

**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.

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

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Pursuant to Fed. R. Civ. P. 12(b)(1) and 9 U.S.C. §§ 3, 4, Qwest Communications International Inc., Qwest Services Corp., Qwest Corp., Qwest Communications Company, LLC, and Qwest Broadband Services, Inc. (collectively "Defendants" or "Qwest") hereby submit their Reply in Support of Motion to Compel Arbitration ("Motion").

### **INTRODUCTION**

The Plaintiff's Opposition is contrary to state and federal law enforcing arbitration clauses, and the Plaintiff's "evidence" and arguments, come nowhere near his burden of overcoming the presumption in favor of arbitration. Citing, in pertinent part, his own affidavit and four attorney-affiants, the Plaintiff argues that the Arbitration Clause in Qwest's High Speed Internet ("HSI") Subscriber Agreement ("Agreement") is unconscionable because he does not "remember" agreeing to it and because it precludes him from vindicating his rights entirely by virtue of his unsupported assertion that attorneys are not sufficiently incentivized to take his case on an individual basis.

The Arbitration Clause is binding on the parties and provides Mr. Grosvenor with fair, meaningful, efficient, and procedurally sound avenues to vindicate his rights. First, the Plaintiff cannot truly deny that he accepted the Agreement. He has recognized the applicability of the Arbitration Clause in his Complaint and is suing under the Agreement. Moreover, Qwest made him aware of the terms of the Agreement when he purchased the HSI service, Mr. Grosvenor accepted those terms, and he never opted-out of the Agreement under the thirty day look-back period. Qwest followed practical and customary business practices to form the Agreement, and Plaintiff cannot now avoid the Agreement by denying any memory of it.

Second, the Arbitration Clause does not preclude Mr. Grosvenor from vindicating his rights; to the contrary, it channels the dispute resolution pursuant to the public policy of the Federal Arbitration Act ("FAA") and allows for the vindication of rights under the Colorado Consumer Protection Act ("CCPA"), including the recovery of attorneys' fees, minimum statutory damages, and costs. The Arbitration Clause provides the parties with alternative low-cost, speedy forums for the resolution of disputes with far less costs and time than a class action.

Plaintiff provides no evidence whatsoever that he cannot afford to pursue his own claim. Similarly, the attorneys who have submitted affidavits claiming that they would not take the case on without the possibility of a class-action payday are not admitted in Utah where Mr. Grosvenor resides and provide no evidence that is pertinent to the issue before the Court. Their opinions are nothing more than their personal financial practices, are contrary to the law, and are irrelevant and unreliable. Indeed, in seeking to avoid the class action waiver he agreed to, the Plaintiff and all his attorneys rely entirely on case law from other jurisdictions that is directly contrary to the law of this State and District.

Finally, the Arbitration Clause is conscionable. The procedure employed to create the Agreement was fair and reasonable, the substance of the Arbitration Clause is appropriate and consistent with public policy, and Mr. Grosvenor cannot avoid the dispute resolution procedures mandated by the Agreement.

## ARGUMENT

### I. THE PLAINTIFF MISCONSTRUES THE BURDEN OF PROOF.

As described below, the Plaintiff has specifically pled a Price for Life contract claim, accepted the Agreement as a matter of fact, and has pled that the specific Arbitration Clause under that Agreement is unconscionable because it makes it "impossible" for him to vindicate his "Price for Life Guarantee." (Compl. ¶ 25.) Having agreed to the Agreement, under the federal policy favoring arbitration the Plaintiff now "bears a heavy burden of proof" to avoid that agreement. *Stone v. E.F. Hutton & Co. Inc.*, 898 F.2d 1542, 1543 (11th Cir. 1990); *see also Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1254 (Colo. App. 2001) (*quoting Peterman v. State Farm Mut. Auto. Ins. Co.*, 961 P.2d 487, 493 (Colo. 1998)) (when an agreement to arbitrate exists, the agreement is presumed valid and should "be **enforced as written** 'absent a conflicting and overriding public policy to the contrary'"); *Bonanno v. Quizno's Franchise Co.*, No. 06-cv-02358-CMA-KLM, 2009 WL 1068744, at \*17 (D. Colo. Apr. 20, 2009); 9 U.S.C. § 4 (when an agreement to arbitrate exists, the court "shall [order] the parties to proceed to arbitration *in accordance with the terms* of the agreement"). To the extent that the Court feels there are factual issues to be resolved, those issues should be resolved by hearing. *Stein v. Burt-Kuni One, LLC*, 396 F. Supp. 2d 1211, 1213 (D. Colo. 2005); 9 U.S.C. § 4.

The Plaintiff has failed to meet his heavy burden. The Arbitration Clause is fair on its face and as applied to this case, and should be enforced as a matter of law.

## II. MR. GROSVENOR IS BOUND BY THE AGREEMENT.

Mr. Grosvenor argues that Qwest has failed to establish that he agreed to the Agreement because (1) he never *really* said in his Complaint that the *HSI Agreement* itself was the contract he was pursuing, (2) he does not specifically remember seeing or agreeing to its terms, and (3) he received the contract after he ordered the service and did not negotiate or change the terms. Mr. Grosvenor cannot avoid the Arbitration Clause in this fashion.

### A. Mr. Grosvenor Agreed to the Terms of the Agreement by Electronic Signature.

The Agreement governs a Qwest subscriber's use of Qwest's HSI service, software, and equipment. (Decl. of Jesse Kohler, Ex. A; Agreement at 1.) Pursuant to generally accepted "click-to-accept" processes, Mr. Grosvenor agreed to the Agreement by electronic signature when he installed the necessary software to activate Qwest's HSI service. Mr. Grosvenor first ordered HSI service from Qwest on July 24, 2006 which was confirmed by a Welcome Letter that notified Mr. Grosvenor that his HSI service was subject to the Agreement which contained an arbitration clause. (Decl. of L. Beardsley ¶¶ 9-10.)

