

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 6th day of December, two thousand five.

Present: HON. ROBERT A. KATZMANN,
HON. RICHARD C. WESLEY,
Circuit Judges

HON. RICHARD K. EATON,¹
Judge

MCI WORLDCOM COMMUNICATIONS, INC.,

Plaintiff-Appellee,

No. 04-3420-cv

- v. -

LD WHOLESALE, INC., and FRANK SCHMAELING,

Defendants-Appellants,

DANIEL VIDELYRA, ALBERT COWLES, and SILVANA CORDERO,

Defendants.

Counsel for Plaintiff-Appellee: RICHARD I. WOLFF, New York, N.Y.

Counsel for Defendants-Appellants: E. MICHAEL ROSENSTOCK, Rockville Centre, N.Y.

¹ The Honorable Richard K. Eaton, Judge of the United States Court of International Trade, sitting by designation.

Appeal from the United States District Court for the Southern District of New York
(Owen, *J.*).

**ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED,
AND DECREED** that this case is **AFFIRMED IN PART** and **VACATED AND REMANDED
IN PART**.

Defendants-Appellants LD Wholesale, Inc. (“LD”) and Frank Schmaeling
 (“Schmaeling”) here appeal from a judgment entered following a bench trial on breach of
contract and fraud claims brought against them by plaintiff-appellee MCI WorldCom
Communications, Inc. We assume the parties’ familiarity with the facts and procedural history of
this case and we reference the facts only as necessary to explain our decision.

On appeal from a bench trial, we review *de novo* a district court’s conclusions of law and
we review for clear error a district court’s findings of fact.² *See Oscar Gruss & Son v.
Hollander*, 337 F.3d 186, 193 (2d Cir. 2003). We conclude that the district court properly found
both LD and Schmaeling liable to WorldCom for breach of contract. As to the former, we find
that LD is contractually liable to WorldCom for the charges set forth in the corrected billing
statements WorldCom mailed to LD on July 16, 2001, because the terms of WorldCom’s Tariff
F.C.C. No. 1³ clearly provide that: (a) WorldCom has the authority to bill for “previously

² The appellants contend that the district court’s findings of fact are entitled to something
less than clear error review in this case because the district court largely adopted WorldCom’s
proposed findings of fact. We reject this contention and find that clear error review is
appropriate, because here the district court did “more than merely adopt a party’s proposed
findings . . . *in haec verba*” but rather “revised them in certain respects and not in others.”
Counihan v. AllState Ins. Co., 194 F.3d 357, 363 (2d Cir. 1999).

³ The terms of this tariff are legally binding upon LD, *see Marcus v. AT&T Corp.*, 138
F.3d 46, 56 (2d Cir. 1998) (noting that filed tariffs “*conclusively and exclusively* enumerate the

unbilled charges for service” so long as that service was “furnished not more than one hundred eighty (180) days preceding” the corrected billing, *see* WorldCom’s FCC Tariff No. 1 § 2.5.5; and (b) LD automatically becomes obligated to pay for such previously unbilled charges for service in the preceding 180 days where, as here, LD failed to dispute the corrected billing statements in writing within thirty (30) days of receiving the corrected billing statements, *see* FCC Tariff No. 1 § 2.5.3 (providing that where invoices are not disputed in writing within thirty (30) days, they are “deemed to be correct and binding”).

The district court also properly found Schmaeling liable for breach of contract under an “alter ego” piercing of the corporate veil theory.” However, while we conclude that the district court properly determined damages for the breach of contract by *LD*, we vacate and remand the district court’s award of damages to WorldCom for breach of contract by *Schmaeling*. The district court awarded WorldCom damages against Schmaeling that were nearly twice the damages that the district court awarded WorldCom against LD. However, the district court has not provided any analysis as to why, as a matter of either fact or law, Schmaeling is liable to WorldCom for any amount other than the precise amount owed by LD to WorldCom. We would have thought that, since Schmaeling was liable for breach of contract on the theory that he is LD’s “alter ego,” Schmaeling’s *personal* liability for breach of contract and LD’s *corporate* liability would be one and the same.

Given our conclusion that LD and Schmaeling are each liable to WorldCom for breach of contract, we need not and do not evaluate the district court’s “alternative[.]” holding that LD and Schmaeling are also liable to WorldCom for fraud or fraudulent concealment.

rights and liabilities of the contracting parties” (citation omitted)).

Lastly, we note that WorldCom's various theories of recovery were all presented as alternative theories arising out of the same injury. Thus, the judgment entered by the district court, which purports to express liability on the causes of action as cumulative, must be amended to reflect that only one recovery is due.

Accordingly, for the reasons stated above, the judgment of the district court is **AFFIRMED IN PART** and **VACATED AND REMANDED IN PART**.

FOR THE COURT:
ROSEANN B. MacKECHNIE, CLERK
By:
