

Exhibit A

Marie L. Fiala (SBN 79676)
mfiala@sidley.com
SIDLEY AUSTIN, LLP
555 California Street, Suite 2000
San Francisco, CA 94104
Telephone: (415) 772-1200
Facsimile: (415) 772-7400

Michael J. Hunseder (*pro hac vice pending*)
mhunseder@sidley.com

Mark P. Guerrera (*pro hac vice pending*)
mguerrera@sidley.com

Noah T. Katzen (*pro hac vice pending*)
nkatzen@sidley.com

SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8000
Facsimile: (202) 736-8711

Attorneys for Defendant AT&T Corp.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO

O1 COMMUNICATIONS, INC.,

Plaintiff,

vs.

AT&T CORPORATION

Defendant.

Case No. 3:16-cv-01452-VC

**MOTION TO DISMISS IN PART
PLAINTIFF'S COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

HONORABLE VINCE CHHABRIA

Date: June 2, 2016
Time: 10:00 a.m.
Place: Courtroom 4, 17th Floor

NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 2, 2016 at 10:00 a.m., or as soon thereafter as counsel may be heard, in Courtroom 4 of the above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, California 94102, defendant AT&T Corp., named herein as “AT&T Corporation,” will and hereby does move to dismiss Plaintiff’s Complaint (“Complaint”), pursuant to Federal Rules of Civil Procedure 8, 9(b), and 12(b)(6).

The motion is based on the following grounds:

1. Plaintiff’s claims arising under Section 201 and 202 of the Communications Act (Counts I and II) are not cognizable because those statutes and numerous decisions of the Federal Communications Commission and district courts make clear that non-payment of charges specified in a carrier’s access tariff does not give rise to a claim under Sections 201 or 202.

2. Plaintiff’s state law claims governing Plaintiff’s tariffed access services (Counts III, VI, VII, VIII, and IX) are preempted as inconsistent with the uniform federal regulatory regime for access services and with the filed tariff doctrine.

Dated: April 26, 2016

SIDLEY AUSTIN LLP

By: /s/ Marie L. Fiala

Marie L. Fiala (SBN 79676)
mfiala@sidley.com
SIDLEY AUSTIN, LLP
555 California Street, Suite 2000
San Francisco, CA 94104
Telephone: (415) 772-1200
Facsimile: (415) 772-7400

Michael J. Hunseder (*pro hac vice pending*)
mhunseder@sidley.com
Mark P. Guerrero (*pro hac vice pending*)
mguerrera@sidley.com
Noah T. Katzen (*pro hac vice pending*)
nkatzen@sidley.com
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8000
Facsimile: (220) 736-8711

Attorneys for Defendant AT&T Corp.

TABLE OF CONTENTS

	Page
INTRODUCTION	1
BACKGROUND	2
A. Regulatory Background	2
B. Plaintiff’s Allegations	5
LEGAL STANDARD.....	6
ARGUMENT.....	6
I. PLAINTIFF’S COMMUNICATIONS ACT CLAIMS SHOULD BE DISMISSED.	6
A. Plaintiff’s Communications Act Claims Are Not Cognizable.....	6
B. Even Accepting Plaintiff’s Conclusory and Unsubstantiated Allegations As True, the Allegations Concern Only AT&T’s Role As Customer and Its Alleged Failure to Pay for Tariffed Services.	9
II. PLAINTIFF’S STATE LAW CLAIMS ARE PREEMPTED.....	10
A. Counts III, VI, VII, and VIII Are Preempted.....	10
B. Count IX Must Also Be Dismissed.....	15
CONCLUSION.....	15

TABLE OF AUTHORITIES**Page(s)****Federal Cases**

<i>Advamtel, LLC v. AT&T Corp.</i> , 118 F. Supp. 2d 680 (E.D. Va. 2000)	12
<i>Ashcroft v. Iqbal</i> , 446 U.S. 662 (2009).....	6, 9
<i>AT&T Co. v. Cent. Office Tel., Inc.</i> , 524 U.S. 214 (1998).....	2, 11
<i>AT&T Corp. v. Dataway Inc.</i> , 577 F. Supp. 2d 1099 (N.D. Cal. 2008)	11, 13
<i>AT&T Corp. v. FCC</i> , 349 F.3d 692 (D.C. Cir. 2003), <i>dismissing pet. for review of Petitions Of</i> <i>Sprint PCS and AT&T Corp.</i> , 17 FCC Rcd. 13192 (2002).....	12
<i>AT&T Corp. v. Iowa Utils. Bd.</i> , 525 U.S. 366 (1999).....	15
<i>Aventure Commc'ns Tech. v. Sprint Commc'ns</i> , No. 4:08-cv-0005, Slip Op. (S.D. Iowa Mar. 19, 2015)	11, 12
<i>California ex rel. Lockyer v. Dynegy, Inc.</i> , 375 F.3d 831 (9th Cir. 2004)	13
<i>Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co.</i> , 450 U.S. 311 (1981).....	14
<i>Connect Insured Tel. Co. v. Qwest Long Distance, Inc.</i> , 2012 WL 2995063 (N.D. Tex. July 23, 2012)	2, 8, 12
<i>Crockett Tel. Co. v. FCC</i> , 963 F.2d 1564 (D.C. Cir. 1992).....	4, 14
<i>Freedom Ring Commc'ns v. AT&T Corp.</i> , 229 F. Supp. 2d 67 (D.N.H. 2002).....	12
<i>In re FCC 11-161</i> , 753 F.3d 1015 (10th Cir. 2014)	4, 5, 6, 11, 14
<i>Iowa Network Servs., Inc. v. Qwest Corp.</i> , 385 F. Supp. 2d 850 (S.D. Iowa 2005), <i>aff'd</i> , 466 F.3d 1091 (8th Cir. 2006).....	12

