

64272-3

64272-3

No. 64272-3-I

COURT OF APPEALS
 OF THE STATE OF WASHINGTON
 DIVISION ONE

TONY PRATT,

Appellant,

v.

OPENMARKET, INC.,

Respondent,

APPELLANT'S OPENING BRIEF

LAW OFFICES OF
 CLIFFORD A. CANTOR, P.C.
 Clifford Cantor, WSBA # 17893
 627 208th Ave. SE
 Sammamish, WA 98074-7033
 (425) 868-7813

Counsel for Appellant

FILED
 COURT OF APPEALS
 DIVISION ONE
 2010 JAN 29 11:51 AM
 SAMSAMISH, WA

Table of Contents

I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERROR	3
	Assignment of Error No. 1	3
	Issues Pertaining to Assignment of Error No. 1	3
	Assignment of Error No. 2.....	4
	Issues Pertaining to Assignment of Error No. 2	4
III.	STATEMENT OF THE CASE.....	5
	A. Plaintiff’s complaint.....	5
	B. OpenMarket’s Motion to Dismiss.....	8
	C. Plaintiff’s Motion for Leave to File an Amended Complaint	9
IV.	ARGUMENT	12
	A. The Trial Court Abused its Discretion in Denying Plaintiff’s Motion for Leave to File his Amended Complaint.....	12
	1. The trial court offered no explanation for denial of plaintiff’s motion to amend	14

2.	OpenMarket did not demonstrate, and there is no reason apparent in the record, that plaintiff’s proposed amended complaint would result in prejudice or would be futile	16
3.	OpenMarket did not demonstrate, and there is no reason apparent in the record, that Plaintiff’s proposed amended complaint would result in undue delay	17
4.	OpenMarket did not demonstrate, and there is no reason apparent in the record, that Plaintiff’s proposed amended complaint would result in unfair surprise or jury confusion.....	19
5.	OpenMarket did not demonstrate, and there is no reason apparent in the record, that Plaintiff’s request for leave to amend was untimely.....	20
B.	The Trial Court Erred in Granting OpenMarket’s Motion to Dismiss.....	21
1.	The “Alltel Contract” cannot be relied on as evidence	23
2.	Plaintiff sufficiently pleaded a claim for unjust enrichment.....	25
a.	Plaintiff sufficiently pleaded all elements..	25
b.	OpenMarket’s arguments for dismissal lacked merit.....	29
c.	A contract with a different party does not vitiate an unjust enrichment claim	29
d.	The trial court’s grounds for dismissal were incorrect	33

3.	Plaintiff sufficiently stated a claim for tortious interference with a contract.....	34
a.	Plaintiff’s allegations are sufficient to state a claim for tortious interference with a contract.....	35
b.	OpenMarket’s arguments for dismissal of the tortious interference claim are without merit	36
c.	The trial court’s stated reasons for dismissal had no legal basis	38
V.	CONCLUSION.....	39

Appendix A: Ruling on motion to dismiss

Appendix B: Ruling on motion to file amended complaint

Appendix C: *Armer v. OpenMarket*,
2009 WL 2475136 (W.D. Wash. July 27, 2009)

Table of Authorities

Cases

<i>Adams v. Allstate Ins. Co.</i> , 58 Wn.2d 659, 364 P.2d 804 (1961)	15
<i>Armer v. OpenMarket, Inc.</i> , No. C 08- 1731 RSL, 2009 WL 2475136 (W.D. Wash. July 27, 2009)	17 <i>et passim</i>
<i>Atchison v. Great W. Malting Co.</i> , 161 Wn.2d 372, 166 P.3d 662 (2007).....	22
<i>Bort v. Parker</i> , 110 Wn. App. 561, 42 P.3d 980 (2002).....	31
<i>Brown v. MacPherson's, Inc.</i> , 86 Wn.2d 293, 545 P.2d 13 (1975).....	23, 29
<i>Caruso v. Local Union No. 690</i> , 100 Wn.2d 343, 670 P.2d 240 (1983).....	12, 14, 17, 20
<i>Corrigal v. Ball & Dodd Funeral Home, Inc.</i> , 89 Wn.2d 959, 577 P.2d 580 (1978).....	22
<i>Donald B. Murphy Contractors, Inc. v. King County</i> , 112 Wn. App. 192, 49 P.3d 912 (2002).....	13, 15
<i>Doyle v. Planned Parenthood</i> , 31 Wn. App. 126, 132, 639 P.2d 240 (1983).....	20
<i>Foman v. Davis</i> , 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962).....	14, 15
<i>Fondren v. Klickitat County</i> , 79 Wn. App. 850, 905 P.2d 928 (1995).....	22
<i>Herron v. Tribune Pub. Co., Inc.</i> , 108 Wn.2d 162, 736 P.2d 249 (1987).....	13, 18

<i>Houser v. City of Redmond</i> , 91 Wn.2d 36, 586 P.2d 482 (1978).....	37
<i>Kinney v. Cook</i> , 159 Wn.2d 837, 154 P.3d 206 (2007)	22
<i>Kopff v. Battaglia</i> , 425 F. Supp. 2d 76 (D.D.C. 2006)	33, 38
<i>Manzarek v. St. Paul Fire & Marine Ins. Co.</i> , 519 F.3d 1025 (9th Cir. 2008)	15
<i>Mueller v. Miller</i> , 82 Wn. App. 236, 917 P.2d 604 (1996).....	15
<i>Pierce County v. State</i> , 144 Wn. App. 783, 185 P.3d 594 (2008)	29
<i>Rodriguez v. Loudeye Corp.</i> , 144 Wn. App. 709, 189 P.3d 168 (2008).....	16, 23
<i>Schnall v. AT&T Wireless Services, Inc.</i> , 2010 Wash. Lexis 61 (Wash. Jan. 21, 2010).	21
<i>Sea-Pac Co., Inc. v. United Food and Commercial Workers Local 44</i> , 103 Wn.2d 800, 699 P.2d 217 (1985).....	34
<i>Tagliani v. Colwell</i> , 10 Wn. App. 227, 517 P.2d 207 (1973)	14, 15
<i>USA Gateway Travel, Inc. v. Gel Travel, Inc.</i> , 2006 WL 3761259 (W.D. Wash. 2006).....	32
<i>Vazquez v. Washington</i> , 94 Wn. App. 976, 974 P.2d 348 (1999).....	37
<i>Walla v. Johnson</i> , 50 Wn. App. 879, 751 P.2d 334 (1988)	15
<i>Waste Management of Seattle, Inc. v. Utilities and Transp. Comm'n</i> , 123 Wn.2d 621, 869 P.2d 1034 (1994).....	12
<i>Wilson v. Horsley</i> , 137 Wn.2d 500, 974 P.2d 316 (1999)	17

Young v. Young, 164 Wn.2d 477, 191 P.3d 1258 (2008).....26

Statutes & Rules

Consumer Protection Act, RCW § 19.86.010 *et seq.*.....5, 21

Civil Rule 8.....8

Civil Rule 12.....22

Civil Rule 15.....12

Other Authorities

Wright & Miller, FEDERAL PRACTICE AND PROCEDURE (2d ed. 1990).....13

I. INTRODUCTION

The ubiquity of cell phones has given rise to a new industry where providers of “mobile content” send ringtones, jokes of the day, video games, dating tips, daily horoscopes, etc. to cell phones via text message. Much of this “mobile content” is sold by recurring monthly subscription. An “aggregator” like defendant-respondent OpenMarket, Inc., through an arrangement with the wireless carrier, places the charge on the customer’s cell phone bill.

Cell-phone users sometimes relinquish their telephone numbers—for example, if they move out of an area code. After a short waiting period, unused telephone numbers are “recycled” to new consumers. Sometimes those recycled numbers are encumbered with mobile content subscriptions of the previous owner. When plaintiff-appellant Tony Pratt signed up for new wireless service, he unknowingly received a “dirty” recycled number. He was then charged for mobile content that the previous owner had ordered.

The occurrence of these charges on Mr. Pratt’s cell phone bill was neither an accident nor an isolated incident. OpenMarket, despite its knowledge about these charges being assessed to certain recycled numbers, chose to ignore the protocols established to strip the monthly subscription charges from new consumers’ bills. OpenMarket did this so

that it could continue to receive its associated revenue share.

In an attempt to curb these practices and obtain compensation for these unauthorized charges, plaintiff filed a class-action complaint naming OpenMarket and his wireless carrier Alltel Communication, LLC as defendants.

Defendant OpenMarket filed a motion to dismiss, which the trial court granted *with prejudice*. Plaintiff Pratt then filed a motion for leave to file an amended complaint and vacate the trial court's judgment. Plaintiff attached his proposed amended complaint to the motion. The trial court denied plaintiff's leave to amend without explanation. Pratt then voluntarily dismissed Alltel as a defendant and timely filed this appeal.

