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UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

Robin Vernon and Rory Patrick Durkin, on  
behalf of themselves and all others similarly  
situated,

Plaintiffs,

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.

NO. \_\_\_\_\_

COMPLAINT

CLASS ACTION

- (1) Penalty Clause in Contract;
- (2) Unjust Enrichment;
- (3) Washington Consumer Protection Act, RCW 19.86.010 *et seq.*;
- (4) Declaratory Judgment Act, 28 U.S.C. § 2201

Plaintiffs Robin Vernon and Rory Patrick Durkin, for their Complaint against Defendants Qwest Communications International, Inc., Qwest Services Corporation, Qwest Corporation, Qwest Communications Corporation, and Qwest Broadband Services, Inc. (collectively “Qwest”) allege:

**OVERVIEW OF THE ACTION**

1. Plaintiffs bring this multi-state consumer class action on behalf of Qwest internet service customers who are subject to an invalid \$200 Early Termination Fee (“ETF”) if





1 Subscriber Agreement at ¶ 12(c). The Subscriber Agreement does not, however, actually  
2 contain any promise from the customer to continue the service for a prescribed term. The  
3 Subscriber Agreement also does not contain a promise from the customer to pay an ETF, let  
4 alone a \$200 ETF, if the customer does not continue the service for the entire term.

5 14. The only specific term of service set forth in the Subscriber Agreement is a  
6 month-to-month commitment. The Subscriber Agreement provides:

7 Unless otherwise specified herein, Service is offered on a monthly basis for a  
8 term that begins on the date your Service order is completed, ends on the last  
9 day of the billing cycle during which you placed the order for Service, and  
automatically renews monthly.

10 Subscriber Agreement at ¶ 12(b). No other term is “specified herein.”

11 15. The terms of the Subscriber Agreement itself preclude any alleged oral  
12 agreement being incorporated into the alleged contract between the parties:

13 This Agreement, together with the other agreements and policies and posted  
14 information referenced herein, constitutes the entire agreement between you and  
15 Qwest with respect to the subject matter hereof, and supersedes all prior or  
contemporaneous oral or written agreements or understandings relating to the  
subject matter hereof.

16 Subscriber Agreement at ¶ 19.

17 16. The amount of the ETF Qwest charges customers does not vary during the term.  
18 The customer purportedly is required to pay the full penalty whether he or she cancels 60 days  
19 into the purported term or one day before it ends. The customer must pay the ETF regardless  
20 of the reason service is terminated, even if the service provided by Qwest is inadequate or if  
21 Qwest decides to cut off service.

22 17. The termination fee is not actually designed to compensate Qwest for any losses  
23 arising from a customer’s termination of internet service within two years. Rather, Qwest  
24 intends the ETF to “lock in” customers for the duration of the service term and discourage them  
25 from switching to competing internet service providers for the term – typically two years.

1 Qwest's ETF thus discourages competition in internet service because consumers cannot freely  
2 shop around for the best internet service.

3 **Robin Vernon Facts**

4 18. Plaintiff Robin Vernon is a resident of Auburn, Washington and received local  
5 phone service from Qwest for many years. In approximately 2005, she and her husband Robert  
6 ordered internet service through Qwest. Neither at the time of purchase nor at any time  
7 thereafter were the Vernons provided with a written contract for their internet service.

8 19. In approximately May of 2008, Ms. Vernon called Qwest to cancel both her  
9 local telephone service and her internet service. Qwest informed Ms. Vernon at that time that  
10 there was no fee for cancelling service. Approximately one week later, however, Ms. Vernon  
11 received a bill from Qwest that included a \$200 ETF for cancellation of their internet service.

12 20. Immediately after receiving this bill, Ms. Vernon called Qwest to contest the  
13 ETF. Qwest's customer service representative told Ms. Vernon that Mr. Vernon had signed a  
14 contract for a two-year term approximately two years after the Vernons initially ordered  
15 internet service with Qwest. According to Qwest, Ms. Vernon's cancellation of service  
16 occurred before this second two year term expired.

17 21. Ms. Vernon demanded that Qwest provide her a copy of the contract Mr.  
18 Vernon had allegedly signed, but Qwest was unable to provide any such document to her. In  
19 fact, Mr. Vernon never signed any such contract.

20 22. In another phone call with Qwest regarding the ETF, Qwest stated to Ms.  
21 Vernon that Mr. Vernon had agreed to a two-year contract term verbally over the phone. Ms.  
22 Vernon asked Qwest for a recording of that phone call or any other evidence that her husband  
23 had orally agreed to a two-year commitment. Qwest informed her it did not have a recording or  
24 any other evidence of the supposed two-year term to which Mr. Vernon had orally agreed.

