UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHRISTOPHER W. HESSE,

Plaintiff,

v.

SPRINT SPECTRUM, L.P.,

Defendant.

NATHANIEL OLSON,

Plaintiff,

v.

SPRINT SPECTRUM, L.P., and SPRINT NEXTEL CORP.,

Defendants.

CASE NO. C06-0592-JCC

ORDER ON CLASS CERTIFICATION AND RELATED MOTIONS

I. INTRODUCTION

This matter comes before the Court on the following motions:

1. Plaintiffs' motion to certify class under Rule 23(b)(3) (Dkt. No. 66);

2. Plaintiffs' motion to certify class under Rules 23(b)(1) and (b)(2) (Dkt. No. 88);

3. Plaintiffs' motion for sanctions (Dkt. No 86);

4. Defendant's motion to strike Plaintiffs' motion to certify class under Rules 23(b)(1) and (b)(2) (Dkt. No. 94); and

5. Plaintiffs' motion for relief from deadline (Dkt. No. 101).

After considering the parties' relevant submissions in this matter and conducting oral argument on May 14, 2007, the Court finds and rules as follows.

II. BACKGROUND AND FACTS

Plaintiffs seek to certify a class action against Sprint for charging a Washington State B&O Tax Surcharge directly to consumers. The above-captioned matter consists of two separate class actions that were consolidated by this Court. The Court already ruled that federal law preempts application of Washington Revised Code Section 82.04.500 to this action, but held that the parties could maintain claims based on generally applicable consumer protection and contract laws. (Amended Order (Dkt. No. 58).)

The amount of the B&O Tax Surcharge assessed against any individual was modest. For example, Sprint assessed Plaintiff Olson a B&O Tax Surcharge of $0.31 in February of 2007. (Ex. 3 to Breskin Decl. in Supp. of Pls.' Mot. to Certify Class at 3 (Dkt. No 67).) However, due to the approximately 515,000 customers affected (Straub Dep. 37:15 (Ex. 1 to Breskin Decl. in Supp. of Pls.' Mot to Certify Class)), Sprint has collected several million dollars in B&O Tax Surcharge from its customers since 2002 (Notice of Removal ¶ 25 (Dkt. No. 1)).

Plaintiffs' remaining claims are as follows: (1) breach of contract for charging a B&O Tax Surcharge in addition to the agreed calling plan rate; (2) violation of the Consumer Protection Act for failing to disclose the B&O Tax Surcharge; and (3) unjust enrichment. (Pl. Hesse's Second Amended Compl. (Dkt. No. 61); Pl. Olson's Compl. (Dkt. No. 1 in C0-1127-JCC).) All of these claims challenge the manner in which Sprint charged the B&O Tax Surcharge to its customers.

III. EVIDENTIARY ISSUES

In their submissions on the many class-certification-related motions before the Court, the parties

have submitted various motions to strike each other's documentary evidence. The Court has duly considered the motions and notes that it will consider evidence only for admissible purposes in ruling on the instant motion.

Plaintiffs separately moved to sanction Sprint by binding the corporation to the statements of Jonathan Straub, Sprint's 30(b)(6) representative. (Pls.' Mot for Sanctions.) The Court notes that Plaintiffs do not allege that Sprint materially changed its position with respect to any affirmative statements Mr. Straub made on behalf of Sprint, but rather argue that Sprint should not be able to fill in any gaps where the 30(b)(6) representative claimed to lack knowledge. (*Id.* at 2.) Having read his deposition, this Court finds that Mr. Straub was reasonably prepared, especially in light of the broad scope of issues on which Plaintiffs sought the 30(b)(6) testimony. The Court declines to strike any declarations on the grounds that such declarations allegedly contradict or change Sprint's 30(b)(6) deposition or otherwise sanction Sprint for this conduct.

IV. PLAINTIFFS' LATE-FILED MOTION FOR CLASS CERTIFICATION

Before this Court consolidated the two separate class actions, Plaintiff *Olson* had already moved for class certification under Rules 23(b)(1), (b)(2), and (b)(3). In the interests of efficiency, this Court struck that initial motion as untimely, and established a briefing schedule to facilitate any motions for class certification in the recently consolidated action, whereby any motion for class certification would be noted for consideration on April 27, 2007 in preparation for the May 14, 2007 class certification hearing. (Dkt. No. 65.)

