

1  
2  
3  
4  
5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 ROBIN VERNON, et al.,

9 Plaintiffs,

10 v.

11 QWEST COMMUNICATIONS  
INTERNATIONAL, INC., et al.,

12 Defendants.

C08-1516Z

ORDER

13  
14 THIS MATTER comes before the Court on Defendants’ Motion to Dismiss First  
15 Amended Complaint, docket no. 56, and Defendants’ Motion to Transfer, docket no. 58.  
16 Having considered the pleadings and declarations filed in support of and in opposition to the  
17 motions, the Court enters the following Order.

18 **I. BACKGROUND**

19 **A. The Parties and Present Lawsuit**

20 Plaintiffs Robin Vernon, a Washington resident, Rory Patrick Durkin, a Minnesota  
21 resident, and Bryan Sandquist, a Washington resident, have filed a First Amended Complaint  
22 (“FAC”), docket no. 53, alleging a multi-state consumer class action on behalf of “[a]ll  
23 Qwest internet service customers who, since October 15, 2002, have been subject to an Early  
24 Termination Fee [“ETF”]<sup>1</sup> for cancelling their internet service before the end of their alleged  
25

26 <sup>1</sup> Taking all factual allegations in the complaint as true, the Court adopts Plaintiffs’ “Early Termination Fee,” or “ETF,” reference to the charge imposed on Plaintiffs. The Court notes that

1 term commitment.” FAC ¶ 36. Plaintiffs sued five corporate entities of Qwest: (1) Qwest  
2 Communications International, Inc., a Delaware corporation, (2) Qwest Services  
3 Corporation, a Colorado corporation, (3) Qwest Corporation, a Colorado corporation, (4)  
4 Quest Communications Corporation, a Delaware corporation, and (5) Qwest Broadband  
5 Services, Inc., a Delaware corporation. FAC ¶¶ 4-8. Plaintiffs allege four claims against  
6 Defendants: (1) Relief from Unlawful Penalties, FAC ¶¶ 44-48, (2) Unjust Enrichment, FAC  
7 ¶¶ 49-53, (3) Violation of Washington Consumer Protection Act (“CPA”) and Other  
8 Applicable State Consumer Protection Acts, FAC ¶¶ 54-64, and (4) Declaratory Judgment  
9 Act, 28 U.S.C. § 2201, FAC ¶¶ 65-69. Among other relief sought, Plaintiffs bring this class  
10 action to enjoin Qwest from enforcing “the term commitment and ETF provisions” and to  
11 obtain damages. *Id.* at 15, Prayer for Relief ¶¶ E, F.

12 **B. Qwest’s Internet Service and the Subscriber Agreement**

13 Qwest<sup>2</sup> offers internet service to its telephone subscribers. FAC ¶ 11.<sup>3</sup> Customers  
14 typically order internet service from Qwest during a telephone conversation with a Qwest  
15 representative. *Id.* ¶ 12. After the customer orders service, Qwest sends the customer a form  
16 Subscriber Agreement that purports to govern the terms of Qwest’s provision of service. *Id.*  
17 ¶ 13. Neither Qwest nor the customer signs the Subscriber Agreement. *Id.* The Subscriber  
18 Agreement states:

19 ///

20 ///

21 ///

22 \_\_\_\_\_  
23  
24 Defendants refer to the same charge as a “Termination Liability Assessment,” or “TLA.”

25 <sup>2</sup> The FAC refers to Defendants collectively as “Qwest;” Plaintiffs do not distinguish between  
the five corporate Qwest entities in their allegations.

26 <sup>3</sup> For the purposes of the motion to dismiss, the Court takes the allegations in the complaint as  
true.

1 IF YOU ORDER SERVICE(S) WITH A TERM COMMITMENT, YOU  
2 AGREE TO MAINTAIN THAT SERVICE(S) FOR THE ENTIRE TERM  
3 COMMITMENT PERIOD.

