

ATTACHMENT A

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

In re: CELLPHONE TERMINATION) J.C.C.P. 4332
FEE CASES)
)
) [TENTATIVE] ORDER GRANTING
) MOTION OF PLAINTIFFS FOR CLASS
) CERTIFICATION ON THE SPRINT
) HANDSET LOCKING COMPLAINT.
)
) Date: March 23, 2006
) Time: 2:00 pm
) Dept.: 22
)
)

The motion of Plaintiffs for class certification on the Sprint handset locking complaint was set for hearing on February 16, 2006, in Department 22 of this Court, the Honorable Ronald M. Sabraw presiding. The Court issued an order dated February 16, 2006, continuing the hearing and requesting additional briefing. *Bacon v. Southern Cal. Edison Co.* (1997) 53 Cal.App.4th 854, 860 (Court should entertain further briefing if it may dispose of a motion on an issue not briefed by the parties). The Court received and considered supplemental briefing and further oral argument. After consideration of the briefing and argument, IT IS ORDERED: The motion of Plaintiffs for class certification on the Sprint handset locking complaint is GRANTED.

1 FACTUAL BACKGROUND

2 This is a purported class action alleging that when Defendant Sprint Spectrum
3 (“Sprint”) sells handsets (phones) to consumers all the handsets are sold with a software
4 lock that prevents consumers from using the handsets to receive the services of other
5 providers. This lock has never been disclosed to consumers. Sprint has consistently
6 represented that its phones “will not accept the services of any wireless provider other
7 than Sprint.” Sprint allegedly uses these locks to make it more expensive for consumers
8 to leave Sprint and start service with another carrier.
9

10 The locked phones sold by Sprint can be used on the networks of other providers
11 (as when a phone is on “roam”), but classmembers cannot use a locked Sprint phone to
12 receive the services of another provider. If a Sprint phone is unlocked, it is significantly
13 more useful if the customer switches to another provider with CDMA technology
14 (Verizon, MetroPCS, and a few others). Even if a Sprint phone is unlocked and can be
15 used with another provider with CDMA technology, the phone may not be able to use
16 text messaging or other features.
17

18 The Sixth Amended Complaint in *Zill v. Sprint*, RG03-114147, filed January 3,
19 2006, alleges four causes of action: (1) Business and Professions Code 17200 et seq, (the
20 UCL) - fraudulent; (2) UCL – unlawful; (3) UCL – unfair; and (4) Civil Code 1750 et
21 seq, (the CLRA)
22

23 Class certification is determined with reference to each claim asserted, and must
24 take into account whether a class is appropriate for each claim. *Hicks v. Kaufman &*
25 *Broad Home Corp.* (2001) 89 Cal. App. 4th 908, 916 fn 22.
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1 Plaintiffs seek to certify a class defined as “All California residents who have
2 purchased handsets from Sprint” and a subclass defined as “All members of the class who
3 are consumers as defined by Civil Code 1761.”
4

5 LEGAL STANDARD.
6

7 Class certification is determined under well established standards. *Linder v.*
8 *Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 435. The Court is vested with discretion in
9 weighing the concerns that affect class certification. *Sav-on Drug Stores Inc. v. Superior*
10 *Court* (2004) 34 Cal.4th 319, 326, 336.

11 Because the class certification analysis may depend on the elements of the claims
12 asserted, the Court can address the elements of a claim in the course of a motion for class
13 certification. *Quacchia v. DaimlerChrysler Corp.* (2004) 122 Cal. App. 4th 1442, 1454
14 (“a trial court operates from a set of legal assumptions in order to decide a class
15 certification issue” and may consider those assumptions at the class certification stage).
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18 PRACTICALITY OF BRINGING ALL CLASS MEMBERS BEFORE THE COURT
19 (NUMERIOSITY).
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21 Sprint does not contest numerosity. The Court finds that the proposed class is
22 numerous.
23

24 ASCERTAINABILITY
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26 A class must be defined in terms of objective characteristics and common
27 transactional facts making the ultimate identification of class members possible. *Hicks v.*

1 *Kaufman and Broad Home Corp.* (2001) 89 Cal.App.4th 908, 915; *Bartold v. Glendale*
2 *Federal Bank* (2000) 81 Cal. App. 4th 816, 828. If the proposed class is not
3 ascertainable, then the Court can and should redefine the class if the evidence suggests
4 that a redefined class is ascertainable. *Hicks*, 89 Cal.App.4th at 916, fn18. At this stage
5 of the proceedings a plaintiff is not required to establish the existence and identity of class
6 members. *Reyes v. Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1275.

7
8 The Court finds that Plaintiffs' proposed class definition must be modified.
9 "California residents" will be changed to "persons with California billing addresses" to
10 make class membership readily susceptible to proof. The definition will be modified to
11 include a temporal scope. The Court will re-define the class as "All persons with
12 California billing addresses for Sprint personal or business accounts who purchased
13 handsets from Sprint from DATE to DATE."

14
15 The Court finds that Plaintiffs' proposed subclass definition must be modified.
16 The Court will re-define the subclass as "All persons with California billing addresses for
17 Sprint personal accounts who purchased handsets from Sprint from DATE to DATE."
18 Although Sprint's distinction between personal accounts and business accounts does not
19 precisely reflect the definition of "consumer" in Civil Code 1761," the use of account
20 records to determine who is a consumer will permit the parties to readily determine who
21 is in the subclass. The resulting class definition may be both over and under-inclusive.
22 Counsel should be prepared to address whether the Court has the ability to elect not to use
23 the statutory definition of "consumer" and instead us the more ascertainable distinction
24 between personal accounts and business accounts.
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1 COMMONALITY - predominant common questions of law or fact.

2 For purposes of the commonality analysis the claims can be divided into three
3 categories (1) Deception under the UCL based on the sale of the phones; (2) Unfair
4 business practices under the UCL based on how locked phones affect the market for
5 telecommunications; and (3) Deception under the CLRA.

6 On a motion for class certification, the Court does not address the merits of the
7 claim. *Linder*, 23 Cal.4th 429 at 439-40. The Court will assume for purposes of this
8 motion that Sprint had some duty to disclose to consumers that the handsets were locked
9 (6AC para 46), that Sprint's practice of handset locking interferes with the market in
10 telecommunications services (6AC, para 53, 60), and that Sprint made inaccurate
11 representations to consumers (6AC, para 65-68). The Court reviews each claim to
12 determine whether Plaintiffs have demonstrated that common questions of law or fact
13 predominate.
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17 Business and Professions Code 17200 et seq. (the UCL) - Deception.

18 Common factual and legal issues predominate regarding the UCL fraudulent
19 claim. Sprint had a common practice of not disclosing that the handsets were locked and
20 there will be a common legal issue of whether Sprint had a duty to make that disclosure.
21

22 Sprint argues that there is no commonality even if Sprint had a duty to disclose
23 and breached that alleged duty to disclose. Sprint argues that individual issues
24 predominate concerning (1) reliance/causation - whether a disclosure that handsets were
25 locked would have affected the decisions of each classmember similarly, (2) fact of injury
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1 - whether each classmember suffered an injury, and (3) amount of injury - whether each
2 classmember has suffered a injury of equal monetary value.

3 Reliance/causation. The Court holds that common factual and legal issues
4 predominate regarding the UCL concealment and misrepresentations claims.

5 The need for a private plaintiff to prove reliance must be examined in light of the
6 recent amendments to Business and Professions Code 17203 and 17204. For a person to
7 be a member of the class, that person must necessarily have standing under section
8 17204, which states the claims can be prosecuted only “by any person who has suffered
9 injury in fact and has lost money or property as a result of such unfair competition.” Only
10 if a person has standing under 17204 does the Court reach the issue of whether the Court
11 can order monetary relief under section 17203, which states that the Court can issue
12 orders to restore to affected persons any money that “may have been acquired by means
13 of such unfair competition.”
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16 The amendment to section 17204 is new and there is no appellate authority on
17 what it means. The Court interprets Proposition 64 using the same principles that govern
18 the construction of a statute. *People v. Canty* (2004), 32 Cal. 4th 1266, 1276-1277.
19

20 First, the Court looks at the plain language of the statute. The phrase “as a result
21 of” suggests causation. Dictionaries define "result" broadly to mean the logical
22 consequence of certain conduct, including anything triggered by the initial act. The
23 Merriam-Webster Online Dictionary (2005) defines "result" to mean "to proceed or arise
24 as a consequence, effect, or conclusion <death *resulted* from the disease>.” Similarly,
25 The American Heritage Dictionary of the English Language (4th Ed. (2000) defines the
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1 noun "result" as "The consequence of a particular action, operation, or course; an
2 outcome."

3 Second, the Court looks at the intent of the electorate as demonstrated by the
4 ballot materials. *People v. Canty* (2004) 32 Cal. 4th 1266, 1280; *Hayward Area Planning*
5 *Assn. v. Alameda County Transportation* (1999) 72 Cal. App. 4th 95, 104-105. These
6 secondary sources do not provide much guidance. The ballot arguments state that
7 Proposition 64 "Protects your right to file a lawsuit if you have been damaged" and
8 "Protects your right to file suit if you've been harmed." The ballot arguments do not refer
9 to causation explicitly.
10

11 Third, the Court considers how the Court of Appeal has interpreted the phrase "as
12 a result of" in other statutes. The CLRA allows an action to be brought by any consumer
13 "who suffers any damage as a result of the use or employment by any person of a method,
14 act, or practice declared to be unlawful ..." Civil Code 1780(a). Interpreting "as a result
15 of" in the CLRA, *Wilens v. TD Waterhouse Group, Inc.* (2003) 120 Cal. App. 4th 746,
16 754, and *Mass. Mut. Life Ins. Co. v. Superior Court* (2002) 97 Cal. App. 4th 1282, 1292,
17 both concluded that it required a causal nexus between the CLRA violation and the
18 injury.
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21 Fourth, because the UCL should be internally consistent, the Court considers other
22 provisions of the UCL and case law interpreting those provisions. The Court is inclined
23 to hold that the "by means of such unfair competition" language in section 17203 should
24 have a meaning similar to the "as a result of such unfair competition" language in section
25 17204. The case law regarding section 17203 suggests that a private plaintiff must
26 demonstrate some causal link between the business practice and the loss of money or
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1 property before a Court can order restitution (monetary relief) under section 17204. A
2 recent case construing section 17203, *In re Firearm Cases* (2005) 126 Cal. App. 4th 959,
3 981, states, “we do not believe a UCL violation may be established without a link
4 between a defendant's business practice and the alleged harm. ... The UCL provisions
5 are not so elastic as to stretch the imposition of liability to conduct that is not connected
6 to the harm by causative evidence.”
7