1	<i>Keystone Driller Co. v. Gen. Excavator Co.</i> ,	
2	290 U.S. 240 (1933).....	13
3	<i>Line Sys., Inc. v. Sprint Nextel Corp.</i> ,	
4	2012 WL 3024015 (E.D. Pa. July 24, 2012).....	8
5	<i>Marcus v. AT&T Corp.</i> ,	
6	138 F.3d 46 (2d Cir. 1998).....	13
7	<i>MCI Telecom. Corp. v. Best Tel. Co., Inc.</i> ,	
8	898 F. Supp. 868 (S.D. Fla. 1994)	15
9	<i>MCI WorldCom v. PaeTec Commc'ns Inc.</i> ,	
10	2005 WL 2145499 (E.D. Va. Aug. 31, 2005), <i>aff'd</i> , 204 F. App'x. 271 (4th	
11	Cir. 2006)	12
12	<i>MCIMetro Access Transmission Servs. of Va., Inc. v. Christie</i> ,	
13	310 F. App'x 601 (4th Cir. 2009)	14
14	<i>Moss v. U.S. Secret Serv.</i> ,	
15	572 F.3d 962 (9th Cir. 2009)	6
16	<i>N. County Commc'ns v. Verizon Select Servs.</i> ,	
17	2012 WL 10907044 (S.D. Cal., Sept. 28, 2012).....	11, 13
18	<i>PaeTec Commc'ns Inc. v. Commpartners, LLC</i> ,	
19	2010 WL 1767193 (D.D.C. Feb. 18, 2010)	12
20	<i>Peerless Network, Inc. v. MCI Commc'ns Servs., Inc.</i> ,	
21	No. 14-C-7417, 2015 U.S. Dist. LEXIS 66822 (N.D. Ill. May 21, 2015).....	12
22	<i>Prentis v. Atl. Coast Line Co.</i> ,	
23	211 U.S. 210 (1908).....	13
24	<i>Pub. Util. Dist. No. 1 of Grays Harbor Cty. v. IDACORP Inc.</i> ,	
25	379 F.3d 641 (9th Cir. 2004)	13
26	<i>Qwest Commc'ns Co. v. Aventure Commc'ns Tech., LLC</i> ,	
27	2015 WL 711154 (S.D. Iowa Feb. 17, 2015).....	8, 11
28	<i>Sancom, Inc. v. Qwest Commc'ns Corp.</i> ,	
	643 F. Supp. 2d 1117 (D.S.D. 2009), <i>referring issues to the FCC and staying</i>	
	<i>mot. to recon.</i> , 2010 WL 960005 (Mar. 12, 2010).....	12
	<i>Splitrock Props., Inc. v. Qwest Commc'ns Corp.</i> ,	
	2009 WL 2827901 (D.S.D. Aug. 28, 2009).....	12
	<i>State Corp. Commc'n of Kan. v. FCC</i> ,	
	787 F.2d 1421 (10th Cir. 1986)	14

1	<i>TPS Utilicom Servs., Inc. v. AT&T Corp.</i> ,	
2	223 F. Supp. 2d 1089 (C.D. Cal. 2002)	13
3	<i>XChange Telecom Corp. v. Sprint Spectrum L.P.</i> ,	
4	2014 WL 4637042 (N.D.N.Y. Sept. 16, 2014)	8, 12
5	Federal Statutes	
6	47 U.S.C. § 151	4
7	47 U.S.C. § 152(a)	4
8	47 U.S.C. § 153(11)	7
9	47 U.S.C. § 153(51)	7
10	47 U.S.C. § 201	<i>passim</i>
11	47 U.S.C. §§ 201(a), (b)	7
12	47 U.S.C. § 202	<i>passim</i>
13	47 U.S.C. § 202(a)	7
14	47 U.S.C. § 203	3
15	47 U.S.C. § 206	7
16	47 U.S.C. § 208	7
17	State Statutes	
18	Cal. Bus. & Prof. Code § 17000, <i>et seq.</i>	6
19	Cal. Civ. Code § 3294	15
20	Regulations	
21	47 C.F.R. § 61.26	3
22	47 C.F.R. §§ 69.1	3
23	Rules	
24	Federal Rule of Civil Procedure 12(b)(6)	1, 6
25	Agency Decisions	
26	<i>AT&T and the Associated Bell Sys. Cos.</i> ,	
27	56 F.C.C.2d 14 (1975)	14
28		

1	<i>AT&T v. All Am. Tel. Co.</i> ,	
2	28 FCC Rcd. 3477 (2013).....	4, 11
3	<i>AT&T Corp. v. Great Lakes Comnet</i> ,	
4	30 FCC Rcd. 2586 (2015).....	3, 11
5	<i>In re All Am. Tel. Co. v. AT&T Corp.</i> ,	
6	26 FCC Rcd. 723 (2011).....	<i>passim</i>
7	<i>In re Connect Am. Fund</i> ,	
8	26 FCC Rcd. 17663 (2011).....	<i>passim</i>
9	<i>In re Connect Am. Fund</i> ,	
10	26 FCC Rcd. 4554 (2011).....	3
11	<i>In re Establishing Just and Reasonable Rates for Local Exchange Carriers</i> ,	
12	22 FCC Rcd. 11629 (WCB 2007).....	4
13	<i>N. Cty. Commc'ns Corp. v. MetroPCS Cal.</i> ,	
14	LLC, 24 FCC Rcd. 3807 (2009)	8, 10
15	<i>Operator Servs. Providers of Am. Pet. for Expedited Declaratory Ruling</i> ,	
16	6 FCC Rcd. 4475 (1991).....	14
17	<i>Qwest Commc'ns v. N. Valley Commc'ns</i> ,	
18	26 FCC Rcd. 8332 (2011), <i>recon denied</i> , 26 FCC Rcd. 14520 (2011), <i>aff'd</i>	
19	<i>sub nom N. Valley Commc'ns v. FCC</i> , 717 F.3d 1017 (D.C. Cir. 2013).....	3, 11
20	<i>Reform of Access Charges Imposed By Competitive Local Exchange Carriers</i> ,	
21	16 FCC Rcd. 9923, ¶¶ 30, 34 (2001)	3, 4, 10
22	<i>U.S. Telepacific Corp. v. Tel-Am. of Salt Lake City, Inc.</i> ,	
23	19 FCC Rcd. 24552 (2004).....	7

INTRODUCTION

Pursuant to Fed. R. Civ. P. 12(b)(6), Defendant AT&T Corp. (“AT&T”) moves to dismiss Counts I, II, III, VI, VII, VIII, and IX of the Complaint (“the Complaint” or “Compl.”) of Plaintiff O1 Communications, Inc. (“O1”). These counts, which are based on the Federal Communications Act (the “Act”) and state law theories, fail to state valid claims for relief.

Plaintiff alleges it is a competitive local exchange carrier (“CLEC”) that provides certain regulated services to AT&T, a long distance or interexchange carrier (“IXC”). Compl. ¶¶ 27-33. According to the Complaint, Plaintiff filed tariffs that contain the rates and terms of the access services it sold to its customers, including AT&T. *Id.* In short, Plaintiff alleges that AT&T has failed to pay for the tariffed services, and it seeks to collect the unpaid tariffed charges. Compl. ¶ 1; *id.* ¶¶ 115-28 (Counts IV and V). There are, however, two reasons the Counts identified above should be dismissed: (1) the law is well settled that §§ 201 and 202 of the Communications Act do not apply to customers; and (2) the state law claims are preempted.

