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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

In re: CELLPHONE TERMINATION) J.C.C.P. 4332
FEE CASES)
) ORDER (1) GRANTING MOTION OF
) PLAINTIFFS FOR CLASS
) CERTIFICATION OF AN ETF PAYER
) CLASS; (2) DENYING MOTION OF
) PLAINTIFFS FOR CLASS
) CERTIFICATION OF A CURRENT
) SUBSCRIBER CLASS; AND (3)
) DENYING MOTION OF BARARY
) PLAINTIFFS FOR CLASS
) CERTIFICATION OF A NEXTEL ETF
) PAYER SUBCLASS.

Date: June 1, 2006
Time: 10:00 am
Dept.: 22

The motion of Plaintiffs for class certification on the ETF complaints in this coordinated action came on regularly for hearing on June 1, 2006, in Department 22 of this Court, the Honorable Ronald M. Sabraw presiding. After consideration of the briefing and the oral argument, IT IS ORDERED: (1) The motion of Plaintiffs for class certification of the ETF Payer classes is GRANTED; (2) The motion of Plaintiffs for class certification of the ETF Current Subscriber class is DENIED; (3) The motion of the Barary Plaintiffs for class certification of the Nextel ETF Payer Subclass is DENIED.

1 FACTUAL BACKGROUND

2 This is a coordinated proceeding that includes claims against both Verizon and
3 Sprint/Nextel alleging that their consumer contracts include Early Termination Fees
4 (ETFs) that are unconscionable contract terms and/or unlawful liquidated damages
5 provisions. Plaintiffs seek to certify two classes in each ETF case: (1) a ETF Payer class
6 that has paid and/or been charged an ETF and seeks the return of money and/or the
7 cancellation of amounts due and (2) a Current Subscriber class that seeks injunctive
8 and/or declaratory relief that the ETF provisions in their contracts are not enforceable.
9 Plaintiff Luis Ramirez seeks class certification of a Nextel ETF Payer Subclass.
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12 THE CLAIMS, DEFENSES, AND CROSS-CLAIMS.

13 Class certification is determined with reference to each claim asserted, and must
14 take into account whether a class is appropriate for each claim. Because commonality is
15 determined based on the elements of the claims asserted, the Court must examine the
16 issues framed by the pleadings and the law applicable to the causes of action alleged.
17 *Quacchia v. DaimlerChrysler Corp.* (2004) 122 Cal. App. 4th 1442, 1454; *Hicks v.*
18 *Kaufman & Broad Home Corp.* (2001) 89 Cal. App. 4th 908, 916 fn 22.
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21 The ETF complaints filed June 24, 2005, allege six causes of action: (1) Unlawful
22 liquidated damages, Civil Code 1671; (2) the CLRA, Civil Code 1770(a)(14) and (19);
23 (3) Business and Professions Code 17200 et seq, (the UCL) - unlawful based on Civil
24 Code 1671 and the CLRA; (4) UCL – unfair (tethered to Civil Code 1671, the CLRA,
25 and the Cartwright Act; (5) unjust enrichment; (6) common count – money had and
26 received. Neither Plaintiffs nor Defendants distinguish among the elements of the
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1 various claims (except for the UCL specific standing requirements). All the claims
2 ultimately rest on the assertion that the ETFs are an unlawful liquidated damage
3 provision under Civil Code 1671. Two aspects of Civil Code 1671 are particularly
4 significant.

5 First, the determination of whether the ETF provisions impose unlawful
6 liquidated damage does not require an inquiry into the sophistication, intent, and
7 expectations of each member of the putative consumer classes. “[L]iquidated damage
8 clauses in consumer contracts are presumed void, placing the burden on the proponent of
9 the clause to rebut that presumption.” *Utility Consumers' Action Network, Inc. v. AT&T*
10 *Broadband* (2006) 135 Cal. App. 4th 1023, 1042. Under Civil Code 1671(d), large
11 enterprises do not need to negotiate with individual consumers and may set the terms of
12 liquidated damage provisions based on their evaluations of whether it would be
13 impracticable or extremely difficult to fix actual damages. *Utility Consumers' Action*
14 *Network*, 135 Cal.App.4th at 1035-1038. There are many cases where Courts have
15 certified classes to assert that provisions in form consumer contracts are unlawful
16 liquidated damage provisions. *Garrett v. Coast & Southern Federal Sav. & Loan Assn.*
17 (1973) 9 Cal. 3d 731; *Hitz v. First Interstate Bank* (1995) 38 Cal. App. 4th 274; *Beasley*
18 *v. Wells Fargo Bank* (1991) 235 Cal. App. 3d 1383, *Shapiro v. United California Bank*
19 (1982) 133 Cal. App. 3d 256; *Hoffman v. Security Pacific Nat. Bank* (1981) 121 Cal.
20 App. 3d 964.