4 Id. (citing Subscriber Agreement at ¶ 12(c)). The Subscriber Agreement does not contain  
5 any promise from the customer to continue the service for a prescribed term<sup>4</sup> or to pay an  
6 ETF if the customer does not continue the service for the entire term. Id. The Subscriber  
7 Agreement provides that “[t]his Agreement, together with the other agreements and policies  
8 and posted information referenced herein, constitutes the entire agreement between [the  
9 customer] and Qwest.” Id. ¶ 15 (citing Subscriber Agreement ¶ 19).

10 **C. Qwest Charges the Named Plaintiffs an Early Termination Fee**

11 Vernon ordered Qwest internet service in approximately 2005. FAC ¶ 18. Durkin  
12 ordered Qwest internet service in approximately 2004, and in March 2007, he called Qwest  
13 and upgraded to “high-speed” internet service. Id. ¶ 25. Neither Vernon nor Durkin ever  
14 received a written contract for internet service. Id. ¶¶ 18, 25. In or about August 2007,  
15 Sandquist signed up for Qwest internet service over the telephone. Id. ¶ 29. Plaintiffs do not  
16 allege whether or not Sandquist received a written contract for internet service. Each of  
17 these three named plaintiffs called Qwest in 2008 to cancel internet service, and Qwest  
18 charged each of them a \$200 ETF. Id. ¶¶ 19, 26-28, 30. Vernon refused to pay the \$200  
19 ETF because neither she nor her husband agreed to pay the fee. Id. ¶ 23. Shortly after  
20 Vernon cancelled her Qwest internet service, she began receiving calls from a collection  
21 agency attempting to collect the \$200 ETF on Qwest’s behalf. Id. To date, Qwest continues  
22 to attempt to collect a \$200 ETF from her. Id. In contrast to Vernon, Plaintiffs Durkin and  
23 Sandquist paid the \$200 ETF under protest. Id. ¶¶ 28, 32.

24  
25 \_\_\_\_\_  
26 <sup>4</sup>The Subscriber Agreement provides that “Unless otherwise specified herein, Service is offered  
on a monthly basis . . . and automatically renews monthly.” FAC ¶ 14 (citing Subscriber  
Agreement ¶ 12(b)). No other term is “specified herein.” Id.

1 **II. DISCUSSION**

2 **A. Defendants’ Motion to Dismiss, docket no. 56**

3 **1. Fed. R. Civ. P. 12(b)(6) Standard**

4 For purposes of a motion to dismiss, the Court must accept all factual allegations in  
5 the complaint as true. Erickson v. Pardus, 551 U.S. 89, 127 S.Ct. 2197, 2200 (2007) (per  
6 curiam). “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a  
7 claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009)  
8 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). The U.S. Supreme  
9 Court in Iqbal recently clarified the two “working principles” that underlie its prior decision  
10 in Twombly: “First, the tenet that a court must accept as true all of the allegations contained  
11 in a complaint is inapplicable to legal conclusions;” and “second, only a complaint that states  
12 a plausible claim for relief survives a motion to dismiss.” Id. at 1949-50. “Determining  
13 whether a complaint states a plausible claim for relief will . . . be a context-specific task that  
14 requires the reviewing court to draw on its judicial experience and common sense.” Id. at  
15 1950.

16 **2. Filed Tariff Doctrine**

17 Defendants move to dismiss “any claims based on contracts formed or upon Qwest’s  
18 purported representations made before January 28, 2006”<sup>5</sup> as barred by the filed tariff  
19 doctrine. Defs.’ Mot. Dismiss, docket no. 56, at 2. Defendants argue that prior to January  
20 28, 2006, the high-speed internet services to which Plaintiffs subscribed were governed by  
21 tariffs filed with the Federal Communications Commission (“FCC”); that Qwest could only  
22 offer internet service in accordance with the filed tariffs during that period; and that the  
23 mandatory federal tariff filings bar any claim or liability that arose prior to the deregulation  
24 of the high-speed internet services market.

25  
26 \_\_\_\_\_  
<sup>5</sup> It is not clear which specific claims Defendants are moving to dismiss.

