

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

Civil Action No. 09-cv-01840-WYD-CBS

ROBIN VERNON, et al.,

Plaintiffs,

vs.

QWEST COMMUNICATIONS
INTERNATIONAL,
INC., et al.,

Defendants.

DEFENDANTS' MOTION TO DISMISS

Qwest Communications International Inc., Qwest Services Corp., Qwest Corp., Qwest Communications Company, LLC, and Qwest Broadband Services, Inc. (collectively "Defendants" or "Qwest")¹ hereby move to dismiss the Plaintiffs' Second Amended Class Action Complaint.

INTRODUCTION

Plaintiffs' Second Amended Class Action Complaint asserts claims that were already dismissed by the United States District Court for the Western District of Washington and other claims by the new named plaintiff, Mr. Moore, that suffer from the same defects as the claims asserted in the First Amended Complaint. The transferor court dismissed Plaintiff Vernon's unjust enrichment and Washington Consumer Protection Act claims because she admits that she has not paid the disputed fee to Qwest, precluding her from pleading that she enriched Qwest or

¹ Several entities are not proper Defendants. Additionally, the entity formerly known as Qwest Communications Corp. is now Qwest Communications Company, LLC.

suffered the requisite injury. *Vernon v. Qwest Commc'ns Int'l, Inc.*, --- F. Supp. 2d. ----, No. C08-1516Z, 2009 WL 2160778, at *7-8 (W.D. Wash. July 16, 2009) ("Order" attached as Exhibit A). Plaintiffs have realleged each of these claims with no relevant additions or changes to their factual averments, and have doubled-down with similarly defective claims asserted on behalf of Plaintiff Moore. Additionally, the Western District of Washington dismissed Plaintiffs' Minnesota Consumer Protection Act claim because Plaintiffs failed to allege reliance on Defendants' alleged omissions or misrepresentations. *Id.* at *8 (Ex. 6). Plaintiffs still have not alleged that they relied upon Defendants' statements or omissions. Reliance is a required element under the Colorado Consumer Protection Act claim, as is intent, another element Plaintiffs have failed to plead, thus this claim must also be dismissed. Finally, as the Court noted in its Order, Plaintiff Sandquist ordered and terminated his Qwest service prior to moving to Washington, thus his Washington State Consumer Protection Act claim is defective given his limited contacts with Washington.

FACTUAL AND PROCEDURAL BACKGROUND

Qwest is a telecommunications company that provides voice, data, internet, and video services. Qwest has been providing internet service to its customers in fourteen states since 2000.² A Subscriber Agreement governs the terms under which Qwest provides its high speed internet service. (Second Am. Compl. ¶¶ 13, 29.)³ In the "Term and Termination" section of the Subscriber Agreement, there is one set of terms for subscribers who elect to take services on a

² Qwest provides residential high speed data service in Arizona, Colorado, Iowa, Idaho, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming.

³ The Court may consider the Subscriber Agreement, which was attached to and referenced in the Complaint, without converting Defendant's Motion to Dismiss into a motion for summary judgment. *McCormick v. City of Lawrence*, 99 Fed. Appx. 169, 176 n.4 (10th Cir. 2004).

month-to-month basis and a different set for those subscribers who agree to a two-year contract. (Subscriber Agreement ¶¶ 12(b), (c) attached as Ex. B.) Subscribers who agree to the two-year contract are guaranteed one low rate for as long as they maintain their service without change ("Price for Life"). In contrast, a subscriber who decides to take monthly service without a two-year commitment is subject to subsequent rate increases. In exchange for receiving the permanent Price for Life discounts, a Price for Life subscriber agrees to continue to receive the high speed internet service for at least two years. (Subscriber Agreement ¶ 12(c).) The Price for Life subscribers also agree that if they terminate early, they will pay a \$200 Termination Liability Assessment ("TLA").

Plaintiff Vernon asserts that in approximately 2005, she ordered internet service through Qwest. (Second Am. Compl. ¶ 18.) She says she called Qwest to cancel her internet service in approximately May of 2008 and later received a bill that included a \$200 TLA. (*Id.* ¶ 19.) Plaintiff Vernon has not paid the TLA. (*Id.* ¶ 23; see also First Amended Complaint, attached as Exhibit C, ¶ 23.)

Plaintiff Sandquist signed up for Qwest internet service in 2007 when he resided in Portland, Oregon. (Second Am. Compl. ¶ 29.) On or about December 1, 2008, Sandquist cancelled his Qwest internet service because he was moving to Tacoma, Washington. (*Id.* ¶ 30.)

Plaintiff Moore began subscribing to Qwest's internet service in 2008. (*Id.* ¶ 33.) Moore cancelled his high speed internet subscription in 2009 and received a bill from Qwest that included the \$200 TLA. (*Id.* ¶ 35.) Plaintiff Moore also has not paid the TLA. (*Id.* ¶ 37.)

