

**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.

**PLAINTIFFS' SURREPLY IN OPPOSITION
TO DEFENDANTS' MOTION TO COMPEL ARBITRATION**

I. INTRODUCTION

Actions speak louder than words.

Qwest says that it has provided Mr. Grosvenor and other consumers “A FAIR AND AFFORDABLE” alternative to a class action lawsuit. (Defendants’ Reply in Support of Their Motion to Compel Arbitration (Dkt. 34, at 19.) It contests that the class action bar in the Subscriber Agreement “effectively eliminates” Mr. Grosvenor’s “ability to vindicate his rights.” (*Id.*) But if arbitration and small claims were really viable alternatives to a class action, Qwest would have no motivation to fight so hard for them. It has filed 50 pages of briefing arguing that Mr. Grosvenor should not be permitted to proceed with a class action in court. The sheer volume of briefing, including a 33-page reply brief, is extraordinary given that parties are only allowed 30 pages of briefing for summary judgment motions, except “in cases of extraordinary

complexity.” (Judge Miller’s Pretrial and Trial Proc. § 6.2.)

The brief is not only overly long, it is repeatedly misleading in its presentation of the facts and law. This surreply fills in gaps in the evidentiary record and corrects the misimpressions created by those gaps as to only one issue: the process by which Mr. Grosvenor supposedly accepted the terms of the Subscriber Agreement and its Dispute Resolution Provision.

II. ARGUMENT

In its opening memorandum, Qwest simply attached a copy of a Subscriber Agreement and assumed, without offering any proof, that Mr. Grosvenor had accepted its terms. In his opposition, Mr. Grosvenor pointed out that Qwest had the burden to show the existence of an agreement, that its reliance on the mere assumption that the attached Subscriber Agreement governed the relationship between Mr. Grosvenor and Qwest was inconsistent with the allegations in the Complaint, and therefore that Qwest was not entitled to dismissal on the pleadings. Qwest implicitly concedes that Mr. Grosvenor was correct: in its reply, it presents evidence for the first time about the process by which it contends Mr. Grosvenor and all customers had to agree to the Subscriber Agreement in order to complete the installation of software necessary to run Qwest’s high speed internet service.

Qwest’s evidence consists of an incomplete summary in an affidavit from Jesse Kohler, a Qwest Manager of Product Management, of the language on a screen presented as a customer installed a QuickConnect CD. Qwest does not present the Court with all of the language on the screen. Mr. Grosvenor therefore attaches as Exhibit A a document that was attached as Exhibit E (Dkt. 27-6) to the Affidavit of Qwest director Travis Leo, filed September 15, 2009 in *Vernon v.*

Qwest Communications International Inc., No. 09-cv-01840-WYD-CBS. Exhibit E purports to be a complete copy of the language on the screen, although slightly different than the language that Mr. Kohler quotes.

A. Qwest’s Installation Disc Neither Contained the Terms of the Subscriber Agreement Nor Alerted Mr. Grosvenor and Other Customers That Qwest Intended Their Acceptance to Include the Terms of that Agreement

According to Mr. Kohler, the bottom of the screen states in bold text:

Your click on “I accept” is an electronic signature to the agreements and contracts set out herein.

Please review the material in the above box for important, binding, legal information.

(Kohler Aff., ¶ 9.)¹

To “set out” means “to display.” WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY 1067 (1988). If Mr. Grosvenor wished to look for the agreements and contracts displayed, the screen directed him to the “above box.” The only box on the page is a scroll box that appears above the “I accept” or “Cancel” buttons. That box is also referenced by the phrase “for important, binding, legal information” because the first line of the text in the scroll box is “Important, Binding, Legal Information.” (Kohler Aff., ¶ 8.) Thus, by two different means, Mr. Grosvenor, like other customers, was referred to the scroll box for a display of the agreements to which he could agree by clicking “I accept.”

¹ Mr. Leo’s version states, “Your click on the radio button labeled ‘I accept the terms of the license agreement’ is an electronic signature to the agreements and contracts set out herein. Please review the material above for important, binding, legal information.” If that, and not the language Mr. Kohler quotes, was the language presented to Mr. Grosvenor, he would have another reason, in addition to all of those discussed below, to believe that his acceptance was only of the License Agreement, not the Subscriber Agreement. The License Agreement would have allowed him to file a class action lawsuit in this Court.

That scroll box “sets out,” or displays, the language of two disclaimers of liability, an End User License Agreement, and relevant language of the federal electronic signature statute. Ex. A. It does not “set out” the language of the Subscriber Agreement. Thus, Qwest informed Mr. Grosvenor that, by clicking “I accept,” he would accept the agreements displayed in the scroll box – the disclaimers of liability and the License Agreement – and that he was doing so through an electronic signature.

