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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

RICHARD J. HARP, KURT ETTLIN, BRUCE)
WYNNE and KIM CLARK, individually and all)
others similarly situated,)
Plaintiffs,)

Case No. 0110-10986
PLAINTIFFS' FIFTH AMENDED
CLASS ACTION COMPLAINT
(Unlawful Trade Practices; Breach of
Contract; Breach of Duty Good Faith and
Fair Dealing; Unjust Enrichment;
Unlawful Debt Collection Practices Act)

v.)
QWEST COMMUNICATIONS)
INTERNATIONAL, INC., a Delaware corporation,)
QWEST WIRELESS, L.L.C., a Delaware Limited)
Liability Company, QWEST)
COMMUNICATIONS CORPORATION, a)
Delaware Corporation, and QWEST)
CORPORATION, a Colorado Corporation,)
Defendants.)

NOT SUBJECT TO MANDATORY
ARBITRATION

Plaintiffs make the following allegation for their complaint. The allegations are based upon information and belief, except for those allegations pertaining to Plaintiffs that are based on their personal knowledge.

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1.

At all material times, Plaintiffs were Oregon residents, or at the time they purchased a cellular calling plan they lived in Oregon, and were customers of Qwest Communications International, Inc., Qwest Wireless, Qwest Corporation, and Qwest Communications Corporation (hereinafter collectively referred to as “Defendants”).

2.

Defendants are two Delaware corporations, a Delaware company and a Colorado corporation who are engaged in business in the State of Oregon. Defendants sell cellular phones and wireless services in the State of Oregon.

3.

Venue is proper in this Court because Defendants have sold and continue to sell cellular wireless service in this county to a substantial number of customers, and the service advertised and promoted by Defendants occurred in this county. Defendants have received substantial compensation from the sale of cellular wireless service in this county and, therefore, this county has suffered the effects of Defendants doing business here.

4.

Defendants have engaged in unlawful, unfair, or unconscionable conduct by (i) representing and selling wireless services with no intent to provide the represented services; (ii) representing that customers would not be charged for calls included within their plan minutes, and then charging for those calls; (iii) representing that customers would not be charged for roaming inside designated geographic areas (“Home Coverage Area”), and then charging customers roaming fees for calls made within Home Coverage Area; (iv) representing that customers would not be charged for calls made between multiple Qwest cellular phones on shared minute plans, and then charging customers with shared minute plans for those calls; and (v) unilaterally changing the original terms and conditions of the service plans and diminishing the value of the

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1 calling plans 1) without an agreement from customers, 2) without a decrease in the monthly
2 charges, and 3) charging customers a penalty if they terminated cellular service.

3 5.

4 After Plaintiffs and putative class members purchased their wireless service, Defendants
5 mailed new, additional, or different terms unilaterally attempting to (i) eliminate Plaintiffs' and
6 putative class members' constitutional right to due process and a jury trial, (ii) require Plaintiffs and
7 other putative class members to submit to mandatory, binding arbitration, (iii) prohibit them from
8 participating in class actions, and (iv) change the original terms of the wireless service.

9 6.

10 Defendants made no effort to ensure that Plaintiffs and other putative class members (i) learned
11 of the new, additional, or different terms that changed the original terms of the wireless service and
12 eliminated their constitutional rights to due process and a jury trial or (ii) knowingly consented to the
13 new, additional, or different terms.

14 7.

15 Defendants did not obtain customers' express and unequivocal consent to these secreted new,
16 additional, or different terms, which unilaterally changed the original terms of wireless service and
17 eliminated customers' constitutional rights to due process and a jury trial. Instead, Defendants mailed
18 customers a written provision stating that activating the wireless service constituted consent to the
19 proposed changes. Such "consent," however, is neither voluntary nor meaningful under the law, and
20 renders the agreement unenforceable. Regardless of whether customers knowingly consented, the
21 additional, new, or different terms are nonetheless unconscionable and unenforceable.

22 8.

23 Defendants have attempted or threatened to disconnect local telephone exchange service when
24 customers fail to pay wireless charges by mailing customers disconnect notices stating that customers
25 must pay all past due amounts, including wireless charges, to avoid temporary disconnection of local or
26 long distance service.

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9.

Defendants send disconnect notices to wireless customers to attempt to collect past due wireless charges without clearly identifying the name of the Qwest entity collecting the debt (the “debt collector”), the name of the Qwest entity for whom the debt collector is attempting to collect the wireless charges, or the debt collector’s business address.

10.