Plaintiffs allege that they were injured when Qwest asked Plaintiffs to pay the TLA after they cancelled their high speed internet accounts with Qwest. (Second Am. Compl. ¶ 1.) They are purportedly suing on behalf of all similarly situated customers. (*Id.* ¶ 41.)

Plaintiffs originally filed their lawsuit on October 15, 2008, in the United States District Court for the Western District of Washington. On December 11, 2008, Qwest moved to dismiss Plaintiffs' claims and requested a transfer to the District of Colorado. On February 26, 2009, before the Court ruled on the pending motions, Plaintiffs filed a First Amended Complaint (Ex. C). Defendants then filed corresponding motions to dismiss and transfer. On July 16, 2009, the United States District Court for the Western District of Washington issued an Order granting Qwest's motion to transfer and dismissing many of Plaintiffs' claims. Plaintiffs have now filed a Seconded Amended Class Action Complaint that adds a plaintiff from Colorado and reasserts nearly every claim previously dismissed without prejudice.

ARGUMENT

The previously dismissed claims, as well as Plaintiffs' claim under the Colorado Consumer Protection Act and Mr. Moore's unjust enrichment claim, should be dismissed. All of the claims Plaintiffs reallege suffer from the same fatal defects the Western District of Washington Court identified in previously dismissing Plaintiffs' claims. Having taken their second bite at the apple, the previously alleged claims should now be dismissed with prejudice. Additionally, Plaintiffs' claim under the Colorado Consumer Protection Act is defective and should be dismissed as well as Plaintiff Sandquist's Washington Consumer Protection Act claim, which should also be dismissed.

I. BECAUSE PLAINTIFFS VERNON AND MOORE HAVE NOT PAID THE TERMINATION LIABILITY ASSESSMENT, THEIR UNJUST ENRICHMENT AND CONSUMER PROTECTION ACT CLAIMS SHOULD BE DISMISSED

A. Vernon And Moore's Unjust Enrichment Claims Fail To Allege A Benefit Conferred On Qwest

As the Western District of Washington Court recognized in dismissing Vernon's unjust enrichment claim, Plaintiffs Vernon and Moore's unjust enrichment claims must be dismissed because they fail to allege an essential element – "a benefit conferred upon the defendant by the plaintiff." *Young v. Young*, 191 P.3d 1258, 1262 (Wash. 2008) (quoting *Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 810 P.2d 12 (Wash. App. 1991)); *Salzman v. Bachrach*, 996 P.2d 1263, 1265-66 (Colo. 2000) (listing elements of unjust enrichment as: (1) the defendant received a benefit; (2) at the plaintiff's expense; (3) under circumstances that would make it unjust for the defendant to retain the benefit without commensurate compensation). Plaintiffs Vernon and Moore have not paid the TLA and concede as much in their Second Amended Class Action Complaint. (Second Am. Compl. ¶¶ 23, 37.) Plaintiffs Vernon and Moore have not, therefore, conferred upon Qwest the benefit that they seek to recover and that they claim was an unjust enrichment to Qwest. *Vernon*, 2009 WL 2160778 at *7, n. 18 (Ex. 6). Plaintiffs have pled no new facts that would justify reasserting this claim on behalf of Vernon or asking this Court to reach a different conclusion than the transferor court. (*Compare* Second Am. Compl. ¶¶ 18-23 with First Am. Compl. ¶¶ 18-23.) Plaintiffs Vernon and Moore have failed to plead an essential element of their unjust enrichment claim and thus Count II of the Second Amended Class Action Complaint must be dismissed as to Vernon and Moore.

B. Vernon And Moore's Washington And Colorado Consumer Protection Act Claims Fail To Allege Injury

Plaintiff Vernon and Moore's failure to pay the TLA also precludes their Washington and Colorado Consumer Protection Act claims. *Vernon*, 2009 WL 2160778 at *7, n. 18 (Ex. 6). (dismissing Vernon's Consumer Protection Act claim because Vernon had not alleged the requisite injury.) While Plaintiffs assert that they "and the other class members" have been injured "in that these *consumers* have lost money," Plaintiffs Vernon and Moore do not identify any harm, injury or damage that they personally have suffered. (Second Am. Comp. ¶ 64.)

