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REC'D JUL 18 2005

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OF CALIFORNIA, INC.
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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF ALAMEDA

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11 **Coordination Proceeding**
Special Title (Rule 1550(b))

Judicial Counsel
Coordination Proceeding
No. 4332

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17 **CELLULAR TERMINATION FEE CASES**

**NEXTEL'S ANSWER TO
PLAINTIFFS' THIRD
CONSOLIDATED AMENDED
COMPLAINT [EARLY
TERMINATION FEES]
AGAINST NEXTEL
DEFENDANTS**

Filing Date: July 23, 2003
Trial Date: None Set

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GENERAL DENIAL

Pursuant to Cal. Civ. Proc. Code § 431.30, defendants Nextel of California, Inc. and Nextel Communications, Inc. (collectively "Nextel") deny, generally and specifically, each and every allegation contained in the Third Consolidated Amended Complaint ("Complaint"). Nextel further denies that plaintiffs have been damaged in any sum, or at all, by reason of any act or omission on the part of Nextel or (as applicable) on the part of Nextel's respective agents, employees, servants, or representatives, or any of them.

AFFIRMATIVE DEFENSES

For its affirmative defenses, Nextel alleges:

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Cause of Action)

1. The Complaint fails to state facts sufficient to constitute a cause of action upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

(Consent)

2. Plaintiffs consented to all the acts and omissions about which plaintiffs now complain.

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THIRD AFFIRMATIVE DEFENSE

(Estoppel)

3. Plaintiffs are estopped by their own actions from asserting their claims against Nextel.

FOURTH AFFIRMATIVE DEFENSE

(Equitable Relief Inappropriate)

4. Plaintiffs are not entitled to equitable relief on their claims as they have an adequate remedy at law.

FIFTH AFFIRMATIVE DEFENSE

(Representative Action Inappropriate)

5. The Complaint fails to state an adequate basis for a representative action under California Business & Professions Code § 17200, et seq.

SIXTH AFFIRMATIVE DEFENSE

(Privilege)

6. With respect to one or more of the purported causes of action set forth in the Complaint, any of the acts alleged to have been performed by Nextel, if performed at all, were privileged acts.

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SEVENTH AFFIRMATIVE DEFENSE

(Failure to Mitigate)

7. Plaintiffs have failed to act reasonably to mitigate their damages, if any.

EIGHTH AFFIRMATIVE DEFENSE

(No Injury)

8. Plaintiffs' claims are barred because plaintiffs have not sustained any cognizable injury.

NINTH AFFIRMATIVE DEFENSE

(Preemption)

9. Plaintiffs' claims are preempted by federal law, including the Federal Communications Act.

TENTH AFFIRMATIVE DEFENSE

(Laches)

10. Plaintiffs claims are barred by the equitable doctrine of laches.

ELEVENTH AFFIRMATIVE DEFENSE

(Setoff)

11. Plaintiffs' recovery, if any, should be setoff against any and all amounts that plaintiffs owe to Nextel as damages and/or contract sums, and if and to the extent that any early termination fee is held unenforceable, all other amounts, including damages

1 and/or contract sums that should then be due to Nextel for the Plaintiffs' early
2 termination(s).

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4 TWELFTH AFFIRMATIVE DEFENSE

5 (Unclean Hands)

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7 12. Plaintiffs' claims are barred by the doctrine of unclean hands.

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9 THIRTEENTH AFFIRMATIVE DEFENSE

10 (No Standing)

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12 13. Plaintiffs' claims are barred because plaintiffs lack standing to assert any
13 claims against Nextel.

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15 FOURTEENTH AFFIRMATIVE DEFENSE

16 (Statute of Limitations)

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18 14. Some or all of the causes of action alleged in Plaintiffs' Amended
19 Complaint are barred by the statutes of limitations, including, but not limited to, the
20 limitations periods set forth in California Code of Civil Procedure § § 337, 338, 339 and
21 340, California Civil Code § 1783, and California Business & Professions Code § 17208.

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23 FIFTEENTH AFFIRMATIVE DEFENSE

24 (Class Action Inappropriate)

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26 15. With respect to each and every allegation of the Complaint as they relate to
27 the request for class certification, class certification is not appropriate because there is a
28 lack of:

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- (a) numerosity;
- (b) commonality or community of interest;
- (c) typicality;
- (d) an ascertainable class;
- (e) adequate representation;
- (f) appropriateness of relief to the putative class as a whole;
- (g) predominance of common questions over questions affecting individual class members;
- (h) substantial benefit to the litigants and the court; and
- (i) superiority of a class action to other available methods for fair and efficient adjudication.

