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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

NORTH COUNTY COMMUNICATIONS
CORP.,

Plaintiff,

v.

VERIZON SELECT SERVICES, INC., et al.,

Defendants.

Civil No. 08cv1518-CAB (WMC)

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS THIRD AMENDED COUNTERCLAIM (Counts II, III, IV, & VI) AND DENYING MOTION FOR LEAVE TO AMEND THE COMPLAINT WITHOUT PREJUDICE

Doc. Nos. 225, 231

NORTH COUNTY COMMUNICATIONS
CORP.,

Plaintiff,

v.

SPRINT COMMUNICATIONS COMPANY,
LP,

Defendant.

Civil No. 09cv2685-CAB (WMC)

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT AND DENYING MOTION FOR LEAVE TO AMEND THE COMPLAINT WITHOUT PREJUDICE

Doc. Nos. 126, 128, 149

Currently before the Court are three motions in two related cases filed by Plaintiff North County Communications Corp. (“NCC”): Case No. 08 cv 1518 (“the Verizon Matter), and Case No. 09cv2685 (“the Sprint matter”). In the Verizon Matter, Plaintiff filed a Motion to Dismiss the Third Amended Counterclaim [Doc. No. 225.] The parties in the Sprint Matter filed Cross Motions for Summary Judgment [Doc. Nos. 126

1 and 128.] The Court heard oral argument on the motions on January 11, 2013. Joseph Dicks, Esq. and Roger
2 Dixon, Jr., Esq. appeared on behalf of Plaintiff. Jacob S. Kreilkamp, Esq. appeared on behalf of Verizon,
3 and Philip R Schenkenberg, Esq. appeared on behalf of Sprint. NCC also filed motions for leave to amend
4 the complaint in both matters [Doc. No. 231 in the Verizon Matter, and 149 in the Sprint Matter.] The Court
5 took those motions under submission without oral argument on January 15, 2013. Those motions are hereby
6 **DENIED WITHOUT PREJUDICE** in light of the outcome of the previously-pending motions as set forth
7 below.

8 **I. BACKGROUND**

9 This case involves “switched access service,” a regulated service that allows a long distance
10 telephone carrier (also known as “interexchange carriers” or “IXCs”), such as Defendants Sprint and
11 Verizon, to use the local network equipment and facilities of a local telephone company, such as Plaintiff
12 NCC, to connect a long distance call to the local network’s end-users.

13 NCC is a competitive local exchange carrier that provides communications services throughout the
14 United States, including California, Arizona, Washington, Oregon, Illinois, and West Virginia. Defendants
15 Sprint and Verizon provide interexchange communications services in the same region. Competitive Local
16 Exchange Carriers (“CLECs”) are carriers that provide local exchange services in competition with
17 incumbent local exchange carriers (“ILECs”), which, prior to 1996, generally enjoyed regional monopolies
18 over local telephonic service.

19 The access service at issue here consists of 1) “originating” access, by which a call is transported
20 from a caller’s premises over the network of the local exchange carrier (“LEC”) to the interexchange
21 network, and 2) “terminating” access, by which a call is transported from the interexchange network over
22 a LEC’s network to the called party’s premises. NCC alleges that it has a legal and regulatory obligation
23 to terminate all calls destined for its end-users. The standard in the telecommunications industry is to charge
24 for originating and terminating access based on the minutes of use for the length of the call. NCC alleges
25 that it provided, and continues to provide, Defendants with both originating and terminating access services
26 for intrastate and interstate calls transported over the NCC network to and from the respective Sprint and
27 Verizon networks.

1 ***Allegations Specific to the Verizon Matter***

2 In the operative Second Amended Complaint [Doc. No. 47,] NCC alleges that it filed tariffs with the
3 appropriate state and federal agencies setting forth its rate for originating and terminating access services
4 for intrastate and interstate interexchange calls, and beginning in October 1999, NCC sent monthly bills to
5 Verizon for such services. Verizon paid in full all of the access services invoices until August of 2006.
6 NCC alleges that Verizon has not paid any of NCC's invoices for interexchange access services since
7 August of 2006, and seeks to recover over \$1.3 million in unpaid access service charges.

8 Verizon filed a counterclaim, alleging unfair imposition of charges under 47 U.S.C. § § 203, 206,
9 and 207, unfair and unreasonable rates, breach of state tariff obligations, unjust enrichment, breach of
10 contract, declaratory relief, and fraud. [Doc. No. 217 (Third Amended Counterclaim).]