Plaintiffs bring this class action on their behalf and on behalf of all other persons similarly situated, pursuant to ORCP 32. The class is composed of individuals who purchased cellular wireless service and cellular telephones and equipment from Defendants from the time they began advertising and selling their cellular wireless services in the State of Oregon, whether under their own names or by virtue of an agreement with US West Corporation or other corporations, and is defined as follows:

All persons who, as Oregon residents, purchased Qwest wireless service pursuant to a one-year Qwest wireless plan in 1997 or later (“class members”), and who fall into one of the following four subclasses:

- (1) All class members who purchased a Qwest consumer wireless plan and who:
 - (a) paid roaming charges for calls made within the home coverage area(s) applicable to their plan; or
 - (b) paid charges for exceeding monthly plan minutes for calls that should have been included in their plan; or
 - (c) purchased a plan over the telephone that included first incoming minute free and dropped call credit features during the twelve-month period prior to August 16, 2001.
- (2) All class members who purchased a Qwest business wireless plan over the telephone and who:
 - (a) paid roaming charges for calls made within the home coverage area(s) applicable to their plan; or

1 (b) paid charges for exceeding monthly plan minutes for calls that should have
2 been included in their plan; or

3 (c) purchased a plan that included first incoming minute free and dropped call
4 credit features during the twelve-month period prior to August 16, 2001.

5 (3) All class members who are within subclass one (1) or two (2) and who paid
6 DEACTIVATION (or cancellation) FEES when their Qwest wireless service was
7 terminated.

8 (4) All class members who purchased a Qwest consumer wireless plan and who
9 received DISCONNECT NOTICES for Qwest wireless service charges.

10 11.

11 The class is composed of approximately 150,000 individuals who now reside or previously
12 resided throughout the State of Oregon. The joinder of class members individually in one action
13 would be impracticable, and the disposition of their claims in a class action will provide substantial
14 benefits to both the parties and the Court. The class is sufficiently numerous for class treatment.

15 12.

16 Plaintiffs have complied with the requirements of ORCP 32 H by mailing a notice and
17 demand to Defendants at least 30 days before commencement of this action.

18 13.

19 There are questions of law and fact common to the class. Those common questions include
20 but are not limited to the following:

21 (i) whether Defendants engaged in unlawful, unfair, or unconscionable conduct by
22 representing and selling wireless services with no intent to provide the represented services;

23 (ii) whether Defendants represented that customers could make calls in their Home
24 Coverage Area up to the minutes included in their plans for a set monthly charge;

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1 (iii) whether Defendants represented that customers would not be charged for roaming
2 inside their Home Coverage Area, and then charged customers for calls made within the Home
3 Coverage Area;

4 (iv) whether Plaintiffs were charged for calls that should have been included in their
5 calling plans; for example, whether Defendants represented that customers would not be charged for
6 calls between multiple Qwest cellular phones on shared minute plans, and then charged customers for
7 those calls;

8 (v) whether Defendants engaged in unlawful, unfair, or unconscionable conduct by
9 sending bills and providing billing information that fails to provide accurate information regarding
10 cellular phone calls, including but not limited to, billing for calls outside customers' Home Coverage
11 Area when those calls are made inside their Home Coverage Area, and billing for repeated and
12 numerous calls to a customer's own cellular phone number;

13 (vi) whether Defendants engaged in unlawful, unfair, or unconscionable conduct by
14 unilaterally changing the original terms and conditions of the service plans and diminishing the value
15 of the calling plans 1) without an agreement from customers, 2) without a decrease in the monthly
16 charges, and 3) charging customers a penalty if they terminated wireless service;

17 (vii) whether Defendants engaged in unlawful, unfair, or unconscionable conduct by
18 refusing to allow Plaintiffs and other class members to cancel their agreements for Defendants'
19 failure to provide the advertised, promoted, and agreed to services without incurring a deactivation
20 fee;

21 (viii) whether Defendants engaged in unlawful, unfair, or unconscionable conduct by
22 unilaterally adding additional, new, and different terms, which changed the original terms of wireless
23 service; and

24 (ix) whether Defendants have engaged in unlawful, unfair, or unconscionable conduct
25 1) by attempting or threatening to disconnect local telephone exchange service for failure to pay
26 wireless charges and 2) by failing to properly identify the Qwest entity collecting the wireless charges

1 and its business addresses and the Qwest entity for whom the wireless charges were being collected
2 on the disconnect notices.

3 14.

4 Plaintiffs have suffered injuries and have claims that are typical of the claims of the class.
5 Plaintiffs will fairly and adequately protect the interests of the class because their claims are typical
6 of the claims of other class members and because they will vigorously pursue their claims.

