



The following constitutes the order of the Court.
Signed: May 28, 2020

M. Elaine Hammond

M. Elaine Hammond
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re)	Case No. 18-51662 MEH
CLICKAWAY CORPORATION,)	Chapter 11
)	
)	Date: May 13, 2020
)	Time: 1:00 p.m.
)	Crtm: 11
Debtor.)	

MEMORANDUM DECISION RE OBJECTION TO CLAIM #44-2

Clickaway Corporation ("Debtor") objects to the amended proof of claim ("Claim 44-2") filed by Cellco Partnership d/b/a Verizon Wireless ("Verizon"). Verizon replied and the matter came on for hearing on May 13, 2020. Following hearing, the matter was taken under submission.

Claim 44-2 includes three components, two of which are no longer in dispute:

- A claim for unpaid telecommunications service in the amount of \$5,328.24. This portion of the claim amount is undisputed.
- A claim based on chargebacks for deactivations and other ordinary course deductions.

At the hearing, the parties agreed that this component was resolved through the Order Granting Motion for Turnover of Unpaid Commissions, Doc # 336, and representations made on behalf of Debtor and Verizon at the hearing on this claim objection.

1 The remainder of the claim is for damages that Verizon asserts resulted from Debtor's
2 breach of the contract underlying the parties' business relationship. Specifically, Verizon
3 asserts breach of contract claims based upon Debtor's alleged: (1) deceptive sale of used
4 devices as new, (2) sale of devices acquired from prohibited sources, (3) sale of Verizon
5 installment contracts for ineligible devices, and (4) infringement of Verizon's trademark and
6 breach of related license provisions. Debtor disputes each of Verizon's breach of contract
7 claims.

8 This court has jurisdiction over this objection to claim pursuant to 28 U.S.C. § 1334.
9 This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B).

10 For the reasons stated herein, Debtor's objection to Claim 44-2 is sustained in part and
11 denied in part. A further hearing will be set to determine the appropriate measure of damages
12 and allowed claim amount in accordance with these findings.

13 Burden of Proof:

14 A properly filed proof of claim constitutes prima facie evidence of the validity and the
15 amount of the claim pursuant to Federal Rule of Bankruptcy Procedure ("FRBP") 3001(f). If
16 a claim is based on a writing, the writing must be provided with the proof of claim. FRBP
17 3001(c)(1). The Verizon Wireless Agent Agreement – ClickAway Corporation d/b/a EVO2
18 ("Agent Agreement") was filed with Claim 44-2, in addition to other supporting information.
19 In order to defeat Verizon's claim, Debtor must "produce evidence and show facts tending to
20 defeat the claim by probative force equal to that of the allegations of the proof of the claims
21 themselves." *In re Holm*, 931 F.2d 620, 623 (9th Cir. 1991). If Debtor does so, the burden
22 reverts to Verizon to prove the validity of the claim by a preponderance of the evidence. *In re*
23 *Consol. Pioneer Mortg.*, 178 B.R. 222, 226 (9th Cir. B.A.P. 1995), *aff'd sub nom. In re*
24 *Consol. Pioneer Mortg. Entities*, 91 F.3d 151 (9th Cir. 1996). Here, Debtor's initial burden is
25 met as both parties rely on the same evidence to support their positions – the terms of the
26 Agent Agreement, related schedules, correspondence over the course of their business
27 relationship, and a sale receipt. Thus, the burden reverts to Verizon to prove the validity of
28 Claim 44-2 by a preponderance of the evidence.

1 The parties agreed on the record that resolution of the claims asserted for deceptive
2 sales, sales of devices from prohibited sources, and installment contracts for ineligible devices
3 are matters of contract interpretation and appropriate for resolution on the record before the
4 court. The parties further agreed that additional evidence may be required for determination
5 of the damages associated with any breach of contract claim established by Verizon.

6 Breach of Contract Claims:

7 1. Deceptive sale of used devices as new

8 The underlying facts are not in dispute. Debtor admits to selling used devices to
9 customers. Debtor provided written notice to the customer that the device was used on the
10 sale receipt. Debtor maintained a customer satisfaction program and received a small number
11 of complaints on this basis.

