy of sending welcome letter referencing subscriber agreement constituted “proof of actual notice”).

Second, the Plaintiffs also admit that Qwest provides new subscribers and some others with a QuickConnect CD to configure their computers and modems for Qwest’s HSI service. (Mot. at 7-8; Pls.’ Resp. at 3) Plaintiffs Vernon, Sandquist and Durkin do not deny using the QuickConnect CD, and Qwest’s records establish that Plaintiffs Vernon and Sandquist used the QuickConnect CD. (Mot. at 7) Like the Welcome Letters, the QuickConnect CDs informed Plaintiffs that their use of Qwest’s equipment and service was subject to the Agreement, that the Agreement could be viewed on the internet, and that clicking to complete configuration constituted acceptance of the Agreement. (Dkt. No. 27-6, Leo Aff., Ex. E)

Third, the evidence – as opposed to Plaintiffs’ counsel’s representations – shows that the QuickConnect CD unambiguously put Plaintiffs on notice that the Subscriber Agreement governed their service and that the Agreement included an arbitration clause. The Plaintiffs argue, citing an interlocutory Order entered in the case captioned *Grosvenor v. Qwest Corp.*, No. 09-cv-2848-WDM-KMT, D. Colo., that Qwest did not present the Subscriber Agreement to the Plaintiffs via the QuickConnect CD. This is incorrect. In the *Grosvenor* case, the Plaintiff’s counsel (who also represent the Plaintiffs here) represented to Judge Miller that a document they filed with the court was “a complete copy of the language *on the screen*” during the use of the QuickConnect CD. (*Id.* at Dkt. No. 46-1 at 2) (emphasis added) Plaintiff’s counsel in *Grosvenor* also argued to the court, but did not present evidence, that during installation a subscriber could not review Qwest’s Subscriber Agreement on the internet. (*Id.* at 5-6) Judge Miller relied on these representations in his Order and the Plaintiffs now quote themselves

through Judge Miller here. (*Id.* at Dkt. No. 65; Pls.’ Resp. at 6) In reality, however, a subscriber can use the internet and view the Subscriber Agreement while using Qwest’s QuickConnect CD, and the incorporation of Qwest’s Subscriber Agreement does appear on the same initial screen as the click to accept button. (Kohler Aff. in Supp. of Defs.’ Mot. to Compel Arbit. (“Kohler Aff.”) ¶ 7, Dkt. No. 34-4)³ In any event, not only was Judge Miller’s decision founded upon the plaintiff’s misrepresentations of the operation of the QuickConnect CD, but also, it did not purport to be dispositive on the question of contract formation.

Finally, the Plaintiffs’ argument that no contract was formed because they could not be released from the Subscriber Agreement during the 30-day look-back period is illogical and internally inconsistent. (Pls.’ Resp. at 8-9) To the extent that Plaintiffs contend they were not eligible to cancel their service to avoid the Agreement, it would be because the Plaintiffs were already bound to the Agreement by a prior passage of the 30-day look-back period. For instance, Plaintiffs Vernon, Durkin and Moore were Qwest HSI subscribers during the deregulation period. (Mot. at 3) When Qwest moved to a non-tariffed service governed by the Subscriber Agreement, Vernon, Durkin and Moore had the opportunity to cancel their service. (*Id.*) Moreover, the Plaintiffs did not attempt to terminate and none remembers receiving Qwest’s notices, thus the 30-day look back could not have “induced” Plaintiffs one way or another.

³ As explained in Qwest’s Motion, the first screen of Qwest’s QuickConnect CD’s Legal Agreements page informs subscribers in the first sentence to “Please read the Qwest High-Speed Internet (also called Qwest Broadband) Subscriber Agreement terms, *including arbitration and limits on Qwest liability*, at www.qwest.com/legal (“Qwest Agreement”) that govern your use and Qwest’s provision of the service(s) and equipment you ordered . . .” (Mot. at 7) (emphasis in original)

II. THE SUBSCRIBER AGREEMENT IS NOT ILLUSORY

Neither state contract law nor federal arbitration law supports Plaintiffs' argument that the Subscriber Agreement's Arbitration Clause is illusory.

