Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
James Chelmowski	)	
Complainant,	)	Proceeding No. 14-260
	)	File No. EB-14-MD-016
v.	)	
	)	
AT&T Mobility LLC,	)	
Defendant	)	

MEMORANDUM OPINION AND ORDER

Adopted: July 10, 2015 **Released: July 10, 2015**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. The Communications Act provides that a complaint against a carrier for the recovery of damages must be filed within two years of the injury. In this Order, we dismiss such a complaint because it was filed outside this strict two-year period.

2. Specifically, in this Order, we address a formal complaint seeking damages that James Chelmowski (Chelmowski) filed against AT&T Mobility LLC (AT&T).[1] Chelmowski, a former AT&T customer, alleges that AT&T failed in March and April of 2011 to port a telephone number to his new provider. The Complaint was filed in December 2014, approximately three and a half years after the alleged number porting failure occurred. For the reasons explained below, we hold that the Complaint is time-barred under the two-year statute of limitations in Section 415(b) the Communications Act of 1934, as amended (Act),[2] and must be dismissed with prejudice.

II. BACKGROUND

3. In 2010 and 2011, Chelmowski was a customer of AT&T with four lines of wireless service.[3] In January 2010, AT&T received a request from Chelmowski's new provider, XO Communications, to port the number for one of the lines: (847) 768-0400 (the "0400 number"). The January 2010 porting request, however, was never completed because, according to AT&T, the information provided by XO was incorrect.[4] AT&T also states that the January 2010 request to port the

[1] Formal Complaint, File No. EB-14-MD-016, FCC No. 14-260 (filed Dec. 11, 2014) (Complaint); Answer to Complaint, File No. EB-14-MD-016, FCC No. 14-260 (filed Jan. 16, 2015) (Answer); FCC Formal Complaint Reply, File No. EB-14-MD-016, FCC No. 14-260 (filed Jan. 26, 2015) (Reply).

[2] 47 U.S.C. § 415(b).

[3] Answer at 4-5, para. 7.

[4] Answer at 5, para. 8 (citing Answer, Ex. 1 (Transcript of Arbitration Proceeding, Testimony of James Camberis, AT&T (dated May 29, 2014))).

0400 number was "never modified or cancelled," and, therefore, remained pending in AT&T's system.[5]

4. In March and April 2011, AT&T received requests to port all four of Chelmowski's numbers, including the 0400 number, to Choice One, on behalf of Choice One's wholesale customer OOMA, and OOMA's retail customer, Chelmowski.[6] Three of the four numbers were ported, but not the 0400 number.[7] On March 17, 2011, after receiving repeated communications from Chelmowski accusing AT&T personnel of "repeatedly [lying and torturing] him,"[8] AT&T sent Chelmowski a letter stating that AT&T was terminating his service due to his "abusive treatment" of AT&T employees.[9]

5. Subsequently, Chelmowski filed with the Commission three informal complaints regarding the unsuccessful porting requests for the 0400 number. He filed the first informal complaint on March 23, 2011,[10] and the second on August 31, 2011.[11] AT&T responded to those informal complaints on April 13 and September 22, 2011, respectively.[12] AT&T states that it sent both responses to Chelmowski.[13] Chelmowski disputes this assertion, and claims that AT&T did not send responses to

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[5] Answer at 1, para. 1; *see also id.* at 5, para. 8.

[6] Complaint at 17-18, paras. 52-66; Answer at 5, para. 8. AT&T asserts that all four of the 2011 requests were to port the numbers to Choice One, for OOMA and Chelmowski. Answer at 5, para. 8. Chelmowski disputes this assertion and states that two of the four numbers were to be ported to Verizon. Reply at 26, paras. 57-58. Chelmowski does not appear to dispute, however, that the 0400 number, which is the focus of the Complaint, was to be ported to Choice One/OOMA. Thus, we need not resolve any dispute about to which carrier(s) the other numbers were to be ported.

