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August 5, 2008

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: Cellular early termination fees, WT Docket, 05-194
Ex Parte Submission of Harold P. Schroer**

Dear Ms. Dortch:

I represent Harold P. Schroer, a claimant in AAA arbitration No. 11 494 01274 05, which involves a dispute concerning Verizon's early termination fee ("ETF"). I also represent Wireless Consumers Alliance (WCA) and a number of individual consumers interested in the proceedings on these dockets.

I write to update the Commission on two significant developments: (1) the July 28, 2008 ruling by a California court that Sprint's ETF charges are illegal, and requiring Sprint to refund more than \$73 million to Sprint customers; and (2) the settlement of ETF litigation involving Verizon Wireless for a \$21 million cash payment to a nationwide class of Verizon Wireless customers who were subject to Verizon Wireless's ETFs.

1. The Sprint Trial Ruling

During the June 12, 2008 hearing before the Commission, Christopher Guttman-McCabe, CTIA's Vice President for Regulatory Affairs, made a dramatic announcement:

Mr. Chairman I ... I have some late breaking news that might be of importance to the panel. The jury in the Sprint trial returned a verdict in favor of Sprint, found that Sprint's losses and damages from the term contracts with ETFs exceeded by a hundred million over the amount it collected in ETFs and therefore no damages will be awarded.

Transcribed from <http://www.fcc.gov/realaudio/mt061208.ram> at timecode 3:19:48.

Although dramatic, this announcement by Mr. Guttman-McCabe was, unfortunately, false. Indeed, I was quoted in the press the following day, June 13, 2008,

explaining that the jury's verdict was a clear win for the plaintiffs, and a clear loss for Sprint:

“If Sprint is claiming they won, they have mathematical problems,” said Bursor. “The jury determined that Sprint overcharged customers in California to the tune of \$74 million, and rejected Sprint's billion dollar damage cross claim.”

See Dow Jones Newswire article reprinted at <http://www.cellular-news.com/story/31781.php> (June 13, 2008), attached hereto as Exhibit A.

I was the lead trial lawyer for the plaintiffs in the Sprint ETF case, and we won that case. Convincingly. Attached hereto as Exhibit B is the Proposed Statement Of Decision issued by Judge Sabraw on July 28, 2008. It states, at page 34, lines 13-14: “Plaintiffs prevail on their CLRA claim under Civil Code 1770(a)(14) and (19) because they have demonstrated that the ETF is a violation of law.” The ruling awards \$73 million to the class I represent. *See id.* at 1:16-18 (“The Court finds that Sprint must pay \$18.25 million to those class members who paid their ETFs and credit \$54.75 million to class members for charged, but unpaid ETFs.”).

Mr. Guttman-McCabe's bogus announcement of a Sprint victory was not only false. It was like the thirteenth stroke of a crazy clock, which casts doubt not only on itself, but on all that came before it. The record of this proceeding is littered with similar distortions, exaggerations, and outright misstatements advanced by the proponents of CTIA's petition. The Commission should re-examine the record with a critical eye, and an appropriate level of caution and skepticism.

The central question here – whether state law challenges to a wireless carrier's ETF are preempted by 47 U.S.C. § 332 – is a question that has already been answered by numerous courts. Indeed, it was answered again in the recent Sprint trial where, after considering weeks of testimony and other evidence, the Court rejected Sprint's preemption defense. In doing so, the Court specifically commented on the proceedings before this Commission:

“The F.C.C.'s need for a hearing on the issue in June 2008 suggests the issue is unclear, which in turn suggests that Congress had no clear intent to preempt. The Court rejects reading ‘rates charged’ to include ‘rate structure’ because that would lead to a broad scope of preemption that Congress rejected by including a savings clause.”

See *Ayyad v. Sprint*, Proposed Statement Of Decision at 12:3-7 (attached hereto as Exhibit B).

The recent decision in the Sprint trial is in accord with the nearly unanimous view of the federal and state trial courts, which have consistently rejected the same preemption arguments CTIA is making before this Commission. See *Phillips v. AT&T Wireless*, 2004 U.S. Dist. LEXIS 14544 (S.D. Iowa 2004) (holding state law challenges to ETF were not preempted rate regulation); *Carver Ranches Washington Park v. Nextel South Corp.*, Case No. 04-CV-80607 (S. D. Fla. Sept. 23, 2004) (same); *State of Iowa v. United States Cellular Corporation*, 2000 U.S. Dist. LEXIS 21656 (S.D. Iowa 2000) (same); *Cedar Rapids Cellular Telephone LP v. Miller*, 2000 U.S. Dist. LEXIS 22624 (N.D. Iowa 2000) (same); *Esquivel v. Southwestern Bell Mobile Systems, Inc.*, 920 F. Supp. 713 (S.D. Tex. 1996)(same); *Hall v. Sprint*, State of Illinois, Third Judicial Circuit, Case No. 04L113 (Aug. 10, 2004) (same); *Kinkel v. Cingular Wireless, LLC*, Case No. 02-999-GPM, (S.D. Ill. Nov. 8, 2002) (same); *Pacific Bell Wireless, LLC v. Public Utilities Commission of the State of California*, 140 Cal.App.4th 718 (Cal. Ct. App. 2006) (same).

2. The Verizon Wireless Settlement

I was also lead trial counsel in *White v. Cellco Partnership d/b/a Verizon Wireless*, the Verizon ETF case recently tried before the same California court. On July 11, 2008, in the middle of trial, Verizon and the plaintiffs agreed to settle that case. The terms of the settlement require Verizon to pay \$21 million to a nationwide class of Verizon Wireless subscribers who were subject to Verizon Wireless ETFs. The terms of the settlement also prohibit Verizon Wireless from including a flat ETF in any new customer agreements for a wireless service personal account in the United States. Article VIII of the Stipulation and Agreement of Settlement, attached hereto as Exhibit C, provides that any decision by the FCC in this matter shall have no effect on the settlement.

The settlement has been preliminarily approved by Judge Sabraw, and a final approval hearing has been set for October 21, 2008.

Very truly yours,



Scott A. Bursor

Attached Exhibits

- A. Dow Jones Newswire article reprinted at <http://www.cellular-news.com/story/31781.php> (June 13, 2008)
- B. *Ayyad v. Sprint Spectrum, L.P.* Proposed Statement Of Decision (July 28, 2008)
- C. *White v. Cellco Partnership d/b/a Verizon Wireless* , Stipulation and Agreement of Settlement (July 11, 2008)

EXHIBIT A

Sprint's Termination Fees Were Legal, But Too High - Lawyer

NEW YORK -(Dow Jones)- A California jury ruled on Thursday that Sprint Nextel didn't violate laws with its early termination fees, but the carrier may still need to pay damages.

The jury for the Alameda County California Superior Court determined that while Sprint customers paid \$73.8 million in early termination fees, the breaches of contract caused losses to Sprint in the amount of \$225.7 million.

But in order for Sprint to score a victory, the jury needed to rule the carrier's losses neared \$300 million, according to Scott Bursor, the attorney for the plaintiffs.

"If Sprint is claiming they won, they have mathematical problems," said Bursor. "The jury determined that Sprint overcharged customers in California to the tune of \$74 million, and rejected Sprint's billion dollar damage cross claim."

Sprint dismissed Bursor's statements.

"No, the jury did not determine that," said Sprint Public Affairs Manager John Taylor. "The jury determined that Sprint appropriately collected \$74 million in early termination fees."

Bursor further said Sprint could wind up paying damages of up to \$75 million, or the difference between the \$300 million that Sprint claimed the contract breaches cost the carrier, and their actual losses, which the jury determined was \$225.7 million.

Taylor said Sprint does not expect to pay any damages to the class of plaintiffs, since the jury ruled that the fees Sprint collected were appropriate.

The trial won't be over until the judge decides on certain aspects of the case, including damages. But a decision could be pushed back until similar cases with Verizon Wireless and AT&T go to trial in the same court.

"We will continue to defend the claims brought in this case and we are focused on the remaining proceedings," Sprint Spokesman Matthew Sullivan said.

The principle of the fees, which incur when a customer breaks their wireless contract before it ends, is being debated around the country from courts in Oakland, Calif., to a Federal Communications Commission hearing in Washington, D.C. Consumer advocacy groups and the plaintiffs argued that it is an unfair measure to keep customers from leaving.

Wireless carriers have long enforced penalties on subscribers who break out of their one- or two-year service contracts early. The carriers argue that the fees are a necessary measure because they subsidize part of the cost of the cell phone and are needed to recoup those expenses.

Regulators and consumer advocates are pushing to end the practice, particularly as carriers are promising to open their networks.

"We are concerned that the wireless industry has become a cozy cartel of a few dominant providers

characterized by consumer lock-in and limited device offerings," Chris Murray, senior counsel for consumer advocacy group Consumers Union, said in a statement.

The California class-action suit, originally filed in 2006 and argued over the course of a month, covered customers who had Sprint service between July 1997 and March 2007. The jury had to decide on portions of the case involving the damages and ruled in Sprint's favor.

"The jury verdict speaks for itself," Sullivan said. "We're pleased that upon hearing all the testimony and examining all the evidence, the jury recognized that Sprint makes a significant investment in its customers through reduced handset prices and discounted monthly rates."

The plaintiffs had sought "tens of millions of dollars" in damages, according to Sullivan.

Verizon Wireless applauded the ruling.

"What we saw here amongst all the rhetoric and debate is some common sense of some typical consumers - that being the jury," said James Gerace, a spokesman for the carrier.

Verizon Wireless expects its trial to begin shortly. AT&T is expected to follow.

T-Mobile USA, a unit of Deutsche Telekom, said it is on track to introduce a more flexible policy, which it expects to unveil before the end of the first half.

The issue of subsidies and early termination fees grew even more prominent with AT&T's decision to cover a significant portion of the cost of the new iPhone, driving it down to \$199 from its original \$499 price tag. AT&T bears a lot of risk in signing up customers because of the frequent occurrence of customers breaking their contracts early and unlocking their iPhones for use in other carriers.

Shares of Sprint closed Thursday down 37 cents, or 4.4%, to \$8.08. Recent after-hour trades pushed the price up to \$8.10.

-By Roger Cheng, Dow Jones Newswires; 201-938-2020; roger.cheng@dowjones.com

(Fawn Johnson contributed to this report.)

(END) Dow Jones Newswires

Posted to the site on 13th June 2008

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cellular-news

EXHIBIT B

1 under the UCL and the claim for unjust enrichment. The jury determined the amount of
2 early termination fees paid by Plaintiffs; whether the members of the class breached their
3 contracts with Sprint and, if so, the amount of Sprint's actual damages on its cross-claim.

4 The Court determined the interaction between the claims and the cross-claims in
5 the Orders of June 9, 2006, and December 27, 2006. The jury determined the class's ETF
6 payments in the aggregate, determined Sprint's lost profits in the aggregate, and then the
7 Court sets off the two numbers. Order of 12/27/06 at 15. These orders concerned the
8 relationship between the claims and the cross-claims and did not alter accepted economic
9 principles. Order of 11/7/07 at 2-3.

11
12 FINDINGS OF FACT.

13 The relevant contract provision. The relevant language of Sprint's Terms and
14 Conditions during the class period states that if a Sprint customer terminates his or her
15 contract before the end of the term, the customer may be required to pay an early
16 termination fee. The specific language of the contract terms varied during the class
17 period. Exhibits 279-286; 630.

18
19 Sprint's business before 2000. In the late 1990s, most of Sprint's contracts with
20 its customers were month-to-month contracts. Pryor Depo. at 8. In 1999, Sprint began
21 to study the concept of term contracts and ETFs. Sprint tested term contracts with ETFs
22 in selected local markets. Pryor Depo. at 28-30; *see also* Exhibit 909A1 (Dippon
23 database showing \$2100 in ETFs charged in 1999).

24
25 In 2000 Sprint decided to offer term contracts with a \$150 ETF. Sprint's goal in
26 offering term contracts with ETFs was to decrease the number of customers who leave
27

1 (churn). Pryor Depo. at 29. Sprint considered three factors when setting the amount of
2 the ETF: what its competitors were doing; how ETFs would financially impact Sprint;
3 and customer inputs, including customer acceptance. Pryor Depo. at 28; 32-33.

4 The amount that Sprint could charge as an ETF was set from a competitive
5 standpoint—between \$150 and \$200. Pryor Depo. at 30:23 to 31:11; 32:7-10.

6 Sprint explored consumer reaction through market testing to determine whether
7 its customers would enter into term contracts with ETFs if they received offsetting
8 benefits such as handset subsidies and lower monthly rates. Exhibits 606-608, 617, 621
9 at SPR-W 000041643, 626, 629.

11 Sprint considered how term contracts with ETFs would impact Sprint financially.
12 Sprint analyzed different pricing scenarios in the \$150 and \$200 range through a
13 Customer Lifecycle Value model ("CLV") that evaluated the impact of various pricing
14 decisions on customer value given different assumptions and inputs, including average
15 costs, revenues and customer tenure. Pryor Depo. at 43:1-7; 44:2-13; 46:9 to 47:2; 63:19
16 to 65:2; TR at 1115:13-1116:14 (Souder); Trial Exhibit 600 (CLV spreadsheet).

18 Sprint did no damage analysis that considered the lost revenue from contracts, the
19 avoidable costs, and Sprint's expected lost profits from contract terminations. Sprint's
20 early evaluations of the ETF assumed that Sprint would not collect any money from the
21 ETFs. Exhibit 866. Sprint's later evaluations of the ETF assumed that Sprint would
22 collect 50% of the ETFs charged. Exhibit 306.

24 In 2006 Sprint merged with Nextel and increased its ETF to \$200. On August 12,
25 2005, Sprint merged with Nextel to form Sprint/Nextel. Sprint thereafter increased the
26 amount of the early termination fee to \$200.

