

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.

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**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS**

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## I. INTRODUCTION

Qwest's attempt to dismiss Plaintiffs' claims should be rejected. Qwest's contentions that Plaintiffs must allege intent and reliance under the Colorado CPA are legally erroneous and should be reserved for either summary judgment or class certification briefing. Qwest's other alleged deficiencies in Plaintiffs' Second Amended Complaint may be cured through the filing of Plaintiffs' proposed Third Amended Complaint. In particular, Mr. Moore has recently paid the ETF under protest, rendering Qwest's argument that he lacks the requisite "injury" to state a claim for unjust enrichment and pursuant to the Colorado CPA moot. Finally, although Ms. Vernon apparently must sacrifice her claims for unjust enrichment and pursuant to the Washington Consumer Protection Act<sup>1</sup> because she chooses to buy groceries for her family rather than pay the \$200 ETF, the anxiety and stress she has suffered resulting from Qwest's attempts to force her to pay an ETF she never agreed to (and cannot afford) satisfy the injury element under the Colorado CPA. With the limited exception of those claims Plaintiffs agree to drop, Qwest's Motion to Dismiss should be denied.

## II. FACTUAL BACKGROUND

Qwest is the primary local telephone service provider in a multi-state region covering parts of the West and Midwestern United States, and also offers Internet service to its telephone subscribers, which it advertises in a variety of ways. Second Amended Complaint ("SAC") ¶ 11. This advertising does not disclose many of the terms and conditions Qwest later seeks to impose on its customers, including a two year term commitment and a \$200 Early Termination Fee ("ETF"). *Id.* These terms are also not disclosed at the time the customer orders Internet service, which is typically done during a telephone call with a Qwest representative. Even the standard Subscriber Agreement that purports to govern the terms of service fails to disclose any promised term or promise to pay an ETF, let alone a \$200 ETF. SAC ¶ 13. Indeed, it is not

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<sup>1</sup> In their Proposed Third Amended Complaint, Plaintiff Vernon drops her claims for unjust enrichment and for violations of the Washington Consumer Protection Act.

until the customer cancels her service that she first learns of any purported term commitment and the \$200 ETF Qwest imposes if the customer does not continue the service for the entire term.

Plaintiffs bring this action on behalf of Qwest Internet service customers that Qwest claims are subject to a term commitment to which they did not agree and which is not enforceable as a matter of law, and who were subject to Qwest's \$200 ETF, which is an invalid and unenforceable penalty. SAC ¶¶ 1-2.

### **The Plaintiffs**

Plaintiff Robin Vernon is a resident of Auburn, Washington, and received local phone service from Qwest for many years. SAC ¶ 18. Plaintiff Vernon and her husband ordered Internet service through Qwest in approximately 2005. *Id.* Neither at the time of purchase nor at any time thereafter were the Vernons provided with a written contract for their Internet service or otherwise informed of any term commitment or ETF. *Id.* Nonetheless, Ms. Vernon received a bill from Qwest that included a \$200 ETF after she cancelled Internet service in approximately May 2008. SAC ¶ 19. When she called about this charge, Qwest first informed her that Mr. Vernon signed a contract for a two-year term. SAC ¶ 20. But after Ms. Vernon asked for a copy of the alleged contract, and Qwest failed to produce one, Qwest changed its story and told Ms. Vernon that her husband agreed to the term verbally over the phone. SAC ¶ 22. But Qwest was also unable to produce any evidence of the alleged oral agreement. *Id.* Ms. Vernon would not have agreed to a deal that included either a two-year commitment or an ETF. See Plaintiffs' Proposed Third Amended Complaint ("TAC") ¶ 18.

