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IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,

Plaintiff,

v.

COMCAST CORPORATION,

Defendant.

No. 16-2-18224-1 SEA

**DEFENDANT COMCAST
CORPORATION'S MOTION TO
DISMISS**

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1 **INTRODUCTION AND RELIEF REQUESTED**

2 The Washington Attorney General’s complaint is premised on a profound
3 mischaracterization of Comcast’s actual business practices. The complaint consistently ignores
4 the evidence the Attorney General gathered during a multi-year investigation, repeatedly
5 misstates the true facts, and – most pertinent to this motion – fails to identify any unfair or
6 deceptive conduct even on the facts as alleged.

7 *First*, the complaint distorts Comcast’s Customer Guarantee – under which Comcast
8 promises to, *and does*, resolve all Comcast-related equipment and network issues for free – by
9 mischaracterizing as unfair and deceptive trade practices what are at most occasional billing
10 errors. The complaint does not cite a single instance in which any Comcast customer was
11 actually charged for a service call properly covered by the Guarantee. Instead, the Attorney
12 General speculates that, in some tiny percentage of service calls, service technicians *might be*
13 misapplying chargeable “fix codes” to service calls that should be covered by the Guarantee.
14 Human error of this type, even if it occurs, is not an unfair and deceptive trade practice.

15 *Second*, the complaint selectively quotes from Comcast’s website and customer service
16 sales scripts in order to portray falsely Comcast’s repair plan, the Service Protection Plan
17 (“SPP”), as a worthless ruse. Nothing could be further from the truth. The Attorney General
18 acknowledges, as he must, that SPP customers have saved millions of dollars in avoided service
19 call costs as a result of this plan. His complaint is premised on the hypothesis that Comcast
20 failed to disclose that the SPP did not cover repairs to in-wall wiring or to customer-owned
21 electronics. But, by the Attorney General’s own admission, the SPP covered more than 99% of
22 service calls. And pages later in the complaint the Attorney General concedes that the two
23 service issues on which he focuses were expressly excepted from coverage in the SPP’s Terms
24 and Conditions, which were posted for all to see on Comcast’s website. The Attorney General
25 contends that customer service representatives should have verbalized what the Terms and
26 Conditions explained in writing and was, in any event, evident to consumers – namely, that the
27 SPP does not cover repairs to customers’ electronic appliances (such as printers, speaker

1 systems, and television sets) or repairs that require ripping open house walls to repair concealed
2 wires. In his prosecutorial zeal, the Attorney General gives his constituents far too little credit.

3 *Third*, the complaint alleges that in certain limited instances Comcast obtained a deposit
4 from customers with credit scores sufficient to avoid Comcast's deposit requirement. The
5 complaint fails to explain how this was unfair or deceptive, since the complaint does not allege
6 what representations were made to any of those 6,000 customers about when a deposit would be
7 required. Even assuming that a small number of deposits were collected contrary to Comcast
8 company policy, this does not amount to an unfair or deceptive trade practice.

9 At bottom, then, the complaint offers little more than speculation about hypothetical
10 billing errors that the Attorney General does not allege have actually occurred. And even if
11 those errors did occur, they would at most amount to isolated breaches of contract, not unfair or
12 deceptive practices warranting a \$3.6 billion legal complaint by the state's Attorney General.

13 The complaint fails to state a claim and should therefore be dismissed *with prejudice*.

14 **STATEMENT OF FACTS¹**

15 Comcast is the largest cable television and home internet service provider in the United
16 States. Compl. ¶ 3.2. Based in Philadelphia, Pennsylvania, Comcast provides valuable services
17 to customers across the country, including over 1.17 million customers in the State of
18 Washington. *Id.* ¶ 3.1, 3.2. In order to insure the reliability of those services, service calls
19 related to Comcast equipment and network issues are provided free of charge to all Comcast
20 subscribers (the "Guarantee"). *See id.* ¶ 3.26. In addition, Comcast customers can, for a modest
21 monthly fee, purchase the SPP to cover certain charges for service calls that would otherwise be
22 chargeable. *See id.* ¶ 3.3.

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26 ¹While the procedural posture requires that the allegations in the complaint be taken as true,
27 unless they are directly contradicted by the documents that the complaint relies upon for a
28 particular allegation, many of the allegations in this complaint are in fact false.

1 **A. Comcast’s Customer Guarantee**

2 Customers who subscribe to Comcast services are provided with a written copy of the
3 Customer Guarantee, under which the company accepts responsibility for the cost of repairs to
4 its equipment and network. Compl. ¶ 3.26; Declaration of Ross Siler (“Siler Dec.”) Ex. A. The
5 complaint alleges that one sentence of the Guarantee – “[W]e won’t charge you for a service
6 visit that results from a Comcast equipment or network problem,” Compl. ¶ 3.26 – is deceptive
7 because Comcast, in certain instances, “failed to honor its guarantee” by applying chargeable
8 “fix codes” for service calls that the Attorney General believes should have been covered. *Id.*
9 ¶¶ 1.7, 1.8, 3.29, 4.2.1.

10 The complaint first identifies three chargeable “fix codes” used by Comcast service
11 technicians that the Attorney General worries could result in improper charges for covered
12 services:

- 13 • Code T43, which applies “when a customer refuses [the] customer guarantee.” The
14 complaint does not allege how many times this code was applied. Compl. ¶ 3.32.a.
- 15 • Codes U52 and U53, which are applied “to add service charges to a normally not
16 charged fix code.” The complaint alleges that these codes were applied fewer than
17 1,000 times over two years. *Id.* ¶ 3.32.b.

