

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 09-cv-02848-WDM-KMT

RICK GROSVENOR,

Plaintiff,

v.

QWEST COMMUNICATIONS
INTERNATIONAL INC., et al.,

Defendants.

**DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF
THEIR MOTION TO COMPEL ARBITRATION AND MOTION FOR STAY**

Qwest Communications International Inc., Qwest Services Corp., Qwest Corp., Qwest Communications Corporation, (now Qwest Communications Company, LLC), and Qwest Broadband Services, Inc. (collectively "Defendants" or "Qwest"), through their undersigned attorneys, submit the following supplemental authority in support of their Motion to Compel Arbitration (Docket No. 13). Defendants also move for a stay of a ruling on the Motion to Compel Arbitration pending the United States Supreme Court's upcoming decision in *AT&T Mobility, LLC v. Concepcion*, a case that presents issues similar to those currently before this Court.

Pursuant to D.C.Colo.LCivR 7.1.A., Defendants' counsel certifies that prior to filing this Motion he conferred with counsel for the Plaintiff. Plaintiff's counsel indicated that Plaintiff opposes this Motion.

INTRODUCTION

Plaintiff seeks to represent a class in a consumer action against Qwest, and argues that the class action ban that the parties agreed to as part of his arbitration agreement under the Federal Arbitration Act ("FAA") renders the arbitration provision unconscionable as a matter of state law. Qwest has moved to compel arbitration pursuant to the parties' arbitration agreement and the FAA on the grounds that, among other things, the clause is enforceable as a matter of consent under the FAA, and that federal and Colorado law preclude a finding of unconscionability based on the arbitration's class action ban standing alone.

Since the completion of the briefing on Defendants' Motion to Compel Arbitration, the United States Supreme Court has issued two decisions, *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*¹ and *Rent-A-Center, West, Inc. v. Jackson*² that provide further guidance and support for Defendants' Motion. Additionally and perhaps more importantly, the Supreme Court recently granted certiorari in *AT&T Mobility, LLC v. Concepcion*³ to address whether the Federal Arbitration Act ("FAA") preempts states from invalidating arbitration clauses on the basis that they ban class actions. *See id.*; *see also AT&T Mobility, LLC v. Concepcion*, Petition for a Writ of Certiorari, filed January 2010, attached hereto as Exhibit A.

¹ -- U.S. --, 130 S. Ct. 1758 (April 27, 2010).

² -- U.S. --, 130 S. Ct. 2772 (June 21, 2010).

³ -- S.Ct --, 130 S. Ct. 3322 (May 24, 2010).

This trilogy of Supreme Court cases should be considered by this Court as it rules on the pending Motion, may require the parties to rebrief significant aspects of the Motion to Compel Arbitration, and regardless, necessitates a stay of this action pending the Supreme Court's decision in *Concepcion*. First, in *Stolt-Nielsen*, the Court held that where the parties' arbitration agreement was silent on whether they agreed to submit their dispute to class arbitration, the arbitration had to take place on an individual basis. The Court noted that class arbitration could not be compelled under the FAA in the absence of "a contractual basis for concluding that the [parties] agreed to [it]." 130 S. Ct. at 1775. *Stolt-Nielsen* reaffirms that, under the FAA, parties are "free to structure their arbitration agreements as they see fit." *Id.* at 1763. The reasoning of the *Stolt-Nielsen* decision indicates that an arbitration clause with an explicit class-action bar, such as the clause at issue here, is every bit as enforceable as an arbitration provision such as the clause at issue in *Stolt-Nielsen* that prohibits class arbitration because it is silent on the issue. The Supreme Court's subsequent orders reinforce this reasoning. After issuing *Stolt-Nielsen*, the Supreme Court summarily vacated the Second Circuit's decision in *In re American Express Merchants' Litigation*, which the Plaintiff relies upon in opposition to Qwest's Motion to Compel Arbitration, and which held a class action waiver in an arbitration agreement unenforceable. The Supreme Court remanded the case "for further consideration in light of" *Stolt-Nielsen*. *American Express Co. v. Italian Colors Restaurant*, -- U.S. --, 130 S. Ct. 2401 (May 3, 2010) (summary disposition).

Second, in *Concepcion*, the Supreme Court will determine whether state unconscionability challenges to arbitration clauses governed by the FAA, such as those asserted by the Plaintiff in this case, are preempted by Federal law. In *Concepcion*, as with the Plaintiff

here, the plaintiffs seek to void an arbitration clause governed by the FAA by arguing that the class action waiver itself renders the arbitration clause unconscionable as a matter of state law. The Supreme Court's decision in *Concepcion* will likely be directly on point with the matters at issue in this case and will affect the nature and viability of the Plaintiff's defenses to Qwest's Motion to Compel Arbitration.