12 The parties dispute whether Debtor's actions satisfied the obligations set forth in the
13 Agent Agreement.¹

14 The Agent Agreement is between designated Verizon Wireless Entities (referred to
15 therein as "VZW") and Debtor as "Agent." The agreement is approximately 16 pages, plus at
16 least eight exhibits relevant to the issues raised in Verizon's claim. It is very detailed and
17 seeks to control or require approval of the majority of the Agent's business operations, but for
18 the pricing of devices and whether Debtor is required to purchase any devices from Verizon.

19 Verizon asserts that Debtor's practices did not satisfy Section 3.1 of the Agent
20 Agreement: "Agent shall conduct itself with the highest standards of honesty, integrity and
21 fair dealing and shall comply with [supplemental provisions]." Sections 3.1(c) and 3.2.1
22 frame this broad language.

23 a. Section 3.2.1 details the information to be included in the Agent's "written
24 Equipment sales contract." Section 3.2.1 requires multiple disclosures, including that the
25 contract is between Agent and the customer, a complete and accurate description of the
26 Agent's Equipment return policy, early termination fees or other fees associated with a return,

27 ¹ The Agent Agreement is the May 2014 form. Some Schedules to the Agent Agreement have
28 different form dates. These dates are noted when relevant.

1 and that Equipment shall be returned to Agent, not to Verizon. It also requires disclosure to
2 the customer in writing of the used, reconditioned or refurbished nature of the Equipment.
3 The requirement requiring disclosure regarding used Equipment is set forth in the same
4 paragraph that requires written disclosure of other material terms and conditions.

5 b. Section 3.1(c) requires compliance with the “Compliance and Clear Disclosure
6 Guidelines for VZW Agents” found at Attachment 1 to Exhibit C (the “Disclosure
7 Guidelines”). The Disclosure Guidelines provide the disclosure requirements without the
8 legalese. It appears that Verizon intended for this document to be shared by each Agent with
9 their sales associates.

10 The Disclosure Guidelines specify that disclosure of certain information is relevant
11 and should be disclosed. The information that must be provided to the customer includes
12 allowance minutes, minimum contract term, return policy, charges and fees associated with
13 the service, early termination fees, charges associated with returns, and optional services with
14 additional fees.

15 The Disclosure Guidelines note that the amount and detail of information to be
16 provided should be framed by what the typical consumer, acting reasonably, expects to
17 receive. For example, “the typical consumer activating Verizon Wireless service for the first
18 time in an agent’s location will expect to receive all of the terms and conditions of the service,
19 and to have the key terms specifically highlighted by the sales representative” and “it is
20 *NEVER* appropriate to provide inaccurate information, . . . Verizon Wireless does not edit or
21 withhold information from customers, we educate them and we expect our agents to do the
22 same.”

23 c. Analysis of the Sales Receipt

24 Verizon criticizes Debtor’s disclosure of the used Equipment in the receipt. Section
25 3.2.1 sets forth information to be provided in the “written Equipment sales contract.” In the
26 normal course of purchasing goods from a store, the only writing between the seller and
27 customer is a receipt. Black’s Law Dictionary (11th ed. 2019) defines a receipt as a “written
28 acknowledgment that something has been received; esp., a piece of paper or an electronic

notification that one has paid for something.” Nothing in Sec. 3.2.1 or the Disclosure Guidelines indicate that the “written Equipment sales contract” must be anything other than a receipt. Verizon does not reference any alternate form of writing in Claim 44-2 or its briefing. So, despite Verizon’s protests that Debtor used a receipt to convey the required information, Sec. 3.2.1 indicates that the receipt is the proper place for Debtor to provide the written disclosure.