The trial court erred by denying Pratt's motion for leave to amend and granting OpenMarket's motion to dismiss. The trial court's orders on both motions are cursory and contain no reasoning. In light of the trial court dismissal of OpenMarket *with prejudice*, and without written explanation, Pratt's understanding of the trial court's untranscribed comments from the bench is this: The trial court viewed OpenMarket as only a portal through which bills flowed to the wireless carriers and believed that OpenMarket was therefore immune from Pratt's claims. Neither this justification—if it accurately reflects the trial court's

reasoning—nor the arguments presented by OpenMarket, warranted dismissal with prejudice under Washington law.

The trial court committed further error when it denied Pratt leave to file an amended complaint. Although the proposed amendment set forth additional facts correcting the trial court's apparent misperception of OpenMarket's role in assessing charges for unauthorized mobile content, the trial court denied Pratt's motion without any stated justification. For the reasons that follow, this Court should reverse the trial court's orders dismissing OpenMarket and denying Pratt's motion for leave to file his amended complaint.

II ASSIGNMENTS OF ERROR

Assignment of Error No. 1

The trial court erred in denying plaintiff's motion for leave to file an amended complaint.

Issues Pertaining to Assignment of Error No. 1

Whether the trial court abused its discretion in denying plaintiff's motion for leave to file an amended complaint when the trial court's order provided no reason, legal or factual, and no reason is apparent from the record.

Whether granting plaintiff's motion for leave to file an amended complaint would be futile.

Whether granting plaintiff's motion for leave to file an amended complaint would result in prejudice to OpenMarket.

Whether granting plaintiff's motion for leave to file an amended complaint would result in undue delay, unfair surprise, or jury confusion.

Assignment of Error No. 2

The trial court erred in granting Defendant OpenMarket's motion to dismiss with prejudice.

Issues Pertaining to Assignment of Error No. 2

Whether the trial court relied on a proper factual and legal basis in granting OpenMarket's motion to dismiss.

Whether the trial court improperly relied on matters outside the pleadings when making its ruling on the motion to dismiss.

Whether the trial court failed to find that plaintiff alleged facts that, if proven true, would show that OpenMarket unjustly received money belonging to plaintiff, and whether under principles of equity and good conscience, OpenMarket should retain it.

Whether the trial court failed to find that plaintiff alleged facts that, if proven true, would show that OpenMarket tortiously interfered with plaintiff's contract with his wireless carrier by causing him to be charged for products and services that only the prior owner of the telephone number had authorized.

III. STATEMENT OF THE CASE

Plaintiff brings this appeal based on the trial court's error in granting OpenMarket's motion to dismiss and erred again in denying plaintiff's motion for leave to file his proposed amended complaint.

The trial court failed to explain its denial of leave to amend and did not provide any reasoning or legal authority to support its decision. Even though Washington law requires trial courts to ensure that their reasons for denying a motion to amend are apparent, the trial court here entered a short conclusory order with no explanation.

Likewise, based on plaintiff's interpretation of the trial court's minimal comments provided orally (but not transcribed) in granting Defendant's motion to dismiss, the trial court misapplied the law and the facts without proper support. On these grounds, plaintiff respectfully asks this Court to reverse the trial court's rulings on both motions and remand for further proceedings.

A. Plaintiff's Complaint

Plaintiff Pratt filed his complaint on March 20, 2009, seeking relief under three legal theories: (1) restitution; (2) tortious interference with a contract; and (3) violation of the Washington Consumer Protection Act, RCW § 19.86.010 *et seq.* (CP 11-14).

Plaintiff is a Michigan resident. In December 2008, he purchased new cell phone service for his personal use from an authorized Alltel sales representative. (CP 5). As part of the transaction, plaintiff agreed to pay Alltel a set fee each month for a period of twelve months in exchange for a service plan. Upon activating his account, Alltel provided plaintiff with a cellular phone number.

Plaintiff alleged in his complaint that the increase in cell phone usage has spawned a new industry that provides “mobile content” services. (CP 2). Providers of mobile content charge for their services directly through customers’ wireless carrier accounts.

Typically, mobile content providers turn to companies known as “aggregators,” including OpenMarket, to handle the billing process. OpenMarket, though its relationship with Alltel and other carriers, has the ability to assess charges for mobile content on the billing statements issued to consumers through their respective wireless carriers. (CP 2).

Plaintiff was unaware that the telephone number Alltel provided him was a “recycled ‘dirty’ phone number—one saddled with preexisting obligations, encumbrances, and billing arrangements for products and services purportedly purchased by the previous cell phone subscriber assigned to that number.” (CP 5-6).

Beginning in January 2009 and continuing through March 2009, Alltel charged plaintiff's account for multiple unwanted mobile content services. (CP 6). OpenMarket processed these charges for its mobile content merchant and client PredictoMobile, LLC ("Predicto"). (CP 69).

At no time did plaintiff authorize the purchase of the products and services processed by OpenMarket, nor did he consent to OpenMarket sending the corresponding text messages to his cellular telephone number. (CP 6).

When plaintiff became aware of the unauthorized charges, he contacted OpenMarket's client Predicto. Predicto informed plaintiff that those specific services were authorized to be charged to plaintiff's cell phone number in October 2008, two months before plaintiff signed up with Alltel and received his number. (CP 6). Thus, it was impossible that plaintiff authorized the charges that OpenMarket placed on his bill. Plaintiff never received a full refund for these charges. (CP 69).

These unauthorized charges form the basis for plaintiff's suit in which he seeks to recoup the amount he was improperly charged. Plaintiff's claim does not involve signing up for wireless service without knowledge of the actual price or falling victim to deceptive marketing. Instead, Pratt simply signed up for new phone service and was issued a phone number burdened with mobile content subscriptions.

Plaintiff's complaint properly stated a claim upon which relief can be granted under one or more legal theories—or, in the alternative, the proposed amended complaint properly stated such a claim.

B. OpenMarket's Motion to Dismiss

Defendant OpenMarket filed its motion to dismiss on May 13, 2009. OpenMarket argued that plaintiff's complaint failed to state a claim as required by CR 8(a) and failed to allege facts entitling him to relief. (CP 26).

Specifically, OpenMarket argued: (1) that the "Alltel Contract" required plaintiff to settle disputes exclusively by arbitration or in small claims court; (2) that plaintiff's unjust enrichment claim against OpenMarket should be dismissed because plaintiff had a contract with Alltel and fails as a matter of law (CP 27); (3) that plaintiff's tortious interference claim should be dismissed because OpenMarket did not cause a breach of plaintiff's contract and fails as a matter of law (CP 30-31); and (4) that plaintiff cannot maintain a CPA claim (CP 32-33).

The trial court granted OpenMarket's motion to dismiss, *with prejudice*, through a cursory order without any written explanation of the court's reasoning. (CP 105-106; *see* Appendix A). Based on the untranscribed comments of the trial judge, plaintiff understood that the trial court granted Defendant's motion because the court viewed

OpenMarket as only a portal through which bills flowed to the cell carriers, and that being that type of conduit is a legitimate and unactionable business model that required dismissal of all counts. (CP 108-109).

C. Plaintiff's Motion for Leave to File an Amended Complaint

After the trial court granted OpenMarket's motion to dismiss, plaintiff sought leave to amend his complaint with additional facts demonstrating that OpenMarket was more than a mere portal through which billing flowed and that its wrongful conduct was done with knowledge. (CP 109). Plaintiff attached a complete draft of his proposed amended complaint with his motion. (CP 112-128).

Plaintiff's proposed amended complaint contained more detailed allegations concerning OpenMarket's conduct. The amended complaint explained how OpenMarket's operations wrongfully charged and collected money from plaintiff's recycled number.

The proposed amended complaint pleaded that OpenMarket is not merely a passive middleman, but an active participant because it is responsible for placing charges on plaintiff's bill, and OpenMarket never attempted to remove the charges from the phone number once it was

aware that the number had been recycled. (CP 117-118).¹ Additionally, OpenMarket, as the aggregator, retains a majority portion of the balance from the charges as its “revenue share,” and in turn, remits the remainder to its content provider client Predicto. (CP 114).

The proposed amended complaint further alleged that OpenMarket knowingly ignores the protocol established by Alltel to prevent precisely this type of problem, and instead “elects to maintain the system through which cell phone users are billed for mobile content services ordered not by them but by the previous subscribers formerly assigned their cell phone numbers.” (CP 114). Fundamentally, unauthorized charges arise as a result of aggregators and carriers failing to follow established protocol to remove recurring charges upon deactivation of a number. (CP 116).