[7] Answer at 1, para. 2; *see also id.* at 5, para. 8 and Ex. 1, transcript page 243. The record is unclear about why the porting request for the 0400 number failed. AT&T states the port initially failed because "Choice One included an incorrect account number on the [request]," and the port continued to fail even after the account number was corrected in a modified port request, "because of the still pending, never modified and inaccurate port request submitted by XO the year before [for the 0400 number]." Answer at 1, para. 2; *see also id.* at 5, para. 8 and Ex. 1, transcript pages 245-46.

[8] *See* Reply at Ex-0360 (Email from James Chelmowski to Ralph de la Vega, AT&T, dated March 1, 2011); *id.* at Ex-0361; *see also id.* at Ex. 0362 to-0519 (providing the text of a string of email messages between Chelmowski and AT&T).

[9] Answer at Ex. 2 (Letter from Stephanie Maidlow, AT&T, to Jim Chelmowski (dated Mar. 17, 2011) (citing term of AT&T's service agreement allowing termination for abusive or unreasonable behavior toward AT&T representatives). AT&T terminated Chelmowski's account on May 15, 2011. *See* Complaint, Ex-0029 (Response to Notice of Informal Complaint 11-C00325771-1 (dated Sept. 22, 2011)).

[10] *See* Answer, Exhibit 2 (Informal Complaint 11-C00292341-1 (filed March 23, 2011) (stating that the telephone numbers involved are "(847) 744-5626[, and] (847) 768-0400" and that the issue is "[n]ot porting - denied porting").

[11] *See* Answer, Exhibit 4 (Informal Complaint 11-C00325771-1 (filed Aug. 31, 2011)) (stating that the telephone number involved is "(847) 768-0400" and that the issue is "AT&T continues to block porting of 847-768-0400"). The Complaint states, without support, that "AT&T impersonated the Complainant and forged the [second] FCC informal complaint." Complaint at 9, para. 31. We do not find this assertion credible, and note that Chelmowski's second informal complaint appears entirely consistent with all of his other filings and communications in the record.

[12] *See* Complaint, Ex-0030 (Response to Notice of Informal Complaint 11-C00292341-1 (stating the "service date" is Apr. 13, 2011); Complaint, Ex-0029 (Response to Notice of Informal Complaint 11-C00325771-1 (dated Sept. 22, 2011)).

[13] Answer at 5-7, paras. 10, 14. The responses to the first and second informal complaints that AT&T filed with the Commission contain the notation, "cc: James Chelmowski." Answer, Exhibit 2 (Informal Complaint 11-C00292341-1 (filed Apr. 13, 2011); Answer, Exhibit 4 (Informal Complaint 11-C00325771-1 (filed Aug. 31, 2011)). The record, however, contains no proof of service confirming delivery of these responses to Chelmowski.

these two informal complaints directly to him.[14] In any event, the record shows that the Commission provided Chelmowski with a copy of AT&T's response to the first informal complaint on May 24, 2013,[15] and a copy of AT&T's response to the second informal complaint on October 22, 2013.[16]

6. On February 26, 2013, Chelmowski initiated an arbitration proceeding regarding the failed 0400 number port, pursuant to an arbitration provision in his customer agreement with AT&T.[17] On July 14, 2014, the arbitrator denied Chelmowski's claims.[18] He then brought an action in court seeking to vacate the arbitration award. The United States District Court for the Northern District of Illinois rejected his request and affirmed the arbitration award.[19] Chelmowski is appealing the District Court's decision.[20]

7. On July 31, 2014, Chelmowski filed a third informal complaint regarding the failed port of the 0400 number.[21] AT&T responded to the third informal complaint on August 13, 2014, and Chelmowski acknowledges that he received this response.[22] On December 11, 2014, Chelmowski filed the instant Complaint seeking damages pursuant to Section 208 of the Act,[23] alleging that, in March and April of 2011, AT&T failed to process his porting requests for the 0400 number, in violation of 47 C.F.R.

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[14] Chelmowski states that AT&T "never" sent him a response to the first informal complaint. *See, e.g.*, Complaint at 18, para. 63.