Further, Sec. 3.2.1 sets forth the disclosure requirements required for every sale and the disclosure requirements regarding used Equipment. No language in the Agent Agreement indicates that disclosure of used Equipment requires a different or higher form of disclosure. In support of Claim 44-2, Verizon provided a sales receipt² issued by Debtor in connection with a sale of used Equipment (the “Receipt”). Verizon complains about the used Equipment disclosure on the Receipt. Yet, it makes no mention of the following required disclosures also provided on the Receipt, in the same font:

- disclosure of initiation fee,
- return policy, fees associated with return, and method of refund,
- method of processing returns,
- identification of Debtor as seller,
- minimum commitment period,
- early termination fees, and
- when a hardware collection fee will be assessed

d. Open Box disclosure

Verizon further argues that Debtor’s use of the term “Open Box” to describe used, reconditioned or refurbished Equipment is deceptive.

Looking first to the language itself, Debtor’s explanation of the term on the receipt states: “Open Box items may have been powered on, activated, or refurbished.” The term “used” is not included. But Verizon chose to use the term “Certified Pre-Owned”³ to identify

² Claim 44-2, Exhibit A-7.

³ Smith Decl., Exhibit I (Doc # 475-9).

1 its used Equipment, so the term “used” is not essential. No evidence was presented that
2 Debtor “reconditioned” devices. The failure to disclose something they were not doing is not
3 deceptive. Finally, the term “refurbished” is found in Sec. 3.2.1 and the receipt, and,
4 therefore, is adequate.

5 Whether Debtor’s disclosure was deceptive should not be determined solely on the
6 language applied. It should also be considered in the context of the sale transaction. On the
7 Receipt, all the disclosures regarding used Equipment are highlighted and starred. This
8 indicates that this information was verbally brought to the customer’s attention at the time of
9 sale. The term “Open Box*” is underlined. The first disclosure provided is underlined and
10 starred, and again notes the device is Open Box. The information that “Open Box items may
11 have been powered on, activated, or refurbished” is subsequently underlined and starred.
12 No information was provided as to who underlined and starred the receipt. However, these
13 acts are consistent with the disclosure procedures placed on sales associates in the “Disclosure
14 Guidelines.” It is also consistent with the practices described in the Sutherland declaration:
15 “In addition, our associates are instructed to provide clear verbal disclosure of the device
16 condition.”⁴ Thus, I find it is reasonable to assume the notations were made at the time of
17 sale.

18 e. Pricing for used devices

19 In its response to Debtor’s objection, Verizon argues that Debtor’s charging the same
20 price for a used device as a new device failed to satisfy Debtor’s obligation “to conduct itself
21 with the highest standards of honesty, integrity and fair dealing.” This cannot form the basis
22 for a breach of contract claim as the Agent Agreement provides at Sec. 4.5: “AGENT
23 SHALL UNILATERALLY ESTABLISH ITS RETAIL SALES PRICES, ADVERTISED
24 PRICES OR OTHER FEES FOR EQUIPMENT IN ITS SOLE DISCRETION, AND VZW
25 SHALL HAVE NO CONTROL OVER SUCH PRICES, CHARGES OR FEES.” (emphasis
26 in original)

27 _____
28 ⁴ Declaration of Richard Sutherland, Exhibit F, 18-5031, Doc # 53-15. As referenced in
Claim 44-2, Exhibit A-6.

1 f. Findings as to sales of used devices

2 Verizon required multiple disclosures to be made to the customer by Debtor at the
3 time of sale. These disclosures were provided in the receipt. Verizon challenges Debtor's
4 enhanced disclosure regarding used Equipment but raises no concerns about the remaining
5 disclosures – disclosures of the type frequently found on a sales receipt. Use of the term and
6 definition for "Open Box" is not inconsistent with Verizon's use of "Certified Pre-Owned" to
7 indicate used Equipment. Verizon's express authorization that Agent may establish pricing at
8 its sole discretion prohibits price from factoring into this analysis.

9 As such, I find that Debtor's disclosure of used Equipment on the Receipt is consistent
10 with Sec. 3.1(c) and 3.2.1 of the Agent Agreement; that use of the term "Open Box" and its
11 definition does not clearly violate the Agent Agreement; and Verizon's remaining argument
12 contradicts Sec. 4.5 of the Agent Agreement. In sum, Verizon has not met its burden to
13 establish that Debtor engaged in the deceptive sale of used devices as new by a preponderance
14 of the evidence.

