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4 UNITED STATES DISTRICT COURT  
5 WESTERN DISTRICT OF WASHINGTON  
6 AT SEATTLE

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8 CRICKET COMMUNICATIONS,  
9 INC.

Case No. C08-00908 MJP

Plaintiff,

v.

ORDER DENYING DEFENDANTS'  
MOTION FOR LEAVE TO FILE  
SUPPLEMENTAL COUNTERCLAIM

10  
11 HIPCRICKET, INC.

Defendant.

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14 This matter comes before the Court on Defendant's motion for leave to file a  
15 supplemental counterclaim. (Dkt. No. 77.) After reviewing the motion, Plaintiff's response  
16 (Dkt. No. 80), Defendant's reply (Dkt. No. 86), and all documents submitted in support thereof,  
17 the Court DENIES the motion.

18 **Background**

19 Plaintiff Cricket Communications, Inc ("Cricket"), a wireless telecommunications  
20 service provider, brings suit against Defendant Hipcricket, Inc ("Hipcricket") alleging  
21 Lanham Act, state trademark law, and state unfair competition law violations. (Dkt. No. 1.)  
22 On June 26, 2008, Hipcricket filed a counterclaim for declaratory relief. (Dkt. No. 38.) The  
23 discovery deadline was January 5, 2009. (Dkt. No. 69.)

24 Hipcricket provides and implements interactive text messaging promotions, and its  
25 business model depends on "short codes" being connected to various wireless service  
providers, including Cricket. (Dkt. No. 77 at 2.) At a date disputed by the parties, Cricket

1 began refusing to connect Hipcricket’s short codes to its network. (Id.; Dkt. No. 80 at 3.)  
2 Hipcricket seeks leave to file a supplemental counterclaim asserting that this conduct violates  
3 the nondiscrimination policy of the Telecommunications Act of 1996, 47 U.S.C. §202(a), and  
4 is an illegal restraint of trade under Section 1 of the Sherman Act, 15 U.S.C. §1. (Dkt. No.  
5 77.)

### 6 **Discussion**

7 The Court has broad discretion to “permit a party to serve a supplemental pleading  
8 setting out any transaction, occurrence, or event that happened after the date of the pleading to  
9 be supplemented,” Fed. R. Civ. P. 15(d); supplemental claims may be allowed in order to  
10 “promote the speedy and economical disposition of a controversy.” Keith v. Volpe, 858 F.2d  
11 467, 473 (9th Cir. 1998).

12 The Court declines to permit the proposed supplemental counterclaim because  
13 discovery is complete and trial is scheduled for early May. See Kaplan v. Rose, 49 F.3d  
14 1363, 1370 (9th Cir. 1994) (finding that the district court did not abuse its discretion in  
15 refusing a motion to amend when “trial was only two months away, and discovery was  
16 completed.”). The Court does not accept the argument that no additional discovery would be  
17 required. Reopening discovery would disrupt the pretrial and trial schedule, increase costs to  
18 the parties, and unfairly prejudice Cricket.

19 Moreover, “[w]hile leave to permit supplemental pleading is favored, it cannot be used  
20 to introduce a separate, distinct, and new cause of action.” Planned Parenthood of Southern  
21 Ariz. v. Neely, 130 F.3d 400, 402 (9th Cir. 1997) (internal citations and quotation marks  
22 omitted). Hipcricket’s proposed supplemental counterclaim involves new and distinct  
23 antitrust and telecommunications claims that are related to the underlying trademark claims  
24 “only in a very broad sense.” Matsushita Elec. Indus. Co. v. CMC Magnetics Corp., 2007  
25 WL 127997 at \*4 (N.D. Cal. Jan. 12, 2007). These claims will require legal briefing beyond  
the scope of the current litigation, and allowing them “would inject an additional layer of

1 complexity and delay into an already complex action.” See id. (denying a proposed  
2 counterclaim that would add a separate, distinct, and new claim that would not promote  
3 economical resolution of the case). There are no “technical obstacles” preventing Hipcricket  
4 from bringing a new, separate action on these claims. Neely, 130 F.3d at 402.

5 Although Hipcricket contends that the facts alleged in its supplemental counterclaim  
6 had not occurred when it filed its original counterclaim on June 26, 2008 (Dkt. No. 77 at 5),  
7 Cricket has presented evidence that suggests that at least some of the events complained of  
8 occurred prior to that date. (See Dkt. No. 82.)

9 Because the requirements of Fed. R. Civ. P. 15(d) are not met, the Court will not  
10 address the merits of the proposed counterclaim.

#### 11 **Conclusion**

12 Because the proposed counterclaim raises totally new issues that would require  
13 additional discovery and briefing and result in undue delay and prejudice, the Court hereby  
14 DENIES Defendants’ motion for leave to file a supplemental counterclaim.

15 The Clerk is directed to send a copy of this order to all counsel of record.

16 DATED this 20<sup>th</sup> day of February, 2009.

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20 Marsha J. Pechman  
21 United States District Judge  
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