21
22 Second, if Plaintiffs prevail on their claims and the liquidated damage provisions
23 are voided, then the Defendants will have claims against the Plaintiffs for the actual
24 damages resulting from the early termination of the multi-year contracts. *Garrett*, 9 Cal.
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1 3d at 740-741 (“We do not hold [that] the borrower escapes unscathed. He remains liable
2 for the actual damages resulting from his default.”) For example, in both *Hitz* and
3 *Beasley*, the defendants asserted cross-claims against the plaintiff classes. Verizon’s
4 answer filed on July 15, 2005, asserts “setoff” as its Fifth Affirmative Defense.
5 Verizon’s First Amended Cross-Complaint filed on July 15, 2005, asserts a breach of
6 contract claim against the class as a whole. (Verizon 1AXC, para 18.) Nextel’s answer
7 filed on July 15, 2005, asserts “setoff” as its Eleventh Affirmative Defense.
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9
10 LEGAL STANDARD - GENERAL.

11 Class certification under C.C.P. 382 is determined under well established
12 standards. *Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 435. The Court is vested
13 with discretion in weighing the concerns that affect class certification. *Sav-on Drug*
14 *Stores Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 and 336. In determining
15 whether to certify a class to pursue a CLRA claim, the Court can consider only the four
16 factors identified in Civil Code 1781(b), but still has “considerable latitude under the four
17 criteria of subdivision (b) in deciding whether a class action is proper.” *Hogya v.*
18 *Superior Court* (1977) 75 Cal.App.3d 122, 138-139.
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21
22 LEGAL STANDARD – WHEN ONLY INJUNCTIVE RELIEF SOUGHT.

23 Plaintiffs are seeking injunctive relief only on behalf of the Current Subscriber
24 class. (P Reply brief at 6:2-3; 29:26-27.) C.C.P. section 382 does not include analytical
25 categories such as those found in F.R.C.P. 23 and California case law provides little
26 guidance on whether the approach to class certification is different depending on whether
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1 the claims are for injunctive relief (as under 23(b)(2)) or for monetary relief (as under
2 23(b)(3)). Consistent with the direction in *Sav-On* that the trial courts should adopt
3 innovative procedures, the Court has considered whether the class certification analysis is
4 different when Plaintiffs seek injunctive relief only. *Bell v. American Title Ins. Co.*
5 (1991) 226 Cal. App. 3d 1589, 1603-1609 (applying analytical categories of the federal
6 rules in California class action).
7

8 A different focus is appropriate when a plaintiff seeks injunctive relief on behalf
9 of a class. The commonality analysis is focused more on the actions of the defendant
10 than on whether those actions have a common effect on each of the Plaintiffs. The Court
11 does not address variations in damages because damages are not sought. *Mendoza v.*
12 *County of Tulare* (1982) 128 Cal. App. 3d 403, 418-419. In an injunction only class, the
13 Court must pay closer attention to the potential for conflicts because individual absent
14 class members cannot opt out of the class to seek inconsistent injunctive relief.
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16
17 PROCEDURAL COMMENT.

18 “Plaintiffs’ burden on moving for class certification ... is not merely to show that
19 some common issues exist, but, rather, to place substantial evidence in the record that
20 common issues *predominate*.” *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.
21 4th 1096, 1108. See also *Hamwi v. Citinational-Buckeye Inv. Co.* (1977) 72 Cal. App. 3d
22 462, 471. Substantial evidence is evidence that “it is not qualified, tentative and
23 conclusionary but, rather, of ponderable legal significance, reasonable in nature, credible,
24 and of solid value.” *Sav-on*, 34 Cal.4th at 329. The initial burden is “light” only in the
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1 sense that the “substantial evidence” standard is fairly deferential to the trial court’s
2 evaluation of the evidence submitted.

3 Plaintiffs’ moving papers lacked substantial evidence. Although this case is
4 single assigned and the Court is sufficiently familiar with the underlying facts to issue
5 case management orders without a full evidentiary record on each matter, the moving
6 party on a motion for class certification should not presume that supporting evidence is
7 somewhere in the record and the Court will locate and rely on that evidence. The moving
8 papers in a motion for class certification should self-sufficient and include sufficient
9 evidence so that any judge could consider and decide the motion. The only evidence
10 submitted with Plaintiffs’ moving papers was a complaint that Defendants filed in
11 another civil case and four declarations stating that counsel were qualified. Had the
12 motion been unopposed and no further evidence offered, the Court might have denied the
13 motion.
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16 Plaintiffs’ reply papers contained substantial evidence and some new arguments.
17 Reply papers may contain evidence that responds to arguments presented in the
18 opposition papers, but should not be used to inject additional evidence in support of
19 matters where the moving party bears the burden of proof. Similarly, reply papers may
20 contain arguments that respond to the opposition papers, but should not raise arguments
21 for the first time. *Shade Foods, Inc. v. Innovative Products Sales & Marketing* (2000) 78
22 Cal. App. 4th 847, 894 fn 10. The insertion of new evidence and argument in the reply
23 papers would have been highly prejudicial to Verizon and Sprint had the Court not
24 permitted those Defendants to file a sur-reply with their own supplemental evidence.
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1 The Court has considered all the evidence and the arguments submitted before the
2 hearing. The Court has also considered the post-hearing correspondence submitted by
3 Plaintiffs and Defendants. The Court’s acceptance of this procedure on this motion
4 should not be construed as an indication that it will be permitted in the future.
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6 PRACTICALITY OF BRINGING ALL CLASS MEMBERS BEFORE THE COURT
7 (NUMERIOSITY).
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9 Verizon and Sprint do not contest numerosity. The Court finds that the proposed
10 class is numerous.
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12 ASCERTAINABILITY
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14 Legal standard. “[Ascertainability] goes to the heart of the question of class
15 certification, which requires a class definition that is 'precise, objective and presently
16 ascertainable.' Otherwise, it is not possible to give adequate notice to class members or
17 to determine after the litigation has concluded who is barred from relitigating.” *Global*
18 *Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal. App. 4th 836, 858. See also
19 *Hicks v. Kaufman and Broad Home Corp.* (2001) 89 Cal.App.4th 908, 915. There are
20 three problems with the class definitions proposed by Plaintiffs.
21