Count I asserts that AT&T has violated 47 U.S.C. § 201 by purportedly engaging in “unjust and unreasonable practices.” Count II asserts that AT&T has violated 47 U.S.C. § 202 by purportedly engaging in “unjust and unreasonable discriminatory practices.” Neither section applies to customers purchasing tariffed services. In fact, numerous decisions before both the courts and the Federal Communications Commission (“FCC”) have held that “an allegation by a carrier that a customer has failed to pay charges specified in the carrier’s tariff fails to state a claim for violation of any provision of the [Communications] Act.”¹ The allegations in the Complaint pertain to AT&T’s role as a customer, and the basis for liability under the Act is premised entirely on Plaintiff’s claim that “AT&T has failed to pay” for Plaintiff’s tariffed service. Compl. ¶¶ 1-2; *see id.* ¶¶ 6-7, 9-10, 19-20, 33, 82-93, 94-104. Because the Communications Act does not apply to customers buying tariffed access services, Counts I and II state no claim for relief and should be dismissed.

¹ *In re All Am. Tel. Co. v. AT&T Corp.*, 26 FCC Rcd. 723, ¶ 10 (2011) (citing cases). Rather, any relief to which Plaintiff is entitled could arise only under Counts IV and V, which allege that AT&T has breached the tariffs by failing to pay the charges.

Likewise, Plaintiff's state law claims (Counts III, VI, VII, VIII, and IX) are preempted. Congress and the FCC established a national regulatory regime that applies uniformly to all access services. Pursuant to that regime, the FCC has provided two exclusive means for a CLEC like Plaintiff to obtain fees for access services from a long distance carrier like AT&T: the CLEC must either (1) file lawful and valid tariffs for such services, including rates no higher than an FCC-established benchmark, or (2) negotiate and enter into an express agreement with the IXC. Because recovery of compensation by other means, such as state law claims like those pled by Plaintiff, is inconsistent with the federal regime, courts across the country have held that the FCC's national regulatory regime preempts recovery based on state law theories. Further, Plaintiff's Complaint alleges that it has filed tariffs for the regulated services for which it seeks to recover, and it is well established that in such cases it may not rely on state law as an additional means to recover for the tariffed services.²

For these reasons, this Court should grant AT&T's motion to dismiss Counts I, II, III, VI, VII, VIII, and IX of the Complaint.

BACKGROUND

A. Regulatory Background

When a caller makes a long distance call, the call often begins or "originates" over telephone lines operated by a local exchange carrier (or "LEC"). Typically, the LEC takes the call to a point in its network where it hands the call off to a long distance carrier (such as AT&T). The IXC carries the call over its national network and often hands it off to a second LEC that serves the called party. The second LEC carries the call over its local network to the called party (where it "terminates" the call to the called party). The services the LECs provide to the IXC are known as access services.

Because access service is susceptible to abuse, particularly by CLECs, the FCC has

² See *AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222 (1998); *Connect Insured Tel. Co. v. Qwest Long Distance, Inc.*, 2012 WL 2995063, **11-12 (N.D. Tex. July 23, 2012) ("[f]ederal law required [the LEC] to file a tariff or negotiate a contract with [the IXC] in order to charge [the IXC] for telecommunications services," and LECs "cannot circumvent this prohibition by relying on equitable theories of recovery.").

1 developed a complex, detailed regulatory regime that aims to tightly control the rates and
 2 situations in which a LEC may assess its access rates upon an IXC.³ The FCC's rules vary for
 3 LECs that are "incumbents" (traditional providers like AT&T California) and those that are
 4 CLECs (such as O1). Although the FCC initially declined to regulate CLEC access rates, in
 5 2001, it concluded that even small, nominally "competitive" local exchange carriers have
 6 "bottleneck monopolies" over their access services. Seventh Report and Order, *Reform of*
 7 *Access Charges Imposed By Competitive Local Exchange Carriers*, 16 FCC Rcd. 9923, ¶¶ 30, 34
 8 (2001) ("*CLEC Access Charge Reform*"). Because of these bottleneck monopolies and growing
 9 concerns over CLEC access abuses, the FCC found that regulation of their access services was
 10 necessary to prevent CLECs from "impos[ing] excessive access charges on IXCs and their
 11 customers." *Id.* ¶¶ 2, 30-34.

12 Access services had traditionally been offered pursuant to tariffs, *see* 47 U.S.C. § 203,
 13 but CLECs had "used the tariff system to set access rates" that were not just and reasonable, as
 14 Congress required. *CLEC Access Charge Reform*, ¶ 2; *see* 47 U.S.C. § 201. Accordingly, the
 15 FCC issued new rules that limited the ways CLECs could collect access charges. 47 C.F.R.
 16 § 61.26; *CLEC Access Charge Reform*, ¶¶ 25-44. Under these rules, CLECs like Plaintiff may
 17 assess access charges only pursuant to express contracts or tariffs that comply with the FCC's
 18 rules governing access charges:

19 there are *two means* by which a CLEC can provide an IXC with, and charge for,
 20 interstate access services. *First*, a CLEC may tariff interstate access charges if its
 21 rates are no higher than the rates charged for such services by the competing
 22 ILEC (the benchmark rule). . . . *Second*, as an alternative to tariffing, a CLEC
 23 may negotiate and enter into an agreement with an IXC to charge rates higher
 24 than those permitted under the benchmark.⁴

24 ³ *See, e.g.*, 47 C.F.R. §§ 69.1. ("Access Charges"). The FCC's access services regime is part of
 25 an overall "intercarrier compensation" system, which is a "system of payments . . . between
 26 carriers to compensate each other for the origination, transport and termination of
 27 telecommunications traffic." Notice of Proposed Rulemaking and Further Notice of Proposed
 28 Rule Making, *In re Connect Am. Fund*, 26 FCC Rcd. 4554, ¶ 494 (2011); *see id.* ¶¶ 494-501
 (describing rules).

