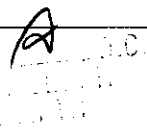


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IN THE LAW COURT FOR SULLIVAN COUNTY, TENNESSEE,  
AT KINGSPORT, TENNESSEE

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SMARTER TECHNOLOGIES CORPORATION,	)	 No. C37584 (c)  <b>ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT</b>
Plaintiff,	)	
vs.	)	
LEVEL 3 COMMUNICATIONS, LLC, TELCOVE OPERATIONS, LLC	)	
and	)	
TELCOVE OF TENNESSEE, INC.,	)	
Defendants.	)	

This matter is before the Court pursuant to the Motions for Summary Judgment filed by Defendants Level 3 Communications, LLC, Telcove Operations, LLC, and Telcove of Tennessee, Inc. Hearing was held on November 3, 2009. Plaintiff was represented by Michael Atkins and Trevor Sharpe of Baker, O'Kane, Atkins & Thompson. Defendants were represented by William Bovender of Hunter, Smith & Davis, LLP, and also by Joseph Jones of Fraser Stryker, PC, LLO, who appeared by Order of the Court pro hac vice.

The Court has reviewed the Defendants' Motions and the parties' briefs and also considered the oral arguments of counsel. At the November 3, 2009 hearing, the parties stipulated and agreed the narrow issue before the Court is whether the Telcove tariffs (Tariff No. 1 and Tariff No. 3) apply to the relationship between Plaintiff and Defendants. The Court hereby finds that the tariffs apply to the parties' relationship, and the limitation of liability and notice provisions in the tariffs bar the claims asserted by the Plaintiff. Accordingly, Defendants are entitled to summary judgment on Plaintiff's claims.

In reaching this conclusion, the Court makes the following findings of fact and conclusions of law:

## FINDINGS OF FACT

1. Plaintiff Smarter Technologies Corporation purchased communication services from KMC Telecom Holdings, Inc. or KMC Telecom, LLC ("KMC") for purposes of resale to Plaintiff's customers.
2. Telcove, Inc. and/or Telcove Operations, Inc. ("Telcove") acquired certain customer accounts from KMC, including the Plaintiff's account with KMC. Pursuant to Telcove's acquisition of Plaintiff's account from KMC, Plaintiff became a customer of Telcove.
3. The Tennessee Regulatory Authority approved tariffs for Telcove, including Tariff No. 1 and Tariff No. 3.
4. Telcove Tariff No. 1 incorporates certain "grandfathered" terms and services previously provided to Plaintiff by KMC under the KMC tariffs.
5. Telcove Tariff No. 1 governs all of the services listed on Exhibit "A" to Plaintiff's Amended Complaint, except for dedicated access services, such as Ethernet.
6. Telcove Tariff No. 3 governs dedicated access services including Ethernet service.
7. Plaintiff is a customer of Telcove. Telcove provided end user communications services to Plaintiff.
8. The Tariffs provide in pertinent part as follows:

### **T.R.A. Tariff No. 1:**

- Section 1.1 --- Application of Tariff --- "This Tariff sets forth the service offerings, rates, terms and conditions applicable to switched services provided by TelCove Operations, Inc. as follows: The furnishing of **interexchange intrastate end-user communications services** to customers within the State of Tennessee."
- Section 2.1.2.1 – Limitations on Liability – "The liability of the Company for damages arising out of the furnishing of its services, including but not limited to mistakes, omissions, interruptions, delays, or errors, or other defects, representations, or use of these services or arising out of the failure to furnish the service, whether caused by acts or omission, shall be limited to the extension of allowances for interruption as set forth in this tariff. The extension of such allowances for interruption shall be the sole remedy of the Customer and the sole liability of the Company. The

Company will not be liable for any direct, indirect, incidental, special, consequential, exemplary or punitive damages to Customer as a result of any Company service, equipment or facilities, or the acts or omissions or negligence of the Company's employees or agents."

- Section 2.1.2.8(d) – "Any claim of whatever nature against the Company shall be deemed conclusively to have been waived unless presented in writing to the Company within thirty (30) days after the date of the occurrence that gave rise to the claim."
- Section 2.1.2.10 – "The entire liability for any claim, loss, damage or expense from any cause whatsoever shall in no event exceed sums actually paid Company by Customer for the specific services giving rise to the claim. No action or proceeding against the Company shall be commenced more than one year after the service is rendered."
- Section 2.11.1 – Credit for Interruptions - This section specifies the manner in which allowances for interruptions in service are to be calculated.
- Section 2.1.3 (Original page 35) --- Any service provided under this Tariff **may be resold or shared** (jointly used) with other persons at the customer's option...**The customer may advise its customers** that a portion of its service is provided by the Company, but the customer shall not represent that the Company jointly participates in the provision of the service.

