E-Filed

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 09-7433-GHK (CWx)	Date	January 23, 2013
Title	*The Dominic Corea LP v. ILD Telecommunications, Inc., et al.*		

Presiding: The Honorable **GEORGE H. KING, CHIEF U.S. DISTRICT JUDGE**

Beatrice Herrera	N/A	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: **(In Chambers) Order re:** Plaintiff's Motion for Class Certification (Dkt. No. 185)

This matter is before us on Plaintiff The Dominic Corea Limited Partnership's ("Plaintiff") Motion for Class Certification. We have considered the arguments in support of and in opposition to the Motion and consider this matter appropriate for resolution without oral argument. L.R. 7-15. As the Parties are familiar with the facts, we will repeat them only as necessary. Accordingly, we rule as follows.

I. Background

In 2009, Plaintiff filed this putative class action in state court against Defendants ILD Telecommunications, Inc. ("ILD") and Advanced Business Services, LLC ("ABS"). Following removal and discovery, Plaintiff filed a Second Amended Complaint ("SAC"), which added Solution Marketing, LLC ("Solution Marketing"), Verification Resources, LLC ("Verification Resources"), daData, Inc. ("daData"), and Vici Marketing, LLC ("Vici Marketing") as Defendants. Plaintiff alleges that Defendants together engaged in the practice of "cramming," whereby Defendants contacted consumers to illegally and insufficiently obtain their authorization to place charges for e-fax services onto their local telephone bills.

In particular, Plaintiff alleges that ABS, the company that purportedly offered the e-fax services, subcontracted with Solution Marketing to sell the services through telemarketing. (Mot. 2). Solution Marketing in turn subcontracted its obligation to Vici Marketing, which conducted the sales portion of the call. (Mot. 2-3). During the sales portion of the call, if the consumer indicated that he or she was interested in purchasing the e-fax services, the call was then transferred to Verification Resources – a subcontractor of Vici Marketing – to verify and finalize the sale. (Mot. 3). Only the verification portions of the calls were recorded. (Mot. 7). ABS also contracted with ILD for billing and collection services and with daData to handle ABS's customer service calls. (Mot. 3-4). daData also provided the platform for the e-fax services that ABS purportedly offered. (*Id.*). Based on these allegations, Plaintiff asserts the following four causes of action against all Defendants: (1) violation of Business and

E-Filed

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 09-7433-GHK (CWx)	Date	January 23, 2013
Title	*The Dominic Corea LP v. ILD Telecommunications, Inc., et al.*		

Professions Code § 17200; (2) violation of California Public Utilities Code § 2890; (3) unjust enrichment; and (4) injunctive relief.

On July 12, 2012, Plaintiff filed the instant Motion to certify the following class: "All individuals and entities residing in California that received, during the four years prior to the filing of the Complaint, telephone bills from a Local Exchange Carrier ("LEC"), including but not limited to AT&T, containing charges from Defendants for services which were never authorized." Based on this definition, whether a customer who was billed for the e-fax service is a Class Member depends on whether he or she authorized the charge. Although this inquiry appears inherently individualized, Plaintiff argues that in this case, no authorization was provided by any customer who was charged for the e-fax service during the Class period because the Authorization Question in the verification script is so misleading and confusing as a matter of law that it vitiated authorization in every case.[1]

---

[1] A review of one version of the sales and verification scripts, dated October 25, 2007, shows that a complete telemarketing call proceeded as follows. In the sales portion of the call, the operator would begin by introducing himself or herself and describing the e-fax services. The operator would then inform the consumer of the cost of the e-fax services ($45.95) and the consumer's right to cancel the service. The operator would then ask the consumer the following two questions: "Are you 18 years or older and duly authorized by the telephone account owner to make changes to and/or incur charges on this telephone account, correct? (response). Are you ready to purchase this very valuable and practical service? (response)." (Mot., Ex. A, at 22). Then, after informing the consumer that the product materials will arrive in 7 to 10 business days and that the consumers can call its Customer Service Department with any questions or to cancel the service, the operator would transfer the call to another operator at Verification Resources to "confirm [the customer's] information and complete the activation process." (*Id.*).