Moreover, the proposed amended complaint alleges that the Federal Communications Commission mandates that deactivated cell phone numbers be set aside for a set period of time once they remitted by

¹ “OpenMarket, as an aggregator, is in a unique position to stop this conduct because (i) OpenMarket has contacts with all of its clients—*i.e.*, the mobile content providers—including PredictoMobile, which supplied the content that the previous user of plaintiff’s cell phone number supposedly ordered; (ii) OpenMarket has contacts with its carrier partners such as Alltel; (iii) OpenMarket received notice that the number later assigned to plaintiff had been deactivated and was in the waiting pool; and (iv) it was OpenMarket that attached the monthly recurring charges to that cell phone number in the first place and had an obligation and easy ability to remove the charges once the number became deactivated.” (CP 117-18).

the previous owner. (CP 116). Therefore, the complaint alleges that OpenMarket, as an aggregator, is required to ensure mobile content charges are no longer processed for cell phone numbers on the deactivation list. (CP 116-117).

As a result of this burden, other aggregators, such as m-Qube, Inc., “have similarly been sued and held responsible for their failure to discontinue bills to the new recipients of previously deactivated cellular phone numbers.” (CP 117). The proposed amended complaint additionally alleged that OpenMarket is responsible for removing the recurring charges after it receives notice that the phone number is deactivated and “in the waiting pool;” however, OpenMarket failed to do so in the interest of its own profit. (CP 117-118).

In short, plaintiff’s proposed amended complaint contained detailed allegations of fact that OpenMarket is more than a mere portal for the billing of mobile content charges. If proved, plaintiff’s allegations would entitle him to relief. The trial court improperly denied plaintiff’s motion for leave to file his amended complaint without written or oral explanation, and issued an order devoid of legal or factual reasoning. (CP 146; *see* Appendix B).

IV. ARGUMENT

A. **The Trial Court Abused its Discretion in Denying Plaintiff's Motion for Leave to File His Amended Complaint**

This Court should reverse the trial court's denial of plaintiff's motion for leave to file his amended complaint as an abuse of discretion.

Review of a trial court's denial of a motion for leave to amend begins with Civil Rule 15(a), which explicitly provides that leave to amend "shall be freely given when justice so requires." *Accord, Caruso v. Local Union No. 690*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983) ("[l]eave to amend should be freely given 'except where prejudice to the opposing party would result'"). As a matter of construction, "shall" means shall; it imposes a mandatory duty. *Waste Management of Seattle, Inc. v. Utilities and Transp. Comm'n*, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994) ("[t]he use of the word 'shall' imposes a mandatory duty").

Courts' adherence to this rule is necessary to enforce "proper decisions on the merits, to provide parties with adequate notice of the basis for claims and defenses asserted against them, and to allow amendment of the pleadings except where amendment would result in prejudice to the opposing party." *Caruso*, 100 Wn.2d at 349. "The purpose of pleadings is to facilitate a proper decision on the merits, and

not to erect formal and burdensome impediments to the litigation process.”

Id.

Courts may consider undue delay, unfair surprise, and jury confusion as factors in considering whether an amendment would cause prejudice to the nonmoving party. *Herron v. Tribune Publ. Co.*, 108 Wn.2d 162, 165, 736 P.2d 249, 253 (1987). *See also Donald B. Murphy Contractors, Inc. v. King County*, 112 Wn. App. 192, 199, 49 P.3d 912 (2002) (appellate courts have upheld a trial court’s decision to deny a motion to amend when witnesses have already been determined and disclosed or where defenses are based on the moving party’s original claims).

“[T]he fact that the material in the amended complaint could have been included in the original complaint will not preclude amendment, absent prejudice to the nonmoving party.” *Herron*, 108 Wn.2d at 166 (no abuse of discretion in denying leave to amend because the lawsuit had “been pending for a substantial period of time” and would “in effect ... broaden the issues”).

Similarly, that an amendment might increase a defendant’s exposure to potential liability is not the type of prejudice that warrants denial of leave to amend a complaint. *See Wright & Miller, FEDERAL PRACTICE AND PROCEDURE* § 1487 (2d ed. 1990).

This Court should review the trial court's decision on the motion for leave to amend under an abuse of discretion standard. *See Caruso*, 100 Wn.2d at 351. Courts have repeatedly found an abuse of discretion where the trial court denied motions to amend following dismissal of a petitioner's complaint for failure to state a claim. *See Tagliani v. Colwell*, 10 Wn. App. 227, 234, 517 P.2d 207 (1973); *Foman v. Davis*, 371 U.S. 178, 179, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962).

The additional facts set forth in plaintiff's proposed amended complaint would not unduly prejudice OpenMarket and plaintiff did not intentionally exclude them from the original complaint. Rather, plaintiff believes that the original complaint is sufficient to state a cause of action against OpenMarket. The trial court's dismissal of plaintiff's original complaint that gave rise to the need to plead additional facts.

1. The trial court offered no explanation for denial of plaintiff's motion to amend

The United States Supreme Court and Washington Courts have held that denying a motion for leave to amend without offering stated reasons, or when the reasons are not readily apparent, is an abuse of

discretion on the part of the trial court.² *Tagliani*, 10 Wn. App. at 233. In

Tagliani, the court held:

In the absence of any apparent or declared reason—such as undue delay, bad faith ... repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party ... futility of amendment, etc.—the leave sought should, as the rules require, be “freely given.” ... [O]utright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Tagliani, 10 Wn. App. at 233 (citing *Foman*, 371 U.S. at 182).³ Case law

suggests that a trial court may properly deny leave to amend without

“explicit explanation” only if the reason is “apparent” from the record.

² “Our rule [15(a)] is the exact counterpart of the provision in the Federal rules of civil procedure ...” *Adams v. Allstate Ins. Co.*, 58 Wn.2d 659, 672, 364 P.2d 804 (1961)

³ See also *Donald B. Murphy Contractors, Inc.*, 112 Wn. App. at 199 (citing *Foman*, 371 U.S. at 182) (the trial court’s reasons for denying any motion for leave to amend must be “apparent in light of circumstances shown in the record”). *Accord Walla v. Johnson*, 50 Wn. App. 879, 883, 751 P.2d 334 (1988) (“Because the trial court ... declined to state a reason on the record for its denial of the motion to amend the pleadings, we cannot ascertain whether its decision was based on untimeliness of the motion or on some other reason. We hold that the trial court abused its discretion in denying leave to amend the answer.”); *Mueller v. Miller*, 82 Wn. App. 236, 252, 917 P.2d 604 (1996) (“a denial without an explanation is not an exercise of discretion, but an abuse of discretion”); *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1034 (9th Cir. 2008) (“[a]n outright refusal to grant leave to amend without a justifying reason is, however, an abuse of discretion”).

Rodriguez v. Loudeye Corp., 144 Wn. App. 709, 730, 189 P.3d 168 (2008).

In this case, the trial court's order gave no reason why the court denied plaintiff's motion to amend and there are no reasons "apparent" in the record. (CP 146; *see* Appendix B). The trial court's order stated simply that it had "considered the parties' submissions" and "DENIES Plaintiff Pratt's motion to vacate judgment and allow amended complaint." *Id.* The order provided no legal or factual reasoning. *Id.*

Because there was no reason apparent in the record, the trial court abused its discretion by failing to support its decision with reasoning. *Rodriguez*, 144 Wn. App. at 726. Thus, the decision of the trial court denying leave to amend should be reversed.

2. OpenMarket did not demonstrate, and there is no reason apparent in the record, that plaintiff's proposed amended complaint would result in prejudice or would be futile

The trial court's denial of plaintiff's motion to amend for no identifiable reason is reversible error. However, even if the trial court had attempted to articulate a justification, no such justification could be affirmed.

In evaluating a motion for leave to amend, the party opposing the motion must show that prejudice will result if the court grants the motion;

prejudice is the key factor for denial of a motion to amend. *Caruso*, 100 Wn.2d at 350-351 (respondent was unable to show any specific objections that would reveal prejudiced with addition of defamation claim to the original complaint). The record provides no evidence that OpenMarket demonstrated prejudice in its opposition to plaintiff's motion for leave to file the amended complaint. OpenMarket did not meet its burden.

And, plaintiff's motion to amend would scarcely have been futile. In *Armer v. OpenMarket*, a federal case pending in the Western District of Washington involving nearly identical claims to those presented here, Judge Lasnik applied Washington law and denied OpenMarket's motion to dismiss. The court held that the plaintiff properly pleaded viable claims for unjust enrichment and tortious interference with a contract, among others. *Armer v. OpenMarket, Inc.*, No. C 08-1731 RSL, 2009 WL 2475136, at *2 (W.D. Wash. July 27, 2009) (CP 151-58; *see* Appendix C).

3. OpenMarket did not demonstrate, and there is no reason apparent in the record, that plaintiff's proposed amended complaint would result in undue delay

Granting plaintiff's motion would not have prejudiced OpenMarket by causing undue delay in the proceedings. It is axiomatic that amendments are "by their nature delayed beyond the original pleading." *Wilson v. Horsley*, 137 Wn.2d 500, 514, 974 P.2d 316 (1999)

(Sanders, J., concurring in part and dissenting in part). But delay alone is not a sufficient reason to deny a motion to amend unless it forces prejudice on the opposing party. *Herron*, 108 Wn.2d at 165 (“timing of a motion to amend pleadings ... may result in prejudice but otherwise is not dispositive”).

Here, plaintiff timely filed a motion to amend following the trial court’s dismissal of his complaint. The case was in its infancy. Discovery had yet to begin. Neither had class certification proceedings. Plaintiff attached his amended complaint to the motion for leave to amend and was prepared to file immediately upon leave of the trial court.

OpenMarket, in its opposition to plaintiff’s motion, failed to demonstrate undue delay that could cause prejudice. Likewise, there is no reason apparent in the record that amendment of the pleadings could have cause undue delay.

4. OpenMarket did not demonstrate, and there is no reason apparent in the record, that plaintiff's proposed amended complaint would result in unfair surprise or jury confusion ⁴

Neither the record nor OpenMarket's opposition to plaintiff's motion for leave to file his amended complaint demonstrates that the additional facts presented in the proposed amended complaint would have causing prejudice to OpenMarket through unfair surprised. OpenMarket is aware of its receipt of deactivated cellular telephone numbers and the role these numbers play in its core business practices. (CP 116-17).

Given the early stage in this litigation, there is no possibility of jury confusion. No discovery or class certification proceedings had even begun. There is no tenable basis for prejudice based on jury confusion.

The record demonstrates that OpenMarket failed to meet its burden of showing prejudice. Therefore, this Court should reverse and direct the trial court to allow plaintiff to file his amended complaint and vacate the trial court's judgment entered.

⁴ While OpenMarket did not directly address or raise unfair surprise or jury confusion as reasons for denying plaintiff's motion for leave to amend, plaintiff presents the absence of these factors for this Court's *de novo* review.

5. OpenMarket did not demonstrate, and there is no reason apparent in the record, that plaintiff's request for leave to amend was untimely

OpenMarket's final argument opposing leave to amend was that plaintiff's motion was untimely because plaintiff did not amend his complaint in response to OpenMarket's motion to dismiss. OpenMarket's argument, unsupported by any case law, is misplaced in that it requires plaintiff to amend his complaint prior to the parties fully briefing OpenMarket's motion.

In accord with Rule 15(a), Washington courts have only found motions for leave to amend untimely after the completion of discovery or after a ruling on summary judgment. *Doyle v. Planned Parenthood*, 31 Wn. App. 126, 131, 132, 639 P.2d 240 (1983) (motion to amend complaint that adding a new claim for strict liability after adverse grant of summary judgment was considered untimely). The Washington Supreme Court found no prejudice by reason of undue delay when a moving party sought leave to amend more than five years after the original complaint was filed. *Caruso*, 100 Wn.2d at 349-350 (“[a]lthough 5 years 4 months is a long period of time and as a practical matter the risk of prejudice increases with time, the delay alone in the instant case does not rise to the level of prejudice required”).

When the trial court dismissed OpenMarket with prejudice, this case had just begun. There had been no discovery, no ruling on class certification or any other motion, and no other pretrial proceedings.

OpenMarket failed to meet its burden to show prejudice. There is no apparent reason in the record to support the trial court's denial of plaintiff's motion for leave to file his amended complaint. Accordingly, the trial court abused its discretion and should be reversed.

B. The Trial Court Erred in Granting OpenMarket's Motion to Dismiss

The trial court erred in granting OpenMarket's motion to dismiss. (CP 105-06; *see* Appendix A). Considering only the facts set forth in plaintiff's original complaint, plaintiff sufficiently pleaded three causes of action: (1) unjust enrichment, (2) tortious interference with a contract, and (3) violation of the Washington Consumer Protection Act ("CPA").⁵ The trial court's possible reason for dismissal—that the court viewed OpenMarket as nothing more than a portal through which bills flowed—

⁵ Plaintiff properly pleaded a CPA claim at the time of filing his complaint. However, the Washington Supreme Court recently clarified the extraterritorial application of the CPA to out-of-state persons. *Schnall v. AT&T Wireless Services, Inc.*, 2010 Wash. Lexis 61 (Wash. Jan. 21, 2010). In light of this ruling, plaintiff does not seek this Court's review of the trial court's dismissal of his CPA claim.

and the arguments that OpenMarket presented in its motion to dismiss provided no justification for the trial court's decision.

An appellate court reviews a CR 12(b)(6) dismissal *de novo*. *Atchison v. Great W. Malting Co.*, 161 Wn.2d 372, 376, 166 P.3d 662 (2007) (“[w]e review CR 12(b)(6) rulings de novo”). Dismissal is proper “only if it appears beyond a reasonable doubt that no facts exist that would justify recovery.” *Id.*

It is the defendant's burden to establish “beyond doubt” that the plaintiff can prove no set of facts entitling the plaintiff to relief. *Fondren v. Klickitat County*, 79 Wn. App. 850; 905 P.2d 928 (1995) (quoting *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 961, 577 P.2d 580 (1978)). “A motion to dismiss is granted sparingly and with care and, as a practical matter, only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.” *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007) (internal quotation marks omitted).

In ruling on a CR 12(b)(6) motion to dismiss, “[t]he court presumes all facts alleged in the plaintiff's complaint are true and may consider hypothetical facts supporting the plaintiff's claims.” *Kinney*, 159 Wn.2d at 842. However, “no matter outside of the pleadings may be considered, and the court in ruling on [a CR 12(b)(6) motion] must

proceed without examining depositions and affidavits ...” *Brown v. MacPherson’s, Inc.*, 86 Wn.2d 293, 297, 545 P.2d 13 (1975) (*en banc*) (citations omitted).

In limited circumstances, a court may be permitted to consider “[d]ocuments whose contents are alleged in the complaint but which are not physically attached to the pleading ...” *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 726, 189 P.3d 168 (2008). On a motion to dismiss, a court may also “take judicial notice of public documents if their authenticity cannot be reasonably disputed ...” *Id.* at 725-726.

Under this standard of review, the trial court erred in granting OpenMarket’s motion to dismiss.

1. The “Alltel Contract” cannot be relied on as evidence

As a preliminary matter, the so-called “Alltel Contract” should not have been considered by the trial court and should be ignored by this Court on appeal. OpenMarket argued in its motion to dismiss that Exhibit 2 to the Thomas declaration was plaintiff’s contract with Alltel that was “repeatedly reference[d] in the Complaint.” (CP 23). The so-called “Alltel Contract” is, by OpenMarket’s own admission, a Verizon Wireless Customer Agreement—not an Alltel agreement—downloaded by OpenMarket’s attorneys more than five months after the date that the complaint alleges plaintiff signed up for wireless service. When plaintiff

signed up for wireless service, Alltel was a separate company from Verizon.⁶ (CP 5, 23).

Moreover, OpenMarket added the terms “ALLTEL Contract [page #]” to each page of the agreement, giving the false impression to the trial court that the contract governed Alltel subscribers. (CP 53-62). The “Alltel Contract”—i.e., a Verizon Contract—contains no evidence of Pratt’s signature or any other indication that he agreed to its terms, and on its face was not Alltel’s operative form agreement at the time plaintiff contracted for his wireless service through Alltel. *See id.*

The federal court in *Armer v. OpenMarket* faced an almost identical situation in which OpenMarket attached to its motion to dismiss a set of “Terms & Conditions” pulled from the internet. *Armer v. OpenMarket, Inc.*, 2009 WL 2475136, *2 (W.D. Wash. 2009) (Lasnik, J.) (CP 151-58; *see* Appendix C). The court there held:

OpenMarket has provided no evidence that the thirteen-page “Terms & Conditions” applies to the cellular telephone plans purchased by plaintiffs, that it was in effect when plaintiffs acquired service, or that plaintiffs agreed to or accepted the

⁶ OpenMarket attached a different contract purportedly applicable to plaintiff to its reply to plaintiff’s opposition to OpenMarket’s motion to dismiss. Regardless of whether this contract is applicable, it is improper to raise new arguments in a reply. The proper course of action would have been to withdraw its motion to dismiss and refile with the new contract. As OpenMarket did not withdraw its motion, the new contract was not properly before the trial court and should not have been considered by the trial court, nor is it properly before this Court.

terms. Plaintiffs have not alleged, and the Court will not presume, that their agreement with Sprint was identical – or even substantially similar – to the ‘Terms & Conditions’ that were published on the website.

Id.

