

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

CAVALIER TELEPHONE, LLC,)
Plaintiff)
)
versus) Civil Action No. 03:01CV736
)
VERIZON VIRGINIA INC.,)
Defendant)

**REPLY MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE
TO FILE SUPPLEMENTAL COMPLAINT**

Plaintiff, Cavalier Telephone, LLC (“Cavalier”), replies to the Opposition to Plaintiff’s Motion for Leave to File Supplemental Complaint (“Opp.” or “Opposition”) filed by Verizon Virginia, Inc. (“Verizon”) on February 19, 2002. Verizon advances four flawed arguments in opposition to Cavalier’s February 7, 2002 motion. Cavalier respectfully suggests that the Court should reject these arguments.

a. Background and Procedural Context

Verizon first claims that “[t]his action was filed as a dispute between Verizon and Cavalier over the terms and conditions under which Verizon provides use of its facilities and services to Cavalier.” (Opp. at p. 1.) To the contrary, Cavalier filed this action to seek “injunctive relief and damages against Verizon arising out of Verizon’s anticompetitive and exclusionary conduct aimed at excluding Cavalier from the relevant market for Basic Telecommunications Services in the Richmond, Tidewater, and northern Virginia areas and preserving Verizon’s monopoly power in that market, thereby causing substantial harm to competition.” (November 1, 2001 Complaint at ¶ 1.)

Second, Verizon’s claim that Cavalier “now seeks to expand this litigation to include allegations” about former customers of Net2000 Communications, Inc. and its affiliates (“Net2000”), when the U.S. Bankruptcy Court for the District of Delaware (“the Bankruptcy Court”) or the Virginia State Corporation Commission (“the SCC”) are the appropriate bodies to address such issues. As explained below, the Bankruptcy Court’s February 13, 2002 Order speaks for itself, and the SCC lacks jurisdiction to address Verizon’s anticompetitive conduct or to award monetary damages to Cavalier.

b. Cavalier’s claims by definition introduce no unrelated issues of law and fact.

Verizon first claims that Cavalier’s supplemental allegations “fail to satisfy Rule 15(d) in that they are unrelated to the original complaint.” (Opp. at p. 3.) Verizon also seeks to contrast the issues surrounding its retaliatory conduct concerning former Net2000 customers from the issues surrounding its other, anticompetitive conduct, by claiming that additional issues might be involved, that discovery from a non-party, Net2000 might be needed, and that Cavalier can bring its Net2000-related claims later (Opp. at pp. 4-5). These arguments are specious.

As even Verizon must acknowledge (Opp. at p. 4), Cavalier has alleged that Verizon’s conduct with respect to former Net2000 customers appeared to be in retaliation for the filing of this civil action by Cavalier. (Supplemental Complaint at ¶ 153.) Cavalier further alleged that this post-complaint conduct differed from Verizon’s pre-complaint conduct in the transfer of former customers of Conectiv Communications, Inc. and Broadstreet Communications. (Id. at ¶ 147.)

Verizon’s conduct, as alleged in the Supplemental Complaint, thus fits squarely within the pattern of anticompetitive conduct already alleged by Cavalier (see Cavalier’s

January 22, 2002 Memorandum in Opposition to Verizon’s Motion to Dismiss at pp. 2-23.) Further, Verizon’s withdrawal of its previously proffered assistance in the transition of customers from other carriers to Cavalier¹ is the same type of willful conduct that the Supreme Court found actionable under the federal antitrust laws in Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

That “relation” is at least as “direct” as the new claims that were allowed by the Seventh Circuit in a decision relied upon by Verizon, Rowe v. United States Fidelity & Guaranty Co., 421 F.2d 937 (7th Cir. 1970). (See Opp. at pp. 3, 4, and 8, citing Rowe.) In Rowe, the Seventh Circuit found an abuse of discretion and reversed a decision of the district court disallowing a supplemental complaint against an insurer. It then allowed plaintiffs to allege a new claim based on an assignment of the rights of an insured, under Fed.R.Civ.P. 15(d). Like the claim in Rowe, Cavalier’s allegation of a retaliatory and anticompetitive response to Cavalier’s filing of this action is directly related to Cavalier’s original complaint concerning a broad range of anticompetitive conduct by Verizon.

The same concern with the “efficient administration of justice” identified in New Amsterdam Cas. Co. v. Waller, 323 F.2d, 28-29 (4th Cir. 1963) (cited in Opp. at p. 2 also militates against Verizon’s suggestion that Cavalier can “present[] any Net2000-related claims in a subsequent state or federal complaint.” (Opp. at p. 5.) The Seventh Circuit rejected that very suggestion in Rowe, 421 F.2d at 944 (7th Cir. 1970) (“Apparently, the district court was of the opinion that the plaintiffs could have instituted a new action....”).

¹ Verizon did not even trouble to disguise its actions. As shown in the pleading attached by Verizon as Tab “1” to its Opposition, Verizon first agreed to assist Cavalier (see Exhs. B, C, and D to Opp. Tab “1”), and then refused to do so on advice of counsel (see Opp. Tab “1” at p. 10, transcript of voice-mail message).