During the verification process, the operator would begin by informing the consumer that "the $49.95 will appear on your monthly telephone bill automatically each month, unless of course you give us a call to cancel. These charges will appear on the ILD Teleservices bill page as being billed on behalf of Advanced Business Services." (*Id.* at 23). After obtaining assurance from the consumer that he or she "understand[s] that Advanced Business Services is not affiliated with your local company," the operator would proceed by asking whether he or she can "start your business on the Advanced Business Services plan? (must get a clear affirmative)." The operator would then proceed to ask 6 verification questions: (1) "I have your name as _____ (read full name, first, last). Is this correct? (response)"; (2) "I have your business name as _____. Is this correct? (response)"; (3) "I show your mailing address as _____ (include street, apt#, city, state and zip). Is this correct? (response)"; (4) "Your business telephone number is _____ (include area code). Is this correct? (response)"; (5) "You are requesting Advanced Business Services for this number only, correct? (response) (yes, right or correct)"; (6) "And You are 18 years or older and duly authorized by the telephone account owner to make changes to and/or incur charges on this telephone account, correct? (response) (yes, right or correct)." (*Id.* at 23). If the customer affirmed the purchase, the operator would then conclude the call by informing the consumer of the contact information of ABS's Customer Service Department.

E-Filed

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 09-7433-GHK (CWx)	Date	January 23, 2013
Title	*The Dominic Corea LP v. ILD Telecommunications, Inc., et al.*		

Plaintiff further requests that we appoint Plaintiff as the Class Representative and the law firms of Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor, LLP, and McNicholas & McNicholas, LLP as co-lead Class Counsel. Although the Motion states that class certification is sought "pursuant to Rules 23(a) and 23(b)(2) and/or 23(b)(3) of the Federal Rules of Civil Procedure," Plaintiff addresses only the certification requirements under 23(b)(3) in its Motion. Thus, we deem Plaintiff to have abandoned class certification under Rule 23(b)(2). Accordingly, we address only whether Plaintiff has satisfied the requirements for class certification under Rule 23(b)(3).

II. Legal Standard

A motion for class certification is governed by the requirements of Federal Rule of Civil Procedure 23. In determining whether to certify the class, we generally take the substantive allegations of the complaint as true. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011). However, we must look beyond the pleadings to evaluate the merits of a plaintiff's substantive claims to the extent they overlap with the Rule 23 requirements, *id.*, as "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *General Telephone Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978)). "When considering class certification under Rule 23," we "must perform a rigorous analysis to ensure that the prerequisites of Rule 23(a) have been satisfied." *Ellis*, 657 F.3d at 980.

Plaintiff seeks to certify a Rule 23(b)(3) Class. Accordingly, Plaintiff bears the burden of establishing that the following Rule 23(a) and Rule 23(b)(3) requirements are met:

(1) "the class is so numerous that joinder of all members is impracticable," Rule 23(a)(1);
(2) "there are questions of law or fact common to the class," Rule 23(a)(2);
(3) "the claims or defenses of the representative parties are typical of the claims or defenses of the class," Rule 23(a)(3);
(4) "the representative parties will fairly and adequately protect the interests of the class," Rule 23(a)(4);
(5) "the questions of law or fact common to class members predominate over any questions affecting only individual members," Rule 23(b)(3); and
(6) "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy," Rule 23(b)(3).

III. Analysis

A. Commonality

Rule 23(a)(2) requires Plaintiff to show that "there are questions of law or fact common to the class." These common issue or issues must be *material* to the resolution of the claims asserted and demonstrate that putative Class Members "suffered the same injury." *Gen. Tel. Co. of Sw. v. Falcon*,

E-Filed

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 09-7433-GHK (CWx)	Date	January 23, 2013
Title	*The Dominic Corea LP v. ILD Telecommunications, Inc., et al.*		

457 U.S. 147, 157 (1992). In *Dukes*, 131 S. Ct. at 2551, the Supreme Court explained that while a single common issue may suffice, it "must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Indeed, after *Dukes*, "what matters to class certification is not the raising of common questions – even in droves – but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id.* at 2551 (internal quotation and alteration removed).

In *Dukes*, the plaintiffs failed to establish the existence of a common question because they "provide[d] no convincing proof of a companywide discriminatory pay and promotion policy." *Id.* Specifically, the Court found that where the plaintiffs alleged that every woman at Wal-Mart was "the victim of one common discriminatory practice," they failed to offer "significant proof" that Wal-Mart operated under a general policy of discrimination, given that plaintiffs' expert "conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking." *Id.* at 2548, 2554. Similarly, in *Ellis*, decided after *Dukes*, the Ninth Circuit required the district court to engage in a "rigorous analysis" to determine, on remand, "whether there was 'significant proof' that [the defendant] operated under a general policy of discrimination" that could "affect the class *as a whole*." *Ellis*, 657 F.3d at 983.