Mr. Grosvenor admits he activated his service by configuring his computer to use the modem and installing the required software using Qwest's QuickConnect CD. (Decl. of Richard Grosvenor ¶ 5 [Dkt # 26-24].) When the QuickConnect CD is loaded into a computer, it calls out the Agreement and its arbitration terms as well as a dialogue box that gives the customer the option to click "I agree" to those terms or "Cancel." (Decl. of J. Kohler ¶¶ 7-10.) If the customer clicks "I agree," the software completes the installation and the customer's HSI service is

activated. (Decl. of J. Kohler ¶ 11.) If the customer clicks "Cancel," the installation stops, and the HSI service is not activated. (*Id.*)

This process is known as "click-to-accept" or "clickwrap" and is enforced by courts across the country as a fair method of contract formation. *See* 15 U.S.C. § 7001 (codifying validity of electronic signatures); *Hugger-Mugger, L.L.C. v. Netsuite, Inc.*, No. 2:04-CV-592TC, 2005 WL 2206128, \*3-6 (D. Utah Sept. 12, 2005) (enforcing forum selection clause in an internet contract incorporated by reference into clickwrap agreement); *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 530, 532-33 (N.J. Super. Ct. App. Div. 1999) (enforcing forum selection clause in click-to-accept online scrollable window).

Here, Mr. Grosvenor clicked "I agree" to accept the terms, as demonstrated by Mr. Grosvenor's activation and use of Qwest's HSI services. If he had not clicked "I agree" to accept the terms, he would have not been able to install the software or use Qwest's HSI service. (Decl. of J. Kohler ¶ 11.) *See Recursion Software, Inc. v. Interactive Intelligence, Inc.*, 425 F. Supp. 2d 756, 782-83 (N.D. Tex. 2006) (clicking "yes" to terms of software license agreement to enable installation constituted acceptance).

Qwest also provided Mr. Grosvenor with a thirty day look-back period to terminate the Agreement without paying monthly recurring charges if, upon further review, he decided that he did not want to accept the terms or he was dissatisfied with the service. (Agreement ¶¶ 12(a), 12(c).) Mr. Grosvenor never exercised his thirty day opt-out right and continued to use the HSI service. Indeed, on November 6, 2007, when Mr. Grosvenor upgraded his HSI service, he

received another Welcome Letter confirming his order and reiterating that the service continued to be governed by the Agreement and its arbitration terms. (Decl. of L. Beardsley ¶ 11.)<sup>1</sup>

**B. Plaintiff's Objections are Legally Irrelevant.**

Mr. Grosvenor's assertions that he did not negotiate and does not remember the Arbitration Clause, do not change the fact that a contract was legally formed.

**1. "Money Now, Terms Later" Transactions are Valid and Enforceable.**

Mr. Grosvenor's claim that he did not receive the terms of the Agreement until after he ordered the services is of no moment. It is a commonly accepted practice to deliver standard, non-negotiated contract terms and conditions after an order is placed ("money now, terms later"), such as Qwest did in this case. *See Bischoff v. DirectTV, 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."); *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).

Indeed, the *Bischoff* court rejected the same arguments that the Plaintiff makes here – that Qwest provided the Agreement to the Plaintiff only after he was "on the hook" for services and therefore no valid arbitration agreement exists. *See Bischoff*, 180 F. Supp. 2d at 1103. The

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<sup>1</sup> The Plaintiff's argument that he had a contract for a "Price for Life" with Qwest, but the contract did not include the HSI Agreement is contrary to logic. Qwest provides its service to subscribers with the expectation that the parties will have an ongoing relationship. It is contrary to everyday experience and common sense for Grosvenor to claim that Qwest would provide hardware, a QuickConnect CD and internet service with no terms other than a price and the duration of that price.

*Bischoff* Court stated that "it did not find the length of time between the two events [i.e., receipt of service and receipt of the customer agreement] dispositive on the issue of whether a valid arbitration agreement exists." *Id.* Rather, the controlling issue "is the economic and practical considerations involved in selling services to mass consumers which make it acceptable for terms and conditions to follow the initial transaction." *Id.* at 1105. Other courts follow this line of reasoning in enforcing agreements with class action bars in arbitration clauses where the plaintiff failed to opt-out of the contract. *See, e.g., Davidson v. Cingular Wireless, LLC*, No. 2:06-cv- 00133, 2007 WL 896349, at \*6 (E.D. Ark. Mar. 23, 2007) (class action bar was fair where plaintiff failed to opt out of the agreement); *Fonte v. AT&T Wireless*, 903 So.2d 1019 (Fla. 2005) (contract with look-back period is enforceable).

To hold that such practices are not enforceable would undermine much of the purchase and sales process in this country. Products or services could never be purchased by phone orders or in stores because all of the terms and conditions of the sales could not be practically described in the moments of the call or sale, and customers could simply deny the existence of a contract by virtue of not remembering or negotiating the terms. *See Hill*, 105 F.3d at 1149 ("Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation and use instead a simple approve or return device.").

**2. Mr. Grosvenor's Failure to Remember the Agreement is Irrelevant to Its Enforceability.**

Mr. Grosvenor's current claim that he does not recall or may not have read the Agreement is irrelevant to the enforceability of the contract. A party entering into a contract is responsible for reading the terms of the contract, and the failure to do so is no defense to the enforceability of

the contract. *See Pleasants v. Am. Express Co.*, 541 F.3d 853 (8th Cir. 2008) (presumption of contract acceptance was not overcome by plaintiff asserting that she did not recall receiving the terms); *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909, 919 (N.D. Tex. 2000) (plaintiffs' denials that they received an arbitration clause was insufficient to overcome presumption of delivery according to business practices); *Leverage Leasing Co. v. Smith*, 143 P.3d 1164, 1168 (Colo. App. 2006) (failure to read contract is not a defense to enforcement); *see also Rasmussen v. Freehling*, 412 P.2d 217 (Colo. 1966) (party who signs contract without reading it is bound by the contract). Accordingly, Mr. Grosvenor should not be permitted to avoid the enforcement of the Agreement on the ground that he failed to read or recall it. *See Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007) ("Absent a showing of fraud, failure to read an enforceable clickwrap agreement, as with any binding contract, will not excuse compliance with its terms.").

**C. The Plaintiff is Estopped from Denying the Existence of the Agreement.**

Not only is Mr. Grosvenor's assertion that he did not agree to the contract contrary to the facts and the law, but it is contrary to his own assertions in his Complaint.