7 15.

8 A class action is superior to other available methods for the fair and efficient adjudication of
9 the controversy. Since the damages suffered by individual class members may be relatively small,
10 the expense of individual litigation makes it impracticable for the class members individually to seek
11 redress for the alleged wrongful conduct. If class treatment of these claims is not available,
12 Defendants would unfairly receive payment for roaming charges and other related wrongful
13 overcharges or would otherwise escape liability for their wrongdoing as challenged in this lawsuit.

14 16.

15 The common questions of law and fact predominate over any questions that may affect
16 individual class members. Most if not all of the misconduct alleged herein was committed
17 pursuant to company-wide policies and procedures, including but not limited to training scripts and
18 standard scripts for telephone sales calls. Adjudication of Plaintiffs' claims requires analysis of the
19 same law and evidence for every class member and far outweighs any questions affecting
20 individual class members.

21 17.

22 The names and addresses of class members are available from Defendants or their agents.
23 Notice can be provided to Defendants' cellular wireless service customers by a combination of
24 mail and published notice.

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1 FIRST CLAIM FOR RELIEF

2 (Violation of Unlawful Trade Practices Act)

3 18.

4 Plaintiffs incorporate the allegations of paragraphs 1 through 4, 5(iv), 10 through 12, 13 (i)
5 through (viii), 14 through 17 as set forth above as part of this cause of action.

6 19.

7 Defendants violated ORS 646.608(1)(e) by representing that their wireless service had
8 characteristics, benefits and qualities it does not have.

9 20.

10 Defendants violated ORS 646.608(1)(i) by advertising wireless services with the intent not to
11 supply those services as advertised.

12 21.

13 Defendants violated ORS 646.608(1)(k) by making false and misleading representations
14 concerning customers' obligation to pay deactivation or termination fees for early cancellation of
15 their wireless service contracts after Defendants' prior breach of that contract.

16 22.

17 Defendants violated ORS 646.608(1)(s) by making false or misleading representations of fact
18 concerning the price of or cost of the wireless services.

19 23.

20 Defendants violated ORS 646.608(1)(t) by failing to disclose known material defects and
21 material nonconformity of the wireless service concurrent with tender or delivery.

22 24.

23 In the regular course of their business, Defendants made representations through sale
24 transactions, advertising and marketing efforts about facts so that Plaintiffs and other class members
25 would purchase wireless services and cellular phones from Defendants.

26 ///

1 25.

2 Defendants' representations to Plaintiffs and class members include, but are not limited to,
3 representing (i) that customers would not be charged for roaming within their Home Coverage Area;
4 (ii) that customers could make and receive phone calls in their Home Coverage Area up to the
5 minutes provided in their plans for a set monthly charge; (iii) that Defendants would bill customers
6 every month showing the plan minutes used; (iv) that customers would not be charged for calls
7 between multiple Qwest cellular phones on shared minute plans; and (v) that various wireless
8 services and features, such as "first incoming minute free" and "dropped call credit," would be
9 included as part of the year calling plan.

10 26.

11 Defendants knew or should have known that their conduct violated the Unlawful Trade
12 Practices Act.

13 27.

14 Defendants made these representations and failed to disclose with the intent that Plaintiffs and
15 other class members would buy wireless service and pay wrongful wireless charges as a result of
16 these representations.

17 28.

18 As a direct and proximate result of Defendants' misrepresentations and failure to disclose,
19 Plaintiffs and class members have suffered ascertainable losses and are entitled to damages in an
20 amount to be proven at trial pursuant to ORS 646.638, which includes the right to actual damages, the
21 recovery of their attorney fees pursuant to ORS 646.638(3) and such other equitable relief as the
22 court deems necessary or proper. Plaintiffs will file a motion to amend pursuant to ORS 18.535.

23 29.

24 Plaintiffs and other class members are entitled to a permanent injunction under ORS
25 646.638(1) prohibiting Defendants from engaging in acts that violate 646.608.

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1 SECOND CLAIM FOR RELIEF

2 (Breach of Contract)

3 30.

4 Plaintiffs incorporate the allegations of paragraphs 1 through 3, 5 through 7, 10 through 12,
5 13 (ii) through (viii), and 14 through 17 set forth above as part of this cause of action.

6 31.

7 Plaintiffs and other class members purchased wireless telephones and equipment and services
8 from Defendants.

9 32.

