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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

NORTH COUNTY  
COMMUNICATIONS  
CORPORATION, a California  
corporation ,

Plaintiff,

vs.

SPRINT COMMUNICATIONS  
COMPANY, L.P., a Delaware limited  
partnership,

Defendant.

**AND RELATED  
COUNTERCLAIMS.**

CASE NO. 09-cv-2685-CAB (JLB)

ORDER GRANTING SPRINT'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT, DENYING NCC'S  
MOTION FOR LEAVE TO AMEND,  
AND DENYING WITHOUT  
PREJUDICE NCC'S MOTION TO  
EXCLUDE EXPERT TESTIMONY

[Doc. Nos. 239, 244, 241]

On December 5, 2014, the court heard oral argument on defendant's motion for partial summary judgment, plaintiff's motion to exclude expert testimony, and plaintiff's motion for leave to amend. [Doc. Nos. 239, 241, 244.] For the reasons set forth below, the court grants defendant's motion for partial summary judgment, denies plaintiff's motion for leave to amend, and denies plaintiff's motion to exclude expert testimony, without prejudice to renewal.

**BACKGROUND**

This is a dispute between two telecommunications carriers. Plaintiff North County Communications Corporation ("NCC"), a competitive local exchange carrier,

1 sues Sprint Communications Company, L.P. (“Sprint”), an interexchange carrier, for  
2 payments allegedly owed under the parties’ 2002 Service Agreement, under NCC’s  
3 tariffs, and under equitable principles.

4 Sprint filed its operative counterclaims on April 26, 2010, and NCC filed its  
5 operative second amended complaint on July 22, 2011. [Doc. Nos. 19, 56.] Sprint then  
6 moved to dismiss. [Doc. No. 57.] NCC, in turn, moved for partial summary judgment,  
7 seeking a ruling that 1) terminating calls to chat lines is not unlawful and 2) switched  
8 access charges may be imposed for termination of chat-line traffic. [Doc. No. 58.] In  
9 addition, NCC moved for a preliminary injunction to “enjoin[ ] Sprint from providing  
10 wholesale access to NCC’s network until Sprint agrees to pay for the use of NCC’s  
11 network by compensating NCC for terminating such calls.” [Doc. No. 60 at 3.]

12 On September 27, 2012, the court denied NCC’s motion for partial summary  
13 judgment, denied NCC’s motion for a preliminary injunction, and granted in part and  
14 denied in part Sprint’s motion to dismiss. [Doc. No. 123.] The court dismissed with  
15 prejudice NCC’s claims based on its federal Tariff No. 2 and for tortious interference  
16 with prospective business advantage, and dismissed without prejudice NCC’s claim that  
17 Sprint owed it amounts due to inadvertent underbilling. [*Id.* at 6.]

18 On October 5, 2012, the parties filed cross motions for partial summary  
19 judgment. [Doc. No. 126.] Sprint sought summary judgment on NCC’s claims arising  
20 out of its August 2010 California tariff and its March 2011 Arizona tariff, on NCC’s  
21 equitable claims (Counts II, III, and IV), and on NCC’s claim for unfair competition  
22 (Count V), to the extent NCC sought monetary damages. NCC, in turn, moved for  
23 summary judgment in its favor on Sprint’s counterclaims for violation of the  
24 Communications Act (Counts I, II, and III), for breach of NCC’s state tariff obligations  
25 (Count IV), for unjust enrichment (Count V), and for declaratory judgment (Count VII).  
26 [Doc. No. 128.] While these motions were pending, NCC moved for leave to amend  
27 its allegation that it underbilled Sprint. [Doc. No. 149.]

28 On January 28, 2013, the court granted in part and denied in part Sprint’s motion

1 for partial summary judgment. [Doc. No. 165.] Consistent with orders in the related  
2 Verizon case (No. 08-cv-1518), the court dismissed plaintiff’s equitable claims without  
3 prejudice, because those claims require determination of a “reasonable rate” that NCC  
4 could charge Sprint without a valid contract or tariff—a determination within the  
5 primary jurisdiction of the Federal Communications Commission. [*Id.* at 8.] In  
6 addition, the court dismissed with prejudice NCC’s claim for breach of its 2010  
7 California tariff and its 2011 Arizona tariff, because those tariffs were unenforceable.  
8 [*Id.* at 9.] Finally, the court dismissed NCC’s unfair competition claim, to the extent  
9 NCC sought monetary damages. [*Id.* at 9.]