Thus, under the post-*Dukes* commonality inquiry, we must conduct a "rigorous analysis" to determine if plaintiffs have offered "significant proof" that there was a common policy or practice concerning an issue central to the plaintiffs' claims "that could affect the class *as a whole*." *Id.* Under *Dukes*, it is the existence of this common policy or practice that drives the generation of common questions or answers. *See* 131 S. Ct. at 2551.

In this case, Plaintiff asserts that the common question shared by all Class Members is whether "the verification script, uniformly applied to the proposed class, could not as a matter of law and fact give rise to a valid authorization because it utilized compound, confusing and misleading questions." (Reply 15). In particular, Plaintiff asserts that the "Authorization Question" asked at the end of the verification process – "And you are 18 years or older and duly authorized by the telephone account owner to make changes to and/or incur charges on this telephone account, correct?" – is so compound, confusing, and misleading, that it could give rise to no valid authorization, even if the consumer responded affirmatively. (Mot. 6). Essentially, Plaintiff argues that Defendant subjected Class Members to the common practice of being asked the allegedly misleadingly and confusing Authorization Question.

While we find that Plaintiff has offered "significant proof" that Defendants had a common practice of posing the Authorization Question, in light of the contracts between Defendants that required

E-Filed

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 09-7433-GHK (CWx)	Date	January 23, 2013
Title	*The Dominic Corea LP v. ILD Telecommunications, Inc., et al.*		

the scripts be read verbatim[2] and Defendants' acknowledgment that the Authorization Question constituted an essential element of the verification script that was never changed,[3] we conclude that Plaintiff's assertion that the Authorization Question can generate common answers as to the class does not withstand the "rigorous analysis" required under *Dukes*.

In particular, we reject Plaintiff's flawed premise that we may artificially isolate a single question from a script to determine whether it is so misleading as to vitiate all authorization. Plaintiff cites no authority for such proposition, nor can we find any. Instead, the authorities indicate that to the extent a standardized sales script may give rise to sufficient commonality, it must do so as a whole. *See, e.g.*, *In re First Alliance Mortgage Co.*, 471 F.3d 977, 984-85 (9th Cir. 2006) (finding that class treatment based on oral misrepresentations by subprime loan officers was warranted because the officers were trained to follow a manual and script that contained an "elaborate and detailed sales presentation" that was "unquestionably designed to obfuscate points, fees, interest rate, and the true principal amount of the loan," in order to persuade borrowers to take out loans with high interest rates and hidden fees); *In re American Continental Corporation/Lincoln Savings & Loan Securities Litigation*, 140 F.R.D. 425, 430 (D. Ariz. 1992) (concluding that class treatment based on a standardized sales pitch by bond representatives was appropriate because the representatives' testimony showed that as a whole, the sales pitch evidenced a "centrally orchestrated strategy" that involved seven principal cornerstones, including the "de-emphasis or rationalization of risks or negative publicity associated with ACC/Lincoln and the bonds" and the "omission of information about defects in ACC/Lincoln's economic prospects"); *McPhail v. First Command Financial Planning, Inc.*, 247 F.R.D. 598, 602, 609 (S.D. Cal. 2007) (finding sufficiently commonality where the sale agents were trained to memorize a script and utilized accompanying charts and graphs that contained misleading statements and omissions "that triggered SEC cease-and-desist proceedings and a [National Association of Securities Dealers] investigation into alleged rule violations"). The requirement that we analyze the script as a whole makes sense given that

---

[2] The contract between ABS and Solution Marketing provides that "[a]ll scripts must be PRE-APPROVED by ABS before their use and Solutions agrees that such approved scripts will be read verbatim and that it will train its agents to read such scripts verbatim." (Mot, Ex. J, at § 2.04). The contract between Solution Marketing and Vici Marketing provides that "[a]ll scripts must be PRE-APPROVED by SOLUTION before their use and VICI Marketing LLC agrees that such approved scripts will be read verbatim and that it will train its agents to read such scripts verbatim." (Mot, Ex. K, at § 2.04). The contract between Vici Marketing and Verification Resources likewise provides that "VR shall use only VICI provided and approved scripts, shall require its VERIFICATION agents to read the approved scripts verbatim, and shall train its Verifiers to read such scripts verbatim." (Mot., Ex. L, § 2.2).

[3] In his deposition, the representative of ABS acknowledged that the components of the Authorization Question, i.e., having the customers "acknowledge[] that they are 18 years of age or older and . . . acknowledge that they are authorized to incur charges on that telephone account," are "two pieces [of information] that are absolutely fundamentally required." (Mot., Ex. B, at 89:2-6).

what may appear to be a material omission or misrepresentation in one part of the script may be neutralized by other statements in the other portions of the script.