In Colorado, individual contract clauses need not be mutual; instead, consideration for a contract is evaluated by looking at the contract as whole, rather than looking at each contract provision individually. *See Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1255 (Colo. App. 2001) ("Under Colorado law, every contractual obligation need not be mutual as long as each party has provided some consideration for the contract."); *Sedalia Land Co. v. Robinson Brick & Tile Co.*, 475 P.2d 351, 353 (Colo. App. 1970) (rights in a contract need not be identical and reciprocal). Thus, in Colorado and elsewhere, an arbitration provision need not contain mutual obligations to be binding so long as there is consideration for the contract as a whole. *See Rains*, 23 P.3d at 1255; *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 180-81 (3rd Cir. 1999) (holding arbitration provision need not be mutual and collecting cases with a similar holding).

Here, because the contract as a whole is supported by mutual consideration, the Agreement is enforceable. Qwest provided high-speed internet service to each Plaintiff for so long as the Plaintiff chose to accept such service. Qwest provided its service subject to the Subscriber Agreement, which bound Qwest to certain pricing terms, and created other obligations and limitations related to Qwest's provision of its HSI service. Qwest's performance under the Agreement and the Plaintiffs' acceptance of the benefits of Qwest's performance preclude any dispute as to whether Qwest provided consideration for Plaintiffs' acceptance of the Agreement. *See H&H Transformer*, 2009 U.S. Dist. LEXIS 105753, at *17 (contract was not illusory where both parties had taken significant steps to perform under the contract); *Sedalia*,

475 P.2d. at 353 (holding that determination of the sufficiency of consideration was “rendered unnecessary by the fact that” the parties had already mutually performed under the contract for a number of years); *In re Advance PCS Health L.P.*, 172 S.W.3d 603, 606-07 (Tex. 2005) (holding plaintiff could not claim contract was illusory after receiving contract’s benefits).⁴

Plaintiffs’ illusory argument relies entirely upon *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002) and subsequent district court cases following *Dumais*. *Dumais* and all of the cases cited by Plaintiffs were decided in the context of an employee asserting a discrimination claim or other employment-related claim and an employer citing and attempting to rely upon an arbitration agreement contained in an employee handbook or similar document. In each case, no provision in the handbook or employment documents other than the arbitration provision was binding upon the employer. *See Dumais*, 299 F.3d at 1217; *Hirschi v. Newcastle Props., Inc.*, No. 06-cv-01424-PSF-MJW, 2006 WL 2927493, at *1-2 (D. Colo. Oct. 12, 2006); *Feldman v. Jobson Pub., LLC*, No. 04-cv-1185-WDM-PAC, 2005 WL 2396938, at *2 (D. Colo. Sept. 28, 2005); *Stein v. Burt-Kuni One, LLC*, 396 F. Supp. 2d 1211, 1214 (D. Colo. 2005). Thus, in these cases, unlike here, the arbitration provision was the *entire* contract between the parties. If there was no mutuality in the arbitration agreement, there was no consideration for the employee’s contract, and no contract was formed. Obviously, this case is wholly distinguishable where the arbitration clause is not the entire contract between the parties and consideration exists throughout the contract. *See In re Advance PCS Health L.P.*, 172 S.W.3d at 607 (in the context

⁴In any event, the question of whether the entire contract was illusory would be an issue for an arbitrator rather than this Court to determine. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967) (holding claim of voidability of the entire contract, not merely the arbitration clause, is a matter to be referred to the arbitrator); *Jeske v. Brookes*, 875 F.2d 71, 75 (4th Cir. 1989) (holding that when alleged defect of lack of consideration “pertain[s] to the entire contract, rather than specifically to the arbitration clause, [it is] properly left to the arbitrator for resolution”).

of a “stand-alone arbitration agreement” the arbitration agreement must be mutual to be enforceable, but “when an arbitration clause is part of an underlying contract, the rest of the parties’ agreement provides consideration.”).