22 Defining a “consumer.” Only a “consumer” can pursue claims under Civil Code
23 1670.5 and 1761(d). Therefore, only persons who opened wireless telephone accounts
24 “for personal, family, or household purposes” can pursue the claims in this case. If the
25 Court were to define the classes as persons who acquired handsets “for personal, family,
26 or household purposes,” then membership in the subclass would be dependent on self-
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1 identification followed by a review of individual facts and an evaluation of subjective
2 purposes. Although the Court could conduct individual factual inquiries to determine
3 whether potential class members are included in the sub-class, this is to be discouraged.
4 *Hicks*, 89 Cal.App.4th at 914, fn 7 and 915-916; *Kenro, Inc. v. Fax Daily* (S.D. Ind.
5 1997) 962 F. Supp. 1162, 1169.

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7 The Court will presume that all personal accounts (as opposed to business
8 accounts) are the accounts of consumers. The Court is guided by the principle that a
9 class definition should be “precise, objective and presently ascertainable” and the reality
10 that the use of account records to define a class will permit the parties to readily
11 determine who is in the class. To the extent that a class definition is under- or over-
12 inclusive, the Court finds that the benefits of a “precise, objective and presently
13 ascertainable” class outweigh the detriment to the absent class members who are
14 erroneously excluded from the class definition and the detriment to Defendants of
15 including persons in the classes who are not “consumers” as defined in Civil Code
16 1671(c)(1) and and 1761(d). The Court finds its authority for the class definitions in *Sav-*
17 *On*, which states that trial courts have substantial discretion in managing class actions.
18 34 Cal.4th at 326 and 336.

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21 Paid/Charged. The proposed Payer Class definition includes “consumers who
22 were charged and/or paid an early termination fee.” The definition should be clear as to
23 whether the class includes all persons who were charged an ETF or just those persons
24 who actually paid an ETF. The Court will define the class as all persons who were
25 charged an ETF because the trier of fact can find liability if a Defendant made an effort to
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1 collect an unlawful ETF. Whether a consumer actually paid the ETF will affect whether
2 the relief will be in the form of money or a declaration that no money is owed.

3 Temporal limitation. The Payer Class definition must have a temporal limitation
4 because class membership is determined through the notice procedure. *Phillips*
5 *Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 811-812 (jurisdiction acquired through
6 notice and opt-out procedure).
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8
9 COMMONALITY - predominant common questions of law or fact.

10 The Court breaks commonality down by liability and damages. Liability is the
11 same for the ETF Payer Class and the Current Subscriber Class. Monetary Relief is
12 relevant only for the ETF Payer Class.
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15 Common Liability - ETF Payer Class and Current Subscriber Class.

16 Plaintiffs have demonstrated that common factual and legal issues predominate
17 regarding the claim that ETFs were and are unlawful liquidated damages provisions
18 under Civil Code 1671(d). The claims involve similar form consumer contracts
19 imposing similar ETFs on consumers. The Court can apply the standards articulated in
20 *Utility Consumers' Action Network* and determine whether the ETFs are lawful liquidated
21 damages provisions.
22

23 There is no need to determine whether each consumer in the ETF Payer Class has
24 been injured. If an ETF is unlawful under Civil Code 1671(d) or the CLRA, then it is
25 void and each consumer is entitled to a refund of their money. This case is
26 distinguishable from *Wilens v. TD Waterhouse Group, Inc.* (2004) 120 Cal. App. 4th 746,
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1 for reasons discussed in the Handset Locking Class certification order of May 25, 2006,
2 at pages 11-13. In *Wilens*, the Plaintiffs asserted that a stock trading cancellation clause
3 was unlawful and sought “special damages [consisting of] economic loss caused by loss
4 of the ability to enter timely trade orders resulting in less favorable transaction prices.”
5 120 Cal.App.4th at 751. Because Wilens had no economic loss injury as a result of the
6 cancellation of his stock trading abilities, he could recover only his subsequent
7 consequential damages and his alleged pain and suffering. The need to prove subsequent
8 injury on an individualized basis justified the denial of class certification. In contrast, in
9 this case every consumer who has paid or been charged an ETF has been injured. There
10 is no claim for subsequent consequential damages over and above the amount of the ETF.
11

12 There is no need to determine whether each consumer in the Current Subscriber
13 class has sustained actual injury. The Current Subscriber class is seeking
14 injunctive/declaratory relief only with the goal of stopping an allegedly unlawful practice
15 and avoiding the imposition of the allegedly unlawful ETFs. (P Reply brief at 6:2-3;
16 29:26-27.) The exception to this is that the Court cannot certify the Current Subscriber
17 class to pursue a claim under the UCL because the members of that class have not “lost
18 money or property” as required by the UCL’s new standing requirement.
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21 The Court will address concerns about inter- and intra-class conflicts in the
22 context of adequacy.
23

24 Common Monetary Relief – ETF Payer Class.

25 Common factual and legal issues predominate regarding the award of monetary
26 relief to the ETF Payer Class. If Plaintiffs prevail on their claims that ETFs were
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1 unlawful liquidated damages provisions, then the Court can determine damages with
2 relative ease or order a Defendant to restore the amount of the ETF to all class members.