Here, the purportedly misleading Authorization Question did not exist in a vacuum. Instead, it was embedded within the context of the verification script, which was always preceded by the sales portion of a telemarketing call. Unlike the plaintiffs in the cases above who had at least alleged that the standardized sales pitch was misleading as a whole because of certain misrepresentations and omissions, Plaintiff has made no showing that the script at issue is misleading as a whole. Indeed, other than the compound nature of the Authorization Question, Plaintiff does not argue that any other aspects of the script is misleading.[4] In fact, the script shows that the Authorization Question is asked only after (1) the customer expressed interest in purchasing the product during the sales portion of the call; (2) the verification agent informed the customer that the charge will show up on his or her telephone bill; and (3) the customer affirmed that he or she is ready to start on the ABS plan. Absent any showing that the script as a whole is misleading and in light of the information provided in the script leading up to the Authorization Question, Plaintiff's assertion that a single compound question asked at the end of the verification process is so misleading that no putative Class Members understood that they were authorizing a charge on their telephone bill is dubious at best. Absent "significant proof" that the script as a whole was misleading, the single question is incapable of generating the type of "common answers" that will drive the resolution of an issue "central to the validity of each one of the claims in one stroke." *Dukes*, 131 S. Ct. at 2551. We must look to the context of each call to determine whether proper authorization was given in light of the conversation that took place. Because we must look at each individual conversation, the potential "dissimilarities in the proposed class" will likely "impede the generation of common answers." *Id.*

Accordingly, we find and conclude that Plaintiff's commonality theory based on the Authorization Question fails. Plaintiff cannot avoid the inherently individualized inquiry of whether authorization was provided in a given call by artificially limiting the script to one compound question without context. Thus, to the extent that Plaintiff relies on the validity of the Authorization Question in support of class certification of a claim, certification must be denied.

1. Claim #1 – Violation of UCL

The UCL outlaws as unfair competition "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. Plaintiff purports to assert violations under all three prongs of § 17200. "Unlawful practices prohibited by § 17200 are any practices forbidden by law, be it civil or criminal, federal, state, or municipal,

---

[4] We note that while Plaintiff's Reply appears to characterize the verification script as containing multiple "compound, confusing and misleading questions," (*see* Reply 15), our review of the verification script shows that the only question susceptible to such characterization is the Authorization Question, as even Plaintiff concedes that the Authorization Question is the only question in the verification script that is compound. (Mot. 5-6).

statutory, regulatory, or court-made." *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 838-39 (Ct. App. 1994) (internal quotations omitted). Under the unlawful prong, "section 17200 'borrows' violations of other laws and treats them as unlawful practices independently actionable." *Id.* at 839. As to the unfair prong, we adopt the view that an "unfair" business practice refers to conduct "that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (1999). Finally, to establish a violation of the UCL under the fraudulent prong, a plaintiff must show that the purportedly fraudulent business practice is one "in which members of the public are likely to be deceived." *Morgan v. AT&T Wireless Servs., Inc.*, 177 Cal. App. 4th 1235, 1254 (Ct. App. 2009).

Here, Plaintiff purports to assert violation of each prong of UCL based on Defendants' uniform deployment of the allegedly misleading Authorization Question that could lead to no valid authorization. (Reply 15). As discussed above, this theory cannot support class certification because whether valid authorization was provided in a given call is not susceptible to classwide resolution.[5]

Accordingly, Plaintiff's Motion to certify the UCL claim is **DENIED**.

2. Claim #2 – Violation of CPU § 2890

Plaintiff's Motion appears to assert violations of CPU § 2890(a), (d)(2)(D), and (e).

Under § 2890(a), "[a] telephone bill may only contain charges for products or services, the purchase of which the subscriber has authorized." Thus, the key inquiry under this subsection is whether a charge was authorized. Plaintiff's argument that certification of its claim under this subsection is appropriate is based solely on its theory that the Authorization Question is so compound, confusing, and misleading such that it could not give rise to any authorization. As discussed above, we reject this theory and conclude that the inquiry into whether a charge was authorized is not susceptible