Specifically, Mr. Grosvenor alleges in his Complaint that: customers like him "entered into contracts" for Price for Life HSI service (Compl. ¶ 1); Qwest sends the "Subscriber Agreement" to customers after the customer has purchased the Price for Life agreement (Compl. ¶ 22); the Arbitration Clause under the Agreement contains a class action bar (Compl. ¶¶ 23-24); the class action bar in the Agreement makes it "impossible" for customers like Mr. Grosvenor to enforce the terms of the "Price for Life" contract (Compl. ¶ 25); the "Price for Life Guarantee is an enforceable term of the contract which Mr. Grosvenor . . . entered with Qwest relating to Qwest's internet service" (Compl. ¶ 35); Qwest breached his Price for Life contract (Compl. ¶¶

34-38); and Mr. Grosvenor is entitled to contract damages and a declaration that the class action bar in the Agreement is unenforceable (Prayer). Moreover, consistent with his recognition that he is suing under the Agreement, Mr. Grosvenor, a Utah resident, asserts claims under Colorado law as required by the governing law provision in the Agreement. (Compl. ¶ 51; Agreement § 17(a)(i).)

Having taken these positions and made these allegations, Mr. Grosvenor cannot now, with a straight face, take the position that he never agreed to the Agreement, and he should be judicially estopped from doing so. *See Hicks v. Cadle Co.*, No. 08-1306, 2009 WL 4547803, at \*6 (10th Cir. Dec. 7, 2009) (holding party's request for arbitration of claims in their pleading judicially estopped party from asserting that the arbitrator lacked jurisdiction).

### **III. THE ARBITRATION CLAUSE IS CONSISTENT WITH THE CCPA.**

In attempting to avoid the consequences of his agreement, the Plaintiff argues as a threshold matter that the Arbitration Clause should be invalidated because it eliminates substantive rights under the CCPA and is inconsistent with the remedial functions of that statute. Both arguments are incorrect: the Arbitration Clause preserves all of the Plaintiff's substantive rights under the CCPA, and is consistent with the intent and purpose of the CCPA, which expressly incentivizes low value individual consumer claims.

#### **A. The Agreement Preserves the Plaintiff's Substantive Rights Under the CCPA.**

Mr. Grosvenor claims that the Arbitration Clause does not preserve his substantive rights under the CCPA because he interprets it to eliminate his ability to recover statutory damages and attorneys' fees. This is an incorrect reading of the Agreement and the relevant case law.

The Arbitration Clause 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." (Agreement § 17(a), 17(a)(1).) There is no question that a court could award Mr. Grosvenor statutory or treble damages, attorney's fees and costs in an individual action brought pursuant to the CCPA. Colo. Rev. Stat. §6-1-113(2)(a); §6-1-113(2)(b). Thus, CCPA claims are arbitrable under the Agreement, and the arbitrator is imbued with authority to award any attorneys' fees, costs, and minimum damages available under the CCPA. *See In re Universal Service Fund Tel. Billing Practices Litig.*, 300 F. Supp. 2d 1107, 1127 (D. Kan. 2003) (clause providing for arbitration of any claim, including statutory claims, imbues the arbitrator with authority to award statutory attorneys' fees that arise from the claim).

The Arbitration Clause does not ban statutory treble damages, attorneys' fees or costs, as the Plaintiff suggests, nor does it prevent an arbitrator (or a small claims court) from assessing statutory damages. Rather, a separate section of the Agreement, the Limitation of Liability section, provides that Qwest will not be liable for "incidental, indirect, special, reliance, punitive, or consequential damages." (Agreement § 13(b).) As an initial matter, the plain language of the Limitation of Liability does not reach statutory treble or statutory minimum damages. Indeed, the Supreme Court and other courts have expressly held that similar provisions limiting awards of punitive and exemplary damages do not prohibit an arbitrator from awarding statutory treble damages. *See PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003) (statutory 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) (holding that an arbitration prohibition against punitive damages does not extend to statutory treble

damages). Regardless, the availability of treble damages is not germane, at least in Mr. Grosvenor's case. The CCPA awards victorious plaintiffs who sue in their individual capacity a minimum of \$500 *or* treble damages, and with \$50 in compensatory damages claimed, Mr. Grosvenor would receive *ten times* those damages by virtue of the minimum statutory damages, regardless of the availability of treble damages.

Third, for the same reasons, the provision in the Arbitration Clause stating that each party bears its own expenses, (Agreement ¶ 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 Service Fund*, 300 F. Supp. 2d at 1127. As explained above, the Agreement provides that an arbitrator may provide any relief or damages that a court could award, which would include the CCPA's provisions for attorney's fees and costs. Even if the Arbitration Clause expressly banned the recovery of attorneys' fees, that provision would likely not be enforceable, but the Arbitration Clause as a whole would remain effective pursuant to the Agreement's savings clause. *Fonte*, 903 So.2d at 1024 (arbitration clause's bar on recovery of attorney fees is not enforceable);<sup>2</sup> (Agreement ¶ 19.)

Thus, the Arbitration Clause preserves all substantive rights under the CCPA and should be enforced. *See Johnson v. West Suburban Bank*, 225 F.3d 366, 374 (3d Cir. 2000) (where "the right made available by a statute is capable of vindication in the arbitral forum, the public policy

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<sup>2</sup> Regardless, if there is any question about whether the Arbitration Clause prohibits statutory treble damages or attorney's fees, the Supreme Court has held that the issue must be first resolved by the arbitrator. *See, e.g., Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *In re Univ. Serv. Fund*, 300 F. Supp. 2d at 1127 (arbitrator must resolve issue of whether limitation on putative damages bans statutory treble damages).

goals of that statute do not justify refusing to arbitrate").

**B. The CCPA Specifically Encourages Individual Vindication of Rights.**

Furthermore, Mr. Grosvenor's suggestion that the Arbitration Clause is inconsistent with the "remedial" purposes of the CCPA is simply false and ignores the intent and plain language of the CCPA. Under the CCPA, the Colorado Legislature incentivized consumers to pursue even low value claims individually by awarding at least \$500 in minimum damages as well as attorneys' fees and costs, but only for plaintiffs pursuing their claims individually, not through a class action. Colo. Rev. Stat. §6-1-113(2)(a); §6-1-113(2)(b). Colorado courts recognize that these damages provisions under the CCPA are "intended to promote private enforcement." *Hall v. Walter*, 969 P.2d 224, 233 (Colo. 1998); *Lexton-Ancira Real Estate Fund, 1972 v. Heller*, 826 P.2d 819, 822 (Colo. 1992).

Here, the fact of the matter is that, while the attorneys may not reap as much benefit (or have as much risk) in pursuing individual claims, the CCPA entitles Mr. Grosvenor to *ten times* the amount of his claimed damages if he pursues his claims individually, as well as attorneys' fees and costs, which is more than the amount he would be entitled to as a class action plaintiff.