⁴ *AT&T Corp. v. Great Lakes Comnet*, 30 FCC Rcd. 2586, ¶ 10 (2015); *see Qwest Commc'ns v.*
N. Valley Commc'ns, 26 FCC Rcd. 8332, ¶¶ 6, 11 (2011) ("CLECs may impose interstate access

As to IXC's, the FCC generally limited the ability of IXC's to block traffic to or from a particular CLEC, even if the CLEC was overcharging the IXC. *In re Establishing Just and Reasonable Rates for Local Exchange Carriers*, 22 FCC Rcd. 11629, ¶¶ 6-7 (WCB 2007). However, the FCC rejected claims that IXC's "wield significant market power in the purchase of access services." *CLEC Access Charge Reform*, ¶ 85 (claims of "IXC monopsony power" are unsupported). The FCC has also issued a series of decisions explaining that the "provisions of the [Communications] Act and [the FCC's] rules regarding access charges apply only to the provider of the service, not to the customer; and they govern only what the provider may charge, not what the customer must pay." *All Am. Tel. Co.*, 26 FCC Rcd. 723, ¶ 18. Accordingly, an IXC's failure to pay access charges—while it might constitute a breach of the tariff—"does not breach any provisions of the Act or [FCC] rules." *Id.*

Long distance calls that originate in one state and terminate in another state are *interstate* calls, and the FCC has exclusive authority over such services. 47 U.S.C. §§ 151 & 152(a); *see also Crockett Tel. Co. v. FCC*, 963 F.2d 1564, 1566 (D.C. Cir. 1992). Although states have traditionally had authority over *intrastate* access services, that changed in 2011, when the FCC, invoking authority provided by Congress, established a "uniform, national framework" for all intercarrier compensation, including both interstate and intrastate access charges. *In re Connect Am. Fund*, 26 FCC Rcd. 17663 ¶¶ 34-35, 788-97 (2011) (hereinafter "*Connect Am. Order*"). As the Tenth Circuit explained in upholding the FCC's new framework, the FCC now "views intrastate access charges as an obstacle to reform" of intercarrier compensation arrangements, and thus the FCC has "exercise[d] its authority to preempt intrastate access charges," subject to a transition period. *In re FCC 11-161*, 753 F.3d 1015, 1121 (10th Cir. 2014); *see id.* at 1119-21.

Under the FCC's new, uniform national framework, carriers will transition over time to a "bill-and-keep" methodology that eliminates interstate and intrastate access charges. *Id.* at 1124-30 (explaining and upholding FCC's methodology). In the meantime, the FCC has established a charges either through tariffs or contracts negotiated with IXC's), *recon denied*, 26 FCC Rcd. 14520 (2011), *aff'd sub nom N. Valley Commc'ns v. FCC*, 717 F.3d 1017 (D.C. Cir. 2013); *AT&T v. All Am. Tel. Co.*, 28 FCC Rcd. 3477, ¶ 37 (2013) ("until a CLEC [1] files valid interstate tariffs under Section 203 of the Act or [2] enters into contracts with IXC's for the access services it intends to provide, it lacks authority to bill for those services") (footnote omitted).

1 transition period, in which carriers may elect to continue to file tariffs for interstate and intrastate
 2 access services. *Connect Am. Order*, ¶¶ 35, 798-808 (explaining the transition period); *id.* ¶ 812
 3 (during the transition period, carriers may rely on negotiated agreements or tariffs that comply
 4 with FCC-specified rules). However, during the transition, it is the FCC that sets the appropriate
 5 rates for both interstate and intrastate access services, and “states will not set the transition for
 6 intrastate rates.” *Id.* ¶ 790. The states’ role under the new uniform federal regime is to
 7 “implement the [FCC’s] bill-and-keep methodology,” which includes “oversee[ing] the tariffing
 8 of intrastate [access] rate reductions during the transition period.” *Id.* ¶¶ 790, 803 (during the
 9 transition, states will oversee “changes to intrastate access services” so that any intrastate tariffs
 10 are “consistent with” the FCC’s uniform, federal framework). In short, as of 2011, all
 11 intercarrier compensation, including intrastate access services, is governed not by state law, but
 12 by the FCC’s new “uniform, national framework” under federal law.⁵

13 **B. Plaintiff’s Allegations**

14 Plaintiff’s Complaint alleges that, since 2011, AT&T has failed to pay charges to Plaintiff
 15 for certain “switched access” services that Plaintiff allegedly “provided . . . to AT&T” pursuant
 16 to tariffs. Compl. ¶¶ 1-2, 27-28. Specifically, Plaintiff alleges that AT&T has withheld charges
 17 for (1) Plaintiff’s termination of calls from AT&T customers to Plaintiff’s customers, (2) toll free
 18 (or “8YY”) calls made by Plaintiff’s customers that are sent to AT&T’s network, and (3) a
 19 service that queries a database (known as an “8YY dip”) in order to identify the long distance
 20 carrier associated with an 8YY telephone number. *Id.* ¶¶ 2, 27. Plaintiff alleges that the charges
 21 at issue are authorized by its interstate and intrastate tariffs, or that in the alternative Plaintiff
 22 should be compensated for these services based on theories of implied contract, unjust
 23 enrichment, and quantum meruit. *Id.* ¶¶ 3, 28-32, 115-62. Plaintiff also claims that AT&T’s
 24 non-payment constitutes an “unjust or unreasonable” and “discriminatory” practice in violation
 25

26
 27 ⁵ Under the FCC’s new framework, carriers use “interconnection agreements” to govern their
 28 exchange of traffic, with “bill-and-keep” as the default regime for intercarrier compensation. States continue to play a role in reviewing the terms of interconnection agreements, but their review of such agreements is subject to federal law. *See In re FCC 11-161*, 753 F.3d at 1125-28.

of the Communications Act, and violates the California Unfair Practices Act (“UPA”), *see* Cal. Bus. & Prof. Code § 17000, *et seq.* Compl. ¶¶ 94-114. According to Plaintiff, AT&T should be required to pay over \$11,000,000 in charges and an additional \$8,000,000 in late fees. *Id.* ¶ 1. Plaintiff also requests exemplary damages under Cal. Civ. Code § 3294. *Id.* ¶¶ 163-65.

LEGAL STANDARD

A court must dismiss a complaint that “fail[s] to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Thus, “for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). In applying this standard, “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.” *Ashcroft v. Iqbal*, 446 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007)).

ARGUMENT

Plaintiff’s claims should be dismissed in part for two reasons. First, its Communications Act claims are not cognizable because they seek to hold AT&T liable under the Act in its role as a customer, not as a provider of service. Second, Plaintiff’s state law claims are preempted by the FCC’s uniform, national regulatory regime and the filed tariff doctrine.

I. PLAINTIFF’S COMMUNICATIONS ACT CLAIMS SHOULD BE DISMISSED.

As noted, Counts I and II of the Complaint allege that AT&T—Plaintiff’s customer—violated Section 201 and 202 of the Communications Act by failing to pay the fees for access services Plaintiff supposedly provided. Count I alleges that AT&T non-payment constitutes an “unjust and unreasonable practice” under Section 201. Count II alleges that this non-payment is “unjust and unreasonable discrimination” under Section 202. Because a customer purchasing an access service cannot be liable under either Section 201 or Section 202 for failing to pay a carrier for providing the service, Counts I and II should be dismissed.