18 The complaint further alleges that Comcast performed approximately 742,000 service
19 calls over a two-year period. Compl. ¶ 3.21. Comcast technicians recorded chargeable fix
20 codes approximately 4,200 times for the repair or replacement of certain jumpers or cables, *id.* ¶
21 3.32.c, an unidentified number of times for cable card issues, *id.* ¶ 3.32.d, approximately 7,600
22 times for drop amplifiers, *id.* ¶ 3.32.e, and approximately 2,000 times for replacement
23 equipment, *id.* ¶ 3.32.f.² In the Attorney General’s view, these chargeable codes – which were
24

25 ²Although the complaint alleges at one point that Comcast charges for a service call whenever
26 “one of the fix codes applied is chargeable,” Compl. ¶ 3.29, that allegation is wrong.
27 Documents that Comcast provided to the Attorney General, on which certain allegations of the
28 complaint are based, make clear that Comcast technicians can apply a code that is “[u]sed to
waive service charges,” Siler Dec. Ex. B, and that more than 60 percent of the time one of the

1 applied in about 2% of service calls in Washington – were for repairs to Comcast equipment
2 covered by the Guarantee. *See id.* ¶ 3.32.

3 **B. Comcast’s Service Protection Plan**

4 Comcast also offers the SPP, which covers the cost of service visits not within the scope
5 of the Guarantee. Compl. ¶¶ 1.2, 3.3. For example, the SPP covers service visits to educate
6 customers in the use of Comcast’s vast array of equipment and services (which can be
7 complicated for less technologically adept customers), visits for issues that are ultimately
8 diagnosed as relating to the customer’s equipment (a home television set or printer having
9 operational issues, for example), or service calls relating to customers’ in-home wiring. Siler
10 Dec. Exs. D & E. Customers who have purchased the SPP have avoided millions of dollars in
11 service charges. Compl. ¶ 3.20.

12 Nonetheless, the complaint alleges that Comcast “grossly misrepresented” the SPP to
13 Washington consumers by making “broad claims” about the “comprehensive” scope of SPP
14 coverage on its website, in internal sales scripts, and in three chat sessions with customers,
15 when, according to the complaint, the SPP’s coverage is actually “narrow.” Compl. ¶¶ 1.3, 3.4.
16 Specifically, the complaint alleges that, in explaining the SPP’s coverage of “inside wiring” and
17 “[s]ervice calls due to . . . customer owned equipment,” *id.* ¶¶ 3.5, 3.8, Comcast “did not
18 identify or allude to any limitations on the coverage,” *id.* ¶ 3.6. These representations were
19 deceptive, according to the complaint, because Comcast did “not cover the repair of wire
20 concealed within a wall,” *id.* ¶ 3.13, and did “not cover repair to customer premise equipment,”
21 *id.* ¶ 3.14.

22 At the same time, however, the complaint acknowledges that both of these limitations
23 are explicitly set forth in the SPP’s terms and conditions. Compl. ¶¶ 3.13, 3.14. Indeed, a link
24 to the terms and conditions is contained on the same webpage cited by the complaint as
25

26 codes identified in the complaint is used a customer is in fact not charged, Siler Dec. Ex. C.
27 With respect to the drop amplifier code in particular, Comcast customers were charged in only
2,134 of the 7,687 occasions in which the code was applied. *Id.*

1 containing the allegedly misleading representations regarding the SPP’s scope. *See id.* ¶ 3.5;
2 Siler Dec. Exs. D & E. Those terms and conditions, which are all of three paragraphs long, state
3 that:

- 4 • “The Plan does not cover the repair of wire concealed within a wall (i.e. wire that
5 is wall fished).”
- 6 • “The Plan does not cover repair to customer premise equipment (i.e. TV, DVD
7 player, surround sound, faxes, scanners, printers, external devices, telephones,
8 etc.”); however, customers subscribing to the Plan will not pay for a service visit
9 even if the Comcast technician discovers that the trouble is within the customer’s
10 equipment.”

11 Siler Dec. Ex. E.

12 C. Comcast’s Credit Screening Policy

13 Finally, the complaint alleges that Comcast customers who subscribe to certain services
14 must undergo a credit screening to determine whether the customer must make a refundable
15 deposit of \$50 to \$150. Compl. ¶¶ 3.33-3.34. According to the complaint, a new or existing
16 customer who would otherwise be subject to credit screening can avoid this screening by paying
17 the refundable deposit. *Id.* ¶ 3.33. Deposits are credited back to a customer’s monthly account
18 balance after 12 months, so long as the customer has a clean payment history for the prior six
19 months. *Id.* ¶ 3.34.

20 The complaint alleges that, over a three-year period, about 6,000 Washington consumers
21 made a deposit despite having credit scores sufficient to avoid the deposit requirement. Compl.
22 ¶3.36. The complaint does not allege that Comcast made any misrepresentations to those 6,000
23 consumers regarding these deposits and credit checks. *See id.* ¶¶ 3.33-3.37. Nor are there any
24 allegations of actual economic harm suffered by individual customers from these various
25 practices. *See id.* And the complaint does not allege that any refundable deposits were not
26 returned. *See id.* The complaint seems to object only that deposits were obtained or credit
27 checks run contrary to Comcast’s internal company policy. *See id.*

1 **STATEMENT OF ISSUES**

- 2 1. Whether the complaint states a claim under the Washington Consumer Protection Act
3 (“CPA”) based on the possibility that customers could be erroneously charged for
4 services allegedly covered by the Comcast Guarantee?
- 5 2. Whether the complaint states a CPA claim based on general statements concerning the
6 scope of the SPP that are explicitly qualified by the Terms and Conditions available on
7 the company’s website?
- 8 3. Whether the complaint states a CPA claim based on Comcast’s alleged collection of
9 customer deposits and performance of customer credit checks in violation of internal
10 company policy, in the absence of any alleged misstatements concerning the same?