[15] *See* Complaint, Ex-0030 (Response to Notice of Informal Complaint 11-C00292341-1 (dated Apr. 13, 2011)) (showing a facsimile date-stamp from the Commission of May 24, 2013); *See also* Reply at 22 (noting that AT&T's letters responding to the first and second informal complaints "were faxed from the FCC to me in 2013."); *see also* Complaint, Ex-0141 (asserting that AT&T never sent Chelmowski its responses to Informal Complaint 11-C00292341-1 and Informal Complaint 11-C00325771-1 "until late 2013").

[16] *See* Complaint, para. 47 and n.57 (citing Ex-0029 (Response to Notice of Informal Complaint 11-C00325771-1 (dated Sept. 22, 2011)) (showing a facsimile date-stamp from the Commission of October 22, 2013)). The record also indicates that on October 18, 2013 a copy of AT&T's response to the second informal complaint was provided to the counsel who represented Chelmowski in the arbitration proceeding he initiated against AT&T (*see infra*). *See* Answer at Exhibit 9 (*James Chelmowski v. AT&T Mobility*, American Arbitration Association Award of Arbitrator (dated July 14, 2014)).

[17] Answer at 7, para. 15.

[18] *See* Answer at Exhibit 9 (*James Chelmowski v. AT&T Mobility*, American Arbitration Association Award of Arbitrator (dated July 14, 2014)).

[19] *See* Letter from James Chelmowski to Market Disputes Resolution Division, FCC, File No. EB-14-MD-016, FCC No. 14-260 (dated Feb. 19, 2015) at 9; Reply at 20, para. 82. Because the Complaint is time-barred, as discussed below, we need not reach AT&T's defense that, because the Complaint's claims were adjudicated in a prior arbitration proceeding, they are barred under the doctrine of *res judicata*. *See* Answer at 8-9, paras. 19-21; *see* Letter from Michael P. Goggin, Counsel for AT&T, to Market Disputes Resolution Division, FCC, File No. EB-14-MD-016, FCC No. 14-260 (dated Jan. 20, 2015) (attaching the United States District Court for the Northern District of Illinois January 15, 2015 Memorandum Opinion and Order denying Chelmowski's petition to vacate the arbitration award).

[20] *See* Letter from James Chelmowski to Market Disputes Resolution Division, FCC, File No. EB-14-MD-016, FCC No. 14-260 (dated Feb. 19, 2015).

[21] Informal Complaint 14-C00602676 (dated July 31, 2014) (referencing the first (April 2011) informal complaint, and stating that the involved telephone number was "(847) 768-0400"). *See* Complaint, Ex-0141 (summarizing text of Informal Complaint 14-C00602676); Answer at 10-11, para. 25.

[22] *See* Complaint, Ex-0029 (Response to Notice of Informal Complaint 14-C00602676-1 (dated Aug. 13, 2014).

[23] 47 U.S.C. § 208.

§§ 52.35 and 52.36.[24]

III. DISCUSSION

A. Chelmowski's Claims are Time-Barred

8. Section 415(b) of the Act provides that "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed within two years from the time the cause of action accrues."[25] Under Section 415(b), a cause of action accrues at the date of the injury, if it is readily discoverable.[26] If the injury is not readily discoverable, the cause of action accrues when the complainant discovers, or should have discovered, the injury.[27] We find that any injury resulting from AT&T's failure to port the 0400 number was readily discoverable at the time the porting failures occurred, and that Chelmowski in fact discovered his alleged injury no later than when he filed his first informal complaint in March 2011 charging AT&T with "[n]ot porting" the 0400 number.[28] Because Chelmowski did not file his formal Complaint until December 11, 2014--significantly more than two years after both the time of injury and the time of discovery--the Complaint is barred under Section 415(b)'s two-year limitations period.