1 Sprint's \$200 post-merger ETF was based on Nextel's pre-merger ETF. Mr.
2 Wiener, Nextel's Vice President of Strategic Pricing, testified that in 2000 Nextel
3 adopted term contracts with ETFs after considering the competition, its customers, and
4 the costs to the company. Weiner Depo. at 36:3 to 39:16; 40:25 to 43:10; 47:11 to 49:4;
5 80:12 to 81:3. Nextel's ETF was also implemented primarily as a means to discourage
6 customers from leaving. There was no evidence at trial that Nextel did a damage analysis
7 that considered the lost revenue from contracts, the avoidable costs, or Nextel's expected
8 lost profits from contract terminations. Mr. Wiener's trial testimony by way of
9 deposition was in some respects narrower than his summary judgment declaration
10 testimony. The Court relies only on the trial record.
11

12 Mr. Souder, Sprint's Vice-President of Pricing, testified that following the merger
13 Sprint decided to use a single ETF amount because it simplified the business by having a
14 single ETF. Sprint's rationale for setting the ETF at \$200 was that Nextel's handsets
15 were more expensive than Sprint's handsets and that a higher ETF would offset Nextel's
16 higher handset subsidies. TR at 1084:3-14.
17

18 Sprint's business during the class period. Sprint's business during the class
19 period operated and evolved in ways that affect the Court's analysis but were not the
20 focus of the parties' evidence or argument.
21

22 Sprint charged ETFs each time a subscriber terminated a contract before the
23 completion of a term contract. Sprint did not, however, charge a single ETF each time a
24 subscriber terminated a single contract. Sprint charged a separate ETF for each phone
25 line that was terminated early. Therefore, for example, a subscriber with a contract for a
26 \$100/month low monthly minute family plan with four phones would be subject to \$700
27

1 in ETFs for terminating the contract early, whereas another subscriber with a contract for
2 a high monthly minute \$100/month plan with one phone would be subject to a \$175 ETF
3 for terminating the contract early. Despite the fact that ETFs were linked to phone lines
4 and not to subscribers or to accounts, almost all the evidence was presented in the context
5 of the number of subscribers, the revenue per subscriber, cost per subscriber, and so forth.
6 There is an evidentiary disconnect between charging ETFs on a per line basis and the
7 evidence presented on a per-subscriber or per-account basis.
8

9 Sprint's business evolved during the class period. The evolution of Sprint's
10 calling plans affects the relevance of Sprint's nationwide network. At the start of the
11 class period, most calling plans were regional in nature with extra fees imposed for calls
12 outside the regional calling area, suggesting that in 2000-2002 the Court should analyze
13 classmember expectations and Sprint's costs on a regional basis. At the conclusion of the
14 class period, most of Sprint's plans were national in nature without extra charges for long
15 distance calls, suggesting that in 2006-2007 the Court should analyze classmember
16 expectation and Sprint's costs on a nationwide basis. The evolution of technology
17 affected Sprint's costs to provide service. At the start of the class period Sprint's average
18 cost to provide a minute of voice service was higher than the average cost to provide a
19 minute of voice service at the conclusion of the class period. There was, however, little
20 explanation of how the changing nature of Sprint's business and costs might affect the
21 Court's analysis.
22
23

24
25 Effect of the ETF - basic facts. Plaintiffs and Sprint stipulated to these facts:

26 The class included 1,986,537 persons.
27

1 The average minimum recurring charge (“MRC”) per subscriber per month was
2 \$49.16.

3 The average customer terminated with 13.25 months remaining on the contract.

4 Sprint’s average lost MRC revenue per early termination was \$651.12.

5 Sprint charged \$299,473,408 in ETFs to class members.

6 Sprint collected \$73,775,974 in ETFs from class members.

7 Sprint billed, but did not collect \$225,697,433 in ETFs from class members.
8
9

10 Sprint’s lost revenue. There are two ways to calculate Sprint’s lost revenue as a
11 result of early terminations – Monthly Recurring Charge (“MRC”) and Average Revenue
12 Per Unit (“ARPU”). MRC revenue is the monthly recurring charge and does not include
13 any optional charges. Sprint’s average California lost MRC revenue per customer per
14 month was \$49.16. TR at 1389:21 to 1391:14 (Dippon) and Stipulated fact. ARPU
15 revenue is the MRC revenue plus charges for optional features such as text messaging,
16 ring tones, and e-mail access. Sprint’s average national lost ARPU revenue per customer
17 per month was approximately \$64.74. TR at 513 (Selwyn).
18

19 Cost Avoidance – Plaintiff’s evidence. Plaintiffs presented Dr. Lee L. Selwyn as
20 their expert witness on economic issues. Dr. Selwyn examined financial data from
21 Sprint’s 10-Ks and 10-Qs from 1999 to 2006 and derived information that permitted him
22 to opine on the costs that Sprint avoids when a classmember terminates early. Using a
23 regression analysis, Dr. Selwyn found a correlation between both Sprint’s operating
24 expenses (“opex”) and its expenses for plant, property and equipment (“PPE”) and its
25 number of customers. TR at 429. Dr. Selwyn also observed that the classmembers
26
27

1 represented a significant percentage of Sprint's subscriber base. TR at 435 and 1372.

2 From this information, Dr. Selwyn concluded that beyond a fixed cost base number of

3 \$7-8 billion per year opex and PPE were each avoidable costs. TR at 432- 437; 504-05.

4 Dr. Selwyn concluded that for each customer-month of MRC revenue (\$49.16) Sprint lost

5 only \$0.70. TR at 512-13 and 1020. Stated otherwise, Dr. Selwyn concluded that when a

6 customer terminated early, Sprint could avoid costs representing 98.6% of the lost MRC

7 revenues.

8
9 An integral part of Dr. Selwyn's analysis was his observation that roughly 30% of

10 Sprint's income was from optional services and his conclusion that Sprint's profit margin

11 on optional services was 90%. Dr. Selwyn concluded that Sprint made little to no profit

12 (1.4% on the dollar) on MRC for providing basic services and made most of its profit

13 (90% on the dollar) from charges for optional services.

14
15 Dr. Selwyn then calculated Sprint's avoidable costs. Dr. Selwyn multiplied the

16 weighted average monthly lost profit per subscriber for MRC services (\$0.70) by the

17 average number of months remaining on the contract term (13.25 months), calculating

18 that Sprint's lost profits averaged \$9.24 per class member. TR. at 451-52. Dr. Selwyn

19 determined that Sprint charged the 1,986,537 classmembers \$299,470,408 in ETFs even

20 though Sprint's actual losses were only \$18,425,130. TR at 1468-70.

21
22 Sprint asserts that Dr. Selwyn's analysis is flawed for six reasons:

23 (1) Sprint argues that Dr. Selwyn improperly treated sunk costs as avoidable. TR

24 at 695:9-25. The Court finds that as a matter of economics, sunk costs are not avoidable.

25 On the facts of this case, experts can disagree about whether to analyze a regularly

1 recurring cost as sunk as to individual transactions or avoidable as applied to the class as
2 a whole over the class period.

3 (2) Sprint argues that Dr. Selwyn improperly treated all of the elements of “cost
4 per gross ad” (“CPGA”) as avoidable. (4/3/08 Selwyn Depo at 167:22 to 168:16.) The
5 Court finds this criticism off the mark. Dr. Selwyn used a top-down approach based on
6 Sprint’s opex, PPE, and other data from Sprint’s 10-Ks under which it was not necessary
7 to determine whether the specific elements of CPGA were avoidable. Dr. Selwyn
8 testified at trial that an individual customer’s termination has no impact on CPGA. TR at
9 258:17-24.
10

11 (3) Sprint argues that Dr. Selwyn improperly calculated the profit margin on
12 optional services. The Court finds that this is an issue on which experts can disagree and
13 is intertwined with avoidable cost issues.
14

15 (4) Sprint argues that Dr. Selwyn improperly used MRC revenue rather than
16 ARPU revenue. The Court finds that Dr. Selwyn properly used MRC revenue for his
17 analysis of avoidable costs. Customers "don't have an obligation to buy the extra stuff
18 beyond the contract." TR at 441:19 to 442:11; 503:2-9.

19 (5) Sprint argues that Dr. Selwyn’s analysis did not address whether costs are
20 fixed or avoidable over a specified period of time. The Court finds this is significant.
21 There must be a fixed time frame. Dr. Selwyn’s assumption that over an extended period
22 time and looking at its entire subscriber base Sprint could anticipate and adapt to
23 changing circumstances, although true, was not proper when considering the effect on
24 Sprint of the early termination of certain numbers of classmembers at certain times.
25
26
27

1 (6) Sprint argues that Dr. Selwyn's analysis improperly assumed that the
2 correlation between the number of Sprint subscribers and Sprint's operating expenses
3 implied that the former caused the latter. The Court finds this is significant. Correlation
4 alone does not show causation.

5 Cost Avoidance – Sprint's evidence. Sprint expert Mr. Baliban examined Sprint's
6 costs on a category-by-category basis to determine the costs that Sprint avoids when a
7 class member terminates early. TR at 1291:25-1292:12; 1297:21-1299:7. In determining
8 whether a cost was avoidable, Mr. Baliban considered the early termination of the class
9 (California only) in relation to Sprint's national subscriber base. TR at 1298. Then,
10 using financial data from Sprint for the third quarter of 2006, Baliban classified each
11 category of expenses as either "avoidable" or "not avoidable" based on his judgment as to
12 whether Sprint would avoid the costs nationwide if it were to lose California subscribers
13 equal to 5% of its nationwide subscribers. TR at 1325. Baliban determined that Sprint
14 can avoid costs representing 18.13% of MRC revenues. *Id.* at 1279.

15
16
17 Sprint expert Dr. Taylor then calculated Sprint's avoidable costs. Dr. Taylor
18 started with the average MRC (\$48.75)(fn1), subtracted what Baliban determined to be
19 avoidable costs (\$8.84 or 18.13%) and concluded that lost MRC profits averaged \$39.31
20 per month per class member. Multiplying that by the number of months remaining on the
21 contract term (13.25 months), Dr. Taylor found that the lost MRC profits per customer
22 averaged approximately \$525.00 per classmember. TR at 1429. Using MRC figures,
23
24

25
26 _____
27 1 The parties initially used Sprint only data without post-merger Nextel data, then later in the trial
used Sprint data combined with post-merger Nextel data. As a result, the numbers used vary
depending on when in the trial an expert was testifying. The distinctions are ultimately not
material.

1 Dr. Taylor determined that Sprint charged the classmembers \$299,470,408 in ETFs even
2 though Sprint's actual losses were \$987 million. TR. at 1432:25-28.

3 Plaintiffs assert that Sprint's analysis is flawed for three reasons:

4 (1) Plaintiffs argue that Baliban's avoidable cost calculations are based entirely on
5 data from 3Q06 and completely ignore the first 7 years of the class period. TR at 1312.

6 The Court finds that Baliban made appropriate cross-checks to satisfy himself and the
7 Court that the data from 3Q06 was representative.

8
9 (2) Plaintiffs argue that in determining which costs were avoidable and
10 unavoidable, Baliban improperly compares the terminations of a California class with a
11 nationwide subscriber base. The Court finds that this is significant. Baliban's analysis is
12 correct in the sense that Sprint built a nationwide network and that in the latter part of the
13 class period California subscribers expected to and could use the nationwide network as
14 part of a regular plan. The analysis is nevertheless problematic because Baliban's
15 comparison of the early terminations of the California class with Sprint's nationwide
16 network costs minimizes the impact of the California terminations by putting them in the
17 context of Sprint's nationwide planning and investment.

18
19 (3) Plaintiffs argue that Baliban improperly concluded that Sprint's largest cost
20 categories – the costs of network equipment, capital costs, and related depreciation and
21 amortization – were completely fixed and unavoidable. TR at 1319-20. The Court finds
22 that this is an issue on which experts can disagree and is intertwined with issues such as
23 the whether one considers individuals or the whole subscriber base, Sprint's California or
24 nationwide network, and other factors.

1 PREEMPTION - LEGAL ANALYSIS.

2 Sprint argues that federal law preempts the claims at issue. Federal statutes
3 preempting state law are read narrowly. *Rice v. Santa Fe Elevator Company* (1947) 331
4 U.S. 218, 230. Preemption will not be found unless the statute evinces a “clear and
5 manifest” Congressional intention to displace state law. *Id.* Where it is possible to
6 interpret a federal statute as not preempting a state claim, the statute must be interpreted
7 in that way. *Bates v. Dow Agrosciences LLC* (2005) 544 U.S. 431, 447.

8 The Federal Communications Act (FCA), 47 U.S.C. § 332(c)(3)(A), states, “No
9 state or local government shall have any authority to regulate the entry of or the rates
10 charged by any commercial mobile service or any private mobile service, except that this
11 paragraph shall not prohibit a state from regulating the other terms and conditions of
12 commercial mobile services.” The FCA’s savings clause, 47 U.S.C. § 414, indicates that
13 the preemptive effect of the FCA is not as broad as statutes such as the LMRA and
14 ERISA. *Smith v. GTE Corp.* (11th Cir. 2001) 236 F.3d 1292, 1313.

15 The FCA’s legislative history suggests that Congress intended to remove state
16 regulations about the setting of rates but intended that state law would apply to the
17 interpretation and enforcement of consumer contracts and continue its traditional role in
18 consumer protection matters. H.R. Rep. No. 103-111, 1993 U.S.C.C.A.N. 378, 588.

19 California case law is discussed in the Order of 3/17/08. Federal decisions go in
20 different directions.

21 The Court finds that Congress intended that “rates charged by a commercial
22 mobile service” are what a cellular carrier charges its customers for the services it
23 provides. The definition of “rates charged” as limited to charges for services provided is
24

1 consistent with the plain language of the statute, the legislative history, *Ball v. GTE*
2 *Mobilnet* (2000) 81 Cal.App.4th 529, 538, and *In re Southwestern Bell*, 14 FCCR 19898,
3 para 19. The F.C.C.'s need for a hearing on the issue in June 2008 suggests the issue is
4 unclear, which in turn suggests that Congress had no clear intent to preempt. The Court
5 rejects reading "rates charged" to include "rate structure" because that would lead to a
6 broad scope of preemption that Congress rejected by including a savings clause.
7

8 The determination of whether something is "rates" or "other terms and
9 conditions" must be based on an objective evaluation of the matter being regulated. A
10 preemption analysis cannot be based on what a commercial mobile service intended to do
11 or why it did it. Were it otherwise, the preemption analysis would depend on the
12 motivation of the regulated party, not the substance of the regulated act.
13

14
15 **PREEMPTION – EVIDENCE AND CONCLUSION.**

16 Sprint did not prove that its ETFs during the class period were "rates."

17 Sprint's design and implementation of the ETF. Sprint designed the ETFs to be
18 part of its term service plans. In designing and implementing term contracts, Sprint
19 designed rate plans to maximize total combined revenue from all sources, whether they
20 be handset prices, service activation fees, monthly access fees, roaming charges, text
21 messaging charges, or ETFs. Just as a consumer bought a bundled product of a handset
22 and services, Sprint's intent was to generate the greatest total bundled revenue. As noted
23 above, however, Sprint's subjective motivation and intent is irrelevant.
24

25 Whether the ETF is objectively part of its rate plans. Sprint's ETFs are
26 objectively bundled with its handset sales and the rates in its various service plans. Both
27

1 Sprint's expert, Dr. Taylor, and plaintiffs' expert, Dr. Selwyn, testified that a Sprint
2 handset and a term service contract with an ETF are a "bundled product." TR at 641:6 to
3 642:1 and 1414:23 to 1415:8. Sprint's term contracts gave customers lower handset costs
4 and lower monthly charges in exchange for the term commitment. It is, however, not
5 clear whether the ETF was a part of Sprint's "rates" given that they were imposed at the
6 termination of service and not for services provided.