25 23. Qwest's customer service representative then became abusive towards Ms.  
26 Vernon, threatening her that "you'll be sorry" and abruptly hanging up the phone on her.

1 Shortly thereafter, Ms. Vernon began receiving calls from a collection agency attempting to  
2 collect on the \$200 ETF. Ms. Vernon refused to pay the \$200 fee because neither she nor Mr.  
3 Vernon ever agreed to pay the fee. To date, Qwest continues to attempt to collect a \$200 ETF  
4 from the Vernons.

5 **Rory Patrick Durkin Facts**

6 24. Qwest provides local telephone service to plaintiff Durkin. On Durkin's  
7 monthly local telephone bills, Qwest routinely advertised its internet service. The  
8 advertisement did not disclose that Durkin would be charged a \$200 ETF if he cancelled the  
9 internet service.

10 25. Durkin became a Qwest internet service subscriber in approximately 2004. In  
11 approximately March 2007, Durkin responded to an advertisement on his telephone bill for  
12 "high-speed" internet access by calling Qwest on the telephone. On this phone call, Durkin  
13 upgraded his Qwest internet service to "high-speed" service. Qwest did not disclose to Durkin  
14 during this call that Qwest would charge him a \$200 ETF if he cancelled service within the  
15 next two years. Neither at the time of purchase nor at any time thereafter was Durkin provided  
16 with a written contract for his internet service.

17 26. In February 2008, Durkin's computer broke down and he contacted Qwest to  
18 cancel his internet service. Qwest informed Durkin that he would have to pay a \$200 ETF to  
19 cancel his service. Durkin vehemently disagreed and demanded to speak with the person's  
20 supervisors, but was told he had verbally agreed to a two-year commitment when he contacted  
21 Qwest about upgrading service.

22 27. After Durkin received his final bill from Qwest reflecting the \$200 ETF  
23 associated with his termination of internet service, he contacted Qwest and informed Qwest he  
24 wanted to rescind his cancellation of service because he did not want to pay the \$200 ETF.  
25 Qwest allowed Durkin to rescind his cancellation of service if he continued to make monthly  
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1 payments for internet service, even though Durkin did not have a functioning home computer at  
2 that time.

3 28. In October of 2008, Durkin again attempted to cancel his internet service.  
4 Qwest informed him, however, that when he had rescinded his cancellation of service in  
5 February, he had agreed to a new two year commitment. Durkin denied agreeing to any term  
6 commitment when he rescinded his cancellation, but Qwest insisted that he must pay the \$200  
7 ETF to cancel. Durkin went forward with the cancellation of service.

8 **The Subscriber Agreement's Mandatory Arbitration and Class Action Waiver Clauses**

9 29. Qwest's Subscriber Agreement purports to impose mandatory arbitration on any  
10 claims by customers that are not within the jurisdiction of a small claims court. This so-called  
11 agreement is drafted entirely by Qwest on a take-it-or-leave-it basis in a setting in which  
12 disputes between Qwest and its subscribers predictably involve small amounts of damages.  
13 Neither Durkin nor the Vernons had the bargaining power or ability to change the contractual  
14 terms.

15 30. Moreover, the arbitration provision in the Subscriber Agreement is not mutual.  
16 Qwest is not required to arbitrate when it seeks to bring an action against a customer for failure  
17 to pay a bill. A customer, however, is purportedly required to arbitrate any dispute he or she  
18 has with Qwest that is not within the jurisdiction of a small claims court, such as the state  
19 statutory and common law claims the plaintiffs present in this suit.

20 31. Qwest's Subscriber Agreement also purports to impose a class action waiver on  
21 its internet service customers. If enforced, the waiver has the effect of immunizing Qwest from  
22 responsibility for its wrongful conduct. Since approximately \$200 is at stake for any particular  
23 customer, the expense associated with pursuing an individual arbitration is prohibitive. The  
24 class action waiver in Qwest's Subscriber Agreement is designed to make it impossible for  
25 customers to vindicate rights that are monetarily insufficient to justify individual litigation,  
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1 such as challenging their obligation to pay Qwest's \$200 ETF. Such waivers are  
2 unconscionable, violate public policy and are not enforceable.

### 3 CLASS ACTION ALLEGATIONS

#### 4 A. Definition of the Class

5 32. Plaintiffs bring their claims on behalf of the following class ("Class"):

6 All Qwest internet service customers who, since October 15, 2002, have been subject to  
7 an Early Termination Fee for cancelling their internet service before the end of their  
8 alleged term commitment.