Under both the Washington Consumer Protection Act and the Colorado Consumer Protection Act, injury to the plaintiff is an element of the claim. *See Robinson v. Avis Rent A Car Sys., Inc.*, 22 P.3d 818, 823 (Wash. App. 2001) (identifying elements under Washington Consumer Protection Act claim as (1) the defendant engaged in an unfair or deceptive act or practice; (2) such act or practice occurred within a trade or business; (3) such act or practice affected the public interest; (4) the plaintiff suffered an injury to his or her business or property; and (5) a causal relationship exists between the defendant's act or practice and the plaintiff's injury); *Wagner v. Travelers Property Cas. Co. of Am.*, 209 P.3d 1119, 1129 (Colo. App. 2008) (citations omitted) (holding plaintiffs must show: (1) the defendant engaged in an unfair or deceptive trade practice; (2) the challenged practice occurred in the course of the defendant's business, vocation, or occupation; (3) it significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property; (4) the plaintiff suffered injury in fact to a legally protected interest; and (5) the challenged practice caused the plaintiff's injury). Plaintiffs who did not pay a TLA have not suffered damages and Plaintiffs have failed to allege any other cognizable injury. *Vernon*, 2009 WL 2160778 at *7-8 (Ex. 6.) Count III, Violation of

Colorado Consumer Protection Act, must be dismissed as to Vernon and Moore, and Count IV of the Second Amended Class Action Complaint, Violation of Washington Consumer Protection Act, must be dismissed as to Vernon. (*See id.*)

II. PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR VIOLATION OF COLORADO'S CONSUMER PROTECTION ACT

A. Plaintiffs' Colorado Consumer Protection Act Claim Fails For The Same Reason As The Previously Dismissed Minnesota Prevention Of Consumer Fraud Act Claim – The Absence Of Allegations Of Reliance

Plaintiffs do not claim to have relied upon any statements or omissions by Defendants and thus their Colorado Consumer Protection Act claim cannot stand. The Colorado Supreme Court has recently held that plaintiffs asserting a Colorado Consumer Protection Act claim cannot use a "fraud on the market"-type of theory to satisfy the reliance element of such a claim. *See Farmers Ins. Exch. v. Benzing*, 206 P.3d 812, 821-22 (Colo. 2009) (affirming decertification of class action). In that case the Colorado Supreme Court noted that each plaintiff had alleged direct reliance on material omission rather than pleading reliance on an efficient market. *Id.* at 821; *see also Pauley v. Bank One Colo. Corp.*, 205 B.R. 272, 276 (D. Colo. 1997) ("[T]he alleged violations of [the CCPA's deceptive trade practices provision] are defective in that there was no element of reliance by the [Plaintiffs] upon the alleged misdeeds of the Defendants.") In contrast, Plaintiffs here have not alleged that they individually relied upon Defendants' statements or omissions and their claims not only cannot be certified as a class, but must be dismissed.

The Western District of Washington Court dismissed Plaintiff Durkin's claim under the Minnesota Prevention of Consumer Fraud Act, *Vernon*, 2009 WL 2160778 at *8 (Ex. 6), finding that under Minnesota law, "reliance is a necessary component of the causation element of

[a Consumer Protection Act] claim." *See Higgins v. Harold-Chevrolet-Geo, Inc.*, 2004 LEXIS 1303, at *8 (Minn. Ct. App. 2004) (identifying elements of Minnesota Prevention of Consumer Fraud Act claim as (1) the defendant used false information or a deceptive practice; (2) the defendant intended that others rely on the false information or deceptive practice; and (3) the plaintiff's reliance on the false information or deceptive practice harmed the plaintiff). The similar causation elements of Minnesota and Colorado Consumer Protection Act claims require dismissal of Plaintiffs' Second Amended Class Action Complaint's Count III, Colorado Consumer Protection Act on behalf of all Plaintiffs. *See Wagner*, 209 P.3d at 1129 (citations omitted) (outlining the causation requirement).

Plaintiffs fail to allege reliance or causation. For example, Vernon fails to allege with any clarity the circumstances surrounding the omissions or misrepresentations Qwest allegedly made prior to Plaintiffs signing up for high speed internet service or when Plaintiffs canceled their services. It is not clear *when* Plaintiff Vernon claims she was deceived by Qwest. Vernon claims that "[i]n approximately 2005, she and her husband Robert ordered internet service through Qwest." (Second Am. Compl. ¶ 18.) But she also asserts that Qwest told her that her husband had entered into a contract with Qwest "approximately two years after the Vernons initially ordered internet service with Qwest." (*Id.* ¶ 20.) Further, it is not clear *how* Qwest misled Vernon because the Second Amended Class Action Complaint is vague as to whether Vernon denies that her husband had contact with Qwest two years into the service or whether she denies that in doing so, Mr. Vernon entered into a term contract with Qwest. It is not clear *who* was allegedly misled – was it Ms. or Mr. Vernon in 2005, Mr. Vernon in 2007, or Ms. Vernon in 2008 when she was billed for the TLA? The other named Plaintiffs' allegations fare no better, as

they fail to allege any misrepresentation upon which they relied or that caused them injury. The Western District of Washington Court recognized this in completely dismissing Plaintiffs' Minnesota law claim. *Vernon*, 2009 WL 2160778 at *8 (Ex. 6).