The disclaimers did not contain any dispute resolution provisions. The License Agreement did. But it is virtually the exact opposite of the provision in the Subscriber Agreement on which Qwest relies. Paragraph 7.2(c) provided that “*disputes regarding this Agreement will be subject to the exclusive jurisdiction of the Colorado state courts in and for Denver County, Colorado or, if there is federal jurisdiction, the United States District Court for the District of Colorado.*” (Ex. A, page 7 of 10) (emphasis added.)

While ignoring most of the language in the scroll box, Mr. Kohler and Qwest want the Court to focus on its first paragraph, which begins: “Your click below on ‘I accept’ is an electronic signature and acknowledges: (1) you agree the Qwest Agreement contains the terms under which service and equipment are offered and provided to you, (2) you understand and agree to such terms (even if you don’t read them), and (3) you understand and agree to the Install Agreements.” (Kohler Aff., ¶ 8.) Nothing in the scroll box defines the “Qwest Agreement” or the “Install Agreements.”

The definition of “Install Agreements” is found in the first paragraph of the page. It is defined as “disclaimers and end user license agreement” reproduced in the scroll box. (Ex. A, page 2 of 10.) Thus, clause (3) above – that “you understand and agree to the Install

Agreements” – refers to the disclaimers and end user license agreement in the scroll box.

The definition of “Qwest Agreement” is more problematic. The term appears in the first sentence of the first paragraph, which (according to Mr. Kohler) provides, “Please read the terms, *including arbitration and limits on Qwest liability*, at www.qwest.com/legal (‘Qwest Agreement’) that govern your use and Qwest’s provision of the service(s) and equipment you ordered from the list below.” That suggests that www.qwest.com/legal is or contains the “Qwest Agreement.”

If Mr. Grosvenor or any other customer had obeyed the directions on the screen, he would not have tried to link to www.qwest.com/legal while installing the disc. One of the disclaimers in the scroll box stated, in all caps, “YOU WILL BE TEMPORARILY CONNECTED TO THE INTERNET FOR THE LIMITED PURPOSE OF CONFIGURING YOUR MODEM. QWEST IS PROVIDING THIS INTERNET CONNECTION TO YOU FOR CUSTOMER SERVICE PURPOSES ONLY.” Linking to Qwest’s legal page for the “terms ... that govern your use and Qwest’s provision of the service(s) and equipment you ordered from the list below” is not configuring a modem.

But if Mr. Grosvenor had defied that disclaimer, Mr. Kohler does not allege what he would have found if he had gone to www.qwest.com/legal at the time he purchased his service. Today, he would find most of the page filled with text, and on the left side of the page, a box labeled “Legal Notices” with 35 links. None of the links, and none of the text that fills most of the page, is labeled “Qwest Agreement.”²

² Exhibit A sets out the sentence differently than does Mr. Kohler. The exhibit states, “Please read the Qwest® High-Speed Internet® (also called Qwest® Broadband) Subscriber Agreement terms, *including arbitration and limits on Qwest liability*, at www.qwest.com/legal

For all these reasons, Mr. Grosvenor had no reason to think he was accepting an agreement that Qwest had not presented to him and was advising him not to look for before he signified his acceptance.

In sum, this click-to-accept process was misleading and uninformative in multiple ways:

- Qwest did not provide the language of the Subscriber Agreement, only of the License Agreement, and did not provide a means to access the language of the Subscriber Agreement during the installation process;
- The License Agreement, the only agreement Mr. Grosvenor could read while using the installation disc, did not restrict customers to individual arbitrations or small claims court actions;
- Immediately above the acceptance button was a bolded explanation that, by clicking, the customer was signing “the agreements and contracts *set out herein*” (emphasis added). The Subscriber Agreement was not “set out herein,” and according to the evidence that Qwest has presented, it was not even referenced.

In its reply brief, Qwest advances arguments about the importance of “click-to-accept,” or “clickwrap,” processes, of “money now, terms later” transactions, and of the enforceability of agreements even if consumers choose not to read them. (Reply at 6-9.) Mr. Grosvenor does not

(‘Qwest Agreement’) that govern your use and Qwest’s provision of the service(s) and equipment you ordered from the list below.” (Emphasis in original.) If that is how the sentence read, *and* if Mr. Grosvenor had gone to Qwest’s legal page notwithstanding the directions that he was supposed only to be configuring the modem *and* notwithstanding that the acceptance was only of contracts and agreements “set out herein,” *and* if he had looked at the Legal Notices box, *and* if he had surfed down to the 25th link, he would have found a link to Qwest High-Speed Internet® Subscriber Agreement. That is a tremendous number of “ifs” on which Qwest must base its argument that Mr. Grosvenor and other customers have given up their right to sue in court on behalf of a class of similar consumers.

dispute any of those arguments as to why “clickwrap” and similar agreements are needed in the modern economy. But the necessity for impersonal, electronic agreements elevates the importance of describing accurately in writing the agreements and terms to which consumers are being asked to agree. Qwest utterly failed to meet its responsibilities in order to create a contract. The Court should conclude that the terms of the Subscriber Agreement were not included in the contract between Qwest and Mr. Grosvenor.