Regardless, the Subscriber Agreement does not give Qwest the unfettered right to change the scope or existence of the Arbitration Clause. First, the Agreement requires 30 days notice prior to making any changes to the Agreement that would directly result in a “material and adverse economic impact to” the subscribers.⁵ (Dkt. No. 27-3, Sub. Agr. § 4) This notice requirement prevents the Arbitration Clause from being illusory. *See Hardin v. First Cash Fin. Servs., Inc.*, 465 F.3d 470, 478 (10th Cir. 2006) (requirement to provide ten days notice before changing arbitration provision and limitation that amendment would not apply to existing disputes provided sufficient consideration); *Lumuenemo v. Citigroup Inc.*, No. 08-cv-00830-WYD-BNB, 2009 WL 371901 (D. Colo. Feb. 12, 2009). Indeed, limited change-of-terms provisions such as those in the Qwest Subscriber Agreement are necessary in modern consumer contracting due to “ever-changing-economic conditions [and] the fast-moving and highly competitive” marketplace. *Perry v. Fleet Boston Fin. Corp.*, No. 04-507, 2004 U.S. Dist. LEXIS 12616, at *13–14 (E.D. Pa. July 6, 2004).

Moreover, as a practical matter, here, Qwest cannot change its arbitration agreement. Each of the Plaintiffs has terminated his/her Qwest HSI service. (Third Am. Compl. ¶¶ 19, 28,

⁵This notice requirement would be applicable to any changes to the Arbitration Clause. This is because this provision, as it stands, provides for the lowest cost dispute mechanism available – individual arbitration or individual litigation in small claims court. (Dkt. No. 27-3, Sub. Agr. § 17) Moreover, Qwest agrees in this provision that an individual residential customer need pay only one half of the arbitration fees, up to a maximum of \$125. (*Id.*) If Qwest were to eliminate or alter this provision to require dispute resolution processes with greater cost to the subscribers, Qwest would be required to provide the subscribers with 30 days notice, as requiring its subscribers to bear more of the arbitration costs or litigate their claims in court would undoubtedly “result in a material and economic adverse impact” to them. *See* Section II, *supra*.

30, 35, Dkt. No. 54) Qwest is therefore not able to amend the Subscriber Agreement in a manner that would be binding upon the Plaintiffs, and is equally bound to arbitrate these claims. This mutuality of obligation, while not necessary, is sufficient to allow Qwest to enforce the Arbitration Clause. *Crawford v. U. S. Auto. Assoc.*, No. 06-cv-00380-EWN-BNB, 2006 U.S. Dist. LEXIS 46433, at *26 (D. Colo. July 7, 2006) (mutually binding arbitration provision was sufficient consideration).

III. QWEST DID NOT WAIVE ITS RIGHT TO ARBITRATION

Plaintiffs' Hail Mary argument that Qwest waived its right to arbitrate under the Subscriber Agreement by filing a contemporaneous motion to dismiss is baseless. No waiver can exist where, as here, a party unambiguously asserts its right to arbitration in its first responsive pleading under Rule 12. *See, e.g., McWilliams v. Logicon, Inc.*, 143 F.3d 573, 577-78 (10th Cir. 1998). Indeed, any other result would be inconsistent with Rule 12 itself, which requires that certain Rule 12 defenses, including improper venue, be presented in a first responsive pleading, and also requires that most other Rule 12(b) motions be filed at the same time to preserve rights. *See Fed. R. Civ. P. 12(g)(2), (h); Conrad v. Phone Directories Co.*, 585 F.3d 1376, 1383 n. 2 (10th Cir. 2009).