Neither is Verizon's purported concern with additional issues and witnesses valid. Verizon claims that Cavalier's allegations of new, anticompetitive conduct will involve delving into Net2000's bankruptcy, transfer agreements between Net2000 and Cavalier, and Verizon's obligations under FCC and SCC rulings. (Opp. at pp. 4-5.) To the contrary, the lone additional issue should be whether Verizon's withdrawal of its cooperation in the transition of former Net2000 issues was anticompetitive. That matter does not directly involve Net2000's bankruptcy nor any agreements between Net2000 and Cavalier. Rather, it involves Verizon's conduct toward Cavalier. Further, although Verizon seeks to argue that additional discovery will be required, Verizon has already been allowed to pursue, and has pursued, discovery into these issues in the bankruptcy litigation, even though the parties have not yet engaged in formal discovery in this action.

c. The claims in Cavalier's supplemental complaint cannot be decided elsewhere.

Verizon next argues that the bankruptcy court or the SCC are deciding the new issues raised in Cavalier's supplemental complaint. That is not true. First, paragraph 4 of the Bankruptcy Court's February 13, 2002 Order provides as follows:

The right of Cavalier to use any services and facilities provided by Verizon, and the right of Verizon to refuse to provide such services shall be governed solely by applicable non-bankruptcy law, including, without limitation applicable tariffs and contracts between Cavalier and Verizon. **No Order of this Court shall prevent either Cavalier or Verizon from seeking all such relief to which they may be entitled under such applicable non-bankruptcy law.**

Opp. at Tab "1," Exh. "A," p. 4, ¶ 4 (emphasis added).

Second, as previously stated, the SCC has no jurisdiction to award Cavalier monetary damages nor to hear any claims under federal law. (See Cavalier's January 22, 2002 Opposition to Verizon's motion to dismiss at p. 25 and Exhibit "10.") Further,

Verizon points to several “issues” allegedly before the SCC. (Opp. at pp. 6-7.). Cavalier is not even a party to the proceeding involving the first two “issues”—Net2000’s petition to withdraw from service in Virginia, and Verizon’s request for an investigation of that petition because of alleged misrepresentations in an asset transfer petition already approved by the SCC. The third “issue” is a letter that Verizon cites but has not provided to the Court (id. at p. 7 and p. 7 n. 3). That letter was an informal precursor to the case that Cavalier brought on February 15, 2002, seeking declaratory relief under Virginia law, as stated in pages 3-5 of the Petition attached as Tab “1” to Verizon’s Opposition.

Therefore, of the several “issues” and proceedings raised by Verizon, only one case pertaining to Net2000 involves Cavalier. In that case, Cavalier is seeking declaratory relief under provisions of state law not involved in this action, before a body that has no jurisdiction to consider issues of federal law, including claims under the federal antitrust laws, and no jurisdiction to award monetary damages. Further, it is irrelevant to Cavalier’s antitrust claims whether the SCC rules in favor of Cavalier or Verizon in that proceeding—at issue will remain whether it was a violation of § 2 of the Sherman Act for Verizon to cooperate with Cavalier in the transition of former Conectiv and Broadstreet customers, to agree to cooperate with Cavalier in the transition of former Net2000 customers, and then to withdraw that cooperation abruptly.

Finally, Verizon once again seeks to invoke the doctrine of primary jurisdiction (Opp. at pp. 7-8), arguing that it “counsels against granting the motion to supplement.” Verizon is incorrect in this assertion. As the Ninth Circuit recently stated, “[p]rimary jurisdiction is properly invoked when a claim is cognizable in federal court but requires resolution of an issue of first impression, or of a particularly complicated issue that

Congress has committed to a regulatory agency.” Brown v. MCI Worldcom Network Services, Inc., 2002 U.S.App. Lexis 714 at *12 (9th Cir. Jan. 17, 2002). It is “not implicated simply because a case presents a question, over which the FCC could have jurisdiction, regarding the interpretation of a single tariff,” but instead is appropriate “when a case presents a far-reaching question that ‘requires expertise or uniformity in administration.’” Id. (citation omitted).

No issue of first impression is involved here, nor is any complicated regulatory issue presented. The SCC will not award Cavalier monetary damages nor determine whether Verizon’s conduct violates the federal and state antitrust laws, the Communications Act of 1934, or other claims stated in Cavalier’s November 1, 2001 Complaint or its February 7, 2002 Supplemental Complaint. Rather, the SCC will decide only whether Cavalier is entitled to expedited relief under the Virginia laws governing public utilities such as telephone companies. It is left to a court of competent jurisdiction, such as this Court, to determine whether Verizon was illegal, anticompetitive, and otherwise actionable as alleged by Cavalier.

d. Verizon improperly argues the sufficiency of Cavalier’s claims.

Verizon also argues that Cavalier’s motion should be denied as futile and because the new allegations fail to state any claim. Both of these arguments are incorrect.