Plaintiffs jointly submitted their motion for class certification pursuant to this schedule on April 5, 2007, seeking only to certify a class based on Rule 23(b)(3). (Dkt. No. 66.) Sprint filed its Opposition on April 20, 2007. (Dkt. No. 70.) On April 26, 2007, the Washington Supreme Court published its decision in *Nelson v. Appleway Chevrolet Inc.*, No. 77985-6, 2007 WL 1218219 (Wash. Apr. 26, 2007). That case affirmed the certification of a B&O-Tax-related class action under the Washington analog of Federal Rule 23(b)(2). That very day, Plaintiffs submitted a second, supplemental motion for class certification

under Rule 23(b)(1) and (b)(2). (Dkt. No. 88.) Sprint moved to strike this motion as untimely. (Dkt. No. 94.) Plaintiffs subsequently moved for relief from the Court's previous case managment schedule. (Dkt. No. 101.)

Under Federal Rule of Civil Procedure 16(b), once the Court has set a trial schedule, including limits on the time to file motions, that schedule shall only be modified "upon a showing of good cause and by leave of the district judge." Fed. R. Civ. P. 16(b). Plaintiffs contend that their delay in moving for class certification was justified by the recent *Nelson* decision. The Court disagrees.

This Court does not see how *Nelson* provides any new legal authority for bringing this class action under Rule 23(b)(1) or (b)(2). Initially, *Nelson* only deals with a 23(b)(2) class certification. It says nothing material about 23(b)(1), under which Plaintiffs also belatedly seek certification. Second, *Nelson* affirmed an appellate court decision regarding class certification, meaning that Plaintiffs were aware that 23(b)(2) certification was potentially available in B&O-Tax-related cases due to a published lower court *Nelson* case. *See Nelson v. Appleway Chevrolet, Inc.*, 121 P.3d 95, 98 (Wash. Ct. App. 2005). Indeed, Plaintiffs even cited the lower court opinion in previous submissions to this Court (*see* Plaintiff Olson's Opp'n to Defendants' Motion to Dismiss Regarding Federal Preemption 15 (Dkt. No. 38 in C06-1127-JCC)) and their designated 30(b)(6) representative referenced it in his deposition (Straub Dep. 42:1 (Skok Decl. in Opp'n to Pls.' Mot. for Sanctions Ex. B (Dkt. No. 107)). Third, *Nelson* does not significantly depart from previous Washington case law on any material issue related to 23(b)(2) certification. Fourth, Plaintiff *Olson* moved for 23(b)(1) and (b)(2) certification back in August, and thus Plaintiffs were decidedly aware that these two additional avenues of certification were potentially available. Given these circumstances, Plaintiffs' delay in seeking certification under 23(b)(1) or (b)(2) is unjustified.

Accordingly, the Court finds that Plaintiffs' untimely motion for class certification does not meet the requisite "good cause" showing of Rule 16(b). The Court thus denies Plaintiffs' motion for relief from

a deadline and strikes Plaintiffs' motion to certify class under Rule 23(b)(1) and 23(b)(2) as untimely.[1] Because the relief sought by Sprint in its Motion to Strike has already been granted, the Court need not reach the issue of whether its separate motion to strike was procedurally proper.

V. CLASS CERTIFICATION UNDER RULE 23(b)(3)

Plaintiffs have proposed the following class definition: "All current and former Washington state wireless service customers of Sprint, who have been charged and paid to Sprint a "Washington State B&O Tax Surcharge." (Pl.'s Mot. 7 (Dkt. No. 66).)

Plaintiffs bear the burden of demonstrating that class certification is proper. Plaintiffs must meet

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[1] The Court also notes that Plaintiffs would have been exceedingly unlikely to prevail on these avenues of certification even if the Court had reached the merits.