Here, for three years, since the inception of this case, the parties have been litigating the arbitrability of these claims. Qwest has asserted its rights to arbitration in every court and in every forum, has deliberately limited discovery to issues relating to arbitration, and has made clear in every motion and pleading it has filed that it seeks to arbitrate these claims. Qwest moved to compel arbitration in its first responsive pleadings filed in the Western District of Washington and then in this Court. (Wash. Dkt. Nos. 33, 34, 36) Plaintiffs then filed an amended complaint, after which the parties stipulated to a new briefing schedule on Qwest's

motions. (*See* Stip. and Proposed Order, Wash. Dkt. No. 54) On the same day that Qwest was to refile its motion to compel arbitration, the Washington court ordered the parties not to file any additional pleadings or motions, including any motion to compel arbitration, until after the court had ruled on Qwest's motions to dismiss and/or to transfer. (*See* Minute Order, Wash. Dkt. No. 60) The Washington court transferred the case to this Court, Plaintiffs filed another amended complaint, and then Qwest timely filed its Motion to Compel Arbitration. (Colo. Dkt. Nos. 20, 26) Given this litigation history, it is implausible to suggest that Qwest has somehow waived its right to arbitration through its litigation filings. *See Hill v. Ricoh Ams. Corp.*, 603 F.3d 766, 775 (10th Cir. 2010) (four month delay of requesting arbitration after filing responsive pleading does not constitute waiver).⁶

To that end, the Plaintiffs have not suffered any prejudice from Qwest's approach. Even under the factors articulated in *Metz v. Merrill Lynch, Pierce, Fenner & Smith*, 39 F.3d 1482, 1489 (10th Cir. 1994), the Plaintiffs ignore the factors related to prejudice. No trial date has been set in this case, and Qwest filed its motion to compel contemporaneously with its Rule 12 motions. Qwest put Plaintiffs on notice of its intent to seek arbitration even before filing its responsive pleadings, (*see* Joint Status Rep. (Wash. Dkt. No. 41) at 3; Defs.' Mot. for Leave to File Overlength Br. (Wash. Dkt. No. 24)). Whatever costs Plaintiffs have incurred have resulted from their filing in an improper forum, from their consistently deficient pleadings, from their insistence on seeking discovery to oppose Qwest's motion to compel arbitration, and from the

⁶ Plaintiffs point to a single statement from a footnote in Qwest's motion to compel arbitration as evidence that Qwest has made "representations . . . inconsistent with the right to arbitration." (Pls.' Resp. at 12). Unlike the defendant in *Belcourt v. Grivel, S.L.R.*, No. 2:08-cv-902-TC, 2009 WL 3764085, at *4 (D. Utah Nov. 9, 2009), who expressed a willingness to proceed in court even if a motion to compel were granted so long as Italian law was applied, Qwest has not taken any actions inconsistent with its right to arbitrate. Plaintiffs cannot explain why Qwest's desire to pursue arbitration in conformance with the full scope of the Arbitration Clause (i.e., individual arbitration) is inconsistent with its right to arbitrate.

Washington court’s decision to rule on Qwest’s motions to transfer and to dismiss before ruling on Qwest’s motion to compel arbitration.⁷

IV. THE PLAINTIFFS’ UNCONSCIONABILITY CLAIM IS BARRED BY *CONCEPCION*

While acknowledging that *Discover Bank* is preempted by *Concepcion*, the Plaintiffs claim that they can make the same argument as that presented in *Discover Bank*—that the Clause prevents them from vindicating small dollar value claims—by virtue of perceived differences in Qwest’s Arbitration Clause and Colorado unconscionability law. (Pls.’ Resp. at 23) The Plaintiffs base this alleged differentiation on (1) the six factor analysis used by *Davis*, and (2) the provisions limiting liability, requiring the payment of \$125.00 in arbitration fees, reducing the statute of limitations, and requiring confidentiality in addition to a class action waiver provision in the Subscriber Agreement. (See Pls.’ Resp. at 20)

This argument runs head-first into the *Concepcion* decision. Regardless of how they dress up the argument, the sum of the Plaintiffs’ unconscionability argument is that the Arbitration Clause is not enforceable because it prohibits class proceedings for low value claims. *Concepcion* made clear, however, that state unconscionability law cannot be used to invalidate an arbitration clause based on such a claimed inability to prosecute low value claims due to the absence of a class mechanism: “The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. But States