11 ***Allegations Specific to the Sprint Matter***

12 With respect to Sprint, NCC alleges that the parties entered into a written switched access settlement
13 and service agreement (the "Service Agreement"), with an effective date of January 30, 2002. [Doc. No. 56,
14 (Second Amended Complaint) at Ex. A.] Sprint gave NCC written notice of its intention to terminate the
15 service agreement, and the termination of the agreement became effective on May 7, 2010. Since the
16 termination date, Sprint has sent access traffic to and received access traffic from NCC's network pursuant
17 to NCC's tariffs, which are on file with the appropriate regulatory agencies, and set forth NCC's per-minute
18 of use rate for originating and terminating access services for intrastate interexchange and interstate calls.

19 During the period of the agreement, NCC billed Sprint for interstate originating and terminating
20 access services for interstate interexchange calls pursuant to Schedule A of the Service Agreement at the
21 benchmark competing ILEC rate as required by the Federal Communications Commission ("FCC") April
22 27, 2001 Access Charge Reform Order, Docket No. 96-262. *Id.* at ¶ 27. With respect to intrastate
23 interexchange calls during the agreement period, pursuant to Schedule A, NCC provided Sprint with a
24 discount on NCC's tariffed intrastate interexchange rates through June 19, 2005, at which time NCC billed
25 Sprint the rates in its applicable state tariffs.

26 Between October 1999 and January 2008, NCC alleges that it sent Sprint billing invoices at the
27 above-mentioned rates, and Sprint accepted the invoices without objection and paid them in full. Beginning
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1 in February 2008, however, Sprint has not paid the amounts demanded for intrastate and interstate
2 interexchange access services, although NCC continues to provide such services to Sprint. Sprint objected
3 to the bills based on the nature of the traffic. NCC alleges that the invoices submitted since February 2008
4 exceed \$2 million for services provided by NCC, which remain unpaid. NCC also alleges that Sprint was
5 underbilled for certain services during the Service Agreement, and NCC seeks to recover that amount, also
6 exceeding \$2 million.

7 Sprint filed a counterclaim, alleging that NCC lacks a valid tariff rate for interstate switched access
8 service, that NCC unlawfully charged for calls to Call Connection Companies and engaged in “traffic
9 pumping,”¹ that NCC improperly billed for services in West Virginia, and that NCC overcharged for calls
10 in the Leaf River, Illinois area. [Doc. No. 19.]

11 **II. PROCEDURAL STATUS**

12 Prior to the transfer of this matter to the undersigned, Judge Battaglia issued two critical orders which
13 were dispositive as to certain claims, and relate to the matters now before the Court.

14 ***The Verizon Matter***

15 On September 28, 2012, Judge Battaglia granted Verizon’s motion for judgment on the pleadings
16 as to NCC’s equitable claims, finding that they depended on the Court’s determination as to whether or not
17 the rates were reasonable – something that is in the exclusive jurisdiction of the FCC. [Doc. No. 213 at 10.]
18 NCC was accordingly ordered to pursue determination of a reasonable rate for services provided with the
19 FCC. *Id.*, citing *N. Valley Communications, LLC v. Sprint*, 2010 WL 936723 (D.S.D. Mar. 15, 2010). Judge
20 Battaglia also granted Verizon’s motion for judgment on the pleadings with prejudice as to its 2003 tariff,
21 finding it to be unenforceable, and granted the motion as to NCC’s claims based on the 2010 tariff,
22 (including the Arizona tariff filed in 2011 and the California tariff filed in August 2010) on the same
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25 ¹According to the counterclaim, traffic pumping occurs when a LEC partners with a second
26 company (“Call Connection Company”) that has established free or nearly free conference calling, chat-
27 lines, or similar services. The Call Connection Company generates huge call volumes to numbers
28 assigned to the LEC, the LEC bills those calls if they are subject to access charges, interexchange
carriers pay those bills, and the LEC and Call Connection company share the profits. [Doc. 19 at ¶¶ 6-
7.]

1 grounds. [Doc. No. 213 at 5-9.]

2 ***The Sprint Matter***

3 On September 27, 2012, Judge Battaglia dismissed NCC's claims based on its FCC tariff with
4 prejudice, finding it invalid, and held that NCC may only rely on the Service Agreement with Sprint, as
5 opposed to its 2010 tariff, for recovering damages. [Doc. No. 123 at 5-6.] The September 27, 2012 order also
6 dismissed without prejudice NCC's contract claim based on underbilling, finding that because a breach
7 would only occur once payment was demanded by NCC and Sprint refused to pay, Sprint could not have
8 breached the Service Agreement by failing to pay for services that NCC never invoiced, and the complaint
9 did not allege facts to indicate when the underbilled amounts were discovered and whether or not they were
10 invoiced. *Id.* at 6. NCC's Tortious Interference with Prospective Business Advantage claim (Count 6) was
11 also dismissed with prejudice on the grounds that the complaint failed to allege an independently wrongful
12 act. *Id.* at 6-7.