1 Plaintiffs urge the Court not to consider the material extrinsic to the complaint that  
2 Defendants have filed in support of their motion to dismiss. See, e.g., Beach Decl., docket  
3 no. 57, Exs. H, I (Tariff F.C.C. No. 1); see Lee v. City of Los Angeles, 250 F.3d 668, 688-90  
4 (9th Cir. 2001). The Court will not consider the extrinsic materials.<sup>6</sup>

5 The Court deems Defendants' motion to dismiss as being maintained only against the  
6 named plaintiffs because the class is not yet certified. See Aguilera v. Pirelli Armstrong Tire  
7 Corp., 223 F.3d 1010, 1013 n.1 (9th Cir. 2000) ("When a motion is maintained against an  
8 uncertified class, only the named plaintiffs are affected by the ruling."). Even if the Court  
9 assumes for the purposes of this motion that the filed tariff doctrine bars claims based on  
10 contracts that arose prior to January 28, 2006, which the parties hotly dispute, none of the  
11 named plaintiffs' claims arose prior to January 28, 2006. Even though Vernon and Durkin  
12 ordered Qwest internet service prior to January 28, 2006, in contrast to Sandquist who  
13 ordered it in August 2007, all of the named plaintiffs' claims arose in 2008 when Qwest  
14 charged them with the ETF for cancelling service. At that point or later is when Qwest  
15 imposed an allegedly unlawful penalty; when Qwest was allegedly unjustly enriched; when  
16 the named plaintiffs allegedly suffered injury necessary to support a claim under state  
17 consumer protection acts; and when an actual case or controversy existed to support a  
18 declaratory judgment claim. The Court DENIES Defendants' motion to dismiss the named  
19 plaintiffs' claims based on the filed tariff doctrine because their claims arose after January  
20 28, 2006.<sup>7</sup>

---

21  
22 <sup>6</sup> While the Court might take judicial notice of a filed tariff, the Court will not assume the  
23 submitted documents contain the applicable filed rates. In addition, for the reasons stated in this  
24 Order, the Court would reach the same conclusion even if the Court took judicial notice of the  
25 filed tariffs. The filed rates have no application to the named plaintiffs' claims, the only claims  
26 before the Court on the Rule 12(b)(6) motion.

<sup>7</sup> The claims of some members of the putative class could theoretically have arisen prior to the  
January 28, 2006 deregulation of Qwest's high-speed internet service contracts because  
Plaintiffs have defined the class as including Qwest customers who have been subject to an ETF  
since October 15, 2002. However, the Court does not reach the issue of whether the filed tariff  
doctrine precludes claims of members of the putative class whose claims arose prior to January

1                   **2.     Standing**

2             A plaintiff has standing only if he can show that he has suffered an injury in fact that  
3 is fairly traceable to the challenged action of the defendant and which will likely, not merely  
4 speculatively, be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S.  
5 555, 560-61 (1992).

6             Defendants argue that Plaintiffs lack standing on two distinct grounds.<sup>8</sup> First,  
7 Defendants argue that Plaintiffs have failed to allege sufficiently that they have been injured  
8 by a particular Defendant’s alleged conduct. In other words, Plaintiffs have not specifically  
9 shown which of the five corporate Qwest entities is responsible for causing their injuries.  
10 Defendants rely on Blum v. Yaretsky, 457 U.S. 991, 1001 n.13 (1982), for the proposition  
11 that “[a] complaint must allege facts showing that a plaintiff has standing as to each  
12 defendant.” Defs.’ Mot. Dismiss at 9. Blum does not stand for this proposition. Rather,  
13 Blum requires class representatives to allege that they have been personally injured and  
14 conversely prohibits them from alleging that injury has been suffered only by unidentified  
15 members of the class. See Blum, 457 U.S. at 1001 n.13. Plaintiffs in this case are not  
16 attempting to establish the injury element of standing by pointing to alleged injury of  
17 unidentified members of the class; rather, they have alleged that they have been personally  
18 injured by Qwest’s imposition of the ETF. Defendants have provided no authority that  
19 would require a plaintiff to establish standing by alleging that he or she has been injured by  
20 each and every corporate defendant when affiliated corporate defendants are sued.

21             At least one court has expressly rejected the argument put forth here by Defendants,  
22 i.e., that a plaintiff must ascertain, prior to conducting discovery, the names and corporate  
23

---

24 28, 2006. That issue may more appropriately be addressed in connection with a motion for class  
25 certification or a motion for summary judgment.