#### T.R.A. Tariff No. 3:

- Section 4.1.4(A) --- Limitations on Liability --- "Except as otherwise stated in this section, the liability of the Company for damages arising out of either (1) the furnishing or its services, including but not limited to mistakes, omissions, interruptions, delays, or errors, or other defects, representatives, or use of these services or (2) the failure to furnish its service, whether caused by acts or omission, shall be limited to the extension of allowances to the Customer for interruptions in service as set forth in this Tariff."
- Section 4.1.4(B) --- "Except for the extension of allowances to the Customer for interruptions in service as set forth in this Tariff, the Company shall not be liable to a Customer or third party for any direct, indirect, special, incidental, reliance, consequential, exemplary or punitive damages, including, but not limited to, loss of revenue or profits, for any reason whatsoever, including, but not limited to, any act or omission, failure to perform, delay, interruption, failure to provide any service or any failure in or breakdown of facilities associated with the service."

- Section 4.1.4(C) --- "The liability of the Company for errors in billing that result in overpayment by the Customer shall be limited to a credit equal to the dollar amount erroneously billed or, in the event that payment has been made and service has been discontinued, to a refund of the amount erroneously billed.
- Section 4.1.4(H) --- "Except as otherwise stated in this Tariff, any claim of whatever nature against the Company shall be deemed conclusively to have been waived unless presented in writing to the Company within thirty (30) days after the date of the occurrence that gave rise to the claim."

9. On May 17, 2006, Level 3 Communications, Inc. and Telcove filed a "Joint Application for approval of a Transfer of Control of Telcove Operations, Inc. and Telcove of Nashville, L.P. and Related Transactions" (hereinafter "Joint Application"). In the Joint Application, the parties requested that the Tennessee Regulatory Authority approve a series of transactions whereby Level 3 Communications, Inc. would acquire indirect control of Telcove Operations, Inc. and Telcove of Nashville, L.P. The Tennessee Regulatory Authority approved the Joint Application on January 30, 2007.

10. Plaintiff applied to the T.R.A. for authority to re-sell local and interexchange long distance telecommunications services in Tennessee. The Order issued by the T.R.A. authorizing Plaintiff to re-sell long distance services in Tennessee states that the T.R.A.'s Order "may be used to obtain the appropriately **tariffed** access line from authorized telecommunications service providers."

11. Plaintiff did not submit a written claim to Defendants within thirty days of the alleged breaches of contract or negligent acts set forth by Plaintiff in its Amended Complaint, nor did Plaintiff submit any written claim to Defendants for lost profits or consequential damages.

12. There are no genuine issues of material fact in dispute.

## **CONCLUSIONS OF LAW**

1. Under Tennessee law, telecommunications companies are considered public utilities. T.C.A. § 65-4-101(6).

2. The Tennessee Regulatory Authority has "general supervisory and regulatory power, jurisdiction, and control over all public utilities, and also over their property, property rights, facilities, and franchises..." T.C.A. § 65-4-104.

3. The Tennessee legislature has "signaled its clear intent to vest in the [T.R.A.] practically plenary authority over the utilities within its jurisdiction." Bellsouth Advertising & Publishing Corp. v. Tennessee Regulatory Authority, 79 S.W.3d 506, 512 (2002) (quoting Tennessee Cable Television Ass'n v. Tennessee Public Service Comm'n, 844 S.W.2d 151, 159 (Tenn.App. 1992)).

4. The Tennessee Regulatory Authority has jurisdiction over the relationship between telecommunications service providers and resellers. GBM Communications, Inc. v. United Inter-Mountain Telephone Co., 723 S.W.2d 109 (Tenn.Ct.App. 1986).

5. In carrying out its duties, the Tennessee Regulatory Authority reviews and approves tariffs, which contain lawful rates and other provisions relating to the relationship between telecommunications companies and their customers. T.C.A. § 65-6-101; Tenn. Adm. Code §§ 1220-4-8-.01 *et seq.*

6. "[T]he published tariffs of a common carrier are binding upon the carrier and its customers and have the effect of law." GBM, 723 S.W.2d at 112 (voluminous citations omitted).