7
8 Conclusion. Sprint has not proven that its ETF are "rates charged." "Rates
9 charged" cannot include all moneys paid by consumers for handset/term contract bundles.
10 The definition of "rates charged" cannot be that broad. (fn2) Sprint's ETFs were not
11 assessed for the services that Sprint provided over the term of a service contract – they
12 were assessed when contracts were terminated. The amount of Sprint's ETFs did not
13 vary with the services provided – a customer with a \$40/month plan paid the same ETF
14 as a customer with a \$150/month plan.

15
16
17 ALTERNATIVE MEANS OF PERFORMANCE – LEGAL ANALYSIS.

18 Under the doctrine of alternative means of performance, "[w]here a contract for a
19 specified period of time permits a party to terminate the agreement before its expiration
20 in exchange for a lump-sum monetary payment, the payment is considered merely an
21 alternative to performance, and not a penalty." *Morris v. Redwood Empire Bancorp*
22 (2005) 128 Cal. App. 4th 1305, 1314. The Court considers whether at its inception the
23 contract offered the terminating party "a 'realistic and rational choice in the future'
24

25 _____
26 ² In *In the matter of Petition of Pittencrieff Communications, Inc. for Declaratory Ruling Regarding*
27 *Preemption of the Texas Public Utility Regulatory Act of 1995*, 13 FCCR 1735, 1745, para 21, the FCC
stated, "an interpretation of section 332(c)(3)(A) that equates state actions that may increase the costs of
doing business with rate regulation 'would have the effect of gutting nearly all regulatory authority over
wireless telecommunications, a result that Congress did not envision.'"

1 between two alternative performances.” *Blank v. Borden* (1974) 11 Cal.3d 963, 971. A
2 contract requiring a party to perform and also imposing an additional charge on the
3 breach of that performance will be construed as a contract with liquidated damages.
4 *Blank, supra*, 11 Cal. 3d at 970; *Garrett v. Coast* (1973) 9 Cal.3d 731, 738.

5
6 ALTERNATIVE MEANS OF PERFORMANCE – EVIDENCE AND CONCLUSION.

7
8 The specific language of Sprint’s Terms and Conditions changed throughout the
9 class period. At all times, however, the relevant language was contained under the
10 heading “Termination – Term Contracts” and in a single paragraph. Exhs. 279-292; 630.
11 Although the ETF condition is stated in somewhat different language in the contract
12 variations over the years, all the ETF provisions state that the subscriber is required to
13 pay an ETF if the subscriber terminates a term service plan before the end of the term or
14 if Sprint terminates services for cause before the end of the term. Some contracts refer to
15 the ETF as a “liquidated damage and not a penalty” (Exhs. 279 – 285), while some make
16 no reference to “liquidated damages” (Exh. 286 – 292). The Court must “look to
17 substance rather than form in determining the ‘true function and character’” of the
18 parties’ arrangement. *Ridgley v. Topa Thrift & Loan Ass’n* (1998) 17 Cal.4th 970, 979.

19
20 The cases that have applied the alternative means of performance doctrine have
21 uniformly involved contract provisions that give one party the right to terminate in
22 exchange for a monetary payment. In those cases, the courts have found that making a
23 rational choice to terminate by payment of an agreed upon fee is not a breach of contract,
24 but rather an alternative means of performing the contract. *Blank, supra*, 11 Cal.3d 963;
25 *Garrett, supra*, 9 Cal.3d 731, 737-738.
26
27

1 Sprint has not met its burden of establishing that the ETF provisions in the
2 “Termination – Term Contracts” clauses in the various contracts simply provide
3 consumers with an alternative means of performing their contracts. Under all of the
4 contracts, the ETF could be triggered by one of two events - either (1) a customer could
5 terminate early by notifying Sprint that he or she wanted to terminate the contract or (2)
6 Sprint could terminate a contract early for cause and then impose an ETF. The
7 “Termination – Term Contracts” clauses therefore permitted Sprint to both take the
8 termination decision away from its subscribers and to impose the ETF. Under that
9 circumstance, the ETF did not give customers a rational choice of paying the ETF or
10 completing the contract. Sprint terminated contracts early and imposed an ETF in
11 approximately 80% of the situations where the ETF clause was triggered. TR at 1250.
12 As a result, the “true function and character” of the termination clauses in approximately
13 80% of the terminations was not to provide the subscriber with an alternative means of
14 performance, but to function as a liquidated damages provision where the payment
15 operated as a substitute for damages.

18 Sprint argues that the Court should treat the jury’s verdict as an advisory verdict
19 on this issue and find that Sprint’s contracts provide for an alternative means of
20 performance. The Court will not do so. Although the jury heard evidence relevant to the
21 alternative means of performance issue because the Court and jury issues were tried at the
22 same time, the Court is responsible for deciding this issue. Order of 4/17/08 at 2:8-16;
23 Statement of the case filed 5/9/08 at 2:14-25. The Court did not instruct the jury on the
24 law related to alternative means of performance and the parties made no arguments to the
25 jury on that issue. Order of 5/1/08 (Non-expert MIL # 7); Order of 5/6/08 (Non-expert
26
27

1 MIL #2). The Court will not presume that the jury intended to provide the Court with an
2 advisory verdict on a matter not addressed to it and, if so, that the advisory verdict was
3 based on the law.
4

5 UNLAWFUL LIQUIDATED DAMAGES PROVISION – LEGAL.
6

7 There is a statutory test and a judicial test for determining whether a liquidated
8 damages provision in a consumer contract is valid. The statutory test is based on the text
9 of Civil Code 1671 and the judicial test has developed in case law. Sprint must meet both
10 tests. *Hitz v. First Interstate Bank* (1995) 38 Cal. App. 4th 274, 292, fn 13.

11 Statutory Test - Impracticability. It must be impracticable or extremely difficult
12 to fix the amount of actual damages. The inquiry is focused at the inception of the
13 contract. *United Sav. & Loan Assn. v. Reeder Dev. Corp.* (1972) 57 Cal. App. 3d 282,
14 299. In the impracticability analysis, “the “proper focus is on *actual damage*” caused by
15 a breach, “not average damage.” *Hitz*, 38 Cal.App.4th at 292, fn. 13.
16

17 Judicial Test - Reasonableness of the clause. Case law requires that liquidated
18 damages must “represent a reasonable endeavor by the parties to estimate fair
19 compensation for the loss sustained.” Recent case law states that the reasonable endeavor
20 analysis considers both (1) the motivation and purpose in imposing the charges, and (2)
21 the effect of the charges. *Utility Consumers' Action Network, Inc. v. AT&T Broadband*
22 (2006) 135 Cal. App. 4th 1023, 1029 (“UCAN”). It is somewhat unclear whether
23 “motivation and purpose” and “effect” are of equal importance and, if not, which element
24 is of greater importance. It is also unclear whether the Court can consider other aspects
25 of reasonableness in addition to “motivation and purpose” and “effect.”
26
27

1 Regarding motivation and purpose, *In re Cellphone Termination Fee Cases*, Case
2 No. A11547 (June 9, 2008 Cal. Ct. App. 1st Dist.), states, “[T]he focus is not ... on
3 whether liquidated damages are disproportionate to the loss from breach, but on whether
4 they were *intended* to exceed loss substantially – a result of which is to generate a profit.”
5 *McCarthy v. Tally* (1956) 46 Cal.2d 577, 585-586, and *Hitz* also suggest that motivation
6 and purpose is the focus of the reasonableness analysis.
7

8 Regarding effect, *UCAN* suggests that the focus is on the actual “effect” of a
9 liquidated damages provision. *UCAN* states, (1) “All three sources demonstrate that the
10 focus had been more on the *amount* of liquidated damages, and not the process by which
11 that amount was derived,” (2) “we believe the reasonable endeavor test they prescribed
12 had more to do with the result and effect of a liquidated damages provision and nothing
13 to do with whether both parties to the contract negotiated the amount of liquidated
14 damages” and (3) “it really does not matter what process is used to select liquidation
15 amounts as long as the amount selected is within the realm of reason.” *UCAN*, 135 Cal.
16 App. 4th at 1034, 1035, and 1042.
17

18 Other cases consider factors that are neither “motivation,” “purpose,” nor
19 “effect.” In *Smith v. Royal Mfg. Co.* (1960) 185 Cal.App.2d 315, 324, the Court
20 considered the reasonableness of using the same fixed sum as liquidated damages without
21 regard to whether the termination was at the start or the end of a contract term.
22

23 The differing approaches can be explained (and reconciled in part) by considering
24 the purpose of Civil Code 1671(d), the origin of the reasonableness requirement, the
25 evidence presented to the courts on the case law, and whether injury to the plaintiffs is an
26 element of liability under Civil Code 1671.
27

1 “The purpose of Civil Code 1671(d) is to prevent a liquidated damages provision
2 from being used oppressively against a consumer with little or no bargaining power.” *In*
3 *re Cellphones*, Case No. A11547, at 8. The focus is on how a liquidated damage
4 provision affects the parties. By making sure that liquidated damages reasonably
5 approximate actual damages, the statute prevents coercion before the termination and
6 punitive payments after the termination. Subjective intent is not relevant to how a
7 liquidated damage provision affects the parties.
8

9 The reasonable endeavor requirement is a judicial addition to the statute. *UCAN*,
10 135 Cal. App. 4th at 1029. Explaining the origin and purpose of the requirement, *UCAN*
11 cites to *Rice v. Schmid* (1941) 18 Cal.2d 382, 385-386, which in turn cites to *Dyer Bros.*
12 *Golden West Iron Works v. Central Iron Works* (1920) 182 Cal. 588, 593. *Dyer Bros.*
13 created the reasonable endeavor requirement with its observation that “Looking to the
14 entire agreement, its scope, purpose, and subject matter, and considering the result of a
15 breach and the reasonableness of the sums agreed to be paid therefor, it is clear that there
16 was an intent to estimate a just compensation for the loss sustainable in the event of a
17 failure to comply with the agreement.” Although the purpose was to discern “an intent to
18 estimate just compensation,” the Court considered (1) the entire agreement, its scope,
19 purpose, and subject matter, (2) the result of a breach, and (3) the reasonableness of the
20 agreed liquidated damages. This does not appear to be an exclusive list of factors. When
21 considering reasonableness in the context of non-consumer contracts, “All the
22 circumstances existing at the time of the making of the contract are considered.” *Weber,*
23 *Lipshie & Co. v. Christian* (1997) 52 Cal.App.4th 645, 654.
24
25
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27

1 The evidence presented to the Courts has defined the issues addressed in the case
2 law. Where a negotiated or two-party contract is at issue, as in *Dyer Bros, Rice*,
3 *McCarthy*, or *Better Food Markets, Inc. v. American Dist. Tel. Co.* (1953) 40 Cal. 2d 179,
4 the available evidence has included the motivation and purpose of the parties at the
5 inception, the liquidated damages amount, and a calculation of the actual damages in that
6 single situation.^(fn3) With a two-party contract there is usually no evidence about what
7 “average” actual damages might be, so these cases necessarily focus on the efforts of the
8 parties to estimate actual damages. In contrast, where a mass consumer contract is at
9 issue, as in *UCAN, Garrett*, or *Hitz*, the parties might be able to collect and present
10 information about the average timing and average damage associated with contract
11 breaches so that the Court can determine whether the liquidated damage clause is in fact a
12 fair approximation of actual average damages. The different considerations in two-party
13 contract cases and in mass consumer contract cases might be tied to the available
14 evidence rather than suggesting divergent legal approaches.

17 The role of the “effect” analysis is related to whether injury is an element of
18 liability under Civil Code 1671. The “effect” analysis is in large measure a damage
19 analysis. In many common law causes of action injury is an element of the cause of
20 action. Statutory violations can, however, occur without causing any damage to any
21 private person. *Carter v. Chotiner* (1930) 210 Cal. 288, 291 (“It is elementary that
22

26
27 ³ *Rice* and *Better Food* concerned standardized form contracts, but arose in the context of two party cases where there was no evidence of how the contracts affected non-parties.

1 violation of a penal ordinance does not of itself create a private nuisance *per se*”). (fn4)

2 This is particularly so with violations of Civil Code 1671(d). “If a liquidated damages
3 provision is declared void under section 1671(d), the consumer is still liable for the actual
4 damages caused by his or her breach of the contract.” *In re Cellphones*, Case No.
5 A11547, at 8. If Civil Code 1671(d) were focused entirely on the motivation of a
6 defendant in setting the amount of liquidated damages, then a liquidated damages clause
7 could be void under the statute even though the cross-claims for actual damages resulted
8 in a net monetary judgment in favor of the defendant.
9

10 The Court holds that a defendant can demonstrate that the liquidated damage
11 clause is valid under Civil Code 1671(d) by proving (1) the calculation of damages was
12 impracticable and (2) the liquidated damage clause is reasonable taking into account (a)
13 the entire agreement, its scope, purpose, and subject matter, (b) the anticipated result of a
14 breach, (c) the reasonableness of the liquidated damages in light of the actual breach, and
15 (d) any other factors bearing on reasonableness. The Court can consider and weigh a
16 variety of factors in its evaluation of validity. *Beasley v. Wells Fargo Bank* (1991) 235
17 Cal. App. 3d 1383, 1394 (“[E]ach of the various questions pertinent to validity ...
18 involves the application of a vague standard to a hypothetical situation.”).

19
20 In considering the “reasonable endeavor” requirement as a “reasonableness”
21 requirement, the Court is not disregarding either *In re Cellphones*, Case No. A11547, at
22

23 _____
24 4 A public entity may pursue and prevail on a claim for a statutory violation even where there is
25 no private injury. For example, in *Koll-Irvine Center Property Owners Assn. v. County of*
26 *Orange* (1994) 24 Cal.App.4th 1036, 1040, property owners alleged violations of federal
27 regulations and county ordinances and the Court dismissed the claims for lack of a cognizable
private injury while noting, “Koll-Irvine adequately pleaded the elements of a public nuisance if
the action had been brought by a public entity.” *Ayyad v. Sprint* was originally filed under the
pre-Proposition 64 statutory framework, when a private party could prosecute claims on behalf of
the general public without having to prove actual injury to any private party.