⁷ The cases relied upon by Plaintiffs do not support their position that waiver exists anytime a defendant files a motion to dismiss. In *Hooper v. Advance Am., Cash Advance Ctrs. of Mo., Inc.*, 589 F.3d 917, 921 (8th Cir. 2009), the defendant filed a motion to dismiss, obtained a decision on the merits, and only then filed a motion to compel arbitration. In that case, the undue delay in seeking to enforce its right to arbitrate warranted a finding of waiver, but the Eighth Circuit noted that “[n]ot every motion to dismiss is inconsistent with the right to arbitration.” *Id.* at 922. In *St. Mary’s Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 589 (7th Cir. 1992), the parties litigated the merits of the case for 10 months before defendant moved to compel arbitration. The Seventh Circuit did not find that even 10 months was necessarily undue delay, but, rather, that defendant’s failure to assert the right to arbitrate until after fully litigating the merits of a motion to dismiss was inconsistent with a desire to arbitrate. *Id.*

cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.” *Concepcion*, 131 S. Ct. at 1753 (citation omitted). The fact that Colorado’s unconscionability law looks to various factors under *Davis* does not change the fact that an arbitration clause governed by the FAA cannot be invalidated based on a perception that the clause prevents the plaintiff from prosecuting low value claims due to the absence of a class mechanism. *See, e.g., Day v. Persels & Assoc.*, No. 8:10cv2463–T–33TGW, 2011 WL 1770300, at *5, *7 (M.D. Fla. May 9, 2011) (whether class action waiver in arbitration clause was, under Florida law, unconscionable or void for any reason, is pre-empted by the FAA under *Concepcion*); *D’Antuono v. Serv. Rd. Corp.*, No. 3:11cv33 (MRK), 2011 WL 2175932, at *27 (D. Conn. May 25, 2011) (state law rule that class action waiver rendered arbitration clause unconscionable might well be preempted by the FAA); *Arellano v. T-Mobile USA, Inc.*, No. C 10-05663 WHA, 2011 WL 1842712, at *2 (N.D. Cal. May 16, 2011) (rejecting, based on *Concepcion*, Plaintiffs’ arguments that class action waiver in arbitration clause precludes the Plaintiff from vindicating his rights).⁸

The *Concepcion* Court did not rely on the language of the arbitration provision at all in determining that, as a matter of law, the *Discover Bank* rule and those like it were preempted by the FAA. Any substantive distinctions Plaintiffs may draw under *Davis* are thus immaterial to this Court’s analysis and should be given no weight. *Drelles v. Metro. Life Ins. Co.*, 357 F.3d 344, 347-48 (3d Cir. 2003) (dictum is ‘a statement in a judicial opinion that could have been

⁸ *See also, e.g., Bellows v. Midland Credit Mgmt., Inc.*, No. 09CV1951-LAB (NMc), 2011 WL 1691323, at *3 (S.D. Cal. May 4, 2011) (*Concepcion* “disposes of Bellows’ best argument, making clear the agreement to arbitrate is not substantively unconscionable merely because it includes a class action waiver. It is therefore not invalid, and will be enforced.”); *Zarandi v. Alliance Data Sys. Corp.*, No. CV 10-8309, 2011 WL 1827228, at *2 (C.D. Cal. May 9, 2011) (Plaintiff’s argument that “the arbitration agreement is unconscionable under state law due to its class action waiver . . . is no longer viable after *Concepcion*.”).

deleted without seriously impairing the analytical foundations of the holding.”); *Bates v. Dep’t of Corr.*, 81 F.3d 1008, 1011 (10th Cir. 1996) (dicta not binding).