8 The Court notes that this case is post-Proposition 64 and seeks monetary relief on
9 behalf of private parties and much of the pre-Proposition 64 UCL case law discussing the
10 need for causation arose in different contexts. Many cases concerned injunctive relief,
11 and in those cases the plaintiffs (public or private) could prove liability without proof that
12 the business practice had caused actual injury. See, e.g., *Committee on Children's*
13 *Television, Inc. v. General Foods Corp.* (1983) 35 Cal. 3d 197, 211 (“To state a cause of
14 action under these statutes for injunctive relief, it is necessary only to show that
15 “members of the public are likely to be deceived.”) Many other cases were brought in the
16 interest of the general public (by private parties before Proposition 64 or by public
17 prosecutors). Claims on behalf of the public are designed for deterrence and not
18 compensation. *People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 17 (“An action
19 filed by the People seeking injunctive relief and civil penalties is fundamentally a law
20 enforcement action designed to protect the public and not to benefit private parties.”)
21 Therefore, it makes sense that claims on behalf of the general public did not need to
22 demonstrate monetary loss to prove liability. This case, however, seeks monetary relief
23 on behalf of private parties.
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1 On the basis of the plain language of the statute and the interpretation of “as a
2 result of” in the CLRA, the Court holds that under current sections 17203 and 17204 a
3 plaintiff must allege and prove that the business practice caused him or her to lose money
4 or property. The Court is mindful of the pre-Proposition 64 case law holding that a UCL
5 “violation can be shown even without allegations of actual deception, reasonable reliance
6 and damage,” but the Court finds that the current language of the statute supercedes the
7 pre-Proposition 64 case law.
8

9 Having held that the UCL now includes a causation requirement, the Court finds
10 that Plaintiffs have demonstrated that common factors will predominate in determining
11 causation. Plaintiffs have demonstrated that the omission and representations were
12 uniform. As a matter of law the court will use a “reasonable consumer” standard in
13 determining whether the uniform statements or omissions were material and consumers
14 were therefore likely to be deceived. *Consumer Advocates v. Echostar Satellite Corp.*
15 (2003) 113 Cal. App. 4th 1351, 1360. The nexus between the materiality of the
16 statements or omissions and the presumption of reliance or causation and how that affects
17 class certification was addressed specifically in *Mass. Mutual*, 97 Cal. App. 4th at 1292-
18 1293. The Court states, “the causation required by Civil Code 1780 does not make
19 plaintiffs' claims unsuitable for class treatment. "Causation as to each class member is
20 commonly proved more likely than not by materiality. That showing will undoubtedly be
21 conclusive as to most of the class. The fact a defendant may be able to defeat the showing
22 of causation as to a few individual class members does not transform the common
23 question into a multitude of individual ones; plaintiffs satisfy their burden of showing
24 causation as to each by showing materiality as to all." ... Thus, "[i]t is sufficient for our
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1 present purposes to hold that if the trial court finds material misrepresentations were
2 made to the class members, at least an inference of reliance would arise as to the entire
3 class””

4 Therefore, the Court concludes that Plaintiffs have demonstrated that common
5 issues will predominate on issues of causation and reliance.

6 Fact of Injury. The Court holds that common factual and legal issues predominate
7 regarding the existence of injury in the UCL fraudulent claim. The parties have
8 submitted expert declarations and testimony on the theoretical economic issue of whether
9 a person has lost “money or property” by being deprived of something that he or she may
10 have had had no intent to use. (Taylor Dec., Economides Dec., Economides Depo.)

11 Having reviewed the expert economic testimony concerning the facts and the
12 economic theory, the Court evaluates the issue through a somewhat simplistic example.
13 Assume Sprint organizes an opera series for Sprint customers and includes an opera ticket
14 in the price of each phone. Those tickets will have a different value to people who have
15 scheduling conflicts (\$0), people who do not like opera (\$0), people who are indifferent
16 to opera (\$5), opera fans (\$30), and rabid opera fans (\$50). Then assume that Sprint
17 cancels the opera series. Each person would have suffered an equal loss of the
18 opportunity to attend the opera even though different people would have placed different
19 values on the opportunity to attend the opera. There might be valuation issues regarding
20 what the loss of a night at the opera means to Sprint customers, but there would be a
21 common loss.

22 This analysis is somewhat similar to the distinction drawn in antitrust cases
23 between the fact of damage, which is presumed when plaintiffs prove an unlawful
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1 combination, and the amount of damages, which Plaintiffs must prove. *B.W.I. Custom*
2 *Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal. App. 3d 1341, 1350-1351 (““Fact of
3 damage pertains to the existence of injury, as a predicate to liability; actual damages
4 involve the quantum of injury, and relate to the appropriate measure of individual
5 relief.””); *Rosack v. Volvo of Am. Corp.* (1982) 131 Cal. App. 3d 741, 753-754 (“Proof of
6 impact at the liability phase is not the same as calculation of damages in the damages
7 phase.”).

9 Plaintiffs have demonstrated that each classmember has suffered a common loss
10 of money or property if he or she purchased a locked phone based on materially
11 misleading or incomplete information. The matter of “standing” under Business and
12 Professions Code 17204 relates to the fact of injury, not the ability to quantify the amount
13 or degree of the injury. This resolves the standing issue.

15 Amount of Injury. The parties have submitted declarations addressing whether
16 unlocked Sprint phones (which use CDMA technology) could technically be used with
17 other carriers (which use other technologies), whether other carriers that use CDMA
18 technology (Verizon, MetroPCS, and a few other carriers) would accept the use of Sprint
19 phones, and other matters concerning the reality of whether an unlocked phone would be
20 materially more useful to most classmembers. (Taylor Dec., Zicker Dec., Zicker Depo.)
21 These suggest that there will be both factual and case management issues concerning the
22 value of any injury to the classmembers as a whole and as individuals.

24 The possibility that the monetary loss to each classmember may vary depending
25 on individualized factors does not defeat commonality. *Sav-On*, 34 Cal.4th at 332 (“That
26 calculation of individual damages may at some point be required does not foreclose the
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1 possibility of taking common evidence on the [common] questions.”). Determining the
2 aggregate or individual amount of restitution will require the use of “innovative
3 procedural tools.” *Sav-On*, 34 Cal.4th at 339. If there is a finding of liability, the Court
4 could order injunctive relief (unlocking the phones), aggregate monetary relief (a cy pres
5 fund), individual monetary relief under a formula (credits to current customers and
6 payments to former customers), individual monetary relief based on individual factors (a
7 claims process), or some other form of relief. The Court need not resolve this issue at
8 this time.
9

10 Sprint argues that the amount of injury is zero because classmembers uniformly
11 got what they expected (a phone that worked only on the Sprint network) (Taylor Dec.,
12 para 5), uniformly paid less for the locked phones than they would have paid for unlocked
13 phones (Economides Dec. para 4), and uniformly would have had limited options about
14 what to do with an unlocked phone (Zicker Depo). Plaintiffs argue that classmembers
15 uniformly could pay a fee of \$10 to unlock the phones (Economides Dec. para 5). These
16 arguments suggest that the amount of any monetary loss can be determined on a common
17 basis. The Court will not resolve on class certification the issue of whether Plaintiffs can
18 prove that classmembers have suffered a loss and the amount of any such loss. This
19 concerns the merits of the claims, not whether the issue can be resolved on a common
20 basis.
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1 Business and Professions Code 17200 et seq. (the UCL) – Market Effects.

2 Common factual and legal issues predominate regarding the UCL market effects
3 claim. Sprint had a common practice of locking its handsets and that practice had a
4 common effect on all Sprint customers.

5 If the practice is unfair under the FTC test of unfairness, then the Court can infer
6 that the practice will affect all Sprint customers. If the practice affects all Sprint
7 customers, the Court can infer the facts of injury. *B.W.I. Custom Kitchen v. Owens-*
8 *Illinois, Inc.* (1987) 191 Cal. App. 3d 1341, 1350-1351 (inferable injury in antitrust
9 context).

10
11 If there is a common fact of injury, then the Court can use the “innovative
12 procedures” described in *Sav-On* to determine aggregate or individual restitution.
13

14 Plaintiffs have committed to the proposition that the amount of injury arising from
15 the alleged market effects is the same as the amount of injury caused by the alleged
16 deception in the sale of the phones. (Plaintiffs’ Supp. Opening Brief at 7:15-8:9.)

17 In certifying this claim, the Court takes no position on whether UCL claims under
18 the unlawful or unfair prong can borrow from or be tethered to the FTC’s test for
19 unfairness. *Bardin v. Daimlerchrysler Corp.* (2006) 136 Cal. App. 4th 1255 (“In light of
20 the uncertain state of the law regarding the proper definition of “unfair” in the context of
21 consumer UCL actions, we urge the Legislature and the Supreme Court to clarify the
22 scope of the definition of “unfair” under the UCL.”)

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1 Civil Code 1750 et seq. (the CLRA).

2 Common factual and legal issues predominate regarding the CLRA claim. Sprint
3 made uniform representations to consumers and had uniform policies in how it treated
4 consumers.

5 Sprint argues that the CLRA requires proof of reliance and that individual factors
6 will predominate in determining reliance.

7 The Court's Order of June 7, 2005, page 13-15, states that that a consumer has
8 standing to assert a claim under the CLRA even if the consumer has not completed a
9 transaction or suffered any monetary loss. Under that analysis, each person who
10 purchased a locked phone has standing to pursue the claim. Standing to assert a claim is
11 not, however, the same as having the ability to recover monetary relief.

12 For a consumer to recover monetary relief under the CLRA, the consumer must
13 prove that he or she suffered monetary injury as a result of a violation of Civil Code 1770.
14 *Wilens v. TD Waterhouse Group, Inc.* (2003) 120 Cal. App. 4th 746, 754, states, "Relief
15 under the CLRA is specifically limited to those who suffer damage, making causation a
16 necessary element of proof." *Mass. Mut. Life Ins. Co. v. Superior Court* (2002) 97 Cal.
17 App. 4th 1282, 1292, states, "plaintiffs in a CLRA action [must] show not only that a
18 defendant's conduct was deceptive but that the deception caused them harm."
19

20 Plaintiffs have demonstrated that common factors will predominate in the
21 determining reliance. The representations were uniform. As in the UCL-Deception
22 claim, the court will use a "reasonable consumer" standard in determining whether the
23 uniform statements or omissions were material. *Consumer Advocates*, 113 Cal. App. 4th
24 at 1360. If the statements or omissions were material, then the trier of fact can reasonably
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1 infer that the member of the class relied on those statements or omissions. *Mass. Mutual*,
2 97 Cal. App. 4th at 1292-1293.

3 The possibility that the damages due to each classmember may vary depending on
4 individualized factors does not defeat commonality. *Sav-On*, 34 Cal.4th at 332 (“That
5 calculation of individual damages may at some point be required does not foreclose the
6 possibility of taking common evidence on the [common] questions.”).