11 **EVIDENCE RELIED UPON**

12 This motion relies on the complaint and documents that are referenced in or provide the
13 bases for allegations in the complaint. These documents are attached as Exhibits A-G to the
14 Siler Declaration. “[W]here a plaintiff asserts allegations in a complaint [based] on specific
15 documents, but does not physically attach those documents, the documents may be considered
16 in ruling on a CR 12(b)(6) motion.” *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838,
17 844 (2015).

18 **AUTHORITY**

19 **I. THE MOTION TO DISMISS STANDARD**

20 Comcast moves to dismiss under CR 12(b)(6) for failure to state a claim for which relief
21 can be granted. CR 12(b)(6) “requires the court to decide whether the allegations in a
22 complaint . . . show[] that the pleader is entitled to relief.” *Haberman v. Wash. Pub. Power*
23 *Supply Sys.*, 109 Wn.2d 107, 120 (1987) (en banc). The court assumes the truth of the facts
24 alleged in the complaint. *See Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 717-18 (2008).
25 However, “[w]hen allegations of the complaint are clearly refuted by an attached document, the
26 Court need not accept conflicting allegations of the complaint as true and may dismiss the
27

1 claim.” *Harris v. City of Seattle*, No. C02-2225P, 2003 WL 1045718, at *4 (W.D. Wash. Mar.
2 3, 2003).

3 In addition, claims that sound in fraud must satisfy the heightened pleading standard of
4 CR 9(b). Under that rule, “the circumstances constituting fraud . . . shall be stated with
5 particularity.” CR 9(b). A “properly pleaded” fraud complaint must provide “the who, what,
6 when, where, and how” of the alleged fraud. *McAfee v. Select Portfolio Servicing, Inc.*, 193
7 Wn. App. 220, 232-33 (2016). The claims relating to the Guarantee and the SPP sound in fraud
8 because they allege that Comcast made deceptive statements to consumers by misrepresenting
9 or failing to disclose the terms and conditions of the Guarantee and the SPP. *See, e.g.*, Compl.
10 ¶¶ 1.3 (“Comcast grossly misrepresented . . . “); 1.7 (“Comcast discloses no limitations . . . “).
11 The heightened pleading requirements of CR 9(b) thus apply. *See Goodman v. HTC Am., Inc.*,
12 No. C11-1793MJP, 2012 WL 2412070, at *9, *16 (W.D. Wash. June 26, 2012) (applying
13 Federal Rule of Civil Procedure 9(b) to claims under the CPA that defendants “engaged in
14 misrepresentations, omissions of material information, and/or wrongful courses of conduct . . .
15 that had the capacity to deceive a substantial portion of the public”).

16 **II. THE WASHINGTON CONSUMER PROTECTION ACT**

17 “Where . . . the Attorney General brings a CPA enforcement action on behalf of the
18 State, [he] must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or
19 commerce, and (3) public interest impact.” *State v. Kaiser*, 161 Wn. App. 705, 719 (2011).
20 “Whether a particular act or practice is ‘unfair or deceptive’ is a question of law.” *Panag v.*
21 *Farmers Ins. Co.*, 166 Wn.2d 27, 47 (2009).

22 “While the CPA does not define the term ‘deceptive,’ the implicit understanding is that
23 the actor misrepresented something of material importance.” *Kaiser*, 161 Wn. App. at 719
24 (internal quotation marks omitted). “Misrepresentation of the material terms of a transaction or
25 the failure to disclose material terms violates the CPA.” *Id.* “The question is whether the
26 conduct has the capacity to deceive a *substantial portion* of the public.” *Id.* (internal quotation
27 marks omitted) (emphasis added).

1 As for the unfairness prong of the CPA, the Washington Supreme Court has stated that
2 “a defendant’s act or practice might be ‘unfair’ if it causes or is likely to cause substantial injury
3 to consumers which is not reasonably avoidable by consumers themselves and is not
4 outweighed by countervailing benefits.” *Mellon v. Reg’l Trs. Servs. Corp.*, 182 Wn. App. 476,
5 489-90 (2014) (quoting *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 787 (2013)). “Similarly, a
6 defendant’s act or practice might be unfair if it offends public policy as established by statutes
7 or the common law, or is unethical, oppressive or unscrupulous, among other things.” *Id.* at 490
8 (internal quotation marks and brackets omitted).

9 **III. THE COURT SHOULD DISMISS THE CPA CLAIM BASED ON THE**
10 **COMCAST CUSTOMER GUARANTEE**

11 The complaint contends that Comcast “failed to honor its guarantee” in some instances,
12 Compl. ¶ 4.2.1, because the company “improperly designate[d]” certain fix codes as chargeable
13 and technicians could have applied those codes to service calls that the Attorney General
14 believes fell within the Guarantee, *id.* ¶ 3.32. At bottom, the Attorney General claims that seven
15 fix codes – out of more than 200, *id.* ¶ 3.28 – *could potentially* be applied to service calls that
16 were not chargeable under the terms of the Guarantee. Notably, however, the complaint fails to
17 identify a single instance in which that occurred. In any event, such fact-intensive squabbles
18 about whether Comcast “honor[ed] its guarantee” with regard to a given service call is at most a
19 breach of contract issue, not an unfair and deceptive trade practices claim.