Plaintiffs all but abandoned seeking Rule 23(b)(1) class certification at oral argument, and with good reason. Rule 23(b)(1)(A) looks at the party opposing class certification and seeks to prevent it from being faced with multiple inconsistent orders in separate actions. "In order to fall within Rule 23(b)(1)(A), there obviously must be a risk that separate actions will in fact be brought if a class action is not permitted." 7AA Charles Alan Wright, et al., Federal Practice and Procedure § 1773 at 11-12 (3d ed. 2005); *see also Zinser v. Accufix Res. Inst., Inc.*, 253 F.3d 1180, 1193 (9th Cir. 2001) (citing Wright, *supra*, § 1773), *amended by Zinser v. Accufix Res. Inst., Inc.*, 273 F.3d 1266 (9th Cir. 2001). Here, Plaintiffs have demonstrated nowhere near such a risk where it is unlikely that a single lawsuit will proceed given the minimal payout for any individual plaintiff should class certification be denied. Further, the risk of conflicting judgments is minimal where, as here, Plaintiffs primarily seek money damages. *McDonnell-Douglas Corp. v. U.S. Dist. Court for Cent. Dist. of Cal.*, 523 F.2d 1083, 1086 (9th Cir. 1975). Moreover, under Rule 23(b)(1)(B) certification is appropriate where individual actions by the plaintiff class would "as a practical matter" be dispositive of other class members' interests. Fed. R. Civ. P. 23(b)(1)(B). This section is largely used for the "depleted fund" cases, which is clearly not the case here. Though 23(b)(1)(B) classes are not limited to depleted funds, the practical impediment must be more than the mere *stare decisis* impact of the Court's decision. *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 467 (9th Cir. 1973). Yet, that very basis is the only rationale provided by Plaintiffs for why they meet the requirements of Rule 23(b)(1)(B). Accordingly, Plaintiffs' Rule 23(b)(1)(B) class certification argument would almost certainly be unsuccessful even if it had been timely filed.

Rule 23(b)(2) class certification would be similarly inapposite here. The Rule has essentially two requirements: (1) that there is a pattern or practice by Defendant that generally affects the class, and (2) that final injunctive relief is "appropriate." The second part of this analysis would likely preclude certification on Rule 23(b)(2) grounds for the very same reasons that the "superiority element" of Rule 23(b)(3) is met. *See* discussion *infra.* Further, the 1966 committee notes to Rule 23(b)(2) state that "the subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Fed. R. Civ. P. 23 advisory committee's notes (1966). Here, Plaintiffs' relief is almost wholly for money damages. Though they also seek declaratory and injunctive relief (that Sprint stop charging the B&O Tax Surcharge and that the Court declare that Plaintiffs interpretation of relevant law is correct) such relief is minor in comparison to the financial compensation sought under the contract and CPA claims.

Though the Washington Supreme Court recently certified a 23(b)(2) class action with respect to a B&O-Tax-related case in *Nelson*, that case can be distinguished because the complaint in that suit only sought equitable remedies: declaratory relief under the Uniform Declaratory Judgment Act, an injunction against future levying of the tax on consumers, and the equitable remedy of restitution for unjust enrichment. As the lower appellate court specifically noted prior to the Washington Supreme Court's affirmance, "[s]ignificantly, the complaint does not allege claims based on theories of tort or contract, or based on a violation of the Washington Consumer Protection Act." *Nelson v. Appleway Chevrolet Inc.*, 121 P.3d 95, 98 (Wash. Ct. App. 2005). Even given these limitations fo *Nelson*, this Court would almost assuredly not certify a Rule 23(b)(2) class even if Plaintiffs had timely filed their motion.

all of the requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation, and at least one of the Rule 23(b) requirements. Because the requirements of Rule 23(b)(3) are similar to, but more exacting than, some of the 23(a) requirements, the Court will address the 23(b)(3) issues first.

A. The 23(b)(3) Requirements

Rule 23(b)(3) requires that the Court find "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). It thus asks (1) whether common issues "predominate" over individual ones, and (2) whether class treatment is "superior" to other methods for handling this dispute.

1. Predominance

Predominance requires a finding that the common issues of fact or law outweigh the material differences of fact or law between the class members. This test is easily met here. The class members signed the same form contracts with the same company, they were all charged a B&O Tax Surcharge with virtually identical disclosures (or lack thereof), and Sprint has stated that it calculated the B&O Tax Surcharge under a consistent formula.

Sprint nevertheless argues that there are material differences between the class members because their responses to Sprint's defenses in this lawsuit will vary. These defenses are essentially (1) that Sprint disclosed the B&O Tax Surcharge to consumers and (2) that consumers' acquiescence in knowingly paying this B&O Tax Surcharge prevents their relief due to a number of somewhat similar doctrines (waiver, ratification, the voluntary payment doctrine, and lack of reliance for the failure to disclose claim).