10 In the same order, the court granted NCC’s motion for partial summary judgment  
11 and dismissed without prejudice Sprint’s counterclaims Counts I, II, III, V, and VII,  
12 again because those counterclaims require the FCC’s determination as to a reasonable  
13 rate. [*Id.* at 8.] Finally, the court denied without prejudice NCC’s motion for leave to  
14 amend its complaint to add allegations as to underbilling. [*Id.* at 10.]

15 On May 6, 2013, the court stayed the case and referred several questions to the  
16 FCC. [Doc. No. 195.] The parties were required to file quarterly status reports. Then,  
17 nearly a year after the court stayed the case, NCC filed a motion to bifurcate trial and  
18 partially lift the stay. [Doc. No. 220.] On June 18, 2014, the court granted NCC’s  
19 motion and lifted the stay as to NCC’s contract-based claims and Sprint’s related  
20 counterclaims. [Doc. No. 230.]

21 On July 17, 2014, United States Magistrate Judge Burkhardt entered an amended  
22 scheduling order, which set a discovery deadline of September 2, 2014 and dispositive  
23 motions deadline of October 1, 2014. [Doc. No. 235.]

24 On October 1, 2014, Sprint filed a motion for summary judgment on NCC’s  
25 seventh affirmative defense, and NCC filed a motion to exclude testimony of Sprint’s  
26 expert witness. [Doc. Nos. 239, 241.] About three weeks later, NCC filed a motion for  
27 leave to amend its second amended complaint. [Doc. No. 244.]

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## DISCUSSION

1  
2 A. Sprint's Motion for Partial Summary judgment [Doc. No. 239]

3 1. Legal Standard

4 "The court shall grant summary judgment if the movant shows that there is no  
5 genuine dispute as to any material fact and the movant is entitled to judgment as a  
6 matter of law." Fed. R. Civ. P. 56(a). A fact is material if, under governing substantive  
7 law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.  
8 242, 248 (1986). A dispute is genuine "if the evidence is such that a reasonable jury  
9 could return a verdict for the nonmoving party." *Id.*

10 The moving party bears the initial burden of establishing the absence of a genuine  
11 issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "Where the  
12 moving party meets that burden, the burden then shifts to the non-moving party to  
13 designate specific facts demonstrating the existence of genuine issues for trial." *In re*  
14 *Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (citing *Celotex Corp.*, 477  
15 U.S. at 324). Inferences drawn from the underlying facts are viewed in the light most  
16 favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio*  
17 *Corp.*, 475 U.S. 574, 587 (1986).

18 2. Analysis

19 Sprint moves for summary judgment on NCC's seventh affirmative defense, in  
20 which NCC states: "Sprint's claims are barred, in whole or in part, under principles of  
21 recoupment and set off." [Doc. No. 34 at 7.] In its opposition, NCC confirms that this  
22 affirmative defense is "based on NCC's underbilling Sprint for intrastate traffic during  
23 the term of the contract." [Doc. No. 247 at 2.] NCC contends that it billed Sprint at the  
24 incorrect rate of \$0.015 per minute for intrastate services between February 2006 and  
25 January 2008. [*Id.* at 4.] NCC argues that the correct rate was \$0.0785 per minute.  
26 [*Id.*]

27 Sprint contends that the "Most Favored Nation" provision in the 2002 Service  
28 Agreement precludes NCC's defense of recoupment and setoff. The Most Favored

1 Nation provision states:

2  
3 6.C Notwithstanding anything to the contrary in this Agreement, if  
4 during the term of this Agreement, North County offers any service that  
5 is similar to the Switched Access Service offered under this Agreement to  
6 any customer other than SPRINT Area at a price (taking into account any  
7 volume or other discounts, credits, or other reduction in compensation)  
8 that is less than the applicable price for the Switched Access Service  
9 offered by the terms of this Agreement, then North County will offer such  
10 service to SPRINT in the same Serving Area at terms, conditions and  
11 prices no less favorable than those offered to such other customer.

12 [Doc. No. 56-1 at 4.] In essence, under the Most Favored Nation provision, NCC could  
13 not have charged Sprint at a rate higher than what it charged any other customer.