3 If the Court awards monetary relief, however, the Court must face the troubling
4 issue of what to do with the cross-claims of the Defendants for their actual damages.
5 The Court can discern six approaches to the intertwined issues of individualized cross-
6 claims and potential intra-class conflicts.

7
8 First, the Court could hold that the Court cannot certify the ETF Payer Class
9 because the need to resolve the cross-complaints of Defendants for each class member
10 will create a morass of individualized issues. Defendants suggest this approach, referring
11 to the need to determine whether each class member is a “consumer,” the thousands of
12 price plans, variations in costs over time, changes in the specifics of the ETF provisions,
13 differences in whether accounts were cancelled early or late in a contract term, actual
14 usage, the voluntary payment doctrine, estoppel based on repeated renewals with notice
15 of the option of non-ETF accounts, and the need to calculate actual damages for each
16 consumer. The Court will not take this approach. The common issue of whether an ETF
17 is an unlawful provision is a central common legal and factual issue that predominates
18 over the individualized issues. The Court can use innovative procedures to address
19 Defendants’ concerns. *Sav-on*, 34 Cal.4th at 339-340.

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22 Second, the Court could hold that the Court cannot certify the ETF Payer Class
23 because the cross-complaints of Defendants will create unavoidable intra-class conflicts.
24 Defendants argue that an intra-class conflict exists because only class members who
25 terminated in the last 6 months of their contracts are likely to have a net monetary
26 recovery but most class members who terminated in the first 12 months of their contracts
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1 will end up owing Defendants hundreds of dollars in actual damages. (Hausman Dec.
2 Exh E, fig. 1 & 2.) The Court will not take this approach. The Court can minimize the
3 potential conflict by ordering an aggregate approach to claims, setoffs, and cross-claims
4 that will eliminate the possibility that any individual class member will end up owing
5 more money than he or she might already have paid or owe under the ETF provision.
6

7 Third, the Court could hold that the issues of individualized claims and potential
8 intra-class conflicts are immaterial because Defendants cannot obtain any setoff or
9 prevail on their cross-claims against the absent class members. Plaintiffs take this
10 approach, arguing that Defendants are estopped from asserting cross-claims and that the
11 statute of limitations has run on any cross-claims. The Court will not take this approach.
12 If the ETFs are void, then Defendants can probably both seek setoffs and assert cross-
13 claims against every class member who is entitled to a refund of an ETF.
14

15 Fourth, the Court could hold that the issues of individualized claims and potential
16 intra-class conflicts are immaterial because class action pragmatics dictate that
17 Defendants should not be permitted to create individualized issues by asserting cross-
18 claims against absent class members. The Court will not take this approach. *Granberry*
19 *v. Islay Invs.* (1995) 9 Cal. 4th 738, 749, addressed a similar situation and held that a
20 defendant should not be deprived of the right to assert a set off just because a plaintiff is
21 proceeding in a class action. *Granberry* states, “it is inappropriate to deprive defendants
22 of their substantive rights merely because those rights are inconvenient in light of the
23 litigation posture plaintiffs have chosen.”
24

25 Fifth, the Court could hold that the issues of individualized claims and potential
26 intra-class conflicts are immaterial (in part) because Defendants cannot obtain affirmative
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1 relief against the individual absent class members. This approach is suggested by *Earley*
2 *v. Superior Court* (2000) 79 Cal. App. 4th 1420, 1431, which states that absent class
3 members “are almost never subject to counterclaims or cross-claims, or liability for fees
4 or costs. Absent plaintiff class members are not subject to coercive or punitive remedies.
5 Nor will an adverse judgment typically bind an absent plaintiff for any damages,
6 although a valid adverse judgment may extinguish any of the plaintiff’s claims which
7 were litigated.” The practical application of *Early* is that in a class action a defendant
8 may assert “set-off” as an affirmative defense under C.C.P. 431.7, but may not obtain
9 affirmative relief from individual absent class members through a cross-claim under
10 C.C.P. 426.10. *Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29
11 Cal. 4th 189, 198 (distinguishing between setoffs and cross-claims.) The Court will
12 follow *Early* to the extent that it suggests that absent class members cannot assume
13 greater liability because they fail to opt-out of a class action. The *Early* approach moots
14 the concerns in *Heaven v. Trust Co. Bank* (11th Cir., 1997) 118 F.3d 735, 738, and *Shelly*
15 *v. AmSouth Bank* (S.D. Ala., 2000) 2000 WL 1121778 at *11, that absent class members
16 could assume greater liability as a result of a class action.
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19 Sixth, the Court could make the issues of individualized claims manageable by
20 permitting the Defendants to aggregate their cross-claims and to pursue them against the
21 class as a whole. This approach is suggested by *Granberry, supra*, 9 Cal. 4th at 749,
22 where the Court stated that on remand the trial court should shape a remedy to avoid the
23 case management problems associated with individual set-off evaluations. *Hitz* suggests
24 a case management approach to this issue. In *Hitz*, it appears that the trial court
25 aggregated the unlawfully paid liquidated damages, set them off against the aggregate
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1 actual damages of the Defendants, and then awarded the balance to the members of the
2 Plaintiff class. See also *Ballard v. Equifax Check Servs.* (E.D. Cal., 2001) 158 F. Supp.
3 2d 1163, 1176 fn 16. Consistent with the direction in *Sav-On* to consider innovative
4 means to manage class actions, the Court will avoid the individualized issues by taking
5 the *Hitz* aggregate approach to monetary relief, set-off, and cross-claims.