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11 TYPICALITY AND ADEQUACY.

12 Plaintiffs Zill and the Mackenzies are typical of consumers who purchased locked
13 handsets – they purchased locked phones and received the same disclosures and
14 nondisclosures as other customers.

15
16 Sprint argues that the named plaintiffs are not typical of the putative class because
17 they did not read the information carefully and continued buying phones after the start of
18 the lawsuit. These facts do not render the named plaintiffs atypical of the putative class.

19 A named plaintiff can be typical of the class members even if the named plaintiff’s
20 specific factual situation is not the same as the specific factual situation of all the other
21 class members. *Daniels v. Centennial Group, Inc.* (1993) 16 Cal. App. 4th 467, 473;
22 *Wershba v. Apple Computer* (2001) 91 Cal. App. 4th 224, 238.

23
24 Plaintiffs Zill and the Mackenzies are adequate class representatives because they
25 have selected counsel qualified to conduct the litigation and have no interests antagonistic
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1 to the interests of the class. *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450.

2 See also *Lazar v. Hertz Corp.* (1983) 143 Cal.App.3d 128, 141-142.

3
4 DETERRING AND REDRESSING THE ALLEGED WRONGDOING.

5 Trial courts have an obligation to consider the role of the class action in deterring
6 and redressing wrongdoing. *Linder*, 23 Cal.4th at 446. Addressing these concerns in the
7 specific context of the CLRA, in *Hogya v. Superior Court* (1977) 75 Cal.App.3d 122,
8 136, the Court held that “the Legislature has determined that class suits against persons
9 who falsely represent the grade of goods in consumer transactions are in the public
10 interest.” Sprint did not argue in this motion that claims by private persons are not
11 necessary because the F.C.C. or some other public entity is investigating the use of
12 handset locking. Compare *Caro v. Procter & Gamble Co.* (1993) 18 Cal. App. 4th 644,
13 660 (no substantial benefit where defendant had already entered in to consent decrees
14 with the FDA, California Attorney General, and District Attorneys in Santa Cruz and
15 Alameda Counties).

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20 ALTERNATIVE PROCEDURES FOR HANDLING THE CONTROVERSY.

21 The Court cannot identify any effective alternate procedures to resolve the
22 controversy. Requiring individual consumers to file individual claims in small claims
23 court would not be effective for the consumers and would not be an efficient use of Court
24 resources. If the Court required individual claims, then the Court would give Sprint
25 practical immunity from liability given that the vast majority of consumers would not
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1 elect to file claims. See in *Discover Bank v. Superior Court* (2005) 36 Cal. 4th 148, 157-
2 161. See also *Szetela v. Discover Bank* (2002) 97 Cal. App. 4th 1094, 1101.

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4 EVIDENCE/MOTIONS TO STRIKE.

5 The Court GRANTS the motion of Plaintiffs to strike certain supplemental
6 evidence submitted by Sprint. The Court's order of February 16, 2006, states "The only
7 new evidence permitted will be the testimony of Zicker and Economides." The Court
8 gives effect to that order.

9
10 The Court DENYS the motion of Sprint to strike paragraph 5 of the Declaration of
11 Economides and Exhibits 2, 3, and 4 to that Declaration. The Court considers the
12 evidence, but gives limited weight to the testimony and exhibits.

13
14 The Court DENYS the motion of Sprint to strike the portions of Plaintiffs' briefs
15 that rely on paragraph 5 of the Declaration of Economides and Exhibits 2, 3, and 4 to that
16 Declaration. The briefs of Sprint are not subject to evidentiary objections. The Court
17 considered the weight of the evidence when evaluating the arguments of counsel.

18 The evidentiary objections by the parties are OVERRULED except as specifically
19 stated otherwise in this order. *City of Long Beach v. Farmers & Merchants Bank of Long*
20 *Beach* (2000) 81 Cal.App.4th 780 (noting importance of evidentiary decisions). The
21 Court's consideration of the evidence is limited to this motion only and is not to be
22 construed as an indication of admissibility in future motions or at trial.

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25 CLASS DEFINITION.
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1 The Court certifies a class defined as “All persons with California billing
2 addresses for Sprint personal or business accounts who purchased handsets from Sprint
3 from DATE to DATE” and a subclass defined as “All persons with California billing
4 addresses for Sprint personal accounts who purchased handsets from Sprint from DATE
5 to DATE.”

6 The start dates will be set by the statute of limitations and the end dates will be
7 determined based on whether and how the Court gives notice to the members of the class.
8 The class period cannot extend past the class notice date because persons who purchase
9 phones after that date will not receive notice and have an opportunity to opt out of the
10 class.
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15 FURTHER PROCEEDINGS AND TRIAL

16 The next case management conference is set for _____, 2006, at _____. At that
17 time, Counsel should be prepared to discuss (1) whether class notice should be required;
18 (2) the content and distribution of class notice, (3) how much additional discovery is
19 necessary to prepare for trial, (4) motion practice, and (5) trial setting.
20

21 Prior to trial, Plaintiffs’ counsel will be required to present the Court with their
22 plan of how the case can proceed to trial in a manner that will protect the due process
23 rights of Defendant and the absent class members, be comprehensible to the jurors, and
24 respect the time of the jurors. The burden rests with Plaintiffs to present a manageable
25 trial plan. *Washington Mutual Bank v. Superior Court* (2001) 24 Cal. 4th 906, 924-925.
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1 Dated: March ___, 2006

Judge Ronald M. Sabraw

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ATTACHMENT B

**AMERICAN ARBITRATION ASSOCIATION
NORTHEAST CASE MANAGEMENT CENTER**

Patricia Brown, on an individual basis, and
also on a classwide basis on behalf of others
similarly situated.

Claimant,

Case No. 11 494 01274 05

-and-

Cellco Partnership d/b/a Verizon Wireless,

ORDER

Respondent.

The purpose of this Order is to rule in three separate areas as follows:

A. The motion by Respondent Cellco Partnership d/b/a Verizon Wireless ("Verizon") to consolidate this arbitration (the "Brown Arbitration") with another pending arbitration captioned Zobrist and Verizon Wireless AAA Case No. 11 594 00324-05 (the "Zobrist Arbitration"), which is the subject of a consolidation order previously rendered by Arbitrator Joseph N. Matthews;

B. Verizon's motion to stay the Brown Arbitration on the grounds that there are related proceedings pending before the Federal Communications Commission and for other reasons; and

C. Certain document production issues.

All of the above items have been the subject of extensive submissions and oral argument by counsel.

VERIZON'S MOTION TO CONSOLIDATE

On October 19, 2005 Verizon submitted a motion to consolidate the Brown

Arbitration with the Zobrist Arbitration. Verizon's motion was made both to Arbitrator Joseph N. Matthews, who was presiding over the Zobrist Arbitration, and to me.

Verizon's cover letter stated that "Verizon Wireless is authorized to state the claimant in the Zobrist matter agrees that the two arbitrations should be consolidated, with certain caveats set out in the first paragraph of the motion." The first paragraph of the motion did not specifically state any caveats, but repeated that Zobrist agreed that the two arbitrations should be consolidated, although Zobrist believed that the Zobrist Arbitration should be accorded "first - filed status" in any consolidation and that Zobrist reserved the right to request that arbitrator fees and other costs be advanced by Verizon. Neither of these two items have yet been briefed.

Although both parties in the Zobrist Arbitration agreed to consolidation, there was no statement as to whether they preferred consolidation before Arbitrator Matthews or before me. Brown has objected to any consolidation for reasons referred to below. In its moving papers, Verizon also urged that the consolidated arbitrations be heard before a three arbitrator panel consisting of Arbitrator Matthews and me and a third arbitrator to be chosen pursuant to AAA rules. Brown also objected to this on the grounds that Brown and Verizon had originally stipulated that the Brown Arbitration would be heard before one arbitrator and both Brown and Verizon had selected me as that arbitrator.

By Order dated February 6, 2006 in the Zobrist Arbitration, Arbitrator Matthews stated that "it appears to me that this case cries out for administrative consolidation in order to assure some level of the efficiency that is intended to be one of the hallmarks of arbitration." Arbitrator Matthews entered a "conditional order" directing the parties in

the Zobrist Arbitration "to proceed in the arbitration currently pending before Arbitrator Farber. It is conditional upon the acceptance by Arbitrator Farber of both actions". He also stated that the transfer to me of the Zobrist Arbitration was "preferable to the transfer of that action to be consolidated before me or the proposed consolidation and appointment of a third arbitrator to serve jointly with us..."

Thus, Arbitrator Matthews has ruled on consolidation and directed that the Zobrist Arbitration be transferred to me on condition that I accept the same. The questions before me are therefore (a) whether I have authority to rule on a consolidation motion and (b) if I have such authority, whether I determine consolidation is appropriate and accept the transfer of the Zobrist Arbitration from Arbitrator Matthews.

A. AUTHORITY TO CONSOLIDATE

Brown's principal argument is that an arbitrator does not possess authority to rule on a motion for consolidation. Brown claims that the absence of a pertinent statute or pertinent AAA rule means either that there can be no consolidation of the Brown Arbitration and the Zobrist Arbitration or that this can only be accomplished by an order of a Court.

Green Tree Financial Corp. v. Bazzle, 123 S. Ct. 2402, 539 U.S. 444 (2003) generally stands for the proposition that arbitrators can preside over class actions. However, the plurality in Bazzle also sets forth a framework for determination of whether an arbitrator has authority to rule on a motion for consolidation. In Bazzle, the plurality stated, in part, as follows:

"In certain limited circumstances, courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter (in the absence of 'clea[r] and unambiguou[s]' evidence to the contrary). *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). These limited instances typically involve matters of a kind that 'contracting parties would likely have expected a court' to decide. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002). They include certain gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy...

The question here—whether the contracts forbid class arbitration—does not fall into this narrow exception. It concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties. Unlike *First Options*, the question is not whether the parties wanted a judge or an arbitrator to decide *whether they agreed to arbitrate a matter*. 514 U.S., at 942-945, 115 S.Ct. 1920. Rather the relevant question here is what *kind of arbitration proceeding* the parties agreed to... That question... concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question. Given these circumstances, along with the arbitration contracts' sweeping language concerning the scope of the questions committed to arbitration, this matter of contract interpretation should be for the arbitrator, not the courts, to decide. Cf. *Howsam*, *supra*, at 83, 123 S.Ct. 588 (finding for roughly similar reasons that the arbitrator should determine a certain procedural gateway matter"). (Emphasis in original) 539 U.S. at 452-3

Thus, the question is whether a motion for consolidation is a "gateway" issue for a Court or a question regarding the "kind of arbitration proceeding the parties agreed to", which should be determined by the arbitrator. See analysis of Bazzle by the United States Court of Appeals for the Fifth Circuit in Pedcor Management Co. v. Nations Personnel of Texas, 343 F.3d 355 (2003).