Plaintiff and other Alltel customers living in 15 states have had or are in the process of having their wireless services transferred from Verizon to AT&T Mobility, and were advised that “the terms and conditions of your [Alltel] contract are still valid.” (CP 88).

By all appearances, this notification refers only to contracts with Alltel and not future contracts with Verizon. Therefore, the so-called “Alltel Contract” that OpenMarket submitted—which is a Verizon contract—is not a document that the trial court should have considered. Nor is it properly before this Court on *de novo* review.

2. Plaintiff sufficiently pleaded a claim for unjust enrichment

a. Plaintiff sufficiently pleaded all elements

Plaintiff adequately pleaded an unjust enrichment claim. The trial court erred in dismissing it.

“Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of

fairness and justice require it.” *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008) (en banc).

To properly plead a claim for unjust enrichment, three elements are required: “(1) the defendant receives a benefit, (2) the received benefit is at the plaintiff’s expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment.” *Id.* at 484-485. Here, plaintiff properly pleaded all three elements.

First, plaintiff’s complaint states that “OpenMarket has received and retains money belonging to the plaintiff ... resulting from its causing cellular telephones to be billed by their cellular carriers for mobile content services authorized to be purchased by the previous subscriber assigned such telephone numbers.” (CP 11). The complaint describes how OpenMarket receives this money as an intermediary between wireless carriers and companies that produce and provide mobile content to consumers. (CP 2). The complaint alleged that OpenMarket’s “revenue share” of the mobile content services offered by its content-provider clients and billed to consumers by its wireless carrier clients, such as Alltel, is a monetary benefit conferred by plaintiff. (CP 2, 7). The complaint further alleges that OpenMarket keeps a sizable share of the money Alltel collects from its customers, and remits the remainder to its content-provider clients. (CP 2-3, 7).

Second, plaintiff's complaint sufficiently alleged that OpenMarket received a benefit from plaintiff. The complaint alleged that plaintiff was charged for multiple unwanted and unauthorized mobile content services that were purportedly "authorized" by the prior owner of plaintiff's recycled number. (CP 6). Because OpenMarket received a "revenue share" of what plaintiff paid and plaintiff has not received a refund, plaintiff sufficiently alleged that OpenMarket directly benefited at plaintiff's expense. (CP 6). The complaint alleged that OpenMarket's conduct allowed it to reap substantial gain from the monetary benefit conferred by plaintiff and the proposed class as a whole. (CP 3, 7, 8).

Third, the complaint alleged that OpenMarket was aware of and appreciated the substantial monetary benefits conferred by plaintiff and the proposed class. The complaint set forth OpenMarket's relationship with the wireless carriers and how its compensation stemmed from a revenue share of each mobile content transaction that it processed, which did not permit OpenMarket to deny receiving money from unauthorized mobile content charges. (*See* CP 2-3, 7). Moreover, the complaint alleged that because OpenMarket tracked each mobile content transaction by the consumer's telephone number, OpenMarket was or should have been aware that it received monetary benefits from the well-known industry problem of dirty recycled numbers. (CP 3).

Last, plaintiff properly pleaded facts in his complaint that demonstrate that OpenMarket's enrichment was "unjust." The complaint alleged that OpenMarket had full knowledge that recycled numbers are assigned to customers, the same numbers that are encumbered with pre-existing billing obligations for mobile content subscriptions. (CP 3). The complaint alleged that OpenMarket contributed to the creation and maintenance of a system where OpenMarket systematically, repeatedly, and without authorization processes charges for mobile content never authorized by the current holder of the affected numbers. (CP 5, 7).

Moreover, the complaint alleged that OpenMarket, in its attempt to reap larger gains, does not employ procedures—such as confirming that a number is "recycled" before processing charges—to protect consumers from these wrongful charges. (CP 5, 8). Regarding plaintiff, it was OpenMarket that processed the charge to him for mobile content, yet he was informed by OpenMarket's client Predicto that he supposedly consented to the charges two months before the date he signed up for wireless service. (CP 2, 6). Plaintiff adequately pleaded that, under these circumstances, OpenMarket's retention of its revenue share rose to the level of being "unjust." The trial court erred by dismissing plaintiff's claim for unjust enrichment.

**b. OpenMarket's arguments for dismissal
lacked merit**

OpenMarket argued in the trial court that plaintiff's unjust enrichment claim failed because (1) the existence of the Alltel Contract prevented such a claim; and (2) plaintiff did not adequately set forth the requisite elements for such a claim. OpenMarket's arguments were fundamentally flawed as they relied on the Alltel Contract, misapplied relevant authority, and studiously overlooked the allegations in the complaint stated above.

**c. A contract with a different party does not vitiate
an unjust enrichment claim**

OpenMarket's primary argument below was that the existence of the "Alltel Contract"⁷ barred plaintiff's claim for unjust enrichment because the contract covered the subject matter of the dispute and, under the terms of the "Alltel Contract," all disputes are to be arbitrated. This argument has no merit.

A party to an express contract cannot bring an unjust enrichment claim on the same subject. *Pierce County v. State*, 144 Wn. App. 783, 829-831, 185 P.3d 594 (2008) ("a party to an express contract cannot bring

⁷ As previously discussed, all of Defendant's arguments based upon the "Alltel Contract" should be disregarded in their entirety. *See Brown*, 86 Wn. 2d at 297.

an action on an implied contract relating to the same subject matter, in contravention of the express contract”).

Ruling on nearly identical facts, the federal court in *Armer v. OpenMarket* found that OpenMarket was not a party to the contracts between plaintiffs and their wireless carrier, and that there was “no evidence that recognizing an implied duty in these circumstances would contravene any provision of the express contracts ... The fact that plaintiffs have contracts with Sprint is irrelevant to their claim against OpenMarket.” *Armer v. OpenMarket*, 2009 WL 2475136, *2 (W.D. Wash. 2009) (CP 151-58; *see* Appendix C). The court there clarified:

[t]he service agreements with Sprint give plaintiffs no contractual rights against OpenMarket. This is exactly the situation for which an unjust enrichment claim was designed. If the Court were unwilling to imply a contract simply because plaintiffs have a contractual claim against Sprint, OpenMarket would be able to retain benefits to which it may have no right in law or equity.

Id.

Here, there is simply no contract between plaintiff and OpenMarket that covers the subject matter of this suit or that would force plaintiff to arbitrate. The “Alltel Contract,” which underlies OpenMarket’s motion to dismiss, was not between plaintiff and OpenMarket. The contract is with Alltel.

OpenMarket's motion to dismiss failed to identify any language in plaintiff's actual contract with Alltel that would require arbitration of plaintiff's claims against OpenMarket or any language "explicitly cover[ing]" plaintiff's allegations against OpenMarket. There is no contractual language in which plaintiff agreed that OpenMarket would serve as an intermediary to charge plaintiff for mobile content ordered by the previous owner of the plaintiff's recycled cell-phone number.

OpenMarket failed to identify an express provision outlining plaintiff's remedies or obligations in the event he is charged for unauthorized third-party mobile-content services. Plaintiff would be unable to bring a breach-of-contract claim against OpenMarket; and OpenMarket would be unable to bring a breach-of-contract claim against plaintiff under the customer agreement with Alltel. Nor could OpenMarket sue plaintiff under his Alltel contract for failure to pay his wireless bill. *See Armer v. OpenMarket*, 2009 WL 2475136, *2 (CP 151-58; *see* Appendix C) ("OpenMarket is not a party to the contracts between plaintiffs and defendant Sprint, and there is no evidence that recognizing an implied duty in these circumstances would contravene any provision of the express contracts. To bar a claim for unjust enrichment simply because a contract touching on the "subject matter" exists would be illogical"). *See also Bort v. Parker*, 110 Wn. App. 561, 572, 42 P.3d 980

(2002). Therefore, plaintiff is not prohibited from recovery under a claim for unjust enrichment against OpenMarket because there is no contract between plaintiff and OpenMarket.

Perhaps recognizing the weakness of its theory that OpenMarket is a party to the Alltel Contract, OpenMarket argues that even a non-signatory can use an entirely separate contract to defeat an unjust enrichment claim. OpenMarket relied exclusively on *USA Gateway Travel, Inc. v. Gel Travel, Inc.*, 2006 WL 3761259, at *6 (W.D. Wash. 2006) for this argument.

In *USA Gateway Travel*, the court dismissed an unjust enrichment claim because the non-signatory defendant was found liable under the plaintiff's *contract theory* on the ground that she was personally liable for breaching the company's contracts. *Id.* at *15-20 (emphasis added). The court held she could not be liable for unjust enrichment *in addition to* breach of contract. *Id.* (emphasis added).