9 Excluded from the Class are Qwest, any entity in which Qwest has a controlling interest or  
10 which has a controlling interest in Qwest, any member of Qwest's control group, and any  
11 member of Qwest's general counsel office or outside legal counsel involved in defending  
12 Qwest in this lawsuit, and their legal representatives, assignees, and successors. Also excluded  
13 are the judge to whom this case is assigned and any member of the judge's immediate family.

14 Plaintiffs reserve the right to modify the class definition or to propose one or more appropriate  
15 subclasses.

#### 15 B. Numerosity

16 33. Plaintiffs believe there are thousands of current and former Qwest internet  
17 customers in the Class. The members of the Class are so numerous that joinder of all members  
18 is impracticable. Moreover, the disposition of the claims of the Class in a single action will  
19 provide substantial benefits to all parties and the Court.

#### 20 C. Commonality

21 34. There are questions of law or fact common to the Class, including at least the  
22 following:

- 23 a. Whether Plaintiffs and members of the Class have agreed to enforceable  
24 term commitments longer than month-to-month or to enforceable ETFs;
- 25 b. whether Qwest has subjected Plaintiffs and members of the Class to  
26 ETFs;
- 27 c. whether Qwest's ETFs are unenforceable penalties;

- d. whether Qwest's ETF is unjust, unreasonable or unenforceable;
- e. whether other provisions of Qwest's Subscriber Agreement are unconscionable, violate public policy or are otherwise unenforceable, such as the class action waiver and mandatory non-mutual arbitration provisions;
- f. whether Qwest's practices constitute unfair or deceptive trade practices;
- g. whether Qwest has been unjustly enriched;
- h. whether declaratory relief is appropriate; and
- i. whether plaintiffs and the Class members have been damaged, and if so, the proper measure of such damages.

**D. Typicality**

35. The claims of the representative Plaintiffs are typical of the claims of the Class. The Plaintiffs and members of the Class have been subject to an ETF. Plaintiffs' claims, like the claims of the Class, arise out of the same common course of conduct by Qwest and are based on the same legal and remedial theories.

**E. Adequacy of Representation**

36. Plaintiffs will fairly and adequately protect the interests of the Class. Plaintiffs have retained competent and capable attorneys who are experienced trial lawyers with significant experience in complex and class action litigation, including consumer and contract law. Plaintiffs and their counsel are committed to prosecuting this action vigorously on behalf of the Class and have the financial resources to do so. Neither Plaintiffs nor their counsel have interests that are contrary to or that conflict with those of the proposed Class.

**F. Predominance**

37. Qwest has engaged in a common course of conduct toward Plaintiffs and members of the Class by subjecting them to invalid, unenforceable, and unlawful ETFs. The common issues arising from this conduct that affect Plaintiffs and members of the Class predominate over any individual issues. Adjudication of these common issues in a single action has important and desirable advantages of judicial economy.

1 **G. Superiority**

2 38. Plaintiffs and Class members have suffered and will continue to suffer harm and  
3 damages as a result of Qwest's unlawful and wrongful conduct. Absent a class action,  
4 however, most Class members would find the cost of litigating their claims prohibitive. Class  
5 treatment is superior to multiple individual suits or piecemeal litigation because it conserves  
6 judicial resources, promotes consistency and efficiency of adjudication, provides a forum for  
7 small claimants, and deters illegal activities. Plaintiffs and their counsel are unaware of any  
8 litigation that has already been commenced concerning Qwest's invalid, unenforceable, and  
9 unlawful ETFs. There will be no significant difficulty in the management of this case as a  
10 class action. The Class members are readily identifiable from Qwest's records and Washington  
11 law can be applied to all claims.

12 **H. Appropriateness of Injunctive and Declaratory Relief**

13 39. Qwest has acted on grounds generally applicable to the Class, thereby making  
14 final declaratory or injunctive relief appropriate with respect to the Class as a whole.  
15 Prosecution of separate actions by individual members of the Class would create the risk of  
16 inconsistent or varying adjudications with respect to individual members of the Class that  
17 would establish incompatible standards of conduct for Qwest.

18 **CAUSES OF ACTION**

19 **COUNT I**

20 **(Relief from Unlawful Penalties)**

21 40. Plaintiffs re-allege the prior paragraphs as if fully set forth herein.

22 41. Qwest's ETF is an unlawful penalty pursuant to the common law of contracts in  
23 Washington and the other states in which Qwest does business because (a) it is wholly  
24 disproportionate to the harm, if any, that early cancellation may cause Qwest; (b) it is not based  
25 on a bona fide reasonable estimate of the damages, if any, that Qwest incurs from an early  
26 cancellation; and (c) the actual damage, if any, Qwest may suffer as a result of early  
27 termination is not difficult to ascertain.