Moreover, the Supreme Court has made clear that compelling arbitration in accordance with an arbitration clause will not impede a statute's remedial or deterrent function as long as arbitration will preserve a plaintiff's substantive rights. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) ("[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."). The test, when a party contends that an arbitration provision (including one with a class action bar) is inconsistent with

the remedial or deterrent functions of a statute, is whether the legislature "itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *see also Mitsubishi*, 473 U.S. at 628.

In *Gilmer*, a plaintiff suing under the Age Discrimination in Employment Act ("ADEA") challenged an arbitration agreement on the ground that a class action would be unavailable. The Supreme Court rejected the argument:

[E]ven if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.

*Gilmer*, 500 U.S. at 32. Although the plaintiff in *Gilmer*, like the Plaintiff here, argued that private class litigation is necessary to further the ADEA's goals, the Supreme Court disagreed: "[I]t should be remembered that arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief." *Id.* Indeed, the majority of federal circuits have rejected the same arguments advanced by the Plaintiff here that he has a right to "private class enforcement" of the CCPA. *In re Universal Service Fund*, 300 F. Supp. 2d at 1137 ("[plaintiff] has advanced no persuasive argument that there is an irreconcilable conflict between a ban on class actions and the substantive rights provided by" the antitrust laws).

These arguments suggesting a right to "private enforcement" are especially rejected by courts where, as here, arbitration will not preclude other enforcement agencies (such as state Attorneys General offices) from seeking public remedies. *See, e.g., Gilmer*, 500 U.S. at 32; *Johnson*, 225 F.3d at 376 ("loss of the availability of a class action does not mean the loss of meaningful deterrence to TILA violations, insofar as the public remedies . . . remain"); *Francis*

*v. AT&T Mobility LLC*, No. 07-CV-14921, 2009 WL 416063, at \*9 (E.D. Mich. Feb. 18, 2009) (state attorney general provides additional avenue for the enforcement of consumer rights); Colo. Rev. Stat. § 6-1-103 (Colorado attorney general and district attorneys concurrently responsible for public enforcement of the CCPA).

Nothing Mr. Grosvenor argues requires a departure from this reasoning. At the end of the day, if he is successful, he is entitled to ten times his compensatory damages as well as costs and attorneys' fees if he pursues his claims individually. By contrast, he would receive \$50 in actual damages alone as a class action plaintiff. Not only are individual claims consistent with the CCPA, but the Colorado legislature drafted the CCPA's damages provision with the specific intent of incentivizing low value individual consumer claims.

**IV. CONSUMERS SHOULD NOT RECEIVE A SPECIAL EXEMPTION FROM ARBITRATION CLAUSES CONTAINING CLASS ACTION BARS.**

Mr. Grosvenor suggests through his repeated incantation of the word "consumer" that consumers are entitled to an exemption from class action bars under arbitration clauses. This argument should be disregarded. It ignores case law of the Supreme Court, this District, and courts throughout the country, and it ignores the Arbitration Clause's presumption of validity as well as federal preemption law.

First, this District has already enforced a class action bar in an arbitration provision against a consumer. *Ornelas v. Sonic Denver T, Inc.*, No. 06-cv-00253-PSF-MJW, 2007 WL 274738, at \*5-7 (D. Colo. Jan. 29, 2007). Five United States Courts of Appeals also have enforced class action waivers in consumer contracts, rejecting arguments similar to the ones made here that consumers should somehow be exempt from honoring their agreements

containing class action bars. *See, e.g., Lloyd v. MBNA American Bank, N.A.*, 27 Fed.Appx. 82, 84–85 (3d Cir. 2002) (compelling arbitration holding that "an arbitration agreement barring classwide relief for claims brought under the TILA is not unconscionable"); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 639 (4th Cir. 2002) (compelling individual arbitration, holding that "we reject as meritless *Snowden's* unsupported argument that forcing consumers . . . to arbitrate consumer protection claims . . . is against public policy"); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175–76 (5th Cir. 2004) (compelling individual consumer arbitration with class action bar); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003) (compelling arbitration with class-action bar); *Jenkins v. First Am. Cash Advance of Georgia, LLC*, 400 F.3d 868, 877–78 (11th Cir. 2005) ("[T]he inclusion of a class action bar in [consumer] Arbitration Agreements did not render those Agreements substantively unconscionable").

In addition, some state legislatures have also concluded that class actions are not a necessary tool for consumers to vindicate their rights. For example, the State of Utah – Mr. Grosvenor's home state – explicitly allows class action waivers in at least some consumer contracts without regard to the value of the claim: "In accordance with this section, a creditor may contract with the debtor of an open-ended consumer credit contract for a waiver by the debtor of the right to initiate or participate in a class action related to the open-end consumer credit contract." Utah Code § 70C-4-105(1). Other states also have limited the use of class actions. *See, e.g., Iberia Credit Bureau*, 379 F.3d at 174–75 (noting that the Louisiana Unfair Trade Practices Act does not permit individuals to bring class actions).

Furthermore, to the extent the Plaintiff seeks special treatment for consumers with low value claims under arbitration clauses, his argument is precluded by the FAA. *Litman v. Cellco P'ship*, No. 07-CV-4886 (FLW), 2008 WL 4507573, \* 4 (D.N.J. Sept. 29, 2008) (citing *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007) ("a state law determination that precludes, on unconscionability grounds, enforcement of an agreement to arbitrate low value consumer claims on an individual basis is preempted by the FAA.")). Thus, to the extent that Mr. Grosvenor suggests that consumers should receive an exemption from arbitration clauses by virtue of their status as a consumer, his argument should be rejected.

In attempting to circumvent this precedent, Mr. Grosvenor paints a broad and misleading brush stroke of what he claims is the "current trend" of invalidating class action bars in consumer arbitration clauses in state and federal courts. The cases Plaintiff cites, however, are inapposite and merely demonstrate why they do not apply to the instant action. All of the cases cited by the Plaintiff are (1) antitrust cases, which courts, including Judge Figa and Judge Arguello, routinely acknowledge are uniquely costly because of the complexity involved; (2) cases applying laws of states other than Colorado; (3) cases in which there is no small claims opt-out or availability for attorneys fees under the applicable statute giving rise to the action, or (4) distinguishable in some other meaningful way from the present action.

