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BYRNES & HELLER LLP

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

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| BAXTER AIR, INC., and all others |) | |
| similar situated, |) | |
| PLAINTIFFS, |) | No. 05-2-37411-0 SEA |
| vs |) | ORDER GRANTING PLAINTIFFS' |
| |) | MOTION FOR PARTIAL SUMMARY |
| |) | JUDGMENT RE: LIABILITY |
| NOS COMMUNICATIONS, INC, |) | |
| AFFINITY NETWORK, INC., and |) | |
| NOSVA LIMITED PARTNERSHIP, |) | |
| DEFENDANTS. |) | |

THIS MATTER has come before the court on Plaintiffs' Motion for Partial Summary Judgment Re: Liability. The court has considered the following:

1. Plaintiffs' Motion for Partial Summary Judgment Re: Liability;
2. Declaration of Daniel F. Johnson in Support of Plaintiffs' Motion for Partial Summary Judgment Re: Liability, and all exhibits attached thereto;
3. Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment Re: Liability;
4. All declarations filed in support of Defendants' Response and all exhibits attached thereto;
5. Plaintiffs' Reply to Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment Re: Liability

ORDER

Judge Harry J. McCarthy
King County Superior Court
516 Third Avenue
Seattle, WA 98104
206-296-9205

1 6. All declarations filed in support of Plaintiffs' Reply and all exhibits attached
2 thereto;

3 7. The court also heard oral argument of counsel.

4 1

5 PROCEDURAL BACKGROUND

6
7 Plaintiffs have moved for partial summary judgment concerning liability. Specifically,
8 Plaintiffs argue that the first three elements of RCW 19.86.010 et. seq., the Consumer Protection
9 Act (CPA), should be determined in their favor as a matter of law. The first three elements of
10 the CPA are:

- 11 (1) Unfair or deceptive act or practice;
12 (2) Occurring in trade or commerce; and
13 (3) Public interest impact.

14 The remaining elements of a CPA violation are causation and injury to plaintiff.
15 Hangman Ridge v. Safeco Title, 105 Wn. 2d 778, 784-785, 719 P.2d 531, 535 (1986).

16 Preliminarily, Defendants argue that the court's previous denial of Baxter's motion for
17 dismissal of Defendants' affirmative defenses of accord and satisfaction, account stated, and
18 release is the law of the case and precludes Plaintiffs' motion for partial summary judgment
19 from being considered by the court. Certainly, if Plaintiffs' current motion were for summary
20 judgment on all five elements of its CPA claim, the defenses of accord and satisfaction, account
21 stated and release would prevent such a summary judgment from being entered. However, the
22 authority cited by Defendants, e.g., Blumenshein v. Voelker, 124 Wn. App. 129, 100 P.3d 344
23 (2004), refers to summary judgment, not partial summary judgment. The distinction is
24 important because a motion for summary judgment would have to be denied "if affirmative
25 defenses raise matters, which, if proved, may possibly preclude a judgment and decree in favor
26 of the plaintiff as a matter of law". C.J.S. § 1158.

27 However, Plaintiffs' motion for partial summary judgment would dispose of just the first
28 three elements under the CPA. Defendants' affirmative defenses survive such a motion and
29 may be presented on the remaining issues of causation and damages. Therefore, even assuming

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1 Defendants' liability on the first three elements of the CPA, Defendants may still argue that
2 causation and damages were lacking because Baxter agreed and accepted Defendants' offer,
3 notwithstanding a sales presentation which may possess elements of deception. The doctrine of
4 the law of the case does not therefore dictate that this motion for partial summary judgment be
5 denied.

6 II

7 MAY PARTIAL SUMMARY JUDGMENT
8 BE ENTERED WITH RESPECT TO CERTAIN
9 ELEMENTS OF A CLAIM?

10 Defendants also argue that partial summary judgment cannot be obtained when a
11 judgment is sought for only certain elements of a claim. Defendants contend that a motion for
12 partial summary judgment in this matter is an improper fragmenting of a single claim and that
13 CR 56 does not permit a judgment as to only a portion of a claim.