A. Plaintiff’s Communications Act Claims Are Not Cognizable.

Plaintiff’s Communications Act claims fail because only the party *providing* a service,

1 and not the party *purchasing* that service, is capable of violating Sections 201 and 202. The
 2 plain text of Section 201 requires a “common carrier” to “furnish [the] communication service” it
 3 offers at rates and terms that are “just and reasonable.” 47 U.S.C. §§ 201(a), (b). Similarly, the
 4 text of Section 202 prohibits a “common carrier” from making “any unjust or unreasonable
 5 discrimination in charges, practices, classifications, regulations, facilities, or services for or in
 6 connection with *like communication service*.” *Id.* § 202(a) (emphasis added). As such, these
 7 provisions apply to “common carriers” that “furnish” a regulated communications service, not to
 8 customers purchasing such services. Removing all doubt that these provisions apply only to the
 9 carrier furnishing the service, the Communications Act further provides that a
 10 telecommunications carrier “shall be treated as a common carrier . . . *only* to the extent that it is
 11 engaged in *providing* telecommunications services.” *Id.* § 153(51) (emphases added); *cf. id.*
 12 § 153(11) (defining “common carrier” generally). In short, Sections 201 and 202 do not provide
 13 a basis for AT&T to be held liable for failure to compensate Plaintiff for access services Plaintiff
 14 was allegedly furnishing or providing to AT&T.

15 Decisions of the FCC and district courts confirm that the Communications Act means
 16 what it says. The FCC has held “an allegation by a carrier that a customer has failed to pay
 17 charges specified in the carrier’s tariff *fails to state a claim* for violation of any provision of the
 18 [Communications] Act.” *All Am. Tel. Co.*, 26 FCC Rcd. 723, ¶ 10 (emphasis added). As the
 19 FCC explained, customers purchasing service are not liable under the Act, “even if the carrier’s
 20 customer is another carrier. These holdings stem from the fact that the [Communications] Act
 21 generally governs a carrier’s obligations to its customers, and not vice versa.” *Id.*

22 Accordingly, “although a customer carrier’s failure to pay another carrier’s tariffed
 23 charges may give rise to a claim in court for breach of tariff/contract, it does not give rise to a
 24 claim at the [FCC] under section 208 [47 U.S.C. § 208] (or in court under section 206 [47 U.S.C.
 25 § 206]) for breach of the Act itself.” *Id.*; *cf. U.S. Telepacific Corp. v. Tel-Am. of Salt Lake City,*
 26 *Inc.*, 19 FCC Rcd. 24552, ¶ 8 (2004) (distinguishing between alleging “a violation of [§] 201(b)”
 27 and “an action for recovery of unpaid access charges that are allegedly [due] under the terms of a
 28 federal tariff”). For these reasons, Count I, which alleges a violation of Section 201 of the Act, is

1 foreclosed by these decisions. *All Am. Tel. Co.*, 26 FCC Rcd. 723, ¶ 10 (finding that Section
2 201(b) does not recognize a claim for non-payment).

3 The FCC has also squarely held that Section 202 of the Act—the provision that Plaintiff
4 relies upon in Count II—is “inapplicable where, as here, the challenged conduct . . . is that of the
5 carrier receiving the communication service rather than the carrier providing the service.” *N.*
6 *Cty. Commc’ns Corp. v. MetroPCS Cal., LLC*, 24 FCC Rcd. 3807, ¶ 22 (2009). The FCC
7 further explained that Section 202 is not implicated when a plaintiff fails to ground its “section
8 202(a) claim on services provided by [the customer-carrier] at all, but on alleged similarities
9 between [the plaintiff’s] own termination services and the termination services of other carriers.”
10 *Id.* The Act is inapplicable in this context because “[s]ection 202(a) is not concerned with
11 whether the services of two separate carriers are ‘like’; it is concerned with whether two services
12 offered by the same carrier are like. There is no dispute that [the plaintiff], not [the customer-
13 carrier], is the carrier providing the communication service in question here. Thus, [the
14 customer-carrier’s] willingness or obligation to pay other carriers a different rate for terminating
15 intrastate traffic than what it is willing to pay [the plaintiff] for terminating services does not fall
16 within the scope of section 202(a) of the Act.” *Id.* *North County* requires dismissal of Count II.

17 Courts have likewise consistently rejected claims brought by common carriers alleging
18 non-payment by carrier-customers. *See, e.g., Qwest Commc’ns Co. v. Adventure Commc’ns*
19 *Tech., LLC*, 2015 WL 711154, at *75-*78 (S.D. Iowa Feb. 17, 2015) (holding that *All American*
20 *Telephone Co.* foreclosed carrier’s claims that carrier-customer violated Sections 201, 202, and
21 203 by refusing to pay charges); *XChange Telecom Corp. v. Sprint Spectrum L.P.*, 2014 WL
22 4637042, at *4 (N.D.N.Y. Sept. 16, 2014) (“[I]t is clear that the failure of a customer to pay
23 access charges is not a scenario that is governed by, or subject to, the Act.”); *Line Sys., Inc. v.*
24 *Sprint Nextel Corp.*, 2012 WL 3024015, at *6 (E.D. Pa. Jul. 24, 2012) (“Line Systems’ claim for
25 violation of § 201 . . . does not allege that any conduct other than non-payment of tariffs violated
26 § 201. I will therefore grant Sprint’s motion to dismiss the § 201 claim.”); *Connect Insured Tel.,*
27 *Inc. v. Qwest Long Distance, Inc.*, 2012 WL 2995063, at *13 (N.D. Tex. Jul. 23, 2012) (claim
28 “seek[ing] damages in the total amount of tariffed charges [plaintiff] is allegedly owed in

accordance with its tariff” is “not cognizable under the Communications Act”).

B. Even Accepting Plaintiff’s Conclusory and Unsubstantiated Allegations As True, the Allegations Concern Only AT&T’s Role As Customer and Its Alleged Failure to Pay for Tariffed Services.

Plaintiff’s assertions in Counts I and II that AT&T’s conduct was “unjust and unreasonable” and “discriminatory,” Compl. ¶¶ 96, 101, are conclusory and unsubstantiated. While Plaintiff incorporates the entire Complaint in these counts, it does not identify the specific conduct that it contends gives rise to these claims. Such legal conclusions, dressed up as factual allegations, do not satisfy federal pleading requirements. *See Iqbal*, 556 U.S. at 678 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”) (citing *Twombly*, 550 U.S. at 555).