Third, setting aside the Supreme Court's decisions recognizing that parties can structure their arbitration agreements to allow for individual claims only, the Supreme Court's recent *Rent-A-Center* decision confirms that, where, as here, the arbitration clause delegates to the arbitrator all matters relating to challenges to the arbitration agreement itself, the arbitrator, not the Court, should determine issues related to the validity of the arbitration clause, including whether the arbitration clause is unconscionable. Thus, the Plaintiff's claim of unconscionability should be addressed to the arbitrator.

The issues presented and resolved or scheduled to be resolved in these three Supreme Court cases are central to how this Court will address and evaluate the pending Motion to Compel Arbitration. For these reasons and for the sake of efficiency, Defendants request that the Court stay its ruling on the Motion to Compel Arbitration until the Supreme Court issues its decision in *Concepcion*.

SUPPLEMENTAL AUTHORITY

I. The *Stolt-Nielsen* Decision Recognizes the Validity of Arbitration Clauses That Preclude Class Arbitration.

The Supreme Court's recent *Stolt-Nielsen* decision reaffirms that "arbitration is a matter of consent, not coercion" and, thus, an arbitrator or court cannot, as matter of public policy, abrogate the parties' agreement to submit their dispute to individual arbitration. In *Stolt-Nielsen*,

an arbitration panel imposed class arbitration on the parties, even though their agreement to arbitrate had been "silent" on the issue. *Id.* at 1769. The Court held the panel's decision in error, stating that the panel's "conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent." *Id.* at 1775. Although an arbitrator may presume implicit authorization "to adopt such procedures as are necessary to give effect to the parties' agreement," class-action arbitration is not among them. *Id.* "This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id.* The *Stolt-Nielsen* Court enforced the arbitration clause over the assertions raised by *amicus curiae* that the arbitration agreement would be unconscionable if class arbitration was not permitted.

Applying *Stolt-Nielsen's* holding and reasoning here should mandate that, even without the explicit class action bar, class arbitration would not be permitted pursuant to the Qwest Arbitration Clause in the Subscriber Agreement because the parties adopted arbitration procedures that did not allow for class arbitration. Thus, *Stolt-Nielsen* suggests that class action bars in arbitration agreements are enforceable, disposing of Plaintiff's challenge to the Qwest Arbitration Clause. Indeed, in *American Express Co. v. Italian Colors Restaurant* and its underlying case *In re American Express Merchants' Litigation* (which is relied upon by the Plaintiff), the Supreme Court issued a summary order suggesting it believes that *Stolt-Nielsen* renders class action waivers in arbitration clauses enforceable despite public policy and other challenges. Pursuant to the order, the Supreme Court granted certiorari, summarily vacated the judgment of the United States Court of Appeals for the Second Circuit, and remanded the case "for further consideration in light of" *Stolt-Nielsen*. See *In re American Express Merchants'*

Litigation, 554 F.3d 300 (2d Cir. 2009), vacated and remanded sub. nom., *American Express Co. v. Italian Colors Restaurant*, -- U.S. --, 130 S. Ct. 2401 (May 3, 2010).

II. This Case Should Be Stayed Pending the Supreme Court's Ruling in *Concepcion*.

A. The Supreme Court's Ruling in *Concepcion* is Likely to Have a Direct Impact on This Court's (or an Arbitrator's) Determination of Whether State Unconscionability Law Can Invalidate Qwest's Arbitration Clause Here.

Regardless, this Court should stay its decision in this action pending the Supreme Court's ruling in *Concepcion*. The *Concepcion* case, in which the Supreme Court recently granted certiorari, has many parallels to this case and the Supreme Court's ruling will likely provide additional guidance to this Court and the parties about the interaction of state unconscionability law and the FAA. There, the *Concepcions* sued AT&T Mobility, asserting consumer class action claims (*Concepcion*, Petition for Writ of Cert. at 10-11 (Ex. A)). Although an arbitration agreement with a class action bar governed the consumers' claims, the District Court and Ninth Circuit held that the clause was invalid under California state unconscionability principles that void consumer arbitration clauses by virtue of the inclusion class action waivers. (*Id.* at 11-13 (Ex. A).) In declining to enforce the arbitration agreement, the District Court found that consumers would likely fare better financially and obtain a quicker resolution when proceeding individually. The District Court nonetheless found that under California law the class action ban rendered the arbitration agreement unconscionable, thus requiring that the arbitration proceed as a class or that arbitration not be permitted. (*Id.*)

The Supreme Court has granted certiorari to determine whether the FAA preempts States from conditioning the enforcement of an arbitration agreement under the FAA on the availability of particular procedures – here, class-wide arbitration – when those procedures are not necessary

to ensure that the parties to the arbitration agreement are able to vindicate their claims. (*See id.*) The FAA requires that FAA arbitration agreements be treated equally with all other contracts, and *Stolt-Nielsen* recognizes that FAA clauses that do not expressly allow for class actions cannot be arbitrated as such. California's law that invalidates certain arbitration clauses that do not allow for class actions, therefore appears to treat certain arbitration clauses (like those in *Stolt-Nielsen* that are silent on class arbitrations) as unenforceable and different from other contract clauses in violation of the FAA. *Concepcion* is set for argument on November 9, 2010.