7. Pursuant to Plaintiff's Amended Complaint, Plaintiff seeks recovery of lost profits. "Lost profits fall under the category of consequential damages." Wings Mfg. Corp. v. Lawson, 2005 WL 1950115 (Tenn.Ct.App. Aug. 12, 2005) (citing Kultura, Inc. v. Southern Leasing Corp., 923 S.W.2d 536, 539 (Tenn.1996); First Tennessee Bank v. Hurd Lock & Mfg., 816 S.W.2d 38, 42 (Tenn.Ct.App.1991)). The Telcove Tariffs prohibit the recovery of consequential damages.

8. The remedies available to Defendants' customers are limited by the terms of Defendants' tariffs which have been approved by the Tennessee Regulatory Authority. Pursuant to the tariffs, Plaintiff's "sole remedy" is "the extension of allowances to the Customer for interruptions in service" as set forth in the tariffs. Plaintiff does not seek to recover allowances for interruption of service as provided for in the tariffs. The relief requested by Plaintiff in Plaintiff's Amended Complaint is barred by the Telcove Tariffs No. 1 and 3 because the requested damages are consequential damages. "Lost profits

fall under the category of consequential damages.” Wings Mfg. Corp. v. Lawson, 2005 WL 1950015 (Tenn.Ct.App. Aug. 12, 2005) (citing Kultura, inc. v. Southern Leasing Corp., 923 S.W.2d 536, 539 (Tenn. 1996); First Tennessee Bank v. Hurd Lock & Mfg., 816 S.W.2d 38, 42 (Tenn.Ct.App. 1991)). Moreover, Plaintiff is not entitled to recover damages “as a result of any Company service, equipment of facilities, or the acts or omissions or negligence of the Company’s employees or agents.”

9. Pursuant to the Tariffs, Plaintiff waived its claims against Defendants by failing to present those claims in writing to Defendants within thirty days of the occurrences that gave rise to the claims.

10. Plaintiff asserts a negligence claim in its Amended Complaint, but does not plead any duty owed to it by Defendants independent of the parties’ alleged contract. “If the only source of duty between a particular plaintiff and defendant is their contract with each other, then a breach of that duty, without more, ordinarily will not support a negligence action.” Thomas & Associates, Inc. v. The Metropolitan Govt. of Nashville, 2003 WL 21302974 (Tenn.Ct.App. June 6, 2003) (citations omitted). “Ordinarily, it is not a tort for one of the contracting parties to breach the contract. Conduct constituting breach of contract becomes tortious only when it also violates a duty, independent of the contract, arising from wider principles of social responsibility.” Id. (voluminous citations omitted).

11. Defendants are entitled to summary judgment as a matter of law.

## DISCUSSION

The material facts are not in dispute. The parties agree that Telcove Tariffs No. 1 and No. 3 govern the services provided by Defendants to Plaintiff. The parties agree that Plaintiff resells “end user communication services” to its customers. The question before the Court, as stipulated by the parties at the November 3, 2009 hearing, is whether Telcove Tariff No. 1 and Telcove Tariff No. 3 apply to the relationship between Plaintiff and Defendants. (See Transcript, 5:5-11). Defendants argue this is a legal question that should be decided on summary judgment, and Plaintiff argues the issue involves fact questions that preclude entry of summary judgment.

Although Plaintiff argues questions of fact exist as to whether the Tariffs apply to the relationship between Plaintiff and Defendants, Plaintiff has not identified any specific facts in dispute. The sole dispute involves the legal question of whether the Tariffs apply to the parties' relationship, much like the legal issue of interpreting an insurance policy or other contract. After Hannan v. Alltel Publ'g Co., 270 S.W.3d 1 (Tenn. 2008), Tennessee appellate courts re-affirmed that interpretation of a contract is a question of law and not a question of fact. See, e.g., Vanderbilt University v. Kafiristan Blokes Partnership, 2009 WL 2957927 at \* 1 (Tenn.Ct.App. Sept. 15, 2009) (affirming summary judgment after interpreting contract); Spears v. Tennessee Farmers Mut. Ins. Co., 2009 WL 2144066 (Tenn.Ct.App. July 17, 2009) (affirming summary judgment after interpreting insurance policy); Seramur v. Life Car Centers of America, Inc., 2009 WL 890885 (Tenn.Ct.App. April 2, 2009) (affirming summary judgment after interpreting employment contract). The Court recognizes that in some instances, the issue of whether a tariff applies to the relationship between certain parties may present fact questions, such as when the parties dispute whether the services provided were included within and/or governed by the tariff. This is not such a case. In response to Defendants' Statement of Facts, Plaintiff admitted that Telcove Tariff No. 1 and Telcove Tariff No. 3 apply to the services Plaintiff purchased from Defendants. There are no genuine issues of material fact in dispute.