Because Plaintiffs fail to allege reliance or that Qwest's misrepresentations caused them injury, their Colorado Consumer Protection Act claim should be dismissed just as the Western District of Washington Court previously dismissed Plaintiffs' Minnesota Prevention of Fraud Act claim.

B. Plaintiffs Fail To Allege The Required Element Of Intent

Colorado's legislature and courts have long made clear that plaintiffs bringing a claim under the Colorado Consumer Protection Act must allege intent. *Crowe v. Tull*, 126 P.3d 196, 204 (Colo. 2006) (noting that "the element of intent [is] explicitly required by the statute"). In fact, "[t]he crux of a CCPA claim is a deceptive trade practice, which, by definition, must be intentionally inflicted on the consumer public." *Id.*

Knowing that they could not satisfactorily plead or prove intent, Plaintiffs may have attempted to circumvent that requirement, but Plaintiffs' claim remains deficient. Plaintiffs chose to allege a violation of only one sub-subsection of the Colorado Consumer Protection Act. In particular, Plaintiffs claim to be relying upon Colorado Revised Statutes § 6-1-105(1)(g). As applied here, such an allegation would require Plaintiffs to prove, among other things, that Qwest represented that its high speed internet services "are of a particular standard, quality, or grade" when Qwest knew or should have known "that they are of another." C.R.S. § 6-1-105(1)(g). Plaintiffs make no allegation that Qwest's service was of a "standard, quality, or grade" other than what Qwest represented it to be. Nor would C.R.S. § 6-1-105(1)(6) apply to Plaintiffs'

claims that Qwest omitted providing information to Plaintiff. Plaintiffs claim that "Qwest falsely represents when service is terminated that customers owe" the TLA. (Second Am. Compl. ¶ 60.) Such an allegation, however, does not relate to the "standard, quality, or grade" of Qwest's service. In any event, the "knows or should know" language of §6-1-105(1)(g) does not relieve Plaintiffs from pleading and proving Qwest's intent. *See Crowe*, 126 P.3d at 204.

This Court, therefore, should dismiss Plaintiffs' Count III, Violation of Colorado Consumer Protection Act on behalf of all Plaintiffs.

III. CHOICE OF LAW PRINCIPLES REQUIRE DISMISSAL OF PLAINTIFF SANDQUIST'S WASHINGTON CONSUMER PROTECTION ACT CLAIM

Plaintiff Sandquist's Washington Consumer Protection Act claim is also defective and should be dismissed. *Vernon*, 2009 WL 2160778 at *12 (Ex. 6). Specifically, Sandquist fails to allege sufficient contacts with Washington state to maintain a Washington Consumer Protection Act claim, given that the Second Amended Class Action Complaint alleges that Sandquist signed up for Qwest internet service when he "resided in *Portland, Oregon*" and he called to cancel his service "*because he was moving to Tacoma, Washington*" (*Id.* (citing First Am. Compl. ¶¶ 29-32.) (emphasis in original); Second Am. Compl. ¶¶ 29, 30.).

In *Schnall v. AT & T Wireless Services, Inc.*, 161 P.3d 395, 402-03 (Wash. App. 2007), the Washington state trial court applied Restatement (Second) of Conflict of Laws section 145 (1971) in analyzing whether plaintiffs' Washington Consumer Protection Act claim was appropriate. Restatement (Second) of Conflict of Laws section 145, which focuses on the defendant's contacts, dictates that:

- (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the

most significant relationship to the occurrence and the parties under the principles stated in § 6 [setting forth Choice-of-Law Principles].

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place where the injury occurred;
- (b) the place where the conduct causing the injury occurred;
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.

The factors outlined in Restatement (Second) of Conflict of Laws section 145 support the dismissal of Sandquist's Washington Consumer Protection Act claim. Here, the Washington Court found that the most significant relationships were in Colorado, transferred the case to Colorado, and noted that Sandquist's alleged contacts with Washington were deficient. *Vernon*, 2009 WL 2160778 at *9-13 (Ex. 6). First, the Order held that most significant relationships were in Colorado because, among other things, the "clearly [] relevant" Subscriber Agreement was drafted in Colorado, no sales call centers are located in Washington, and Defendants are headquartered in Colorado and have more offices in Colorado than any other state. (*Id.* at *10-11.) Second, as the Court also noted, Sandquist entered into the agreement in *Oregon*, and cancelled his service because he was *moving* to Washington. (*Vernon*, 2009 WL 2160778 at *12 (Ex. 6); Second Am. Compl. ¶¶ 29, 30.)

This Court, therefore, should dismiss Plaintiffs' Count IV, Violation of Washington Consumer Protection Act, on behalf Plaintiff Sandquist.