Ms. Vernon refused to pay and then began receiving calls from a collection agency attempting to collect the \$200 ETF. SAC ¶ 23. To date, although Qwest continues to attempt to collect the \$200 ETF from the Vernons, they simply cannot afford to pay it; it is a choice between paying the ETF or buying groceries. See TAC ¶ 23. Qwest's collection efforts have

caused Ms. Vernon to suffer anxiety and stress, including concern over the impact on the Vernon's credit history. *Id.*

Plaintiff Rory Patrick Durkin is a citizen of the State of Minnesota and resides in Hennepin County, Minnesota. SAC ¶ 3. Mr. Durkin ordered Internet service from Qwest in approximately 2004, after seeing an advertisement on his monthly local telephone bill. SAC ¶¶ 24-25. The advertisement did not disclose a term commitment or \$200 ETF. SAC ¶ 24. In approximately March 2007, he responded to another advertisement to upgrade his service to "high-speed." SAC ¶ 25. During this phone call, Qwest again failed to disclose any term commitment or ETF. *Id.* Mr. Durkin would not have agreed to a deal that included either a two-year term commitment or an ETF. See TAC ¶25. Just like the Vernons, Mr. Durkin was charged a \$200 ETF when he cancelled his service in approximately October 2008. SAC ¶ 28. Mr. Durkin paid the ETF under protest in order to avoid being sent to collections and damaging his credit. *Id.* Qwest's attempts to collect the ETF Mr. Durkin never agreed to pay caused Mr. Durkin to suffer anxiety and stress, including concern that Qwest's actions would damage his credit history. See TAC, ¶ 28. Qwest's Motion to Dismiss does not affect Mr. Durkin's claims.

Plaintiff Bryan Sandquist was a resident of Portland, Oregon when he first signed up for Internet service in approximately August of 2007. SAC ¶ 29. Mr. Sandquist ordered service over the telephone, and Qwest did not mention any term commitment or ETF during this phone call. *Id.* Mr. Sandquist would not have agreed to a deal that included either a two-year term commitment or an ETF. See TAC ¶ 29. On or around December 1, 2008, Mr. Sandquist cancelled his Qwest Internet service because he was moving to Tacoma, Washington. SAC ¶ 30. When he called Qwest, he was informed by a customer service representative that Qwest owed him a \$30 refund, but when his final bill came, rather than offering a credit, it imposed a \$200 ETF. *Id.* When Mr. Sandquist called to complain about the ETF, Qwest first informed him he had entered into a "verbal contract." SAC ¶ 31. However, each subsequent Qwest

representative gave him a different story regarding when and how he supposedly agreed to a term commitment. *Id.* Mr. Sandquist also paid Qwest's ETF under protest to avoid damage to his credit rating. SAC ¶ 32. He paid the ETF after he moved to Washington. See TAC ¶ 32. Qwest's attempt to collect the ETF caused Mr. Sandquist anxiety and stress, including concern about the impact on his credit rating. See TAC.

Plaintiff Ted Moore is a resident of Denver, Colorado. SAC ¶ 33. Mr. Moore signed up for Qwest Internet service in or around May 2008. *Id.* Mr. Moore packaged his Internet service with his local telephone service. *Id.* Mr. Moore ordered his Internet service with Qwest by telephone. SAC ¶ 34. While he discussed various levels of services and package deals with the customer service representative during this call, no mention was made of any term commitment or ETF. *Id.* Mr. Moore would not have agreed to a deal that included a term commitment or an ETF. *Id.* Mr. Moore never signed any contract with Qwest relating to his Internet service. *Id.*

In approximately May or June of 2009, Mr. Moore contacted Qwest by telephone to cancel his Internet service. SAC ¶ 35. Qwest did not say anything to him during this telephone call about his supposed term commitment or ETF. *Id.* When Mr. Moore received his final bill from Qwest, however, it included a \$200 ETF. *Id.*

Mr. Moore contacted Qwest after receiving his final bill to dispute the \$200 ETF. SAC ¶ 36. Qwest insisted that he had agreed to a two-year term commitment and \$200 ETF when he signed up for Internet service in May of 2008. *Id.* Qwest was unwilling to waive the \$200 ETF. *Id.*