9. Additionally, we find that the Complaint cannot be deemed timely under the "relation back" principle in Section 1.718 of the Commission's rules.[29] Rule 1.718 provides that when an informal complaint against a carrier has not been satisfied, the complainant may file a formal complaint which "will be deemed to relate back to the filing date of the informal complaint" *provided* that the formal complaint is filed within 6 months from the date of the carrier's response to the informal complaint.[30]

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[24] *See* Complaint at 2-3, paras. 4-9. The Complaint incorrectly references rules "53.35" and "53.36" as the bases for the alleged number porting violations. *See* Complaint at 5-8. The relevant rules concerning the porting intervals are Commission rules 52.35 and 52.36. 47 C.F.R. §§ 52.35, 52.36. The Complaint also briefly mentions, but does not include as counts, several non-Act legal theories, such as, for example, "theft of a vanity number," "libel," and "wrongful deprivation of property." *See, e.g.*, Complaint at 25. Because these legal theories are not presented as counts in the Complaint and do not allege a violation of the Act, we do not consider them here.

[25] 47 U.S.C. § 415(b). The two-year statute of limitations in Section 415 "'is a statute of repose, designed to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed.'" *See Operator Communications, Inc. v. Verizon Telephone Companies*, Memorandum Opinion and Order, 20 FCC Rcd 19783, 19786, para. 140 (citations omitted) (2005) ("*OCI*").

[26] *See Communications Vending Corp. of Arizona v. FCC*, 365 F.3d 1064, 1074 (D.C. Cir. 2004) (stating that under Section 415, "a cause of action accrues either when a readily discoverable injury occurs or, if an injury is not readily discoverable, when the plaintiff should have discovered it") (citing *MCI Telecomms. Corp. v. FCC*, 59 F.3d 1407, 1417 (D.C. Cir. 1995)). *See also AirTouch Cellular v. Pacific Bell*, Memorandum Opinion and Order, 16 FCC Rcd 13502, 13504, para. 6 (2001) (stating that, under Section 415(b), a cause of action accrues "when the carrier does the unlawful act or fails to do what the law requires").

[27] *See Communications Vending Corp. of Arizona v. FCC*, 365 F.3d at 1074; *Sprint Communications Co. v. FCC*, 76 F.3d 1221, 1225 (D.C. Cir. 1996) (*Sprint*) (stating that a cause of action accrues and the limitations period begins to run only when the plaintiff discovers, or with due diligence should have discovered, the injury that is the basis of the action).

[28] *See* Answer, Exhibit 2 (responses to questions 1-3, 5).

[29] 47 C.F.R. § 1.718.

[30] 47 C.F.R. § 1.718 (stating, in pertinent part, that a formal complaint "will be deemed to relate back to the filing date of the informal complaint: *Provided*, That the formal complaint: (a) Is filed within six months from the date of the carrier's [*i.e.*, the defendant's] report ..."). *See, e.g.*, *In The Matter of American Cellular Corporation and Dobson Cellular Systems, Inc., v. Bellsouth Telecommunications, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 1083, 1087-88, para. 10 (Enf. Bur. 2007) (stating that where the response to an informal complaint was filed on August 8, 2003, the last day of the six-month relation-back period under rule 1.718 was February 8, 2004).

AT&T responded to the first informal complaint on April 13, 2011, and the second informal complaint on September 22, 2011, alleging in both instances that it provided a "copy to Mr. Chelmowski."[31] While Mr. Chelmowski disputes receiving any of AT&T's responses in 2011, he admits receiving AT&T's responses to the first and second informal complaints *no later than* October 22, 2013.[32] We need not reach the question of whether the six month relation back period runs from April 13, 2011, September 22, 2011, or October 22, 2013, because Chelmowski did not file the instant formal Complaint until December 11, 2014—more than six months after all of these dates. The relation back principle in rule 1.718 is therefore inapplicable here.[33] Finally, we note that the third informal complaint cannot provide a basis for "relation back" under rule 1.718 because that complaint was itself time barred under Section 415(b) when Chelmowski filed it on July 31, 2014, more than two years after the 0400 number porting claim accrued in 2011.