20 **A. Breaches of Contract Do Not State A Claim Under The CPA**

21 The essence of the Attorney General’s claim is that Comcast has “failed to honor its
22 guarantee.” Compl. ¶ 4.2.1. The Attorney General contends, in other words, that Comcast has
23 breached its contract with some number of individual customers. But such isolated instances of
24 contractual breaches – like those alleged in the complaint – lack the capacity to deceive a
25 substantial portion of the public and as a result are not deceptive as a matter of law. *Kaiser*, 161
26 Wn. App. at 719 (deceptive conduct must have the capacity to deceive a substantial portion of
27 the public). Thus, the “[m]ere failure to repair warranty items to the buyer’s satisfaction or

1 breach of a private contract does not establish a Consumer Protection Act violation.” *Burbo v.*
2 *Harley C. Douglass, Inc.*, 125 Wn. App. 684, 701 (2005). Instead, in order to make out a CPA
3 claim, the Attorney General must allege facts demonstrating pre-sale or post-sale deceptive
4 conduct, or bad faith. *See Pilch v. Hendrix*, 22 Wn. App. 531, 533 (1979).

5 Courts in other states have similarly declined to treat contractual breaches as deceptive
6 practices without additional allegations of wrongdoing. The Colorado Supreme Court, for
7 instance, has held that a breach of contract “without more” is not a deceptive practice because a
8 “promise cannot constitute a misrepresentation unless the promisor did not intend to honor it at
9 the time it was made.” *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d
10 142, 148 (Colo. 2003) (en banc); *see also Supplee v. Miller-Motte Bus. Coll., Inc.*, 768 S.E.2d
11 582, 598 (N.C. Ct. App. 2015) (“breach of contract ... does not qualify as unfair or deceptive
12 acts, but rather must be characterized by some type of egregious or aggravating
13 circumstances”); *Helms v. Sw. Bell Tel. Co.*, 794 F.2d 188, 191 (5th Cir. 1986) (dismissing
14 deceptive practice claim under Texas law because “[t]he ‘misrepresentation’ alleged by the
15 [plaintiffs] was nothing more than Southwestern Bell’s failure to perform its promise”). The
16 U.S. Supreme Court has reached the same conclusion, observing that “a breach of contract,
17 without more, does not amount to a cause of action cognizable under the [Illinois Consumer
18 Fraud] Act.” *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 (1995).

19 The complaint here is devoid of any allegations of bad faith or other deceptive conduct
20 outside of the purported breaching acts themselves. The Attorney General alleges that Comcast
21 technicians at times made fact-specific errors in how certain fix codes should have been applied
22 to the particular service provided to a given customer. *See Compl.* ¶ 3.31 (“Technicians do not
23 always apply the correct fix codes This can result in Comcast charging customers for non-
24 chargeable service calls.”). Even if proven, such allegations at most describe a breach of
25 contract. Allowing the complaint to state a CPA claim in such circumstances would be contrary
26 to the very purpose of the capacity-to-deceive requirement: “to deter deceptive conduct *before*
27 injury occurs.” *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d

1 778, 785 (1986) (emphasis in original). The Attorney General seeks to impose liability for
2 conduct – fact-specific coding errors – that by definition cannot be deterred beforehand.

3 Without regard for the controlling case law and underlying purpose of the CPA, the
4 Attorney General seeks to convert any billing error that violates the terms of a consumer
5 contract into an unfair and deceptive trade practice claim. And for the Attorney General, that is
6 just the beginning. He contends that, given a few thousand billing errors over several years,
7 Comcast “violated the CPA over 1.8 million times” by marketing its products as carrying the
8 Guarantee, Compl. ¶ 4.3 – a reading of the CPA that is without precedent. Such a novel reading
9 of the CPA would lead to untenable results, requiring that companies achieve perfection in their
10 provision of a service or risk multi-billion dollar penalties for deceptive marketing. *See* Compl.
11 ¶ 5.4 (requesting civil penalties of up to \$2,000 per violation). The absurdity of the Attorney
12 General’s proposed reading of the CPA is evident here, where he claims that, with regard to the
13 Guarantee alone, Comcast has committed over 1.17 million violations of the CPA, Compl. ¶
14 4.3, justifying the imposition of up to \$2.34 billion in civil penalties. This has never been held
15 to be the law in Washington and constitutes a gross misreading of the CPA.

16 Further, a claim under the CPA requires allegations of a “public interest impact.”
17 *Kaiser*, 161 Wash. App. at 719. Under established Washington state law, “a breach of a private
18 contract affecting no one but the parties to the contract is not an act or practice affecting the
19 public interest.” *Hangman Ridge*, 105 Wn.2d at 790. Only when multiple parties “have been or
20 will be injured in exactly the same fashion” does the matter become one of public interest
21 covered by the CPA. *Id.* The Attorney General’s allegations here fail to satisfy this public
22 interest impact element, as the complaint fails to allege that multiple customers have been or
23 will be injured “in exactly the same manner.” To the contrary, the Attorney General’s theory
24 requires a customer-by-customer assessment of whether a particular fix code happens to have
25 been erroneously applied in a particular situation, which even by the Attorney General’s
26 account occurred in only a tiny fraction of service calls made under the Guarantee. Therefore,
27 the claim also fails to satisfy the “public interest” prong under the CPA.