6 The use of an aggregate approach to monetary relief, set-off, and cross-claims
7 will also minimize the intra-class conflict in the ETF Payer Class. A minimal and
8 disclosed intra-class conflict does not preclude class certification. *National Solar*
9 *Equipment Owners' Assn. v. Grumman Corp.* (1991) 235 Cal. App. 3d 1273, 1285-1286.
10 Because of how the aggregate approach to monetary relief will work, the consumers who
11 might suffer prejudice from the aggregate approach will be those with the strongest
12 claims. The Court is less concerned about the possibility of a diminished recovery for
13 class members than it would have been concerned about the possibility that individual
14 class members would be faced with cross-claims exceeding the value of the ETF. To the
15 extent that individual absent members of the ETF Payer class think that they can
16 maximize their individual monetary recoveries, they will receive adequate notice and can
17 opt out of the class. *Anthony v. General Motors Corp.* (1973) 33 Cal. App. 3d 699, 704
18 (An order for notice ... can be so drawn as to warn those members of the class defined in
19 the complaint of the risk they run by remaining as participants; if they knowingly assume
20 that risk, no one else can complain.”).

21 The aggregate approach to monetary relief also provides Defendants with due
22 process because it permits them to realize more of the benefits of any cross-claims. If the
23 Court were to take an individual approach to monetary relief, then Defendants probably
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1 could not obtain a net judgment against any individual absent class member. *Early*,
2 *supra*. The result would be that if the class won on liability, then individual
3 classmembers who have a net recovery after the cross-claims would obtain that recovery,
4 but consumers who have a net loss due to the cross-claims would receive a 100% setoff
5 and not be responsible Defendants' total actual damages. By taking an aggregate
6 approach to monetary relief, the Court will provide each Defendant the benefit of all of
7 its cross-claims against the ETF Payer Class as a whole. If the Plaintiffs win on liability,
8 the Court can set off the total value of the allegedly unlawful ETFs against the total value
9 of Defendants' actual damages.
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12

TYPICALITY.

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14 The class representatives are: Plaintiffs Nguyen and White (Verizon ETF Payer
15 Class); Mr. Ayyad, Ms. Hull, Mr. Samko, and Ms. Selby (Sprint ETF Payer Class), Mr.
16 Ayyad, Ms. Hull, Mr. Samko, Ms. Selby, and Ms. Zill (Sprint Current Subscriber Class);
17 and Morton and Ramirez (Nextel).

18

19 The named plaintiffs are typical of the members of the putative classes even
20 though each plaintiff's specific factual situation is not the same as the specific factual
21 situation of all the other class members. *Daniels v. Centennial Group, Inc.* (1993) 16
22 Cal. App. 4th 467, 473; *Wershba v. Apple Computer* (2001) 91 Cal. App. 4th 224, 238.

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The Court is cautious about addressing the merits of the individual claims of the
class representatives as part of the typicality requirement. The class certification process
is a procedural question and does *not* include a weighing of whether the action is legally
or factually meritorious. *Linder*, 23 Cal.4th at 439-40. The typicality requirement should

1 not be a means of addressing the merits of the case in a class certification motion.

2 Therefore, the Court will not address whether the claims of the individual classmembers
3 have merit.

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6 **ADEQUACY.**

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8 The responsibilities of a class representative fall into two categories: (1) to have
9 no interests adverse to the class and (2) to select and monitor class counsel to ensure the
10 vigorous prosecution of the case. *Lazar v. Hertz* (1983) 143 Cal.App.3d 128, 141-142.

11
12 Adequacy – Vigorous Prosecution.

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14 The vigorous prosecution aspect of “adequacy” requires named plaintiffs and
15 class counsel to “raise those claims reasonably expected to be raised by the members of
16 the class.” *City of San Jose v. Superior Court* (1974) 12 Cal. 3d 447, 464. See also
17 *Janik v. Rudy, Exelrod & Zieff* (2004) 119 Cal. App. 4th 930, 936-943. The named
18 plaintiffs and class counsel have unambiguously elected not to pursue monetary relief on
19 behalf of the Current Subscriber Class. (P Reply brief at 6:2-3; 29:26-27.) Defendants
20 argue that the named plaintiffs and class counsel in these cases are not adequate because
21 they are not pursuing monetary claims on behalf of the Current Subscriber Class.