13 Judge Battaglia also denied NCC's motion for partial summary judgment, which asked the court to
14 determine that 1) terminating calls to chat lines is not unlawful and 2) switched access charges may be
15 imposed for terminating calls to chat lines, because NCC never identified any element, counterclaim, or
16 defense to which those findings would apply. *Id.* at 3.

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18 **III. PLAINTIFF'S MOTION TO DISMISS VERIZON'S THIRD AMENDED
COUNTERCLAIM**

19 **A. STANDARD OF REVIEW ON 12(b)(6) MOTIONS TO DISMISS**

20 A party may bring a motion to dismiss one or more claims for relief asserted against it on the grounds
21 that the complaint fails to "state a claim upon which relief may be granted." Fed. R. Civ. Proc. 12(b)(6).
22 While a counterclaim "does not need detailed factual allegations," it must set forth "more than labels and
23 conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp.*
24 *v. Twombly*, 550 U.S. 554, 555 (2007). To survive a motion to dismiss, a complaint must contain sufficient
25 factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.* at 570. A claim
26 has facial plausibility when the plaintiff pleads factual content for the court to draw the reasonable inference
27 that the defendant is liable for the conduct alleged. *Id.* at 556.

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1 **B. ANALYSIS**

2 NCC moves to dismiss Verizon's counterclaim counts II (Unfair and Unreasonable Rates), III (Unfair
3 and Unreasonable Practices), IV (Unjust Enrichment), and VI (Fraud). [Doc. No. 225.] Plaintiff argues that
4 Judge Battaglia's September 28, 2012 ruling, dismissing NCC's equitable claims on the grounds that the
5 determination of a reasonable rate for telecommunications services is the exclusive province of the FCC and
6 the relevant state public utility commissions, should equally apply to Verizon's counterclaims which would
7 require the same determination (Counts II, III, and IV). Plaintiff also seeks to dismiss the fraud claim,
8 arguing that Verizon cannot satisfy the elements necessary to sustain that claim.

9 In the interest of judicial economy and consistency with prior rulings in this matter, the Court
10 **GRANTS** the motion to dismiss counts II, III, and IV **WITHOUT PREJUDICE** on the grounds that the
11 requested relief would improperly require the Court to determine a reasonable rate. [See Doc. No. 213 at
12 9-10.] As with the NCC claims, the Court finds that it is not in the position to determine whether the
13 amounts Verizon paid to NCC for access services was reasonable, and by extension whether it is entitled
14 to be reimbursed for amounts paid. See *N. Valley Communications, LLC*, 2010 WL 936723 at * 11. Indeed,
15 Counterclaim II by definition requires a determination as to whether NCC was charging unfair and
16 unreasonable rates, and Counterclaim III alleges that Verizon was injured by having to pay money that it did
17 not owe. [Doc. No. 217 at ¶ 86.] These determinations are precisely what Judge Battaglia already found to
18 be within the exclusive province of the FCC, and this Court declines to revisit that ruling. [Doc. No. 213 at
19 10.] Verizon may renew its counterclaims, if appropriate, upon the FCC's determination as to the
20 reasonableness of NCC's rates.

21 As to the Fraud claim, the Court finds that the allegations, if true, adequately state a plausible claim
22 for relief. Indeed, while NCC raises arguments as to the validity of the claim, the Court finds that such
23 arguments are factually-based, and improperly seek determination of issues outside the four corners of the
24 counterclaims alleged. See *Lee v. City of Los Angeles*, 250 F.3d 1259, 1270 (9th Cir. 2001). As such the
25 motion to dismiss the counterclaim is **DENIED**.

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1 **V. CROSS MOTIONS FOR SUMMARY JUDGMENT IN THE SPRINT MATTER**

2 **A. LEGAL STANDARD**

3 Summary judgment is proper only upon the movant's showing "that there is no genuine dispute as
4 to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(a).
5 "Material," for purposes of Rule 56, means that the fact, under governing substantive law, could affect the
6 outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Cline v. Industrial*
7 *Maintenance Engineering & Contracting Co.*, 200 F.3d 1223, 1229 (9th. Cir. 2000). For a dispute to be
8 "genuine," a reasonable jury must be able to return a verdict for the nonmoving party. *Id.*, citing *Anderson*,
9 477 U.S. at 248.