1
2 **B. The Complaint Does Not Allege That Comcast Wrongly Charged Any**
3 **Customers**

4 The Attorney General’s claim is rendered all the more meritless given his failure to
5 identify a single instance in which Comcast breached the Guarantee. Each of the seven fix
6 codes identified in Attorney General’s complaint can be applied consistent with the Guarantee,
7 and the complaint contains no allegations that any code was ever actually applied – as opposed
8 to its mere potential to be applied – inconsistent with the Guarantee. In other words, the
9 complaint does not identify a single instance in which a customer was actually charged as a
10 result of the misapplication of one of the chargeable fix codes to work covered by the
11 Guarantee.

12 **1. Code for Customer Refusal of Guarantee**

13 The complaint alleges that Comcast had a chargeable fix code for otherwise covered
14 service that is applied when a customer refuses benefits provided under the Guarantee. Compl.
15 ¶ 3.32.a. The Attorney General asserts “that no customer would intentionally refuse the
16 Customer Guarantee.” *Id.* If the Attorney General is correct, then the code will never be
17 applied and no customer will be charged. The complaint does not allege that this code was ever
18 applied improperly applied or a charge imposed on a customer who did not in fact refuse the
19 Guarantee. *See id.*

20 **2. Codes for Adding Service Charges**

21 The complaint next alleges that the Guarantee is deceptive because Comcast
22 occasionally applies the U52 and U53 fix codes, which are described as applying “to add
23 service charges to a normally not charged fix code.” Compl. ¶ 3.32.b. But the fact that a
24 particular service may not “normally” be chargeable does not mean that it is never chargeable.
25 Any number of events can occur during a call that could cause it to fall outside the Guarantee.
26 *See Siler Dec. Ex. F.* The complaint does not allege any instance in which the U52 or U53 code
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28

1 was ever applied improperly, or identify any customer who was improperly charged, as the
2 result of the application of one of these codes. *See* Compl. ¶ 3.32.b.

3 **3. Codes for Replacement of Jumpers and Cables**

4 The complaint further alleges that, over the course of a two-year period, Comcast
5 technicians applied chargeable fix codes relating to the replacement of certain jumpers and
6 cables a total of 4,204 times to service calls for non-SPP customers. Compl. ¶ 3.32.c. The
7 complaint alleges that those jumpers and cables are Comcast equipment “[i]n the overwhelming
8 majority of households.” *Id.* In doing so, the complaint attempts to transform into a CPA claim
9 a purely legal question regarding the classification of which in-home wiring elements become
10 the permanent property of the homeowner once installed. Even if the complaint’s allegations
11 are true, none of this suggests that a single customer was improperly charged for the
12 replacement of the identified items. Despite a multi-year investigation, the complaint fails to
13 allege that a single jumper or cable for which a customer was charged was in fact Comcast-
14 owned equipment. *See id.*

15 **4. Code for Resolution of Cable Card Issues**

16 The complaint next takes issue with the application of fix codes for cable card issues.
17 Comcast customers can either own their cable cards or lease them from the company. Compl. ¶
18 3.32.d. In those situations where a card is customer-owned, it is not Comcast Equipment
19 covered by the Guarantee, as the complaint itself acknowledges. *See id.* ¶¶ 3.26, 3.27, 3.32.d.
20 Accordingly, Comcast has two chargeable codes for service calls relating to customer-owned
21 cable cards (which the complaint alleges are not covered by the Guarantee) and two non-
22 chargeable codes for calls relating to Comcast-owned cards (which the complaint alleges are
23 covered). *Id.* ¶ 3.32.d. Comcast also has a chargeable code – T86 CC-Other – that applies to
24 “any cable card related issue not covered” by the other codes. *Id.* This is entirely proper. The
25 Attorney General fears that the T86 code *could be* applied to repairs to Comcast equipment. *Id.*
26 But he has failed to allege that this actually occurred or that a customer was charged as a result.
27 *See id.*

1 **5. Code for Installation of Drop Amplifiers**

2 The complaint alleges that in 7,687 instances over two years Comcast applied a
3 chargeable fix code for the installation of a drop amplifier. Compl. ¶ 3.32.e. The Attorney
4 General’s theory seems to be that this was improper because drop amplifiers can be used to
5 remedy lost signal strength due to the deterioration of a “tap,” which is a Comcast network issue
6 covered by the Guarantee. *See id.* While it is true that *one* of the uses of drop amplifiers is to
7 remedy the lost signal strength from tap deterioration, the complaint notably does not allege that
8 this is the *only* reason for the installation of a drop amplifier. *See id.* Indeed, the complaint
9 alleges only that Comcast technicians “frequently” install a drop amplifier for that purpose. *Id.*
10 The complaint nowhere alleges that a single instance in which the chargeable code was applied
11 for a drop amplifier involved a Comcast network problem – rather than, for instance, a customer
12 desire for faster service – or that a customer was improperly charged as a result.³ *See id.*

13 **6. Code for Replacement of Comcast Equipment**

14 The complaint alleges that, between December 2013 and December 2015, Comcast
15 applied a chargeable “swap equipment” code to customer accounts on 2,087 occasions. Compl.
16 ¶ 3.32.f. But as the complaint acknowledges, sometimes Comcast customers demand that
17 technicians replace equipment that is not broken. *Id.* Such replacements are not covered by the
18 Guarantee, as the complaint seems to acknowledge. *See id.* Although the complaint alleges that
19 it is possible for a Comcast representative to insist that functioning equipment is broken and
20 must be replaced, the complaint does not allege any instances in which this occurred or, more
21 importantly, when the chargeable “swap equipment” code was applied to the customer in that
22 circumstance and the customer was charged as a result. *Id.*

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26 ³Further, customers were not charged more than 70% of the time the drop amplifier code was
27 applied. Siler Dec. Ex. C (stating that Comcast customers were charged in only 2,134 of the
28 7,687 occasions in which the code was applied).