26 <sup>8</sup> Although Defendants do not specifically refer to the Court’s jurisdiction or refer to this portion  
of the motion as one to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), standing is a jurisdictional  
issue.

1 affiliations of telephone representatives with whom he or she had only a brief exchange. See  
2 Bechtold v. Sprint Nextel Corp., No. 08-cv-23-JPG, 2008 U.S. Dist. LEXIS 88207, at \*\*8-10  
3 (S.D. Ill. Oct. 30, 2008). In Bechtold, the Court allowed the plaintiff to sue nine corporate  
4 entities of Sprint and rejected the argument that the plaintiff lacked standing by bringing his  
5 allegations against the Sprint Defendants as a group. Id. “Whether Bechtold will be able to  
6 prove . . . that the Sprint representatives he dealt with were agents of all, some, one, or none  
7 of the Defendants is a matter for another day.” Id. at \*10. “[E]ven if Bechtold is unable to  
8 prove his claims, such an eventuality would not mean that he lacked standing to bring them.”  
9 Id. Here, Plaintiffs will need to conduct discovery to ascertain the proper Qwest  
10 Defendant(s).<sup>9</sup> The Court finds Bechtold persuasive and denies Defendants’ motion to  
11 dismiss for lack of standing on this basis.<sup>10</sup>

12 Second, Defendants argue that Plaintiffs lack standing to assert claims under the  
13 consumer protection act statutes of states in which Plaintiffs do not reside. The three named  
14 plaintiffs are residents of Washington and Minnesota, but they purport to assert claims under  
15 consumer protection acts of twelve other states. FAC ¶¶ 54-64 (alleging violations of the  
16 “Washington Consumer Protection Act and Other Applicable State Consumer Protection  
17 Acts.”).<sup>11</sup> Plaintiffs argue, and the Court agrees, that the standing issue is not ripe at this time  
18 because the class certification issue is logically antecedent to the standing issue. See Jepson  
19 v. Ticor Title Ins. Co., No. C06-1723-JCC, 2007 WL 2060856, \*1 (W.D. Wash. May 1,

---

20  
21 <sup>9</sup> Defendants have not identified with certainty the proper Qwest Defendant. Compare Leo Decl.  
22 ¶ 3 (“Qwest’s broadband services are part of Defendant Qwest Corporation”); Leo Decl. Ex. B  
23 (Subscriber Agreement) ¶ 1 (“‘Qwest’ means the affiliate of Qwest Services Corporation that  
provides you the Service . . .”) and ¶ 2 (“Qwest Corporation (‘QC’) and/or Qwest Broadband  
Services, Inc. will provide . . . the Service”).

24 <sup>10</sup> Defendants apparently found Bechtold persuasive too as they, in their reply brief, abandoned  
25 their argument that Plaintiffs lack standing because Plaintiffs failed to allege injury as to each  
and every Qwest Defendant. See Defs.’ Reply to Mot. Dismiss, docket no. 63, at 7-8.

26 <sup>11</sup> Qwest offers high-speed internet services in fourteen states – i.e., Arizona, Colorado, Iowa,  
Idaho, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota,  
Utah, Washington, and Wyoming. Leo Decl., docket no. 59, ¶ 6.

1 2007). Defendants have not challenged Plaintiffs’ assertion that, as in Jepson, “there is no  
2 question that the proposed class would have standing to assert non-Washington claims if it  
3 were certified.” See Jepson at \*1. To require Plaintiffs to add a plaintiff from each state in  
4 Qwest’s service area in order to survive a motion to dismiss would be inefficient and  
5 contrary to the purposes of Rule 23 of the Federal Rules of Civil Procedure. The Court  
6 rejects Defendants’ argument that a motion for class certification needs to be pending to  
7 justify the Court’s deferral of the Article III standing issue. The standing concerns would not  
8 exist but for the class action nature of the case. The Court denies without prejudice  
9 Defendants’ motion to dismiss Plaintiffs’ non-Washington and non-Minnesotan consumer  
10 protection act claims for lack of standing.<sup>12</sup>