14 NCC acknowledges that it billed AT&T at a rate of \$0.015 per minute for  
15 intrastate services during the time period addressed in Sprint's counterclaim. [Doc. No.  
16 247 at 4.] But NCC maintains that the rate it billed AT&T, like the rate it billed Sprint,  
17 was in error. NCC contends it reached a settlement agreement with AT&T in August  
18 2010 that resulted in AT&T paying more than \$0.015 per minute. Thus, NCC argues,  
19 a genuine dispute of fact exists as to what rate NCC offered AT&T.

20 As Sprint notes, however, the settlement agreement between AT&T and NCC  
21 does not reference underbilling or purport to retroactively alter the rate at which NCC  
22 billed AT&T. [Doc. No. 253.] Further, the Most Favored Nation provision applies to  
23 offers made to other customers "during the term of [the 2002 Service] Agreement."  
24 [Doc. No. 56-1 at 4, ¶ 6.C.] NCC's settlement agreement with AT&T, entered into in  
25 August 2010, was not made "during the term of [the 2002 Service] Agreement," which  
26 was terminated on May 7, 2010.

27 In light of the 2002 Service Agreement's Most Favored Nation clause and NCC's  
28 acknowledgment that it billed AT&T at the same rate it billed Sprint for intrastate  
services between February 2006 and January 2008, the court finds as a matter of law  
that NCC could not have billed Sprint more than \$0.015 per minute. Sprint's motion  
for partial summary judgment is therefore **GRANTED**.

1 B. NCC's Motion for Leave to Amend [Doc. No. 244]

2 1. Legal Standard

3 The Federal Rules of Civil Procedure provide that "[t]he court should freely give  
4 leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). "The court  
5 considers five factors in assessing the propriety of leave to amend—bad faith, undue  
6 delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff  
7 has previously amended the complaint." *United States v. Corinthian Colleges*, 655 F.3d  
8 984, 995 (9th Cir. 2011).

9 2. Analysis

10 NCC moves for leave to amend its allegation that it underbilled Sprint. In its  
11 operative second amended complaint, NCC alleges:

12 34. In addition, NCC has discovered that Defendant was under-billed  
13 for certain services under the Service Agreement and over-billed for  
14 certain services under the Service Agreement, and NCC seeks to  
15 recover the difference, which is an under-billed amount in excess of  
\$2,000,000 (above and beyond the unpaid invoice amounts that  
exceed \$2,000,000.

16 [Doc. No. 56 ¶ 34.] Sprint moved to dismiss NCC's contract claim, to the extent NCC  
17 sought to recover for the alleged underbilling. [Doc. No. 57.] On September 27, 2012,  
18 the court granted Sprint's motion and dismissed NCC's claim for underbilling, without  
19 prejudice, on the basis that NCC did not allege that it ever invoiced NCC for the  
20 underbilled amounts or that Sprint refused to pay them. [Doc. No. 123 at 6.]

21 On December 28, 2012, NCC filed a motion for leave to amend its allegation as  
22 to underbilling. [Doc. No. 149-1.] The court denied NCC's motion, however, again  
23 without prejudice, in light of the court's decision to stay the action and refer issues to  
24 the FCC. [Doc. No. 165 at 10.]

25 On June 18, 2014, the court granted NCC's motion to bifurcate trial and lift the  
26 stay as to NCC's contract-based claims and Sprint's related counterclaims. [Doc. No.  
27 230.] The parties subsequently attended a case management conference before United  
28 States Magistrate Judge Burkhardt. [Doc. No. 234.] On July 17, 2014, Judge Burkhardt

1 entered an amended scheduling order, which set a discovery deadline of September 2,  
2 2014 and a dispositive motions deadline of October 1, 2014. [Doc. No. 235 at 2.]

3 On October 21, 2014, over four months after the stay was lifted and almost three  
4 weeks after the parties had filed their dispositive motions, NCC filed its motion for  
5 leave to amend. NCC seeks to replace its prior paragraph 34 with the following new  
6 paragraph:

7  
8 34. In addition, NCC discovered on November 12, 2009, that  
9 Defendant was under-billed and overbilled for certain services  
10 under the Service Agreement, at which time NCC notified Sprint of  
11 the under-billing. NCC seeks to recover the difference (an under-  
12 billed amount in excess of \$1,000,000 for invoices dated November  
13 2005 forward, above and beyond the unpaid invoice amounts that  
14 exceed \$2,000,000), which amount was invoiced to Sprint by NCC  
15 in January 2011, after NCC unsuccessfully attempted to resolve  
16 informally the under-billed and overbilling issues. Sprint has  
17 refused to pay the invoiced amounts for that under-billing.