Qwest has sent the dispute over Mr. Moore's \$200 ETF to a collections agency which is attempting to collect the \$200 ETF. SAC ¶ 37. Qwest's attempts to collect the EFT which Mr. Moore never agreed to pay caused Mr. Moore anxiety and stress, including about the impact on his credit history. See TAC ¶ 37. Mr. Moore's attempts to resolve the matter with the

collection agency have been unsuccessful. See TAC ¶ 38. Although Mr. Moore continues to dispute the legitimacy of the ETF, he has now paid it. *Id.*

### III. ARGUMENT

#### A. Standard of Review

When ruling on a Fed. R. Civ. P. 12(b)(6) motion to dismiss, “the Court ‘assume[s] the truth of the plaintiff’s well-pleaded factual allegations and view[s] them in the light most favorable to the plaintiff.’” *Dolin v. Contemporary Fin. Solutions, Inc.*, 622 F. Supp.2d 1077, 1082 (D. Colo. 2009) (quoting *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007)). In considering Qwest’s motion to dismiss, the Court must: (1) accept all factual allegations in the Complaint as true; (2) draw all reasonable inferences from those facts in favor of the plaintiffs; and (3) determine whether the plaintiff can prove any set of facts to support a claim that would merit relief. *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (per curiam) (quoting *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007)).

Concurrently with filing this Response, Plaintiffs also seek leave to file their Third Amended Complaint (“TAC”). Plaintiffs’ TAC cures several of the alleged deficiencies of their Second Amended Complaint. In particular, Plaintiffs seek to (1) amend the allegations of Plaintiff Ted Moore to reflect his recent payment of the ETF; (2) amend the allegations of Plaintiffs Robin Vernon, Bryan Sandquist, and Ted Moore to allege facts relating to the materiality of Qwest’s failure to disclose the term commitment and ETF, as well as the anxiety and stress they suffered as a result of Qwest’s attempts to collect the invalid ETFs; and (3) amend Plaintiffs’ claim under the Colorado Consumer Protection Action to clarify the basis of their claim that Qwest’s conduct is “unfair and deceptive.”

#### B. Plaintiff Moore Can State Claims for Unjust Enrichment

Since the Second Amended Complaint was filed, Plaintiff Moore has paid the ETF under protest. See TAC ¶ 38. Plaintiffs’ counsel advised Qwest’s counsel that Mr. Moore had paid the ETF and suggested that Qwest stipulate that Plaintiffs be allowed to amend the Second Amended Complaint to reflect Mr. Moore’s recent payment. See Declaration of Beth E. Terrell

in Support of Plaintiffs' Motion for Leave to Amend ¶¶ 2-4. Qwest's counsel would not agree to so stipulate, but did indicate that if Qwest had processed the payment prior to filing its reply regarding its Motion to Dismiss, it would "acknowledge" that the payment had been received. *Id.*

Plaintiff Moore's payment of the ETF conferred a benefit upon Qwest under circumstances which make it unjust for Qwest to retain it. *Salzman v. Bachrach*, 996 P.2d 1263, 1265-66 (Colo. 2000). As a result, if this Court allows Plaintiffs to amend their Complaint to add the allegations about Mr. Moore's payment of the ETF, he will have pled all essential elements of an unjust enrichment claim and Qwest's Motion to Dismiss should be denied.

**C. Plaintiffs Moore and Vernon Have Sufficiently Alleged Injury as an Element of their Claims for Violation of the Colorado Consumer Protection Acts**

Mr. Moore's payment of the ETF satisfies the injury element under the CCPA. *See Wagner v. Travelers Prop. Cas. of Am.*, 209 P.3d 1119, 1129 (Colo. App. 2008). Qwest concedes as much in its Motion to Dismiss. *See* Defs.' Mot. at 6 ("Plaintiffs who did not pay a[n] [ETF] have not suffered damages. . ."). If allowed, Plaintiffs TAC will state a claim under the CCPA. *See* TAC ¶ 38.