Similarly, the fact that the Subscriber Agreement contains other limitation clauses cannot change the application of *Concepcion*. All of the clauses identified by the Plaintiffs (limitations on damages and liability, statute of limitations, arbitration costs, and confidentiality) are valid and enforceable clauses under Colorado law. 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) (inclusion of class action waiver in franchise agreement not unconscionable); *Univ. Hills Beauty Acad., Inc. v. Mountain States Tel. & Tel. Co.*, 554 P.2d 723, 726 (Colo. App. 1976) (limitation of liability clause not unconscionable); *Axis Venture Grp., LLC v. 1111 Tower, LLC*, No. 09-cv-01636-PAB-KMT, 2010 WL 1278306, at *7 (D. Colo. Mar. 30, 2010) (provision shortening statute of limitations is not unconscionable where the plaintiff had not argued that it will bar its claims); *Rains*, 23 P.3d at 1254-55 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (rejecting argument that limited discovery renders arbitration clause unconscionable)).

Simply adding these otherwise enforceable provisions to a contract that contains an arbitration clause with a class action waiver cannot render the arbitration clause invalid under the FAA. Indeed, to find that the arbitration clause is unconscionable here, based on terms that are otherwise enforceable, would create the kind of “toothless and malleable” standard the *Concepcion* Court rejected and treat arbitration clauses differently from other contracts in violation of the FAA and *Concepcion*. See *Concepcion*, 131 S. Ct. at 1747-48 (stating that “[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons,” noting that arbitration clause may specify that arbitration proceedings be kept confidential, and stating invalidating an arbitration clause because it fails to provide for judicially monitored discovery is an “obvious illustration” of an impermissible rule interfering with

arbitration); *Arellano*, 2011 WL 1842712, at *2 (rejecting, based on the dictates of *Concepcion*, the plaintiffs' argument that arbitration clause should be voided because preclusion of injunctive relief on behalf of the class equates to preclusion of the ability to obtain effective relief).

The case law relied upon by the Plaintiffs is distinguishable, is not binding (unlike *Concepcion*), and was all developed before *Concepcion*. In some cases the Plaintiffs' law has already been called into question in light of *Concepcion*; in others, it is only a matter of time. *Kristian v. Comcast Corp.*, 446 F.3d 25, 29, 60 (1st Cir. 2006), for example, involved federal antitrust claims and is one of the cases this District found inapplicable when evaluating class action bars in consumer and franchise cases because of the extreme complexity that antitrust cases uniquely involve. *See Ornelas v. Sonic-Denver T, Inc.*, No. 06-cv-00253-PSF-MJW, 2007 WL 274738, at *5-7 (D. Colo. Jan. 29, 2007); *Bonanno*, 2009 WL 1068744, at *13-15.

Dale v. Comcast Corp., 498 F.3d 1216, 1224 (11th Cir. 2007), involved a claim where there was no statutory availability of attorneys' fees. *See id.*⁹ Similarly, in *Kinkel v. Cingular Wireless, LLC*, 857 N.E.2d 250 (Ill. 2006), the arbitration clause was "hidden in a maze of fine print," unlike here. *Id.* at 264. The holding of *Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88 (N.J. 2006) was recently called into doubt by *Wolf v. Nissan Motor Acceptance Corp.*, No. L 2490939, 2011 WL 2490930 (D.N.J. June 22, 2011). *Wolf* held that, based on the United States Supreme Court's holding and reasoning in *Concepcion*, the Court cannot find that any public interest overrides the clear, unambiguous, and binding class action waiver included in the parties' arbitration agreement. *See id.*

⁹ Notably, in *Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119 (11th Cir. 2010), the Eleventh Circuit specifically distinguished *Dale* from the case before it on the basis that a small claims option as well as attorneys' fees were available to *Pendergast*, unlike *Dale*. *See id.* at 1142-43.

And *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 373 (N.C. 2008) and *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161 (Ohio Ct. App. 2004) concluded that a class action waiver in an arbitration clause violated North Carolina's and Ohio's public policy and hindered the consumer protections afforded under their consumer protection laws. Obviously, *Tillman's* and *Eagle's* reasoning was subsequently rejected by the *Concepcion* Court's core holding: "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Concepcion*, 131 S. Ct. at 1748; *see also Wolf*, 2011 WL 2490930 (Under *Concepcion*, federal policy in favor of arbitration overrides any state public interest in consumer protection law).

