

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SHANNON CARNEY,

Plaintiff,

vs.

VERIZON WIRELESS TELECOM, INC., et
al.,

Defendants.

CASE NO. 09cv1854 DMS (AJB)

**ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' MOTION TO
DISMISS THE FIRST AMENDED
COMPLAINT**

[Docket No. 42]

This case comes before the Court on Defendants' motion to dismiss the First Amended Complaint ("FAC"). Plaintiff filed an opposition to the motion, and Defendants filed a reply. On April 21, 2010, the Court requested supplemental briefing from the parties on the effect of *North County Communications Corp. v. California Catalog & Technology*, 594 F.3d 1149 (9th Cir. 2010), on Plaintiff's fourth claim for relief for violation of the Federal Communications Act ("FCA"). Plaintiff submitted her supplemental brief on April 29, 2010, and Defendants submitted their supplemental brief on April 30, 2010. After thoroughly considering the parties briefs, evidence and the relevant legal authority, the Court grants in part and denies in part Defendants' motion.

I.

BACKGROUND

On July 23, 2008, Plaintiff purchased a cellular phone from a Verizon Wireless store in Sherman Oaks, California. (FAC at ¶ 34.) In conjunction with this purchase, Plaintiff entered into

1 a two-year wireless service agreement with Verizon. (*Id.*) The full retail price of the phone was
 2 \$279.99, but Plaintiff paid a sale price of \$99.99. (*Id.* at ¶¶ 34-36.) Plaintiff alleges that at the time
 3 of purchase, a Verizon salesperson told her that Verizon was required by law to charge her sales tax
 4 on the full retail price of the phone as opposed to the sale price. (*Id.* at ¶ 35.) As so calculated, the
 5 sales tax amounted to \$23.10. (*Id.*) Plaintiff alleges she asked a sales manager why Verizon
 6 calculated sales tax on the full retail price of the phone as opposed to the sale price. (*Id.* at ¶ 36.) The
 7 manager responded that “Verizon was required by California state law to charge consumers the
 8 bundled sales tax.” (*Id.*) Plaintiff alleges that in deciding to purchase the phone from Verizon, she
 9 relied on the statements of the Verizon employees that California law required her to pay the sales tax.
 10 (*Id.* at ¶ 44.) Plaintiff also alleges she relied on these representations in deciding to purchase another
 11 phone from Verizon in January 2009. (*Id.* at ¶¶ 45-46.)

12 Plaintiff alleges these representations are repeated in the Customer Information Overview
 13 (“CIO”) she received from Verizon. (*Id.* at ¶38.) She relies specifically on the section of the CIO
 14 labeled “Taxes, Governmental Surcharges And Fees,” which states, “Your bill will include sales,
 15 excise and other taxes and governmental surcharges and fees that we are required by law to bill to
 16 customers.” (FAC, Ex. 3.)

17 On May 11, 2009, Plaintiff filed the present case against Verizon Wireless Telecom, Inc.
 18 (“Verizon”) in Los Angeles Superior Court. The original complaint alleged claims for violations of
 19 California’s Consumer Legal Remedies Act (“CLRA”) and Business and Professions Code § 17200
 20 (“UCL”). On July 2, 2009, Verizon removed the case to the United States District Court for the
 21 Central District of California. Verizon filed its Answer to the complaint on August 21, 2009. A few
 22 days later, the case was transferred to this Court.

23 On November 30, 2009, pursuant to the parties’ stipulation, Plaintiff filed a First Amended
 24 Complaint (“FAC”) against Verizon and Cellco Partnership dba Verizon Wireless (collectively,
 25 “Defendants”). The FAC realleges the claims under the CLRA and UCL, and adds claims for
 26 violation of Business and Professions Code § 17500 (“FAL”), the FCA and fraud. In response to the
 27 FAC, Defendants filed the present motion.

28 ///

II.