In addition, Plaintiffs Moore and Vernon experienced anxiety and stress as a result of Qwest's aggressive attempts to collect the invalid ETFs. *See* TAC ¶¶ 37, 23. In particular, they were and are concerned about the impact such collection efforts may have on their credit histories. *See id.* Damages under the CCPA are not limited to financial losses or injury to property. "The CCPA provides a private right of action 'to any person in a civil action for *any claim* against any person who has engaged in or caused another to engage in any deceptive trade practice.'" *Schmaltz v. Smithkline Beecham Corp.*, No. 08-cv-00119-WDM-MEH, 2009 WL 1456723 at \*1 (D. Colo. May 21, 2009) (quoting C.R.S. § 6-1-113(1)) (emphasis added). In *Schmaltz*, the Court refused to dismiss claims for personal injuries sought under the CCPA, noting the Colorado Supreme Court has instructed that "the statute be given a liberal

construction consistent with its ‘broad remedial relief and deterrence purposes.’” *Id.* at \*2 (quoting *Hall v. Walter*, 969 P.2d 224, 230 (Colo. 1998)).

If this Court allows Plaintiffs to plead the very real emotional distress they have suffered and continue to suffer as a result of Qwest’s collection efforts, all of the named Plaintiffs will state claims under the CCPA and Qwest’s Motion to Dismiss should be denied.

**D. Plaintiffs Have Stated a Claim for Violation of Colorado’s Consumer Protection Act**

The Colorado Consumer Protection Act (“CCPA”) “is a remedial statute intended to deter and punish deceptive trade practices committed by businesses in dealing with the public.” *Showpiece Homes Corp. v. Assurance Co. of America*, 38 P.3d 47, 50-51 (Colo. 2001). To that end, the CCPA is to be liberally construed consistent with the statute’s “broad remedial relief and deterrence purposes.” *Hall v. Walter*, 969 P.2d 224, 230 (Colo. 1998). Indeed, as this Court recently noted when denying a motion to dismiss a CCPA claim, “in determining whether conduct falls within the purview of the CCPA, it should ordinarily be assumed that the CCPA applies to the conduct. That assumption is appropriate because of the strong and sweeping remedial purposes of the CCPA.” *Dolin*, 622 F. Supp. 2d at 1088 (quoting *Showpiece Homes*, 38 P.3d at 53).

Over a decade ago, influenced by the State of Washington’s “model” consumer protection legislation and case law, the Colorado Supreme Court adopted a five-element test for private CCPA claims. *Hall*, 969 P.2d at 234-235. The five elements are: (1) “conduct by the defendant that constitutes a deceptive trade practice[;]” (2) “the deceptive act must be related to the conduct of the defendant’s business[;]” (3) public interest impact; (4) the plaintiff must demonstrate “injury in fact to a legally protected interest[;]” and (5) “the plaintiff must be able to show that the defendant’s actions in violation of the CCPA caused the plaintiff’s injury.”

Here, Qwest seeks to add two additional elements to the five elements of a CCPA claim adopted by the Colorado Supreme Court in *Hall*, arguing that at the pleading stage, Plaintiffs must affirmatively plead “reliance” and “intent.” *Defs.’ Mot.*, pp. 7-10. Qwest confuses sub-

elements Plaintiffs may be required to prove at trial with what Plaintiffs must allege in their complaint to put Qwest on notice of their claims. As detailed below, the Court should reject Qwest's request to dismiss Plaintiffs' CCPA claim.

1. Plaintiffs Are Not Required to Allege Reliance to State a Claim for Violation of the Colorado Consumer Protection Act

No Colorado Supreme Court decision holds that a CCPA complaint should be dismissed at the pleading stage for failure to allege the plaintiff relied on the defendant's statements or omissions. Nor can Qwest point to any language in the statute, Colo. Rev. Stat. § 6-1-101 *et seq.*, which requires a CCPA plaintiff to allege reliance as an element of a CCPA claim. Rather, Qwest relies on a recent Colorado Supreme Court decision affirming a trial court did not abuse its discretion in decertifying a class in a consumer class action “[b]ecause the plaintiff advanced no theory of class-wide causation sufficient to maintain a class action” to support its argument that Plaintiffs' CCPA claim is defective. Defs.' Mot., p. 7 (citing *Farmers Ins. Exch. v. Benzing*, 206 P.3d 812, 815 (Colo. 2009)).