The AT&T Mobility arbitration agreement in *Concepcion* shares many common features with Qwest's Arbitration Clause in this case. Both agreements call for the application of the rules of the American Arbitration Association (“AAA”). (*Concepcion*, Petition for Writ of Cert. at 7 (Ex. A); Subscriber Agreement § 17(a) (Ex. A to Motion to Compel) [Dkt # 13-2].)⁴ Both the Qwest and AT&T arbitration agreements also provide for arbitration in a location convenient to the plaintiff, for cost support for the plaintiff's arbitration, for the arbitrator's ability to award the full damages and remedies available to a court, and for the option to pursue a matter in small claims court. (*Concepcion*, Petition for Writ of Cert. at 7-8 (Ex. A); Subscriber Agreement § 17(a) (Ex. A to Motion to Compel) [Dkt # 13-2].) Finally, the AT&T arbitration clause provides for minimum damages under certain circumstances and the recovery of attorney fees. (*Concepcion*, Petition for Writ of Cert. at 7-8 (Ex. A). Likewise, Qwest's Arbitration Clause permits the arbitrator to award statutory damage and attorney fees. (*See* Defendants' Reply in Support of Their Motion to Compel Arbitration [Dkt # 26] at 10-14.)

⁴ As explained in Defendants' Reply in Support of the Motion to Compel, the AAA rules provide various consumer-friendly procedures. (Defendants' Reply in Support of Their Motion to Compel Arbitration [Dkt # 26] at 27-28.)

Given the similar facts in this case and *Concepcion*, the similarity of the legal claims and arguments made by the plaintiffs in both cases, and the vast amount of authority analyzing the validity of arbitration agreements that do not permit class action proceedings, the Supreme Court's decision in *Concepcion* will very likely provide guidance in this matter. For example, the Court may determine that California is applying its unconscionability laws in a way that uniquely disfavors arbitration and thus violates the FAA. The Court may also incorporate the holding of *Stolt-Nielsen*, making the point that accepting the *Concepcions'* argument would invalidate countless arbitration agreements and deprive entire sectors of industry and consumers of the benefit of arbitration. Alternatively or additionally, the Court may provide guidance on balancing the FAA with the vindication of state consumer protection laws. In that case, the Court may shed further light upon what types of arbitration provisions and/or statutory remedies, particularly addressing procedures or remedies at issue in this case, suffice to ensure that plaintiffs may vindicate their statutory rights.

B. This Court Has the Authority to Grant a Stay and a Brief Stay Is in the Best Interest of the Court and the Parties.

Under these circumstances, the Court has inherent power to stay a cause of action "pending resolution of independent proceedings which bear upon the case." *Leyva v. Certified Grocers of Cal., LTD.*, 593 F.2d 857, 864 (9th Cir. 1979) (citing cases from several circuit courts); *Flying J Inc. v. Sprint Comms. Co., L.L.P.*, No. 99CV111TC, 2006 WL 1473338, at *1 (D. Utah May 22, 2006). The Court's power is derived from its "power to control its docket and calendar and to provide for a just determination of the cases pending before it." *Leyva*, 593 F.2d at 864. Economy of time and effort, efficiency, and fairness factor strongly into the Court's discretionary authority. *Id.*; *Flying J Inc.*, 2006 WL 1473338, at *1.

As discussed at length above, any ruling by the Supreme Court in *Concepcion* will undoubtedly influence the Court's decision in this matter. Likewise, any decision will likely result in additional briefing by the parties in response to the decision. Accordingly, a stay through the Supreme Court's decision in *Concepcion*⁵ will facilitate judicial economy as well as encourage efficiency of time and effort of the parties and the Court. Further, given the posture of this case in which discovery is stayed pending resolution of Qwest's Motion to Compel Arbitration (Docket No. 45), an additional stay of proceedings pending the outcome of *Concepcion* will not prejudice any litigant.

III. Regardless, the *Rent-A-Center* and *Pikes Peak* Decisions Place the Question of Arbitrability Before the Arbitrator, Not the Court.