14 CR 56(a) and (b) allow for summary judgment on a claim "or any part thereof." CR
15 56(c) states that "[a] summary judgment, interlocutory in character, may be rendered on the
16 issue of liability alone although there is a genuine issue as to the amount of damages." As long
17 as a determination of liability does not depend on unresolved factual issues, partial summary
18 judgment may be properly ordered for a part of a claim. Partial summary judgment on less than
19 an entire claim allows the court to tailor litigation by eliminating issues and "focus[ing] the
20 litigation on the true matters in controversy". 11-56 Moore's Federal Practice-Civil § 56.40. It
21 would be an improper use of partial summary judgment, however, for the moving party to "play
22 leapfrog" with the claim by seeking a decision the validity of which depends on one or more
23 unresolved factual issues. Kendall McGaw Laboratories, Inc. v. Community Memorial
24 Hospital, 125 F.R.D. 420, 422 (D.N.J. 1989). Because the three elements under consideration
25 here concern liability only, and not causation or damages, they may be the proper subject of a
26 motion for partial summary judgment only if no unresolved factual issues exist. It is therefore
27 necessary to examine the record to determine whether any disputed material factual issues exist.
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2 III

3 ELEMENT ONE: DECEPTIVE ACT OR PRACTICE

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5 The CPA proscribes unfair or deceptive acts or practices in trade or commerce. RCW
6 19.86.020. Its purpose is to protect the public and foster honest competition. Id. Griffith v.
7 Centex Real Estate Corp., 93 Wn. App. 202, 213, 969 P.2d 486, 492 (1998). To establish the
8 existence of an unfair or deceptive act, a claimant need not show that deception in fact took
9 place or that the act in question was intended to deceive. What is required is that the alleged act
10 or practice has the capacity to deceive a substantial portion of the public. Hangman Ridge at
11 785.

12 In this case, the most salient evidence concerning whether Defendants acts or practices
13 had the capacity to deceive is found in the transcript of the January 17, 2003, telephone
14 conversation between Baxter Air (Baxter) manager Shannon Harney and Quantum Link
15 (Quantum) sales manager Dar Johnson. Quantum is a subsidiary company of Defendants.
16 Quantum solicited Baxter to purchase long distance phone service in January of 2003. The sales
17 pitch was by telephone and was followed up with written advertising information. At the heart
18 of the sales solicitation was Quantum's commitment and Baxter's expectation that Quantum
19 would save Baxter Air a significant amount in their long distance telephone costs as a result of
20 Quantum's better pricing formula.

21 On January 17, 2003, in a call that was recorded and transcribed by Quantum (Decl. of
22 Daniel F. Johnson Ex. 8), Dar Johnson of Quantum advised Ms. Harney that he would offer 7.9
23 "cents per call unit" but did not explain what a call unit was, nor did he explain that the use of
24 Quantum's cents per call unit formula would result in more than doubling the standard rate of
25 cents per minute. Mr. Johnson did not explain the difference between Defendants cents per call
26 unit and cents per minute that Baxter then used. At one point during the conversation, Johnson
27 encouraged Ms. Harney to compare Defendants' rates (7.9) to the 8.3 cents per minute that
28 Baxter was then paying. Urging Ms. Harney to compare long-distance rates would only make
29 sense if different cents per minute rates were being compared. Ms. Harney reasonably assumed

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1 that cents per minute rates were being compared, and Dar Johnson never disabused her of this
2 assumption when, in fact, he knew otherwise.

3 At another point during this lengthy and confusing sales solicitation, Ms. Harney
4 specifically asked Mr. Johnson what the per minute charge was. In response, Johnson
5 confirmed that the rate was 7.9 cents, allowing Ms. Harney to believe that Baxter would be
6 receiving a reduction in price from their existing cost of 8.3 cents per minute to Quantum's
7 quote of 7.9 cents per minute. Subsequently, Baxter confirmed their understanding in writing
8 that they were agreeing to purchase long-distance telephone services from Defendants at 7.9
9 cents per minute. A few days later, Quantum wrote Baxter and advised that the price was 7.9
10 cents per call unit. At no time did Johnson ever explain to any representative of Baxter that
11 cents per call unit would not result in the cost savings on long distance service to Baxter, but
12 instead would result in a significantly greater cost.