OpenMarket pressed this same argument in *Armer v. OpenMarket*, where the federal court found OpenMarket's citation to and summary of *USA Gateway Travel* was "misleading" and unpersuasive. *Armer v. OpenMarket*, 2009 WL 2475136, *4 (CP 151-58; *see* Appendix C). Plaintiff properly pleaded a claim for unjust enrichment.

d. The trial court's grounds for dismissal were incorrect

The trial court's reasons to grant OpenMarket's motion to dismiss are unwritten and untranscribed. (CP 105-06; *see* Appendix A).

Plaintiff's understanding, based on the trial court's comments at the motion hearing, is that the trial court's reasoning was not based on the arguments that OpenMarket made in its motion. Instead, plaintiff's understanding is that the trial court based its decision on the assertion that OpenMarket is merely a portal through which bills flowed to the wireless carriers and that this is a legitimate and unactionable business model. (CP 108-109).

As alleged in the complaint and further expanded upon in the proposed amended complaint, OpenMarket is more than a simple billing portal, and in fact is an active participant that profits from every transaction with full knowledge that a significant percentage of the charges are unauthorized and improperly applied.

Plaintiff's research uncovered no support in Washington case law for the trial court's singular position. However, there is federal case law to the contrary, concerning a similar business model. *See Kopff v. Battaglia*, 425 F. Supp. 2d 76, 92 (D.D.C. 2006) (in a fax spam case, "courts have extended liability to the company that transmits the

a. Plaintiffs allegations are sufficient to state a claim for tortious interference with a contract

It is uncontested that plaintiff has alleged the existence of a valid contract. OpenMarket's motion to dismiss acknowledges that plaintiff and had a contract with his wireless carrier, Alltel, for cell-phone service, under which the carriers promised to bill only for authorized products or services. (CP 5, 11-12, 26). Plaintiff sufficiently alleged the first element.

Plaintiff's complaint next alleges that OpenMarket was aware of the contractual relationships between plaintiff and Alltel because OpenMarket not only has a relationship with the wireless carrier but also receives compensation based on its revenue share of each mobile content transaction that it processes. (CP 23, 2-3, 7). Plaintiff sufficiently alleged the second element.

Plaintiff also alleged the third element in his complaint when pleading that OpenMarket "intended to and did induce a breach or disruption of the contractual relations" and that "OpenMarket intentionally interfered with said contractual relationships through improper motives and/or means by knowingly and/or recklessly repeatedly causing unauthorized charges to be placed on the cellular telephone bills" of plaintiff and the proposed class. (CP 12).

The complaint further set forth facts expounding on how OpenMarket's intentional behavior interfered with the contract and exactly how it was breached, including that: (1) OpenMarket was aware that recycled numbers were given to wireless customers, and that these numbers were encumbered with mobile content subscriptions from the previous owner (CP 3); and (2) OpenMarket did nothing to mitigate these effects and, instead, aided in the creation and maintenance of system that charged the current holder with unauthorized mobile content. (CP 5-7).

Lastly, plaintiff's complaint alleged that OpenMarket's charging and collecting significant sums of money from plaintiff and the Class resulted in harm to them. (CP 5, 6, 7, 8). Accordingly, plaintiff has adequately pleaded a cause of action against OpenMarket for tortious interference with a contract and OpenMarket's arguments to the contrary are without merit.

b. OpenMarket's arguments for dismissal of the tortious interference claim are without merit

OpenMarket's sole legal argument in the motion to dismiss concerning tortious interference posited that OpenMarket is not a "stranger" to the contract and, as a result, is immune from liability for tortious interference. OpenMarket's contention has no basis in law.

A party to a contract cannot be liable for tortious interference with its own contract because the remedy vis-à-vis two contracting parties is a breach-of-contract action. See *Houser v. City of Redmond*, 91 Wn.2d 36, 39, 586 P.2d 482 (1978) (“the remedy available against a party to the contract for wrongful action on its part ... is an action for breach of contract,” not “tortious interference”; see also *Vazquez v. Washington*, 94 Wn. App. 976, 989, 974 P.2d 348 (1999) (dismissing claim against employer for tortious interference with its own employment contract).

Although the courts extended the term “party” to mean agent or employees of a corporation acting within the scope of their employment, it has *not* been extended to reach non-party entities such as OpenMarket. See *Houser*, 91 Wn.2d at 39-40 (agents or employees of a municipal corporation were “parties,” as a corporation can only act through its agents).

In *Armer v. OpenMarket*, OpenMarket likewise argued it was “a ‘non stranger’ to the contractual relationship” between the plaintiffs and their wireless carries. Yet the court there found OpenMarket’s “role is not adequately defined. OpenMarket is neither a party nor a total stranger to the contract: whether it was factually or legally incapable of interfering with the plaintiffs’ contracts ... must be determined later in the litigation.”

Armer v. OpenMarket, 2009 WL 2475136, *5 (CP 151-58; see Appendix C).

Plaintiff's complaint never alleged that OpenMarket was a party to his agreement with Alltel, just as OpenMarket never claimed to be a party to such agreement. Because OpenMarket has no key role in the contract between plaintiff and Alltel, and its absence would not impact the contractual obligations of plaintiff and Alltel, plaintiff properly pleaded the elements of tortious interference with a contract. The trial court should have denied OpenMarket's motion to dismiss this claim.

c. The trial court's stated reasons for dismissal had no legal basis

As discussed above, plaintiff believes the trial court based its dismissal on the court's own belief that OpenMarket was merely a portal through which bills flowed to the cell carriers; and that being such a portal is a legitimate business model that required dismissal of all counts against OpenMarket. (CP 108-09).

As explained above, not only was the trial court wrong with respect to plaintiff's allegations but the trial court's legal conclusion finds no support in Washington case law. A federal case concerning a similar business model reached the opposite conclusion. *See Kopff*, 425 F.Supp.2d at 92, discussed *supra* at 33.

The allegations in plaintiff's complaint that OpenMarket facilitated the placement of unauthorized charges on plaintiff's bill were sufficient to support a claim for tortious interference with a contract. The trial court erred in dismissing plaintiff's claim.

V. CONCLUSION

The trial court erred in granting OpenMarket's motion to dismiss. Likewise, the trial court erred in denying plaintiff's motion for leave to file his amended complaint. Plaintiff respectfully requests that this Court reverse the trial court's rulings and remand for further proceedings.

Dated: January 29, 2010

LAW OFFICES OF
CLIFFORD A. CANTOR, P.C.

By: *Cliff Cantor*
Clifford Cantor, WSBA # 17893

Appendix A

Ruling on motion to dismiss

FILED
KING COUNTY, WASHINGTON

JUN 25 2009
SUPERIOR COURT CLERK
BY JOSEPH MASON
DEPUTY

The Honorable Suzanne Barnett

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

TONY PRATT, individually and on behalf of
all others similarly situated,

Plaintiff,

v.

ALLTEL COMMUNICATIONS, INC., a
Delaware limited liability company, and
OPENMARKET, INC., a Michigan corporation,

Defendants.

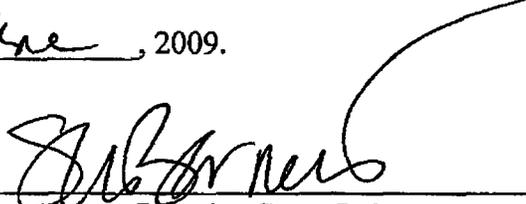
CLASS ACTION

Case No. 09-2-13214-3 SEA

ORDER GRANTING DEFENDANT
OPENMARKET, INC.'S MOTION TO
DISMISS

This matter coming before the Court pursuant to Defendant OpenMarket, Inc.'s Motion to Dismiss Complaint, and having considered the parties' submissions, and heard argument of counsel, this Court hereby GRANTS defendant OpenMarket's motion and dismisses all claims against that defendant with prejudice.

DATED this 25 day of June, 2009.



King County Superior Court Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45

Presented by:

GORDON TILDEN THOMAS & CORDELL LLP

By 
Jeffrey M. Thomas, WSBA No. 21175
Mark A. Wilner, WSBA No. 31550
Attorneys for Defendant OpenMarket, Inc.

Appendix B

Ruling on motion
to file amended complaint

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45

The Honorable Suzanne Barnett

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

TONY PRATT, individually and on behalf of
all others similarly situated,

Plaintiff,

v.

ALLTEL COMMUNICATIONS, INC., a
Delaware limited liability company, and
OPENMARKET, INC., a Michigan corporation,

Defendants.