But even if they did, it is clear that Counts I and II seek to do precisely what the FCC and courts have said is impermissible: hold a customer-carrier liable under the Act for “failure to pay.” The Complaint is replete with allegations that AT&T failed to pay Plaintiff’s tariffed charges. See Compl. ¶¶ 1 (“This is an action to recover more than \$11,000,000 in charges and an additional \$8,000,000 in late charges . . . which AT&T has failed to pay.”), 2 (“AT&T has failed to pay O1”), 6 (“AT&T has engaged in improper self-help tactics by unilaterally withholding payment from O1 . . .”), 7 (“AT&T . . . unilaterally refuses payment . . .”), 9 (“AT&T[] unilateral[ly] deci[ded] . . . to reduce its monthly payments to O1 from nearly 80% to less than 10%.”), 10 (“AT&T[] deci[ded] suddenly to dispute almost the entire monthly invoice from O1 and to impose a drastic reduction in monthly payments to O1 . . .”), 19 (referring to AT&T’s “refusal to pay”), 20 (“This Complaint seeks to recover amounts owed by AT&T for terminating and originating services for which AT&T refuses to pay.”), 33 (“AT&T has refused to compensate O1 fully for its switched access services.”), 82 (“To date, AT&T IXC maintains its refusal to compensate O1 reasonably for traffic subject to O1’s monthly invoices . . .”), 86 (“AT&T IXC continues to receive access services from O1 while withholding full payment for the service O1 provides . . .”), 87 (“Because of AT&T’s refusal to compensate O1 fully for its services, O1 has . . . been damaged . . .”). Indeed, the heading of the first subsection within the Complaint’s “Relevant Facts Applicable to All Counts” section is entitled “AT&T violates O1’s

tariffs by failing to pay for services and failing to follow the billing dispute processes.” *Id.* ¶ 7.

Furthermore, Plaintiff’s other allegations against AT&T— *e.g.*, that it “has not filed timely, valid or good faith disputes,” *id.* ¶ 34, that it “created a financial squeeze” on O1 by failing to pay, *id.* ¶ 83, and that (“upon information and belief”) AT&T is “engaged in a pattern of unlawful self-help behavior,” *id.* ¶ 89—are each predicated on, and derivative of, the primary allegation that AT&T has failed to pay Plaintiff’s tariffed charges. The alleged failure to file timely, valid, good faith disputes arises solely because of AT&T’s alleged *failure to pay*.

Likewise, the claim AT&T allegedly “created a financial squeeze” is based on its *failure to pay*.

And the “self help” that Plaintiff decries consists of nothing more than AT&T’s alleged *failure to pay*. As previously noted, these types of claims based allegedly on AT&T’s monopsony power have been specifically rejected by the FCC. *See supra* at 4; *CLEC Access Charge Reform*, ¶ 85. Consequently, nothing in the Complaint alleges that AT&T acted unlawfully in providing any services to Plaintiff, which is a necessary condition of a Communications Act claim.

Moreover, the allegations in the Complaint positively refute Plaintiff’s charge that AT&T’s alleged non-payment is “discriminatory.” The Complaint alleges that AT&T has engaged in a “pattern” of refusing to pay similar charges for *all* CLECs, not just Plaintiff. Compl. ¶¶ 89-92. Moreover, the allegation that “the name of the CLEC whose bills AT&T refuses to pay is interchangeable,” *id.* ¶ 91, tends to show that AT&T treated these charges consistently as improper and thus did not discriminate.⁶

II. PLAINTIFF’S STATE LAW CLAIMS ARE PREEMPTED.

A. Counts III, VI, VII, and VIII Are Preempted.

As set forth above, in 2011, the FCC implemented a new “uniform, national framework”

⁶ Nor is it “discriminatory” for AT&T to enter into different settlements with different carriers based on the terms to which those carriers were willing to agree. Plaintiff’s allegations do not show that AT&T’s litigation with other carriers constitutes anything other than a series of disputes revolving around similar charges for similar services that AT&T disputed as improperly billed. In any event, as discussed above, the FCC has held that such allegations would not state a claim of “discrimination” under Section 202. *N. Cty. Commc’ns Corp.*, 24 FCC Rcd 3807, ¶ 22 (“Section 202(a) is inapplicable where . . . the challenged conduct – refusing to pay a comparable rate for allegedly like termination services – is that of the carrier receiving the communication service rather than the carrier providing the service.”).

1 for intercarrier compensation, including both interstate and intrastate access charges. *Connect*
 2 *Am. Order*, ¶¶ 34, 790. Under that framework, the FCC has established a transition period in
 3 which carriers may continue to file tariffs for access services, but the rates, terms and conditions
 4 for those services are subject to federal law, not state law. *Id.* ¶¶ 790, 803, 812. Accordingly,
 5 except as permitted by the FCC’s transition rules, the FCC has “exercise[d] its authority to
 6 preempt intrastate access charges.” *In re FCC 11-161*, 753 F.3d at 1121.

7 Plaintiff’s access charges (both interstate and intrastate) are thus subject to the FCC’s
 8 new national framework. And, the FCC’s regime establishes only two methods by which a
 9 CLEC can obtain compensation for access services. First, the CLEC can tariff those charges if
 10 they are no higher than the rates charged by the competing ILEC. Second, the CLEC can enter
 11 into an express agreement with an IXC to charge higher rates. *See supra* at 4; *Great Lakes*
 12 *Comnet*, 30 FCC Rcd. 2586, ¶ 10; *Qwest Commc’ns v. N. Valley Commc’ns*, 26 FCC Rcd. 8332,
 13 ¶¶ 6, 11 (2011) ; *All Am. Tel. Co.*, 28 FCC Rcd. 3477, ¶ 37. Other methods of recovery – such as
 14 Plaintiff’s state law claims – would plainly conflict with the FCC’s “uniform” federal regime for
 15 access charges. Further, the filed rate doctrine preempts state law to the extent it would
 16 authorize other methods of recovery. *See AT&T Co. v. Cent. Office Tel.*, 524 U.S. at 222
 17 (explaining that “the century-old ‘filed rate doctrine’” prohibits a carrier from assessing a charge
 18 that deviates from its published tariff); *AT&T Corp. v. Dataway Inc.*, 577 F. Supp. 2d 1099, 1107
 19 (N.D. Cal. 2008) (“[T]he filed rate doctrine . . . preempt[s] any state law claim challenging
 20 services, billing, or other practices, which could effectively alter the rights and liabilities defined
 21 by the tariffs.”). Because Plaintiff’s UPA, implied contract, quantum meruit, and unjust
 22 enrichment theories for recovering access charges do not fall within either of these established
 23 methods, they are inconsistent with the FCC’s framework and are preempted.