The Plaintiff relies first and foremost, for example, on *Kristian v. Comcast Corp.*, 446 F.3d 25, 29 (1st Cir. 2006) and *In re Am. Express Merchs. Litig.*, 554 F. 3d 300, 304 (2d Cir. 2009), in support of his claim that there is a modern trend toward prohibiting class action bars. These are the same cases, however, that Judges Figa and Arguello found inapplicable when evaluating class action bars in consumer and franchise cases because of the extreme complexity

that antitrust cases uniquely involve. *Ornelas*, 2007 WL 274738, at \*5-7; *Bonanno*, 2009 WL 1068744, at \*13-15. Indeed, *American Express* involved a complex antitrust action where the required expert testimony alone was estimated to cost between \$300,000 to more than \$2 million. *American Express*, 554 F. 3d at 316-317. *Kristian* also was an antitrust case in which the court distinguished its holding from the Third Circuit's *Johnson* decision because of the "sheer complexity" of antitrust cases that typically involve great expense and labor by plaintiff's attorneys as well as the commitment of high expert fees which, in that case, ranged allegedly from \$300,000 to \$600,000. *Kristian*, 446 F.3d at 57-60.

The Plaintiff also relies on state court cases that do not apply Colorado law, as well as federal cases where the applicable state has either legislated or held as a matter of law that class action bars are unenforceable as a matter of the public policy of that state. *See, e.g., Fisher v. Dell*, 188 P.3d 1215, 1219 (N.M. 2008) (prohibiting class action bar based on New Mexico legislative enactment); *Homa v. Am. Express, Co.*, 558 F.3rd 225, 230 (3d Cir. 2009) (citing *Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 89-101 (N.J. 2006)) (predicting that New Jersey would find that the class action bar violates state's public policy in light of the New Jersey Supreme Court's recent opinion in *Muhammad*).<sup>3</sup>

The other cases relied upon by the Plaintiff are similarly distinguishable based on the unavailability of attorneys' fees, small claims opt-out, or other facts or circumstances that were peculiar to that case. In *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007), for

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<sup>3</sup> By contrast, there is no Colorado legislation or case prohibiting class action bars as a matter of Colorado's public policy. The Colorado Appellate Court's decision in *Rains v. Foundation Health Systems Life & Health*, 23 P.3d

example, the plaintiff sued under the Cable Act, and unlike here, there was no statutory availability of attorneys' fees, which was critical to the *Dale* court's holding. *See id.*<sup>4</sup> 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" and was "so difficult to find, read, or understand that the plaintiff [could not] fairly be said to have been aware he was agreeing to it," unlike here, where the Arbitration Clause uses bold and capitalized lettering. *Id.* at 264; *see also Crandall v. AT & T Mobility, LLC*, No. 07-750-GPM, 2008 WL 2796752 (S.D. Ill. July 18, 2008) (distinguishing *Kinkel* and enforcing class action bar in arbitration clause).

These cases are unique to their facts, do not suggest a "modern trend" of invalidating class action bars in arbitration clauses, do not override federal and Colorado policy in favor of arbitration, and should not apply in this case to invalidate the Arbitration Clause. *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 581 (2008) (noting that purpose of FAA was to establish a national policy favoring arbitration); *Rains*, 23 P.3d at 1251 ("Colorado public policy strongly favors the resolution of disputes through arbitration.").

**V. THE ARBITRATION CLAUSE AFFORDS THIS PLAINTIFF A FAIR AND AFFORDABLE PROCESS.**

With regard to his circumstances, the Plaintiff claims that the class action bar "effectively eliminates" his ability to vindicate his rights because (1) it would be "impractical" for attorneys

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1249, 1253 (Colo. App. 2001), rather, suggests the opposite. *See Rains*, 23 P.3d at 1253 ("arbitration clauses are not unenforceable simply because they might render a class action unavailable").

<sup>4</sup> Notably, earlier this year 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.

to represent him given the attorneys' "economic realities;" (2) it would not be worth pursuing his claims because the filing fees for small claims court and the AAA exceed the amount-in-controversy; and (3) AAA Arbitration and small claims courts are not suitable forums for the resolution of his dispute. Mr. Grosvenor cannot prove that the Arbitration Clause is cost-prohibitive or utilizes unsuitable forums.

**A. Plaintiff Cannot Prove that the Dispute Resolution Process is Cost-Prohibitive.**

**1. The Plaintiff Has Not Demonstrated that He Lacks the Resources to Pursue His Claim in His Individual Capacity.**

A plaintiff like Mr. Grosvenor, "seeking to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive bears the burden of showing the likelihood of incurring such costs." *Green Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79, 92 (2000) ("*Randolph I*"); *Rains*, 23 P.3d at 1253 (quoting *Bradford v. Rockwell Semiconductor Sys. Inc.*, 238 F.3d 549, 556 (4th Cir. 2001)) ("an individual cannot reasonably claim to be 'deterred from pursuing his statutory rights in arbitration simply by the fact that his 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.>"). In demonstrating that arbitration would be prohibitively expensive, such that the plaintiff's ability to vindicate statutory rights would be eliminated, "[t]he cost differential between arbitration and litigation is evidence highly probative . . . ." *James v. McDonald's Corp.*, 417 F.3d 672, 680 (7th Cir. 2005); see also *Bradford*, 238 F.3d at 556 (relevant analysis is the "ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims").

First, the Plaintiff has not made any showing that he lacks the financial resources to pursue this claim under the Arbitration Clause in AAA arbitration or in small claims court. The Plaintiff claims only that he is on a fixed income but says nothing about his ability to pay the filing fees or other costs. Indeed, like any plaintiff in Federal Court, Mr. Grosvenor is responsible for the up-front costs in this case, including the \$350 filing fee and possible experts, as well as the cost of individual notice to every proposed member of the class. *See, e.g., Michaels v. Ambassador Group Inc.*, 110 F.R.D. 84, 90–91 (E.D.N.Y. 1986). There is no indication that he cannot meet those obligations here. If, however, he can afford those costs, then he can surely afford the costs of the \$125 AAA fee or the \$60 small claims court fee.<sup>5</sup> Additionally, as described in Section V.B., *infra*, both the AAA and Small Claims Court statutes contain provisions to protect parties from prohibitive expenses.