10 The initial burden of establishing the absence of a genuine issue of material fact falls on the moving
11 party. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). If the moving party can demonstrate that
12 its opponent has not made a sufficient showing on an essential element of his case, the burden shifts to the
13 Plaintiff to set forth facts showing that a genuine issue of disputed fact remains. *Id.* at 324. When ruling on
14 a summary judgment motion, the court must view all inferences drawn from the underlying facts in the light
15 most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,
16 587 (1986).

17 **B. EQUITABLE CLAIMS AND CLAIMS DEPENDENT UPON THE FCC'S**
18 **DETERMINATION OF REASONABLE RATES**
19 **(NCC Counts II, III, IV; Sprint Counterclaims I, II, III, V, VII)**

20 Both parties have filed cross motions for summary judgment as to certain claims and counterclaims
21 on the grounds that Judge Battaglia's September 28, 2012 order in the Verizon matter dictates their dismissal
22 because they require a determination as to whether NCC's rates were reasonable. As a procedural matter,
23 the Court finds that these issues are more appropriately handled by a motion for judgment on the pleadings
24 because the Court is not reaching the merits of these claims. Indeed, the September 28, 2012 Verizon order
25 granted Verizon's motion for judgment on the pleadings and was not a ruling on summary judgment.
26 Accordingly the Court will construe both motions as they relate to the claims and counterclaims discussed
27 in this section as a motion for judgment on the pleadings under Fed. R. Civ. Proc. 12(c).
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1 Sprint seeks dismissal of NCC's equitable claims (Count II -Breach of Implied Contract; Count III -
2 Unjust Enrichment, and Count IV - Quantum Meruit) on the grounds that Judge Battaglia granted a motion
3 for judgment on the pleadings as to the identical claims in the Verizon matter. *See* Case No. 08cv1518, Doc.
4 No. 213 at 9-10.] As stated above, in the interest of judicial economy and consistency, NCC's equitable
5 claims against Sprint are hereby **DISMISSED WITHOUT PREJUDICE**. The Court finds that NCC's
6 equitable claims against Sprint are virtually identical (a finding NCC does not dispute), and the Court
7 accordingly holds that it is not in the position to determine the amount to which NCC is allegedly entitled
8 as compensation for its services. *See N. Valley Communications, LLC*, 2010 WL 936723 at *11. NCC may
9 renew these claims, if appropriate, following a determination by the FCC as to the reasonableness of NCC's
10 rates.

11 As it did with respect to Verizon's counterclaims, NCC argues that the September 28, 2012 order
12 in the Verizon matter should equally apply to Sprint's counterclaims, and seeks their dismissal. For the
13 reasons set forth above, the Court finds that Sprint's counterclaims I, II, III, V, and VII all require the Court
14 to determine whether or not the rates NCC charged were reasonable. Indeed, Counterclaim Counts I and
15 III seek recovery for amounts Sprint allegedly paid to NCC but did not owe [Doc. No. 19 at ¶¶ 39, 48,] and
16 Count VII seeks a declaration from this Court that Sprint does not owe money on the invoices it chose not
17 to pay. *Id.* at ¶ 66. Whether or not that is the case remains to be determined, and the Court finds that the
18 answers are dependent upon the FCC's determination as to whether or not the rates NCC charged were
19 reasonable. Count II, by definition, seeks a determination as to whether the rates charged were fair and
20 reasonable, and Sprint does not dispute that the Count V for unjust enrichment should be dismissed
21 consistent with the September 28, 2012 Verizon order. [Doc. No. 135 at 2.] Accordingly, the Court
22 **DISMISSES** Sprint's counterclaim Counts I, II, III, V, and VII **WITHOUT PREJUDICE**. Sprint may
23 renew its counterclaims, if appropriate, upon the FCC's determination as to the reasonableness of NCC's
24 rates.

25 C. 2010 CALIFORNIA AND 2011 ARIZONA TARIFFS

26 Sprint moves for summary judgment as to NCC's Count I to the extent it is based on NCC's 2010
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1 California tariff and 2011 Arizona tariff in light of Judge Battaglia’s holding that both were unenforceable
2 in the Verizon Matter. [See Case No. 08cv1518, Doc. No. 213 at 9, n.7 (finding tariffs to be invalid).] NCC
3 does not dispute that Judge Battaglia found the tariffs to be invalid in the Verizon matter, but argues that the
4 Court’s reasoning in reaching such a conclusion was flawed. As with the findings on the equitable claims,
5 this Court is not inclined to revisit prior rulings on this issue, and accordingly **GRANTS** Sprint’s motion
6 for summary judgment as to Count I, to the extent that it seeks to enforce the 2010 California and 2011
7 Arizona tariffs. As both parties have pointed out, NCC’s California tariff claim is still alive for periods from
8 May 2010 through August of 2010, and its Arizona tariff claim is still alive for periods from May 2010
9 through March 2011.