In Shaw's Supermarkets, Inc. v. United Food and Commercial Workers Union, 321 F.3d 251 (2003) the First Circuit dealt squarely with the question of whether a motion to consolidate three grievance arbitrations under three different collective bargaining agreements should be decided by the Court or by an arbitrator. The First Circuit ruled as follows:

"The issue before us is who should make the determination as to whether to consolidate the three grievances into a single arbitration: the arbitrator or a federal court. Since each of the three grievances is itself concededly arbitrable, we think the answer is clear. Under Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002), this is a procedural matter for the arbitrator." 321 F.3d at 254

In Blimpie International, Inc. v. Blimpie of the Keys, 371 F.Supp.2d 469

(S.D.N.Y., J. Leisure, 2005) the Federal District Court considered if Blimpie of the Keys together with 44 other sub-franchisees of Blimpie International could file a consolidated demand for arbitration with the American Arbitration Association. The Court concluded as follows:

"Thus, the Court...finds that Green Tree is controlling here. Consolidation does not fall within the 'narrow exception' reserved for gateway matters that the parties would likely have expected a court to resolve. Like the question of class arbitration in Green Tree, the question of consolidated arbitration here concerns the nature of the arbitration proceeding agreed to, not whether the parties agreed to arbitrate. Indeed, consolidation is a procedural issue, 'which grow[s] out of the [parties] dispute,' and therefore, presumptively falls to the arbitrator. And, as the Supreme Court reasoned in Green Tree, whether a particular procedural device is permissible in the absence of any language in the agreement is a question of 'contract interpretation and arbitration procedures,' which '[a]rbitrators are well situated to answer.' Accordingly, in light of Green Tree and its progeny and the breadth of the arbitration provision here, the Court finds that the question of whether the parties' arbitration proceeding may be consolidated with other arbitration proceedings should be decided by an arbitrator." (Citations omitted) 371 F. Supp. 2d at 473-474

Similarly, in Yuen v. Superior Court of Los Angeles County, 121 Cal.App.4th 1133, 18 Cal.Rptr.3d 127, (2004) the California Court of Appeals considered an application for consolidation of two American Arbitration Association commercial arbitrations and concluded that "the reasoning of Green Tree should result in the arbitrator or arbitrators deciding whether the arbitration agreements in this case permit consolidation and whether the arbitrations should be consolidated." In Kalman Floor Company v. Jos. L. Muscarelle, 196 N.J. Super. 16, 481 A.2d 553 (1984) the Appellate

Division of New Jersey similarly ruled that the question of consolidation was a "procedural matter" which should be determined by the arbitrators.

I therefore conclude that, based upon the caselaw, an arbitrator does have authority to determine whether or not two arbitrations should be consolidated.

B. THE MOTION FOR CONSOLIDATION

I conclude that Verizon's motion for consolidation should be granted and I accept the transfer of the Zobrist Arbitration from Arbitrator Matthews. My reasons are as follows:

1. It is undisputed that all factual allegations in the Zobrist Arbitration are identical to factual allegations in the Brown Arbitration. Zobrist seeks damages from Verizon for its imposition of an allegedly unlawful early termination fee of \$175.00 for each Verizon subscriber of Verizon's wireless telephone services who terminated his or her agreement before the end of the term of that agreement. Brown seeks exactly the same relief. In fact, the only factual differences between the two arbitrations is that the claims of Zobrist are limited to matters relating to the early termination fee but the claims of Brown also relate to an additional issue. Brown also seeks damages against Verizon based upon Verizon's allegedly illegal locking of cell phone handsets sold by Verizon to customers, which purportedly makes it impossible or impracticable for customers to switch cell phone providers without purchasing new handsets. Claimants in Brown seek to create two classes, a Termination Penalty Class and a Locked Handset Class. Zobrist makes no allegations against Verizon regarding allegedly locked headsets.

2. The putative parties in both the Brown Arbitration and the Zobrist Arbitration are identical. In both cases Verizon is the respondent. In the Brown Arbitration, Brown

seeks certification of a Termination Penalty Class consisting of all persons in the United States, except California, who entered into agreements with Verizon which purported to require payment of an early termination fee. In the same order in which he directed consolidation, Arbitrator Matthews granted Zobrist's motion to file a First Amended Claim to "assert a putative class claim on behalf of residents of all states other than the state of California." Thus, although the class representatives and their counsel are different, the putative parties in the Zobrist Arbitration and Brown Arbitration are identical.

3. The discovery in the Zobrist Arbitration for both class certification and on the merits appears to be identical to and totally encompassed within the discovery in the Brown Arbitration.

4. The factual presentations regarding the claims and defenses in the Zobrist Arbitration also appear to be identical to and totally encompassed within the factual presentations in the Brown Arbitration.

5. Even the legal issues in the Zobrist Arbitration appear to be substantially similar or even identical to the legal issues in the Brown Arbitration. Presently, Zobrist's claims are breach of contract, breach of the Illinois Consumer Fraud Statute, presumably because Zobrist resides in Illinois, and breach of "the substantially similar consumer protection statutes of other states where Verizon Wireless does business" (see paragraph 47 of Zobrist's First Amended Demand). Considering that the pleading requirements in arbitration are generally viewed with more flexibility than in litigation, Brown's claims appear to amount to the same as those of Zobrist. Brown claims a putative Termination Penalty Class of all persons in the United States, except California, who entered into Verizon agreements requiring an early termination penalty.

Brown, who resides in Florida, alleges her first two causes of action for breach of the Florida Deceptive and Uniform Trade Practices Act and a third claim based upon violations of the Federal Communications Act. However, after Brown commenced the Brown Arbitration, upon Verizon's consent, Brown served a First Amended Demand For Class Arbitration adding Harold P. Schroer, a New York resident, as an additional class representative. Presumably, Claimant Schroer will seek to assert claims under New York consumer protection statutes. Moreover, the standard Verizon Customer Agreement provides that the law of the state of each customer's residence applies to that customer's contract. Therefore, it seems likely that the applicable law in the Brown Arbitration will also be the relevant consumer protection statute in each state except California. Thus, the legal issues in the Zobrist Arbitration may well be entirely encompassed within the legal issues in the Brown Arbitration.

6. Finally, the consolidation of the Zobrist Arbitration and Brown Arbitration will avoid the gross inefficiencies and unnecessary significant expense of two separate proceedings regarding the same issues and the same parties. It will also avoid the possibility of inconsistent results. It would make no sense for parties to have selected arbitration, a process designed to save time and expense, and then do everything twice.

The identity and/or substantial similarity of factual issues, parties, discovery, trial presentations and legal issues outweighs other objections to consolidation raised by Brown, as follows:

1. Brown argues that a consolidated arbitration is not workable because her arbitration agreement and Zobrist's arbitration agreement are different. However, Brown has not established that the differences are significant and there may be similar

differences between Brown's arbitration agreement and the arbitration agreement of Claimant Harold P. Schroer in the Brown Arbitration. Moreover, as noted in Rule 4 of the AAA Supplementary Rules for Class Arbitration (the "Supplementary Rules"), class certification only requires that each class member has entered into an agreement containing an arbitration clause which is "substantially similar" - not identical - to that signed by the class representative and each of the other class members. Finally, to the extent there are differences, it is likely that they can be resolved by different procedures and/or sub-classes.

2. Brown next argues that since I have already entered an order allocating arbitral fees in the Brown Arbitration, there should be no consolidation because it is possible that a fee allocation in the Zobrist Arbitration based on a different agreement will conflict with the fee allocation I have previously ordered. As noted above, Zobrist has reserved the right to request that arbitrator fees and other costs be advanced by Verizon and no ruling has yet been made on this issue. Therefore, there may be no conflict. Additionally, my prior ruling was that, on a cash flow basis, Verizon is required to advance virtually all arbitral fees in the Brown Arbitration. Consolidation of the Zobrist Arbitration would not change this ruling such that there would be any adverse financial impact upon Brown.

3. Arbitrator Matthews has rendered a clause construction award determining that the clause in the Zobrist Arbitration permits class arbitration. As such, an objection based upon clause construction is moot. If a Court subsequently disagrees and rules that the Zobrist Arbitration clause prohibits class arbitration, consolidation would certainly be warranted. Additionally, if a class is subsequently certified in the Brown Arbitration, Zobrist would in all likelihood be afforded an opportunity to opt out of any

such class.

4. The locale of the Brown arbitration is New York City and the locale for Zobrist is apparently somewhere in the Midwest. However, when Zobrist consented to consolidation, presumably she consented to a change of locale. Moreover, different locales in otherwise substantially similar arbitration clauses would not seem to rise to the level of denying a consolidation motion.

5. Brown argues that the two arbitrations may require different class definitions. However, as noted above, they do not. In both the Zobrist Arbitration and the Brown Arbitration the putative classes are all Verizon customers in the United States except California. The putative classes are therefore identical, a key fact which supports consolidation.

6. Brown argues that there will be delays from ancillary disputes such as designation of "first filed" status and legal counsel. However, such delays and associated additional expense are minimal compared to the delays and expense of two entirely different separate arbitrations among the same parties regarding the same issues.

7. Brown argues vehemently in opposition to Verizon's suggestion of a reconfiguration of the arbitration panel to constitute Arbitrator Matthews, me and a third arbitrator. I do not believe I have authority to change the agreement reached between Brown and Verizon that there be one arbitrator. I also do not have authority to change the ruling of Arbitrator Matthews directing that the Zobrist Arbitration be consolidated into the Brown Arbitration. I therefore conclude that Brown's objection in this regard is valid and must be sustained.

C. CONCLUSION

I conclude that I have authority to rule on a consolidation motion and that Verizon has presented a compelling case for consolidation. I do not believe any of the points raised by Brown in opposition to consolidation are sufficient to defeat Verizon's motion. As such, Verizon's motion for consolidation is granted. The case manager is directed to advise Arbitrator Matthews that I will accept the transfer of the Zobrist Arbitration.

THE MOTION FOR A STAY

Verizon has also moved before me and before Arbitrator Matthews for a stay of the Brown Arbitration and the Zobrist Arbitration for a variety of reasons. In granting the consolidation motion, Arbitrator Matthews determined that I should rule on the stay application if I accepted his order directing consolidation of the Zobrist Arbitration into the Brown Arbitration.

For the reasons set forth below, I deny Verizon's application for a stay to the extent that the consolidated action may proceed to the class certification and notice phases of the arbitration. I will consider entertaining a motion for a stay by Verizon at a later date if the Federal Communications Commission issues an order in connection with preemption of state claims in favor of proceedings pending before the Federal Communications Commission.