V. THE ARBITRATION CLAUSE IS CONSCIONABLE AND ENFORCEABLE

The Plaintiffs claim that, notwithstanding *Concepcion*, the components of the Arbitration Clause satisfy Colorado's *Davis* factors and therefore should be invalidated. As discussed above, regardless of *Concepcion*, the Arbitration Clause is conscionable under Colorado law.

A. The Arbitration Clause Is Not Procedurally Unconscionable Under Colorado Law.

In response to Qwest's opening brief, the Plaintiffs do not cite to any authority contradicting the Supreme Court's ruling in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991), which held that the inequality of bargaining power does not render a clause unconscionable; nor do they cite to any law indicating that the "take it or leave it" nature of a contract renders that contract unconscionable under Colorado law; and they fail to address the fact that *Concepcion* already dismissed this argument. *See Concepcion*, 131 S. Ct. at 1750; *cf. Bonanno*, 2009 WL 1068744, at *12 n. 13. In short, the Plaintiffs have not demonstrated, and cannot demonstrate, that the Arbitration Clause is procedurally unconscionable.

B. The Arbitration Clause Is Not Substantively Unconscionable Under Colorado Law.

The Plaintiffs also cannot show that the Arbitration Clause is substantively unconscionable under Colorado law. First, the Arbitration Clause does not ban statutory treble damages, statutory damages, attorneys' fees or costs. It provides for arbitration of *any* claim, controversy or dispute, and it provides that an arbitrator "may award any relief or damages that a court could award." (Dkt. No. 27-3, Sub. Agr. §§ 17(a), 17(a)(1)) Because statutory or treble damages, attorneys' fees and costs are available under the Colorado Consumer Protection Act ("CCPA") or Washington Consumer Protection Act ("WCPA"), Colo. Rev. Stat. § 6-1-113(2); Wash. Rev. Code § 19.86.090, the arbitrator is imbued with authority to award those available attorneys' fees, costs, and damages. *See In re Universal Serv. Fund Tel. Billing Practices Litig.*, 300 F. Supp. 2d 1107, 1127 (D. Kan. 2003) (clause providing for arbitration of any claim authorizes arbitrator to award statutory fees).

Second, the Limitation of Liability section prohibits punitive damages; it does not prohibit an arbitrator from awarding statutory treble damages, which are remedial. *See PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003) (antitrust treble damages and attorneys' fees are regarded as remedial rather than punitive); *see also Inv. Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314, 316-17 (5th Cir. 2002) (arbitration prohibition against punitive damages does not extend to statutory damages). For the same reasons, the provision in the Arbitration Clause stating that each party bears its own expenses, (Dkt. No. 27-

3, Sub. Agr. § 17(a)(ii)), is not meant to, and could not, overcome the statutory fee and cost shifting provisions of the CCPA. *See In re Universal Serv. Fund*, 300 F. Supp. 2d at 1127.¹⁰

Third, the Plaintiffs' unsupported assertions of "high" costs do not satisfy their burden of showing the likelihood of incurring such costs. A party seeking to invalidate an arbitration agreement based on prohibitive costs "bears the burden of showing the likelihood of incurring such costs;" speculative "risk" of bearing such costs is insufficient grounds on which to invalidate an arbitration clause. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000); *Rains*, 23 P.3d at 1253 (same).

Here, the Plaintiffs have not demonstrated that they cannot pay the \$125.00 filing fee.¹¹ *See id.* They likewise "ha[ve] not provided the evidence necessary to estimate the length of the arbitration and the corresponding amount of arbitrators' fees (e.g., sophistication of issues, average daily or hourly arbitration costs in the region' for an individual arbitration.)" *Cicle v. Chase Bank USA*, 583 F.3d 549, 556 (8th Cir. 2009) (quotations omitted).¹² And they ignore that the small claims option mitigates any costs. Even if the Plaintiffs had demonstrated an

¹⁰ Regardless, if there is any question about whether the Arbitration Clause prohibits statutory treble damages or attorneys' fees, the contractual interpretation must be first resolved by the arbitrator, not the Court. *See PacifiCare Health Sys.*, 538 U.S. at 407 (arbitrator must resolve potential conflict between arbitration agreement that prohibited punitive damages and statutory language entitling the plaintiff to treble damages); *In re Universal Serv. Fund*, 300 F. Supp. 2d at 1127 (arbitrator must resolve issue of whether limitation on putative damages bans statutory treble damages).

