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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
CV 11-02599
SAN JOSE DIVISION

PSG

23 TODD SMITH, INDIVIDUALLY AND AS
24 REPRESENTATIVE OF A CLASS OF PERSONS
25 SIMILARLY SITUATED,

Plaintiff,

v.

26 QWEST COMMUNICATIONS COMPANY,
27 LLC; SPRINT COMMUNICATIONS
28 COMPANY, L.P.; LEVEL 3
COMMUNICATIONS, LLC; and WILTEL
COMMUNICATIONS, LLC;

Defendants.

CASE NUMBER:

PLAINTIFF'S COMPLAINT FOR TRESPASS
AND QUASI CONTRACT-UNJUST
ENRICHMENT

CLASS ACTION

JURY TRIAL DEMANDED

1 **I. INTRODUCTION TO CLASS ACTION COMPLAINT**

2 Plaintiff, Todd Smith, on behalf of himself and all others similarly situated, by and
3 through his attorneys, for his class action complaint against defendants, Qwest Communications
4 Company, LLC ("Qwest"), Sprint Communications Company, L.P. ("Sprint"), Level 3
5 Communications, LLC, and WilTel Communications, LLC ("WilTel") states and alleges as
6 follows:

7 **II. NATURE OF THE CASE**

8 1. This is an action seeking damages and injunctive relief for an unlawful and continuing
9 trespass and unjust enrichment by defendants on the lands of Plaintiff and members of the
10 plaintiff Class.

11 2. Plaintiff and members of the plaintiff Class are current and past owners of land. As part
12 of national schemes and business plans, defendants entered onto the lands of Plaintiff and
13 members of the plaintiff Class to install and maintain telecommunications cable systems, which
14 are frequently and ordinarily utilized to provide telecommunications services. Defendants own,
15 maintained, operate and lease their telecommunications cable systems to telephone companies
16 and other users at a substantial profit for their commercial benefit without paying any
17 compensation to Plaintiff and members of the plaintiff Class. Because defendants have hidden
18 their trespass from Plaintiff and the plaintiff Class, defendants have also been able to eliminate
19 substantial expenses, including payment for easement rights and royalties, which they would
20 have incurred if they had lawfully obtained easements from the landowners.

21 **III. JURISDICTION AND VENUE**

22 3. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C.
23 §1332, in that this case involves citizens of different states and the amount in controversy,
24 exclusive of interest and costs, is in excess of \$75,000.

25 4. Venue is proper in this forum pursuant to §1391(a) of the Judicial Code, 28 U.S.C.
26 §1391(a) including , but not limited to the following:

27 a. Defendants transacted and transact business in this District;

28 b. Defendants committed and continue to commit the acts complained of within this

1 District;

2 c. Plaintiff's property and a substantial part of the property of class plaintiffs that is
3 the subject of the action is situated in this District;

4 d. A substantial part of the events giving rise to the claim occurred in this District;
5 and

6 e. Assignment to the San Jose Division within this District is appropriate based on,
7 but not necessarily limited to, the location of Plaintiff's real property and other
8 affected real property and the location of Defendants' activities as alleged herein.

9 **IV. PARTIES**

10 5. Plaintiff Todd Smith is a citizen and resident of California and at all material times owned
11 certain real estate (APN 76410008) located on the northwest corner of Monterey Road and
12 Cochrane Avenue (18625 Monterey Road), in the city of Morgan Hill, Santa Clara County,
13 California, across which runs a portion of fiber optic cable owned by one or more of the
14 defendants and utilized in the operation of integrated telecommunications networks by all of the
15 defendants. Along and/or on the western edge of Plaintiff's land is a railroad right of way and
16 railroad tracks used by, among others, railroad companies generally known as Union Pacific and
17 Southern Pacific.

18 6. Defendant Qwest is a Delaware limited liability company with its principal place of
19 business in Denver, Colorado. Qwest has only one member, Qwest Services Corporation, a
20 Colorado corporation with its principal place of business in Colorado. Qwest is engaged in the
21 business of providing telecommunications services to telephone companies and other
22 communications providers and users in California. Qwest has created, operated and leased to
23 telephone companies the fiber optic cables that run through the lands of the Plaintiff and the
24 members of the plaintiff Class.