Verizon argues that the early termination fee claims should be stayed because of application of Florida's doctrine of primary jurisdiction. See New York Cross Harbor v. Consolidated Rail, 72 F. Supp.2d 70 (E.D.N.Y., 1998); Baltimore & Ohio Chicago Terminal R.R. v. Wis. Cent. Ltd., 154 F.3d 404 (7th Cir. 1998). Verizon asserts that proceedings have been initiated before the Federal Communications Commission

("FCC") In an attempt to obtain a ruling that a future determination by the FCC preempts all claims that Verizon's early termination fee violates state statutes, including various consumer protection statutes. I do not accept Verizon's assertions for the following reasons:

1. Although Verizon argues that the application of the doctrine of primary jurisdiction is mandatory, it cites no case where a Court or an arbitrator stayed or abated an arbitration because of a pending investigation by an administrative agency.
2. There appears to be significant doubt that the FCC will determine that any FCC decision regarding this matter will preempt claims based upon state statutes. As pointed out by Brown, Judge Herndon in Zobrist v. Verizon Wireless, 02-CV 1000-DRH (SD Ill 2002) has ruled that, "the Court finds that the Early Cancellation Fee is not part of Defendants' rate-making structure, or a part of market entry", which would be the subject of the FCC investigation, but rather is one of Verizon's "other terms and conditions..." Judge Herndon also stated that he agreed with the same result determined by Chief Judge Murphy in Hinkel v. Cingular Wireless, 2002-0999 (S.D. Ill.). Chief Judge Murphy ruled that Cingular's early termination fee "is not part of Defendant's rate-making structure and, thus, it escapes federal preemption". If the early termination fee is not part of Verizon's rates or rate-making structure, it is highly doubtful that the FCC will issue any preemption order.
3. Verizon claims that a decision by the FCC on preemption "can be expected by March or April 2006" (see page 2 of Verizon reply). Brown, on the other hand, argues persuasively that in other similar proceedings the FCC has taken years to make any such decision, that there are thousands of pages of submissions which have been made in this matter to the FCC, that the FCC itself and its staff have been hindered in

making quick decisions by internal administrative problems, and that a stay pending an FCC decision will interminably delay these arbitration proceedings. The FCC initiated its proceedings in May 2005 and to date has only issued an Order accepting comments. Verizon does not deny that the FCC took 7 years to issue its most recent preemption ruling in the Truth-In-Billing matter. It therefore appears that Brown's assertion regarding the timing of any possible relevant FCC action is far more likely than Verizon's assertion. However, I will reconsider a motion for a stay if the FCC issues a relevant decision during the pendency of this arbitration.

4. When faced with the same questions in the California action, In re Cellphone Termination Fee Cases (Cal. Super. Ct. 6/21/95), Judge Sabraw determined that a stay of the class action and notice phases of the matter pending before him should not be granted. For the reasons set forth in Judge Sabraw's decision, I similarly believe a stay should not be granted.

5. A stay in these circumstances appears contrary to the parties' agreements. The parties agreed to resolve their disputes by the more flexible and faster procedures of arbitration. It seems contrary to those agreements to conclude that a respondent such as Verizon can stop a putative class action against it, possibly for years, by simply filing for a determination of the issue with a relevant administrative agency and succeeding in having that agency determine it will accept comment on the issue.

6. Finally, as stated by Judge Sabraw in the California action, there are enough built in delays provided by the Supplementary Rules with mandatory stays following partial awards on clause construction and class certification such that it is inappropriate to grant an additional stay because of possible FCC action, especially where 2 courts have already ruled to the contrary.

Verizon also argues that the handset lock claims should be stayed because it argues these claims were settled in a prior class action, Campbell v. Airtouch Cellular, GIC 751725 (Cal. Super. Ct., S.D. Co., 2001). Verizon also argues that the claims herein are enjoined by specific orders in the Campbell case. Verizon asserts that the claims herein should be stayed because of Florida's "principle of priority". See Siegel v. Siegel, 575 So. 2d 1267 (Fla. 1991). I reject Verizon's arguments for a stay of the handset lock claims for the following reasons:

1. Based upon the record before me, Verizon has not established that handset lock claims herein were argued and settled in Campbell. There is particular question as to whether the Campbell settlement permitted the assertion of the claims in this arbitration.

2. Based upon the record before me, I also question Verizon's assertion that the releases executed in Campbell cover the claims asserted herein. Verizon can assert its defense of release at the possible merits phase of this proceeding.

3. Verizon argues that proceeding with the handset lock claims this arbitration will violate the injunction granted in Campbell. However, Verizon offers no explanation as to why it has not then sought an order from the Campbell Court to stay this arbitration.

4. Florida's principle of priority appears to apply only to pending cases and the Campbell case has been settled.

5. Based upon the record before me, Verizon has not established that Campbell covered anything more than disclosure issues in connection with handset lock claims. As noted, it is not at all clear to me that the Campbell settlement intended to preclude this later arbitration.

6. Although Verizon has not established enough of a basis for me to grant any stay, this order is not intended to preclude Verizon from presenting its defenses based upon Campbell at the possible merits phase of these proceedings.

Finally, for reasons set forth above, I also reject Verizon's application for a stay in connection with claims made under Section 201 of the Federal Communications Act. The import of Verizon's argument is that a Court or arbitration tribunal has no jurisdiction in an action pursuant to Section 201 of the Federal Communications Act if the FCC accepts comments regarding the "reasonableness" issue. However, there appears to be no law or authority so holding.

CONCLUSION

For the reasons set forth above, I deny Verizon's application to stay this proceeding to the extent that the class certification and possible notice phases of this arbitration shall proceed. However, counsel are directed to advise me of any decision by any Court or the FCC which would warrant reconsideration.

DISCOVERY MATTERS

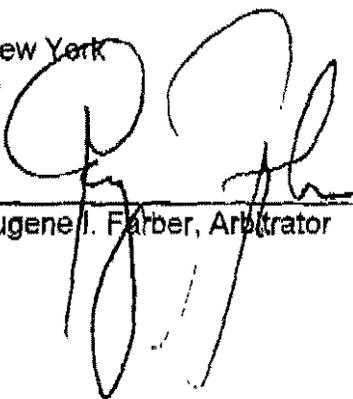
The only discovery issue not resolved to date relates to Brown's request that discovery it obtained from Verizon in the matter captioned In Re Wireless Telephone Services Antitrust Litigation, Case No. 02 Civ.2637 (DLC) pending in the United States District Court for the Southern District of New York (the "Federal Action") be deemed discovery in this action subject to the Federal Court's applicable protective order. Verizon objects and argues that the Federal Court discovery was significantly more broad than the discovery required in this matter and that Brown should be compelled to serve notices for production and have another production only of what is relevant to this arbitration and the claims asserted herein.

Both sides concede that the counsel for Brown appeared in the Federal Action and that such counsel already has all the documents which would be the subject of a document production. It simply makes no sense to compel Brown to incur the entirely duplicative cost of serving new demands and having another production for documents already in the possession of Brown's counsel. The nature of the production of documents from Verizon to Brown is irrelevant to whether such documents are properly admissible in possible future phases of this arbitration. As such, I grant the request of Brown's counsel.

It is Ordered that:

1. The motion for consolidation is granted.
2. By March 28, 2006, counsel in both the Brown Arbitration and the Zobrist Arbitration shall submit comments to me regarding pending issues and further steps in this Consolidated Arbitration. Counsel should also be prepared to discuss the same in a previously scheduled conference call for March 31, 2006 at 1:00 p.m. EST.
3. The motion for a stay is denied to the extent the class certification and possible notice phases of this arbitration shall proceed.
4. The documents produced in the Federal Action are deemed to be produced in this arbitration subject to the applicable protective order in the Federal Action.

Dated: White Plains, New York
March 20, 2006



Eugene J. Farber, Arbitrator

ATTACHMENT C

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SCANNED

FILED
CLERK, U.S. DISTRICT COURT
MAR 22 2006
CENTRAL DISTRICT OF CALIFORNIA
BY [Signature] DEPUTY

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

Priority
Send
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JS-2/JS-3
See Only

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

GENTRY, et al.,
Plaintiffs,
v.
CELLCO P'SHIP, D/B/A/ VERIZON
WIRELESS,
Defendant.

Case No. CV 05-7888 GAF (VBKx)

MEMORANDUM AND ORDER
REGARDING DEFENDANT'S MOTION
TO STAY

ENTERED
CLERK, U.S. DISTRICT COURT
MAR 23 2006
CENTRAL DISTRICT OF CALIFORNIA
BY [Signature] DEPUTY

I.
INTRODUCTION

Kenneth Gentry and others similarly situated ("Plaintiffs") seek injunctive and
restitutionary relief under the Class Action Fairness Act of 2005 ("CAFA") for
Defendant's practice of charging Early Termination Fees ("ETFs") when wireless
telephone subscribers choose to cancel or terminate their service contract because of
the poor quality of the service. Plaintiffs' diversity action alleges state law claims for:
(1) breach of contract; (2) unjust enrichment; and (3) violation of the Consumers

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1 Legal Remedies Act, Cal. Civ. Code §§ 1750, et seq. Plaintiffs seek damages and an
2 injunction ordering Defendant to cease any such unlawful practices.

3 Defendant Cellco Partnership, d/b/a/ Verizon Wireless ("Verizon") seeks to
4 stay this action pending the outcome of a formal proceeding **currently pending**
5 before the Federal Communications Commission ("FCC"). Verizon claims that the
6 FCC's ruling will be dispositive of the claims in this case. The Court agrees. 47
7 U.S.C. § 332(c)(3)(A) of the Federal Communications Act ("FCA") preempts any state
8 regulation of the "rates charged" by any commercial mobile service provider, while
9 allowing state regulation of "terms and conditions." Currently pending before the FCC
10 is the precise question of whether ETFs are "rates charged" or "terms and conditions"
11 for the purposes of Section 332(c)(3)(A). The matter was originally referred to the
12 FCC by a South Carolina state court in Edwards v. SunCom, No. 02-CP-26-3539
13 (Horry County, S.C.). (Reply at 1). The FCC has issued Public Notices seeking
14 comment on the issue and the agency's decision could be entirely dispositive of the
15 claims presented in this case. That is, if the FCC determines that ETFs are "rates
16 charged," then Plaintiffs' Complaint is squarely preempted under 47 U.S.C. §
17 332(c)(3)(A).

18 Nevertheless, Plaintiffs argue that the instant action is not based on "rates
19 charged" and would not be impacted by the FCC proceeding or its outcome since
20 Plaintiffs base their claims on Verizon's breach of contract in providing inadequate
21 and poor service, and not on ETFs in general. That argument begs the question.
22 The FCC has under consideration whether a charge imposed by a carrier for early
23 termination – whatever the asserted legal basis for the charge – is a "rate." If it
24 answers yes, then Plaintiffs cannot pursue the claims raised in this case.
25 Accordingly, the Court concludes that a stay in this matter is proper based on the
26 doctrine of primary jurisdiction or, alternatively, based on this Court's inherent power
27 to stay matters for reasons of judicial economy and efficiency. Accordingly,

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SCANNED

1 Defendant's motion to stay is **GRANTED** and proceedings in this case are **STAYED**
2 until the resolution of the currently pending question before the FCC.