13 It also appears from the deposition of Defendants' employee Chris Francis (Decl. of
14 Daniel F. Johnson Ex. 2) that Defendants maintained a company policy that allowed a customer
15 to twice mention cents per minute during a call without correction by Defendants. If the
16 customer referred to cents per minute three times, Defendants would then correct the customer.
17 This practice confirmed that Defendants willfully allowed their employees to mislead Baxter
18 and other similar customers as a matter of company policy, and fostered the customer's false
19 belief and understanding concerning the true cost of the product being offered for sale.

20 At the time that Dar Johnson made his solicitation of Ms. Harney, Defendants were
21 operating under a Consent Decree they had entered into with the Federal Communications
22 Commissions (FCC). The FCC had conducted an investigation of numerous consumer
23 complaints against Defendants. As a part of the Consent Decree, released on December 26,
24 2002, Defendants agreed that each marketing employee would affirm that the employee
25 understood and would adhere to a call unit marketing, sales, and customer service Code of
26 Conduct ("The Code") and also agreed to make no misrepresentations or material omissions to
27 consumers or otherwise mislead or imply that cents per call unit billing was the same as or equal
28 to cents per minute or minute billing. The Consent Decree also required Defendants to disclose.

29 ORDER

1 clearly and conspicuously, the material facts regarding their call unit pricing methodology and
2 promotional plan offerings.

3 Defendants characterize their telephone conversation between Quantum representative
4 Dar Johnson and Ms. Harney as "fact specific back and forth negotiation from the outset."
5 (Defendants' Opposition at 6.) While there may have been a prolonged telephone discussion
6 between the parties, Dar Johnson of Quantum misled Baxter and never once addressed the most
7 significant part of its presentation, i.e., the true cost difference to Baxter between cents per
8 minute service and cents per call unit. This failure to address this crucial distinction was
9 particularly acute when Defendants and its employees had previously agreed to conspicuously
10 and clearly make this disclosure in its sales presentation to the public. In light of the provisions
11 of the FCC Consent Decree, there can be little doubt that the misrepresentations were intentional
12 and not simply inadvertent.

13 Under the CPA, false statements on a "routine sales presentation" have the capacity to
14 deceive. Potter v. Wilbur-Ellis Co., 62 Wn. App. 318, 327-328, 814 P.2d 670, 674-75 (1991).
15 Whether a particular act or pattern is deceptive is a question of law. Robinson v. Avis Rent a
16 Car System, Inc., 106 Wn. App. 104, 114, 22 P.3d 818, 823 (2001). An objective review of the
17 entire transcript of the January 17, 2003, sales call between Dar Johnson of Quantum
18 Communications to Shannon Harney of Baxter, along with the remainder of the record, compels
19 the conclusion that the solicitation of Baxter by Quantum possessed the requisite "capacity to
20 deceive." Indeed, a fair reading of the transcript makes it evident that the solicitation was at
21 best misleading and, at worst, fraudulent. From this objective review of the transcript as a
22 whole, it is this court's view that reasonable minds could not differ on the issue of whether the
23 sales presentation by Quantum had a capacity to deceive.

24 Defendants point out that there were a number of subsequent contacts between Quantum
25 and Baxter and that Baxter later accepted and ratified the cents per call unit pricing scheme.
26 While it appears correct that there were follow-up contacts resulting in an agreement between
27 Baxter and Quantum Link to contract for long distance telephone services on a call per unit
28 basis, that "agreement" was predicated upon the original misleading sales solicitation by Dar
29 Johnson. In any event, the subsequent communications between the parties did not diminish in

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1 any way the significance of the January 13, 2003, sales solicitation which laid the foundation for
2 a relationship initiated by Defendants, a relationship which was built upon misleading and
3 deceptive information.

4 The solicitation by Quantum on January 13, 2003, is what it is and no contrary evidence
5 disputing that conversation has been or could reasonably be offered by Defendants. Defendants
6 have failed to come forward with admissible evidence to create a genuine issue of material fact.
7 CR 56(c). While Defendants ably interpret and argue the actual legal meaning of the material
8 facts, there is no dispute concerning what was represented by Quantum during the January 13,
9 2003 solicitation. In this court's CR 56(c) analysis of all the relevant evidence related to the
10 first element of the CPA, considered in the light most favorable to the Defendants, the element
11 of a deceptive act or practice under the CPA is established as a matter of law. Hartley v. State,
12 103 Wn.2d 768, 774-75, 698 P.2d 775(1985).