---

[5] We note that as the party bearing the burden of establishing class certification requirements, Plaintiff made no effort to distinguish between the analytical framework among the three prongs. To the extent Plaintiff's UCL claim under the unlawful prong "borrows" from Defendants' alleged violation of the California Public Utility Code § 2890, Plaintiff fails to establish commonality as discussed below. To the extent that the fraudulent prong poses an objective inquiry, we conclude that Plaintiff still cannot establish commonality. Because Plaintiff fails to offer significant proof that the script as a whole is misleading as a matter of law, as discussed above, the inquiry under the fraudulent prong is whether each conversation, on the whole and as it occurred, was likely to deceive a reasonable consumer. This inquiry is not susceptible to classwide resolution in one stroke. As to the unfairness prong, we observe that Plaintiff cannot establish a UCL claim under the unfairness prong as a matter of law because the allegation of cramming by Defendants does not involve an incipient violation of an antitrust law. *See Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1365-66 (Ct. App. 2010) (reasoning that Cel-Tech's definition of "unfair" applies in consumer UCL actions).

to classwide resolution in one stroke. Thus, this claim cannot be certified because Plaintiff fails to establish commonality.

Section 2890(d)(2)(D) requires a billing telephone company to "provide a means for expeditiously resolving subscriber disputes over charges for a product or service, the purchase of which was not authorized by the subscriber. In the case of a dispute, there is a rebuttable presumption that an unverified charge for a product or service was not authorized by the subscriber and that the subscriber is not responsible for that charge." In other words, to establish commonality and predominance under this subsection, Plaintiff must show that Defendants had a policy or practice of failing to expeditiously resolve subscriber charge disputes, or a policy of practice of failing to apply the appropriate statutory presumption regarding unverified charges.

Here, Plaintiff fails to satisfy its burden of establishing any policy or practice by Defendants that violates this subsection. Instead, Plaintiff conclusorily states in its Motion that "Defendants . . . failed to expeditiously resolve customer complaints regarding e-fax services, and ignored the statutory presumption that disputed charges are not authorized and refused to refund more than a single month of charges to complaining consumers, despite the fact that ILD alone received over 10,000 complaints, not including complaints that may have been made to the local telephone companies, the Better Business Bureau, the FCC or ABS itself."[6] (Mot. 21). That ILD received 10,000 complaints, however, does not establish that it was dilatory in *responding* to these complaints. In fact, in response to Plaintiff's conclusory allegations, ILD cites the declaration of Kathy McQuade, Vice President of ILD, which states that ILD handled ABS's customer inquiries on a case-by-case basis, and consistently responded to

[6] While Plaintiff refers to the BBB complaints in the Motion, it did not specifically cite these complaints in support of its § 2890(d)(2)(D) claim. We independently reviewed the BBB complaints attached as Exhibit M and find that to the extent that Plaintiff relies on these complaints in support of this claim, Defendants' responses to these complaints tend to show that they did not have a policy of dilatory response or a policy of issuing only single-month refunds. Instead, at least on some occasions, Defendants may have timely addressed the complaints and issued multi-month credits. (*See* Mot., Ex. M, at 245 ("Upon receipt of a telephone call from [customer x] on 3/29/08[,] we cancelled the account . . . and issued a credit in the amount of $49.95 plus tax. We also at her request called and played the voice print for her review on 4/2/08; at that time we also issued a credit for the remaining charge. There were a total of two charges to her account in the amount of $49.95 each."); *id.* at 254 ("We received a telephone call to our customer service call center on 7/8/09 from [customer y] stating that [customer y] is an unauthorized employee and that she did not wish to continue the services. We cancelled the account and issued (8) credits . . . in the amount of $49.95 each plus tax to the telephone service provider."); *id.* at 236 ("On 9/9/2008 we received a letter from [customer z] requesting the service be cancelled[.] [The letter] stat[ed] that [customer z] was not authorized to add charges to the telephone account. We immediately cancelled the account and issued a full credit of $299.70 for all monthly billings.")). Plaintiff has not offered any evidence to rebut Defendants' assertions in these responses. Thus, on this record, Plaintiff has failed to satisfy its burden in offering "significant proof" of a common practice of dilatory response by Defendants.

E-Filed

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 09-7433-GHK (CWx)	Date	January 23, 2013
Title	*The Dominic Corea LP v. ILD Telecommunications, Inc., et al.*		

customer inquiries within one month and frequently issued multi-month credits. (McQuade Decl. ¶ 13). In light of Plaintiff's conclusory allegations regarding the manner by which Defendants handled customer complaints, together with ILD's specific evidence showing that it generally responded to subscriber charge disputes in a timely fashion, we conclude that Plaintiff fails to satisfy its burden of offering "significant proof" of a common policy or practice by Defendants that violates § 2890(d)(2)(D). Thus, this claim cannot be certified because Plaintiff fails to establish commonality.