1 8, or *Hitz*, 38 Cal.App.4th at 289. *Auto Equity Sales, Inc. v. Superior Court* (1962) 57
2 Cal.2d 450, 455. The Court is trying to reconcile the somewhat conflicting case law and
3 to give effect to the statute and to the decisions of the California Supreme Court. *UCAN*,
4 135 Cal.App.4th at 1038 fn 9 (“we are concerned with *Hitz*’s interpretation of *Garrett*”).
5 To ensure an appropriate record for review, the Court will make findings that should
6 permit the case to be resolved on appeal without regard to which standard the Court of
7 Appeal may find appropriate.
8

9
10 UNLAWFUL LIQUIDATED DAMAGES PROVISION – EVIDENCE AND
11 CONCLUSION.

12 Impracticability of fixing the amount of actual damages. Sprint’s actual damages
13 for each customer would be the amount of its lost revenue less the amount of its
14 avoidable costs. (fn5)

15
16 Sprint’s lost revenue is best measured by MRC revenue. It is not relevant for the
17 impracticability test that Sprint has many different term plans over the class period – for
18 any given customer with any given plan it would be simple to calculate the MRC due
19 based on the remaining months on the contract.

20 For the individual customer, Sprint’s avoidable costs are the costs it can avoid
21 when that individual consumer terminates after the initiation of a contract. Sprint can
22 and does plan for the average termination rate of its subscribers, but it cannot predict and
23

24
25 _____
26 5 The Court will ignore the possibility that Sprint might suffer consequential damages from the
27 breach of any consumer contract and could recover any such damages. *Archdale v. American
Intern. Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 469 (citing Civil Code 3300 and
Hadley v. Baxendale.) If Sprint were unable to provide service, the Terms and Conditions state
that customers cannot recover consequential damages.

1 plan for the early termination of any single customer. *Hitz*, 38 Cal.App.4th at 292, fn. 13
2 (“the “proper focus is on *actual damage*” caused by a breach, “not average damage.””).

3 At the initiation of Sprint’s ETF policy and the insertion of the clause into its
4 consumer contracts, it would have been practicable for Sprint to determine the lost MRC
5 revenue for any anticipated individual contract, but impracticable for consumers and
6 Sprint to determine Sprint’s avoidable costs for any given individual contract. As the
7 expert evidence in this case demonstrates, the avoidable cost analysis is complicated and
8 expensive. *Weber, Lipshie & Co. v. Christian* (1997) 52 Cal.App.4th 645, 654 (in non-
9 consumer contract the Court can consider “the anticipation of the parties that proof of
10 actual damages would be costly or inconvenient.”).

11
12 Motivation and purpose. There are three relevant decision points in this case -
13 Sprint’s adoption of the \$150 ETF in May 2000; Nextel’s adoption of the \$200 ETF in
14 approximately 2000; and Sprint/Nextel’s post merger decision to implement the \$200
15 ETF companywide.
16

17 Sprint did not prove that its motivation and purpose in 2000 was to estimate
18 Sprint’s damages. Sprint’s concern was to implement term contracts with ETFs to
19 decrease churn. Sprint considered three factors when adopting and setting the amount of
20 the ETF – whether the competition had similar contracts and ETFs, whether customers
21 would sign up with contracts with ETFs, and how different amounts of ETFs would
22 impact Sprint financially. Regarding the financial impact on Sprint, Sprint analyzed
23 different scenarios and considered the profitability of the proposed pricing change, but it
24 did not estimate damages caused by a potential breach. *Pryor Depo* at 65.
25
26
27

1 Sprint did not prove that Nextel's motivation and purpose in 2000 was to estimate
2 the damage that Nextel would suffer from an early termination. As with Sprint, Nextel
3 considered whether the competition had similar contracts and ETFs, whether customers
4 would sign up with contracts with ETFs, and how different amounts of ETFs would
5 financially impact Nextel. As with Sprint, Nextel did not estimate damages caused by a
6 potential breach. Weiner Depo at 65.
7

8 Sprint did not prove that its motivation and purpose in 2005 in increasing the ETF
9 from \$150 to \$200 was to estimate the damage that Sprint would suffer from early
10 terminations. The only evidence on this decision suggests that it was motivated by a
11 desire to establish a uniform ETF, with no consideration given to whether the amount of
12 the ETF was justified by the damage that Sprint would suffer from an early termination.
13

14 Sprint did not prove that it made a reasonable endeavor to have the ETF estimate
15 its actual damages. If the Court were to focus on Sprint's motivation and purpose, the
16 Court would end the analysis here and find Sprint has not met its burden under Civil
17 Code 1671(d) to demonstrate the ETF is valid.

18 Other factors. Consistent with the suggestion in *Dyer Bros* that the Court can
19 consider a variety of factors in the judicially created reasonableness test, the Court
20 considers other factors.
21

22 Sprint's ETF was set as a fixed flat fee without regard to the amount of Sprint's
23 sunk costs (handset subsidies), the term of the contract (1 year or 2 year), or the monthly
24 recurring charge on the contract. Sprint's ETF did not vary depending on the months
25 remaining in a term contract. These facts resemble those in *Smith v. Royal Mfg. Co.*
26 (1960) 185 Cal.App.2d 315, where parties entered into a one year contract for the
27

1 purchase of 100 coffee vending machines at a price of \$300 per machine and the contract
2 stated that the purchaser would forfeit \$5,100 as liquidated damages if he failed or
3 refused to fulfill the terms of the agreement. The Court stated, “Here, the damages were
4 the same whether the breach occurred after one or 99 machines were taken by
5 Montgomery. Where a fixed sum is agreed upon as liquidated damages for one of several
6 breaches of varying degree, it is to be inferred that a penalty was intended.” 185
7 Cal.App.2d at 324.
8

9 Effect of the liquidated damage amount – Court’s independent analysis. (fn6)

10 The effect analysis requires the Court to determine whether the ETF approximates
11 Sprint’s actual damages. Sprint’s estimated damages are its lost revenue less its
12 avoidable costs. This is not a simple calculation. There is a smorgasbord of legal
13 considerations, expert economic approaches, and expert factual evidence. The Court
14 decides as follows.
15

16 Monthly Recurring Charge (“MRC”) or Average Revenue Per Unit (“ARPU”).

17 MRC is the appropriate measure of Sprints’ lost revenue. This is suggested by Sprint’s
18 terms and conditions, which states “If Services are terminated before the end of your
19 current billing cycle, (1) the MRC is not prorated to the date of termination....” and limits
20 Sprint’s liability to consumers with reference to the MRC. Exh 630 at 000093 and 97.
21

22 Individual or class. Sprint’s avoidable costs are best considered on a classwide
23 basis over the class period. Sprint’s clearly identifiable avoidable costs relating to the
24 termination of any given subscriber on any given day might be de minimis, but the
25 aggregate identifiable costs related to the termination of the class over the class period are
26

27 ⁶ Even though the “effect” component of the Court’s validity analysis has a substantial overlap with the jury’s determination of actual damages, the Court independently determines the effect of the ETF for purposes of the validity analysis. Order of 4/17/08 at 4:8-19.

1 identifiable and not de minimis. The identifiable whole is a more accurate measure than
2 the sum of the de minimis parts. See also *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.
3 App. 4th 715, 746-758.

4 Time frame. Sprint's avoidable costs must be considered over a time frame.
5 Sprint's evidence suggests an approximately 2-year period because Sprint plans its
6 expenditures approximately 2 years ahead. (Smith on 5/30/08.) Plaintiffs suggest a
7 "very long run" time frame because Sprint can adjust its spending to account for changes
8 in its number of subscribers. (Selwyn). The Court finds that Sprint's avoidable costs are
9 best considered over a time frame of approximately 2 years.
10

11 California or national. Sprint used its national costs and argued that none of
12 Sprint's capital expense was avoidable because the California class is relatively small in
13 relationship to the national subscribers. (Baliban 6/2/08 – cross.) Plaintiffs used
14 nationwide costs and compared them to nationwide early terminations in determining
15 what costs were avoidable. The Court is persuaded that although most of Sprint's
16 California mobile phone subscribers used most of their service within California, almost
17 all California subscribers occasionally used nationwide services, some California
18 subscribers routinely used nationwide services, and for the majority of the class period all
19 California subscribers expected nationwide services when they subscribed with Sprint.
20
21 A national scope is appropriate on the facts of this case.
22

23 Bottom up or top down. Sprint's expert evaluated Sprint's avoidable costs using a
24 bottom-up approach to determine whether certain cost elements were avoidable and then
25
26
27

1 aggregated that data to arrive at his conclusions. TR 1283-1294 (Baliban 6/2/08). (fn7)
2 Plaintiffs' expert evaluated Sprint's avoidable costs using a top-down approach where he
3 evaluated Sprint's nationwide annual cost data from its forms 10-K and used that data to
4 arrive at his conclusions. (Selwyn 5/21/08.) Sprint's bottom-up approach is more
5 persuasive. Plaintiffs' analysis is overly generalized and was based on a correlation
6 between Sprint's increased number of customers and its increased costs without
7 convincing proof that Sprint's increased number of customers were the only cause of its
8 increased costs.
9

10 Handset subsidies and CPGA. Sprint's handset subsidy and CPGA costs were
11 incurred before contract inception and before any early termination. Sprint incurred
12 handset subsidies and CPGA costs to acquire customers, not to provide services. The
13 CPGA costs were "sunk" and could not have been avoided following any early
14 termination. These costs were neither avoidable following the termination of a contract
15 as suggested by Plaintiffs nor related to the provision of services as suggested by Sprint.
16

17 Lost revenue based on MRC income. There were an average of 13.25 months
18 remaining on a contract when a class member terminated early, the average MRC
19 incurred by each class member was \$49.16, and the average MRC loss for Sprint per
20 early termination of each class member was \$651.12. Therefore, Sprint's total lost
21
22
23

24 7 The distinction between avoidable costs and non-avoidable overhead is a fact issue.
25 *Vitex Mfg. Corp. v. Caribtex Corp.* (3rd Cir., 1967) 377 F.2d 795, 796 ("under the facts
26 presented, the district court was not compelled to consider Vitex's overhead costs"). The
27 most relevant California law is *Beasley v. Wells Fargo Bank* (1991) 235 Cal. App. 3d
1383, 1403, which suggests only that the avoidable costs analysis is limited to costs that
are directly avoidable. There is no law stating that experts must use any particular time
frame when calculating lost revenue and avoidable costs. These are issues of fact.

1 revenue for the class of 1,986,537 persons was \$1,293,468,298. TR at 1389- 1391
2 (Dippon).

3 Avoidable costs based on early terminations. The Court had difficulty with the
4 expert testimony on avoidable costs. Dr. Selwyn's analysis seemed more focused on a
5 long-term regulatory analysis than on the calculation of avoidable costs arising from
6 breaches of specific contracts in specific time frames. Dr. Selwyn's conclusion that
7 Sprint could lose \$1,293,468,298 in MRC revenue and suffer a net loss of only
8 \$18,425,130 was not convincing. Mr. Baliban and Dr. Taylor were more closely focused
9 on the calculation of avoidable costs arising from the term contracts at issue in this case.
10 Dr. Taylor's conclusion Sprint had an effective profit margin of 82% on MRC revenue
11 and that the loss of \$1,293,468,298 in MRC revenue has caused a net loss of
12 \$1,060,644,000 was also not convincing. The experts relied on different factual data and
13 economic concepts and reached conclusions at what appear to the Court to be extreme
14 positions. The Court was provided little guidance on how to consider and analyze the
15 avoidable cost issue if it accepted less than all of the experts' data and concepts.
16

17
18 The Court would ideally distinguish between Sprint's avoidable and non-
19 avoidable nationwide costs for the class as a whole over a series of 2-year time frames
20 under a variant of Mr. Baliban's category-by-category approach. That information is not,
21 however, available. Therefore, the Court approaches the issue by starting from data
22 about the cost per minute of service.
23

24 Dr. Selwyn testified that there was data that the cost per minute for use of a
25 wireless network was \$0.004/minute according to MIT Professor Hausman in an
26 unidentified publication, \$0.05/minute according to Hausman in the National Tax
27

1 Journal, and \$0.039/minute according to Sprint in a 2002 submission to the New York
2 Public Service Commission. TR at 447-448. Dr. Selwyn considered the \$0.039/minute
3 cost figure as “one of the better data sources.” TR at 781. The Court will presume
4 Sprint’s avoidable costs at \$0.039/minute of service over the class period for minutes
5 used per month, which includes “Anytime” minutes, “Night and Weekend” minutes,
6 “Sprint Mobile to Mobile” minutes, and any other minutes actually used by class
7 members.
8

9 Conclusion - effect. Sprint’s estimated damages for purposes of the effects
10 analysis is the difference between the revenue it did not receive due to the early
11 terminations of the class as a whole (\$1,293,468,298) less its avoidable costs. The
12 Court need not and does not determine the amount of Sprint’s avoidable costs with
13 specificity. The Court does, however, use the \$0.039/minute cost of service over the
14 class period to estimate Sprint’s avoidable costs and damages over the class period. The
15 Court notes that \$0.039/minute is an average figure and that Sprint’s cost per minute was
16 probably higher in 2000 than it was in 2007. Similarly, for any given monthly price
17 Sprint probably provided fewer minutes in 2000 than it did in 2007. The Court runs a
18 series of scenarios.
19

20 Assuming the average class member used 300 minutes per month, Sprint’s
21 monthly cost per classmember was \$11.70 (300 mins x \$0.039/min), Sprint’s profit on
22 MRC per month per average customer would be \$37.46 (\$49.16 - \$11.70), Sprint’s profit
23 per customer on MRC for 13.25 months would be \$496.35, and Sprint’s profit for the
24 1,986,537 classmembers would be approximately \$986,007,700.
25
26
27

1 Assuming the average class member used 450 minutes per month, TR at 779-780,
2 and a cost of \$0.039/minute, Sprint's monthly cost per classmember was \$17.55 (450
3 mins x \$0.039/min), Sprint's profit on MRC per month per average customer would be
4 \$31.61 (\$49.16 - \$17.55), Sprint's profit per customer on MRC for 13.25 months would
5 be \$418.83, and Sprint's profit for the 1,986,537 classmembers would be approximately
6 \$832,026,250.

7
8 Assuming the average class member used 600 minutes per month, Sprint's
9 monthly cost per class member was \$23.40 (600 mins x \$0.039/min), Sprint's profit on
10 MRC per month per average customer would be \$25.76 (\$49.16 - \$23.40), Sprint's profit
11 per customer on MRC for 13.25 months would be \$341.32, and Sprint's profit for the
12 1,986,537 classmembers would be approximately \$678,044,800.

