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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

Robin Vernon, Rory Patrick Durkin, and Bryan Sandquist 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. 2:08-cv-01516 TSZ

FIRST AMENDED 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, Rory Patrick Durkin, and Bryan Sandquist for their First Amended 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 IF YOU ORDER SERVICE WITH A TERM COMMITMENT, YOU AGREE
2 TO MAINTAIN THAT SERVICE FOR THE ENTIRE TERM COMMITMENT
3 PERIOD.

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

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

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

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

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

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

22 Subscriber Agreement at ¶ 19.

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

17. The termination fee is not actually designed to compensate Qwest for any losses
arising from a customer’s termination of internet service within two years. Rather, Qwest
intends the ETF to “lock in” customers for the duration of the service term and discourage them
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 and paid the \$200 ETF
8 under protest.

9 **Bryan Sandquist Facts**

10 29. Mr. Sandquist signed up for Qwest internet service in or about August 2007. At
11 the time, he resided in Portland, Oregon. Mr. Sandquist signed up for the service over the
12 telephone. He recalls speaking to a live operator and was not transferred to a voice prompt
13 system. Qwest never disclosed that it would charge Mr. Sandquist an early termination fee.
14 Indeed, Mr. Sandquist understood he was on a month-to-month contract and could cancel
15 without penalty.

16 30. On or about December 1, 2008 Mr. Sandquist cancelled his Qwest internet
17 service because he was moving to Tacoma, Washington. When he called Qwest, he was
18 informed by a customer service representative that Qwest owed him a \$30 refund. The
19 customer service representative did not mention an ETF. Subsequently, Qwest sent Mr.
20 Sandquist a bill which included a \$200 ETF.

21 31. Mr. Sandquist called Qwest to object to the ETF. The customer service
22 representative advised him that he had agreed to it verbally and described it as a “verbal
23 contract.” Mr. Sandquist escalated the call to a supervisor and was then informed that he had
24 gone through a “voice mail/teleprompter” process during which he had agreed to the ETF.
25 When Mr. Sandquist escalated his complaint and sent a detailed email, Qwest responded that he
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1 had agreed to the ETF when he installed the software. Finally, Qwest now claims that Mr.
2 Sandquist was advised of the ETF on his first bill and that he agreed to it when he paid it.

3 32. Qwest threatened to send Mr. Sandquist to collection. Because he was
4 concerned about his credit rating, he paid the \$200 ETF under protest.

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

6 33. Qwest's Subscriber Agreement purports to impose mandatory arbitration on any
7 claims by customers that are not within the jurisdiction of a small claims court. This so-called
8 agreement is drafted entirely by Qwest on a take-it-or-leave-it basis in a setting in which
9 disputes between Qwest and its subscribers predictably involve small amounts of damages.
10 Plaintiffs Durkin, Vernon, and Sandquist did not have the bargaining power or ability to change
11 the contractual terms.

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

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

1 **CLASS ACTION ALLEGATIONS**

2 **A. Definition of the Class**

3 36. Plaintiffs bring their claims on behalf of the following class (“Class”):

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

7 Excluded from the Class are Qwest, any entity in which Qwest has a controlling interest or
8 which has a controlling interest in Qwest, any member of Qwest’s control group, and any
9 member of Qwest’s general counsel office or outside legal counsel involved in defending
10 Qwest in this lawsuit, and their legal representatives, assignees, and successors. Also excluded
11 are the judge to whom this case is assigned and any member of the judge’s immediate family.
12 Plaintiffs reserve the right to modify the class definition or to propose one or more appropriate
13 subclasses.

13 **B. Numerosity**

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

18 **C. Commonality**

19 38. There are questions of law or fact common to the Class, including at least the
20 following:

- 21 a. Whether Plaintiffs and members of the Class have agreed to enforceable
22 term commitments longer than month-to-month or to enforceable ETFs;
- 23 b. whether Qwest has subjected Plaintiffs and members of the Class to
24 ETFs;
- 25 c. whether Qwest’s ETFs are unenforceable penalties;
- 26 d. whether Qwest’s ETF is unjust, unreasonable or unenforceable;
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- 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

39. 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

40. 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

41. 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.