25 7. Sprint is a Delaware limited partnership with its principal place of business in Kansas.
26 Sprint's partners are US Telecom, Inc., a Kansas corporation with its principal place of business
27 in Kansas, UTELCOM, Inc., a Kansas corporation with its principal place of business in Kansas,
28 and Sprint International Communications Company, a Delaware corporation with its principal

1 place of business in Virginia. Sprint is engaged in the business of providing telecommunications
2 services to telephone companies and other communications providers and users in California.
3 Sprint has created, operated and leased to telephone companies the fiber optic cables that run
4 through the lands of the Plaintiff and the members of the plaintiff Class.

5 8. Defendant Level 3 is a single member Delaware limited liability company with its
6 principal place of business in Colorado. Its only member is Level 3 Financing, Inc., a Delaware
7 corporation with its principal place of business in Colorado and is a wholly owned subsidiary of
8 Level 3 Communications, Inc., a publicly traded Delaware corporation with its principal place of
9 business in Colorado. Level 3 is engaged in the business of providing telecommunications
10 services to telephone companies and other communications providers and users in California.
11 Level 3 or its predecessors in interest have installed, maintained, operated and leased to
12 telephone companies the fiber optic cables that run through the lands of the Plaintiff and the
13 members of the plaintiff Class.

14 9. Defendant WilTel is a single member, Delaware limited liability company with its
15 principal place of business in Colorado. Its only member is Level 3 Communications, LLC, also
16 a single member Delaware limited liability company with its principal place of business in
17 Colorado. Its only member is Level 3 Financing, Inc., a Delaware corporation with its principal
18 place of business in Colorado and is a wholly owned subsidiary of Level 3 Communications,
19 Inc., a Delaware publicly traded corporation with its principal place of business in Colorado.
20 WilTel is engaged in the business of providing telecommunications services to telephone
21 companies and other communications providers and users in California. WilTel has created,
22 operated and leased to telephone companies the fiber optic cables that run through the lands of
23 the Plaintiff and the members of the plaintiff Class.

24 10. The integrated network services offered by each defendant are in fact dependent upon its
25 access to and joint beneficial ownership rights under indefensible rights of use and by other
26 mechanisms and juridical links. Defendants acted jointly and together as part of a common
27 course of action in connection herewith.

28 11. The defendants are jointly and severally liable to the Plaintiff and the members of the

1 plaintiff Class for their continuing trespass and unjust enrichment as described hereafter.

2 **V. CLASS ACTION ALLEGATIONS**

3 12. Plaintiff brings this action on their own behalf and as a class action pursuant to Rules
4 23(b)(2) and (b)(3) of the Federal Rules of Civil Procedure on behalf of a class of California
5 landowners who currently or formerly owned the land through which Defendants have
6 trespassed by installing and maintaining their telecommunications cable systems

7 13. For the purposes of this complaint, "compensation period" is the period from the date
8 which a defendant installed any part of their telecommunications cable systems in the right of
9 way that adjoins, underlies, or includes covered property.

10 14. For the purposes of this complaint, "covered property" means the cable side of a railroad
11 right of way and the real property owned by the respective Plaintiff and members of the plaintiff
12 class that adjoins, underlies, or includes all or any part of the cable side of the right of way.

13 15. For the purposes of this complaint, "cable side" means the side of a railroad right of way
14 on which any component of a defendant's telecommunications cable system has been installed.

15 16. This cause is properly maintainable as a class action under Rule 23 for, but not
16 necessarily limited to, the following reasons:

17 (a) Plaintiff is a member of his own Class; the members of the Class are so numerous
18 as to make it impracticable to bring them all before the Court. The exact number
19 and identities of the Class members are presently unknown to Plaintiff, but
20 Plaintiff reasonably believes that there are at least hundreds of individuals who
21 have been injured as a result of defendants' past and continuing trespass, unjust
22 enrichment and wrongful conduct as alleged;

23 (b) The claims of the Class involve common questions of both fact and law that
24 predominate over any questions affecting only individual members. Among
25 questions of law and fact common to the Class are:

26 i. Whether defendants have and continue to intentionally and unlawfully
27 trespass on the lands owned by Plaintiff and members of the Class by
28 installing, operating and maintaining on the land telecommunications cable

1 systems without authority;

2 ii. Whether defendants have profited or been unjustly enriched by their use of
3 telecommunications cable systems, which cross the land owned by Plaintiff
4 and members of the plaintiff Class;

5 iii. Whether defendants have installed, maintained, leased and operated in
6 California telecommunications cable systems without seeking and obtaining
7 the consent of Plaintiff and the members of the plaintiff class; and

8 iv. Whether defendants are liable to the Class for actual damages and punitive
9 damages.