13 Assuming the average class member used 900 minutes per month, Sprint's
14 monthly cost per class member was \$35.10 (900 mins x \$0.039/min), Sprint's profit on
15 MRC per month per average customer would be \$14.06 (\$49.16 - \$35.10), Sprint's profit
16 per customer on MRC for 13.25 months would be \$186.30, and Sprint's profit for the
17 1,986,537 class members would be approximately \$370,081,910.

18
19 Based on these scenarios, the Court concludes that Sprint's lost profit on MRC
20 revenues exceeded the \$299,473,408 that Sprint charged in ETFs to class members.
21 These are also reasonably consistent with the Dippon/Baliban/Taylor analysis. Sprint has
22 demonstrated that the effect of the ETF was to underestimate compensation for the loss
23 sustained. Therefore, if the Court were to focus on the effect of the ETF as suggested by
24 *UCAN*, the Court would find that Sprint has met its burden under Civil Code 1671(d) to
25 demonstrate that the ETF is valid.
26
27

1 Effect of the liquidated damage amount – Jury verdict. The estimated “effect”
2 component of the Court’s Civil Code 1671(d) liability analysis has a substantial overlap
3 with the jury’s determination of actual damages on Sprint’s cross claims. Although the
4 Court makes its own decision, it also considers the jury verdict for guidance. (fn8)

5 The verdict is troublesome because it can be read in several different ways in light
6 of the evidence in the case and the questions asked by the jury. It was undisputed at trial
7 that Sprint charged \$299 million in ETFs and collected \$73 million in ETFs. The verdict
8 states that Sprint’s actual damages from the early termination of the class’s contracts
9 (\$226 million) was equal to the amount of the charged but unpaid ETFs (\$226 million).

11 One reading (suggested by the plain language of the verdict form) is that the jury
12 (1) knew that Sprint charged \$299 million in ETFs, (2) knew that it should not consider
13 the \$73 million in ETFs that Sprint had already collected, (3) found that the class
14 members breached their contracts by terminating early, and (4) decided Sprint’s total
15 actual damages from early terminations were \$226 million. Assuming the ETF was
16 invalid, after set-off this would result in a judgment of \$73 million in favor of the class.

18 A second reading is that the jury (1) knew that Sprint charged \$299 million in
19 ETFs, (2) *assumed* that it should not award Sprint damages for the \$73 million in ETFs
20 that Sprint had already collected, (3) found that the class members breached their
21 contracts by terminating early, and (4) decided Sprint’s total actual damages from early
22

23
24 _____
25 ⁸ Addressing another issue, the Court previously noted its concern with the specter that the Court
26 and the jury might make inconsistent factual findings. Order of 2/14/05 at 5:16-19. “It is a well
27 established rule in this state that in an equitable proceeding a jury trial is not a matter of right, and
even though a court may, in the exercise of its discretion, call a jury to assist in the trial of the
matter, nevertheless the court is not bound in such a case by the findings of the jury.” *Olson v.*
Foster (1941) 42 Cal.App.2d 493, 498.

1 terminations were \$226 million. Assuming the ETF were invalid, this would result in a
2 break even set-off and a judgment of \$0.

3 A third reading is that the jury (1) knew that Sprint charged \$299 million in ETFs,
4 (2) *assumed* that it should not award Sprint damages for the \$73 million in ETFs that
5 Sprint had already collected, (3) found that the classmembers breached their contracts by
6 terminating early, (4) decided that Sprint's total actual damages exceeded \$300 million,
7 (5) *decided that Sprint was estopped from collecting more than the \$226 million it would*
8 *have collected had the ETFs been valid*, and (6) limited Sprint's total actual damages
9 form early terminations to \$226 million. Assuming the ETF were invalid, this would
10 result in a break even set-off and a judgment of \$0.
11

12 A fourth reading (suggested by the jury's questions) is that the jury (1) *assumed*
13 *the ETF provision was valid*, (2) knew that Sprint charged \$299 million in ETFs, (3)
14 *assumed* that it should not award Sprint damages for the \$73 million in ETFs that Sprint
15 had already collected, (4) found that the classmembers breached *their agreements to pay*
16 *the ETF*, and (5) decided Sprint's total actual damages *from the unpaid ETFs* were \$226
17 million. This reading presumes the jury mistakenly thought it could assume that the ETF
18 were valid, and is of little use in determining what Sprint's actual damages would have
19 been if the ETF were invalid.
20

21 For purposes of whether to use the jury's verdict as an advisory verdict, the Court
22 finds that the fourth reading of the jury verdict is the most plausible. Therefore, the Court
23 cannot give any effect to the jury's verdict as an advisory verdict.
24

25 By way of dicta, the Court also considers the plain language of the verdict and its
26 suggestion that Sprint's total actual damages from early terminations was \$226 million
27

1 when Sprint had charged \$299 million in ETFs. This reading of the verdict suggests that
2 Sprint's average actual damages per subscriber were \$132, or \$43 less than the \$175
3 ETF. This could be restated as an overstatement of 32% or an aggregate overcharge of
4 \$73,000,000. It is unclear whether this is a significant overstatement or within the range
5 of reasonable estimations when setting liquidated damages. The Court reviews the case
6 law.

7
8 In *Weber, Lipshie & Co. v. Christian* (1997) 52 Cal.App.4th 645, 654, the Court
9 **approved** a liquidated damages clause for 12 months of recoverable billings, which was
10 found to be \$447,136.75 even though there was no evidence of any actual damages. The
11 liquidated damage/actual damage ratio is 447,136.75/0 or infinite.

12 In *Smith v. Royal Mfg. Co.* (1960) 185 Cal.App.2d 315, 324, the Court
13 **invalidated** a liquidated damage clause for \$5,100 as liquidated damages in a one year
14 contract for the purchase of 100 coffee vending machines at a price of \$300 per machine
15 even though there was no evidence of any actual damages. The liquidated damage/actual
16 damage ratio is 5100/0 or infinite.

17
18 In *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152
19 Cal.App.4th 1106, 1115, the Court **invalidated** a liquidated damages clause of 10% for a
20 late balloon payment of \$776,140 because \$77,614 exceeded the presumptive \$614 in
21 administrative costs related to processing a late payment. The liquidated damage/actual
22 damage ratio is 77,614/614 or 126.4.

23
24 In *Harbor Island Holdings v. Kim* (2003) 107 Cal.App.4th 790, the Court
25 **invalidated** a liquidated damages clause that set the effective monthly rent at
26
27

1 \$90,000/month even though the market rate and presumptive actual loss was
2 \$30,000/month. The liquidated damage/actual damage ratio is 9/3 or 3.0.

3 In *Retail Clerks*, 85 Cal.App. 3d 286, the Court **invalidated** a liquidated damage
4 clause that doubled the actual damages for a repeated contract breach within a set time
5 where there was no evidence that the actual damages of a repeat breach were greater. .
6 The liquidated damage/actual damage ratio is 2/1 or 2.0.

7
8 In *Hitz*, the trial court **invalidated** a liquidated damages clause that imposed total
9 fees of \$22,212,192 where the actual loss was \$21,031,932. The liquidated
10 damage/actual damage ratio is 22,212,192/21,031,932 or 1.056.

11 In *Better Food Markets, Inc. v. American Dist. Tel. Co.* (1953) 40 Cal. 2d 179, the
12 Court **approved** a liquidated damages clause for \$50 for the failure of a burglar alarm
13 even though the plaintiff suffered an actual loss of \$35,930. There was no evidence of
14 the average loss in a burglary. The liquidated damage/actual damage ratio is 50/35,930
15 or 0.0014.
16

17 In *Atkinson v. Pacific Fire Extinguisher Co.* (1953) 40 Cal. 2d 192, 197, the Court
18 **approved** a liquidated damages clause for \$25 for the failure of a fire alarm even though
19 the plaintiff suffered an actual loss of \$97,437. There was no evidence of the average
20 loss from fire. The liquidated damage/actual damage ratio is 25/97437 or 0.00025.
21

22 The case law reveals no pattern. Assuming the Court were to read the verdict as
23 suggesting that Sprint set its ETF at \$175 when its average actual damages per subscriber
24 is \$132, the Court would find that where it is impracticable or extremely difficult to fix
25 the amount of actual damages an average overstatement of 32% is within the range of
26 reasonable estimation when setting liquidated damages.
27

1 Conclusion. Sprint (1) proved that it was impracticable to determine the amount
2 of actual damages at the inception of any given contract, (2) did not prove that its
3 motivation and purpose in creating and setting the amount of the ETF was to estimate its
4 damages, (3) did not prove that its ETF varied in proportion to its actual damages, and (4)
5 proved that the effect of its ETF was to underestimate damages. Considering all of the
6 above, and giving the most weight to Sprint’s motivation in creating and setting the
7 amount of the ETF and its decision not to vary the ETF in proportion to its actual
8 damages, the Court finds that the Sprint ETF is an unlawful penalty under Civil Code
9 1671(d). The Court considers the “effect” analysis in the context of awarding relief.
10

11
12 THE REMAINING CLAIMS – EVIDENCE.

13 Plaintiffs prevail on their CLRA claim under Civil Code 1770(a)(14) and (19)
14 because they have demonstrated that the ETF is a violation of law.
15

16 Plaintiffs cannot prevail on their claim for a violation of the unlawful and unfair
17 prongs of the UCL. Assuming the ETF is both unlawful and unfair, the UCL’s standing
18 requirement in section 17204 requires that plaintiffs must have suffered injury in fact and
19 to have lost money or property as a result of business practice. The Court determines that
20 the Plaintiff class benefited from the ETF and has no standing under section 17204.
21

22 Plaintiffs cannot prevail on their claim for unjust enrichment. Although the ETF
23 was unlawful, the net result of the ETF was that the class benefited. Plaintiffs have not
24 demonstrated that it would be unjust to permit Sprint to retain the ETFs it has collected.

25 *Cal. Fed. Bank v. Matreyek* (1992) 8 Cal. App. 4th 125, 131.
26
27

1 Plaintiffs cannot prevail on their claim for money had and received. The
2 undisputed facts demonstrate that the net result of the ETF was that the class benefited.

3
4 SPRINT'S AFFIRMATIVE DEFENSES TO PLAINTIFFS' CLAIMS.

5 Sprint did not argue its affirmative defenses either orally or in its closing trial
6 brief. The Court considers those defenses abandoned.

7
8
9 SPRINT'S CONTINGENT CROSS-CLAIM AGAINST THE CLASS.

10 The verdict form is problematic because it can be read in several different ways.
11 The Court must, however, take all inferences in favor of the validity of the verdict on the
12 cross-claim.

13 The Court will give effect to the plain language of the verdict form. The Court
14 will assume that the jury (1) knew that Sprint charged \$299 million in ETFs, (2) knew
15 that it should not consider the \$73 million in ETFs that Sprint had already collected, (3)
16 found that the classmembers breached their contracts by terminating early, (4) decided
17 Sprint's total actual damages from early terminations were \$226 million, and (5) intended
18 (assuming the ETF was invalid) that the verdict result in a payment to the class of \$73
19 million (\$299 million – \$226 million).
20
21
22

23 THE OFFSET.

24 Sprint has charged \$299 million in ETFs and collected \$73 million in ETFs.
25 Because the ETF is not valid under Civil Code 1671(d), Sprint must return the \$73
26
27

1 million to the class and reverse the charges on the \$226 million that has been charged but
2 not collected.

3 Sprint prevailed on its cross-claim and the demonstrated that its actual damages
4 were \$226 million.

5 The set off is complicated by the evidence that only approximately 25% of the
6 class paid the ETF charged and the Court's presumption that Sprint can and will pay the
7 full amount of any judgment. There are at least two ways to approach the set off: (1)
8 actual dollar payments then credits and (2) proportional.
9

10 If the Court sets off actual dollar payments and then considers credits, the Court
11 first sets off the class's \$73 million actual dollar judgment against Sprint's \$226 million
12 actual dollar judgment against the class. The Court then sets off the class's \$226 million
13 judgment for credits against Sprint's \$153 million actual dollar judgment against the
14 class. The result is that no money changes hands and Sprint credits \$73 million to those
15 persons who did not pay their ETFs.
16

17 If the Court does a proportional set off, the Court sets off the class's combined
18 \$299 judgment (\$73 million actual dollar and \$226 credit) against Sprint's \$226 million
19 actual dollar judgment against the class. The balance in favor of the class is \$73 million,
20 but using the dollar/credit proportion of the judgment as a whole, $73/299$ (25%) of the
21 judgment against Sprint is for actual dollars and $226/299$ (75%) of the judgment is in the
22 form of credit. Sprint pays the class \$18.25 million and owes the class a reverse charge
23 of \$54.75 million.
24
25
26
27

1 The Court will enter judgment using the proportional set off. That approach is
2 consistent with the aggregate then setoff approach adopted at class certification and
3 allocates the benefits of the judgment equally across the members of the class.
4

5 THE CLASS'S AFFIRMATIVE DEFENSES TO SPRINT'S CONTINENT CROSS-
6 CLAIM.
7

8 Plaintiffs did not argue their affirmative defenses either orally or in their closing
9 trial brief. The Court considers those defenses abandoned.
10

11 CONCLUSION.

12 Sprint must pay the class \$18.25 million and provide the class with a credit of
13 \$54.75 million. Sprint must pay the \$18.25 million to those class members who paid
14 their ETFs and credit \$54.75 million to class members on charged but unpaid ETFs.
15

16 The Court will hold post-judgment hearings on the plan to distribute the 18.25
17 million and to credit the \$54.75 million.
18

19 PROCEDURE.

20 This Proposed Statement of Decision shall become the Statement of Decision in
21 this matter unless on or before August 5, 2008, any party specifies controverted issues or
22 makes proposals not covered in this decision. The Court expedites the time required by
23 Cal. Rules of Court, Rule 3.1590(f) due to Judge Sabraw's impending retirement.
24

25
26 Dated: July 28 2008
27


Judge Bonnie Sabraw

EXHIBIT C

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6 Counsel and Attorneys for
7 Defendant CELLCO PARTNERSHIP d/b/a/
VERIZON WIRELESS
8
9

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF ALAMEDA

12 MOLLY WHITE and CHRISTINA
13 NGUYEN, on behalf of themselves and
all others similarly situated,

14 Plaintiffs,

15 vs.