¹¹ Although the Plaintiffs have submitted no evidence that they lack the financial wherewithal to pay the initial \$125 filing fee, as stated above, Qwest is willing to pay even the \$125 filing fee or the applicable small claims court filing fees should the Plaintiffs choose to file in one of those venues.

¹² The Plaintiffs point to the *Cellphone Fee Termination Cases* as evidence that bringing individual arbitration in *this* case would be prohibitively expensive. This California class action is not part of this action and therefore cannot support a legal conclusion of unconscionability. *See Cicle*, 583 F.3d at 557 (rejecting evidence of costs provided by the plaintiffs that related "to a class, not an individual, arbitration of a different matter" as too speculative).

inability to pay the filing fees,¹³ the small claims courts have filing fee waiver provisions for indigent plaintiffs as well as cost-shifting provisions. *See, e.g.*, Minn. Conc. Ct. Rules 506, 516; Wash. Rev. Code §§ 36.18.040, 12.40.045; Colo. R. P. Sm. Cl. Cts. 516.

Finally, as discussed in Qwest’s opening brief and again above, where attorneys’ fees are available for low value individual claims, such as here, the legislature has already determined that the claims are “worth” pursuing as a matter of law. (*See Mot.* at 12).¹⁴ Thus, the assertion by the Plaintiffs’ attorneys¹⁵ that it would be uneconomical and irrational for the Plaintiffs to pursue arbitration claims or for attorneys to represent them in doing so is frivolous. “[A]n individual cannot reasonably claim to be ‘deterred from pursuing their statutory rights in arbitration simply by the fact that their fees would be paid to the arbitrator where the overall cost of arbitration is otherwise equal to or less than the cost of litigation in court.’” *Rains*, 23 P.3d at 1253 (quoting *Bradford v. Rockwell Semiconductor Sys. Inc.*, 238 F.3d 549, 556 (4th Cir. 2001)). And the Plaintiffs have not made any showing that the cost to pursue their claims individually in arbitration so greatly exceeds the cost of litigating their claims in court that they would effectively be precluded from vindicating their rights. *See James v. McDonald’s Corp.*, 417 F.3d 672, 680 (7th Cir. 2005) (“[t]he cost differential between arbitration and litigation is evidence highly probative . . .”).

¹³ *See, e.g.*, Dkt. No. 81-02 (Durkin Depo Excerpts), at 83:5-11 (noting that he is not claiming an inability to pay conciliation court fees or a \$125 filing fee for arbitration).

¹⁴ The Plaintiffs’ suggestion that they must show bad faith to obtain attorneys’ fees or the statutory minimum damages under the CCPA, (Pls.’ Resp. at 18), is false and misreads the statute, as Qwest briefed in its first round of briefing. (*See* Dkt. No. 82 at 18) Under the statute, minimum statutory damages and attorneys’ fees are available to the consumer upon a showing of liability, and treble damages may be awarded if the consumer demonstrates bad faith. *See* Colo. Rev. Stat. § 6-1-113(2).

¹⁵ Concurrently with this brief, Qwest is filing its Renewed Motion in Limine to exclude the Affidavits of the four attorneys the Plaintiffs have proffered as experts.

CONCLUSION

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

DATED this 5th day of July, 2011.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

s/ Peter J. Korneffel, Jr.

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

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2011, I electronically filed the foregoing **DEFENDANTS' REPLY IN SUPPORT OF THEIR 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:

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

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

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
kgunning@tmdwlaw.com
jmurray@tmdwlaw.com

s/ Cynthia A. Smith

Cynthia A. Smith