B. Even Qwest’s Cases Do Not Condone the Flawed Sign-Up Process it Used

Qwest is unable to point to a single decision in which a court has ruled that a process as flawed as Qwest’s was sufficient to form a contract. Two of the three decisions that Qwest cites involve a typical “clickwrap” process: the agreement is available to the customer in a scrollbox, and either at the bottom of the scrollbox or immediately afterward, the customer must signify whether he or she accepts its terms. *See Recursion Software, Inc. v. Interactive Intelligence, Inc.*, 425 F. Supp. 2d 756, 781-83 (N.D. Tex. 2006) (explaining that website provided the terms of the license agreement in a scrollable window, at the bottom of which was a question asking whether the user accepted all of the agreement’s terms, and that an affirmative answer was a precondition to downloading the software); *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 530 (N.J. Super. Ct. App. Div. 1999) (explaining that the “membership agreement appears on the computer screen in a scrollable window next to blocks providing the choices ‘I Agree’ and ‘I Don’t Agree,’” and that “[n]o charges are incurred until after the membership agreement review is completed and a subscriber has clicked on ‘I Agree.’”). Unlike Qwest, the selling party in each of these cases provided the language of the agreement being accepted, provided a button stating that by clicking it the customer was accepting that agreement, and did not create confusion by

presenting agreements with different dispute resolution provisions, the more benign of which it presented to consumers.

The third decision also is readily distinguishable from this case. In *Hugger-Mugger, L.L.C. v. Netsuite, Inc.*, No. 2:04-CV-592TC, 2005 U.S. Dist. LEXIS 33003 (D. Utah Sep. 12, 2005), the court held that Hugger-Mugger was bound by the forum selection provision in Netsuite's Terms of Service in two ways: the License Agreement that Hugger-Mugger signed incorporated the Terms of Service by reference, *id.* at *13-17; and a Hugger-Mugger employee with apparent authority clicked an acceptance button for the Terms of Service, *id.* at *18-20. The first means of acceptance did not involve a computerized acceptance at all, and the court made clear that under California law, which controlled in the case, incorporation would not have been effective if the License Agreement had been a contract of adhesion between parties with unequal bargaining power rather than a contract between two commercial entities. *Id.* at *16. And although the court did not discuss Netscape's clickwrap process in the same detail as did the authors of the other two opinions, there is no indication that it suffered from any of the flaws of Qwest's process.

C. Qwest's Clickwrap Process Fails Under Black Letter Contract Law

No case deals directly with a clickwrap process as flawed as Qwest's. In the absence of directly controlling precedents, the Court may look to general principles of contract formation. "The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if ... that party has no reason to know of any different meaning attached by the other, and the other has reason to know the meaning attached by the first party." *Restatement (Second) of Contracts* § 20(2)(b). "Under Subsection (2) (b) a party may be bound by a ...

negligent manifestation of assent, if the other party is not negligent.” *Restatement (Second) of Contracts* § 20 (comment d).

Qwest was, at best, negligent in preparing the clickwrap process; at worst, Qwest was intentionally misleading. Qwest easily could have made consumer assent clear. It could have had a separate button “I accept the terms of the Subscriber Agreement,” or if it wanted a single button, it could have read, “I accept the terms of the Subscriber Agreement, Disclaimers and License Agreement.” It could have inserted a scroll box with the terms of the Subscriber Agreement, or at least a link directly to the document. It could have omitted the language “set out herein” and “important, binding, legal information” that called attention only to the language in the scroll box, not the Subscriber Agreement. It did none of these things.

As discussed above, Qwest had multiple reasons to believe that Mr. Grosvenor and other consumers would not interpret the button to be clicked as encompassing the Subscriber Agreement. Mr. Grosvenor was a retired corrections officer. He was not a lawyer whose job it is to parse legal language. Even if he were, the language Qwest prepared suggests that the Subscriber Agreement was not encompassed by clicking the “I accept” button. Whether Qwest’s drafting was negligently or intentionally misleading need not be decided. It was misleading for consumers such as Mr. Grosvenor, and the Subscriber Agreement should not be deemed to be part of the contract between Qwest and him.

CONCLUSION

For the reasons set forth in Mr. Grosvenor’s reply as well as this Surreply, the Court should deny Qwest’s Motion to Compel Arbitration and allow Mr. Grosvenor to embark on discovery as to whether this case may proceed as a class action lawsuit.

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Respectfully submitted,

s/ Michael D. Lieder

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