24 Indeed, district courts have repeatedly dismissed state law claims seeking to recover
 25 access charges.⁷ As these courts have explained, where the federal regulatory regime provides a

27 ⁷ *See N. County Commc’ns v. Verizon Select Servs.*, 2012 WL 10907044, at *7 (S.D. Cal., Sept.
 28 28, 2012); *Qwest Commc’ns Corp. v. Adventure Commc’ns Tech., LLC*, 2015 WL 711154, at *80
 (S.D. Iowa Feb. 17, 2015); *Adventure Commc’ns Tech. v. Sprint Commc’ns*, No. 4:08-cv-0005,

1 carrier with the ability to recover access charges via one of two means—either a tariff or an
 2 express contract—state law claims permitting recovery via other means are inconsistent with the
 3 federal regime and the filed rate doctrine.⁸ These decisions fully apply to Plaintiff’s attempt to
 4 recover alleged access charges through UPA, implied contract, quantum meruit, and unjust
 5 enrichment theories.

6 Plaintiff’s state law claims seek to bypass the uniform national regime for access charges
 7 and obtain recovery not under valid tariffs or negotiated contracts, but under various state law
 8 theories. Plaintiff’s quasi-contract claims (Counts VI, VII and VIII) are clear substitutes for the
 9 tariffs or express contracts that the FCC’s regime requires, and thus flatly conflict with federal
 10 law. As to the UPA claim in Count III, the only allegations supporting Plaintiff’s claim are the
 11 same “failure to pay” assertions that underlie Plaintiff’s tariff claims. Under the FCC’s national
 12 regime, a failure to pay is a breach of tariff, not an act of unfair competition. As such, the UPA

13
 14 Slip Op. at 121-26 (S.D. Iowa Mar. 19, 2015) (similar order in parallel case) (“Since [the LECs]
 15 allege[] that [they] ha[ve] filed interstate access services tariffs, the only way [they] can recover
 16 from [IXCs] is via tariff. This precludes [the LECs] from claiming unjust enrichment or
 17 quantum meruit.”); *XChange Telecom Corp. v. Sprint Spectrum L.P.*, 2014 WL 4637042, at *5-
 18 6, (N.D.N.Y. Sept. 16, 2014) (“[b]ecause carriers are obligated under the Communications Act
 19 and FCC interpretations to either submit [tariffs] setting forth the applicable rates for interstate
 20 access charges, or negotiate such rates directly with other carriers, courts have held that they
 21 cannot avoid these requirements by instead asserting equitable claims for unpaid charges.”);
 22 *Connect Insured Tel. Co. v. Qwest Long Distance, Inc.*, 2012 WL 2995063, **11-12 (N.D. Tex.
 23 July 23, 2012) (“[f]ederal law required [the LEC] to file a tariff or negotiate a contract with [the
 24 IXC] in order to charge [the IXC] for telecommunications services,” and LECs “cannot
 circumvent this prohibition by relying on equitable theories of recovery.”); *Peerless Network,
 Inc. v. MCI Commc’ns Servs., Inc.*, No. 14-C-7417, 2015 U.S. Dist. LEXIS 66822, at *29-30
 (N.D. Ill. May 21, 2015); *Sancom, Inc. v. Qwest Commc’ns Corp.*, 643 F. Supp. 2d 1117, 1125-
 27 (D.S.D. 2009), *referring issues to the FCC and staying mot. to recon.*, 2010 WL 960005, at
 *12-13 (Mar. 12, 2010); *Splitrock Props., Inc. v. Qwest Commc’ns Corp.*, 2009 WL 2827901, at
 *2 (D.S.D. Aug. 28, 2009) (“a quasi-contract claim must fail” because the carrier’s remedy
 exclusively arose under its filed tariff); *see also Freedom Ring Commc’ns v. AT&T Corp.*, 229 F.
 Supp. 2d 67, 69-70 (D.N.H. 2002); *Advantel, LLC v. AT&T Corp.*, 118 F. Supp. 2d 680, 688
 (E.D. Va. 2000); *MCI WorldCom v. PaeTec Commc’ns Inc.*, 2005 WL 2145499, at *5 (E.D. Va.
 Aug. 31, 2005), *aff’d*, 204 F. App’x. 271 (4th Cir. 2006).

8 Courts have made similar holdings for other regulated services. *PaeTec Commc’ns Inc. v.
 25 Commpartners, LLC*, 2010 WL 1767193, at *5 (D.D.C. Feb. 18, 2010) (“Injecting common law
 26 claims into intercarrier compensation would undermine the complex scheme Congress and the
 27 FCC have established”); *Iowa Network Servs., Inc. v. Qwest Corp.*, 385 F. Supp. 2d 850, 904-16
 (S.D. Iowa 2005) (“*INS*”), *aff’d*, 466 F.3d 1091, 1098 (8th Cir. 2006). Further, in other contexts,
 28 the FCC itself has “strongly suggested that a claim based on *quantum meruit* would be
 preempted.” *AT&T Corp. v. FCC*, 349 F.3d 692, 701 (D.C. Cir. 2003), *dismissing pet. for
 review of Petitions Of Sprint PCS and AT&T Corp.*, 17 FCC Rcd. 13192 (2002).

claim Plaintiff has pleaded is entirely derivative, and is pre-empted for the same reasons that its state law quasi-contract claims conflict with federal law. *See TPS Utilicom Servs., Inc. v. AT&T Corp.*, 223 F. Supp. 2d 1089, 1109 (C.D. Cal. 2002) (holding Federal Communications Act preempted statutory unfair business practices claim as a “state law intrusion” into federal regulatory scheme for wireless service); *cf. California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 852-53 (9th Cir. 2004) (holding that Federal Energy Regulatory Commission regulations and the filed rate doctrine preempted statutory unfair business practices claims because they “encroach[ed] upon the substantive provisions of the tariff”).

Moreover, because Plaintiff’s state law theories arise only if this Court finds that the charges Plaintiff seeks to recover violate its tariffs and/or the FCC’s rules, these theories would “effectively alter the rights and liabilities defined by the tariff[.]” *Dataway*, 577 F. Supp. 2d at 1107.⁹ Indeed, recovery under these theories would have the effect of establishing a rate for the services Plaintiff allegedly provided, thus violating the well-established principle that ratesetting is a function of agencies, rather than courts. *See Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226 (1908) (“the establishment of a rate” has never been considered a “judicial” act in which courts can properly engage); *Pub. Util. Dist. No. 1 of Grays Harbor Cty. v. IDACORP Inc.*, 379 F.3d 641, 651 (9th Cir. 2004) (“The relief sought by [plaintiff] would require the court to set damages by assuming a hypothetical rate, the ‘fair value,’ in violation of the filed rate doctrine.”); *see also Marcus v. AT&T Corp.*, 138 F.3d 46, 60 (2d Cir. 1998); *N. County Commc’ns*, 2012 WL 10907044, at *7 (a court could not award relief on unjust enrichment or quantum meruit claims for services provided outside of a lawful tariff, because “it is well established that the FCC is specially positioned to determine the reasonableness of rates”).