Second, Mr. Grosvenor has not identified any complexities or experts that would uniquely impact this case or make this case particularly cost prohibitive. Mr. Grosvenor claims that Qwest breached its contract by failing to give him the price it promised. These claims are straightforward, and small claims court and the AAA surely handle far more complex cases on a regular basis. Indeed, the AAA rules and small claims court rules both contemplate far more complex cases.

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<sup>5</sup> Although the Plaintiff has submitted no evidence and does not argue that he lacks the financial wherewithal to pay the initial \$125 filing fee or the other costs that he may incur as would be required if the Plaintiff were challenging the cost of the arbitration, Qwest is willing to pay even the \$125 filing fee or the \$60 small claims court filing fee should the Plaintiff choose to file in one of those venues.

Third, Mr. Grosvenor has ignored the cost differential between arbitration and litigation, which merely demonstrates that arbitration or small claims court is cost-effective, and not cost-prohibitive. For example, the filing fee in Federal Court is \$350 as opposed to the \$125 for the AAA and \$60 for small claims court. In Federal Court expert fees are generally not recoverable costs, but they are recoverable costs in Colorado small claims courts. Colo. Rev. Stat. § 13-16-122. Because the class action process in Federal Court takes far longer than arbitrations and small claims court (in 2009, the average length of time for civil cases in this District from filing to trial was approximately 28 months, [www.uscourts.gov](http://www.uscourts.gov), while trials in small claims court cases are tried within a couple months of filing), they necessarily require larger capital, and the procedure for Federal Court class actions is far more complex than the arbitration and small claims court procedures.

Fourth, the Plaintiff's relative recovery in a class action will be less than his possible recovery under the Arbitration Clause. In a class action setting, under the CCPA, the most he can recover is his actual damages of \$50, while in an individual claim he can recover ten times his claimed damages.

## **2. The Plaintiff's "Attorney" Evidence is Irrelevant.**

Instead of actually addressing the costs of the case under the Arbitration Clause, Mr. Grosvenor, relying on his four attorney-affiants, claims that no attorney would represent him in the instant action against Qwest because it would be impractical given the small amount in controversy for this type of CCPA case. These attorneys' statements are nothing more than their own business desires, are irrelevant here, and are contrary to the law.

First, it does not appear that Mr. Grosvenor asked any of the attorneys to represent him, or that any of the attorneys declined to represent him. Indeed, none of the attorney-affiants are from Mr. Grosvenor's home state of Utah. Moreover, as attorneys alone, they cannot purport to be experts on how consumers act. Their testimony is therefore irrelevant and not helpful to the Court, as described in Qwest's motion in limine filed with this Reply.

Second, the four attorneys' supposed refusal to represent Mr. Grosvenor in his individual capacity is of no moment. Here, by including the minimum damages, costs and a fee-shifting provision for individual actions, the Colorado state legislature has already ensured that Mr. Grosvenor's CCPA claims are "worth" individually pursuing as a matter of law regardless of the amount-in-controversy or the complexity of the case. 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 statutory attorney's fees awards "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") (quotation marks and citation omitted). And when attorneys' fees, costs and minimum statutory damages are available, courts routinely reject the contentions made here that consumers would be unable to obtain legal representation without a class action vehicle. *See Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 878 (11th Cir. 2005) (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*, 290 F.3d 631, 638 (4th Cir. 2002) (holding plaintiff's argument that without class mechanism she would be unable to

maintain legal representation was "unfounded" in light of availability of statutory attorney's fees).

For the same reasons, where attorneys' fees, costs and minimum statutory damages are available, such as here, courts reject arguments that low-value claims are not "worth" pursuing individually. As noted by the Seventh Circuit, fee-shifting statutes remove the "normative decision" from the court as to whether a small but complex claim is "worth" pursuing at great cost because the legislature has already ensured that the claim is worth bringing:

. . . small claims can be complex and large claims can be very straightforward. So . . . measuring fees against damages will not explain whether the fees are reasonable in any particular case. Reasonableness has nothing to do with whether the district court thinks a small claim was "worth" pursuing at great cost. Fee-shifting statutes remove this normative decision from the court. If a party prevails, and the damages are not nominal, then Congress has already determined that the claim was worth bringing.

*See Anderson v. AB Painting & Sandblasting, Inc.*, 578 F.3d 542, 546 (7th Cir. 2009).

Finally, the attorneys' assertion that it would be uneconomical and unethical to represent Mr. Grosvenor on an individual basis is absurd. These attorneys are suggesting that, as a matter of ethics, they could never present a pricing option to a prospective client to recover the statutory \$500 minimum damages that are only available for individual claims under the CCPA. They then build on this false premise, arguing that "[w]ithout an attorney, consumers are left without an avenue to vindicate their rights" (Pl.'s Opp'n at 4). The logical conclusion to their reasoning is that no consumer would ever be able to vindicate their rights to the \$500 CCPA damages, rendering the CCPA minimum damages provision effectively meaningless. Of course this cannot be the case, and the CCPA creates opportunities for attorneys to pursue various pricing models that can be cost-effective and economical to the attorneys, parties, and judicial system.

In a class action setting, the attorneys are offering the Plaintiff the opportunity to recover up to a total damage amount of \$50 in actual damages after many years of litigation, submitting to extensive procedures, and being responsible for Federal Court costs and notices to the class. For the class action attorney, he or she must invest years of time and capital, and can only recover his or her investment at the end of the day if the case is successful.

In the alternative, a consumer attorney could offer Mr. Grosvenor an up-front flat fee to file in arbitration or small claims court with the opportunity to recover for him the \$500 minimum individual CCPA damages in a month or two of proceedings, plus all of the attorneys' fees and costs. Similarly, blended offers could be made of a small up-front fee, say \$250, with the rest of the fees due after the arbitration or small claims case is over with the same opportunity to recover for Mr. Grosvenor the \$500 quickly plus all of the attorneys' fees and costs. Under both alternatives, the attorneys invest far less in the case, put far less capital at risk, are assured revenue, and receive the same hourly return for the hours worked as the class action attorney who only gets paid if successful.

**B. AAA Arbitration and Small Claims Courts Provide Fair and Cost-Effective Venues for Plaintiff's Claims.**

Mr. Grosvenor also argues that the Arbitration Clause precludes him from vindicating his rights because of the procedural nuances of arbitration and small claims court, the alleged complexities of the two forums, and the unavailability of injunctive relief in small claims court. These arguments ignore the AAA's rules for consumers as well as legislative and judicial recognition of arbitration and small claims court and the benefits of those forums to plaintiffs, and do not provide a basis to invalidate the Arbitration Clause.