15 2. Sales from prohibited sources

16 Verizon next asserts that Debtor breached Sec. 4.2 of the Agent Agreement by "selling
17 used phone devices to consumers which were not acquired by the Debtor from manufacturers,
18 Verizon, or distributors authorized by Verizon." Debtor responds that the Agent Agreement
19 only restricts the entities that Debtor may *purchase* equipment from, and it does not prohibit
20 the sale of phones that were previously activated on Verizon's network and acquired as trade-
21 ins.

22 Again, we return to the terms of the Agent Agreement to resolve this question of
23 contract interpretation. Article 4 of the Agent Agreement is titled "Equipment Requirements,
24 Procurement, Warranty, Retail Sales Prices." At the hearing, Verizon's counsel argued that
25 Article 4 restricts the sale of devices. It does not. Article 4 addresses the issues provided in
26 its title and specifically provides in all caps that Agent unilaterally establishes its prices,
27 charges or fees. Sec. 4.5.

1 Section 4.2 provides: “Agent shall purchase Equipment *only and directly* from (i)
2 manufacturers, (ii) distributors authorized by VZW, or (iii) VZW.” (emphasis added)
3 In order to interpret this provision, reference to the Glossary provided in the Agent Agreement
4 is required:

- 5 • **Equipment** means mobile or portable telephones and data communications devices,
6 **including, but not limited to**, wireless modems/PC cards and PIBs, used in
7 conjunction with or in order to utilize Service, but excluding any Accessories.
- 8 • **PAD or Previously Activated Device** means a unit of VZW Equipment that has been
9 active on the VZW Facilities at any time and for any amount of time.
- 10 • **PAD-Like New** means any PAD that was new when Agent performed an Activation
11 or Upgrade and was subsequently returned using the Returns Process Control
12 functionality.
- 13 • **VZW Equipment** means Equipment used in conjunction with or in order to utilize
14 VZW Service that complies with all applicable laws and regulations is approved for
15 use with VZW Service, and otherwise complies with the requirements set forth in
16 Exhibit D to the Agreement.

17 By definition, a PAD is a unit of Equipment. The issue then is whether a return or
18 trade-in is a *purchase* of Equipment. Although not defined in the Agent Agreement, return is
19 used consistently throughout to refer to a customer’s return of a device pursuant to the
20 Agent’s return policy, which must satisfy Verizon’s minimum standards. Therefore, a return
21 is not a purchase.

22 The term “trade-in” is also not defined. However, Exhibit L, paragraph 6, addresses a
23 trade-in made pursuant to an Installment Contract. It requires Agent to disclose “Trade-In
24 Criteria and the requirement that a Subscriber return the unit of VZW equipment directly to
25 VZW when participating in the Trade-In Program.” Further, while paragraph 12 prohibits
26 Agent from accepting VZW Equipment under Installment Contract, it does not prohibit Agent
27 from accepting trade-in devices on other types of sale. As such, a trade-in is not a purchase.

1 Accordingly, Verizon has not satisfied its burden to establish that the Agent Agreement was
2 breached by the sale of devices obtained through return or trade-in.

3 3. Sale of Installment Contracts on ineligible devices

4 Verizon next asserts that Debtor breached the Agent Agreement by assigning to
5 Verizon Installment Contracts for ineligible devices, namely used phones. Debtor asserts that
6 the Installment Contract program was expanded over time and authorized inclusion of
7 additional devices, including PAD-Like New.⁵ The Agent Agreement and its attachments, as
8 well as memorandum and correspondence related to the Program's modification during the
9 parties' contractual relationship were submitted into evidence for interpretation of this
10 asserted contractual breach.

11 Debtor and Verizon entered into the Agent Agreement in February 2015. Installment
12 Sales of VZW Equipment are authorized pursuant to Sec. 4.9 of the Agent Agreement, subject
13 to the terms and conditions set forth in Exhibit L, which provides the terms as of February 11,
14 2014. It states in Sec. 5:

15 VZW shall unilaterally decide which makes and models of VZW Equipment are
16 eligible for the Program . . . Agent shall not offer the Program to a Subscriber or
17 potential Subscriber with a unit of VZW Equipment that is not eligible for the
18 Program . . . Agent shall only offer the Program in connection with VZW Equipment
19 that is New Equipment.

