UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NATHANIEL OLSON and CHRISTOPHER W. HESSE,

Plaintiffs,

v.

SPRINT SPECTRUM L.P. *d/b/a* SPRINT PCS,

Defendant.

CASE NO. C06-0592-JCC

ORDER

This matter comes before the Court on Plaintiffs' Motion for Partial Summary Judgment (Dkt. No. 175), and Defendant's Motion for Summary Judgment (Dkt. No. 176), together with responses and replies to each motion, and supporting affidavits and exhibits. Having carefully considered the papers filed, and determined that oral argument is unnecessary, the Court hereby GRANTS Defendant's Motion (Dkt. No. 176) and DENIES Plaintiffs' Motion (Dkt. No. 175), as follows.

I. BACKGROUND

In this action, Plaintiffs Christopher Hesse and Nathaniel Olson, individually and on behalf of a similarly situated class,[1] assert common law claims of breach of contract and unjust enrichment and

[1] The class is defined as all current and former Washington State wireless service customers of Sprint, who have been charged and paid to Sprint a Washington B&O tax surcharge. (Order May 18, 2007 (Dkt. No. 117 at 11).)

further allege that Defendant Sprint[2] violated the Washington Consumer Protection Act, WASH. REV. CODE 19.86.010 *et seq*. (Dkt. No. 118 at 9–10.) Plaintiffs' allegations all relate to a Washington B&O tax surcharge,[3] which they contend Sprint impermissibly billed to its Washington customers.

Plaintiffs originally brought two separate class actions, filed in state court in March and July 2006. Sprint removed both actions to federal court, where they were subsequently consolidated. The Court certified the class on May 18, 2007; Plaintiffs' Consolidated Complaint was filed soon thereafter on June 8; and Sprint's Answer followed on June 22. (Dkt. Nos. 117, 118, 121.) Sprint's Answer asserted several affirmative defenses, including *res judicata* (Dkt. No. 121 at 14), and more specifically, "application of the doctrine of settlement." (*Id.* at 15.)

Meanwhile, in February 2006, Sprint entered into a Settlement Agreement in a different class action that had been pending, in one form or another, in the Missouri and Kansas state courts, since 2002. (Dkt. No. 178-3 at 2–3.) That Agreement created two distinct settlement classes; relevant here is the *Benney* Settlement Class, which the Agreement defined as:

> all current and former Sprint wireless customers in the United States who were customers for any time during the period December 1, 2000 to the Effective Date,[4] and who were charged

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[2] Sprint PCS provides wireless and commercial mobile radio services in Washington State. It is a limited partnership organized under the laws of Delaware, with its principal place of business in Kansas. (*See* Dkt. No. 186 at 2.)

[3] Washington imposes a Business and Occupation ("B&O") tax "for the act or privilege of engaging in business activities" in the state. WASH. REV. CODE 82.04.220. The B&O tax is an excise tax. 1B KELLY KUNSCH ET AL., WASHINGTON PRACTICE: METHODS OF PRACTICE § 72.7 (1997).

[4] "'Effective Date' . . . means the termination of the Actions after . . . [t]his Class Action Settlement Agreement is approved in all respects by the Court; and . . . [a] Final Order, entering judgment of dismissal with prejudice against all Class Plaintiffs and Settlement Class members who do not properly opt out . . . has been filed, and the time for the filing of any appeals has expired, or if there are appeals, approval of the settlement and judgment has been affirmed in all respects by the appellate court of last resort to which such appeals have been taken and such affirmances are no longer subject to further appeal or review." (Agreement 9 (Dkt. No. 178-3 at 10).)

Regulatory Fees (as defined in paragraph 1.3(a)).[5]

(*Id*. at 15.) The Settlement Agreement was ultimately approved in an order issued by Judge Duncan of the District Court of Wyandotte County, Kansas, on November 8, 2006. (Dkt. No. 178-2 at 2.) That order defined the *Benney* Settlement Class as:

> all current and former Sprint-branded ("Sprint" or "Sprint PCS") wireless telephone customers in the United States who were customers for any time during the period December 1, 2000 to the Effective Date as defined in the Settlement Agreement, and who were charged Regulatory Fees (as defined in the Settlement Agreement).

(*Id*. at 6.) In approving the Settlement Agreement, the court found that Sprint had provided notice "far exceed[ing] the minimum standard necessary" to potential settlement class members. (*Id*. at 13.) Approximately 425,000 current or former Sprint customers submitted claim forms, and approximately 103 persons or entities objected to the Settlement Agreement. Roughly twenty current or former Sprint subscribers elected to opt out of the Settlement Class. (*Id*. at 10.) The settlement became effective on March 8, 2007, when the final appeal by an objector was dismissed. (Dkt. No. 178-5 at 2.)