10 Plaintiffs and other class members agreed to purchase wireless telephones and equipment and
11 services from Defendants in exchange for: (i) being able to use their cellular phones for a certain
12 number of minutes in their Home Coverage Area for a set fee; (ii) Defendants providing an accurate
13 billing for calls made within the plan terms; (iii) retaining all of the plan features and services for the
14 year plan period; (iv) not being charged roaming fees inside their Home Coverage Area; and (v) not
15 being charged for calls between multiple Qwest cellular phones on shared minute plans.

16 33.

17 Plaintiffs and other class members have performed all the obligations required of them and all
18 other conditions precedent to Defendants' performance.

19 34.

20 Defendants have failed and refused to perform or provide the promised services described in
21 paragraph 32.

22 35.

23 Plaintiffs and class members are entitled to recover damages in an amount to be proven at
24 trial, including but not limited to the amount necessary to compensate them for the loss of value of
25 the monthly calling plans over the time of the services, and all overcharges on the calling plans
26 including but not limited to fees charged for roaming within the Home Coverage Area, all wrongful

1 deactivation fees and resulting telephone and equipment charges, and the value lost when Defendants
2 removed features and services from the calling plans, plus prejudgment interest.

3 THIRD CLAIM FOR RELIEF

4 (Breach of the Duty of Good Faith and Fair Dealing)

5 36.

6 Plaintiffs incorporate the allegations of paragraphs 1 through 3, 5 through 7, 10 through 12,
7 13 (i) through (viii), 14 through 17, and 31 through 34 set forth above as part of this cause of action.

8 37.

9 Plaintiffs and other class members receive written monthly statements, which reflect the terms
10 of the agreement reached at the time of the sales transactions: (i) price and plan minutes, including
11 shared minutes for plans with multiple Qwest cellular phones; (ii) other features and services agreed
12 to for the year plan period; and (iii) roaming fees apply to calls made outside their Home Coverage
13 Area.

14 38.

15 At all times material to this claim, Defendants' agreement to provide Plaintiffs and class
16 members with the wireless services and features promised at the time of the sales transactions
17 included an express or implied covenant of good faith and fair dealing in the making and the
18 performance of the agreement.

19 39.

20 After agreeing to provide features and services for the year plan period, Defendants cancelled
21 them but they did not reduce the charges for the calling plan. In particular, Defendants cancelled the
22 first incoming minute free and dropped call credit.

23 40.

24 After agreeing that Plaintiffs and other class members would not be charged for roaming in
25 their Home Coverage Area, Defendants charged Plaintiffs and other class members for roaming in
26 their Home Coverage Area.

1 41.

2 Defendants breached their duty of good faith and fair dealing owing to Plaintiffs and other
3 class members by: (i) representing and selling wireless services with no intent to provide the
4 represented services; (ii) representing that customers would not be charged for roaming inside their
5 Home Coverage Area, and then charging customers for calls made within the Home Coverage Area;
6 (iii) representing that customers would not be charged for calls between multiple Qwest cellular
7 phones on shared minute plans, and then charging customers for those calls; and (iv) unilaterally
8 changing the original terms and conditions of the service plan without reducing the charge for the
9 monthly calling plans and charging a deactivation fee if customers terminated their service.

10 42.

11 Plaintiffs and class members are entitled to recover damages in an amount to be proven at
12 trial, including but not limited to the amount necessary to compensate them for the loss of value of
13 the monthly calling plans over the time of the services, and all overcharges on the calling plans
14 including but not limited to fees charged for roaming within the Home Coverage Area, all wrongful
15 deactivation fees and resulting telephone and equipment charges, and the value lost when Defendants
16 removed features and services from the calling plans, plus prejudgment interest.

17 **FOURTH CLAIM FOR RELIEF**

18 (Unjust Enrichment)

19 43.

20 Plaintiffs incorporate the allegations of paragraphs 1 through 3, 5 through 7, 10 through 12,
21 13 (ii) through (v), 14 through 17, 31 through 34, 37, and 39 through 40 set forth above as part of this
22 cause of action.

23 44.

24 Plaintiffs and other class members incurred and paid (i) for monthly calling plans although
25 some features and services were discontinued, (ii) for minutes in excess of their monthly calling plans
26 when the bills failed to accurately list the calls made, (iii) for roaming charges within their Home

1 Coverage Area, (iv) for calls between multiple Qwest cellular phones on shared minute plans, and
2 (v) for deactivation fees and (vi) for cellular telephones and equipment they could not use.

3 45.

4 Defendants received payments that they were otherwise not entitled to receive.

5 46.