With respect to the first set of defenses—that Sprint disclosed the B&O Tax Surcharge to consumers—Sprint argues that the point-of-sale disclosures by Sprint store personnel will vary amongst class members. This argument is unpersuasive. First, Sprint's disclosure policy of letting in-store

customers ask whatever questions they may have is unlikely to have led to significantly different disclosures amongst class members, especially because Sprint has not identified a single person who has ever asked or answered a question about the B&O Tax Surcharge. Second, to the extent that Sprint's disclosures took the form of simulated billing statements other than those specifically requested by customers in the ask-and-answer policy described above, any simulated billing statements would invariably have been sufficiently common amongst class members. Third, even if there were slightly different disclosures for a small subset of very sophisticated class members, the common issues of fact and law surrounding disclosures of the bill and contract between class members far outweigh any material differences.

With regard to the second set of defenses—that consumers paid their bills with knowledge of the B&O Tax Surcharge and that the customers' acquiescence precludes their legal claims—the Court finds that the class members all will have virtually identical arguments regarding their knowledge and acquiescence to the B&O Tax Surcharge. It is undisputed that the line-item "B&O Tax Surcharge" appears on customers' standard bills and contracts. Thus, the vast majority of class members presumably could have waived, ratified, or voluntarily paid and otherwise hindered their legal rights in the exact same manner. The Court need not reach the merits of these defenses now. It need only note that responses to these defenses will be largely identical among class members. Any minor differences between them, such as when customers may have come to subjectively know about the tax or when they entered into new form contracts, are vastly outweighed by the similarities and could easily be managed in the context of a class action.

Thus, Plaintiffs have demonstrated that the common issues of fact or law between the class members predominate over individual differences.

2. Superiority

The superiority requirement in Rule 23(b)(3) requires examination of whether the class action mechanism is the best means to resolve the controversy, as opposed to using other methods to address

multiple related claims such as joinder or intervention.

Rule 23(b)(3) lists four illustrative factors to consider regarding this question, only two of which are relevant here. The first consideration is: "the interest of members of the class in individually controlling the prosecution or defense of separate actions." Fed. R. Civ. P. 23(b)(3)(A). The instant case is a classic example of plaintiffs with little, if any, incentive to prosecute individual actions because the litigation costs would dwarf the monetary value of any relief. *See, e.g., Carnegie v. Household Intern., Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.") Thus, Plaintiffs have little interest in maintaining separate actions and this enumerated factor weighs completely in Plaintiffs' favor.

The second relevant listed factor is: "the difficulties likely to be encountered in the management of a class action." Fed. R. Civ. P. 23(b)(3)(D). Here, there are unlikely to be difficult management issues due to the form contracts and bills, the standard method in which the B&O Tax Surcharge was calculated, the single defendant, and the fact that all of the plaintiffs in any certified class would be in Washington. Any accounting difficulties in calculating individual damages due to differing lengths of contracts will likely be minimal and can easily be addressed later on should such problems arise. In contrast, the potential efficiency gains of addressing the similar claims of the approximately 515,000 Washington Sprint customers through one action are significant.

Accordingly, the Court finds that a class action would be superior to all other methods of handling these claims.

* * *

Thus, the Named Plaintiffs have demonstrated both the predominance and superiority elements under Rule 23(b)(3). The only remaining issue as to whether a Rule 23(b) class should be certified is whether the Rule 23(a) factors have been met.

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B. The 23(b) requirements

There are four 23(a) requirements, each of which must be met for class certification: numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a).

1. Numerosity

Numerosity is not disputed and is easily met here because there are roughly 515,000 Washington Sprint Customers who could be potential class members. *See* Fed. R. Civ. P. 23(a)(1).

2. Commonality

Commonality under Rule 23(a)(2) is essentially a less rigorous standard than that set out by Rule 23(b)(3) because it asks that there be common questions of fact or law, whereas Rule 23(b)(3) requires that the common questions outweigh the divergent ones. *See* Fed. R. Civ. P. 23(a)(2); *Hanlon v. Chrysler Corp.* 150 F.3d 1011, 1019 (9th Cir. 1998). Since the Court has already concluded that the 23(b)(3) standard is met, the 23(a)(2) is met as well.

