

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

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

RICK GROSVENOR, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

QWEST COMMUNICATIONS INTERNATIONAL, INC., a Delaware corporation,  
QWEST SERVICES CORPORATION, a Colorado corporation,  
QWEST CORPORATION, a Colorado corporation,  
QWEST COMMUNICATIONS CORPORATION, a Delaware corporation, and  
QWEST BROADBAND SERVICES, INC., a Delaware corporation,

Defendants.

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**PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL  
ARBITRATION**

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## I. INTRODUCTION

This case involves a complex consumer claim where individual damages are small. As detailed below, without the ability to proceed on a classwide basis, Plaintiff Rick Grosvenor and thousands of other Qwest customers challenging the multi-billion-dollar corporation's unfair and deceptive "Price for Life" promotion are effectively left without redress for their claims.

Defendant Qwest Communications International Inc. and its affiliated defendants (collectively "Qwest" or "Defendants") insist the "Dispute Resolution" provision in their form Subscriber Agreement, which includes a mandatory arbitration clause and class action waiver, is "efficient" and "fair." A more fitting way to describe a contract provision that effectively exonerates Qwest from all liability for its unlawful business practices is "unconscionable."

Qwest's characterization of the "Dispute Resolution" options available to Mr. Grosvenor turns on the availability of individual proceedings in small claims court or before the American Arbitration Association ("AAA"). But when individual claims are for small amounts – Mr. Grosvenor's damages are approximately \$50 – neither small claims nor arbitration is cost-effective. Where the cost of pursuit outweighs the amount of recovery, as is the case here, Qwest will never be held accountable for its wrongdoing. A class action is the only option for Mr. Grosvenor and other consumers who fell prey to a "Price for Life" that was anything but.

The Court should deny Defendants' Motion to Compel Arbitration.

## II. STATEMENT OF FACTS

Plaintiff Rick Grosvenor, a retired correction officer on a fixed income living in Utah, filed this putative class action on behalf of all similarly situated Qwest customers on December 7, 2009. Compl. (Dkt. #1). Mr. Grosvenor obtained high-speed internet service from Qwest in late 2005 or early 2006. Grosvenor Decl., ¶ 4. He switched to Qwest's "Price for Life" plan in about October 2007, and then upgraded to a higher-priced, faster-speed service from Qwest, also pursuant to the Price for Life plan, the next month. *Id.*, ¶ 6.

Mr. Grosvenor brought this suit to challenge Qwest's failure to honor the Price for Life guarantee. He alleges that Qwest entices consumers to purchase high-speed internet service by promising a "Price for Life," but after customers agree to purchase the service, Qwest routinely raises their monthly rates. Compl. ¶ 1. As a result of this conduct, Mr. Grosvenor suffered individual damages of approximately \$50. Grosvenor Decl. ¶ 14. For other consumers, damages vary depending on how many months they had Qwest internet service, but less than \$20 per month is at stake for any particular customer. Compl. ¶ 25. While the claim of each putative class member is small, collectively they are likely to amount to millions of dollars given the success of the Price for Life promotion. Terrell Decl. ¶¶ 10-11, Exs. E, F.

When he initially ordered High-Speed Internet service from Qwest and when he changed his service or price plan in October and November 2007, Mr. Grosvenor called Qwest and talked with a customer representative. Grosvenor Decl., ¶ 6. On no occasion did the representative alert him to the existence of a Subscriber Agreement or of a requirement that disputes be resolved only in individual adjudications or small claims court actions. *Id.*, ¶ 10. And to the best of his knowledge, Qwest did not advise him of any of these matters by any other means. *Id.*, ¶¶ 8-10. Grosvenor never saw the Subscriber Agreement prior to the filing of this lawsuit. *Id.*, ¶ 10.

Qwest claims Section 17 of the Subscriber Agreement, captioned "Dispute Resolution and Arbitration: Governing Law," bars Mr. Grosvenor's access to this Court and his right to proceed on a class basis. *See* High Speed Internet Subscriber Agreement, Ex. A to Mot., Dkt. No. 13-2 ("Subscriber Agreement"), § 17. That provision, provided in 8-point type, and on the next-to-last page of the 16-page agreement, is reproduced in the Appendix. Qwest does not negotiate the terms of the Dispute Resolution clause with its customers. Terrell Decl., Ex. D (Response to Interrogatory No. 6).