3 **II.**

4 **STATEMENT OF FACTS**

5 The facts giving rise to this motion are easily summarized. Plaintiffs' First
6 Amended Complaint ("FAC") alleges that Verizon unlawfully charges penalties to its
7 cellular telephone service customers who terminate their contracts early due to
8 dissatisfaction with the quality of service. (FAC ¶ 5). Plaintiffs claim that Verizon
9 encourages long service contracts – lasting one or more years – and that many
10 customers who find the quality of their cellphone service unacceptable have no choice
11 but to pay an ETF. (Id. ¶¶ 6-7).

12 **A. FCC COMMENCES A FORMAL PROCEEDING TO DECIDE AN ISSUE THAT MAY BE**
13 **DISPOSITIVE OF PLAINTIFFS' CLAIMS**

14 On May 18, 2005, the FCC commenced a formal proceeding to determine the
15 extent to which federal law preempts state-law actions that challenge ETFs in
16 contracts for wireless telephone services. (Mot. at 1). Specifically, the FCC is
17 deciding two related issues: (1) whether ETFs "in wireless carriers' service contracts
18 are 'rates charged' for Commercial Mobile Radio Services ("CMRS") within the
19 meaning of Section 332(c)(3)(A) of the Communications Act and Commission
20 precedent;" and (2) whether "any application of state law by a court or other tribunal to
21 invalidate, modify, or condition the use or enforcement of [ETFs] . . . constitutes
22 prohibited rate regulation preempted by Section 332(c)(3)(A)." (Def.'s Request for
23 Judicial Notice ("RFJN")¹, Ex. H [5/18/05 FCC Public Notice] at 128).

24 Section 332(c)(3)(A) states, in pertinent part, that:

25 _____
26 ¹ The Court hereby takes judicial notice of the FCC Public Notices. See, e.g., Cellco P'ship v.
27 FCC, 357 F.3d 88, 96 (D.C. Cir. 2004) (taking judicial notice of FCC Reports); Fed. R. Evid. 201
28 (Courts may take judicial notice of facts that are not subject to reasonable dispute either
because they are: (1) generally known within the territorial jurisdiction of the trial court; or (2)
capable of accurate and ready determination by resort to sources whose accuracy cannot be
reasonably questioned).

1 [N]o State or local government shall have any authority to regulate the entry of
2 or the *rates charged* by any commercial mobile service or any private mobile
3 service, *except* that this paragraph shall not prohibit a State from regulating
4 the other *terms and conditions* of commercial mobile services.

5 47 U.S.C. § 332(c)(3)(A) (emphases added).

6 **B. A CALIFORNIA SUPERIOR COURT RECENTLY STAYED A SIMILAR ACTION BASED ON THIS**
7 **SAME PENDING FCC PROCEEDING**

8 Verizon, along with a number of other wireless carriers, is a defendant in a
9 class action in Alameda County Superior Court in which those plaintiffs asserted
10 various state-law claims also challenging Verizon's ETFs. In light of the FCC's Public
11 Notice, on June 21, 2005 the Superior Court partially stayed the consolidated case of
12 In Re Cellphone Termination Fee Cases based on the doctrine of "Primary
13 Jurisdiction." (RFJN, Ex. A [6/21/05 Stay Order] at 5-7).² However, the court declined
14 to stay the proceeding in its entirety, only staying the proceeding "insofar as the Court
15 is asked to wait for the FCC to decide whether ETFs are 'rates charged' or 'other
16 terms and conditions' before addressing this issue." (*Id.* at 5). Since the case had
17 already substantially progressed, the court allowed the parties to proceed with class
18 certification, motions to compel arbitration, and additional discovery. (*Id.* at 10).
19 However, as to its decision only partially to stay the case, the court acknowledged that
20 it was unable to "locate any case law that discussed the idea of recognizing an
21 administrative agency's primary jurisdiction over an issue but not staying the case in
22 its entirety." (*Id.* at 11).

23 Verizon now seeks a complete stay in this action based, in part, on Superior
24 Court Judge Sabraw's decision.

25 //
26 //

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² The Court takes judicial notice of this Superior Court Order. See Fed. R. Evid. 201.

SCANNED

1 III.

2 DISCUSSION

3 A. PRIMARY JURISDICTION

4 1. THE LEGAL STANDARD

5 The doctrine of primary jurisdiction is invoked to stay matters properly
6 cognizable before a court while the resolution of a relevant or determinative issue
7 within the special competence of an administrative agency is decided. See Reiter v.
8 Cooper, 507 U.S. 258, 268 (1993). The doctrine is largely “concerned with promoting
9 proper relationships between the courts and administrative agencies charged with
10 particular regulatory duties.” Nader v. Allegheny Airlines, 426 U.S. 290, 303 (1976)
11 (citation and quotation marks omitted). That is, it “allocates initial decision-making
12 responsibility between agencies and courts where jurisdictional overlaps exist and
13 there is a potential for conflict.” William W. Schwarzer, et al., California Practice
14 Guide: Federal Civil Procedure Before Trial § 2:1330, at 2E-63 (2005) (“Schwarzer”).

15 This Circuit has indicated:

16 Primary jurisdiction is properly invoked when a claim is cognizable in federal
17 court but requires resolution of an issue of *first impression*, or of a
18 particularly complicated issue that Congress has committed to a regulatory
19 agency. See Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426,
20 442 [] (1907). ‘The doctrine applies when protection of the integrity of a
21 regulatory scheme dictates preliminary resort to the agency which administers
22 the scheme.’ [United States v. Gen. Dynamics Corp., 828 F.2d 1356, 1362
23 (9th Cir. 1987).]

24 Brown, 277 F.3d at 1172 (emphasis added). That is, “primary jurisdiction is properly
25 invoked when a case presents a far-reaching question that ‘requires expertise or
26 uniformity in administration.’” Id. (quoting Gen. Dynamics Corp., 828 F.2d at 1362).

27 There is no rigid formula for determining whether to stay an action under the
28 doctrine. Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1042, 1051 (9th Cir.

1 2000); Schwarzer, § 2:1330.3, at 2E-64. Instead, courts in this Circuit consider the
2 following factors: (1) the need to resolve the issue; (2) whether the issue has been
3 placed by Congress within the jurisdiction of an administrative body having regulatory
4 authority pursuant to a statute that subjects an industry or activity to comprehensive
5 regulation; and (3) whether that regulation requires expertise or uniformity in
6 administration. Schwarzer, § 2:1330.3, at 2E-64; Gen. Dynamics Corp., 828 F.2d at
7 1362; Syntek Semiconductor Co. v. Microchip Tech., 307 F.3d 775, 781 (9th Cir.
8 2002). Once a court concludes that a claim “contains some issue within the special
9 competence of an administrative agency,” the doctrine requires a court to refer the
10 matter to the administrative agency. Phone-Tel Commc'n v. AT&T Corp., 100 F.
11 Supp. 2d 313, 321 (E.D. Pa. 2000) (quoting Reiter, 507 U.S. at 267). As such,
12 equitable arguments such as that a stay will delay the proceeding and increase the
13 plaintiff's injury have been squarely rejected by at least one district court. Id.

14 Federal courts applying the primary jurisdiction doctrine have looked to both
15 federal and state law in analyzing such issues. See, e.g., Chabner, 225 F.3d at 1051
16 (citing Farmers Ins. Exch. v. Super. Ct., 2 Cal. 4th 377 (1992)).

17 **2. THE DOCTRINE OF PRIMARY JURISDICTION APPLIES**

18 An examination of the factors that this Circuit considers in determining the
19 application of primary jurisdiction reveals that this issue is squarely within the FCC's
20 authority.

21 **a. The Need to Resolve the Issue**

22 This factor favors a determination that the FCC has primary jurisdiction over
23 this matter. The primary issue presented to the FCC is whether ETFs “in wireless
24 carriers' service contracts are ‘rates charged’ for [CMRS] within the meaning of
25 Section 332(c)(3)(A).” (RFJN, Ex. H [5/18/05 FCC Public Notice] at 128). In the
26 instant action, Plaintiffs allege that the existence of ETFs violates various state laws.
27 The resolution of whether ETFs are “rates charged,” (and thereby preempting any
28 state law claims challenging ETFs), or “terms and conditions,” (which would allow the

1 prosecution of state law claims based on ETFs), is critical to this diversity action
2 based entirely on California claims. That is, if ETFs in this case are interpreted to be
3 "rates charged" under the FCA, then federal law preempts Plaintiffs' state law claims.

4 Moreover, the second issue that the FCC is set to determine is whether "any
5 application of state law by a court or other tribunal to invalidate, modify, or condition
6 the use or enforcement of [ETFs] . . . constitutes prohibited rate regulation preempted
7 by Section 332(c)(3)(A)." (RFJN, Ex. H [5/18/05 FCC Public Notice] at 128). This is
8 the precise and ultimate issue that will determine whether Plaintiffs' case may
9 proceed. While there is an argument that federal courts should determine issues of
10 preemption, the fact that the FCC will decide the first question – whether ETFs are
11 "rates charged" – will moot this second issue since the FCC's ruling on the first
12 question will implicitly answer the second. For this reason, even if referring this
13 second question related to preemption to the FCC is inappropriate, the Court does
14 not need to address this question since a resolution of the first issue by the FCC is
15 sufficient.

16 Therefore, this factor weighs in favor of staying Plaintiffs' action.

17 **b. Congress Has Placed the Issue Within the FCC's Jurisdiction**

18 This factor also militates in favor of a stay. The FCC was created to "execute
19 and enforce" the provisions of the FCA. 47 U.S.C. § 151. Indeed, this Circuit
20 recognizes and defers to the FCC's reasonable, authoritative interpretation of
21 provisions in the FCA. See Metrophones Telecomm., Inc. v. Global Crossing
22 Telecomm., Inc., 423 F.3d 1056, 1061 (9th Cir. 2005); see also Coalition for a Healthy
23 Cal. v. FCC, 87 F.3d 383, 384 (9th Cir. 1996) (FCC has interpreted other provisions of
24 the FCA). As such, it is clear that Congress has placed issues of FCA interpretation
25 within the FCC's jurisdiction and competence. Accordingly, this factor also militates in
26 favor of a stay based on primary jurisdiction.