20 Through its communications to Debtor, Verizon subsequently modified the last sentence of
21 Exhibit L, Sec. 5.

22 Attached as Exhibit A-8 to Claim 44-2 is a form letter from Verizon on Installment
23 Contracts. It expands the Program to include PAD-Like New, in addition to the previously
24 allowed New Equipment. As before, Verizon maintains control over which makes and
25 models of Equipment are authorized. Further, this memo notes that updates will be provided
26 if there are future changes to the program. The memo is not dated.

27 _____
28 ⁵ Installment Contracts are also referred to as the Program in the Agent Agreement. "Program
means the VZW installment sales program for certain VZW Equipment . . ."

1 Through email, Debtor sought clarification from Verizon on how to identify
2 authorized PADs for the Installment Contracts. This correspondence ran from October 12
3 through November 10, 2015. The email string begins with a request from Thomas Vu, an
4 employee of Debtor responding to an email with a memo as the same title as the form
5 document. Vu requests clarification on how to identify a device that is PAD-Like New. The
6 initial response from the Verizon representative is that he is not clear and will find someone
7 else to answer the question. A week later Vu follows-up, and when no response is received
8 ten days after that, he reaches out to another contact. On November 2, 2015, Vu finally
9 receives a response from Zoraida Finlez. She informs him that PAD-Like New is any new
10 device that has been sold, then returned via RPC within the first 30 days of the original sale.
11 She also directs Vu to a tool with pop ups that indicate whether a device is eligible, adding,
12 “however, final determination of commission eligibility is determined by commissions and
13 compliance tables.”

14 Vu then requests information on how to ensure Debtor will be eligible for full
15 commissions at the time of sale. Finlez directs him to a tool in OMNI called commissions
16 eligibility at point of sale and recommends ensuring that returns are being processed correctly
17 through RPC and devices are being purchased through approved vendors. She again reminds
18 Vu that Verizon has final say and refers him to the contract for a more thorough review.

19 Vu’s last question is whether compensation is reduced or the entire transaction is not
20 commissionable if a device is subsequently determined to not be PAD-Like New. Finlez
21 responds, “As far as payments goes, this is covered in your exhibit b (please see attached).”
22 Unfortunately, the information provided by Finlez is incorrect. First, neither the Agent
23 Agreement, Exhibit L, nor any other document submitted as evidence requires a device to be
24 returned within 30 days of the original sale in order to qualify as PAD-Like New. Thus,
25 Debtor was provided incorrect information on what qualifies as PAD-Like New.

26 Second, the contract Vu is referred to had not been updated to reflect the commission
27 changes with the increase in devices eligible for the Program. Therefore, the instruction to
28 review the contract and that the Agent Agreement controls does not help. The parties did not

1 address the lack of updates to the contract in their briefing. My findings on this point are
2 based on the following. Exhibit B to the Agent Agreement addresses compensation. The
3 form's effective date is July 13, 2014. When drafted, Installment Contracts were limited to
4 New Equipment. In addition, Vu subsequently forwarded the email string with Verizon's
5 representatives to Sutherland and Rowen. Having reviewed the Exhibit B referenced by
6 Finlez he determines, "We are not in contract violation just are in a reduced commission if the
7 devices we activate are determined to be a PAD not new (PAD other)." Vu had reviewed and
8 applied "Chart 7 PAD – Other Activation and Upgrade Commissions with 2-year CA" which
9 does not appear to apply to the Installment Contract commission. But Chart 6 is also not
10 directly on point because it does not address the addition of PAD to Installment Contracts but
11 it is the only schedule Debtor has.

12 Overall, these email communications can be viewed as benefiting each party's
13 position. For Verizon, Debtor was directed to use the Returns Processing Control, work with
14 approved vendors, and reminded that the Agent Agreement controls. For Debtor, despite
15 seeking additional information, Verizon was unable to provide a clear answer, information
16 provided by Verizon was not correct, and based on the lack of clarity regarding the program,
17 Debtor may have been unable to avoid problems with the Installment Contract program in
18 2015.