DISCUSSION

3 Defendants raise several arguments in support of their motion to dismiss. First, they argue the
4 allegations in the FAC are contradicted by the documents attached thereto. Second, they dispute
5 whether the CIO applies to the purchase of products. Third, Defendants contend Plaintiff has failed
6 to allege reliance. Fourth, Defendants argue Plaintiff has failed to state a valid claim under the FCA.
7 Fifth, Defendants assert that a safe harbor protects them from Plaintiff's statutory claims. Sixth,
8 Defendants maintain there is no private cause of action for seeking tax refunds from retailers.
9 Seventh, Defendants assert the California Constitution bars Plaintiff's request for an injunction.
10 Finally, Defendants contend Plaintiff's request for restitution is barred because Defendants did not
11 benefit.

12 || A. Standard of Review

13 In two recent opinions, the Supreme Court established a more stringent standard of review for
14 12(b)(6) motions. *See Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937 (2009); *Bell Atlantic Corp. v.*
15 *Twombly*, 550 U.S. 544 (2007). To survive a motion to dismiss under this new standard, “a complaint
16 must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on
17 its face.’” *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 570). “A claim has facial plausibility
18 when the plaintiff pleads factual content that allows the court to draw the reasonable inference that
19 the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556).

20 “Determining whether a complaint states a plausible claim for relief will ... be a context-
21 specific task that requires the reviewing court to draw on its judicial experience and common sense.”
22 *Id.* at 1950 (citing *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007)). In *Iqbal*, the Court began this
23 task “by identifying the allegations in the complaint that are not entitled to the assumption of truth.”
24 *Id.* at 1951. It then considered “the factual allegations in respondent’s complaint to determine if they
25 plausibly suggest an entitlement to relief.” *Id.* at 1951.

26 | B. Allegations in FAC v. Documents Attached Thereto

27 Before turning to whether the factual allegations in the FAC plausibly suggest an entitlement
28 to relief, the Court addresses Defendants' argument that Plaintiff's claims fail because the documents

1 attached to the FAC contradict Plaintiff's factual allegations. Specifically, Defendants contend
 2 Plaintiff's February 18, 2009 letter to Verizon contradicts Plaintiff's allegation that a salesperson in
 3 the Sherman Oaks store misrepresented that Verizon was required by law to charge Plaintiff sales tax
 4 on the phone. Defendants assert Plaintiff's letter does not include this allegation, therefore it
 5 contradicts the facts alleged in the FAC.

6 Defendants are correct that this specific allegation is not included in Plaintiff's letter.
 7 However, the absence of that allegation does not render the letter contradictory to the allegations in
 8 the FAC. The Court therefore rejects this argument.

9 **C. Reliance**

10 Next, Defendants argue Plaintiff has failed to adequately plead the element of reliance.
 11 Plaintiff disputes that she must allege reliance to support a claim of unfair or unlawful business
 12 practices under the UCL. Plaintiff agrees that she must allege reliance to support a claim of fraudulent
 13 business practices under the UCL, and asserts she has done so.

14 In *Laster v. T-Mobile USA, Inc.*, No. 05cv1167, 2009 WL 4842801 (S.D. Cal. Dec. 14, 2009),
 15 this Court held that for UCL claims based on misrepresentations, the plaintiff must show actual
 16 reliance regardless of whether the claim arises under the "unfair," "unlawful" or "fraudulent" prong
 17 of the UCL. *Id.* at *5 (citing *In re Tobacco II Cases*, 46 Cal. 4th 298, 326 (2009)). Plaintiff does not
 18 address *Laster* in her opposition brief, but instead relies directly on *In re Tobacco II*. In that case, the
 19 California Supreme Court stated, "[t]here are doubtless many types of unfair business practices in
 20 which the concept of reliance, as discussed here, has no application." 46 Cal. 4th at 325 n.17. Plaintiff
 21 asserts her case falls into that category, but the Court disagrees. As in *Laster*, this case is based on
 22 affirmative misrepresentations. Accordingly, regardless of the label Plaintiff applies to Defendants'
 23 conduct ("unfair," "unlawful" or "fraudulent"), she must plead and prove reliance to prevail on her
 24 UCL claim.