Mr. Grosvenor has submitted affidavits or reports from four attorneys whose experience representing individual consumers qualifies them to testify regarding the types of cases

consumer lawyers will handle on an individual basis. *See* Fuller Aff. ¶¶ 4–11 (37 years representing consumers in Minnesota); Maier Aff. ¶¶ 3–13 (29 years representing consumers in Washington State); Terrell Decl., Ex. A [Treinen Rep.] ¶¶ 1–4 (11 years representing consumers in New Mexico); *Id.*, Ex. B. [Villanueva Rep.] at 1 (31 years representing individuals with small claims in Colorado). These experts testify that small amounts in controversy make cases against large corporations such as Qwest impractical to pursue on an individual basis. As Washington consumer lawyer Peter Maier points out, “the cost of litigation over allegations of overcharging for services, especially against a corporation, is far too high” to allow him to represent a consumer, like Mr. Grosvenor, whose damages are approximately \$50.00. Maier Aff. ¶ 15. The fees to perform the tasks required in even the very simplest consumer cases (e.g., interviewing the client, sorting through documents, explaining the retainer, opening a file, analyzing and organizing the evidence, and drafting a demand letter), would far exceed the amount at issue, even for a lawyer charging below-market rates. Maier Aff. ¶¶ 19–21. Minnesota attorney Richard J. Fuller echoes Mr. Maier, estimating that a consumer case of minimal complexity “can be expected to result in the expenditure of at least 24 hours” of total time, including “6 to 8 hours of attorney time...and very likely more.” Fuller Aff. ¶ 23–25. As New Mexico attorney Rob Treinen opines, these economic realities make it “highly unlikely that any competent consumer law attorney in his or her right mind would agree to represent a plaintiff that wants to bring the claims in this lawsuit on an individual basis.” Terrell Aff., Ex. A [Treinen Rep.] at 7.

Without an attorney, consumers are left without an avenue to vindicate their rights. This case involves complex factual and legal issues that take time and expertise to analyze. *See* Maier Aff. ¶ 22 (noting Qwest’s Subscriber Agreement is sixteen pages of closely packed type, “which will require time and effort to read and digest”); Fuller Aff. ¶ 31 (describing the Subscriber Agreement as “long, complex, and ungrammatical”); Terrell Aff., Ex. A [Treinen Rep.] at 5–6 (setting forth the complicated legal defenses Qwest likely would assert during the

course of the lawsuit). Both AAA arbitration and small claims court present procedural hurdles that consumers would find difficult to surmount. *See* Maier Aff. ¶ 22 (noting AAA’s procedures “take time to locate and understand”); Fuller Aff. ¶ 33 (testifying that the average consumer “can be expected to have difficulty explaining his or her claim” in small claims court). Perhaps most important, the cost of AAA arbitration or small claims court is prohibitive for individuals with relatively small damages claims. *See* Terrell Aff., Ex. B [Villanueva Rep.] at 5 (reporting the cost to file an action and effect service of process would amount to half or more of the amount of the consumer’s typical claim and noting that arbitration costs \$125 even if the consumer wins).

In short, without the ability to proceed on a classwide basis, few if any of Qwest’s customers would be able to seek redress for their claims. As Mr. Fuller states, “[i]f Qwest succeeds in its attempt to bar such class actions, it will have effectively insulated itself from liability for the alleged practices as described in the Complaint.” Fuller Aff. ¶ 41.

These experts’ conclusions are supported by the lack of small claims matters and arbitrations despite widespread dissatisfaction with Qwest’s dishonoring of its Price for Life promotion. Toms Decl., ¶¶ 2-6; *id.*, Exs. A and B. Since January 1, 2005, AAA has conducted no consumer arbitrations involving Qwest. Terrell Decl. ¶ 13. Qwest can provide only one example of consumers who attempted to pursue arbitration regarding claims arising under Qwest’s High Speed Internet Subscriber Agreement. Terrell Decl. ¶ 7. But Qwest summarily ignored their arbitration demand and to date, they have not had the opportunity to pursue their claims. Terrell Decl. ¶¶ 14-20 and Exs. H-N. Only 14 consumers have pursued small claims against Qwest in the last four years and only one involved a challenge to the Price for Life promotion. Terrell Decl. ¶¶ 5-9 and Ex. D.