19 No further guidance on the Program was submitted into evidence for the next two
20 years.

21 Finally, in the summer of 2017 Verizon provided more detailed information in the
22 form of two memos:⁶

23 June 30, 2017 Memo: CPO VZW iPhone on Device Payment Program: New trial of
24 Certified Pre-owned Inventory on Installment contract provided the following
25 information:

- 26 ○ "The objective of this trial is to evaluate if lower priced VZW Equipment is an
27 attractive alternative to Subscribers and potential Subscribers."

28 ⁶ Smith Declaration, Exhibit I (Doc # 475-9).

- 1 ○ “VZW is making some CPO/Used Equipment* available to you that have been
- 2 refurbished in accordance with VZW standards and that are classified as “Certified
- 3 Pre-Owned” (“CPO Inventory”).”
- 4 ○ “Eligible CPO Inventory will be made available to you for purchase in Dymax.
- 5 Notwithstanding Section 5 of Exhibit N⁷ of your Agent Agreement addressing the
- 6 Program, CPO Inventory will be eligible for the program during trial and will be
- 7 eligible for Compensation as a ‘VZW iPhone’ in accordance with Chart 5 to
- 8 Exhibit B to your Agent Agreement. Only CPO Inventory made available for this
- 9 trial, and no other units of Used Equipment, is eligible for the Program.”
- 10 ○ “**Used Equipment means any unit of Equipment that has been active on the VZW*
- 11 *Facilities (or the Facilities of any Carrier) at any time and for any amount of*
- 12 *time.*” (italics in original)

13 August 28, 2017 Memo: Used Equipment and Installment Contracts:

- 14 ○ VZW “will make for Sale a limited quantity of Used Equipment identified in the
- 15 Chart below (“CPO Inventory”) that will be eligible in the System for
- 16 Activations/Upgrades on Postpay Service on Installment Contracts. The CPO
- 17 Inventory will be available starting August 31, 2017.”
- 18 ○ “CPO Inventory will be made available to you for purchase in Dymax.
- 19 Notwithstanding Section 5 of Exhibit N⁸ (the Program), this CPO Inventory will
- 20 be eligible for the Service Commission as “Smartphones” in accordance with
- 21 Chart 5 to Exhibit B to your Agreement.”

22 These memos are the earliest, clear disclosure of the Program requirements and

23 limitations on Used Equipment. After June 30, 2017, Debtor was on notice that Used

24 Equipment (a new term that includes PADs) available for an Installment Contract was limited

25 to the CPO Inventory obtained through Dymax. Prior to this date, the information provided

27 ⁷ This appears to be a reference error. There is no Exhibit N to the Agent Agreement. Exhibit

28 L, Sec. 5 limits the Program to New Equipment.

⁸ Same issue as above.

1 by Verizon to Debtor is unclear and at times contradicts the terms of the Agent Agreement.
2 As such, Verizon has not met its burden to establish a breach of contract related to ineligible
3 devices placed on Installment Contracts prior to June 30, 2017.

4 Additional evidence may be provided regarding calculation of damages for ineligible
5 devices placed on Installment Contracts after June 30, 2017, as contemplated at the hearing.

6 Breach of Trademark License:

7 In Claim 44-2, Verizon asserts a new claim for breach of trademark license. The basis
8 of this claim is that Debtor violated the Agent Agreement, Exhibit I, Sec. 5.5 that states:

9 Agent shall not use the VZW Licensed Marks in connection with . . . the sale or lease
10 of any unauthorized Equipment, or in any other manner not expressly authorized by
11 this Agreement or separately in writing by VZW, or in any manner that is likely to
12 confuse or mislead.

13 Verizon argues that Debtor used Verizon's trademarks when their actions were not in
14 compliance with the Agent Agreement, thereby violating the license. Debtor objects that
15 basis for relief claim was late-filed as it was not included in the original proof of claim.