16 CELLCO PARTNERSHIP D/B/A/
17 VERIZON WIRELESS,

18 Defendant
19

CASE NO. RG04-137699

**STIPULATION AND AGREEMENT OF
SETTLEMENT**

Place: Dept. 22
Judge: Hon. Bonnie Sabraw

1 *Verizon Wireless, Defendant*, Alameda County Superior Court Case No. RG04-137699.

2 “Action” includes the claims that Verizon Wireless has asserted by way of its Cross-Complaint.

3 3. “Brown” means the named claimant in the New York Arbitration, Patricia Brown.

4 4. “Class Counsel” means the Law Offices of Scott A. Bursor; Bramson, Plutzik,
5 Mahler & Birkhaeuser, LLP.; Franklin & Franklin APC; and Coughlin Stoia Geller Rudman &
6 Robbins LLP.

7 5. “Class-Related Released Parties” mean all Settlement Class Members and each of
8 their past, present, or future officers, directors, shareholders, owners, employees, representatives,
9 agents, principals, consultants, contractors, insurers, accountants, attorneys, partners, members,
10 administrators, legatees, executors, heirs, estates, predecessors, successors, or assigns, and any
11 other Person with which any of them is affiliated or for which any of them is responsible at law,
12 in equity, or otherwise.

13 6. “Class-Related Releasing Parties” means all Settlement Class Members.

14 7. “Class Released Claims” means any and all actions, causes of action, claims,
15 demands, liabilities, obligations, fees, costs, sanctions, proceedings, and/or rights of any nature
16 and description whatsoever, including, without limitation, violations of any state or federal
17 statutes, rules or regulations, including but not limited to 47 U.S.C. § 201, or principles of
18 common law, whether liquidated or unliquidated, known or unknown, in law or in equity,
19 whether or not concealed or hidden, that have been asserted in the Action and the Related
20 Litigation. “Class Released Claims” also means any and all actions, causes of action, claims,
21 demands, liabilities, obligations, fees, costs, sanctions, proceedings, and/or rights of any nature
22 and description whatsoever, including, without limitation, violations of any state or federal
23 statutes, rules or regulations, including but not limited to 47 U.S.C. § 201, or principles of
24 common law, whether liquidated or unliquidated, known or unknown, in law or in equity,
25 whether or not concealed or hidden, that could have been asserted in the Action and Related
26 Litigation challenging the validity of the Flat-Rate ETF or the propriety of its assessment or
27 collection. Notwithstanding the foregoing, in the event that Verizon Wireless institutes a lawsuit
28 or arbitral proceeding to recover unpaid ETFs from any Class-Related Releasing Party, nothing in

1 this Settlement Agreement or any Judgment entered pursuant hereto shall be construed to
2 preclude any such Class-Related Releasing Party from asserting, on an individual basis only, any
3 defenses, provided, however, that this sentence shall not affect or apply to actions taken to collect
4 unpaid ETFs that do not involve the institution by Verizon Wireless of a lawsuit or arbitral
5 proceeding. Nothing herein shall be construed to permit any Class Related Releasing Party from
6 asserting any affirmative claim relating to the Flat-Rate ETF, including any Class Released
7 Claim, against Verizon Wireless.

8 8. "Class Representatives" means White, Nguyen, Brown, and Schroer.

9 9. "Common Fund" means a fund in the amount of twenty-one million dollars
10 (\$21,000,000.00) deposited by Verizon Wireless into an escrow account for the benefit of the
11 Settlement Classes. The Aggregate Fees, Costs, and Expenses shall also be paid from the
12 Common Fund. The Common Fund represents the absolute, capped amount of Verizon
13 Wireless's financial liability for the entire settlement, except as expressly set forth in Article
14 IV.1.b.

15 10. "Court" means the Superior Court of the State of California for the County of
16 Alameda.

17 11. "Cross-Complaint" means the second amended cross-complaint filed in the Action
18 on or about August 7, 2006.

19 12. "Effective Date" means the first date by which all of the following events shall
20 have occurred: (a) the Court has entered the Preliminary Approval Order; (b) the Court has
21 entered the Final Approval Order and Judgment; (c) the Final Approval Order and Judgment has
22 become Final; and (d) the New York Arbitration has been dismissed with prejudice.

23 13. "Escrow Account" means the escrow account established pursuant to an escrow
24 agreement to be entered into among the Parties, substantially in the form of Exhibit F, with an
25 escrow agent to be selected by the Parties.

26 14. "ETF Assessed Class" means all persons in the United States who were parties to a
27 contract for a wireless telephone personal account and were billed a Flat-Rate ETF by Verizon
28 Wireless and/or its legacy companies from July 23, 1999 until the date that Publication Notice

1 commences under the terms of this Settlement Agreement. The ETF Assessed Class includes
2 such persons whether or not they paid any portion of the ETF, either to Verizon Wireless or to
3 any outside collection agency.

4 15. "ETF Assessed Class Payer List" means a list of Verizon Wireless customers that
5 Verizon Wireless's records indicate are members of the ETF Assessed Class who paid a Flat-Rate
6 ETF on or after January 1, 2004. Verizon Wireless shall compile this list based upon Verizon
7 Wireless's records and the list shall be provided to Class Counsel and the Settlement
8 Administrator. The Settlement Administrator shall take such reasonable measures to eliminate
9 duplicative entries as may be possible at reasonable expense, with the objective of ensuring to the
10 extent practicable that any Person who is included on the ETF Assessed Class Payer List receives
11 not more than one Mail Notice even if such Person (or the account for which such person was
12 responsible) was assessed more than one ETF.

13 16. "Fee and Cost Application" means that written motion or application by which
14 White, Nguyen, Brown, Schroer and/or Class Counsel requests that the Court award attorneys'
15 fees, costs, expenses and incentive awards.

16 17. "Final" means that the Final Approval Order and Judgment has been entered on
17 the docket in the Action, and (a) the time to appeal from such order has expired and no appeal has
18 been timely filed, (b) if such an appeal has been filed, it has finally been resolved and has resulted
19 in an affirmation of the Final Approval Order and Judgment, or (c) the Court, following the
20 resolution of the appeal, enters a further order or orders approving settlement on the terms set
21 forth herein, and either no further appeal is taken from such order(s) or any such appeal results in
22 affirmation of such order(s). Neither the pendency of the Fee and Cost Application, nor any
23 appeal pertaining solely to a decision on the Fee and Cost Application, shall in any way delay or
24 preclude the Final Approval Order and Judgment from becoming Final.

25 18. "Final Approval Hearing" means the hearing scheduled to take place at least
26 ninety days after the date of entry of the Preliminary Approval Order at which the Court shall: (a)
27 determine whether to grant final approval to this Settlement Agreement and to certify the
28

1 Settlement Classes; (b) consider any timely objections to this Settlement and all responses
2 thereto; and (c) rule on the Fee and Cost Application.

3 19. "Final Approval Order and Judgment" means the order, substantially in the form
4 of Exhibit B attached hereto, in which the Court grants final approval of this Settlement
5 Agreement, certifies the Settlement Classes, and authorizes the entry of a final judgment and
6 dismissal of the Action with prejudice.

7 20. "Flat-Rate ETF" means an early termination fee based on a contract provision that
8 is structured such that the amount of the fee for early termination remains constant for the
9 duration of the contract.

10 21. "Fourth Consolidated Amended Complaint" means the Fourth Consolidated
11 Amended Complaint to be filed in this Action by Class Counsel with the Motion for Preliminary
12 Approval of the Settlement.

13 22. "Gentry Action" means the civil action entitled *Gentry v. Cellco Partnership*,
14 Central District of California, Case No. CV 05 7888 GAF.

15 23. "Mail Notice" means notice by postcard, substantially in the form of Exhibit C
16 attached hereto, to be mailed to those Persons identified on the ETF Payer Class Member List.

17 24. "New York Arbitration" means the civil arbitration proceedings entitled *Brown,*
18 *Zobrist & Cellco Partnership d/b/a Verizon Wireless American Arbitration Association*, Case
19 Nos. 11 494 01274 05 and 11 494 0032 05.

20 25. "Nguyen" means the named plaintiff in the Action, Christina Nguyen.

21 26. "Notice" shall mean Mail Notice and Publication Notice.

22 27. "Parties" means Nguyen, White, Brown, Schroer and Verizon Wireless.

23 28. "Person" means any natural person, firm, corporation, unincorporated association,
24 partnership, or other form of legal entity or government body, including its agents and
25 representatives.

26 29. "Preliminary Approval Order" means the order, substantially in the form of
27 Exhibit A attached hereto, in which the Court grants its preliminary approval to this Settlement
28

1 Agreement and preliminarily certifies the Settlement Classes, authorizes dissemination of Notice
2 to the Settlement Classes, and appoints the Settlement Administrator.

3 30. "Plan of Allocation of Settlement Proceeds" means the plan proposed by Class
4 Representatives for the distribution of the Common Fund.

5 31. "Prorated ETF" means an early termination fee based on a contract provision that
6 is structured such that the amount of the fee for early termination varies depending on the length
7 of time that a subscriber has been a party to the contract.

8 32. "Publication Notice" means the long-form and short-form notices, substantially in
9 the form of Exhibits D and E attached hereto. The long-form Publication Notice will be
10 published on the Internet and the short-form Publication Notice will be published in national
11 newspapers, periodicals and/or other related print media as set forth in the Preliminary Approval
12 Order, pursuant to California Rule of Court 3.771(b).

13 33. "Related Litigation" means the New York Arbitration, the Southern District of
14 New York Litigation, the Waudby Action, and the Gentry Action, collectively, including all
15 cross-claims and counter-claims.

16 34. "Request for Exclusion" means a valid request for exclusion from a member of
17 the ETF Assessed Class. To be valid, a request for exclusion must (a) be submitted by the
18 member of the ETF Assessed Class; (b) be submitted to the Settlement Administrator and
19 postmarked by a date not later than 21 days before the Final Approval Hearing; (c) contain the
20 submitter's name, address and telephone number; and (d) otherwise comply with the instructions
21 set forth in the Notice.

22 35. "Settlement Administrator" means such settlement administrator as Class Counsel
23 and Verizon Wireless select, subject to the approval of the Court.

24 36. "Settlement Agreement," "Settlement," or "Agreement" means this Stipulation and
25 Agreement of Settlement, including the attached exhibits.

26 37. "Settlement Classes" means the ETF Assessed Class and the Subscriber Class,
27 collectively.
28

1 38. “Settlement Class Member” means any Person within the ETF Assessed Class or
2 the Subscriber Class that does not submit a timely and valid Request for Exclusion.

3 39. “Schroer” means the named claimant in the New York Arbitration, Harold P.
4 Schroer.

5 40. “Southern District of New York Action” means the civil action entitled *Cellco*
6 *Partnership d/b/a Verizon Wireless, and Verizon Communications Inc. v. Brown, Schroer, and*
7 *Zobrist*, Southern District of New York, 08 CV 00427 (RWS).

8 41. “Subscriber Class” means all persons in the United States who were or are parties
9 to a contract for a wireless telephone personal account with Verizon Wireless that included or
10 includes a provision for a Flat-Rate ETF from July 23, 1999 until the date that Publication Notice
11 commences under the terms of this Settlement Agreement.

12 42. “Third Consolidated Amended Complaint” means the Third Consolidated
13 Amended Complaint Against Verizon Wireless filed in the Action on or about June 24, 2005.

14 43. “Verizon Wireless” means Cellco Partnership d/b/a Verizon Wireless.

15 44. “Verizon Wireless-Related Released Parties” means (a) Verizon Wireless; (b)
16 Verizon Wireless’s counsel; (c) Verizon Wireless’s past, present, and future direct and indirect
17 owners, parents, subsidiaries, and other corporate affiliates; (d) Verizon Wireless’s successors
18 and predecessors and their past, present, and future direct and indirect owners, parents,
19 subsidiaries, and other corporate affiliates; and (d) for each of the foregoing Persons, each of their
20 past, present, or future officers, directors, shareholders, owners, employees, representatives,
21 agents, principals, partners, members, administrators, legatees, executors, heirs, estates,
22 predecessors, successors, or assigns.

23 45. “Verizon Wireless Released Claims” means any and all actions, causes of action,
24 claims, demands, liabilities, obligations, fees, costs, sanctions, proceedings, and/or rights of any
25 nature and description whatsoever, whether liquidated or unliquidated, in law or in equity, that
26 have been asserted by Verizon Wireless in the Action and the Related Litigation by way of cross-
27 complaint. For avoidance of doubt, Verizon Wireless Released Claims does not include claims
28

1 for unpaid ETFs or other indebtedness of the Class-Related Released Parties and Verizon
2 Wireless shall not be deemed to have released such claims.

3 46. “Verizon Wireless’s Counsel” means Munger, Tolles & Olson LLP.

4 47. “Waudby Action” means the civil action entitled *Waudby v. Verizon Wireless et*
5 *al.*, District of New Jersey, Civil Action No. 07-470(FLW)(JJH).

6 48. “White” means the named plaintiff in the Action, Molly White.

7 49. “Zobrist” means the named claimant in the New York Arbitration, Dawn M.
8 Zobrist.

9 ARTICLE III– SETTLEMENT CLASS RELIEF

10 In consideration of a full, complete, and final settlement of the Action, dismissal of the
11 Action with prejudice, dismissal of New York Arbitration with prejudice, and the Releases in
12 Article X below, and subject to the Court’s approval, the Parties agree to the following relief:

13 1. Common Fund

14 Within ten days of the date of entry of the Preliminary Approval Order, Verizon Wireless
15 shall deposit twenty-one million dollars (\$21,000,000) into the Escrow Account for the benefit of
16 the Settlement Classes and Class Counsel, thereby establishing the Common Fund. Any interest
17 generated from the Common Fund shall remain in the Common Fund to be distributed consistent
18 with the terms of this Agreement. In no event shall Verizon Wireless’s monetary liability under
19 this Settlement Agreement exceed the amount of the Common Fund, except as expressly provided
20 in Article IV.1.b.

21 2. Distribution of the Common Fund

22 The Aggregate Fees, Costs, and Expenses shall be paid from the Common Fund consistent
23 with the provisions of Article VI of this Agreement. The remainder of the Common Fund shall
24 be distributed pursuant to a Plan of Allocation to be adopted by the Court separately from the
25 approval of the Settlement. Any distribution to the ETF Assessed Class shall commence only
26 after the Effective Date.

27
28

1 3. Injunctive Relief

2 The Court shall enjoin Verizon Wireless from entering into new customer service
3 agreements for a wireless service personal account in the United States with consumers that
4 contain a Flat-Rate ETF provision. This injunction shall be effective within 30 days of the
5 Effective Date, shall expire two years from that date, and shall be substantially in the form set
6 forth in the proposed Final Approval Order and Judgment attached hereto as Exhibit B.