**1. Arbitration is a Fair and Effective Forum for Mr. Grosvenor to Vindicate His Rights.**

The AAA has developed procedures and protocols to ensure a fundamentally-fair process specifically for consumers. In the Spring of 1997, the AAA announced the establishment of a National Consumer Disputes Advisory Committee whose stated mission was to advise the AAA "in the development of standards and procedures for the equitable resolution of consumer disputes." (Decl. of K. Rothman, Ex. A, Consumer Due Process Protocol, at 3.) As a result of the Committee's recommendations, the AAA created the Consumer Due Process Protocol ("Due Process Protocol") and the Supplementary Procedures for Consumer-Related Disputes ("Supplementary Procedures"). The Due Process Protocol "is a statement of principles and standards aimed at promoting fair procedures that protect consumers in arbitrations," applies to "all possible conflicts from small claims to complex disputes," and can be found on the AAA's website. (Decl. of K. Rothman, Ex. B, Supplementary Procedures for Consumer-Related Disputes Questions and Answers ("Supp. Procs. Q&A"), at 2; Consumer Due Process Protocol, at 4.) The AAA developed the Supplementary Procedures "to provide a low-cost, streamlined process to resolve disputes between consumers and businesses whose Agreements contain a standardized arbitration clause . . . and to reinforce the principles of the Consumer Due Process Protocol." (Decl. of K. Rothman, Ex. B, Supplementary Procedures for Consumer-Related Disputes Questions and Answers ("Supp. Procs. Q&A"), at 2.)

Contrary to Mr. Grosvenor's assertions, these standards and principles ensure fair, streamlined, and cost-effective arbitrations for consumers like Mr. Grosvenor, including, among other things:

- A simple method for filing a claim. (Supplementary Procedures Q&A, at 2.)
- Access to information regarding the ADR program, including access to all information necessary for effective participation in ADR after a dispute arises. (Consumer Due Process Protocol, Principle 2.)
- Reasonable costs for consumers, subsidized if necessary. (Consumer Due Process Protocol, Principle 6; Decl. of K. Rothman, Ex. C, Consumer-Related Disputes Supp. Procs., Procedure C-8.)
- A "fundamentally fair" hearing, including a neutral arbitrator as well as the availability of a hearing by telephone or in-person, even if the other party does not attend. (Consumer Due Process Protocol, Principles 3 and 12; Supp. Procedure C-6.)
- Access to discoverable information to ensure a "fundamentally-fair due process." (Consumer Due Process Protocol, Principle 13.)

The fairness and advantages of arbitration, particularly to consumers, are repeatedly recognized by the courts. Arbitration's procedural simplicity, informality and expedition are part and parcel of what is offered by arbitration and are "characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims." *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174 (5th Cir. 2004) (citing *Gilmer*, 500 US at 31); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) ("We agree that Congress, when enacting [the FAA], had the needs of consumers, as well as others, in mind.") (citing S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924) (the Act, by avoiding "the delay and expense of litigation," will appeal "to big business and . . . individuals"). In fact, the Supreme Court noted that "arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation." *Allied-Bruce*, 513 U.S. at 280 (citing H. R. Rep. No.97-542, p. 13 (1982) ("The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it

normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices. . .").<sup>6</sup>

## **2. Small Claims Court is an Efficient and Inexpensive Alternative for Resolution of Low-Value Claims.**

The very purpose of small claims courts is to dispense “speedy justice between the parties” for claims that involve small amounts of money by balancing due process with efficiency.<sup>7</sup> Utah Code § 78A-8-102(6); R. of Small Claims P. 1(a). Yet, Mr. Grosvenor – a former small claims court bailiff - argues that he could not vindicate his statutory rights in small claims court because the filing fee in Utah is more than his compensatory damages, he would not be able to conduct discovery either at trial or on appeal, and he cannot seek injunctive relief. These arguments should be rejected.

First, the Utah small claims court, like most other small claims courts throughout the country, has mechanisms by which a party’s filing fees will be waived if the party demonstrates that he or she cannot afford them. R. of Small Claims P. 2(c). Here, Mr. Grosvenor has not

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<sup>6</sup> The Plaintiff asserts that the Arbitration Clause must dissuade claims against Qwest because there are "widespread consumer complaints" and yet there are few claims made. (Pl.'s Opp'n at 13.) As explained in the Motion to Strike The Declaration of Deborah Toms, the "evidence" of "widespread complaints" and "dissatisfaction" consists of: (1) unscientific internet searches and even then Plaintiff's counsel could only produce postings from a handful of alleged but anonymous customers and (2) some sort of print out allegedly from the Better Business Bureau that in no way on its face indicates that it relates to Qwest at all or is limited to Qwest's high speed internet service rather than services subject to other contracts or to a tariff. (Decl. of Deborah Toms ¶¶ 3-4, 6 [Dkt. # 26-21].) These internet postings and the BBB report have no indicia of reliability or probative value. If anything, these posts indicate that Qwest provides its Subscriber Agreement to subscribers, that some subscribers resolve their disputes by accepting credits on their account, and that a relatively few alleged customers are unhappy with their service.

<sup>7</sup> In recommending the AAA's Consumer Due Process Protocols, the National Consumer Disputes Advisory Committee concluded that access to small claims tribunals is an important right of consumers which should not be waived by a pre-dispute ADR agreement because "within the judicial system, the least expensive and most efficient

shown that he is unable to pay that amount, and even if he could not, he could seek relief through small claims court. Furthermore, as described above, the Colorado Legislature under the minimum damages, costs and attorneys' fees provisions of the CCPA has already assured that a claim like Mr. Grosvenor's is "worth" pursuing.

Second, although there is no formal discovery in small claims court, the parties engage in informal document exchange and must bring to the trial all documents related to the controversy regardless of whose position they support. R. of Small Claims P. 6(a), 7(a). Mr. Grosvenor's argument that he cannot effectively vindicate his statutory rights under the CCPA without such discovery because he would need such discovery in order to establish bad faith for treble damages is nonsense. Proving bad faith does not necessitate elaborate discovery, and the Plaintiff here does not even need to prove bad faith to recover the most he can recover under the CCPA – the minimum statutory damages of \$500. Colo. Rev. Stat. § 6-1-113(2) (actual damages, \$500, or treble damages are alternative damages, and bad faith is required for treble damages only).