CLASS ACTION

Case No. 09-2-13214-3 SEA

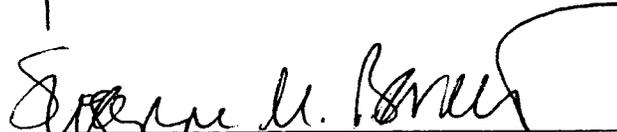
ORDER DENYING PLAINTIFF'S
MOTION TO AMEND AND
VACATE JUDGMENT

~~[PROPOSED]~~

This matter coming before the Court pursuant to Plaintiff Pratt's Motion for Leave to File
an Amended Complaint and Vacate Judgment, and having considered the parties' submissions, ,

this Court hereby DENIES Plaintiff Pratt's motion. *to vacate judgment and allow amended complaint.* *

DATED this 27th day of July, 2009.



King County Superior Court Judge

* Plaintiff may, on proper notice, seek his alternate remedy of
non-suit against Alltel. 

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45

Presented by:

GORDON TILDEN THOMAS & CORDELL LLP

By /s/ Jeffrey M. Thomas
Jeffrey M. Thomas, WSBA No. 21175
Mark A. Wilner, WSBA No. 31550
Attorneys for Defendant OpenMarket, Inc.

Appendix C

Armer v. OpenMarket,
2009 WL 2475136
(W.D. Wash. July 27, 2009)

Slip Copy, 2009 WL 2475136 (W.D. Wash.)

(Cite as: 2009 WL 2475136 (W.D. Wash.))

HOnly the Westlaw citation is currently available.

United States District Court,
W.D. Washington,
at Seattle.

Wilma ARMER, et al., Plaintiffs,
v.
OPENMARKET, INC., et al., Defendants.

No. C08-1731RSL.

July 27, 2009.

West KeySummary
Telecommunications 372  1051

372 Telecommunications

372IV Wireless and Mobile Communications

372k1051 k. Contracts for Service. Most Cited

Cases

Cellular phone customers stated claims of unjust enrichment against a mobile network company regarding a billing and collection system as the fact that the customers had an express contract with a cellular phone company did not preclude an action on an implied contract with the network. The network company was not a party to the contract between customers and the cell phone company, and there was no evidence that recognizing an implied duty between the network and the customers would contravene any provision of the express contracts.

Clifford A. Cantor, Sammamish, WA, Michael J. Aschenbrener, Kamber Edelson LLC, Chicago, IL, for Plaintiffs.

Charles Platt, Sanket J. Bulsara, Wilmer Cutler Pickering Hale & Dorr, New York, NY, Jeffrey M. Thomas, Mark A. Wilner, Gordon Tilden Thomas & Cordell LLP, Amanda J. Beane, Perkins Coie, Seattle, WA, Sarah J. Crooks, Perkins Coie, Portland, OR, for Defendants.

ORDER DENYING DEFENDANT OPENMARKET'S MOTION TO DISMISS

ROBERT S. LASNIK, District Judge.

*1 This matter comes before the Court on a "Motion to Dismiss Complaint by Defendant OpenMarket, Inc." Dkt. # 30.^{FN1} Defendant argues that all of plaintiffs' claims should be dismissed because they (1) do not satisfy the notice pleading requirement of Rule 8, (2) are subject to arbitration, and (3) fail to state a claim upon which relief can be granted.

FN1. After this motion was filed, plaintiffs obtained leave to amend their complaint. A new operative pleading was filed on June 19, 2009. This Order evaluates the adequacy of the allegations contained in the Second Amended Complaint-Class Action (Dkt.# 46).

Having reviewed the papers submitted by the parties, the Court finds that this matter can be decided without oral argument.

In the context of a motion to dismiss under Fed.R.Civ.P. 12(b) (6), the Court's review is generally limited to the contents of the complaint. Campanelli v. Bockrath, 100 F.3d 1476, 1479 (9th Cir.1996). The Court may, however, consider documents referenced extensively in the complaint, documents that form the basis of plaintiffs' claim, and matters of judicial notice when determining whether the allegations of the complaint state a claim upon which relief can be granted. United States v. Ritchie, 342 F.3d 903, 908-09 (9th Cir.2003). Where consideration of additional documents is appropriate, the allegations of the complaint and the contents of the documents are accepted as true and construed in the light most favorable to plaintiff. In re Syntex Corp. Sec. Litig., 95 F.3d 922, 925-26 (9th Cir.1996); LSO, Ltd. v. Stroh, 205 F.3d 1146, 1150 n. 2 (9th Cir.2000). No claim should be dismissed unless the complaint, taken as a whole, fails to give rise to a plausible inference of actionable conduct. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

Slip Copy, 2009 WL 2475136 (W.D. Wash.)

(Cite as: 2009 WL 2475136 (W.D. Wash.))

Defendant has placed before the Court a document entitled "Terms & Conditions" that was apparently printed on March 23, 2009, from the following internet address: <http://www.sprintpcs.com/common/popups/popLegalTermsPrivacy.html>. This document is not mentioned in the Second Amended Complaint. The contract on which plaintiffs' claims are based is described in the complaint as an agreement to pay Sprint a set monthly fee for a period of approximately 12 months in exchange for cellular telephone service. OpenMarket has provided no evidence that the thirteen-page "Terms & Conditions" applies to the cellular telephone plans purchased by plaintiffs, that it was in effect when plaintiffs acquired service, or that plaintiffs agreed to or accepted the terms. Plaintiffs have not alleged, and the Court will not presume, that their agreement with Sprint was identical or even substantially similar to the "Terms & Conditions" that were published on the website as of March 23, 2009. In these circumstances, OpenMarket has not shown that the document it submitted for the Court's consideration forms the basis of plaintiffs' claims or are the proper subject of judicial notice. The Court has not, therefore, considered the March 23, 2009, "Terms & Conditions" when determining whether the complaint, taken as a whole, gives rise to a plausible inference of actionable conduct.

I. ADEQUACY OF PLEADING

Without addressing the allegations of the complaint as a whole, OpenMarket argues that the pleading must be dismissed because plaintiffs have failed to allege "the amount of the charges, the total number of charges, the phone number that was charged, the date of charges, and the attempts to achieve a refund" from defendants. Motion at 9. Defendant also challenges the adequacy of the allegations related to the elements of plaintiffs' claims. See Motion at 13-14, 16-17, and 19. Pursuant to Fed.R.Civ.P. 8(a) (2), a complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." Plaintiffs are not, as OpenMarket would have it, required to plead detailed factual allegations such as the date and amount of each alleged overcharge. *Twombly*, 550 U.S. at 555. Rather, a plaintiff must simply avoid labels, conclusions, and formulaic recitations of the elements of a cause of action in favor of factual allegations that are "enough to raise a right to relief above the speculative level." *Id.* (quoting 5 C. Wright & A. Miller, Federal Practice

and Procedure § 1216, pp. 234-236 (3rd ed. 2004) ("The pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.")).

*2 Having reviewed the allegations of the Second Amended Complaint, the Court finds that they are sufficient to provide 'fair notice' of the nature of plaintiffs' claims against OpenMarket and the 'grounds' on which the claims rest. See *Twombly*, 550 U.S. at 555 n. 3. Plaintiffs have alleged facts regarding the aggregation business in which OpenMarket is engaged, the lack of safeguards to reduce the risk of unauthorized charges, and overcharges levied by OpenMarket and paid by plaintiffs. These allegations are not conclusory and satisfy Rule 8.^{FN2}

FN2. OpenMarket cannot rely on *Lowden v. T-Mobile USA, Inc.*, 2009 WL 537787 (W.D.Wash. Feb.18, 2009), for the proposition that plaintiffs are required to allege the specific dates and amounts of improper charges in order to satisfy Rule 8. Despite broad allegations of improper charges, the plaintiffs in *Lowden* failed to allege that they had been overcharged for calls and services. The court therefore concluded that plaintiffs' right to relief was speculative and that the improper charges claim should be dismissed. In this case, the named plaintiffs have alleged not only that OpenMarket's practices and policies resulted in unauthorized charges for mobile content to Sprint customers, but also that their cell phone accounts were improperly charged as a result of OpenMarket's actions. See Second Amended Complaint at ¶¶ 29, 31, 35, and 37.

II. ARBITRATION

Pursuant to the Federal Arbitration Act ("FAA"), a written agreement to arbitrate a dispute "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. For the reasons discussed above, OpenMarket has not shown that a written agreement to arbitrate exists, much less that it encompasses plaintiffs' claims against OpenMarket.^{FN3}

FN3. Even if the Court were to assume that the March 23, 2009, "Terms & Conditions"

Slip Copy, 2009 WL 2475136 (W.D. Wash.)