22
23 The decision not to seek monetary relief on behalf of the Current Subscriber Class
24 will not likely prejudice the absent class members. The current state of the record
25 suggests that the potential for the Current Subscriber Class to obtain monetary relief is
26 slim. Order of 6/7/05 at 10-11. Similarly, Defendants will not likely be prejudiced by
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1 plaintiff's decision not to seek monetary relief on behalf of the Current Subscriber Class.
2 An absent member of the Current Subscriber Class could potentially file a claim seeking
3 monetary relief, but that is unlikely given the amount of money at issue. *Szetela v.*
4 *Discover Bank* (2002) 97 Cal. App. 4th 1094, 1101. Sprint/Nextel stresses the possibility
5 of collateral attack, but it is unclear whether there is modern authority for permitting a
6 collateral attack on a class action judgment or settlement. *Hansberry v. Lee* (1940) 311
7 U.S. 32, concerned the res judicata effect of an Illinois state court judgment in a non-
8 class action case on similarly situated persons in another case. Both *City of San Jose* and
9 *Horton v. Citizens Nat'l Trust & Sav. Bank* (1940) 86 Cal. App. 2d 680, 685, were
10 decided on motions for class certification and neither concerned a collateral attack on a
11 class action judgment or settlement. Where the modern class action procedure has been
12 followed, absent class members are usually bound by any judgment or settlement even if
13 in hindsight the class certification process was flawed in some aspect. *Zimmer Paper*
14 *Products, Inc. v. Berger & Montague, P.C.* (3rd Cir. 1985) 758 F.2d 86.
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17 18 Adequacy – Conflicts Among the Class.

19 Defendants argue that the named plaintiffs cannot adequately represent the
20 proposed classes due to intra- and inter-class conflicts. *J. P. Morgan & Co., Inc. v.*
21 *Superior Court* (2003) 113 Cal. App. 4th 195, 212-215 (trial court must examine
22 potential conflicts between class members at the class certification stage); *Global*
23 *Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal. App. 4th 836, 851-854
24 (same). The potential conflicts take three forms.
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1 First, there are potential intra-class conflicts in the ETF Payer class between
2 persons with a probable net monetary recovery and persons who may be exposed to
3 cross-claims for actual damages in excess of the ETF. The Court addressed this issue in
4 the context of commonality and found that an aggregate approach to damages, setoffs,
5 and cross-claims will minimize, if not eliminate, the potential conflict. By using an
6 aggregate approach to monetary relief, consumers with a probable net monetary recovery
7 may not recover as much as they would in individual actions, but persons who might
8 liable for actual damages in excess of the ETF will not be exposed to those potential
9 damages.
10

11 The Court considered eliminating this conflict by narrowing the class definition.
12 Data provided by Verizon suggests that persons who terminate in the last 6 months of a
13 24 month contract are likely to have a net recovery after a setoff for actual damages and
14 that persons who terminate in the first 12 months are likely to owe more in actual
15 damages than the amount of the ETF. (Hausman Dec. Exh E, fig. 2.) Limiting the ETF
16 Payer class to those persons who cancelled their contracts in the last 6 months of the
17 contract would eliminate the potential intra-class conflict in the ETF Payer Class. The
18 Court decided not to limit the ETF Payer Class to persons with a probable net monetary
19 recovery. Due process and equity suggest that the Court should define the class to
20 provide the ETF Payer Class and Defendants with all the benefits and liabilities that
21 would arise if the ETFs are unlawful and should not define the class to maximize the
22 potential recovery of the ETF Payer class. Keeping all ETF payers in the ETF Payer
23 Class ensures that Defendants get the benefits of their anticipated crossclaims.
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1 Second, there are potential intra-class conflicts in the Current Subscriber class
2 between (1) the members of the class who prefer multi-year contracts with lower monthly
3 charges and ETFs and (2) the members of the class who prefer pay as you go contracts
4 with higher monthly charges and no ETFs. Defendants present evidence that many
5 consumers have voluntarily elected the multi-year plans with ETFs and have a “revealed
6 preference” for those plans. (Hausman Dec., Taylor Dec.) Defendants argue that the
7 named plaintiffs cannot adequately represent the putative Current Subscriber Class
8 because many customers prefer multi-year plans with ETFs and would oppose the
9 prosecution of this lawsuit. The Court finds the potential conflicts in the Current
10 Subscriber Class troubling. The Court must consider the potential conflicts in the
11 Current Subscriber Class with greater care because the absent class members cannot opt-
12 out of the class.
13

14 The Court focuses on the distinction between having a claim and desiring to
15 pursue a claim. Civil Code 1671(d) is plainly designed to protect consumers from
16 excessive unlawful liquidated damages provision. This public purpose suggests that
17 unlawful liquidated damages are “voidable” at the election of the consumer and are not
18 “void.” *Guthman v. Moss* (1984) 150 Cal. App. 3d 501, 510-512 (discussing purposes of
19 1978 amendments to liquidated damages statutes). Therefore, the Court must consider
20 potential variations in the desires of the absent class members. The evidence in the
21 record suggests enough of a potential conflict within the Current Subscriber Class that
22 the Court is wary about certifying that class.
23

24 The Court has considered a structural solution to permit the allegedly competing
25 goals of the class members to be addressed on their merits rather than as a basis for
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1 denying class certification. *Richmond v. Dart Industries, Inc.* (1981) 29 Cal. 3d 462,
2 471-473, suggests that the Court should create a class or subclass of consumers who
3 prefer the status quo and have them appear to make their arguments. This solution might
4 work if class notice solicited consumers to volunteer to serve as representatives of the
5 status quo and present arguments on behalf of consumers who prefer the status quo. The
6 anticipated problem lies in obtaining counsel to represent the status quo: Plaintiffs have
7 no interest in paying the status quo counsel; Defendants cannot pay the status quo
8 counsel without compromising the independence of the status quo subclass; and the
9 Court probably cannot award fees to the status quo counsel where the benefit conferred is
10 maintaining the status quo.
11