1 **7. Codes for Customer Education**

2 Comcast has chargeable fix codes for the provision of “customer education” during a
3 service visit. Compl. ¶ 3.29. The complaint alleges that Comcast technicians applied
4 chargeable customer education fix codes 2,078 times between June 2014 and June 2016. *Id.*
5 The complaint appears to suggest that it somehow violates the Guarantee for Comcast
6 technicians to apply a chargeable fix code under circumstances in which the service call related
7 both to an issue that is covered by the Guarantee and an issue (such as customer education) that
8 is not covered by the Guarantee. But it is not apparent, and the complaint does not explain, why
9 this is so. There is nothing deceptive about Comcast charging customers for service calls in
10 which Comcast technicians perform work that is not covered by the Guarantee, even if those
11 technicians also perform work that is covered by the Guarantee.

12 * * *

13 In sum, the complaint on its face both acknowledges that there are legitimate, non-
14 deceptive reasons why each of the fix codes can be applied consistent with the terms of the
15 Guarantee, and lacks any allegations that the above codes were ever applied in a manner that is
16 inconsistent with the Guarantee. Simply marching through an array of billing codes that may or
17 may not be appropriately applied in a given case pursuant to the terms of the Guarantee does not
18 make out a claim for deception or unfairness. And that is especially so when, as noted, there is
19 no allegation in the complaint that Comcast had a policy or common practice of deliberately
20 using these codes as a means of billing customers for repairs that should have been covered
21 under the Guarantee. Accordingly, the Attorney General’s CPA claim should be dismissed to
22 the extent it is premised on the Guarantee.

23 **IV. THE COURT SHOULD DISMISS THE CPA CLAIM BASED ON THE SERVICE**
24 **PROTECTION PLAN**

25 The complaint also alleges that Comcast deceptively marketed the SPP as providing
26 comprehensive coverage of service calls by failing to disclose that the SPP (1) did not cover one
27 specific technique for repairing in-home wiring (i.e., repairs that require punching a hole in the
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1 customer's wall to "fish" the wire out from behind an enclosure, as opposed to less intrusive
2 means of completing the repair, such as access through basements, attics, or outside walls), and
3 (2) did not cover actual repairs to customer-owned electronic appliances, such as televisions,
4 DVD players, surround sound systems, fax machines, or other such equipment. There is simply
5 no merit to this claim. The Attorney General's own allegations reveal that the SPP covered
6 99% of all service calls. *See* Compl. ¶¶ 3.21, 3.22. And the Terms and Conditions linked on
7 Comcast's webpage marketing the SPP *plainly disclosed these two limitations* about which the
8 Attorney General complains. *See id.* ¶¶ 3.13, 3.14. Indeed, the very materials on which the
9 complaint relies include these exclusions – which may explain why the complaint does not
10 allege that any customer misunderstood the SPP to include such repairs. Given these written
11 disclosures concerning the SPP's exclusions, there cannot be any deception or unfairness on
12 which to base a CPA claim.

13 The complaint also alleges that Comcast deceptively marketed the SPP by claiming that
14 it covered services that were already provided free of charge under Comcast's Guarantee. But
15 the complaint fails to identify *any* marketing materials containing this supposed deceptive
16 representation. Absent some minimal allegations of when and where this purported deception
17 occurred, a CPA claim premised on these unidentified marketing materials fails to satisfy the
18 CR 9(b) pleading requirements and cannot stand.

19 **A. Inside Wiring and Customer Equipment**

20 **1. Online Advertisements**

21 The complaint alleges that the Comcast website misleadingly described the SPP as
22 providing coverage for all "service calls related to inside wiring" and "customer owned
23 equipment," Compl. ¶ 3.5, but "did not identify or allude to any limitations on the coverage
24 described." *Id.* ¶ 3.6. These allegations, however, are conclusively refuted by the quoted
25 website itself. *See Harris*, 2003 WL 1045718, at *4 ("When allegations of the complaint are
26 clearly refuted by an attached document, the Court need not accept conflicting allegations of the
27 complaint as true and may dismiss the claim.").

1 While the Comcast website did describe in general terms the SPP’s coverage of service
2 calls related to “inside wiring” and “customer owned equipment,” that same webpage
3 prominently linked to the SPP’s terms and conditions. Siler Dec. Ex. D. The Attorney
4 General’s complaint grudgingly acknowledges as much. Three pages after alleging that
5 Comcast’s “online description [of the SPP] did not identify or allude to any limitations” on the
6 scope of the SPP, Compl. ¶ 3.6, the complaint concedes that the Terms and Conditions
7 explained those very limitations, *id.* ¶¶ 3.13, 3.14. Those Terms and Conditions, which run a
8 little over a page in length, plainly disclosed that, while the SPP does cover repairs to a
9 customer’s in-home wiring, the SPP does not cover the “repair of . . . wire that is wall fished.”
10 *Id.* ¶ 3.13 (quoting Terms and Conditions); *see also* Siler Dec. Ex. E. The SPP Terms and
11 Conditions also clearly exclude “repair to customer premise equipment (i.e., TV, DVD player,
12 surround sound, faxes, scanners, printers, external devices, telephones, etc.)” *Id.* ¶ 3.14
13 (quoting Terms and Conditions); *see also* Siler Dec. Ex. E. Accordingly, the online description
14 of the SPP cannot violate the CPA as a matter of law. *See Steele v. Extendicare Health Servs.,*
15 *Inc.*, 607 F. Supp. 2d 1226, 1233-34 (W.D. Wash. 2009) (“Washington ‘cases establish a
16 general duty on the part of a seller to disclose facts material to a transaction when the facts are
17 known to the seller *but not easily discoverable by the buyer.*’” (quoting *Griffith v. Centex Real*
18 *Estate Corp.*, 93 Wn. App. 202, 214 (1998) (emphasis added)). There is no allegation that
19 consumers were unable to access the complete description of the SPP on the company’s
20 website.