(Cite as: 2009 WL 2475136 (W.D. Wash.))

accurately sets forth plaintiffs' agreement with defendant Sprint, OpenMarket has not shown that it is entitled to enforce the arbitration clause contained therein. The "Terms & Conditions" purportedly represent an agreement between Sprint and its customers. OpenMarket has not shown that it was a party to the contract or that it was an express or implied beneficiary of the agreement. According to its terms, the agreement to arbitrate does not encompass claims against third parties: it expressly limits arbitrable disputes to "any claims or controversies *against each other* related in any way ..." to Sprint's services or the contract between the parties." Terms & Conditions at 35 (emphasis added to counteract OpenMarket's creative (and misleading) use of ellipses in its reply memorandum). Nor has OpenMarket shown that it was an "agent" or "affiliate" of Sprint or that plaintiffs are equitably estopped from opposing OpenMarket's efforts to compel arbitration. Unlike the situation in *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir.1993), where plaintiff's claim against a third party was intimately founded on and intertwined with the underlying contract obligations, plaintiffs' causes of action against OpenMarket could proceed even if their contractual claim against Sprint were to fail.

III. FAILURE TO STATE A CLAIM

Plaintiffs have asserted claims of unjust enrichment, tortious interference with contract, and violations of the Washington Consumer Protection Act, RCW 19.86.010 *et seq.*, against defendant OpenMarket. Defendant seeks dismissal of all three claims under Fed.R.Civ.P. 12(b)(6).

A. Unjust Enrichment

Plaintiffs allege that OpenMarket has created a billing and collection system that is devoid of the checks and safeguards necessary to protect cell phone users from unauthorized charges for mobile content. Plaintiffs explain why erroneous or fraudulent billing can occur, how aggregators such as OpenMarket make money from every such billing, and how plaintiffs came to enrich OpenMarket through their payments to Sprint.

Plaintiffs allege that, given its business model and practices, OpenMarket knew that some of the money it was collecting was unauthorized and that its retention of that money is unjust.

Defendant argues that the existence of a contract regarding the subject matter of plaintiffs' claims (namely charges for the provision of mobile content) bars a claim for unjust enrichment. Although a broad "subject matter" bar may exist in New York (*see Vitale v. Steinberg*, 307 A.D.2d 107, 111, 764 N.Y.S.2d 236 (N.Y.A.D.2003)), Washington law is materially different on this point. In Washington, "[a] party to a valid express contract is bound by the provisions of that contract, and may not disregard the same and bring an action on an implied contract relating to the same matter, in contravention of the express contract." *Chandler v. Wash. Toll Bridge Auth.*, 17 Wash.2d 591, 604, 137 P.2d 97 (1943).^{FN4} OpenMarket is not a party to the contracts between plaintiffs and defendant Sprint, and there is no evidence that recognizing an implied duty in these circumstances would contravene any provision of the express contracts. To bar a claim for unjust enrichment simply because a contract touching on the "subject matter" exists would be illogical. A claim for unjust enrichment is based on a theory of implied contract: in order to prevent a party from keeping benefits to which it is not entitled, courts are willing to infer a duty to return the benefits even in the absence of express consent or agreement. *MacDonald v. Hayner*, 43 Wash.App. 81, 85, 715 P.2d 519 (1986). The fact that plaintiffs have contracts with Sprint is irrelevant to their claim against OpenMarket. Plaintiffs have alleged facts supporting all of the elements of an unjust enrichment claim under Washington law: (1) a benefit conferred, (2) knowledge of the benefit, and (3) circumstances that would make it unjust for OpenMarket to retain the benefit. The service agreements with Sprint give plaintiffs no contractual rights against OpenMarket. This is exactly the situation for which an unjust enrichment claim was designed. If the Court were unwilling to imply a contract simply because plaintiffs have a contractual claim against Sprint, OpenMarket would be able to retain benefits to which it may have no right in law or equity.

FN4. *USA Gateway Travel, Inc. v. Gel Travel, Inc.*, 2006 WL 3761259 at *6 (W.D. Wash. Dec. 20, 2006), is not to the contrary. OpenMarket's citation to and summary of

Slip Copy, 2009 WL 2475136 (W.D. Wash.)

(Cite as: 2009 WL 2475136 (W.D. Wash.))

that case are misleading. Plaintiff's claim of unjust enrichment was dismissed in *USA Gateway* because the court found that a contract implied in fact existed between the parties and governed plaintiff's right to recovery.

*3 Defendant also argues that plaintiffs' unjust enrichment claim fails because they voluntarily paid their cell phone bills without protest. The voluntary payment doctrine is an affirmative defense: plaintiffs are under no obligation to plead facts sufficient to negate every possible affirmative defense in order to avoid dismissal. To the extent the voluntary payment doctrine is applicable under Washington law,^{FN5} factual determinations regarding voluntariness, fraud, compulsion, and protest must await the development of the record.

^{FN5}. See *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wash.2d 59, 87, 170 P.3d 10 (2007) (open question whether doctrine applies only in the contract context).

B. Tortious Interference with Contract

Plaintiffs allege that they had a contractual relationship with Sprint pursuant to which Sprint would provide and bill for communications and related services and plaintiffs would pay for the services received. Plaintiffs further allege that OpenMarket's erroneous or fraudulent billing for unauthorized services caused Sprint to breach its contracts with plaintiffs by placing charges on their cell phone bills for products and services that were never provided. OpenMarket argues that these facts cannot support a claim of tortious interference because it is "a non-stranger" to the contractual relationship. "Recovery for tortious interference with a contractual relation requires that the interferer be an intermeddling third party; a party to a contract cannot be held liable in tort for interference with that contract." *Houser v. City of Redmond*, 91 Wash.2d 36, 39, 586 P.2d 482 (1978). The complaint contains no allegations regarding a contract with OpenMarket and instead portrays OpenMarket as an intermeddling third party that caused Sprint to breach its contracts with plaintiffs. Although the Court is not convinced that OpenMarket is the type of third-party against whom a tortious interference claim can be levied, its role is not adequately defined. OpenMarket is neither a party nor a total stranger to the contract:

whether it was factually or legally incapable of interfering with plaintiffs' contracts with Sprint at the time of the relevant events must be determined later in the litigation.

C. Washington Consumer Protection Act ("CPA")

Plaintiffs allege that OpenMarket, as part of its business model, misleads the public and deceptively facilitates charges to consumer telephone bills for unauthorized mobile content. Plaintiffs further allege that they have been injured by OpenMarket's practices and that Washington has an interest in regulating the business activities of companies headquartered in the state.

Defendant argues that the CPA claim fails as a matter of law because (1) there is no contract between plaintiffs and OpenMarket (Motion at 20), and (2) out-of-state residents may not bring a claim under the CPA (Motion at 21).^{FN6} Neither argument has merit. A contractual relationship is not an element of a CPA claim (see *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 780, 719 P.2d 531 (1986), and the Washington Supreme Court has confirmed that "any person who is injured" may sue under the CPA, regardless of whether there is privity of contract (*Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 312-13, 858 P.2d 1054 (1993)).^{FN7} OpenMarket has not identified any authority limiting the remedies afforded by the CPA to Washington citizens. At least one court has determined that "[t]he CPA targets all unfair trade practices either originating from Washington businesses or harming Washington citizens." *Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 553 (W.D.Wash.2008), rev. denied, No. 08-80030 (9th Cir.2008). Because the CPA is to be liberally construed (*Indoor Billboard*, 162 Wash.2d at 86, 170 P.3d 10), the Court agrees.

^{FN6}. Defendant has abandoned its argument that its conduct is exempt from scrutiny under the CPA.

^{FN7}. A statement to the contrary in *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wash.App. 736, 758, 87 P.3d 774 (2004), is unsupported by any citation or analysis. Where there is a conflict in the case law, this Court will follow the pronouncements of the Washington Supreme Court.

Slip Copy, 2009 WL 2475136 (W.D. Wash.)

(Cite as: 2009 WL 2475136 (W.D. Wash.))

OpenMarket has failed to support its more general assertion that its interactions with plaintiffs were so tenuous and indirect that they cannot be the basis of a CPA claim. Defendant offers no case law in support of this argument and has not explained which of the elements of a CPA claim depends on the directness of the relationship between the parties.

***4 For all of the foregoing reasons, OpenMarket's motion to dismiss is DENIED.**

W.D.Wash.,2009.

Armer v. OpenMarket, Inc.

Slip Copy, 2009 WL 2475136 (W.D.Wash.)

END OF DOCUMENT

Certificate of Service

I, being competent to testify and based on my personal knowledge, certify that, on Jan. 29, 2010, I caused a copy of this document to be served on OpenMarket by depositing it in the U.S. Mail, postage prepaid, addressed to their counsel at the addresses listed below. I also sent them a courtesy copy by email.

Jeffrey M. Thomas
Mark Wilner
GORDON TILDEN THOMAS
& CORDELL LLP
1001 Fourth Ave., Suite 4000
Seattle, WA 98154-1007

Charles Platt
Sanket J. Bulsara
WILMER CUTLER PICKERING
HALE AND DORR
399 Park Ave.
New York, NY 10022

Counsel for OpenMarket



Clifford Cantor, WSBA # 17893