Third, injunctive relief is an available remedy in arbitration pursuant to the Arbitration Clause, and therefore its unavailability in small claims court is irrelevant to Mr. Grosvenor's ability to vindicate his statutory rights under the CCPA. (Agreement § 17(a), 17(a)(1).)

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alternative for resolution of claims for minor amounts of money often lies in small claims courts." (Consumer Due Process Protocol, at 10.)

**VI. THE ARBITRATION CLAUSE IS CONSCIONABLE.**

**A. The Plaintiff Bears a High Burden of Proving Unconscionability Under Colorado Law.**

The Plaintiff bears a high burden to invalidate the Arbitration Clause based on unconscionability because arbitration clauses are presumed valid and contracts are presumed enforceable. As a result, Colorado courts rarely use the doctrine to invalidate a contract and, indeed, other than *Davis v. M.L.G. Corp.*, 712 P.2d 985 (Colo. 1986), a case that was decided with extensive reliance on principles of insurance law, the Plaintiff has not identified one case in which a Colorado court has found a contract provision unconscionable.

To invalidate the Agreement as unconscionable, the Plaintiff must show far more than that the contract is inconvenient for him – he must demonstrate that the contract evokes a “profound sense of injustice.” *See Bonanno*, 2009 WL 1068744, at \*17; *Lincoln Gen. Ins. Co. v. Bailey*, No. 08CA0371, 2009 WL 1331094 (Colo. App. May 14, 2009) (*quoting Univ. Hills Beauty Acad. Inc. v. Mountain States Tel. & Tel. Co.*, 554 P.2d 723, 726 ((Colo. App. 1976)) (“People should be entitled to contract on their own terms without the indulgence of paternalism by courts . . . [unless] the terms of a contract so unconscionable that no decent, fair [-] minded person would view the ensuing result without being possessed of a profound sense of injustice . . . .”). The Plaintiff cannot demonstrate this profound sense of injustice and the Court should not disable the Arbitration Clause on unconscionability grounds.

**B. The Arbitration Clause is Substantively Fair.**

As an initial matter, as described above, the Plaintiff claims that the Arbitration Clause is substantively unfair from an unconscionability perspective because it eliminates his ability to

vindicate his rights and because small claims and arbitration do not provide effective redress.

For the reasons stated above in Sections III and V, *supra*, the Arbitration Clause provides effective redress of Mr. Grosvenor's claims, does not preclude Mr. Grosvenor from vindicating his rights, and is therefore substantively fair.

**C. The Arbitration Clause Satisfies the Remaining *Davis* Factors.**

In attempting to invalidate the Arbitration Clause based on the remaining *Davis* factors for unconscionability, the Plaintiff also argues that there is no commercially reasonable justification for the Clause, and that it is procedurally unconscionable because it was presented to Mr. Grosvenor on a take-it-or-leave-it basis, Mr. Grosvenor did not have an opportunity to read or become familiar with the document before signing it, and the Arbitration Clause was buried in fine print. These arguments ignore the law.

First, as Judge Arguello has already recognized, the class action bar has a commercially reasonable justification because it reduces litigation:

Like other provisions that discourage litigation . . . *e.g.*, exculpatory clauses, contractual statutes of limitations, limitations on punitive damages, etc., the class action bar likely benefits Quiznos' bottom line . . . . [T]he fact that the class action bar discourages litigation, even if it is a somewhat nefarious goal from Plaintiffs' perspective, does serve a commercial purpose from Quiznos' perspective.

*Bonanno*, 2009 WL 1068744, at \*20.

Plaintiff does not address *Bonanno*, but rather asserts that because Qwest has sometimes litigated in court with business partners, it must not truly view arbitration as commercially reasonable. (Pl.'s Opp. at 19-20.) Plaintiff's argument, however, misses the point. In light of the strong policies favoring arbitration, there can be no debate that arbitration clauses generally have a commercially reasonable justification, and as the *Bonanno* Court noted, so do class action bars.

Second, as described in Section II.B.1., *supra*, it is settled that "take-it-or-leave it" contracts between parties of unequal bargaining power are not unconscionable and do not render contracts unenforceable. *Clinic Masters, Inc. v. Dist. Ct. of County of El Paso*, 556 P.2d 473, 475-76 (Colo. 1976). Regardless, the Agreement here was not offered on a take-it-or-leave it basis: Mr. Grosvenor had a thirty-day look-back period to reject the Agreement, which also is an accepted method by the courts. *See* Section II.B.1., *supra*. Moreover, there was nothing compelling the Plaintiff to use Qwest's high speed internet. The Plaintiff has not alleged or presented any evidence that there are no other HSI providers in his area or that all such providers use the same contract terms.

Third, it is irrelevant where the Arbitration Clause appears in the Agreement. The language of an arbitration provision need only be as prominent as the language in the rest of the contract; it need not be more prominent and is not required to be separately executed or initialed. *Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536 (8th Cir. 2002) (relying on *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (holding that § 2 of the FAA preempted state statute that imposed typography requirements on arbitration notices)). In this case, the Arbitration Clause is not less conspicuous but more prominent. "**Dispute Resolution and Arbitration**" is written in bold followed by the warning in all caps: "PLEASE READ THIS SECTION CAREFULLY. IT AFFECTS RIGHTS THAT YOU MAY OTHERWISE HAVE." This weighs in favor of enforcing the class action bar, not invalidating it. *See Bonanno*, 2009 WL 1068744, at \*19 (noting that the fact that arbitration clause comes towards the end of the agreement does not make it any more difficult to see or understand than a provision placed on the third or thirteenth page); *Cicle v. Chase Bank, USA*, 583 F.3d 549, 554-555 (8th Cir. 2009) (approving

arbitration clause where entire contract was in same sized print but arbitration clause was introduced with a bold faced heading and an all-upercase paragraph); *Iberia Credit Bureau*, 379 F.3d at 172 (finding print of arbitration provision was same size as rest of contract and that FAA prohibited requirement that arbitration clause be displayed with special prominence).

**CONCLUSION**

For the reasons stated above, Defendants respectfully request that this Court stay this case and compel arbitration or dismiss this action if Plaintiff chooses to proceed in small claims court.

DATED this 11th day of March, 2010.

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 11, 2010, I electronically filed the foregoing **DEFENDANTS' REPLY IN SUPPORT OF THEIR 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:

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