

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MICHAEL KARP, THOMAS GRAVINA,	:	
and DEBRA BURUCHIAN, t/a/ ATX	:	
TELECOMMUNICATIONS SERVICES,	:	
LTD.,	:	CIVIL ACTION
Plaintiff,	:	
	:	NO. 99-4784
v.	:	
	:	
U.S. BILLING, INC. and	:	
BUSINESS DISCOUNT PLAN,	:	
Defendants.	:	

MEMORANDUM

BUCKWALTER, J.

January 27, 2000

Presently before the Court in this Title 47 U.S.C.A. § 258 (“Section 258”) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, is Defendant U.S. Billing Inc.’s (“USBI”) Motion to Dismiss Plaintiffs Michael Karp, Thomas Gravina and Debra Buruchian t/a ATX Telecommunications Services, Ltd.’s (“ATX”) Complaint pursuant to Fed.R.Civ.Pro. 12(b)(6) and 12(b)(1), and ATX’s Cross-Motion for Leave to Amend the Complaint. Upon consideration of said Motions, and each parties’ response thereto, both USBI’s Motion to Dismiss and ATX’s Motion for Leave to Amend the Complaint are granted for the following reasons.

I. BACKGROUND

Michael Karp, Thomas Gravina and Debra Buruchian, t/a ATX Telecommunications Services, Ltd., (“ATX”) are the principals of a Pennsylvania Limited Partnership. ATX is engaged in the business of providing telephone and telecommunication services to businesses and individuals for which ATX receives compensation on a monthly basis. Defendant U.S. Billing, Inc. (“USBI”) is a Texas corporation and is engaged in the business of providing billing services for long distance telephone companies. Defendant Business Discount Plan is a California corporation and is engaged in the business of providing and/or reselling long distance and telecommunications services to businesses and individuals. Business Discount Plan utilizes USBI to bill for long distance services.

As the Complaint alleges, in or about December, 1997, USBI and/or Business Discount Plan transferred the long distance service of seventeen different entities from ATX to Business Discount Plan without authorization. ATX contends that this practice is strictly prohibited by the policies of the Federal Communications Commission and the Federal Communications Act of 1934, as amended in 1996. The practice for which ATX brings this action is known as “slamming”--a term used to describe the practice of changing a consumer’s long distance carrier without the customer’s knowledge or consent. Slamming is strictly prohibited by 47 U.S.C.A. § 258.

USBI moves to dismiss this action pursuant to Fed.R.Civ.Pro. 12(b)(6) and 12(b)(1). USBI urges that ATX has failed to state a claim upon which relief can be granted, and that this Court lacks subject matter jurisdiction over this matter. ATX moves for leave to amend the Complaint.

II. STANDARD

When deciding to dismiss a claim pursuant to Rule 12(b)(6) a court must consider the legal sufficiency of the complaint and dismissal is appropriate only if it is clear that "beyond a doubt ... the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." McCann v. Catholic Health Initiative, 1998 WL 575259 at *1 (E.D. Pa. Sep. 8, 1998) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). The court assumes the truth of plaintiff's allegations, and draws all favorable inferences therefrom. See, Rocks v. City of Philadelphia, 868 F.2d. 644, 645 (3d. Cir. 1989). However, conclusory allegations that fail to give a defendant notice of the material elements of a claim are insufficient. See Sterling v. SEPTA, 897 F.Supp. 893, 895 (E.D. Pa.1995). The pleader must provide sufficient information to outline the elements of the claim, or to permit inferences to be drawn that these elements exist. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d. Cir. 1993). The Court must determine whether, under any reasonable reading of the pleadings, the law allows the plaintiff a remedy. See, Nami v. Fauver, 82 F.3d 63, 65 (3d. Cir. 1996).