7 ARTICLE IV – NOTICE AND REQUESTS FOR EXCLUSION

8 1. Mail Notice.

9 a. Within sixty days of the Court’s entry of the Preliminary Approval Order, the
10 Settlement Administrator shall mail the Mail Notice to the last known address of those Persons
11 identified on the ETF Payer Class Member List. The Mail Notice shall be substantially in the
12 same form as the Exhibit C.

13 b. In the event that the number of postcards to be sent to the ETF Payer Class
14 Member List exceeds three million pieces, the Parties shall meet and confer in good faith to
15 discuss an appropriate adjustment to the Mail Notice. Absent agreement of the Parties and
16 approval of the Court, the costs of Mail Notice in excess of costs associated with mailing three
17 million postcards shall be borne by Verizon Wireless and shall not be deducted from the Common
18 Fund.

19 2. Last Known Addresses.

20 Before mailing the Mail Notice as provided above, the Settlement Administrator will use
21 the National Change of Address Databank maintained by the United States Postal Service to
22 update the addresses reflected in Verizon Wireless’s records of those Persons that appear on the
23 ETF Payer Class Member List. There shall be no obligation on the part of the Parties or the
24 Settlement Administrator to attempt to provide further notice to those Persons on the ETF Payer
25 Class Member List.

26 3. Publication Notice

27 Publication Notice to the Settlement Classes shall be provided in the forms approved by
28 the Court in the Preliminary Approval Order, in those newspapers, periodicals, and/or other

1 related print media as set forth in the Preliminary Approval Order. The Publication Notice shall
2 be substantially in the same forms as the exemplars submitted as Exhibits D and E. The
3 Publication Notice shall be published promptly after entry of the Preliminary Approval Order on
4 dates to be agreed upon by the Parties so as to provide the best practical notice to the Settlement
5 Classes. The Parties and the Settlement Administrator shall use best efforts to cause the
6 Publication Notice to commence within 30 days, and to conclude within 58 days, after the date of
7 entry of the Preliminary Approval Order. The publication of the Publication Notice shall be
8 administered by the Settlement Administrator. The cost of publishing the Publication Notice
9 shall be paid for from the Common Fund.

10 4. Notice by Internet Posting

11 The long-form of the Publication Notice shall be posted on the Internet at a website
12 established by the Settlement Administrator commencing on the first date on which Notice is
13 published or mailed under this Settlement Agreement.

14 5. Declarations Of Compliance.

15 The Settlement Administrator shall prepare a declaration attesting to compliance with the
16 mailing, address updating, and publication requirements set forth above. Such declaration shall
17 be provided to Class Counsel and Verizon Wireless's Counsel and filed with the Court no later
18 than 10 days prior to the Final Approval Hearing.

19 6. Best Notice Practicable.

20 The Parties agree, and the Preliminary Approval Order shall state, that compliance with
21 the procedures described in this Article is the best notice practicable under the circumstances and
22 shall constitute due and sufficient notice to the Settlement Classes of the pendency of the Action,
23 certification of the Settlement Classes, the terms of the Settlement Agreement, and the Final
24 Approval Hearing, and shall satisfy the requirements of the California Rules of Court, the
25 California Code of Civil Procedure, the Constitution of the State of California, the United States
26 Constitution, and any other applicable law.

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1 7. Report On Requests For Exclusion.

2 Not later than ten days before the Final Approval Hearing, the Settlement Administrator
3 shall prepare and deliver to Class Counsel, who shall file it with the Court, and Verizon
4 Wireless's Counsel, a report stating the total number of Persons that have submitted timely and
5 valid Requests for Exclusion from the ETF Assessed Class, and the names of such Persons. Such
6 Persons will not be entitled to receive any relief under this Settlement Agreement.

7 8. Inquiries From Settlement Class Members.

8 It shall be the responsibility of Class Counsel to establish procedures for receiving and
9 responding to all inquiries from Settlement Class Members with respect to this Settlement.
10 Verizon Wireless and Verizon Wireless's counsel may respond, but are not required to respond,
11 to such inquiries.

12 ARTICLE V– COURT APPROVAL OF SETTLEMENT

13 1. Preliminary Approval.

14 As soon as practicable after the execution of this Settlement Agreement, Class Counsel
15 and Verizon Wireless's Counsel shall jointly apply for entry of the Preliminary Approval Order in
16 the form of Exhibit A hereto. The Preliminary Approval Order shall include provisions: (a)
17 preliminarily certifying the Settlement Classes for settlement purposes only; (b) preliminarily
18 approving this Settlement and finding this Settlement sufficiently fair, reasonable and adequate to
19 allow Notice to be disseminated to the Settlement Classes; (c) approving the form, content, and
20 manner of the Notice; (d) setting a schedule for proceedings with respect to final approval of this
21 Settlement; (e) providing that, pending entry of a Final Approval Order and Judgment, no
22 Settlement Class Member (either directly, in a representative capacity, or in any other capacity)
23 shall commence or continue any action against Verizon Wireless or other Verizon Wireless-
24 Related Released Parties asserting any of the Class Released Claims; and (f) staying the Action,
25 other than such proceedings as are related to this Settlement.

26 2. Objections To Settlement.

27 Any Settlement Class Member wishing to object to or to oppose the approval of this
28 Settlement and/or the Fee and Cost Application shall file a written objection (with a statement of

1 reasons) with the Court and serve it on the Parties at least twenty-one days before the date of the
2 Final Approval Hearing. Any Settlement Class Member that fails to do so shall be foreclosed
3 from making such objection or opposition. White, Nguyen, Brown and Schroer will file with the
4 Court their brief in support of final settlement approval, in support of final certification of the
5 Settlement Classes, and in response to any objections at least seven days before the date of the
6 Final Approval Hearing. Any Settlement Class Member that fails to file a timely written
7 objection and to appear at the final approval hearing shall have no right to file an appeal relating
8 to the approval of this Settlement.

9 3. Final Approval Hearing.

10 The Parties shall request that the Court, on the date set forth in the Preliminary Approval
11 Order or on such other date that the Court may set, conduct a Final Approval Hearing to:
12 (a) determine whether to grant final approval to this Settlement Agreement and to certify the
13 Settlement Classes; (b) consider any timely objections to this Settlement and the Parties'
14 responses to such objections; (c) rule on the Fee and Cost Application, and (d) rule on any
15 applications for incentive awards; and (d) determine whether or not to adopt the Plan of
16 Allocation. At the Final Approval Hearing, the Parties shall ask the Court to give final approval
17 to this Settlement Agreement. If the Court grants final approval to this Settlement Agreement,
18 then the Parties shall ask the Court to enter a Final Approval Order and Judgment, substantially in
19 the form of Exhibit B attached hereto, which approves this Settlement, certifies the Settlement
20 Classes, authorizes entry of a final judgment, and dismisses the Action with prejudice.

21 4. Disapproval, Cancellation, Termination, Or Nullification Of Settlement.

22 a. Each Party shall have the right to terminate this Settlement Agreement if either (i)
23 the Court denies preliminary approval or final approval to this Settlement Agreement, (ii) the
24 Final Approval Order and Judgment does not become Final by reason of a higher court reversing
25 final approval by the Court, and the Court thereafter declining to enter a further order or orders
26 approving settlement on the terms set forth herein, or (iii) the New York Arbitration is not
27 dismissed within 60 days of the date that all other conditions precedent to the Effective Date have
28 been met. If a Party elects to terminate this Agreement under this paragraph, that Party must

1 provide written notice to the other Parties' counsel within thirty days of the occurrence of the
2 condition permitting termination. Such written notice shall be provided by hand delivery or mail
3 to the Parties' counsel.

4 b. Verizon Wireless shall have the right to terminate this Settlement Agreement if,
5 prior to the date of the Final Approval Order and Judgment, the total number of Persons that have
6 submitted timely and valid Requests for Exclusion from the ETF Assessed Class constitutes
7 greater than 5% of the ETF Assessed Class. If Verizon Wireless elects to terminate this
8 Agreement under this paragraph, Verizon Wireless must provide written notice to the other
9 Parties' counsel on or before the date of the Final Approval Order and Judgment. Such written
10 notice shall be provided by hand delivery or mail to the Parties' counsel.

11 c. If this Settlement Agreement is terminated pursuant to its terms, then: (i) this
12 Settlement Agreement shall be rendered null and void; (ii) this Settlement Agreement and all
13 negotiations and proceedings relating hereto shall be of no force or effect, and without prejudice
14 to the rights of the Parties; and (iii) all Parties shall be deemed to have reverted to their respective
15 status in the Action or Related Litigation as of the date and time immediately preceding the
16 execution of this Settlement Agreement and, except as otherwise expressly provided, the Parties
17 shall stand in the same position and shall proceed in all respects as if this Settlement Agreement
18 and any related orders had never been executed, entered into, or filed, except that the Parties shall
19 not seek to recover from one another any costs incurred in connection with this Settlement.

20 ARTICLE VI – ADMINISTRATIVE EXPENSES, ATTORNEYS' FEES, AND COSTS

21 1. Costs Of Notice.

22 All costs of providing the Notice as provided herein, including the costs of identifying
23 members of the Settlement Classes and the costs of printing, mailing and/or publishing the
24 Notice, shall be paid for out of the Common Fund, subject to the terms hereof. Notwithstanding
25 the foregoing, Verizon Wireless shall bear its own costs incurred in identifying and compiling the
26 ETF Payer Class Member List. In the event that this Settlement Agreement is terminated
27 pursuant to its terms, Verizon Wireless shall bear any costs of providing notice already incurred.
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1 2. Costs Of Administering Settlement.

2 All costs of administering this Settlement, including all fees of the Settlement
3 Administrator and the costs of generating and mailing any checks to be issued as part of this
4 Settlement, shall be paid for out of the Common Fund. In the event that this Settlement
5 Agreement is terminated pursuant to its terms, Verizon Wireless shall bear any costs of
6 administering this Settlement already incurred.

7 3. Attorneys' Fees And Costs.

8 White, Nguyen, Brown, Schroer and/or Class Counsel may make a Fee and Cost
9 Application to be heard at the Final Approval Hearing seeking an award of attorneys' fees in an
10 amount not to exceed \$7,350,000 and reimbursement of expenses. Verizon Wireless will not
11 oppose or undermine the application or solicit others to do so. Attorneys' fees and costs
12 consistent with this paragraph that are approved by the Court shall be paid by the Settlement
13 Administrator out of the Common Fund within three days after the latest of: (a) the date that the
14 Court has entered the Final Approval Order and Judgment; or (b) the date that the New York
15 Arbitration is dismissed with prejudice. Payments under this provision shall be made to the four
16 law firms constituting Class Counsel. Class Counsel shall be solely responsible for further
17 distributing any payments made under this provision.

18 Notwithstanding the foregoing, if for any reason the Court fails to grant final approval to
19 this Settlement Agreement; the Final Approval Order is reversed or rendered void as a result of an
20 appeal; or this Settlement Agreement is voided, rescinded, or terminated for any other reason,
21 then Class Counsel shall return to Verizon Wireless all fees, costs and other payments received by
22 Class Counsel under this Agreement. In such event, the following Persons shall be severally
23 liable for such payments to the extent received by them: (a) the Law Offices of Scott A. Bursor;
24 (b) Bramson Plutzik Mahler & Birkhaeuser LLP.; (c) Franklin & Franklin APC; (d) Coughlin
25 Stoia Geller Rudman & Robbins LLP; and (e) any attorneys of such firms in their individual
26 capacity who receive a share of payments directly from the Common Fund made pursuant to this
27 Agreement. To effectuate this provision, each individual attorney or firm who receives a share of
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1 payments under this provision shall execute a guarantee of repayment in the form attached hereto
2 as Exhibit G.

3 4. Incentive Award.

4 White, Nguyen, Brown, Schroer, and Zobrist, or Class Counsel on their behalf, may make
5 an application to be heard at the Final Approval Hearing for incentive awards to be paid out of the
6 Common Fund in an amount not to exceed \$10,000 per individual. Verizon Wireless will not
7 oppose or undermine the application or solicit others to do so. Not later than fifteen days after the
8 Effective Date, and only in the event that the Effective Date occurs, the Settlement Administrator
9 shall pay out of the Common Fund incentive awards as approved by the Court. These payments
10 shall be compensation and consideration for the efforts of White, Nguyen, Brown, Schroer, and
11 Zobrist as the class representatives in the Action and the Related Litigation.

12 5. Effect On Settlement.

13 The Parties agree that the rulings of the Court regarding the amount of attorneys' fees or
14 costs and any incentive award, and any claim or dispute relating thereto, will be considered by the
15 Court separately from the remaining matters to be considered at the Final Approval Hearing as
16 provided for in this Settlement Agreement and any determinations in that regard will be embodied
17 in a separate order. Any order or proceedings relating to the amount of attorneys' fees or
18 incentive award, including any appeals from or modifications or reversals of any order related
19 thereto, shall not operate to modify, reverse, terminate, or cancel the Settlement Agreement,
20 affect the releases provided for in the Settlement Agreement, or affect whether the Final Approval
21 Order and Judgment becomes Final as defined herein. Similarly, the rulings of the Court
22 regarding the Plan of Allocation, and any claim or dispute relating thereto, will be considered by
23 the Court separately from the remaining matters to be considered at the Final Approval Hearing
24 as provided for in this Settlement Agreement and any determinations in that regard will be
25 embodied in a separate order. Any order or proceedings relating to the Plan of Allocation,
26 including any appeals from or modifications or reversals of any order related thereto, shall not
27 operate to modify, reverse, terminate, or cancel the Settlement Agreement, affect the releases
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1 provided for in the Settlement Agreement, or affect whether the Final Approval Order and
2 Judgment becomes Final as defined herein.

3 ARTICLE VII– RELEASES UPON EFFECTIVE DATE

4 1. Binding and Exclusive Nature of Settlement Agreement.

5 On the Effective Date, the Parties and each and every Settlement Class Member shall be
6 bound by this Settlement Agreement and shall have recourse exclusively to the benefits, rights,
7 and remedies provided hereunder. No other action, demand, suit or other claim may be pursued
8 against the Verizon Wireless-Related Released Parties or the Class-Related Released Parties with
9 respect to the Class Released Claims.

10 2. Releases.

11 On the Effective Date, the Class-Related Releasing Parties shall be deemed to have, and
12 by operation of this Agreement shall have, fully, finally and forever released, relinquished and
13 discharged the Verizon Wireless-Related Released Parties from any and all of the Class Released
14 Claims; and Verizon Wireless shall be deemed to have, and by operation of this Agreement shall
15 have, fully, finally and forever released, relinquished and discharged the Class-Related Released
16 Parties from any and all of the Verizon Wireless Released Claims.