25 In *In re Tobacco II*, the court stated that reliance is proved by "show[ing] that the
 26 misrepresentation was an immediate cause of the injury-producing conduct[.]" *Id.* at 326. A plaintiff
 27 can make this showing by demonstrating that, "in all reasonable probability," she would not have
 28 engaged in the injury-producing conduct absent the misrepresentation. *Id.* (quoting *Mirkin v.*

1 *Wasserman*, 5 Cal. 4th 1082, 1110-1111 (1993)). Defendants argue Plaintiff has failed to make that
 2 showing here because “she does not allege what she did in reliance upon the purported statements.”
 3 (Mem. of P. & A. in Supp. of Mot. at 10.) However, Plaintiff does so allege. (See FAC at ¶¶ 44, 46)
 4 (“Relying on Defendants’ false misrepresentations ... [Plaintiff] did not shop around for retailers that
 5 do not opt to charge the discretionary cost recovery fee.”) Contrary to Defendants’ assertion, these
 6 allegations are sufficient to survive Defendants’ motion to dismiss.

7 **D. The CIO, the Assurance of Voluntary Compliance (“AVC”) and the CTIA Consumer
 8 Code for Wireless Service (“CTIA Code”)**

9 Plaintiff attaches the CIO, the AVC and the CTIA Code to the FAC as Exhibits 3, 4 and 7,
 10 respectively. Defendants argue these documents apply to service only, and thus they do not support
 11 Plaintiff’s claims. Plaintiff does not rely on the AVC as a basis for her claim, (see Mem. of P. & A.
 12 in Opp’n to Mot. at 4), but rather attached it to the FAC “to show Verizon is a repeat offender.” (*Id.*)
 13 The role of the CTIA Code is less clear, but it, too, appears to serve as evidence in support of
 14 Plaintiff’s claims rather than a basis therefor. Accordingly, the Court will not address the scope of
 15 these documents in deciding the present motion.

16 In contrast, Plaintiff relies directly on the CIO to support her claims under the CLRA and the
 17 UCL. (See FAC at ¶¶ 64, 72.) Defendants argue the CIO cannot serve as a basis for Plaintiff’s claims
 18 because it applies to service only. In support of this argument, Defendants rely on two sections of the
 19 CIO. The first section is found in the first paragraph, which states: “We think it makes sense to help
 20 you understand your *wireless service* in a simple way, so here are answers to some questions we’ve
 21 heard customers ask.” (FAC, Ex. 3 at CIO-P.1) (emphasis added). Defendants also rely on the
 22 allegedly offending portion of the CIO, which states: “Your bill will include sales, excise and other
 23 taxes and governmental surcharges and fees that we are required by law to bill to customers.” (*Id.* at
 24 CIO-P.2.) Defendants argue that a reasonable person would understand “your bill” to refer to the
 25 monthly bill for wireless service, not the initial purchase of the phone.

26 Plaintiff does not address these portions of the CIO, but instead relies on other portions to
 27 support her position that the CIO applies to the purchase of her phone. Specifically, Plaintiff relies
 28 ///

1 ///

2 on those portions of the Customer Agreement (“CA”)¹ that mention a “wireless phone.” (See Mem.
3 of P. & A. in Opp’n to Mot. at 3.)

4 Clearly, the CIO and the CA, as a whole, provide information about both service and phones.
5 However, the allegedly offending portion of the CIO refers to “your bill.” Although Plaintiff argues
6 “your bill” could refer to the initial purchase of the phone, the more reasonable interpretation is that
7 it refers to the monthly bill for wireless service. The preceding paragraph of the CIO refers to “your
8 bill,” and states it will include charges that are “subject to change.” If “your bill” applied to the initial
9 purchase, the charges would not be subject to change, but would be fixed at the time of purchase.
10 Subsequent paragraphs of the CIO also refer to “your bill” as having “cycles,” and refer to a “first bill”
11 and “subsequent bills.” Each of these references supports the finding that the “bill” mentioned in the
12 allegedly offending portion of the CIO refers to the monthly service bill, not the bill for the purchase
13 of the phone. Accordingly, to the extent Plaintiff relies on the CIO as a basis for her claims, those
14 claims are dismissed.

