SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

RAMZY AYYAD, et al., Plaintiffs, v. SPRINT SPECTRUM, L.P., Defendant.	Case No. RG03-121510 PROPOSED STATEMENT OF DECISION [C.C.P § 632, CRC § 232]

SUMMARY.

Plaintiffs allege that the Early Termination Fees ("ETF") in Sprint's consumer contracts is an unlawful penalty under Civil Code 1671(d) and otherwise. 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.

PROCEDURAL BACKGROUND

This case was tried to the Court and to a jury. The Court set out the responsibilities of the Court and the jury in the Orders of March 17, 2008, April 17, 2008, and May 30, 2008. The Court decides whether federal law preempts the claims; whether the ETFs are an alternative means of performance; whether the ETFs are a lawful liquidated damages provision under Civil Code 1671(d), and the monetary relief, if any, under the UCL and the claim for unjust enrichment. The jury determined the amount of early termination fees paid by Plaintiffs; whether the members of the class breached their contracts with Sprint and, if so, the amount of Sprint's actual damages on its cross-claim.

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

FINDINGS OF FACT.

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

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

In 2000 Sprint decided to offer term contracts with a $150 ETF. Sprint's goal in offering term contracts with ETFs was to decrease the number of customers who leave (churn). Pryor Depo. at 29. Sprint considered three factors when setting the amount of the ETF: what its competitors were doing; how ETFs would financially impact Sprint; and customer inputs, including customer acceptance. Pryor Depo. at 28; 32-33.

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

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

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

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

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

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

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

<u>Sprint's business during the class period.</u> Sprint's business during the class period operated and evolved in ways that affect the Court's analysis but were not the focus of the parties' evidence or argument.

Sprint charged ETFs each time a subscriber terminated a contract before the completion of a term contract. Sprint did not, however, charge a single ETF each time a subscriber terminated a single contract. Sprint charged a separate ETF for each phone line that was terminated early. Therefore, for example, a subscriber with a contract for a $100/month low monthly minute family plan with four phones would be subject to $700 in ETFs for terminating the contract early, whereas another subscriber with a contract for a high monthly minute $100/month plan with one phone would be subject to a $175 ETF for terminating the contract early. Despite the fact that ETFs were linked to phone lines and not to subscribers or to accounts, almost all the evidence was presented in the context of the number of subscribers, the revenue per subscriber, cost per subscriber, and so forth. There is an evidentiary disconnect between charging ETFs on a per line basis and the evidence presented on a per-subscriber or per-account basis.

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

<u>Effect of the ETF - basic facts.</u> Plaintiffs and Sprint stipulated to these facts:

The class included 1,986,537 persons.

The average minimum recurring charge ("MRC") per subscriber per month was $49.16.

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

Sprint's average lost MRC revenue per early termination was $651.12.

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

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

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

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

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

represented a significant percentage of Sprint's subscriber base. TR at 435 and 1372. From this information, Dr. Selwyn concluded that beyond a fixed cost base number of $7-8 billion per year opex and PPE were each avoidable costs. TR at 432- 437; 504-05. Dr. Selwyn concluded that for each customer-month of MRC revenue ($49.16) Sprint lost only $0.70. TR at 512-13 and 1020. Stated otherwise, Dr. Selwyn concluded that when a customer terminated early, Sprint could avoid costs representing 98.6% of the lost MRC revenues.

An integral part of Dr. Selwyn's analysis was his observation that roughly 30% of Sprint's income was from optional services and his conclusion that Sprint's profit margin on optional services was 90%. Dr. Selwyn concluded that Sprint made little to no profit (1.4% on the dollar) on MRC for providing basic services and made most of its profit (90% on the dollar) from charges for optional services.

Dr. Selwyn then calculated Sprint's avoidable costs. Dr. Selwyn multiplied the weighted average monthly lost profit per subscriber for MRC services ($0.70) by the average number of months remaining on the contract term (13.25 months), calculating that Sprint's lost profits averaged $9.24 per class member. TR. at 451-52. Dr. Selwyn determined that Sprint charged the 1,986,537 classmembers $299,470,408 in ETFs even though Sprint's actual losses were only $18,425,130. TR at 1468-70.

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

(1) Sprint argues that Dr. Selwyn improperly treated sunk costs as avoidable. TR at 695:9-25. The Court finds that as a matter of economics, sunk costs are not avoidable. On the facts of this case, experts can disagree about whether to analyze a regularly

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

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

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

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

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

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

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

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

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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.

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

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

(1) Plaintiffs argue that Baliban's avoidable cost calculations are based entirely on data from 3Q06 and completely ignore the first 7 years of the class period. TR at 1312. The Court finds that Baliban made appropriate cross-checks to satisfy himself and the Court that the data from 3Q06 was representative.

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

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

PREEMPTION - LEGAL ANALYSIS.

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

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

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

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

The Court finds that Congress intended that "rates charged by a commercial mobile service" are what a cellular carrier charges its customers for the services it provides. The definition of "rates charged" as limited to charges for services provided is consistent with the plain language of the statute, the legislative history, *Ball v. GTE Mobilnet* (2000) 81 Cal.App.4th 529, 538, and *In re Southwestern Bell*, 14 FCCR 19898, para 19. 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.

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

PREEMPTION – EVIDENCE AND CONCLUSION.

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

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

<u>Whether the ETF is objectively part of its rate plans.</u> Sprint's ETFs are objectively bundled with its handset sales and the rates in its various service plans. Both

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

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

ALTERNATIVE MEANS OF PERFORMANCE – LEGAL ANALYSIS.

