

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

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

ROBIN VERNON,  
RORY PATRICK DURKIN,  
BRYAN SANDQUIST, and  
TED MOORE,

Plaintiffs,

v.

QWEST COMMUNICATIONS INTERNATIONAL, INC.,  
QWEST SERVICES CORPORATION,  
QWEST CORPORATION,  
QWEST COMMUNICATIONS CORPORATION, and  
QWEST BROADBAND SERVICES, INC.,

Defendants.

---

**SECOND AMENDED CLASS ACTION COMPLAINT**

---

Plaintiffs Robin Vernon, Rory Patrick Durkin, Bryan Sandquist, and Ted Moore for their Second Amended Class Action 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 they cancel their internet service before the end of a purported contractual commitment, in most cases, two years.

2. Plaintiffs and members of the Class did not agree to either a contract longer than month-to-month or an ETF. Indeed, Plaintiffs were not aware of an ETF until they decided to

cancel their internet service. Qwest's \$200 ETF is not prorated and bears no relation to any actual costs incurred by Qwest when a customer cancels service. The purpose of Qwest's ETF is not to compensate Qwest for any such costs, but rather to deter subscribers from switching to other internet service providers, to prevent dissatisfied subscribers from canceling their internet service, and to increase Qwest's revenue. Qwest imposes this \$200 fee on its internet customers regardless of the customer's reason for cancelling service, the time remaining on the subscriber's alleged oral term commitment and the lack of an agreement signed by the customer agreeing to such terms.

### **PARTIES**

3. Plaintiff Robin Vernon is a citizen of the State of Washington and resides in Auburn, King County, Washington. Plaintiff Rory Patrick Durkin is a citizen of the State of Minnesota and resides in Hennepin County, Minnesota. Plaintiff Bryan Sandquist is a citizen of the State of Washington and currently resides in Pierce County, Washington. Plaintiff Ted Moore is a citizen of the State of Colorado and resides in Denver, Colorado.

4. Defendant Qwest Communications International, Inc. is a Delaware corporation with its principal place of business in Denver, Colorado. Qwest Communications International, Inc. has a number of subsidiaries and affiliates through which it operates throughout the West and Midwestern United States, including, but not limited to, Defendants Qwest Services Corporation, Qwest Corporation, Qwest Communications Corporation and Qwest Broadband Services, Inc.

5. Defendant Qwest Services Corporation is a Colorado corporation with its principal place of business in Denver, Colorado.

6. Defendant Qwest Corporation is a Colorado corporation with its principal place of business in Denver, Colorado.

7. Defendant Qwest Communications Corporation is a Delaware corporation with its principal place of business in Denver, Colorado.

8. Defendant Qwest Broadband Services, Inc. is a Delaware corporation with its principal place of business in Denver, Colorado.

### **JURISDICTION AND VENUE**

9. This Court has jurisdiction pursuant to 28 U.S.C. § 1332(d). The case is filed as a class action, the matter in controversy exceeds the value of \$5,000,000, exclusive of interest and costs, and more than two-thirds of the members of the proposed class are citizens of a state different than Defendant.

10. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(c) because Qwest regularly transacts business and is subject to personal jurisdiction in the State of Colorado. This action was transferred to this District from the Western District of Washington on July 16, 2009.

### **FACTS**

11. Qwest is the primary local telephone service provider in a multi-state region covering parts of the West and Midwestern United States. Qwest also offers internet service to its telephone subscribers and advertises such services on local phone bills. It also advertises the service on the internet, on television and by mailing unsolicited promotional materials throughout its service area. This advertising does not disclose many of the terms and conditions Qwest later seeks to impose on its customers, including a term commitment and a \$200 ETF.

12. Whether in response to these advertisements or otherwise, customers typically order internet service from Qwest during a telephone conversation with a Qwest representative.

13. After the customer orders service, Qwest sends the customer a form Subscriber Agreement that purports to govern the terms of Qwest's provision of service. Neither Quest nor the customer signs the Subscriber Agreement. The Subscriber Agreement states:

**IF YOU ORDER SERVICE WITH A TERM COMMITMENT, YOU AGREE TO MAINTAIN THAT SERVICE FOR THE ENTIRE TERM COMMITMENT PERIOD.**

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

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

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

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

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

This Agreement, together with the other agreements and policies and posted information referenced herein, constitutes the entire agreement between you and 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.