### III. ARGUMENT

#### A. Qwest Fails to Demonstrate Mr. Grosvenor Agreed to the Arbitration Clause and Class Action Waiver in Qwest's Subscriber Agreement

Qwest asserts a motion to compel arbitration “is treated as a motion to dismiss.” Mot. at 4. Qwest is wrong. A standard of review similar to the standard applicable to summary judgment motions governs a motion to compel arbitration under the Federal Arbitration Act. *See, e.g., Stein v. Burt-Kuni One, LLC*, 396 F. Supp. 2d 1211, 1213 (D. Colo. 2005) (citation omitted); *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 300 F. Supp. 2d 1107, 1116–117 (D. Kan. 2003) (collecting cases).

Because a summary judgment standard applies, the party seeking to compel arbitration must present evidence “sufficient to demonstrate an enforceable agreement to arbitrate.” *Stein*, 396 F. Supp. 2d at 1213–14 (citation omitted); *see also Ernest v. Lockheed Martin Corp.*, 2008 WL 2958964, \*3 (D. Colo. July 29, 2008) (noting defendant bears burden of setting forth sufficient evidence to show an enforceable arbitration agreement exists). Only after the party seeking arbitration “has substantiated the entitlement by a showing of evidentiary facts” does the burden shift to the plaintiff to raise an issue of fact. *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1336 (D. Kan. 2000) (refusing to compel arbitration where defendant failed to provide any evidence that a contract between the parties had been formed). State law principles of contract formation govern whether an enforceable agreement exists. *See Stein*, 396 F. Supp. 2d at 1213. Under Colorado law, a contract is formed only when the parties “understand and agree to the essential terms and conditions of the claimed contract.” *I.M.A., Inc. v. Rocky Mountain Airways, Inc.*, 713 P.2d 882, 888 (Colo. 1986). The parties’ agreement is evidenced by their manifestations of mutual assent. *Id.* (citing Restatement (Second) of Contracts § 17(1) (1981)).

Qwest fails to submit any evidence, such as a signed agreement or documented communications with Qwest, demonstrating Grosvenor’s assent to the “Dispute Resolution” provision. Instead, Qwest merely appends to its motion the version of the Subscriber

Agreement purportedly in effect when Grosvenor subscribed to Qwest's service and the current version of the document. But the fact that a document called "Subscriber Agreement" exists does not establish that its terms were included in the agreement between Qwest and Grosvenor for the "Price for Life" plan. To the contrary, a form agreement is included in a contract only where the plaintiff was aware of the agreement and assented to it. *See Davis v. Monroe Cty. Bd. of Ed.*, 526 U.S. 629, 640 (1999) ("there can, of course, be no knowing acceptance of the terms of the putative contract if a [party] is unaware of the conditions imposed"); *Vasey v. Martin Marietta Corp.*, 29 F.3d 1460, 1465 (10th Cir. 1994) ("Because he was unaware of the document prior to his termination, Plaintiff's continued employment could not constitute an acceptance of the terms of the document as part of an implied contract."). Where a defendant fails to present evidence showing the plaintiff was aware of a form dispute resolution agreement, defendant's motion to compel arbitration should be denied. *See Smith v. Devlin Partners, L.L.C.*, 2004 WL 1490401, at \*2-3 (D. Kan. July 2, 2004) (holding defendant failed to show the existence of an enforceable agreement to arbitrate where defendant asserted it gave plaintiff a copy of a form agreement but provided no sworn testimony to support its assertion).<sup>1</sup>