*Farmers* is not dispositive of Plaintiffs' CCPA claim.<sup>2</sup> First, unlike the plaintiff in *Farmers*, Plaintiffs do not allege they are relying on the “fraud on the market” theory of causation rejected by the Colorado Supreme Court in that case. *Farmers*, 206 P.3d at 814 (holding “under the circumstances of this case, the fraud on the market theory cannot be applied to maintain a class action”). Nor is the issue of whether Plaintiffs' claims can be maintained as a class action presently before this Court.

Moreover, the *Farmers* court explicitly declined to reach an opinion as to whether reliance “may be presumed on a class-wide basis where there is a uniform material omission or representation.” *Farmers*, 206 P.3d at 815 (holding presumption of reliance theory of causation

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<sup>2</sup> Nor is Qwest's citation to *Pauley v. Bank One Colo. Corp.*, 205 B.R. 272 (D. Colo. 1997) helpful to its argument that Plaintiffs' complaint is defective for failure to expressly allege reliance. In *Pauley*, the district court affirmed the bankruptcy court's *summary judgment* dismissal of the plaintiff's CCPA claim. 205 B.R. at 274, 276-77. Cases in which courts have dismissed a CCPA claim at the summary judgment stage cannot be relied upon for the proposition that a CCPA claim should be dismissed at the pleading stage.

“was not raised in the trial court, not considered by the court of appeals, and [the Court] therefore reach[es] no opinion as to the merits of this argument”). In so doing, the Colorado Supreme Court left undecided the issue of whether plaintiffs in a consumer class action must prove reliance to prevail on a CCPA claim.

In *Farmers*, the Colorado Supreme Court held the trial court did not abuse its discretion in decertifying the class “[b]ecause the plaintiff advanced no theory of class-wide causation sufficient to maintain a class action.” 206 P.3d at 815. Here, Plaintiffs have alleged Qwest’s deceptive and unfair practices caused injury to Plaintiffs and all similarly situated consumers. SAC, ¶64 (alleging, as part of CCPA claim, that “Qwest’s conduct has injured the Plaintiffs and the Class, in that these consumers have lost money *as a result of* Qwest’s invalid ETFs and threats of ETFs”) (emphasis added). Plaintiffs’ proposed Third Amended Complaint further alleges that Qwest’s attempts to collect the ETF, which Plaintiffs never agreed to pay, has caused Plaintiffs and the Class to suffer anxiety and stress, including concern about their credit histories. *See* TAC ¶ 65.

Moreover, Plaintiffs’ proposed Third Amended Complaint alleges Qwest made uniform and material omissions and representations. *See* TAC ¶ 65. As the *Farmers* court noted, the “presumption of reliance” theory has been applied by other states’ courts when “there is a material uniform misrepresentation or omission in [consumer protection] class actions.” *Farmers*, 206 P.3d at 823 (citing cases). “Undisclosed facts are ‘material’ if the consumer’s decision might have been different had the truth been disclosed.” *Briggs. v. Am. Nat’l Prop. & Cas. Co.*, 209 P.3d 1181, 1186 (Colo. App. 2009) (internal citations omitted). “A plaintiff does not have the burden of proving that his or her decisions necessarily would have been different had the truth been disclosed.” *Id.* The standard is whether a “reasonable fact finder” could conclude a consumer “might have made different purchasing decisions” had certain facts been disclosed. *Id.* Moreover, the standard is that of a “reasonable consumer.” *Wagner*, 209 P.3d at 1127. Plaintiffs are not required to provide the Court with a detailed “theory of class-wide