12 The Court does not make any factual determination about whether members of the
13 Current Subscriber Class were adequately informed about ETF and non-ETF price plans,
14 whether they made fully informed choices about price plans, whether they have a
15 “revealed preference” for ETF plans, and whether they presumably want to pursue the
16 claims in this case. The Court is wary of the “revealed preference” argument because it
17 appears to be a merits argument in disguise. In *Dean Witter Reynolds, Inc. v. Superior*
18 *Court* (1989) 211 Cal. App. 3d 758, 766-772, the Court addressed a similar argument in
19 the context of a merits determination. Following *Linder*, this Court will defer resolution
20 of merits issues to motions on the merits.
21

22 Third, there is a potential conflict between the past and current subscribers who
23 might benefit from this action and future subscribers who might suffer detriment if
24 Defendants change their rate structures. As a technical matter, this case concerns
25 consumers who paid, were charged, or are currently subject to an ETF. The classes do
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1 not include and the class representatives have no duty to persons who may initiate
2 cellphone service in the future under different contracts. As a practical matter, even if
3 the Court were to assume that Defendants will change their rate structures or consumer
4 contracts in response to a determination that the current ETFs are unlawful, that assumed
5 fact does not create a present conflict, much less a disabling conflict. The possibility that
6 a Court order enforcing a consumer protection law will have unintended consequences to
7 consumers elsewhere does not create a conflict that precludes enforcement of the law.
8 These are policy and practical considerations for the Legislature in writing laws and for
9 the trier of fact in determining how to apply the law to the facts of any given case.
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12 **DETECTING AND REDRESSING THE ALLEGED WRONGDOING.**

13
14 Trial courts have an obligation to consider the role of the class action in deterring
15 and redressing wrongdoing. *Linder*, 23 Cal.4th at 446. There is no evidence that the
16 F.C.C. or some other public entity is investigating the legality of ETFs. Compare *Caro v.*
17 *Procter & Gamble Co.* (1993) 18 Cal. App. 4th 644, 660 (defendant had already entered
18 in to consent decrees with public law enforcement entities). The Court is aware that the
19 F.C.C. is evaluating whether ETFs are “rates charged” under section 332(c)(3)(A) of the
20 Federal Communications Act. (Order of June 21, 2005.) That F.C.C. proceeding is,
21 however, related to jurisdiction rather than enforcement.
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24 **SUPERIORITY/ALTERNATIVE PROCEDURES FOR HANDLING THE**
25 **CONTROVERSY.**
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1 The Court cannot identify any effective alternate procedures to resolve the claims
2 of the ETF Payer Class. Requiring individual consumers to file individual claims in
3 small claims court would not be effective for the consumers and would not be an efficient
4 use of Court resources. If the Court required individual claims, then the Court would
5 give Defendants practical immunity from liability because most consumers would
6 probably not file claims. *Discover Bank v. Superior Court* (2005) 36 Cal. 4th 148, 157-
7 161; *Szetela v. Discover Bank* (2002) 97 Cal. App. 4th 1094, 1101.

9 The claims of the Current Subscriber Class for injunctive relief can be resolved
10 through the alternate procedure of claims for monetary relief. If the ETFs in their current
11 amounts are void, then Defendants will be subject to monetary liability. A judgment and
12 the resulting monetary liability will likely cause Defendants to change their business
13 practices. The Court is more prone to certify a class for injunctive relief where the
14 plaintiffs are seeking to enforce claims that affect the personal interests, health, or careers
15 of the members of the putative plaintiff class. *Reese v. CNH Am. LLC* (E.D. Mich., 2005)
16 227 F.R.D. 483 (certifying injunction only class regarding provision of health benefits);
17 *Drayton v. Western Auto Supply Co.* (M.D. Fl., 2000) 203 F.R.D. 520, 528 (certifying
18 injunction only class regarding discrimination and noting that federal rules regarding
19 injunction only classes were “crafted in part to effectuate civil rights class actions”).
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22 The Court is also reluctant to move beyond the determination of whether the
23 existing ETFs are lawful and assume any ongoing responsibility for overseeing the
24 pricing practices of the Defendants or opining on what might constitute an acceptable
25 ETF. In *Cal. Grocers Ass'n v. Bank of Am.* (1994) 22 Cal. App. 4th 205, 217-218, the
26 Court held that it was an inappropriate exercise of judicial authority to remedy an
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1 unconscionably high bank fee by issuing an injunction requiring the bank to lower its
2 fees. The Court noted with approval the action of the trial judge in *Beasley* “who
3 awarded damages for overcharges on bank credit card fees but declined to grant
4 injunctive relief, stating he did not believe the court was "well suited to regulating retail
5 bank pricing via injunction on an ongoing basis.”” See also *Desert Healthcare Dist. v.*
6 *Pacificare FHP* (2001) 94 Cal. App. 4th 781, 793-796. The Court can conclude with
7 great certainty at this time that if it certified the proposed Current Subscriber class to
8 pursue injunctive relief, then the Court would refrain from providing relief beyond a
9 declaration that the current fees are unlawful. The decision concerning the ETF Payer
10 class will provide that limited relief, so there is little point in certifying a Current
11 Subscriber class.
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15 **THE BARARY PLAINTIFFS’ MOTION FOR A NEXTEL SUBCLASS.**