16 FRBP 7015, incorporating Federal Rule of Civil Procedure 15(c), applies. "A new
17 claim must be based upon a common core of operative facts. It is the operative facts that
18 control the question of relation back, not the theory of liability applied to those facts." *In re*
19 *PG&E Co.*, 311 B.R. 84, 88 (Bankr. N.D. Cal. 2004). Under well-settled principles "there
20 must be facts alleged in the Original Claims that would reasonably alert Debtor to the
21 possibility of assertion of new theories based upon those facts to support the Amended
22 Claims, whether or not those facts or events were foreseeable." *Id.* at 88.

23 Claim 44-1, the original proof of claim, was filed November 19, 2018. Claim 44-1
24 states the basis of the claim is "Chargebacks pursuant to contract; unpaid service charges."
25 The trademark claim does not relate to chargebacks or unpaid service charges. Exhibit A
26 asserts there are three components to Claim 44-1: (1) Contract claims which have been
27 liquidated to date, (2) Contract claims which remain contingent, but will be liquidated, (3)
28 Unpaid claims for telecommunications service. Of these, the first category does not apply and

1 the third category does not relate to a breach of contract claim. The second category also does
2 not apply because the trademark-based claim was not contingent when Claim 44-1 was filed.
3 The question of whether a claim is contingent often arises in bankruptcy, primarily in
4 determining whether a debtor's debts exceed the debt limits for Chapter 13. A claim is non-
5 contingent if all events giving rise to liability occurred prior to the filing of the bankruptcy
6 petition. *In re Nicholes*, 184 B.R. 82, 88 (9th Cir. B.A.P. 1995). Debtor ended operations as
7 an authorized retailer of Verizon at the end of June 2018. Prior to the filing of Debtor's case,
8 the sale of its stores to Victra closed. As such, when the proof of claim was filed, all events
9 giving rise to liability for a breach of trademark license had occurred, thus, the contract claim
10 did not remain contingent.

11 The only factual basis asserted in Claim 44-1 that might be able to support the newly
12 asserted trademark claim is "commission damages from debtor sale of used devices as 'new.'"
13 As explained above, Verizon did not establish a contractual breach on these facts. It follows
14 that if there was no contractual breach then a claim for misuse of the Verizon trademark
15 through the breach would also fail.

16 The critical inquiry is whether Debtor would be unduly prejudiced by the amendment.
17 *See In re Robert Farms, Inc.*, 980 F.2d 1248, 1251 (9th Cir. 1992). In *Robert Farms*, the
18 Ninth Circuit cited with approval the test set forth by the B.A.P. in *In re Wilson*, 96 B.R. 257,
19 262 (9th Cir. B.A.P. 1988): (1) bad faith or unreasonable delay in filing the amendment, (2)
20 impact on other claimants, (3) reliance by the debtor or other creditors, and (4) change of the
21 debtor's position.

22 I find that two factors weigh against amendment. First, Claim 44-2 was not filed until
23 15 months after Claim 44-1. This is over a year after the estimated time for amending the
24 claim based on the Termination Agreement. Thus, an unreasonable delay occurred. Second,
25 Claim 44-2 will have a significant impact on other claimants. It is one of the largest claims in
26 the case. Continued litigation over a claim premised on a factual basis already determined to
27 be meritless is a waste of resources. More importantly, due to Verizon's assertion of setoff
28 rights, the funds to pay this claim are being held by Verizon. If the claim is reduced or

1 disallowed, the difference between the held funds and the allowed claim amount will be paid
2 to the estate and distributed to creditors pursuant to the confirmed plan. The remaining two
3 factors are not applicable and do not weigh in favor of amendment.

4 Thus, leave to amend is denied as to Verizon's claim for breach of trademark license.
5 Amendment of the claim will prejudice debtor and the estate. The underlying contractual
6 basis has been determined as without merit and no equities weigh in favor of authorizing the
7 amendment.

8 Determination of Allowed Claim Amount:

9 A status conference is set for June 18, 2020, at 11:00 a.m., by Zoom to determine a
10 date for hearing on presentation of any additional evidence regarding calculation of damages
11 in accordance with the findings provided herein. The parties shall meet and confer regarding
12 the additional evidence to be provided and file a joint proposal for resolution of these issues
13 no later than June 11, 2020.

14 **END OF MEMORANDUM DECISION**
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COURT SERVICE LIST

All ECF Recipients