13 ELEMENT (2): TRADE OR COMMERCE

14
15 The second element of a CPA claim is whether the deceptive practice occurred in "trade
16 or commerce." This element is not in dispute because Defendants conceded at argument that
17 their sales solicitation activity would necessarily affect trade or commerce within the State of
18 Washington. (Transcript of March 23, 2007, argument at 56.) The CPA broadly defines trade
19 or commerce and clearly encompasses the interstate sales marketing activity by Defendants with
20 Baxter and other Washington State businesses. RCW 19.86.010. Short v. Demopolis 103
21 Wn.2d 52, 61, 691 P.2d 163, 168 (1984).

22
23 ELEMENT (3): PUBLIC INTEREST

24
25 The Supreme Court of Washington has established two avenues by which a plaintiff may
26 prove the public interest prong of a CPA claim: (1) a multi-prong test or (2) a showing that the
27 defendant has violated a statute that explicitly impacts the public interest, which satisfies the
28

29 ORDER

1 element per se. Hangman Ridge at 789. In addition, a distinction is recognized between
2 consumer transactions and private disputes, and there is a different test for each. Id. at 790-791.

3 This relationship between a telephone service provider and small businesses is properly
4 categorized as a consumer transaction. Examples of consumer transactions include sales of
5 homes, cars and agricultural products. Id. at 790. Factors for determining whether consumer
6 transactions impact the public interest include:

- 7 (1) Were the alleged acts committed in the course of defendant's business?
- 8 (2) Were the acts part of a pattern or generalized course of conduct?
- 9 (3) Were repeated acts committed prior to the act involving plaintiff?
- 10 (4) Was there a real and substantial potential for repetition of defendant's conduct
11 after the act involving plaintiff?
- 12 (5) If the act complained of involved a single transaction, were many consumers
13 affected or likely to be affected by it? Id.

14 The facts in this case appear to satisfy the five elements of the consumer transaction test.
15 The sale of a defective product, such as a car or a mobile home or wheat seed, has been treated as
16 a consumer transaction and subjected to the corresponding test. Hangman Ridge at 790. Private
17 disputes, on the other hand, are "essentially contract disputes affecting only the specific parties to
18 the contract." Id. Courts have regarded disputes between an insurer and an insured, between a
19 realtor and a property purchaser, and between an escrow closing agent and a client as private
20 disputes to which the second test applies. Id. Because the purchase of long-distance telephone
21 service is a purchase of a product, and the Defendants' marketing practices affect all its
22 customers, it is best categorized as a consumer transaction. As sales of homes, cars and
23 agricultural products qualify as consumer transactions, surely the solicitation and sale of long
24 distance telephone services do as well.

25 In this case, Defendants' conduct satisfies the five factors of consumer transactions
26 impacting the public interest. It is undisputed that the Defendants' acts were committed in the
27 course of business. The evidence also strongly suggests that the acts were not unique to Baxter,
28 but were part of a pattern or generalized course of conduct. Elements three through five are also
29 satisfied by the evidence showing that similar acts were committed before Quantum contacted

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1 Baxter. The numerous complaints made to the FCC, resulting in Quantum's agreement to the
2 Consent Decree, clearly establishes that Quantum previously engaged in similar conduct.

3 Because Defendants engaged in interstate sales solicitation in the usual course of
4 business, it is highly probable that their solicitations did not end with Baxter. Indeed, the
5 declaration of Cindy Pizer of Pizer Inc., in Seattle, Washington, confirms that Quantum also
6 contacted Ms. Pizer's company in January 2003 in a similar solicitation. Ms. Pizer, like Baxter
7 and the numerous others who earlier complained to the FCC, found that Quantum's solicitation
8 resulted in significantly greater long distance telephone costs to her company.

9 Perhaps the most persuasive evidence of a consumer transaction impacting the public
10 interest is the very fact of this class certification. Approximately 1,100 Washington State
11 businesses are currently part of this class action. That fact alone is strong evidence that
12 Defendants' substantial activity in Washington has had a significant impact upon the public at
13 large. Indeed, it is difficult to conceive of more powerful evidence of a public interest
14 connection than the widespread solicitation of so many businesses within the state.