15 **E. The FCA Claim**

16 In her fourth claim for relief, Plaintiff alleges Defendants violated the FCA, 47 U.S.C. §
17 201(b). This statute provides: “All charges, practices, classifications, and regulations for and in
18 connection with such communication service, shall be just and reasonable, and any such charge,
19 practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful[.]” 47
20 U.S.C. § 201(b). In a recent case, the Ninth Circuit found that before a plaintiff may bring a claim
21 for violation of this statute, the Federal Communication Commission (“FCC”) must “determine
22 whether a particular practice constitutes a violation for which there is a private right to compensation.”
23 *North County Communications Corp.*, 594 F.3d at 1158. The parties disagree as to whether that
24 requirement has been met in this case.

25 Plaintiff argues the FCC’s March 18, 2005 Second Report and Order, Declaratory Ruling, and
26 Second Further Notice of Proposed Rulemaking (“Report”) constitutes the “requisite predicate
27 determination” for Plaintiff’s claim. (Pl.’s Supp. Br. at 3.) That Report states,

28 ¹ The CA is attached to the CIO. (See FAC, Ex. 3.)

1 ///

2 Consistent with the Commission's prior findings, we reiterate that it is a misleading
 3 practice for carriers to state or imply that a charge is required by the government when
 4 it is the carriers' business decision as to whether and how much of such costs they
 5 choose to recover directly from consumers through a separate line item charge.

6 (FAC, Ex. 1 at ¶ 27.) However, there is no evidence that these findings apply to the "particular
 7 practice" at issue in this case. Rather, the Report, as a whole, is directed to "a Petition for Declaratory
 8 Ruling filed by the National Association of State Utility Consumer Advocates (NASUCA) seeking
 9 to prohibit telecommunications carriers from imposing any separate line item or surcharge on a
 10 customers' bill that was not mandated or authorized by federal, state or local law." (*Id.* at ¶ 1.) Like
 11 the CIO discussed above, the "bill" at issue in the report appears to be the customers' monthly service
 12 bill, not the bill for the purchase of the initial product. Accordingly, the Court rejects Plaintiff's
 13 argument that the Report provides the necessary prerequisite to Plaintiff's FCA claim.

14 The Court also rejects Plaintiff's argument that she may proceed with this claim absent a prior
 15 determination from the FCC that the practice at issue here is unlawful. In essence, Plaintiff asserts
 16 that fraud is unlawful, she has alleged a claim for fraud, therefore the practice at issue here is
 17 unlawful. However, there has been no determination by the FCC or any other administrative or
 18 adjudicative body that Defendants have committed fraud. Plaintiff's allegation of fraud is simply not
 19 enough to proceed with the FCA claim.

20 In light of *North County Communications Corp.*, the Court finds Plaintiff has failed to state
 21 a valid FCA claim. Accordingly, the Court grants Defendants' motion to dismiss this claim.

22 **F. Safe Harbor**

23 Next, Defendants argue that California Civil Code § 1656.1(a) and 18 Cal. Code Regs. §
 24 1585(b)(3) provide them with safe harbor from Plaintiff's statutory claims. Section 1656.1(a) states,
 25 "Whether a retailer may add sales tax reimbursement to the sales price of the tangible personal
 26 property sold at retail to a purchaser depends solely upon the terms of the agreement of sale." Cal.
 27 Civ. Code § 1656.1(a). The statute then goes on to identify situations that give rise to a presumption
 28 "that the parties agreed to the addition of sales tax reimbursement to the sales price of tangible
 29 personal property sold at retail to a purchaser[.]" *See* Cal. Civ. Code § 1656.1(a)(1)-(3). Regulation

1 1585(b)(3) states, “The retailer of the wireless telecommunication device is required to report and pay
 2 tax measured by the unbundled sales price of the device and may collect tax or tax reimbursement
 3 from its customer measured by the unbundled sales price.” Cal. Code Regs. tit. 18 § 1585(b)(3).