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1 **c. The Regulation of Section 332 Requires Expertise and**
2 **Uniformity in Administration**

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3 **i. Expertise**

4 This factor is a major source of contention between the parties. The Court,
5 however, concludes that it also favors a stay. In the Court's view, the Court would
6 greatly benefit from the FCC's expertise and experience in interpreting whether ETFs
7 are "rates charged" or "terms and conditions."

8 Plaintiffs argue that no special expertise is required to resolve this issue since
9 it simply calls for an analysis and application of the existing case law. (Opp. at 4).
10 Plaintiffs claim that "[a]ll that is involved here is the interpretation and application of a
11 federal statute and existing law. . . ." (Opp. at 4). Controlling decisions in the field,
12 however, suggest that an agency's interpretation of its governing statute is precisely
13 the sort of thing that warrants a stay under present circumstances.

14 Plaintiffs rely on the Supreme Court's decision in Nader v. Allegheny Airlines
15 for the proposition that courts are competent to decide matters in which the judgment
16 of an expert body is not likely to help in the application of "existing" standards to the
17 facts of the case. (Opp. at 4 (citing 426 U.S. at 305-06)). However, Plaintiffs fail to
18 recognize that the issue presented is unsettled, and its resolution is essential for the
19 proper application of existing law precisely because there are no **controlling**
20 interpretations or definitions of the precise terms – "rates charged" or "terms and
21 conditions" – that are at issue under Section 332(c)(3)(A). Since the meaning of
22 those very terms is in dispute, and the parties have not offered any existing standards
23 governing the interpretation of the terms, Plaintiff cannot persuasively argue that the
24 Nader principle applies in this case.

25 In fact, the reason offered for referral to the administrative agency in Nader is
26 quite different from the facts of this case. In Nader, the Supreme Court determined
27 that the doctrine did not apply to require the referral of a **misrepresentation issue** to
28 the Civil Aeronautics Board in order to achieve uniformity and consistency in the

1 regulation of business. The Supreme Court noted that the standards to be applied in
2 a fraudulent misrepresentation action were within the conventional competence of the
3 courts, and the judgment of a technically expert body was not likely to be helpful in
4 applying the standards to the facts of the case. Nader, 426 U.S. at 305-06.

5 Here, the FCC is not deciding what "deceptive" means as the agency would
6 have been charged with determining in Nader had the Court there referred the case.
7 Rather, the FCC in this instance will interpret the meaning of the terms of a statute
8 within its jurisdiction. "Congress has delegated to the Commission the authority to
9 execute and enforce the Communications Act . . . and to prescribe such rules and
10 regulations as may be necessary in the public interest to carry out the provisions of
11 the Act." Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688,
12 2699 (2005) (citations and quotation marks omitted) (hereinafter, "Brand"). In these
13 circumstances, Plaintiffs give no reasons for their assumption that the FCC's
14 examination of and research on the issue will not be valuable or utilize any
15 experience or expertise. Their position flies in the face of Supreme Court precedent
16 holding that "agencies created by Congress for regulating the subject matter should
17 not be passed over." Id. (quoting Far East Conf. v. United States, 342 U.S. 570, 574
18 (1952)).

19 Moreover, the Supreme Court has noted that "Congress is well aware that the
20 ambiguities it chooses to produce in a statute will be resolved by the implementing
21 agency." AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 397 (1999) (citing Chevron,
22 U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842-43 (1984) ("Chevron"). In fact, this
23 Circuit recently deferred to the FCC's interpretation of Section 201 of the FCA, 47
24 U.S.C. § 201. It held that "resolving statutory ambiguities 'involves difficult policy
25 choices that agencies are better equipped to make than courts.'" Metrophones
26 Telecomm., Inc., 423 F.3d at 1070 (quoting Brand, 125 S. Ct. at 2699). Likewise, in
27 Brand the Supreme Court recently held:

1 If a statute is ambiguous, and if the implementing agency's construction is
2 reasonable, Chevron requires a federal court to accept the agency's
3 construction of the statute, even if the agency's reading differs from what the
4 court believes is the best statutory interpretation.

5 Brand, 125 S. Ct. at 2699 (citing Chevron, 467 U.S. at 865-66) This Circuit has held
6 that "resolving statutory ambiguities 'involves difficult policy choices that agencies are
7 better equipped to make than courts'. . . . In that spirit, we defer to the Commission's
8 reasonable, authoritative interpretation [of the FCA]." Metrophones Telecomm., Inc.,
9 423 F.3d at 1070 (citing Brand, 125 S. Ct. at 2699)).

10 The Court views this language as controlling and concludes that the Court
11 should defer to the FCC for its learned interpretation of the issue. Indeed, to the
12 extent that technical inquiries and other complex issues must be addressed, the FCC
13 would be better able to analyze the matter. See Access Telecomms., 137 F.3d at
14 609. Thus, the Court concludes that the FCC's expertise in this area also weighs in
15 favor of the FCC's primary jurisdiction, a finding that is also supported by the next
16 inquiry, the need for uniformity in this area of the law.

17 ***ii. Uniformity***

18 The need for uniformity is also a factor the Court considers. Indeed, in
19 applying the primary jurisdiction doctrine, the Supreme Court has "stressed" the
20 "desirable uniformity which would obtain if initially a specialized agency passed on
21 certain types of administrative questions." United States v. W. Pac. Ry. Co., 352 U.S.
22 59, 64 (1956).

23 The need for uniformity is acute in this case. Several district courts have
24 already addressed the issue before this Court and conducted their own statutory
25 interpretation. These lower courts have reached conflicting conclusions on the
26 question. Some courts hold that ETFs are "terms and conditions" and therefore not
27 preempted, see, e.g., Phillips v. AT&T Wireless, No. 4:04-cv-40240 (JEG), 2004 U.S.
28 Dist. LEXIS 14544, at *36 (S.D. Iowa July 24, 2004) ("[ETFs] are not rates but rather

1 are other terms and conditions.”), while some have concluded otherwise, see, e.g.,
2 Chandler v. AT&T Wireless Servs., No. 04-180 (GPM), 2004 U.S. Dist. LEXIS 14884,
3 at *4 (S.D. Ill. July 21, 2004) (ETFs are “directly connected to the rates charged for
4 mobile services” and therefore preempted under Section 332).

5 Verizon argues that staying the action would promote regulatory uniformity in
6 the application of Section 332. The Court agrees. Given the splintered case law, the
7 Court will be better informed after the FCC interprets the “rates charged” language in
8 the statute. Indeed, staying this case pending the outcome of the FCC’s current
9 proceeding will avoid the possibility that the Court may issue an order that may
10 conflict with the FCC’s ruling on the identical issue and add to the growing confusion
11 as to whether ETFs are “rates charged” or “terms and conditions.” Contrary to such
12 a result, “Congress intended . . . to establish a national regulatory policy for CMRS,
13 not a policy that is balkanized state-by-state.” 10 FCC Rcd 7486, 7499 (FCC May 1,
14 1995).

15 Thus, the need for uniformity on the issue favors staying this action pending
16 the FCC’s determination on the subject. As such, and for the reasons outlined above,
17 the Court is convinced it should apply the primary jurisdiction doctrine and **GRANT**
18 Defendant’s motion to stay.³

19 3. A CALIFORNIA SUPERIOR COURT RECENTLY STAYED A SIMILAR ACTION

20 In support of Verizon’s motion to stay, Verizon points to a recent decision of
21 the California Superior Court to partially stay its case under very similar facts in light
22 of these same pending FCC proceeding. (Mot. at 2; RFJN, Ex. A [Order Regarding

23 _____
24 ³ Plaintiffs’ equitable arguments – such as judicial economy, fairness, prejudice, and delay – in
25 opposition to Defendant’s motion seeking the application of the primary jurisdiction doctrine are
26 not relevant to the ultimate question of whether an issue is within an agency’s primary
27 jurisdiction. Courts have held that “once the court determines that a claim ‘contains some issue
28 within the special competence of an administrative agency, [the doctrine of primary jurisdiction]
requires the court to refer the matter to the administrative agency.” Phone-Tel Commc’n v.
AT&T Corp., 100 F. Supp. 2d 313, 321 (E.D. Pa. 2000) (quoting Reiter, 113 S. Ct. at 1220)
(brackets in original; emphasis added). Any of a “[p]laintiff’s equitable arguments are misplaced
because application of the doctrine of primary jurisdiction is not discretionary.” Id. Thus, such
arguments are irrelevant to the Court’s analysis of this issue.

1 Motion to Stay, In re Cellphone Termination Fee Cases). There, as discussed in
2 more detail infra, the court applied the doctrine of primary jurisdiction and granted a
3 partial stay of the matter on the precise question currently pending before the FCC:
4 "whether ETFs are 'rates charged' or 'other terms and conditions,'" and the court
5 refused to decide the issue until the FCC addresses it. (RFJN, Ex. A [Order
6 Regarding Motion to Stay, In re Cellphone Termination Fee Cases] at 6).

7 Although plainly not controlling the logic of the Court's ruling suggests that
8 prudence favors awaiting a decision by the FCC.

9 **4. ANY FCC RULING ON THE ISSUE, SINCE IT IS WITHIN THE AGENCY'S SPECIAL**
10 **COMPETENCE, SHALL BE AFFORDED SUBSTANTIAL DEFERENCE IN THIS COURT'S**
11 **SUBSEQUENT ANALYSIS OF THE SAME LEGAL QUESTION**

12 Plaintiffs' contention that "a stay pending the FCC's anticipated ruling is
13 inappropriate" since "this Court will ultimately bear responsibility for this decision" is
14 without merit. (Opp. at 9). This argument is flawed on numerous levels. This Circuit
15 has made clear that courts "can properly seek the benefit of whatever contributions
16 can be made by an agency whose 'area of specialization' embraces problems similar
17 to or intermeshed with those presented to the court." Foremost Int'l Tours, Inc. v.
18 Qantas Airways, Ltd., 525 F.2d 281, 287 (9th Cir. 1975). Indeed, as discussed supra,
19 a ruling from the FCC on this issue would be of valuable guidance to the Court and
20 relevant case law teaches that courts generally give "**substantial deference**" to
21 decisions by those charged with administering and regulating the subject matter at
22 issue. Nw. Airlines v. County of Kent, 510 U.S. 355, 367 (1994) (emphasis added).
23 Moreover, if the FCC's ruling is appealed and the Federal Circuit issues a ruling, the
24 Circuit's ruling will control.