Subscriber Agreement at ¶ 19.

16. The amount of the ETF Qwest charges customers does not vary during the term. The customer purportedly is required to pay the full penalty whether he or she cancels 60 days into the purported term or one day before it ends. The customer must pay the ETF regardless of the reason service is terminated, even if the service provided by Qwest is inadequate or if 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. Qwest's ETF thus discourages competition in internet service because consumers cannot freely shop around for the best internet service.

**Robin Vernon Facts**

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

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

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

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

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

23. Qwest's customer service representative then became abusive towards Ms. Vernon, threatening her that "you'll be sorry" and abruptly hanging up the phone on her. Shortly thereafter, Ms. Vernon began receiving calls from a collection agency attempting to collect on the \$200 ETF. Ms. Vernon refused to pay the \$200 fee because neither she nor Mr. Vernon ever agreed to pay the fee. To date, Qwest continues to attempt to collect a \$200 ETF from the Vernons.

#### **Rory Patrick Durkin Facts**

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

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

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

27. After Durkin received his final bill from Qwest reflecting the \$200 ETF associated with his termination of internet service, he contacted Qwest and informed Qwest he wanted to rescind his cancellation of service because he did not want to pay the \$200 ETF.

Qwest allowed Durkin to rescind his cancellation of service if he continued to make monthly payments for internet service, even though Durkin did not have a functioning home computer at that time.

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

#### **Bryan Sandquist Facts**

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

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

31. Mr. Sandquist called Qwest to object to the ETF. The customer service representative advised him that he had agreed to it verbally and described it as a “verbal contract.” Mr. Sandquist escalated the call to a supervisor and was then informed that he had gone through a “voice mail/teleprompter” process during which he had agreed to the ETF. When Mr. Sandquist escalated his complaint and sent a detailed email, Qwest responded that he had

agreed to the ETF when he installed the software. Finally, Qwest now claims that Mr. Sandquist was advised of the ETF on his first bill and that he agreed to it when he paid it.

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

**Ted Moore Facts**

33. Mr. Ted Moore is a resident of Denver, Colorado. He first signed up for internet service with Qwest in approximately May of 2008. Mr. Moore packaged his internet service with his local telephone service.

34. Mr. Moore ordered his internet service with Qwest by telephone. 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. Mr. Moore would not have agreed to a deal that included a term commitment or an ETF. Mr. Moore never signed any contract with Qwest relating to his internet service.

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

36. Mr. Moore contacted Qwest after receiving his final bill to dispute the \$200 ETF. 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. Qwest was unwilling to waive the \$200 ETF.

37. Qwest has sent the dispute over Mr. Moore's \$200 ETF to a collections agency which is attempting to collect the \$200 ETF. While Mr. Moore has contested the legitimacy of the ETF with the collection agency, he intends to pay the ETF.

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

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

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

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

**CLASS ACTION ALLEGATIONS**

**A. Definition of the Class**

41. Plaintiffs bring their claims on behalf of the following class(es) ("Classes"):

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

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

**B. Numerosity**

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

**C. Commonality**

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

- a. Whether Plaintiffs and members of the Class have agreed to enforceable term commitments longer than month-to-month or to enforceable ETFs;
- b. whether Qwest has subjected Plaintiffs and members of the Class to ETFs;
- 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**

44. 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**

45. 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**

46. 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.

**G. Superiority**

47. Plaintiffs and Class members have suffered and will continue to suffer harm and damages as a result of Qwest's unlawful and wrongful conduct. Absent a class action, however, most Class members would find the cost of litigating their claims prohibitive. Class treatment is superior to multiple individual suits or piecemeal litigation because it conserves judicial resources, promotes consistency and efficiency of adjudication, provides a forum for small claimants, and deters illegal activities. Plaintiffs and their counsel are unaware of any litigation that has already been commenced concerning Qwest's invalid, unenforceable, and unlawful