4 Neither the statute nor the regulation, however, applies to the practice at issue here. As
 5 Plaintiff makes clear, she is not challenging Defendants’ ability to *collect* the tax from consumers.
 6 Rather, she takes issue with the manner in which Defendants’ *represent* the tax to consumers, *i.e.*, that
 7 Defendants are required by law to collect the tax from consumers when in fact the law only permits
 8 Defendants to collect the tax, it does not require that they do so. Because neither Section 1656.1(a)
 9 nor Regulation 1585(b)(3) addresses this precise situation, Defendants are not entitled to safe harbor
 10 protection from Plaintiff’s statutory claims.

11 **G. Requested Relief**

12 Finally, Defendants argue Plaintiff’s requests for restitution and an injunction should be
 13 dismissed. Specifically, they argue Plaintiff’s request for restitution is an improper attempt to obtain
 14 a tax refund, and further, that restitution is unavailable because Defendants did not receive any unjust
 15 enrichment. Defendants also assert that Plaintiff’s request for an injunction is barred by the California
 16 Constitution.²

17 **1. Restitution**

18 In contrast to Defendants’ argument, Plaintiff states she is not attempting to obtain a tax refund
 19 in this case. Rather, she is attempting to recover the fees that Verizon imposed on her in connection
 20 with the purchase of her cell phones. Although Verizon used those fees to fulfill its obligation to pay
 21 sales tax, Plaintiff states she is not the taxpayer in this situation, therefore she is not seeking a tax
 22 refund. Plaintiff also argues that Defendants were unjustly enriched in that Plaintiff reimbursed them
 23 for the sales tax even though she was not required to do so. The Court finds both of these arguments
 24 persuasive, and thus declines to dismiss Plaintiff’s request for restitution.

25 ///

27 ² Defendants assert these arguments are currently under review by the California Supreme
 28 Court in *Loeffler v. Target Corp.*, 99 Cal. Rptr. 3d 866 (2009), and *Yabsley v. Cingular Wireless*, 101
 Cal. Rptr. 3d 655 (2009), and therefore request that the Court stay this action pending decisions in
 those cases. However, the Court declines to do so.

1 ///

2

3 2. Injunction

4 With respect to Plaintiff's request for an injunction, Defendants argue this request is barred
5 by Article XIII, § 32 of the California Constitution, which states, "No legal or equitable process shall
6 issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the
7 collection of any tax." Cal. Const. art. XIII, § 32. However, Defendants fail to explain how this
8 section applies to them, and they mischaracterize Plaintiff's requested injunction. Contrary to
9 Defendants' assertion, Plaintiff is not seeking to enjoin either the State or Defendants from collecting
10 sales taxes. Rather, she is seeking to enjoin Defendants "from continuing to make false and
11 misleading misrepresentations with respect to discretionary cost recovery fees which reimburse
12 retailers for bundled sales tax costs, but which retailers are not legally obligated to charge and are not
13 taxes on the consumer[.]" (FAC at 25.) This relief is not barred by the California Constitution, and
14 thus, the Court declines to dismiss it.

15

III.

16

CONCLUSION AND ORDER

17

 For these reasons, the Court grants in part and denies in part Defendants' motion to dismiss.
18 Specifically, the Court grants the motion to dismiss Plaintiff's claims to the extent they rely on the
19 CIO. The Court also grants Defendants' motion to dismiss Plaintiff's fourth claim for relief for
20 violation of the FCA. As to the remainder of Defendants' arguments, the motion is denied.

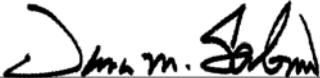
21

IT IS SO ORDERED.

22

 DATED: May 13, 2010

23


HON. DANA M. SABRAW
United States District Judge

24

25

26

27

28