Rather than submit any evidence to establish that Grosvenor was aware of the Subscriber Agreement, Qwest suggests Grosvenor concedes the existence of an agreement because the Complaint contains a breach of contract claim. *See Mot.* at 1. Qwest misses the point. Grosvenor has not alleged Qwest breached the Subscriber Agreement. Instead, Grosvenor alleges Qwest breached its contract to provide internet services at a set "Price for Life." *See Compl.* (Dkt. #1) ¶¶ 34-38. The purported Subscriber Agreement never was a part of Grosvenor's agreement with Qwest because Qwest did not inform him about the terms of the

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<sup>1</sup> *See also Chase Bank USA, N.A. v. Leggio*, 997 So.2d 887, 890 (La. Ct. App. 2008) (holding defendant credit card company failed to prove the existence of agreement to arbitrate where it offered unsigned standard-form contracts containing arbitration clauses, but failed to offer evidence linking those forms to individual plaintiffs or establishing notice to and consent by the cardholders); *Burgess v. Qwest Corp.*, 546 F. Supp. 2d 1117, 1121 (D. Or. 2008) (holding alleged arbitration agreement unenforceable because defendant provided no evidence other than a standard form agreement to establish plaintiff was aware of terms of form agreement and agreed to those terms).

Subscriber Agreement at the time he enrolled in the Price for Life program. *See* Grosvenor Decl. ¶ 10.

Qwest wrongly maintains a “presumption of arbitrability” should be applied because the language of the alleged arbitration agreement is broad. *See* Mot. at 5. To the contrary, in the Tenth Circuit the “presumption of arbitrability disappears... when the parties dispute the existence of a valid arbitration agreement.” *Stein*, 396 F. Supp. 2d at 1213 (citing *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1220 (10th Cir. 2002)). The rationale for this rule is plain. “Arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes — but only those disputes — that the parties have agreed to submit to arbitration.” *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). A party “cannot be required to submit any dispute which he has not agreed so to submit.” *AT&T Tech., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 648 (1986). Therefore, no “presumption of arbitration” arises until the existence of an agreement to arbitrate has been established. The unpublished cases relied upon by Qwest are distinguishable in that they did not involve a challenge to the existence of an agreement to arbitrate.<sup>2</sup>

In short, Qwest has utterly failed to establish that Grosvenor “agreed” to the Dispute Resolution Provision contained in the Subscriber Agreement. Because no agreement exists, Grosvenor cannot be required to arbitrate his claims or waive his right to bring his claims as a class action. For these reasons, Qwest’s motion should be denied.

**B. Even If the Court Finds Mr. Grosvenor Agreed to the Arbitration Clause and Class Action Waiver, the Purported “Dispute Resolution Provision” Is Unenforceable Under Colorado Law**

To date, no published Colorado decision addresses the specific issue here: whether an arbitration clause with an embedded class action waiver which impairs a consumer’s right to

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<sup>2</sup> *See OrbitCom, Inc. v. Qwest Commc’ns Corp.*, 2009 WL 1847355, at \*2 (D. Colo. June 25, 2009) (issue was whether claims were within the scope of an arbitration agreement that had terminated); *May v. J.P. Turner & Co., LLC*, 2008 WL 4533922, \*3 (D. Colo. Oct. 6, 2008) (issue was whether the claims asserted fell within the scope of the arbitration agreement rather than on the existence of an agreement in the first place). Neither of these cases holds, as Qwest falsely asserts, that the “breadth” of a putative agreement to arbitrate triggers a “presumption of arbitrability” when the existence of the agreement itself is in question.

enforce a consumer protection statute and exculpates a corporate defendant from liability is enforceable under Colorado law. Under the well-established framework Colorado courts rely upon to determine whether a contract term is unconscionable, Qwest's supposedly "fair" and "efficient" attempt to channel all consumer claims into small claims court or individual arbitration is nothing more than an unenforceable attempt to deny consumers with low-value claims their day in court.

**1. Unconscionability Analysis in Colorado is governed by the *Davis* Factors**

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

**2. Qwest's "Dispute Resolution" Provision Is Procedurally Unconscionable**

Qwest admits the Subscriber Agreement is a form contract it presents to customers on a take-it-or-leave-it basis. Mot. at 7. It admits it is unaware of any negotiations with a customer regarding the arbitration clause in the Subscriber Agreement. Terrell Decl., Ex. D (Response to