21 Further, “a defendant’s act or practice is not ‘deceptive’ unless it involves ‘a
22 representation, omission or practice that is *likely* to mislead a *reasonable* consumer.” *Mellon*,
23 182 Wn. App. at 489 n.2 (quoting *Panag*, 166 Wn.2d at 50 (emphasis added)). Reasonable
24 consumers would hardly expect (much less desire) a Comcast cable technician to engage in the
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1 partial destruction and reconstruction of their walls to reach concealed wires.⁴ Equally
2 implausible is the notion that a reasonable Washington consumer would have believed that
3 Comcast's SPP covered repairs to their own devices and appliances. It is not surprising, then,
4 that the complaint fails to allege that any consumer labored under these misapprehensions.

5 **2. Sales Scripts**

6 The complaint similarly alleges that the "sales scripts" used by Comcast customer
7 service representatives broadly referred to coverage for "inside wiring" while failing to mention
8 any exclusions from that coverage. Compl. ¶¶ 3.8, 3.9. The complaint also alleges that the
9 sales scripts omitted the fact that service calls to repair customer-owned equipment were
10 excluded from the SPP's coverage. *Id.* ¶ 3.17. These allegations too are meritless.

11 As noted above, Comcast's webpage plainly disclosed the relevant exclusions from the
12 SPP's coverage, which is all the law requires. *See Steele*, 607 F. Supp. 2d at 1233-34 (no
13 deception for failing to disclose facts "easily discoverable by the buyer"). While the complaint
14 carefully alleges that the "sales scripts" themselves did not reference the limitations of the SPP,
15 Compl. ¶¶ 3.9, 3.17, the scripts contained a link to the terms and conditions, *see* Siler Dec. Ex.
16 G. Not surprisingly, then, the complaint fails to identify a single instance in which a customer
17 service representative misrepresented the scope of the SPP's coverage. *See* Compl. ¶¶ 3.8, 3.9.
18 Nor does the complaint allege that any consumer, as a result of speaking with a Comcast
19 customer service representative, misunderstood the scope of the SPP's coverage.

20 **3. Chat Transcript**

21 Finally, the complaint identifies a single online chat concerning the SPP's coverage in
22 which the customer was told that the SPP covers "the repair of in-home wiring" and "any wire-
23 related service calls." Compl. ¶ 3.10. Presumably, the Attorney General believes this chat was
24 deceptive absent a simultaneous description of the SPP's exclusions in the chat itself.

25
26 ⁴That said, the fact that Comcast does not break through walls to repair concealed wiring has not
27 prevented Comcast from using other repair techniques to remedy problems with concealed
28 wires free of charge under the SPP.

1 In fact, nothing about the chat statements was rendered misleading by the failure to
2 discuss in the chat itself that one technique for repairing in-wall wiring was not covered by the
3 SPP. The terms and conditions available on the Comcast website made clear the SPP's
4 limitations. *See Steele*, 607 F. Supp. 2d at 1233-34 (no deception for failing to disclose facts
5 “easily discoverable by the buyer”). And in any event, one private chat between a Comcast
6 representative and a single customer does not suffice to allege the existence of an act or practice
7 that has the capacity to deceive a substantial portion of the public. *See Camp v. H.C.*
8 *Composites, LLC*, No. C11-5340RBL, 2012 WL 4089887, at *4 (W.D. Wash. Sept. 17, 2012)
9 (“An isolated misrepresentation to a single individual is insufficient to show the requisite
10 capacity to deceive a substantial portion of the public.”).

11 More fundamentally, the complaint does not allege that this single chat was even with a
12 Washington resident. *See* Compl. ¶ 3.10. Nor is there an allegation that the Comcast
13 representative who made the representations at issue was located in Washington. *See id.* Under
14 these circumstances, the complaint fails to allege adequately that the Washington CPA applies
15 to the conduct identified. *See Trader Joe's Co. v. Hallatt*, No. 14-35035, 2016 WL 4488009, ---
16 F.3d ---, at *12 (9th Cir. Aug. 26, 2016) (holding that the Washington CPA does not apply
17 extraterritorially).⁵

18 **B. Comcast Equipment and Outside Wiring**

19 The complaint also vaguely alleges that some unidentified Comcast “advertisements”
20 suggested that the SPP covered Comcast equipment and wiring outside a customer’s house,
21 when in fact those things were both already covered free of charge by the Guarantee. *See*
22 Compl. ¶¶ 1.5, 3.17. But the complaint fails to allege with even minimal specificity what
23 advertisements are being referenced or what those advertisements said to create the supposedly
24 misleading impression. *See id.* These basic “where” and “what” allegations are required for a
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26 ⁵During his investigation, the Attorney General requested and Comcast provided all chat
27 transcripts in the company’s possession regarding the SPP. The chat transcript quoted in the
28 Attorney General’s complaint is not one of those provided.