18 [Doc. No. 244-1 at 3.]

19 NCC's proposed amendment is futile for the same reason NCC's seventh  
20 affirmative defense fails—because the 2002 Service Agreement's Most Favored Nation  
21 provision precluded NCC from charging Sprint more than \$0.015 per minute (the rate  
22 that NCC charged AT&T).

23 In addition, NCC has unduly delayed in bringing its motion for leave to amend.  
24 The stay as to NCC's contract claim was lifted on June 18, 2014. And Judge Burkhardt  
25 entered the amended scheduling order on July 17, 2014, setting a discovery deadline of  
26 September 2, 2014, and a dispositive motions deadline of October 1, 2014. [Doc. No.  
27 235 ¶ 2, 3.] Yet plaintiff waited until October 21, 2014 (over four months after the stay  
28 was lifted, a month and a half after the close of discovery, and nearly three weeks after  
the dispositive motions deadline) to move for leave to amend. [Doc. No. 244.]

Accordingly, plaintiff's motion for leave to amend [Doc. No. 244] is DENIED  
due to futility and undue delay.

1 C. NCC's Motion to Exclude Testimony of Sprint's Expert [Doc. No. 241]

2 At this stage of this bifurcated case, the parties are only trying their contract-  
3 related claims. NCC moves to exclude testimony of Sprint's expert witness, Don J.  
4 Wood. [Doc. No. 241.] In particular, NCC objects to Mr. Wood testifying as to the  
5 meaning of terms contained in the 2002 Service Agreement and as to the agreement's  
6 validity.

7 The court is inclined to exclude Mr. Wood's testimony, since Mr. Wood was not  
8 a party to the 2002 Service Agreement, and "contract interpretation is a legal question  
9 for the court." *Legendary Investors Grp. No. 1, LLC v. Niemann*, 224 Cal. App. 4th  
10 1407, 1413, 169 Cal. Rptr. 3d 787, 793 (2014). However, the court reserves final ruling  
11 on this issue until the context of trial, and therefore **DENIES** NCC's motion without  
12 prejudice to renewal at trial.

#### 13 CONCLUSION

14 The court **GRANTS** Sprint's motion for partial summary judgment [Doc. No.  
15 239], **DENIES** NCC's motion for leave to amend [Doc. No. 244], and **DENIES** NCC's  
16 motion to exclude [Doc. No. 241], without prejudice to renewal at trial.

17 In addition, the court sets the following amended pretrial schedule:

- 18 1. Memoranda of Contentions of Fact and Law in compliance with Local  
19 Rule 16.1(f)(2) shall be filed on or before **January 23, 2015**.
- 20 2. All parties or their counsel shall fully comply with the Pretrial Disclosure  
21 requirements of Fed. R. Civ. P. 26(a)(3) on or before **January 23, 2015**.
- 22 3. Pursuant to Local Civil Rule 16.1(f)(4), on or before **January 30, 2015**,  
23 the parties shall meet and confer to comply with the provisions of that  
24 section and prepare a proposed pretrial order in accordance with Local  
25 Rule 16.1(f)(6)(c).
- 26 4. Counsel for plaintiff is responsible for preparing the pretrial order and  
27 arranging the meetings of counsel pursuant to Civil Local Rule  
28 16.1(f)(6)(a). On or before **February 6, 2015**, plaintiff's counsel must

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provide opposing counsel with the proposed pretrial order for review and approval. Opposing counsel must communicate promptly with plaintiff's counsel concerning any objections to form or content of the pretrial order, and both parties should attempt promptly to resolve their differences, if any, concerning the order.

- 5. The proposed final pretrial conference order, including objections counsel have to any other party's Fed. R. Civ. P. 26(a)(3) Pretrial Disclosures, shall be prepared, served, and lodged with Judge Bencivengo's chambers on or before **February 13, 2015**, in compliance with Local Rule 16.1(f)(6)(c).
- 6. The final pretrial conference is scheduled for **February 20, 2015**, at **2:00 p.m.**, in Courtroom 4C, during which time the court will address the trial schedule as well as the submission of motions in limine.

**IT IS SO ORDERED.**

DATED: December 23, 2014

  
**CATHY ANN BENCIVENGO**  
United States District Judge