15 Judging element (3) of the CPA by appropriate summary judgment standards, it is clear
16 that there are no disputed material factual issues on this element and judgment should be entered
17 as a matter of law. Hartley v. State, supra.

18 IV

19 IS PLAINTIFFS' CLAIM EXEMPT FROM
20 THE CONSUMER PROTECTION ACT?

21 Defendants argue that because long-distance telephone service providers are regulated by
22 the Washington Utilities and Transportation Commission (WUTC) and the FCC, Plaintiffs'
23 claim is outside the protection of the Consumer Protection Act (CPA). (Defs.' Opp'n to Pls.'
24 Mot. for Partial Summ. J. at 10.) The CPA provides that the statute shall not "apply to actions or
25 transactions otherwise permitted, prohibited or regulated under laws administered by...the
26 Washington Utilities and Transportation Commission." RCW 19.86.170.

27 Defendants assert that Plaintiffs' claim is that "call unit billing in and of itself violates
28 the CPA." (Defs.' Opp'n to Pls.' Mot. for Partial Summ. J. at 10.) Plaintiffs' claim is more
29 focused on whether Defendants have engaged in deceptive practices. Moreover, Plaintiffs are

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1 not arguing that the actual existence of call unit billing is deceptive. It is not that call unit
2 billing is per se unlawful----- it is the deceptive manner in which it is marketed that brings it
3 within the purview of the CPA.

4 Defendants rely on D.J. Hopkins, Inc. v. GTE Northwest, Inc., 89 Wn. App. 1, 947 P. 2d
5 1220 (1997), in which the court dismissed a CPA claim because the Washington Utilities and
6 Transportation Commission (WUTC) regulates disputed phone charges. Id. In that case,
7 Plaintiff paid GTE a lease for nine years even though he did not have a GTE phone. Id. at 3.
8 When he discovered the error and brought it to GTE's attention, GTE offered only a partial
9 refund. Id. at 4. Plaintiff sued for a full refund. Id.

10 The Court of Appeals dismissed the CPA claim because the WUTC was "the proper
11 place for these issues to be decided." Id. at 9. The WUTC has established ways a customer can
12 seek a refund of an overcharge. Id. at 6. For example, a customer can complain to the WUTC
13 that he or she was "charged an amount for any service rendered in excess of the lawful rate in
14 force at the time such charge was made." RCW § 80.04.230. Defendants have not cited any
15 administrative procedure of the WUTC related to Plaintiffs' claim. Hopkins appears
16 distinguishable on the grounds that in this case Plaintiffs are not complaining of rating errors
17 that are readily rectifiable through administrative channels, but of deceptive practices affecting
18 trade on commerce and the public interest, in violation of the CPA.

19 The plaintiff in Hopkins also failed to convince the Court of Appeals that it was seeking
20 damages and not just a refund. The court found that "even though the complaint is couched in
21 terms of deceptive practices, what actually is presented is a claim for overcharges, or an
22 unreasonable charge for something not received." Id. at 6. Therefore, if Baxter and the class
23 filed a complaint simply about overcharged billings, they would have to seek relief with the
24 WUTC. Here, however, Baxter's complaint is about much more than disputed telephone bills
25 over which the WUTC has jurisdiction. Their complaint is concerned instead with the deceptive
26 practices by Quantum involving trade or commerce and impacting the public interest. While the
27 WUTC would be the appropriate forum for Plaintiffs to bring a complaint of an overcharge,
28 Plaintiffs properly bring their claim of deceptive practices under the CPA.

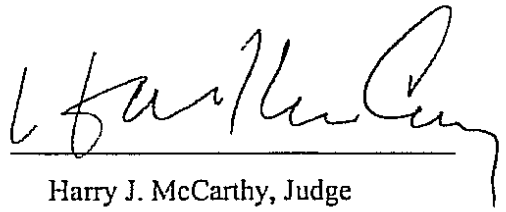
29 ORDER

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V
CONCLUSION

Wherefore, IT IS ORDERED and ADJUDGED that Plaintiff's Motion for Partial Summary Judgment regarding liability is GRANTED.

DATED this 6 day of July, 2007



Harry J. McCarthy, Judge

ORDER

Judge Harry J. McCarthy
King County Superior Court
516 Third Avenue
Seattle, WA 98104
206-296-9205