First, Verizon’s motion testing the sufficiency of some claims alleged by Cavalier remains pending before this Court.² Further, as Rule 15(d) itself states, “[p]ermission may be granted even though the original pleading is defective in its statement of a claim

² As Cavalier’s counsel noted in the February 8, 2002 hearing on Verizon’s Motion to Dismiss, Verizon failed to challenge Cavalier’s claims under the Virginia antitrust laws until it filed its Reply on its Motion to Dismiss on February 1, 2002. Those claims should not be dismissed without affording Cavalier an opportunity to respond to Verizon’s arguments or granting Cavalier leave to amend its claims.

for relief.” Futility typically means that “the amended complaint fails to state a claim upon which relief could be granted.” Stripling v. Jordan Production Co., LLC, 234 F.3d 863, 873 (5th Cir. 2000). Verizon cites no decision to support its argument for denying leave to file a supplemental complaint whilst a motion to dismiss a portion of the original claims is still pending.

Second, Verizon’s argument about the sufficiency of Cavalier’s allegations in its Supplemental Complaint is as flawed as its argument about the allegations contained in Cavalier’s original Complaint.³ As noted in Cavalier’s January 22, 2002 Memorandum in Opposition to Verizon’s motion to dismiss, monopolists sometimes have a duty to cooperate with competitors, including situations where the monopolist terminates its prior cooperative efforts for anticompetitive reasons. Virginia Vermiculite, Ltd. v. W.R. Grace & Co., 156 F.3d 535, 539-540 (4th Cir. 1998); see also Aspen Skiing, *supra*.

It is the function of a court to determine that such duties exist under the antitrust laws, regardless of whether they exist under the Virginia laws governing public utilities. Violation of state statutes or regulations would only lend additional force to Cavalier’s allegations that Verizon has violated the federal and state antitrust laws and other duties. See, e.g., 1 *Antitrust Law Developments* at p. 248 & n. 94 (4th ed. 1997).

e. Verizon’s claims of delay are baseless.

Verizon’s final argument is a baseless complaint that Cavalier delayed bringing its Supplemental Complaint.

³ Cavalier further notes that Verizon’s arguments with respect to the antitrust laws (Opp. at p. 9) shows how quickly Verizon is forced to abandon its pretence that the original complaint was no more than “a dispute between Verizon and Cavalier over the terms and conditions under which Verizon provides use of its facilities and services to Cavalier.”

Verizon's retaliatory conduct began, as alleged, in December 2001—in fact, it apparently began on December 28, 2001, as stated on page 10 of Tab “1” to Verizon's Opposition. However, it took several days for Cavalier to confirm Verizon's intended course of action, and the parties were still attempting to resolve the dispute concerning Net2000 almost until the eve of the Bankruptcy Court hearing on February 5, 2002. Upon failure of the efforts at informal resolution, Cavalier prepared its Motion for Leave to File a Supplemental Complaint and filed it on February 7, 2002, without even waiting for the conclusion of the Bankruptcy Court hearing on February 8, 2002.

Even without any intervening efforts to resolve the Net2000 dispute, the timing of Cavalier's Supplemental Complaint could not be called “dilatatory.” The Supplemental Complaint followed the very start of Verizon's retaliatory conduct by little more than four weeks. Such a “delay,” if it can even be called that, is completely dissimilar to the supplemental complaint at issue in Twin Disc, Inc. v. Big Bud Tractor, Inc., 772 F.2d 1329, 1338 (7th Cir. 1983), cited in Opp. at p. 10. In Twin Disc, the original complaint was filed in July 1980, trial was set for April 9, 1984, and the plaintiff sought leave to file a supplemental complaint on April 2, 1984—a week before trial and almost four years after the original complaint. With its citation to Twin Disc, Verizon has provided an example of true delay. Cavalier's filing is not even remotely analogous.

Finally, Verizon assails Cavalier's Supplemental Complaint as filed later in this action than the Supplemental Complaint at issue in Star Scientific, Inc. v. R.J. Reynolds Tobacco Co., 174 F.Supp.2d 388 (D.Md. 2001). However, as in Star Scientific, this action is in its early stages. It is true that the motion to dismiss has been briefed, Rule

26(a) initial disclosures have been exchanged, and this Court has set a trial date.⁴

However, Verizon has not yet filed an answer, formal discovery has not yet commenced, and the Court has not yet ruled on Verizon's motion to dismiss. Moreover, Verizon does not raise even a single example of any prejudice that it claims would result from Cavalier's purported "delay" or from this Court granting Cavalier's motion.

f. Conclusion

For the reasons stated above, Cavalier respectfully requests that the Court reject the arguments advanced by Verizon in its February 19, 2002 Opposition, and grant Cavalier's motion for leave to file its proposed Supplemental Complaint.

Dated: February 22, 2002.

Respectfully submitted,

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⁴ Despite Verizon's insistence that a Scheduling Order has already been entered (e.g., Opp. at p. 10), Cavalier has not yet received any formal Scheduling Order in this action. In response to Cavalier's February 22, 2002 telephone inquiry, the Clerk of Court advised that no formal Scheduling Order appeared to have been entered yet.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 2002, I caused a true and correct copy of the above pleading to be served by first class U.S. mail, postage prepaid and properly addressed, to the following counsel:

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