10. We reject Chelmowski's assertion that the limitations period should be tolled because AT&T continuously and fraudulently concealed the alleged "injury" he suffered.[34] In short, Chelmowski argues that AT&T failed to provide him with material information and thus rendered him unable to discover "material facts [relating] to the basis of his claim."[35] Chelmowski claims that this fraudulent concealment amounts to a continuing harm that tolls the statute of limitations.[36] Although a defendant's active concealment of facts giving rise to a cause of action may provide a basis for equitable tolling of the limitations period,[37] such tolling is unavailable here. The record shows that Chelmowski had the basic facts needed to assert a claim regarding the 0400 number port, and that he actually did so, in two informal complaints in 2011, and in an arbitration proceeding in 2013.[38] Accordingly, Chelmowski cannot persuasively assert that a continuing course of fraudulent concealment by AT&T enables him to "avoid the limitations bar."[39]

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[31] Answer at 6-7.

[32] *See supra* paragraph 5 and notes 15-16. *See also* Reply at 22 (stating that, in requesting AT&T provide proof that it sent responses to "informal complaints 11-C00325771 and 11-C00292341 ... [that] ... AT&T did not send these letters to me in the Fraudulent Concealment scheme. These letters were faxed from the FCC to me in 2013."). As discussed above, the record shows that October 22, 2013 is the *latest* date that Chelmowski received AT&T's response regarding the 0400 port request.

[33] We note that a complainant cannot re-start the six month period under rule 1.718 by filing a later informal complaint that re-states the claims asserted in a previously filed informal complaint to which a carrier has already responded. In any event, the record here establishes that the Complaint was not filed within six months of AT&T's response to either the first informal complaint or the second informal complaint.

[34] Complaint at 9-12, 16-17 paras. 29-41, 49-51; Reply at 19, para. 51.

[35] Complaint at 10-11, para. 35.

[36] *Id.* at 16-17, paras. 49-51.

[37] *See, e.g.*, *OCI*, 20 FCC Rcd at 19788, para. 14 ("'The construction of section 415 by the Commission and the federal courts has been strict ...'" and "the Commission has identified only one circumstance that warrants equitable tolling of section 415 -- fraudulent concealment by the defendant of the facts giving rise to the claim." (citations omitted); *Aetna Life Insurance Company and Aetna Casualty and Surety Company v. AT&T*, Memorandum Opinion and Order, 3 FCC Rcd 2126, para. 16 (1988) ("*Aetna Life*"); *see also Sprint*, 76 F.3d at 1226 (stating that "where the defendant fraudulently concealed material facts related to its wrongdoing," the cause of action does not accrue until the plaintiff has "something approaching actual notice").

[38] Because the Complaint is time-barred, we need not reach AT&T's defense that the Complaint's claims were arbitrated and are barred under the doctrine of res judicata. *See* Answer at 9-12, paras. 22-27.

[39] *See, e.g.*, *Aetna Life*, 3 FCC Rcd at 2130, para. 17 ("In our view, the complainants knew, or by the exercise of due diligence should have known, all of the facts they needed to allege a cause of action against [the Defendant] well

(continued....)

IV. CONCLUSION

11. The two-year statute of limitations in Section 415(b) of the Act bars Chelmowski's claims. Chelmowski's claims regarding the 0400 number accrued no later than March 23, 2011 when he filed the first informal complaint. Because there is no basis for tolling of the two-year limitations period, Chelmowski's claims expired by March 24, 2013, well before he filed this formal Complaint on December 11, 2014.[40]

V. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 208, and 415 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, and 415, and Sections 0.111, 0.311, and 1.711–1.735 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, and 1.711–1.735, that the Complaint IS DISMISSED WITH PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Travis LeBlanc
Chief
Enforcement Bureau

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within the statutory limitations period. Under these circumstances, complainants cannot successfully assert fraudulent concealment to avoid the limitations bar.").

[40] The Complaint contains several requests for interrogatories, all relating to why the porting requests were not successful, and who at AT&T was involved either in processing the request(s) or responding to Chelmowski's complaints. *See* Complaint at 28-30. Because the claims in the Complaint are time-barred, we deny all requests for discovery.