In Hannan v. Alltel Publ'g Co., 270 S.W.3d 1 (Tenn. 2008), the Tennessee Supreme Court set forth the legal standard for reviewing summary judgment motions:

In summary, in Tennessee, a moving party who seeks to shift the burden of production to the non-moving party who bears the burden of proof at trial must either: (1) affirmatively negate an essential element of the non-moving party's claim; or (2) show that the non-moving party cannot prove an essential element of the claim at trial.

Hannan, 270 S.W.2d at 8-9.

Here, the Defendants have affirmatively negated an essential element of Plaintiff's claim by showing that Plaintiff is not entitled to any of the damages prayed for in Plaintiff's Amended Complaint and by showing that Plaintiff waived its claim by failing to submit a written claim within thirty days of the alleged occurrence. The Tariffs expressly prohibit Plaintiff from recovering consequential damages such as lost profits.

Defendants have therefore negated the damages element of Plaintiff's claim. Plaintiff cannot prove the damages alleged at trial because the damages alleged are barred as a matter of law. Tennessee appellate courts have affirmed numerous decisions granting summary judgment since the Hannan decision in cases involving the interpretation of written contracts, which are analogous to the Tariffs in this case. Moreover, Plaintiff failed to submit a written claim to Defendants within thirty days of the allegedly wrongful conduct, and the Tariffs expressly preclude Plaintiff from asserting any claim for which it did not notify Defendants within thirty days of the occurrence.

Plaintiff argues the Tariffs do not apply to it because it is not an "end user." Plaintiff's argument misses the point. The Tariffs apply to "end user communication services," provided to Telcove's customers. Plaintiff is a Telcove customer. Plaintiff does not dispute the services provided by Telcove to Plaintiff are end user services. The language of the Tariffs indicates the Tariffs specifically apply to re-sellers (and not just end users). The Tariffs expressly state services provided thereunder "**may be resold** or shared (jointly used) with other persons at the customer's option..." (E.g., T.R.A. Tariff No. 1, Sec. 2.1.3, Original Page 35). The Tariffs also describe what a re-seller is authorized to tell **its own customers** about where the re-seller acquired the services. Id. ("The customer may advise its customers that a portion of the service is provided by the Company..."). The inclusion of language pertaining to re-sellers would be unnecessary and would have no meaning if the Tariffs did not apply to re-sellers such as Plaintiff. Plaintiff's argument that the Defendants' Tariffs apply to Plaintiff's end user customers (who have no relationship with or knowledge of Defendants) but not to Plaintiff (who does have a relationship with Defendants) makes no legal or practical sense. Plaintiff also admits the KMC Tariffs applied to Plaintiff, but Plaintiff does not explain why the Telcove Tariffs (which contain the same "end user" language as the KMC Tariffs) do not apply to Plaintiff.

Plaintiff also argues that the Tariffs do not apply to Plaintiff because Plaintiff has a contract that defines the scope of the relationship between Plaintiff and Defendants. Plaintiff's argument ignores the well-established rule that tariffs have the force and effect of law in Tennessee. GBM, 723 S.W.2d at 112 (voluminous citations omitted). Exhibit A, attached to Plaintiff's Amended Complaint, does not include various terms



such as limitation of liability or recoverability of certain damages, which the parties could have bargained for, but did not. The language in Exhibit A does not state the Tariffs are not applicable to the services provided by Telcove to Plaintiff. If, as Plaintiff argues, Exhibit A defines the scope of the relationship the Tariffs apply because the parties did not agree the Tariffs do not apply.