In considering a motion to dismiss for lack of subject matter jurisdiction, the person asserting jurisdiction bears the burden of showing that the case is properly before the court at all stages of the litigation. See Packard v. Provident National Bank, 994 F.2d 1039, 1045 (3d Cir. 1993). In reviewing a motion to dismiss for lack of subject matter jurisdiction, the district court must accept as true the allegations contained in the plaintiff's complaint, except to the extent federal jurisdiction is dependent on certain facts. Haydo v. Amerikohl Mining, Inc., 830 F.2d 494, 496 (3d Cir.1987). In determining whether subject matter jurisdiction exists, the district court is not limited to the face of the pleadings. Armstrong World Industries v. Adams,

961 F.2d 405, 410, n.10 (3d Cir. 1992). In assessing a Rule 12(b)(1) motion, the parties may submit and the court may consider affidavits and other relevant evidence outside the pleadings. Berardi v. Swanson Memorial Lodge No. 48 of Fraternal Order of Police, 920 F.2d 198, 200 (3d Cir.1990). When a defendant supports its attack on jurisdiction with supporting affidavits, the plaintiff has the burden of responding to the facts so stated. A conclusory response or a restatement of the allegations of the complaint is not sufficient. International Association of Machinists & Aerospace Workers v. Northwest Airlines, Inc., 673 F.2d 700, 711 (3d Cir.1982). Although courts "enjoy substantial procedural flexibility" in ruling on jurisdictional challenges, they should proceed cautiously in dismissing claims for lack of subject matter jurisdiction at an early stage if relevant facts are in dispute and pertinent discovery has not been concluded. Mortensen v. First Federal Savings and Loan Association, 549 F.2d 884, 892 (3d Cir.1977).

III. DISCUSSION

Section 258 explicitly prohibits telecommunications carriers from submitting or executing "a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe." Title 47 U.S.C.A. § 258.

A "telecommunications carrier is defined as any "provider of telecommunications services, except that such term does not include aggregators of telecommunications services." Title 47 U.S.C.A. § 153(44). The term "telecommunications service" means "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." Title 47 U.S.C.A. § 153(46).

USBI claims that it is neither a common carrier nor a telecommunications carrier and, as it points out, ATX's Complaint states that USBI is engaged in the business of providing billing services for long distance telephone companies. Although ATX contends that USBI is, in fact, a telecommunications carrier, a liberal reading of the Complaint states otherwise. ATX has filed a Motion for Leave to Amend the Complaint, and I will allow ATX to do so, for the purpose of not only clarifying USBI's status, but also to aver, more specifically, the relationship between USBI and Business Discount Plan.

Additionally, I note at this time my disagreement with regard to USBI's contention that if this Court were to dismiss Count One, as it pertains to USBI, subject matter jurisdiction no longer exists. Count One would not be dismissed in its entirety and subject matter jurisdiction would exist, as that count deals with a federal statute, namely the Telecommunications Act of 1996. Rather than address the effect of a dismissal of Count One as it pertains to USBI, I will refrain until the matter comes before me, if necessary, at a later date.

IV. CONCLUSION

USBI's Motion to Dismiss is granted and ATX's Cross-Motion for Leave to Amend the Complaint is also granted. ATX has failed to appropriately plead that USBI is a "telecommunications carrier" for purposes of Title 47 U.S.C.A. § 258, however, I will allow them to attempt to cure this defect.

An appropriate Order follows.

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BUSINESS DISCOUNT PLAN,	:	
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ORDER

AND NOW, this 27th day of January, 2000, upon consideration of Defendant U.S. Billing, Inc.'s Motion to Dismiss, and Plaintiff ATX Telecommunications Services, Ltd.'s Response and Cross-Motion for Leave to Amend the Complaint, it is hereby ORDERED and DECREED that said Defendant's Motion to Dismiss is GRANTED and Plaintiff's Motion for Leave to Amend the Complaint is GRANTED.

It is further ORDERED and DECREED that Plaintiff shall file its Amended Complaint no later than ten (10) days from the date of this Order.

BY THE COURT:

RONALD L. BUCKWALTER, J.