SIXTEENTH AFFIRMATIVE DEFENSE

(Waiver)

16. Plaintiffs have waived any right to assert each of the purported causes of action set forth in the Complaint.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Adequate Remedy at Law)

17. Plaintiffs' claims for equitable relief, including his claims for restitution and injunction, are barred because plaintiffs, members of the potential class and members of the general public have an adequate remedy at law.

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EIGHTEENTH AFFIRMATIVE DEFENSE

(Intervening Acts of Others)

18. Nextel is informed and believes and on that basis alleges that the damages alleged in plaintiffs' Complaint, if proved, were caused by persons and entities other than Nextel, including but not limited to various unidentified intermediaries involved in each individual transaction at issue in this lawsuit. Such intervening and superseding conduct of others bars and/or diminishes recovery, if any, by plaintiffs against Nextel.

NINETEENTH AFFIRMATIVE DEFENSE

(Constitutional Defects in § 17200, *et seq.*)

19. Any award of restitution under California Business & Professions Code § 17203 based upon asserted interests or injuries of the general public in this case would violate the Due Process Clause to the United States Constitution.

TWENTIETH AFFIRMATIVE DEFENSE

(Disgorgement Not Available)

20. Any award of disgorgement would violate California law including, but not limited to, the California Supreme Court's decision in Korea Supply Co. v. Lockheed Martin, 29 Cal. 4th 1134 (2003).

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TWENTY-FIRST AFFIRMATIVE DEFENSE

(Constitutional Defects with Punitive Damages)

21. The imposition of punitive damages in this case would violate the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and would fail to provide due process under Article I, section 7 of the California Constitution, and would constitute an excessive fine under the Excessive Fines clause of the California Constitution, because the standards of liability for punitive damages in California are unduly vague and subjective, and permit retroactive, random, arbitrary and capricious punishment that serves no legitimate governmental interest.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Alternative Means of Performance)

22. The early termination fees that are the subject of the Complaint are not improper liquidated damages because, among other reasons, they provide an alternative means by which Nextel customers may perform the terms of their contracts with Nextel.

TWENTY-THIRD AFFIRMATIVE DEFENSE

(Accord and Satisfaction)

23. Plaintiffs have received and accepted full satisfaction of their claims, if any.

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TWENTY-FOURTH AFFIRMATIVE DEFENSE

(Additional Affirmative Defense)

24. Nextel has not completed its investigation and discovery regarding the facts and claims asserted by plaintiffs. Accordingly, Nextel reserves the right to assert such additional affirmative defenses as necessary based on their ongoing investigation and discovery.


PRAYER FOR RELIEF

WHEREFORE, Nextel prays for relief as follows:

1. That plaintiffs take nothing by reason of their Complaint, that the Complaint be dismissed with prejudice in its entirety, and that judgment be entered in favor of defendants;
2. That defendants be awarded attorney's fees and costs of suit incurred in defending this action;
3. For such other and further relief as the Court may deem just and proper.

DATED: July 15, 2005

QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP

By 
Michael L. Fazio
Dominic Surprenant
Attorneys for Defendants
Nextel of California, Inc. and Nextel
Communications, Inc.

PROOF OF SERVICE

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STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 865 South Figueroa Street, 10th Floor, Los Angeles, CA 90026.

On July 15, 2005, I caused the foregoing document(s) described as

*Nextel's Answer to Plaintiffs' Third Consolidated Amended Complaint
[Early Termination Fees] Against Nextel Defendants*

to be served on all interested parties in this' action.

By placing the original true copies thereof enclosed in sealed envelopes addressed as follows:

See Attached Service List

BY MAIL

I placed such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon full prepaid.

As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more that one day after date of deposit for mailing in affidavit.

BY TELECOPIER By transmitting the above listed document(s) to the fax number(s) set forth on this date.

BY FEDERAL EXPRESS by placing the document(s) listed above in such envelope for deposit with FEDERAL EXPRESS to be delivered via priority overnight service to the persons at the addresses set forth above.

Executed on July 15, 2005, at Los Angeles, California.

(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Sandra Acosta
Print Name


Signature

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