Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY

Present: Honorable **JAMES J. GOLIA** IAS TERM, PART 33
Justice

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WENDELL E. SHABAZZ, Index No. 5101/09

Plaintiff(s), Motion Date: 05/14/09

-- against -- Cal. No: 22 & 23

VERIZON NEW YORK, INC., LAURA BRIERTON, Individually and in her official capacity as Manager for Consumer Financial Services for Verizon New York, Inc., Sequence No. 2 & 3

Defendant(s).

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The following papers numbered 1 to 36 read on this (1) motion by defendants to dismiss the action pursuant to CPLR 3211; (2) motion by plaintiff for a default judgment against defendant Verizon New York, Inc. (Verizon) pursuant to CPLR 3215; (3) cross motion by plaintiff for summary judgment pursuant to CPLR 3212; and (4) cross motion by defendant to compel acceptance of defendants' original answer, or for an extension of defendants' time to answer the complaint pursuant to CPLR 3012 (d), or to excuse the delay of service of an answer pursuant to CPLR 2005.

	PAPERS NUMBERED
Notice of Motion, Affidavits, Exhibits.....	1 – 10
Notices of Cross Motion, Affidavits, Exhibits	11 – 18
Answering Affidavits, Exhibits.....	19 – 28
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Upon the foregoing papers it is ordered that this motion is decided as follows:

The relevant facts are undisputed. In 2007, plaintiff received a solicitation from Verizon for a telephone service known as "Verizon Freedom Value" (the Freedom Plan), offering unlimited calling for "as low as $19.99 a month (plus taxes and fees) for six

months." In the seventh month under the Freedom Plan, the base rate would increase to $39.99 per month. Plaintiff opened two accounts under the Freedom Plan, with telephone numbers 718-322-2730 (Account 2730) and 718-322-1902 (Account 1902).

The first invoices plaintiff received with respect to his Freedom Plan accounts were dated July 4, 2007 and covered two billing cycles. The charges were $104.12 and $133.40 for Accounts 1902 and 2730, respectively. Believing these charges to be in excess of $19.99 per month plus taxes and fees, plaintiff filed complaints against Verizon with the Public Service Commission (PSC).

While the charges continued to go unpaid, plaintiff notices, dated March 19, 2008, that service would be terminated unless plaintiff remitted $202.91 on Account 1902, and &275.88 on Account 2730, by 5:00 P.M. on March 31, 2008. Plaintiff alleges that on March 26, 2008, he spoke with defendant Laura Brierton (Brierton) and established with her that less was owed on each account. Payment confirmations show that, on March 31, 2008, approximately twenty minutes before the payment deadline, plaintiff paid $128.88 on Account 1902, and $180.69 on Account 2730. Service to both accounts, however, had been suspended hours before, and was not restored for two days. It is not clear from the record how Brierton and plaintiff arrived at the reduced charges.

An informal hearing was held before the PSC regarding plaintiff complaints against Verizon on September 9, 2008. Based on this hearing and documentation submitted by Verizon, the PSC issued a decision dated January 20, 2009, finding that there had been no billing improprieties, but that plaintiff's service had been disconnected in violation of 16 NYCRR 609.4(f), which prohibits termination of service without verification that the account is delinquent. Plaintiff appealed the PSC's decision, claiming his grievances had not been redressed.

On March 14, 2009, while the appeal of the PSC's decision was pending, plaintiff commenced this action. On April 14, 2009, plaintiff filed and served an amended complaint, as of course (*see* CPLR 3025[a]), and defendants made the instant motion to dismiss the complaint.

Plaintiff alleges the following with respect to Account 1902 and Account 2730, for a total of 16 causes of action: (1) Defendants violated 16 NYCRR 609.8 by interrupting telephone service without offering him a deferred payment plan. (2) Defendants violated 16 NYCRR 609.4 (f) by interrupting service without verifying that the account was delinquent. (3) Defendants'

erroneous invoicing and subsequent interruption of service constituted intentional infliction of emotional distress. (4) Verizon violated General Business Law § 349 by inducing plaintiff into the Freedom Plan through the use of deception. (5) Verizon violated General Business Law § 350 by inducing plaintiff into Freedom Plan through the use of false advertising. (6) Verizon fraudulently induced plaintiff into entering into the Freedom Plan. (7) Verizon breached its contract with plaintiff through the erroneous invoicing and subsequent interruption of service. (8) Verizon violated the tariff it filed with the PSC (the tariff), by suspending plaintiff's telephone service without determining whether payment had been posted to plaintiff's account, and while the invoices were still in dispute. The asserted causes of action for violations of the tariff are the only material difference between the original complaint and the amended complaint.

Plaintiff's motion for a default judgment based on Verizon's late answer to the original complaint must be denied. "[A]n amended complaint is deemed to supersede and original complaint, and thus, a defendant's original answer has no effect" (*Mendrzycki v Cricchio*, 58 AD3d 171, 174-175 [2008]; *see Halmar Distribs., v Approved Mfg. Corp.*, 49 AD2d 841 [1975]). Pursuant to CPLR 3025 (d), defendants served a timely answer to the amended complaint on April 17, 2009. Since "an answer to an amended complaint served pursuant to CPLR 3025 (d) is in fact an original answer to the amended complaint" (*Mendrzycki*, 58 AD3d at 175(), there are no grounds for a default judgment (*see* CPLR 3215 [a]). In any event, Verizon's answer to the original complaint was only seven days late, and granting an extension of that much time would not be an abuse of discretion (*see Pdagurski v County of Suffolk*, 278 AD2d 397 [2000]).