3. Typicality

Typicality is similar to commonality, but focuses on whether the Named Plaintiffs are typical of the class. *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001). Sprint emphasizes the details of the Named Plaintiffs' relationships with Sprint and argues that these minor differences make these plaintiffs atypical class members. The Court disagrees.

Sprint contends that Plaintiff Olson is unique because he continued paying the B&O Tax Surcharge even after the lawsuit was initiated. (See Pl.'s Opp'n 16.) However, even if Sprint is successful in its argument that Olson cannot receive damages after this time but otherwise loses on the ultimate issue of liability, it would not be difficult to calculate his pro rata share of any award prior to the date he filed suit. Further, there is nothing inconsistent with a customer disputing a charge on his or her bill and still continuing to pay for service while the dispute is being resolved.

Sprint further argues that Plaintiff Hesse is uniquely inappropriate as a class member because Hesse has unique expertise regarding the B&O Tax. Plaintiff Hesse is the tax director of a regional

accounting firm in Eastern Washington that advises businesses on the B&O Tax. (Hesse Dep. 14:4-24 (Ex. B to Brenner Decl., Dkt. No. 73).) He has also testified in state legislative hearings regarding the tax and his primary focus appears to be on how the tax affects agricultural businesses. (*Id.* at 19:21-29:20.) These unique attributes do not prevent Plaintiff Hesse from meeting the typicality requirement of Rule 23(a)(3). First, Plaintiff Hesse's knowledge of the B&O Tax largely relates to its application to agricultural businesses rather than cell phone consumers (*see, e.g., id.* at 38:5), not on how that tax relates to individual consumers. Second, though his unique knowledge may have helped him realize that there might be something problematic with a B&O Tax Surcharge appearing on his Sprint bill, his deposition testimony indicates that he timely took action to determine whether such a line item was appropriate and then filed the instant lawsuit. Finally, like Plaintiff Olson, even if Sprint is correct and Plaintiff Hesse is not entitled to damages for any charges that he voluntarily paid after realizing the B&O Tax Surcharge line item, he would be situated in roughly the same situation as the other class members with respect to any charges he incurred before that date.

Thus, both Hesse and Olson are sufficiently typical of the class such that they satisfy the requirements of 23(a)(3).

4. Adequacy

The adequacy requirement of Rule 23(a)(4) requires the Court to ask: "(1) [d]o the representative plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). There is no reason to think that Plaintiffs' Counsel has any conflicts of interest, that the class members have any conflicts amongst one another, or that their counsel cannot vigorously prosecute this action. Further the parties do not appear to dispute this requirement.

* * *

Because all of the Rule 23(b)(3) and 23(a) requirements have been met, the class shall be certified

under Rule 23(b)(3) as defined *supra*.

VI. CONCLUSION

For the foregoing reasons, the Court hereby:

1. GRANTS Plaintiffs' motion to certify the 23(b)(3) class (Dkt. No. 66), containing "[a]ll current and former Washington state wireless service customers of Sprint, who have been charged and paid to Sprint a "Washington State B&O Tax Surcharge";
2. DENIES Plaintiffs' motion for sanctions (Dkt. No. 86);
3. DENIES Plaintiffs' motion for relief from a deadline (Dkt. No. 94);
4. STRIKES AS UNTIMELY Plaintiffs' second motion for class certification (Dkt. No. 88);
5. STRIKES AS MOOT Defendant's motion to strike Plaintiffs' second motion for class certification (Dkt. No. 94).

Additionally, Pursuant to Rule 23(d)(1), which allows the Court to "prescrib[e] measures to prevent undue repetition or complication in the presentation of . . . argument" the Court ORDERS that henceforth the Named Plaintiffs shall submit consolidated motions and pleadings to this Court. Plaintiffs are also ORDERED to file a single, consolidated amended complaint on behalf of the entire class listing both Named Plaintiffs Hesse and Olson by June 12, 2007.

Further, the parties are hereby ORDERED TO APPEAR for a status conference on June 12, 2007 at 9:00 a.m. in order to set a trial schedule in this matter.

SO ORDERED this 18th day of May, 2007.

John C. Coughenour
United States District Judge