11 **3. Heightened Pleading Standard for Fraud Claims**

12 Defendants move to dismiss Plaintiffs’ unjust enrichment claim (Count II) and their  
13 consumer protection act claim (Count III) by arguing that these claims “sound in fraud” and  
14 do not meet the heightened pleading standard for fraud claims set forth in Rule 9(b) of the  
15 Federal Rules of Civil Procedure. See Vess v. Ciba-Geigy Corp., 317 F.3d 1097, 1107 (9th  
16 Cir. 2003) (“A motion to dismiss a complaint or claim ‘grounded in fraud’ under Rule 9(b)  
17 for failure to plead with particularity is the functional equivalent of a motion to dismiss under  
18 Rule 12(b)(6) for failure to state a claim.”). In contrast to Rule 8(a)(2) of the Federal Rules  
19 of Civil Procedure, which requires that a claim for relief contain “ a short and plain statement  
20 of the claim showing that the pleader is entitled to relief,” Rule 9(b) requires that a “fraud or  
21 mistake” claim “state with particularity the circumstances constituting fraud.” Plaintiffs  
22 argue that their unjust enrichment and consumer protection act claims are not subject to Rule  
23 9(b), and that, even if it applies, their pleading satisfies Rule 9(b).

24  
25 \_\_\_\_\_  
26 <sup>12</sup> In making this ruling, the Court does not reach Plaintiffs’ argument that non-residents of Washington may invoke the Washington Consumer Protection Act. See Pls.’ Opp’n to Mot. Dismiss, docket no. 62, at 11-12.

1 Notwithstanding the fact that Plaintiffs have not plead a common law fraud claim,  
2 Rule 9(b) applies where a claim is based on “a unified course of fraudulent conduct,” even if  
3 the word “fraud” is not used. See Vess, 317 F.3d at 1103-05. Here, Defendants argue that  
4 Plaintiffs’ unjust enrichment and consumer protection act claims are based on an alleged  
5 unified course of fraudulent conduct in which Qwest made material omissions and  
6 misrepresentations to all of its high-speed internet customers; Qwest knew of the statements’  
7 falsity; Qwest had the intent to induce customers to buy or continue Qwest’s service; and  
8 Qwest’s customers relied on those misrepresentations to their detriment. Defs.’ Mot.  
9 Dismiss at 10-11. While Plaintiffs admit that they allege that Qwest’s omissions and  
10 misrepresentations about the existence and amount of the ETF “have the tendency or  
11 capacity to mislead consumers,” FAC ¶ 60, Plaintiffs contend such allegations do not amount  
12 to common law fraud<sup>13</sup> and do not trigger Rule 9(b) in the absence of allegations of either an  
13 intent to deceive or an overarching fraudulent scheme. See In re Mattel, Inc., 588 F. Supp.  
14 2d 1111 (C.D. Cal. 2008) (allegations of likely deception are not enough to trigger Rule  
15 9(b)). The Court rejects Defendants’ argument that Plaintiffs have alleged an intent to  
16 deceive. The allegations cited by Defendants assert that through the imposition of an ETF,  
17 Qwest intended to discourage customers from canceling Qwest service and increase  
18 revenues, but not that Qwest intended to deceive customers. See Defs.’ Reply to Mot.  
19 Dismiss at 8 (citing FAC  
20 ¶¶ 2, 17, 51).

21 Rule 9(b) can also apply where fraud is an essential element of a claim or where  
22 Plaintiffs allege some fraudulent and some non-fraudulent conduct. See Vess, 317 F.3d at  
23 1103-05. Fraud is not an essential element of Plaintiffs’ unjust enrichment or consumer

---

24  
25 <sup>13</sup> Under Washington law, “[t]he nine elements of fraud are: (1) representation of an existing  
26 fact; (2) materiality; (3) falsity; (4) the speaker’s knowledge of its falsity; (5) intent of the  
speaker that it should be acted upon by the plaintiff; (6) plaintiff’s ignorance of its falsity;  
(7) plaintiff’s reliance on the truth of the representation; (8) plaintiff’s right to rely upon it; and  
(9) damages suffered by the plaintiff.” Stiley v. Block, 130 Wn.2d 486, 505 (Wash. 1996).