25 Thus, even though in this Circuit "[t]he court has the last word, [] it can
26 properly seek the benefit of whatever contributions can be made by an agency whose
27 'area of specialization' embraces problems similar to or intermeshed with those
28 presented to the court." Foremost Int'l Tours, Inc., 525 F.2d at 287. Thus, "[r]eferring

1 a case to an agency simply allows the court to consider the agency's views when
2 rendering its decision; it does not shift the power to determine a federal lawsuit to an
3 administrative agency." AT&T Corp. v. Ameritech Corp., No. 98 C 2993 (BMM) 1998
4 U.S. Dist. LEXIS 9175, at *10 (N.D. Ill. June 10, 1998). An FCC decision on the issue
5 would be far from meaningless. Even if not controlling on the Court, it would at the
6 very least greatly assist the Court in the interpretation of the FCA. Thus, Plaintiffs'
7 argument that somehow the agency's determination of this issue – which is uniquely
8 within the scope of issues it was created to interpret – is somehow completely
9 superfluous to the questions this Court must ultimately decide, is wrong.

10 Defendant's motion to stay this *entire action* is **GRANTED**, given the FCC's
11 primary jurisdiction over these unresolved issues and the fact that the matter is
12 *already pending* before that agency.

13 **B. THE COURT'S INHERENT POWER TO STAY PROCEEDING**

14 The Court alternatively concludes that a stay is appropriate based on its
15 inherent power to stay matters in the interests of judicial economy and efficiency.

16 As an initial matter, the Court points out that in this case, as opposed to most
17 other cases seeking the application of the primary jurisdiction doctrine, *the issue the*
18 *Defendant asks the FCC to first determine is already before that agency*. This
19 fact cuts strongly in favor of a stay in this matter. Thus, the Court does not actually
20 need to refer the matter to the FCC since it is already there. District courts err in not
21 deferring to the jurisdiction of an agency when that agency is concurrently interpreting
22 a Congressional statute and issues raised thereunder within that agency's
23 competency. See New England Legal Found. v. Mass. Port Auth., 883 F.2d 157, 173
24 (1st Cir. 1989). Accordingly, a stay in the first instance is proper under these facts.

25 **1. THE LEGAL STANDARD**

26 The decision whether to stay a proceeding falls within the discretion of the
27 Court as part of a district court's inherent power to control its docket and calendar.

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1 Landis v. N. Am. Co., 299 U.S. 248, 254 (1936); Mediterranean Enters., Inc. v.
2 Ssangyong Corp., 708 F.2d 1458, 1465 (9th Cir. 1983). In the Ninth Circuit:

3 A trial court may, with propriety, find it is efficient for its own docket and the
4 fairest course for the parties to enter a stay of an action before it, pending
5 resolution of independent proceedings which bear upon the case. This rule
6 applies whether the separate proceedings are judicial, administrative, or
7 arbitral in character, and does not require that the issues in such proceedings
8 are necessarily controlling of the action before the court. . . .

9 Leyva v. Certified Grocers of Cal., Ltd., 593 F.2d 857, 863-64 (9th Cir. 1979) (citations
10 omitted). Neither the parties nor the issues in a case need be identical in order for a
11 stay to issue. Landis, 299 U.S. at 254.

12 Typically, a district court will "make express findings that a just and efficient
13 determination of the case will be promoted by a stay." Leyva, 593 F.2d at 864.

14 Specifically,

15 [w]here it is proposed that a pending proceeding be stayed, the competing
16 interests which will be affected by the granting or refusal to grant a stay must
17 be weighed. Among those competing interests are the possible damage which
18 may result from the granting of a stay, the hardship or inequity which a party
19 may suffer in being required to go forward, and the orderly course of justice
20 measured in terms of the simplifying or complicating of issues, proof, and
21 questions of law which could be expected to result from a stay.

22 Lockyer v. Mirant Corp., 398 F.3d 1098, 1110 (9th Cir. 2005) (citation and quotation
23 marks omitted).

24 The Ninth Circuit has noted that when an injunction is sought and the other
25 proceeding is not likely to resolve any important issues in the case, as an example, it
26 is more likely that damage will result from the granting of a stay. Id. at 1112-13.

27 "Landis cautions that 'if there is even a fair possibility that the stay . . . will work
28 damage to some one else,' the party seeking the stay 'must make out a clear case of

1 hardship or inequity.” Id. at 1112 (quoting Landis, 299 U.S. at 255). However,
2 “[t]hese considerations are ‘counsels of moderation rather than limitations on power.’”
3 Versa Corp. v. Ag-Bag Int’l Ltd., No. CV-01-544 (HU), 2001 WL 34046241, at *1 (D.
4 Or. Sept. 14, 2001) (quoting Landis, 299 U.S. at 255); see also id. at *5.

5 2. ANALYSIS

6 “Th[e] power to stay is ‘incidental to the power inherent in every court to
7 control the disposition of the causes on its docket with economy of time and effort for
8 itself, for counsel, and for litigants.’” Rivers v. Walt Disney Co., 980 F. Supp. 1358,
9 1360 (C.D. Cal. 1997) (quoting Landis, 299 U.S. at 254). Here several factors favor
10 a discretionary stay.

11 First, a stay will avoid duplicative litigation and the useless consumption of
12 judicial resources that will have been wasted if the FCC determines that the entire
13 process is federally preempted. (Mot. at 13). Based on the FCC’s Notice seeking
14 comment on the issue, it seems that the FCC will be deciding a critical issue
15 presented here, and proceeding now would likely result in duplicative consideration of
16 the same issue. Furthermore, not granting a stay might prejudice Verizon, which
17 would be deprived of any expertise the FCC would offer in its ruling, and the interests
18 underlying comity seem to support a stay since deference to the agency in performing
19 its constitutionally delegated role would be undermined if the Court were to proceed
20 with this litigation. Since the agency is in the process of deciding the very issue
21 before this Court, Plaintiffs will suffer no significant prejudice if the Court waits for the
22 agency’s ruling. In any event, the risk that the parties and the Court might waste their
23 limited resource in pursuing litigation in this case outweighs any prejudice Plaintiff
24 may experience.

25 Thus, a stay based on the Court’s inherent authority is appropriate under
26 controlling case law.

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1 **3. A STAY OF THE MATTER IN ITS ENTIRETY IS PROPER**

2 Plaintiffs argue that even if a stay is instituted, the Court should grant only a
3 partial stay and allow the parties to proceed on various issues. Plaintiffs rely on the
4 recent state court case of In Re Cellphone Termination Fee Cases where Judge
5 Sabraw concluded, given considerations of prejudice and undue delay, that only a
6 partial stay was appropriate. Specifically, Plaintiffs seek to move forward now with:
7 (1) discovery; (2) class certification; and (3) pursuit of injunctive relief. (Opp. at 15).
8 Plaintiffs argue that they would be prejudiced since: (1) the anticipated FCC ruling
9 could take years; and (2) the decision might not have any bearing on the case. (Id. at
10 9). Moreover, Plaintiffs argue that a stay would not advance judicial economy. The
11 Court disagrees.

12 As a threshold matter, the Court is not in any way bound by this state court
13 ruling. Moreover, the Judge himself recognized that his case management approach
14 was *novel* in acknowledging the FCC's primary jurisdiction over one issue, but not
15 staying the case in its entirety. (RFJN, Ex. A [6/21/05 Stay Order] at 11).
16 Furthermore, the case before Judge Sabraw was at a more advanced stage than the
17 present action and much of the work that the parties would do here had already been
18 completed in that case.

19 But, even if the Court were to consider the merits of a partial stay, that request
20 would be denied on the merits. (RFJN, Ex. A [6/21/05 Stay Order]). There the court
21 cautioned that it must consider how long the administrative process would run before
22 its work was done, and that Plaintiffs' case – including the evidence, witnesses, and
23 memories – might grow old and stale. (Id. at 8-9 (citing Rohr Indus., Inc. v. Wash.
24 Metro. Area Transit Auth., 720 F.2d 1319 (D.C. Cir. 1983)). The court also
25 referenced a notable burden to the defendants in not staying the case: requiring them
26 to undergo the expense and distraction of litigation while waiting for the FCC's
27 decision. (Id. at 9). As such, the court determined that discovery in the case should
28 proceed and that the plaintiffs could pursue class certification so that a class would be

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1 certified (or not) when the FCC rendered its decision. (Id. at 9-10). Here none of
2 those factors are present.

3 First, Plaintiffs have not presented any compelling argument suggesting that
4 the FCC proceedings will be protracted, supposedly taking years to complete. In
5 reality, the evidence suggests that the FCC is proceeding expeditiously in the
6 administrative proceedings. (See, e.g., RFJN, Ex. H [5/18/05 FCC Public Notice], at
7 129.) Second, Plaintiffs have offered no support for the proposition that the FCC may
8 choose simply to ignore the issue presented to it: whether "[ETFs] in wireless carriers'
9 service contracts are 'rates charged' . . . within the meaning of Section 332(c)(3)(A)."
10 (RFJN, Ex. H [5/18/05 FCC Public Notice] at 128). To the contrary, the Court
11 believes that there is little chance the FCC will not address the issue since: (1) the
12 Public Notice recognizes that the "Petition raises important issues;" and (2) the FCC
13 "seek[s] comment on the Petition." (Id.). As such, Plaintiffs' speculative contention is
14 rejected. Third, Plaintiffs argue that the petition may not have any bearing on the
15 resolution of the preemption issue in this case. As Plaintiffs see it, the issue is not
16 whether the "Verizon Wireless ETF is an unreasonable and unlawful penalty," (Mot. at
17 3), but rather whether those ETFs are unlawful "when imposed on customers who
18 complain about the quality of service, for whom Verizon does not investigate their
19 complaints." (Opp. at 13). The Court fails to see Plaintiffs' proffered distinction or
20 how the FCC's ruling on this narrow issue would not foreclose Plaintiffs' case
21 altogether, even if the challenge is premised on the quality of service. Whether
22 Plaintiffs cancel their service because of its poor quality or simply because they
23 choose to, that decision does not change the result of the preemption inquiry at issue.
24 An FCC finding that ETFs are "rates charged" would be directly applicable to the
25 preemption issue in this case, notwithstanding Plaintiffs' proffered distinction. In
26 short, since the issue of preemption will likely be determined by the FCC, and
27 because this Circuit has held that "[a]s a threshold issue, [courts] first determine
28 whether any of [Plaintiffs'] claims are preempted by federal law," Rivera v. Philip

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Morris, Inc., 395 F.3d 1142, 1146 (9th Cir. 2005), a stay in the entire matter is appropriate and advances the interest of judicial economy.

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Therefore, even if the Court had denied that the FCC has primary jurisdiction over this issue, the Court concludes that the matter should be stayed *in its entirety* under the Court's inherent power to stay and manage cases since the interests of judicial economy and avoiding duplicative litigation outweigh any prejudice to Plaintiffs in waiting for the FCC's forthcoming ruling.

IV.
CONCLUSION

For the foregoing reasons, Defendant's motion is **GRANTED** and Plaintiffs' case is **STAYED** in its entirety until the resolution of these currently pending questions before the FCC.

IT IS SO ORDERED.

DATED: March 21, 2006



Judge Gary Allen Feess
United States District Court