17 3. Stay And Dismissal Of The Action And Related Litigation.

18 The Parties agree to request that the Court, in connection with Preliminary Approval, issue
19 an immediate stay of the Action. The Parties further agree that, within two business days of the
20 date of entry of the Final Approval Order and Judgment, they will file a motion or other request
21 in the Southern District of New York Action for the entry of a stipulated order and judgment
22 substantially in the form of Exhibit H hereto, vacating class certification and related awards in the
23 New York Arbitration and ordering the dismissal of the New York Arbitration. The Parties
24 further agree to cooperate in seeking the dismissal all other actions that challenge the legal
25 validity of Flat-Rate ETFs, including without limitation the Gentry Action and the Waudby
26 Action.

1 4. Waiver of Unknown Claims.

2 On the Effective Date, the Verizon Wireless and the Class-Related Releasing Parties shall
3 be deemed to have, and by operation of this Agreement shall have, with respect to the subject
4 matter of the Class Released Claims and the Verizon Wireless Released Claims, expressly waived
5 the benefits of any statutory provisions or common law rule that provides, in sum or substance,
6 that a general release does not extend to claims which the party does not know or suspect to exist
7 in its favor at the time of executing the release, which if known by it, would have materially
8 affected its settlement with any other party. In particular, but without limitation, Verizon
9 Wireless and the Class-Related Releasing Parties waive the provisions of California Civil Code §
10 1542 (or any like or similar statute or common law doctrine), and do so understanding the
11 significance of that waiver. Section 1542 provides:

12 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS**
13 **WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT**
14 **TO EXIST IN HIS OR HER FAVOR AT THE TIME OF**
15 **EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM**
OR HER MUST HAVE MATERIALLY AFFECTED HIS OR
HER SETTLEMENT WITH THE DEBTOR.

16 Neither this paragraph nor any other provision of this Settlement Agreement shall be construed
17 to effectuate a general release of claims. The releases provided for in this Settlement Agreement
18 are limited to the Class Released Claims as defined in Article II(7) above and the Verizon
19 Wireless Released Claims as defined in Article II(45) above.

20 5. Assumption of Risk.

21 In entering into this Settlement Agreement, each of the Parties assumes the risk of any
22 mistake of fact or law. If either Party should later discover that any fact which the Party relied
23 upon in entering this Agreement is not true, or that the Party's understanding of the facts or law
24 was incorrect, the Party shall not be entitled to modify, reform, or set aside this Settlement
25 Agreement, in whole or in part, by reason thereof.

26 **ARTICLE VIII – EFFECT OF FCC RULINGS ON FEDERAL PREEMPTION**

27 In the event that the Federal Communications Commission (the "FCC") issues a ruling or
28 order preempting state regulation of ETFs or any of the Class Released Claims, in whole or in

1 part, Verizon Wireless will not seek to vacate this Settlement Agreement on the basis of such a
2 ruling or order. This Article in no way limits Verizon Wireless's rights to otherwise vacate this
3 Settlement Agreement consistent with its terms.

4 ARTICLE IX – LIMITATIONS ON USE OF SETTLEMENT AGREEMENT

5 1. No Admission.

6 Neither the acceptance by Verizon Wireless of the terms of this Settlement Agreement nor
7 any of the related negotiations or proceedings constitutes an admission with respect to the merits
8 of the claims alleged in the Complaint, the validity of any claims that could have been asserted by
9 any of the Settlement Class Members in the Complaint, the liability of Verizon Wireless in the
10 Action or the Related Litigation, or the validity, legality, or fairness of the Flat-Rate ETF or the
11 Prorated ETF. Verizon Wireless specifically denies any liability or wrongdoing of any kind
12 associated with the claims alleged in the Action and the New York Arbitration. Neither the
13 acceptance by White, Nguyen, Brown and Schroer of the terms of this Settlement Agreement nor
14 any of the related negotiations or proceedings constitutes an admission with respect to the merits
15 of the claims alleged in the Action or the Related Litigation.

16 2. Limitations on Use.

17 This Agreement shall not be used, offered, or received into evidence in the Action for any
18 purpose other than to enforce, to construe, or to finalize the terms of the Settlement Agreement
19 and/or to obtain the preliminary and final approval by the Court of the terms of the Settlement
20 Agreement. Neither this Agreement nor any of its terms shall be offered or received into
21 evidence in any other action or proceeding.

22 ARTICLE X – MISCELLANEOUS PROVISIONS

23 1. Amendment Of Third Consolidated Amended Complaint; Class Certification.

24 Within seven (7) days of the Court's entry of the Preliminary Approval Order, the named
25 plaintiffs in this Action shall amend the Third Consolidated Amended Complaint to modify the
26 definition of the classes to be certified to state:

27 "ETF Assessed Class: All persons in the United States who were parties to a contract for
28 a wireless telephone personal account and were billed a Flat-Rate ETF by Verizon Wireless

1 and/or its legacy companies from July 23, 1999 until the date that Publication Notice commences
2 under the terms of this Settlement Agreement. The ETF Assessed Class includes such persons
3 whether or not they paid any portion of the ETF, either to Verizon Wireless or to any outside
4 collection agency.”

5 “Subscriber Class: All persons in the United States who were or are parties to a contract
6 for a wireless telephone personal account with Verizon Wireless that included or includes a
7 provision for a Flat-Rate ETF from July 23, 1999 until the date that Publication Notice
8 commences under the terms of this Settlement Agreement.”

9 The Third Consolidated Amended Complaint shall also be amended to delete as class
10 representatives Delores Johnson and Christine Morton.

11 Defendant shall stipulate to these amendments, solely for purpose of this Settlement and
12 without prejudice to its rights absent this Settlement, including, without limitation, rights to move
13 to compel arbitration of any claims asserted in this Action and Related Litigation and to contest
14 class certification in either this Action or Related Litigation. The Third Consolidated Amended
15 Complaint shall not be amended in any other respect. Should this Settlement not be finalized for
16 any reason, the Parties shall stipulate to an order striking the Fourth Consolidated Amended
17 Complaint, and the Third Consolidated Amended Complaint shall be the operative pleading in
18 this Action.

19 2. Confidentiality Agreement. The Parties agree that, prior to the provision of information to
20 the Settlement Administrator, Class Counsel, counsel for Verizon Wireless, and the Settlement
21 Administrator will execute the “Confidentiality Agreement Relating to Settlement Agreement,”
22 substantially in the form of Exhibit I hereto, pertaining to information and documents provided to
23 the Settlement Administrator by Verizon Wireless.

24 3. No Assignment.

25 Each Party represents, covenants, and warrants that he or it has not directly or indirectly
26 assigned, transferred, encumbered, or purported to assign, transfer, or encumber any portion of
27 any liability, claim, demand, cause of action, or rights that he or it herein releases.

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1 4. Binding On Assigns.

2 This Agreement shall be binding upon and inure to the benefit of the Parties and their
3 respective heirs, trustees, executors, successors, and assigns.

4 5. Captions.

5 Titles or captions contained herein are inserted as a matter of convenience and for
6 reference, and in no way define, limit, extend, or describe the scope of this Agreement or any
7 provision hereof. Each term of this Agreement is contractual and not merely a recital.

8 6. Class Member Signatures.

9 It is agreed that, because the Settlement Class Members are so numerous, it is impractical
10 to have each Settlement Class Member execute this Agreement. The Notice will advise all
11 Settlement Class Members of the binding nature of the Releases and of the remainder of this
12 Agreement, and in the absence of a valid and timely Request for Exclusion, such Notice shall
13 have the same force and effect as if each Settlement Class Member executed this Agreement.

14 7. Construction.

15 The Parties agree that the terms and conditions of this Settlement Agreement are the result
16 of lengthy, intensive arms-length negotiations between the Parties and that this Agreement shall
17 not be construed in favor of or against any Party by reason of the extent to which any Party, or his
18 or its counsel, participated in the drafting of this Agreement.

19 8. Counterparts.

20 This Agreement and any amendments hereto may be executed in one or more
21 counterparts, and either Party may execute any such counterpart, each of which when executed
22 and delivered shall be deemed to be an original and both of which counterparts taken together
23 shall constitute but one and the same instrument. A facsimile or PDF signature shall be deemed
24 an original for all purposes.

25 9. Governing Law.

26 Construction and interpretation of the Agreement shall be determined in accordance with
27 the laws of the State of California, without regard to the choice-of-law principles thereof.

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1 10. Integration Clause.

2 This Agreement, including the Exhibits referred to herein, which form an integral part
3 hereof, contains the entire understanding of the Parties with respect to the subject matter
4 contained herein. There are no promises, representations, warranties, covenants, or undertakings
5 governing the subject matter of this Agreement other than those expressly set forth in this
6 Agreement. This Agreement supersedes all prior agreements and understandings among the
7 Parties with respect to the settlement of the Action. This Agreement may not be changed, altered
8 or modified, except in a writing signed by the Parties and approved by the Court. This
9 Agreement may not be discharged except by performance in accordance with its terms or by a
10 writing signed by the Parties.

11 11. Jurisdiction.

12 The Court shall retain jurisdiction, after entry of the Final Approval Order and Judgment,
13 with respect to enforcement of the terms of this Settlement, and all Parties and Settlement Class
14 Members submit to the exclusive jurisdiction of the Court with respect to the enforcement of this
15 Settlement and any dispute with respect thereto.

16 12. Presiding Judicial Officer.

17 The Parties agree to jointly request that The Honorable Bonnie Sabraw preside, by
18 designation if necessary, over the settlement approval process, including without limitation any
19 application for an award of attorneys' fees, costs, expenses and incentive awards or for approval
20 of a Plan of Allocation. In the event that Judge Sabraw is unable to preside, the Parties agree to
21 jointly request that the settlement approval process be presided over by a different judge from the
22 Superior Court of California, County of Alameda.

23 13. No Collateral Attack.

24 This Agreement shall not be subject to collateral attack by any Settlement Class Member
25 at any time on or after the Effective Date. Such prohibited collateral attacks shall include, but
26 shall not be limited to, claims that a Settlement Class Member's claim was improperly denied,
27 that the payment to a Settlement Class Member was improperly calculated, and/or that a
28 Settlement Class Member failed to receive timely notice of the Settlement Agreement.

1 14. Parties' Authority.

2 The signatories hereto represent that they are fully authorized to enter into this Agreement
3 and bind the Parties to the terms and conditions hereof.

4 15. Receipt Of Advice Of Counsel.

5 The Parties acknowledge, agree, and specifically warrant to each other that they have read
6 this Settlement Agreement, have received legal advice with respect to the advisability of entering
7 into this Settlement, and fully understand its legal effect.

8 16. Waiver Of Compliance.

9 Any failure of any Party to comply with any obligation, covenant, agreement, or condition
10 herein may be expressly waived in writing, to the extent permitted under applicable law, by the
11 Party or Parties entitled to the benefit of such obligation, covenant, agreement, or condition. A
12 waiver or failure to insist upon compliance with any representation, warranty, covenant,
13 agreement, or condition shall not operate as a waiver of, or estoppel with respect to, any
14 subsequent or other failure.

15 17. Terms and Conditions Not Superseded.

16 Nothing in this Agreement abrogates, supersedes, modifies, or qualifies in any way any of
17 the contractual terms and conditions applicable in the ordinary course to the relationship between
18 Verizon Wireless and its customers, or to the services provided by Verizon Wireless and
19 purchased by its customers.

20 18. Settlement Conditioned on Certain Matters.

21 This entire Settlement Agreement is contingent upon the Parties reaching agreement on
22 the contents of the exhibits and ancillary agreements hereto.

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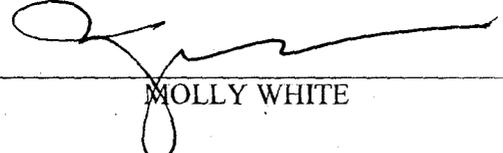
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IN WITNESS WHEREOF, THE PARTIES HAVE EXECUTED THIS SETTLEMENT
AGREEMENT ON THE DATES SET FORTH BELOW:

DATED: July 11, 2008 
MOLLY WHITE

DATED: _____
CHRISTINA NGUYEN

DATED: _____
PATRICIA BROWN

DATED: _____
HAROLD P. SCHROER

DATED: _____
CELLCO PARTNERSHIP d/b/a VERIZON
WIRELESS

By: _____

Its: _____

1 IN WITNESS WHEREOF, THE PARTIES HAVE EXECUTED THIS SETTLEMENT
2 AGREEMENT ON THE DATES SET FORTH BELOW:

3 DATED:

4 _____
MOLLY WHITE

5 DATED:

07/11/08

6 Christina
CHRISTINA NGUYEN

7 DATED:

8 _____
PATRICIA BROWN

9 DATED:

10 _____
HAROLD P. SCHROER

11 DATED:

12 CELLCO PARTNERSHIP d/b/a VERIZON
13 WIRELESS

14 By: _____

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IN WITNESS WHEREOF, THE PARTIES HAVE EXECUTED THIS SETTLEMENT
AGREEMENT ON THE DATES SET FORTH BELOW:

DATED: _____
MOLLY WHITE

DATED: _____
CHRISTINA NGUYEN

DATED: 7/11/08 _____
PATRICIA BROWN

DATED: _____
HAROLD P. SCHROER

DATED: _____
CELLCO PARTNERSHIP d/b/a VERIZON
WIRELESS

By: _____

Its: _____

STIPULATION AND AGREEMENT OF SETTLEMENT

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IN WITNESS WHEREOF, THE PARTIES HAVE EXECUTED THIS SETTLEMENT
AGREEMENT ON THE DATES SET FORTH BELOW:

DATED: _____
MOLLY WHITE

DATED: _____
CHRISTINA NGUYEN

DATED: _____
PATRICIA BROWN

DATED: 7/11/08 _____
HAROLD P. SCHROER

DATED: _____
CELLCO PARTNERSHIP d/b/a VERIZON
WIRELESS

By: _____

Its: _____

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IN WITNESS WHEREOF, THE PARTIES HAVE EXECUTED THIS SETTLEMENT
AGREEMENT ON THE DATES SET FORTH BELOW:

DATED: _____
MOLLY WHITE

DATED: _____
CHRISTINA NGUYEN

DATED: _____
PATRICIA BROWN

DATED: _____
HAROLD P. SCHROER

DATED: 7-11-08 CELLCO PARTNERSHIP d/b/a VERIZON
WIRELESS

By: Parent Et

Its: Deputy General Counsel