6 Defendants should disgorge all overcharges and wrongful charges, plus prejudgment interest.
7 Plaintiffs and class members are entitled to a sum in an amount to be proven at trial, including but not
8 limited to the amount necessary to compensate them for the loss of value of the monthly calling plans
9 over the time of the services, and all overcharges on the calling plans including but not limited to fees
10 charged for roaming within the Home Coverage Area, all deactivation fees, telephone and equipment
11 charges, and the value lost when Defendants removed features and services from the calling plans,
12 plus prejudgment interest.

13 FIFTH CLAIM FOR RELIEF

14 (Unlawful Debt Collections Practices Act)

15 47.

16 Plaintiffs incorporate the allegations of paragraphs 1 through 3, 8 through 12, 13 (ix), 14
17 through 17 set forth above as part of this cause of action.

18 48.

19 Defendants have attempted or threatened to disconnect local telephone exchange service for
20 failure to pay wireless charges, in violation of Oregon law.

21 49.

22 Attempting or threatening to enforce a right or remedy with knowledge or reason to know that
23 the right or remedy does not exist violates ORS 646.639(2)(k).

24 50.

25 Defendants send disconnect notices to wireless customers to attempt to collect past due
26 wireless charges without clearly identifying the name of the Qwest entity collecting the debt, the

1 collecting Qwest entity's business address, or the name of the Qwest entity for whom the debt
2 collection attempt is being made in violation of ORS 646.639(2)(h).

3 51.

4 Defendants violated ORS 646.639 and plaintiffs and class members are entitled to a
5 permanent injunction prohibiting Defendants from engaging in acts that violate the statute, attorney
6 fees, and such equitable relief as the court deems necessary or proper.

7
8 WHEREFORE, on the basis of the foregoing allegations, Plaintiffs on behalf of themselves
9 and all other class members request that the Court enter judgment against Defendants, jointly and
10 severally, as follows:

11 1. An order certifying that the action may be maintained as a class action;

12 2. Compensatory damages in an amount to be proven at trial, including but not limited to
13 the amount necessary to compensate Plaintiffs and other class members for the loss of value of the
14 monthly calling plans over the time of the services, and all overcharges on the calling plans including
15 but not limited to fees charged for roaming within the Home Coverage Area, all wrongful
16 deactivation fees and equipment charges, and the value lost when Defendants removed features and
17 services from the calling plans;

18 3. Equitable and injunctive relief as permitted by law or equity, including disgorgement,
19 imposition of a constructive trust, requiring Defendants to pay restitution to Plaintiffs and all class
20 members and restoring to them all funds acquired by means of any act or practice declared by this
21 Court to be an unlawful or unfair business practice or act, a violation of laws or statutes, or
22 constituting false, untrue, or misleading advertising;

23 4. Enjoining Defendants from billing and exacting from Plaintiffs, similarly-situated
24 class members, and customers of Qwest Wireless phones and cellular services roaming charges inside
25 their Home Coverage Area;

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5. Enjoining Defendants from attempting or threatening to disconnect residential and local telephone exchange service for failure to pay wireless charges.

6. Enjoining Defendants from sending disconnect notices that a) threaten to disconnect home phone service in an attempt to collect past due wireless charges, and b) threaten to disconnect notices to wireless customers that do not clearly identify the debt collector, the person for whom the debt is being collected, and the debt collector's business address;

7. Awarding Plaintiffs reasonable attorneys' fees, costs and expenses incurred in connection with this lawsuit;

8. Pre- and post-judgment interest; and

9. Such other and further relief as the Court deems necessary and proper.

DATED this ___ day of December, 2003.

NORTHWEST LAW FIRM

By _____
Jennifer L. Palmquist, OSB #79342
Christine Tracey, OSB #01437
Of Attorneys for Plaintiffs

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that the foregoing **PLAINTIFFS' FIFTH AMENDED CLASS ACTION**
3 **COMPLAINT** was served on:

4
5 Sarah Crooks
6 Michael Simon
7 Perkins Coie, LLP
8 1120 NW Couch Street
9 Tenth Floor
10 Portland, OR 97200-4128

11 by:

- 12 hand delivery
- 13 mailing to them a complete and correct copy of the original thereof, deposited
14 in the United States Postal Service
- 15 facsimile (see above facsimile number(s))
- 16 federal expressing them a complete and correct copy of the original thereof

17 on December 1, 2003.

18 _____
19 Jennifer L. Palmquist, OSB #79342
20 Christine Tracey, OSB #01437
21 Attorneys for Plaintiffs