Plaintiff argues it would be contrary to public policy to enforce the Tariffs because the T.R.A. is intended to protect consumers, and enforcing the Tariffs' limitation of liability provisions would not further that goal. However, many courts have rejected similar arguments and have found a tariff's "limitation of liability [provision] serves the public interest by lowering the utility's rate and is an inherent part of the rate...and therefore bar[s] claims for simple negligence and breach of contract." Duggal v. G.E. Communications Services, Inc., 81 Cal.App.4<sup>th</sup> 81, 94 (2000). Courts have uniformly held that limitation of liability provisions in tariffs are enforceable. See, e.g., ICOM Holding, 238 F.3d at 222; In re Richman Bros. Records, Inc. v. U.S. Sprint Communications, 10 F.C.C.R. 13639, ¶ 12, 1995 WL 733639 (1995); Katz v. MCI Telecomms., 14 F.Supp.2d 271, 275 (E.D.N.Y. 1998); In re Worldcom, Inc., 322 B.R. 530 (S.D.N.Y. Bkcty. 2005). One court described liability limitations in tariffs as follows:

Liability limitations reflect: the status of public utilities as regulated monopolies whose operations are subject to extensive restrictions; the requirements of uniform, nondiscriminatory rates; and the goal of universal service, achieved through the preservation of utility prices that virtually all customers can afford. The underlying theory of liability limitations is that, because a public utility is strictly regulated, its liability should be defined and limited so that it may be able to provide service at reasonable rates. A reasonable rate is in part dependent on a rule limiting liability.

Adams, 809 N.E.2d at 1264 (internal citations omitted). Accordingly, the limitation of liability provisions in the Defendants' Tariffs are enforceable and are consistent with Tennessee public policy.

The Court hereby finds that the damages sought by Plaintiff in its Amended Complaint are not recoverable under the terms of the Telcove Tariffs. Plaintiff seeks to recover consequential damages, which the Tariffs expressly provide are not recoverable. Moreover, Plaintiff failed to present a claim in writing to Defendants within thirty days of the occurrence giving rise to the claim, resulting in a waiver of the claims

asserted in Plaintiff's Amended Complaint. Accordingly, Defendants have negated an essential element of Plaintiff's claim, and Defendants are entitled to summary judgment on Plaintiff's breach of contract claim.

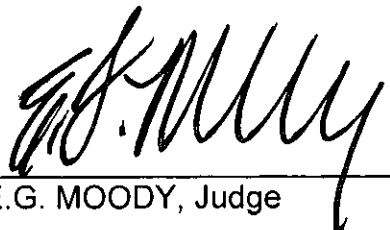
Plaintiff's negligence claim is also barred because, under Tennessee law, it is not a tort for a party to breach a contract unless the breach violates a duty, independent of the contract, arising from wider principles of social responsibility.

Thomas & Associates, 2003 WL 21302974.

PREMISES CONSIDERED, IT IS HEREBY ORDERED:

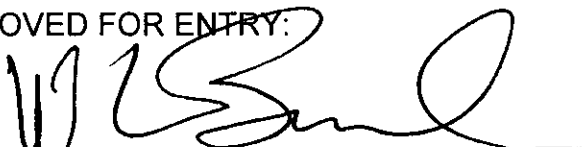
1. Summary Judgment is entered in favor of Defendants. Plaintiff's Amended Complaint is dismissed with prejudice.

ENTER:

  
\_\_\_\_\_  
E.G. MOODY, Judge

APPROVED FOR ENTRY:

By:

  
William C. Bovender, Esq. BPR #000751  
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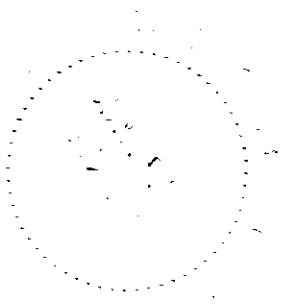
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I HEREBY CERTIFY  
THIS IS A TRUE AND CORRECT  
COPY OF THE ORIGINAL  
FILED IN THIS CASE

5/20/11 11:32

Tommy R. Kerns  
CIRCUIT COURT CLERK

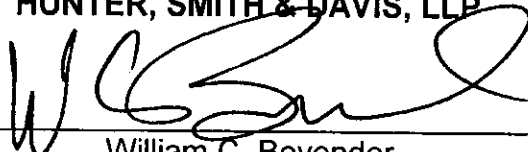


**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing *proposed* **ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT** has been served by email and United States Mail, postage prepaid, to the office of counsel of record, on this the 13<sup>th</sup> day of May, 2011, as follows:

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\_\_\_\_\_  
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