Sprint moves for summary judgment arguing, *inter alia*, that Plaintiffs' claims are barred by the terms of the *Benney* Settlement Agreement and the court order approving that Agreement. Plaintiffs make several arguments in opposition, each of which the Court addresses, below.

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[5] "'Regulatory Fees' means: (i) the 'USA Regulatory Obligations & Fees' fee or surcharge on subscriber invoices that Sprint charged subscribers for the cost of implementing federally mandated programs for Enhanced 911 ('E911') emergency calling Phase II and federal Universal Service Fund contributions ('USF'); (ii) 'Federal Telephone Number Pooling' fee or surcharge on subscriber invoices that Sprint charged subscribers to recover costs of implementing the federally mandated program for wireless number portability; (iii) 'Federal USF,' 'Federal E911' and 'Federal Wireless Number Pooling and Portablility' fees or surcharges on subscriber invoices that Sprint charged wireless subscribers to recover costs of implementing federally mandated programs for wireless number pooling and portability, federal Universal Service Fund contributions, and Enhanced 911 emergency calling Phase II." (Agreement 7–8 (Dkt. No. 178-3 at 8–9).)

II. LEGAL STANDARD

The question before the Court is whether Plaintiffs' claims are precluded by the Settlement Agreement approved by a Kansas state court in a separate class action against Sprint. Summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Substantive law determines which facts are material, *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631–32 (9th Cir. 1987), and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Once the moving party has met its burden, the burden shifts to the nonmoving party to "set out specific facts showing a genuine issue for trial." FED. R. CIV. P. 56(e); *see also T.W. Elec. Serv.*, 809 F.2d at 630. To discharge this burden, the nonmoving party cannot rely merely on allegations or denials in its pleadings, but instead must have evidence showing that there is a genuine issue for trial. *Id.*

Under the Full Faith and Credit Act, the "judicial proceedings of any court of any . . . State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738. "This statute has long been understood to encompass the doctrine[] of res judicata, or 'claim preclusion' . . . ." *San Remo Hotel, L.P. v. City and County of San Francisco, Cal.*, 545 U.S. 323, 336 (2005) (internal quotation marks omitted). Judgments of state courts in class action proceedings fall squarely within this mandate and, as such, must be given the same preclusive effect in federal court that they would be accorded in the courts of the rendering state. *Matsushita Elec. Indus. Co., Ltd., v. Epstein*, 516 U.S. 367, 373–74 (1996). Whether the doctrine of claim preclusion applies is a question of law, properly resolved on summary judgment. *See Stanfield v. Osborne Indus., Inc.*, 949 P.2d 602, 608 (Kan. 1997).

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III. ANALYSIS

A. Hesse and Olson Are Members of the Benney *Settlement Class*

The *Benney* Settlement Class is comprised of all Sprint wireless customers in the United States who: (1) were customers for any time during the period December 1, 2000 to March 8, 2007; and (2) were charged "regulatory fees." Regulatory fees are defined in the Settlement Agreement as fees or surcharges on subscriber invoices, specifically including "USA Regulatory Obligations & Fees," "Federal E911" and "Federal Wireless Number Pooling and Portablility" fees or surcharges. (Dkt. No. 178-3 at 8–9.)

That Plaintiffs are members of the *Benney* Settlement Class is evident. Plaintiffs attach to their motion for partial summary judgment a Sprint PCS wireless invoice addressed to Hesse for the billing period ending January 14, 2002, which includes an assessment for "USA Regulatory Obligations & Fees." (Dkt. No. 175-2 at 50.) Similarly, Sprint submits a wireless invoice addressed to Olson dated September 23, 2006, which includes charges for "Federal Wireless Number Pooling and Portability," and "Federal E911." (Dkt. No. 72 at 10.) That the current action challenges the imposition of a "surcharge" rather than a "regulatory fee" is irrelevant to class membership—Plaintiffs cannot and do not deny that at some point during the period December 1, 2000 to March 8, 2007 they were charged regulatory fees as defined in the Settlement Agreement.

B. Hesse and Olson Had Notice of the Benney *Settlement and Did Not Opt Out of the Class*

Plaintiffs received notice of the proposed Settlement Agreement and failed to opt out of the settlement class. Hesse was sent notice of the proposed settlement in an insert enclosed with his May 15, 2006 invoice, for which Sprint received payment on or around June 11, 2006. (Nevels Decl. ¶¶ 9, 10 (Dkt. No. 178).) That notice defined the *Benney* Settlement Class as "all current and former Sprint wireless telephone customers in the United States who were customers for any time during the period December 1, 2000 to the Effective Date, and who were charged Regulatory Fees." (Dkt. No. 178-6 at 8.)

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