Although defendants' motion to dismiss was facially directed at plaintiff's original complaint, since, as discussed *infra*, the new allegations do not support a cognizable cause of action, the motion may be deemed addressed to the amended complaint (*see* Siegel, Practice commentaries, McKinney's Cons Laws of NY, Book 7B. CPLR C3211:65).

The amended complaint cannot support a cause of action against Verizon or Brierton for the service interruption. A private right of action exists against a telephone corporation that violates State law "for all loss, damage or injury caused thereby or resulting form the two-day interruption of service to the two accounts. Plaintiff's sole allegation as to damages-the he has been "damaged in an amount not yet ascertained"-is insufficient to avoid dismissal (*see* CPLR 3211 [a][7]; 3013; *Long Island Cent. Station, Inc. v. New York Tel. Co.*, 54 AD2d 893 [1976]).

Furthermore, the tariff, which plaintiff submitted in pertinent part, limits Verizon's liability to a proportional credit to the customer for the duration of the interruption, unless there is gross negligence or willful misconduct. According to plaintiff's documentation, the service interruption was made only a few hours before the deadline, and plaintiff made payments approximately 25 minutes before the deadline. This does not constitute gross negligence or willful misconduct (*see Long Island Cent. Station, Inc.*, 54 AD2d at 894). The causes of action for violations of 16 NYCRR 609.8 and 609.4 (f), and the tariff, must thus be dismissed.

The causes of action asserted under General Business Law §§ 349 and 350 must be dismissed, as plaintiff failed to allege actual harm that resulted from his purchase of the Freedom Plan, purportedly in reliance on defendants' deceptive acts and false advertising (*see Stutman v. Chemical Bank*, 95 NY2d 24, 29 [2000]; *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 56 [1999]; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 26 [1995]; *Donahue v Ferolito, Vultaggio & Sons*, 13 AD3d 77, 79 [2004]; *Smith v Chase Manhattan bank, USA, N.A.*, 293 AD2d 598, 599 [2002]). Moreover, the documentary evidence "utterly refuses plaintiff's factual allegations" that defendants' promise of telephone service at $19.99 per month was false, as the solicitation from Verizon did not promise that the discount would be applied in any particular form, and the PSC found that plaintiff had not been overcharged (*see* CPLR 3211 [a] [1]; *Goshen v Mutual Life Ins. Co.*, 98 NY2d 314, 327 [2002]).

Plaintiff also asserts that defendants' interference with plaintiff's telephone service amounts to intentional infliction of emotional distress. The tort of intentional infliction of emotional distress has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress (*Howell v New York Post co.*, 81 NY2d 115, 121 [1993]). Regarding the first element, "[l]iability has been found only where the conduct has been outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*id.* at 122 [internal quotation marks omitted]; *see Benyo v Sikorjak*, 50 AD3d 1074, 1077 [2008]).

As a matter of law, the conduct that plaintiff attributes to defendants does not meet this standard, consisting, at worst, of mere annoyances (*see Leibowitz v Bank Leumi Trust Co.*, 152 AD2d 169, 182 [1989]; *see Harvill v. Lowville Cert. School Dist.*, 245

AD2d 1106 [1997]; *Bell v Slepakoff,* 224 AD2d 567, 568 [1996]; *Lincoln First Bank v Barstro & Assoc. Contr., Inc.,* 49 AD2d 1025, 1025–1026 [1975] 0, rather than "extreme and outrageous conduct" (*see e.g. Eves v Ray,* 42 AD3d 481, 483 [2007]; *Nigro v Pickett,* 39 AD3d 720, 721–722 [2007]; *Mitchell v Giambruno,* 35 AD3d 1040, 1041–1042 [2006]; *Cavallaro v Pozzi,* 28 Ad3d 1075, 1078 [2006]; *Bunker v Testa,* 234 AD2d 1004, 1005 [1996]; *see also Conradt v NBC Universal, Inc.,* 536 F Supp 2d 380, 397 [2008]). The causes for intentional infliction of emotional distress must thus be dismissed.

Regarding the causes of action for breach of contract for the allegedly erroneous invoicing, plaintiff had to allege existence of a contract, Verizon's breach of that contract, and resulting damages (*see Furia v Furia*, 116 AD2d 694, 694 [1986]). Not only has plaintiff failed to allege factually the damages resulting from Verizon's purported breach, the PSC found that plaintiff had been charged in accordance with the filed rates. "[A] consumer's claim, however, disguised, seeking relief for an injury allegedly caused by the payment of a rate on file with a regulatory commission, is viewed as an attack upon the rate approved by regulatory commission. All such claims are barred by the 'filed rate doctrine'" (*Porr v. NYNEX Corp.,* 230 AD2d 564, 568 [1997]). The causes of action for breach of contract must be dismissed.

Finally, plaintiff does not have a cause of action for fraudulent inducement. "[T]he fraud alleged cannot relate to a breach of contract" (*Kaufman v Torkan,* 51 AD3d 977, 980 [2008]). The alleged misrepresentation of telephone service at $19.99 per month for six months "was not collateral or extraneous to terms of the parties'...agreement" (*id.*); rather, it forms the core of the parties' dispute. Furthermore, plaintiff failed to allege damages resulting from reliance on such a misrepresentation (*see Ideal Steel Supply Corp. v Anza,* 63 AD3d 884 [2009]). Plaintiffs' causes of action alleging fraudulent inducement must thus be dismissed (*see* CPLR 3211 [a][7]; 3016[b]).

Accordingly, plaintiff's motion for a default judgement is denied, and defendants' motion to dismiss is granted in its entirety. Plaintiff's cross motion summary judgment, and defendants' cross for an extension of time to answer, etc., are both denied as academic. The amended complaint is hereby dismissed.

This constitutes the Order of the Court.

Dated: September 3, 2009

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JAMES J. GOLIA, J.S.C.