10 17. Plaintiff seeks certification of a California class defined as follows:

11 All persons who own or who claim to own, for any period of time during a
12 compensation period any covered property, provided that the class does not
13 include: (1) right of way providers and their predecessors, parents, subsidiaries,
14 and affiliates, past or present; (2) federal state and local governmental entities; (3)
15 Native American nations and tribes; or (4) any person who files a valid and timely
16 exclusion on or before the opt-out deadline.

17 **VI. COUNT I (CONTINUING TRESPASS)**

18 18. Plaintiff incorporates paragraphs 1 through 17 above as if set forth in full herein.

19 19. During a time period presently uncertain, but believed to have begun in the late 1980's,
20 defendants and their predecessors began to install telecommunications cable systems on and over
21 many miles on land owned by the Class, including the land of the Plaintiff. The
22 telecommunications cable systems were installed without permission or knowledge of Plaintiff
23 or members of the plaintiff Class. Since the telecommunications cable systems were originally
24 installed, defendants have not sought approval of or paid any compensation to Plaintiff or
25 members of the plaintiff Class. Defendants have regularly and repeatedly used the
26 telecommunications cable systems installed on the lands of Plaintiff and members of the plaintiff
27 Class by sending messages and signals through the cable as part of their integrated nationwide
28 telecommunications networks.

1 20. Neither defendants nor their predecessors have secured any easements or sought
2 condemnation or secured by any other means a lawful right to enter the land of Plaintiff and the
3 plaintiff Class' lands to install, maintain and operate telecommunications cable systems.

4 21. At the time the telecommunications cable systems were installed on the lands owned by
5 Plaintiff and members of the plaintiff Class, defendants knew that they had no lawful authority
6 to use the Class' lands for such purpose.

7 22. Defendants' entry and continuing trespass on the lands of Plaintiff and the plaintiff Class
8 was and continues to be willful and malicious and has been done without the knowledge or
9 consent of Plaintiff or the members of the plaintiff Class.

10 23. The unlawful use of the land and continuing trespass on the land of Plaintiff and members
11 of the plaintiff Class by defendants have resulted in significant savings and profits to defendants
12 in the creation of their nationwide integrated telecommunications networks.

13 24. As a result of the continuing trespass by defendants, Plaintiff and members of the plaintiff
14 Class have each been injured and seek judgment therefore as hereinafter set forth.

15 **VII. COUNT II (QUASI CONTRACT -- UNJUST ENRICHMENT)**

16 25. Plaintiff incorporates paragraphs 1 through 24 above as if set forth in full herein.

17 26. As a result of defendants' commercial use of the lands of Plaintiff and members of the
18 plaintiff Class, defendants have received benefits and the Class has a reasonable expectation of
19 having a right to and receive compensation. Defendants acted intentionally to obtain large profits
20 at the expense of Plaintiff and the plaintiff Class. If defendants were allowed to retain the
21 profits they have made are continuing to make and are reasonably likely to make in the future, on
22 the operation, sale or lease of the telecommunications cable systems, they would be unjustly
23 enriched.

24 27. Plaintiff and members of the plaintiff Class have been damaged and are entitled to be
25 compensated in full for the benefit obtained by the defendants' unauthorized use of their lands.

26 28. Plaintiff is informed and believes and thereon alleges Defendants concealed their
27 scheme from Plaintiff and members of the plaintiff Class with the intent to deceive and induce
28 them to refrain from demanding compensation for defendants' unauthorized commercial use of

1 their lands and acted in such a fashion as to indicate that they had the right to install and
2 maintain their telecommunications cable systems on the Plaintiff and plaintiff Class lands
3 despite their knowledge that they had no such right. Plaintiff and members of the plaintiff Class
4 justifiably relied on defendants to inform them of the defendants' intent to unlawfully profit from
5 the use of the Class' lands.