1 CPA claim premised on deception. *See* CR 9(b); *McAfee*, 193 Wn. App. at 232-33 (requiring
2 that a claim sounding in fraud allege “the who, what, when, where, and how” of the fraud). In
3 any event, these marketing materials could not have misled anyone given that Comcast
4 customers are each provided with a copy of the Guarantee as part of their welcome kit. Compl.
5 ¶ 3.26; *Steele*, 607 F. Supp. 2d at 1233-34 (no deception under the CPA when the facts are
6 “easily discoverable by the buyer”).⁶

7 Similarly, the complaint alleges that, in two chats with customers, a Comcast technician
8 misstated that a charge imposed for the repair of “outside wiring” was proper, given that outside
9 wiring is Comcast’s responsibility under the Guarantee. *See* Compl. ¶ 3.10. Two instances in
10 which a service fee was erroneously imposed do not make out a claim under the CPA, both
11 because they were not deceptive and because they does not have the potential to impact a
12 substantial portion of the public. *See Camp*, 2012 WL 4089887, at *4. Indeed, the
13 representations in these chats could not have been deceptive, even if erroneous, given that
14 consumers had access to the Guarantee itself. *See Steele*, 607 F. Supp. 2d at 1233-34.
15 Furthermore, the complaint does not allege that these two chats were with Washington
16 consumers. *See Trader Joe’s*, 2016 WL 4488009, at *12.

17 **V. THE COURT SHOULD DISMISS THE CPA CLAIM BASED ON COMCAST’S**
18 **COLLECTION OF REFUNDABLE DEPOSITS**

19 Finally, the complaint alleges that over the course of a three-year period Comcast
20 obtained a deposit from over 6,000 Washington customers with credit scores that were
21 sufficient, under Comcast’s internal policies, to avoid Comcast’s deposit requirement. Compl.
22 ¶¶ 3.33-3.37. The complaint baldly asserts that this was done “unfairly and deceptively.” *Id.* ¶
23 4.2.3. These conclusory allegations are insufficient to state a claim under the CPA.

24 As to deceptiveness, there is no allegation that Comcast misrepresented its credit
25 screening policy to consumers. The complaint does not identify any representations that

26 _____
27 ⁶The complaint also fails to allege that the marketing materials were distributed in the State of
28 Washington. *See Trader Joe’s*, 2016 WL 4488009, at *12.

1 Comcast made to any of those 6,000 customers with respect to its screening and deposit
2 policies, how any such representations were deceptive, or when and where any such
3 representations occurred. *See* Compl. ¶¶ 3.33-3.37. At most, the allegations, taken as true,
4 would mean that Comcast’s internal policy was not properly applied with respect to the limited
5 number of consumers identified in the complaint, not that Comcast misrepresented its policy.

6 As for the unfairness allegation, the complaint does not allege any injury, much less
7 substantial injury, to consumers. The complaint does not allege that Comcast failed to return
8 the deposits after six months. *See* Compl. ¶ 3.34. Nor does the complaint allege that the “hard
9 hit” to a consumer’s credit profile standing alone had any impact on a consumer’s credit score.
10 *See id.* ¶ 3.35. At most, the complaint alleges that the credit check “can” have an impact on a
11 consumer’s credit profile *if* certain other events occur in the future. *See id.* This is the very type
12 of speculative harm that the substantial injury element is designed to weed out. *See Am. Fin.*
13 *Servs. Ass’n v. FTC*, 767 F.2d 957, 972 (D.C. Cir. 1985) (The FTC Act “is not concerned with
14 trivial or merely speculative harms.”); *Tungate v. MacLean-Stevens Studios, Inc.*, 714 A.2d 792,
15 797 (Me. 1998) (“The substantial injury requirement is designed to weed out ‘trivial or merely
16 speculative harms.’”).

17 **CONCLUSION**

18 For the reasons set forth above, Comcast respectfully submits that the Complaint should
19 be dismissed for failure to state a claim under the CPA.

20 DATED this 30th day of September, 2016.

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I certify that this memorandum contains 6,927 words, in compliance with the Local Civil Rules.

s/ Matthew Martens

Matthew Martens (admitted *pro hac vice*)

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I caused the document to which this certificate is attached to be
3 delivered to the following as indicated:

4 Daniel Davies () Messenger
5 Joel Delman (X) U.S. Mail, postage prepaid
Assistant Attorneys General () Federal Express
6 Consumer Protection Division () Facsimile
7 800 Fifth Avenue, Suite 2000 () Email:
Seattle, WA 98104

8
9 Declared under penalty of perjury under the laws of the state of Washington dated at
10 Seattle, Washington this 30th day of September, 2016.

11
12 s/ Ross Siler
13 Ross Siler, WSBA #46486

The Honorable Timothy A. Bradshaw
Noted for Hearing: December 16, 2016
Hearing Time: 9:30 am

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,

Plaintiff,

v.

COMCAST CORPORATION,

Defendant.

No. 16-2-18224-1 SEA

[PROPOSED] ORDER GRANTING
MOTION TO DISMISS WITH PREJUDICE

A motion to dismiss for failure to state a claim under CR 12 has been presented by Defendant Comcast Corporation. Based on good cause shown, it is hereby ORDERED that Comcast Corporation's Motion to Dismiss is granted and the State's lawsuit is dismissed with prejudice.

Dated _____.

Honorable Timothy A. Bradshaw