⁹ For similar reasons, even if the equitable state law claims of implied contract, quantum meruit, and unjust enrichment were not pre-empted, they would be barred as a matter of state law. Under well-established principles of equity, an entity that violates the law cannot resort to equity to obtain recovery. *See Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 245 (1933) (“It is a principle in chancery, that he who asks relief must have acted in good faith. The equitable powers of this court can never be exerted in behalf of [one] who has acted fraudulently, or who by deceit or any unfair means has gained an advantage.” (quoting *Bein v. Heath*, 47 U.S. 228, 247 (1848))). Here, OI’s state law claims arise only if they have violated the terms of its tariffs.

As such, Counts III, VI, VII, and VIII, which seek recovery for access services under state law, are preempted and should be dismissed. Without question, Plaintiff's state law claims for interstate access services are plainly preempted, because the FCC has exclusive authority over the rates, terms and conditions for interstate services,¹⁰ and states "do not have jurisdiction over interstate communications."¹¹ As the FCC and Department of Justice explained in a case in which a state attempted to regulate interstate access services, the Act "generally grants the FCC exclusive authority to regulate the rates, terms, and conditions under which interstate communications services are sold. [A state agency] therefore lacks authority to regulate interstate special access services."¹²

The same is also true of Plaintiff's state law claims for *intrastate* access services, because as of 2011, those services are subject to a "uniform, national framework," and, during the transition period for that federal framework, the role of the states in regulating tariffed intrastate access services is limited to ensuring that those tariffed rates comply with federal law and federal pricing standards. *Connect Am. Order*, ¶¶ 790, 803; *In re FCC 11-161*, 753 F.3d at 1119-25. As such, allowing carriers to recover on state law grounds for intrastate access services would

¹⁰ *Crockett Tel. Co. v. FCC*, 963 F.2d 1564, 1566 (D.C. Cir. 1992) (the FCC has "exclusive jurisdiction to regulate interstate common carrier services including the setting of rates"); *accord State Corp. Comm'n of Kan. v. FCC*, 787 F.2d 1421, 1426 (10th Cir. 1986) (it is the FCC's "basic function under the Act" to govern "all interstate and foreign communication by radio or wire") (quoting 47 U.S.C. § 152(a)).

¹¹ *AT&T and the Associated Bell Sys. Cos.*, 56 F.C.C.2d 14, ¶ 21 (1975); *Operator Servs. Providers of Am. Pet. for Expedited Declaratory Ruling*, 6 FCC Rcd. 4475, ¶ 10 (1991) (Congress has "deprived the states of authority to regulate the rates or other terms and conditions under which interstate communications service may be offered in a state."); cf. *Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318, (1981) ("There can be no divided authority over interstate commerce, and . . . the acts of Congress on that subject are supreme and exclusive.") (quotation omitted); *accord id.* ("[A]s early as 1907, the Court struck down a State's common-law cause of action to challenge as unreasonable a rail common carrier's rates because rate regulation was within the exclusive jurisdiction of the Commission, and a state-court action 'would be absolutely inconsistent with the provisions of the act.'" (quotation omitted)).

¹² Amicus Brief of FCC/DOJ, at 5-6 (Exhibit A), cited in *MCIMetro Access Transmission Servs. of Va., Inc. v. Christie*, 310 F. App'x 601, 603 (4th Cir. 2009). After receiving the FCC/DOJ brief, the state agency withdrew its order regulating interstate access, and the 4th Circuit dismissed an appeal on mootness grounds because the state agency "explicitly recognized the FCC's exclusive authority to regulate the interstate communications services at issue." 310 F. App'x. at 605.

1 conflict with this federal regime. *See Connect Am. Order*, ¶¶ 792-96 (a “uniform national
 2 transition” period is necessary, and allowing “disparate state actions” could “impede [the FCC’s]
 3 comprehensive reform efforts”).

4 In short, allowing Plaintiff to proceed with claims for recovery of access service under
 5 state law would be inconsistent with the careful regime the FCC has established. That regime
 6 ensures that a CLEC’s rates for access services either will not exceed Commission-prescribed
 7 benchmarks, or will be set by express negotiations between a CLEC or an IXC. Indeed, if
 8 CLECs could also obtain compensation on state law grounds, then the FCC would have no
 9 assurances that the rates for CLEC access services will in fact comport with the statutory
 10 standard and the FCC’s implementing regulations. *Cf. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S.
 11 366, 378 n.6 (1999) (“a federal program administered by 50 independent state agencies is
 12 surpassing strange”). Accordingly, to preserve the integrity of the intercarrier compensation
 13 regime, this Court should follow the lead of other district courts and hold that Plaintiff cannot
 14 recover alleged access service charges through state law theories.

15 **B. Count IX Must Also Be Dismissed.**

16 Finally, this Court should also dismiss Plaintiff’s claim for exemplary damages. Under
 17 California law, such damages are allowable only “[i]n an action for the breach of an obligation
 18 not arising from contract.” Cal. Civ. Code § 3294. The only claims which may proceed here are
 19 breach of tariff claims. Since “[t]he [t]ariff is the contract governing the rights and obligations”
 20 of Plaintiff and AT&T, *see MCI Telecom. Corp. v. Best Tel. Co., Inc.*, 898 F. Supp. 868, 870
 21 (S.D. Fla. 1994), Plaintiff has no valid claim that permits exemplary damages. Accordingly,
 22 Count IX of the Complaint should be dismissed.

23 **CONCLUSION**

24 For the foregoing reasons, this Court should grant AT&T’s motion to dismiss Counts I,
 25 II, III, VI, VII, VIII, and IX of the Complaint.

1
2 Dated: April 26, 2016

SIDLEY AUSTIN LLP

3 By: /s/ Marie L. Fiala

4 Marie L. Fiala (SBN 79676)
mfiala@sidley.com
5 SIDLEY AUSTIN, LLP
555 California Street, Suite 2000
6 San Francisco, CA 94104
Telephone: (415) 772-1200
7 Facsimile: (415) 772-7400

8 Michael J. Hunseder (*pro hac vice pending*)
mhunseder@sidley.com
9 Mark P. Guerrera (*pro hac vice pending*)
mguerrera@sidley.com
10 Noah T. Katzen (*pro hac vice pending*)
nkatzen@sidley.com
11 SIDLEY AUSTIN LLP
1501 K Street, N.W.
12 Washington, D.C. 20005
Telephone: (202) 736-8000
13 Facsimile: (220) 736-8711

14
15 *Attorneys for Defendant AT&T Corp.*
16
17
18
19
20
21
22
23
24
25
26
27
28