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

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2 In *In the matter of Petition of Pittencrieff Communications, Inc. for Declaratory Ruling Regarding 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.'"

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

ALTERNATIVE MEANS OF PERFORMANCE – EVIDENCE AND CONCLUSION.

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

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

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

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

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

UNLAWFUL LIQUIDATED DAMAGES PROVISION – LEGAL.

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

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

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

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

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

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

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

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

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

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

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

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.

violation of a penal ordinance does not of itself create a private nuisance *per se*"). (fn4) This is particularly so with violations of Civil Code 1671(d). "If a liquidated damages provision is declared void under section 1671(d), the consumer is still liable for the actual damages caused by his or her breach of the contract." *In re Cellphones*, Case No. A11547, at 8. If Civil Code 1671(d) were focused entirely on the motivation of a defendant in setting the amount of liquidated damages, then a liquidated damages clause could be void under the statute even though the cross-claims for actual damages resulted in a net monetary judgment in favor of the defendant.

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

In considering the "reasonable endeavor" requirement as a "reasonableness" requirement, the Court is not disregarding either *In re Cellphones*, Case No. A11547, at

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4 A public entity may pursue and prevail on a claim for a statutory violation even where there is no private injury. For example, in *Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1040, property owners alleged violations of federal 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.

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

UNLAWFUL LIQUIDATED DAMAGES PROVISION – EVIDENCE AND CONCLUSION.

<u>Impracticability of fixing the amount of actual damages.</u> Sprint's actual damages for each customer would be the amount of its lost revenue less the amount of its avoidable costs. (fn5)

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

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

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5 The Court will ignore the possibility that Sprint might suffer consequential damages from the 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.

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

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

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

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

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

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

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

<u>Other factors.</u> Consistent with the suggestion in *Dyer Bros* that the Court can consider a variety of factors in the judicially created reasonableness test, the Court considers other factors.

Sprint's ETF was set as a fixed flat fee without regard to the amount of Sprint's sunk costs (handset subsidies), the term of the contract (1 year or 2 year), or the monthly recurring charge on the contract. Sprint's ETF did not vary depending on the months remaining in a term contract. These facts resemble those in *Smith v. Royal Mfg. Co.* (1960) 185 Cal.App.2d 315, where parties entered into a one year contract for the purchase of 100 coffee vending machines at a price of $300 per machine and the contract stated that the purchaser would forfeit $5,100 as liquidated damages if he failed or refused to fulfill the terms of the agreement. The Court stated, "Here, the damages were the same whether the breach occurred after one or 99 machines were taken by Montgomery. Where a fixed sum is agreed upon as liquidated damages for one of several breaches of varying degree, it is to be inferred that a penalty was intended." 185 Cal.App.2d at 324.

<u>Effect of the liquidated damage amount – Court's independent analysis.</u> (fn6) The effect analysis requires the Court to determine whether the ETF approximates Sprint's actual damages. Sprint's estimated damages are its lost revenue less its avoidable costs. This is not a simple calculation. There is a smorgasbord of legal considerations, expert economic approaches, and expert factual evidence. The Court decides as follows.

Monthly Recurring Charge ("MRC") or Average Revenue Per Unit ("ARPU"). MRC is the appropriate measure of Sprints' lost revenue. This is suggested by Sprint's terms and conditions, which states "If Services are terminated before the end of your current billing cycle, (1) the MRC is not prorated to the date of termination…." and limits Sprint's liability to consumers with reference to the MRC. Exh 630 at 000093 and 97.

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

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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.

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

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

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

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

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

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

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7 The distinction between avoidable costs and non-avoidable overhead is a fact issue. *Vitex Mfg. Corp. v. Caribtex Corp.* (3rd Cir., 1967) 377 F.2d 795, 796 ("under the facts presented, the district court was not compelled to consider Vitex's overhead costs"). The 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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8 Addressing another issue, the Court previously noted its concern with the specter that the Court and the jury might make inconsistent factual findings. Order of 2/14/05 at 5:16-19. "It is a well 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.

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

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

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

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

By way of dicta, the Court also considers the plain language of the verdict and its suggestion that Sprint's total actual damages from early terminations was $226 million when Sprint had charged $299 million in ETFs. This reading of the verdict suggests that Sprint's average actual damages per subscriber were $132, or $43 less than the $175 ETF. This could be restated as an overstatement of 32% or an aggregate overcharge of $73,000,000. It is unclear whether this is a significant overstatement or within the range of reasonable estimations when setting liquidated damages. The Court reviews the case law.

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

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

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

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

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

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

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

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

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

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

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

THE REMAINING CLAIMS – EVIDENCE.

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.

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

Plaintiffs cannot prevail on their claim for unjust enrichment. Although the ETF was unlawful, the net result of the ETF was that the class benefited. Plaintiffs have not demonstrated that it would be unjust to permit Sprint to retain the ETFs it has collected. *Cal. Fed. Bank v. Matreyek* (1992) 8 Cal. App. 4th 125, 131.

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

SPRINT'S AFFIRMATIVE DEFENSES TO PLAINTIFFS' CLAIMS.

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

SPRINT'S CONTINGENT CROSS-CLAIM AGAINST THE CLASS.

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

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

THE OFFSET.

Sprint has charged $299 million in ETFs and collected $73 million in ETFs. Because the ETF is not valid under Civil Code 1671(d), Sprint must return the $73 million to the class and reverse the charges on the $226 million that has been charged but not collected.

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

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

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

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

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

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

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

CONCLUSION.

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

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

PROCEDURE.

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

Dated: July __, 2008

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Judge Bonnie Sabraw