Under § 2890(e), "[i]f an entity responsible for generating a charge on a telephone bill receives a complaint from a subscriber that the subscriber did not authorize the purchase of the product or service associated with that charge, the entity, not later than 30 days from the date on which the complaint is received, shall verify the subscriber's authorization of that charge or undertake to resolve the billing dispute to the subscriber's satisfaction."

Plaintiff alleges that Defendants violated this subsection[7] by "failing to verify consumers' authorization of disputed charges, instead recording whomever answered the telemarketing call saying 'okay' or 'yes' to a series of compound, confusing, leading, deceptive, and pre-recorded questions." (Mot. 21). This assertion is irrelevant to establishing a violation under § 2890(e), given that a close reading of this subsection shows that it regulates the manner by which Defendants respond to subscriber complaints alleging unauthorized charges, not the manner by which Defendants record the authorizations in the first instance. Because Plaintiff fails to provide any evidence to support its assertion that Defendants violated this subsection, much less that such claim is susceptible to common determination, certification of a claim under this subsection must be denied.

Accordingly, Plaintiff's Motion to certify its CPU § 2890 claim is **DENIED**.

3. Claim #3 – Unjust Enrichment

To establish unjust enrichment, Plaintiff must show that Defendants unjustly retained a benefit from the Class. *See, e.g., First Nationwide Savings v. Perry*, 11 Cal. App. 4th 1657, 1662 (Ct. App. 1992). As an action based on quasi-contract, a claim for unjust enrichment cannot lie "where a valid express contract covering the same subject matter exists between the parties." *Gerlinger v. Amazon.com, Inc.*, 311 F. Supp. 2d 838, 856 (N.D. Cal. 2004).

Plaintiff asserts that no express contract existed because the Authorization Question, as a matter of law, could produce no valid authorization. As a result, no contract was formed. Thus, Class Members are entitled to restitution under a quasi-contract theory. As discussed above, however, we reject Plaintiff's theory that we can decide whether the Authorization Question is misleading as a matter of law without looking at the context of each call. Because we conclude that we must look to the

---

[7] Plaintiff actually states that Defendants violated "2890(d)(2)(E)." (Mot. 21). However, since subsection (d)(2)(E) does not exist, we construe Plaintiff's assertion regarding subsection (d)(2)(E) as relating to subsection (e).

context of each call to determine whether a Class Member gave valid authorization to form an express contract, the unjust enrichment claim is not susceptible to classwide resolution.

Accordingly, we conclude Plaintiff fails to establish commonality as to the unjust enrichment claim. Thus, Plaintiff's Motion to certify this claim is **DENIED**.

4. Claim #4 – Injunctive Relief

Plaintiff makes no argument in support of the certification of this claim. Accordingly, we deem Plaintiff to have abandoned this claim.

B. Other Rule 23(a) and (b)(3) Requirements

Because Plaintiff fails to satisfy the commonality as to its claims, we need not address whether Plaintiff meets the other relevant certification requirements.

C. Subcontractor Defendants' Opposition Regarding Standing

In response to Plaintiff's Motion, ILD and ABS each filed an Opposition. Solution Marketing, Vici Marketing, Verification Resources, and daData (collectively, "Subcontractor Defendants") joined in ILD and ABS's Oppositions, but they also filed a separate Opposition arguing that Plaintiff lacks standing to assert any claims against them. (*See* Dkt. No. 183). To the extent that Subcontractor Defendants argue that no claims may be certified against them because Plaintiff lacks standing, we need not address this argument because we conclude that no claims may be certified against any Defendant. To the extent that Subcontractor Defendants argue that this action should be dismissed against them for lack of standing, we find that the Opposition to a Motion for Class Certification is an improper vehicle to raise this argument.

Accordingly, Plaintiff's Request to Supplement Expert Report of Thomas A. Neches in Support of Plaintiff's Motion for Class Certification ("Request"), offered solely to rebut the substance of Subcontractor Defendants' Opposition regarding the standing issue, is **DENIED**.

IV. Conclusion

Based on the foregoing, Plaintiff's Motion for Class Certification is **DENIED** in its entirety.

IT IS SO ORDERED.

-- : --

E-Filed

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 09-7433-GHK (CWx)	Date	January 23, 2013
Title	*The Dominic Corea LP v. ILD Telecommunications, Inc., et al.*		

Initials of Deputy Clerk Bea