Setting aside emerging Supreme Court law and the impending *Concepcion* decision, the recent Supreme Court decision in *Rent-A-Center*, together with this Court's recent holding in *Pikes Peak Nephrology Associates, P.C. v. Total Renal Care, Inc.*, No. 09CV00928, 2010 WL 1348326 (D. Colo. 2010), demonstrates that the Plaintiff's challenge to the enforceability of Qwest's arbitration clause should be resolved by an arbitrator, not this Court.

In *Rent-A-Center*, the plaintiff claimed that the binding arbitration agreement he signed when he started work was unconscionable, because he had no alternative but to sign it if he wanted the job. The Supreme Court held that certain challenges to arbitration agreements must be decided by arbitrators, and not judges. *See Rent-A-Center*, 130 S. Ct. 2772, at 2777-78. In particular, the Court reiterated its prior holdings that parties could agree by contract to arbitrate such "gateway" or threshold issues such as the scope or enforceability of an arbitration

⁵ The *Concepcion* docket indicates that the respondents' brief is due to be filed on September 15, 2010 and that the case will be heard in the November 2010 term.

agreement. The Court found that the parties had made such an agreement. *Id.* Specifically, the arbitration agreement provided that the arbitrator had the exclusive authority to resolve any dispute relating to "the interpretation, applicability, enforceability, or formation" of the agreement. *Id.* at 2775.

Based on the parties' "clear and unmistakable" agreement to give the arbitrator jurisdiction over the enforceability of the agreement, the Court held that an arbitrator will decide whether a potentially invalid arbitration agreement is enforceable unless the objecting party's challenge goes to the "delegation provision", i.e., the specific portion of the contract that delegates the power to the arbitrator to decide unconscionability questions. *Id.* at 2778-79. Thus, under *Rent-A-Center*, where the parties have "clearly and unmistakably" agreed to arbitrate issues related to the enforceability of the agreement, a claim that the entire agreement is unconscionable or invalid for other reasons will no longer be enough to avoid evaluation of the claim by the arbitrator rather than the court. *See id.* Unless the party challenges the particular provision of the arbitration agreement that delegates the claims to the arbitrator, it will be the arbitrator, not the court, who will decide unconscionability issues. *See id.* (It is only when a party contests the validity "of the *precise* agreement to arbitrate at issue" that a court must address the validity of the agreement before compelling arbitration.)

Here, as in *Rent-a-Center*, the parties "clearly and unmistakably" agreed to arbitrate issues related to the enforceability of the agreement. The Qwest Arbitration Clause provides that "any dispute or claim arising out of or relating to" the Subscriber Agreement "will be resolved by binding arbitration." (Subscriber Agreement § 17(a) (Ex. A to Motion to Compel) [Dkt # 13-2].) The sole exceptions to arbitration are for matters brought in small claims court or related solely

to a debt owed to Qwest. (Subscriber Agreement § 17(a).) Moreover, the parties agreed pursuant to the Arbitration Clause that any arbitration shall be conducted by the AAA. (Subscriber Agreement § 17(a)(i).) The AAA's rules provide that an arbitrator "shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement." (*See* Rule 7 of the AAA Rules of Commercial Arbitration.) This constitutes a clear and unmistakable delegation of matters relating to the enforceability of the arbitration agreement to the arbitrator. *See, e.g., Pikes Peak*, 2010 WL 1348326, at *6-7 (holding that where, as here, an arbitration agreement is governed by the AAA Rules, the parties "acquiesce[] to the arbitrator's jurisdiction on matters of arbitrability or scope [of the arbitration agreement].").

Furthermore, the Plaintiff's challenges to the Qwest Arbitration Clause do not contest the validity "of the *precise* agreement to arbitrate at issue." Rather, the Plaintiff's challenges are directed to the arbitration agreement as a whole. (*See* Compl. ¶¶ 22-25, Dkt # 1.) This is insufficient under *Rent-a-Center*. *See Rent-A-Center*, 2010 WL 2471058, at *4-6. Thus, in this case, while matters relating to contract formation are still properly before this Court, matters relating to the enforceability of the arbitration clause, including the Plaintiff's unconscionability challenge, should be delegated to the arbitrator pursuant to *Rent-A-Center*.

CONCLUSION

Based on the foregoing, Qwest respectfully requests the Court exercise its discretionary authority to manage its docket fairly and efficiently and grant a brief stay of these proceedings through the Supreme Court's resolution of *Concepcion*.

Respectfully submitted this 7th day of September, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2010, I served the foregoing **NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF THEIR MOTION TO COMPEL ARBITRATION AND MOTION FOR STAY** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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