6 29. As a result of the defendants' affirmative acts of concealment, all applicable statutes of
7 limitation have been tolled and suspended.

8 30. As a further result of the defendants' scheme, Plaintiff and members of the plaintiff
9 Class have been damaged and pray for relief as set forth below.

10 **VIII. PRAYER**

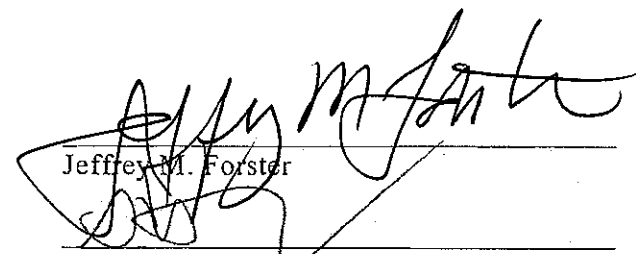
11 WHEREFORE, Plaintiff prays as follows:

- 12 (a) That this action be declared a proper class action pursuant to Rules 23(b)(2) and
13 23(b)(3) of the Federal Rules of Civil Procedure, and that Plaintiff be named as a
14 class representative and that Plaintiff's counsel be appointed as class counsel;
- 15 (b) That judgment be entered for the Plaintiff and the plaintiff Class against
16 defendants jointly and severally for trespass, awarding damages compensating
17 Plaintiff and members of the plaintiff Class in an amount in excess of \$75,000
18 each, exclusive of interest and costs;
- 19 (c) That judgment be entered for the Plaintiff and members of the plaintiff Class and
20 against defendants jointly and severally for punitive damages for defendants'
21 intentional and malicious conduct;
- 22 (d) That defendants be preliminarily and permanently enjoined from trespassing upon
23 the lands of Plaintiff and members of the plaintiff Class to use and maintain their
24 telecommunications cable systems; and
- 25 (e) That Plaintiff and members of the plaintiff Class be awarded such other and
26 further relief, including an award of attorneys' fees and expenses, as the Court
27 deems proper.

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Dated: May 31, 2011

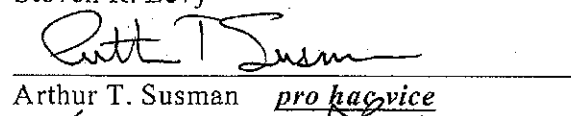


Jeffrey M. Forster

Dated: MAY 28, 2011

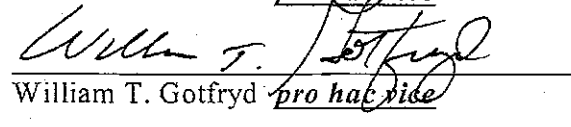
Steven R. Levy

Dated: May 31, 2011



Arthur T. Susman pro hac vice

Dated: May 31, 2011



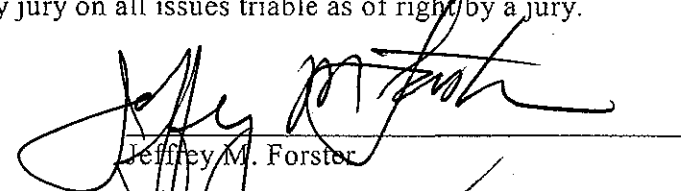
William T. Gotfryd pro hac vice

Attorneys for the Plaintiff

IX. DEMAND FOR JURY TRIAL/JURY TRIAL DEMANDED

31. Plaintiff demands trial by jury on all issues triable as of right by a jury.

Dated: May 31, 2011

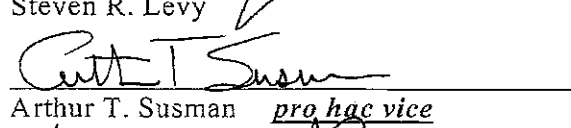


Jeffrey M. Forster

Dated: MAY 28, 2011

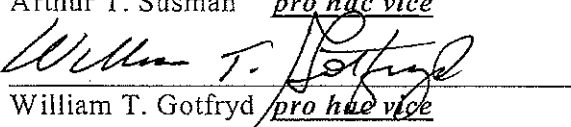
Steven R. Levy

Dated: May 31, 2011



Arthur T. Susman pro hac vice

Dated: May 31, 2011



William T. Gotfryd pro hac vice

Attorneys for the Plaintiff