10 **D. CONTRACT CLAIMS**

11 Sprint moves for summary judgment as to NCC’s contract claims, arguing that because NCC has
12 admitted to overbilling Sprint for services provided, and because such overbilling constitutes a material
13 breach of the contract, NCC may not enforce the contract at issue. *See Brown v. Dillard’s, Inc.*, 430 F.3d
14 1004, 1010 (9th Cir. 2005) (recognizing that California contract law deprives a party of the right to enforce
15 a contract if it has breached her obligations under the same contract). Plaintiff provided the Court with
16 deposition testimony indicating that, while NCC did occasionally overbill Sprint under the contract, it also
17 underbilled Sprint. [See Doc. No. 136-1, Dixon Decl., at ¶ 4, Ex. A.] Thus, Plaintiff argues that the
18 overbilling was not a material breach of the contract. Considering the evidence in the light most favorable
19 to NCC as it must, the Court finds that NCC has presented sufficient evidence to raise a question of fact for
20 the jury as to the materiality of the overbilling, and that to rule in Defendant’s favor would improperly
21 require the Court to weigh the evidence. Accordingly, Sprint’s Motion for Summary Judgment as to Count
22 I for breach of contract is **DENIED**.

23 **E. Unfair Competition Law Claim (Count V)**

24 Sprint moves for summary judgment as to NCC’s claim for money damages pursuant to its California
25 Unfair Competition Law (“UCL”) claim. The motion is **GRANTED** as to the claim for money damages
26 only. *See Korea Supply Company v. Lockheed Martin Corp., et al.*, 29 Cal.4th 1134, 1144 (2003) (“A UCL
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1 action is equitable in nature; damages cannot be recovered.”). Because the motion was specific to the claim
2 for damages, the Court does not reach the issue as to whether or not NCC has a right to the equitable
3 remedies available under the UCL.

4 **V. NCC’s MOTIONS FOR LEAVE TO AMEND THE SECOND AMENDED**
5 **COMPLAINT**

6 In light of today’s ruling, NCC’s pending motions for leave to amend the complaints [Doc. No. 231
7 in the Verizon Matter, and 149 in the Sprint Matter] are **DENIED WITHOUT PREJUDICE**. On or before
8 **February 8, 2013**, the parties are ordered to file a Joint Status Report setting forth 1) what they understand
9 to be the remaining claims and counterclaims in both matters, 2) whether any party intends to move to stay
10 any of the remaining claims, and, if so, identifying such claims, and 3) a proposed plan for seeking the
11 appropriate relief from the FCC. Upon review of the Status Report, the Court will set forth a briefing
12 schedule for any motions to stay and/or for amending the complaints.

13 **VI. CONCLUSION**

14 For the reasons set forth above, NCC’s Motion to Dismiss the Third Amended Counterclaim [Doc.
15 No. 225] is **GRANTED WITHOUT PREJUDICE** as to counterclaim counts II, III, and IV, and **DENIED**
16 as to Count VI.

17 As to Sprint’s Motion [Doc. No. 126], NCC’s Counts II, III, and IV are **DISMISSED WITHOUT**
18 **PREJUDICE**. Sprint’s Motion for Summary Judgment as to Count I for breach of the Service Agreement
19 is **DENIED**, its motion as to Count I, to the extent that it seeks to enforce the 2010 California and 2011
20 Arizona tariffs, is **GRANTED**, and its motion as to the damages claim only in NCC’s Count V for Unfair
21 Competition Law violations is **GRANTED**. As to Plaintiff’s Motion against Sprint [Doc. No. 128,] Sprint’s
22 Counterclaim Counts I, II, III, V, and VII are **DISMISSED WITHOUT PREJUDICE**.

23 Plaintiff’s Motions for Leave to Amend are **DENIED WITHOUT PREJUDICE**. The parties shall
24 file a Joint Status Report as set forth above on or before **February 8, 2013**.

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1 As stated during oral argument, the Court hereby **REFERS** Sprint's motion for terminating sanctions
2 [Doc. No. 156] to Magistrate Judge McCurine for a report and recommendation as it involves discovery
3 issues, and the hearing on the motion currently set for February 22, 2013 is hereby **VACATED**.

4 **IT IS SO ORDERED.**

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6 **DATED: January 28, 2013**

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10 **CATHY ANN BENCIVENGO**
11 **United States District Judge**

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