16 The motion of the Barary Plaintiffs for class certification of the Nextel ETF Payer
17 Subclass is DENIED. The proposed subclass would assert claims on behalf of persons
18 who complained to Nextel about system coverage or performance issues within 90 days
19 before termination and/or cited dissatisfaction with system coverage or performance as
20 the reason for termination. The class is numerous. This class is theoretically
21 ascertainable, but it would require an intensive individualized review of customer
22 account records to determine who is in the class. Common issues do not predominate
23 because not all complaints about system coverage or performance may be meritorious
24 and, if meritorious, not all are of equal gravity. The subclass is not a superior means of
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1 resolving the claims because the members of the subclass will be members of the larger
2 Sprint ETF Payer class.

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4 EVIDENCE/MOTIONS TO STRIKE.

5 The Court DENIES Plaintiffs’ “Omnibus Motion to Strike Evidence Submitted by
6 Defendants.” The Court has considered the expert testimony of Hausman and Taylor.

7
8 All evidentiary objections by the parties are OVERRULED. *City of Long Beach*
9 *v. Farmers & Merchants Bank of Long Beach* (2000) 81 Cal.App.4th 780 (noting
10 importance of evidentiary decisions). The Court’s consideration of the evidence is
11 limited to this motion only and is not to be construed as an indication of admissibility in
12 future motions or at trial.

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15 CONCLUSION AND CLASS DEFINITION.

16 ETF Payer Class. The motion to certify ETF Payer Classes is GRANTED on
17 the EFT complaints against Verizon and Sprint/Nextel. The class definition proposed by
18 Plaintiffs is inadequate. Court will redefine the classes because the evidence shows that a
19 redefined class is ascertainable. *Hicks*, 89 Cal.App.4th at 916, fn18. The Court re-defines
20 the classes as “All persons who (1) had a wireless telephone personal account with
21 [DEFENDANT] with a California area code and a California billing addresses, who (2)
22 cancelled the account at any time from July 23, 1999, through [DATE], and (3) were
23 charged an early termination fee in connection with that cancellation.” These classes can
24 pursue all claims in the ETF complaints filed June 24, 2005.
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1 The start date for the ETF Payer Classes is set by the statute of limitations and the
2 end date will be determined based on whether and how the Court gives notice to the
3 members of the classes. The class period cannot extend past the class notice date because
4 persons who are charged ETFs after that date will not receive notice.

5 Current Subscriber Class. The motion to certify Current Subscriber Classes is
6 DENIED. Although the classes are ascertainable, the claims are common, and the
7 plaintiffs are typical, the Court has significant concerns about whether the named
8 plaintiffs are adequately representing the interests of all members of the putative class
9 and whether classwide injunctive relief is a superior way to address the issues presented.

10 Nextel ETF Payer Subclass. The motion of the Barary Plaintiffs for class
11 certification of the Nextel ETF Payer Subclass is DENIED. Common issues do not
12 predominate and the subclass is not a superior means of resolving the claims.
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16 TRIAL STRUCTURE AND MANAGEMENT.

17 Class certification of the ETF Payer Classes is expressly predicated on the use at
18 trial of an aggregate approach to monetary relief and the related setoff and cross-claim
19 issues. An aggregate approach to damages was used in *Hitz* and *Beasley*, both of which
20 cases raised issues similar to those in this case. More recently, *Bell v. Farmers Ins.*
21 *Exchange* (2004) 115 Cal. App. 4th 715, 746-758, approved an aggregate approach to
22 monetary relief in a class action. *Bell* holds that an aggregate approach is within the trial
23 court's discretion and that if done properly it will protect the due process rights of the
24 members of the class and the defendant. See also *Bruno v. Superior Court* (1981) 127
25 Cal. App. 3d 120, 129 fn 4. The use of an aggregate approach to monetary relief in this
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1 case will eliminate many of the individualized issues, will substantially limit the potential
2 intra-class conflict in the ETF Payer Class, and will afford Defendants due process by
3 permitting them to realize the full effect of any setoff and cross-claims against the
4 members of the ETF Payer classes. As suggested by *Early*, individual absent members of
5 the ETF Payer Class will not be exposed to cross-claims in excess of the ETF.
6

7
8 FURTHER PROCEEDINGS AND TRIAL

9 The next case management conference is set for June 12, 2006, at 3:00 pm. At
10 that time, Counsel should be prepared to discuss (1) whether class notice should be
11 required; (2) the content and distribution of class notice, (3) the temporal scope of the
12 classes, (4) payment of the cost of class notice, (5) how much additional discovery is
13 necessary to prepare for trial, (6) whether Verizon and Sprint intend to amend the
14 pleadings clarify the affirmative defense of setoff or to add cross-claims against the class,
15 (7) motion practice (including any requests to have motions for summary judgment heard
16 before class notice is sent), and (8) trial setting.
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18 Counsel should also be prepared to report on the status of the F.C.C. proceedings
19 and to address whether the case should now be stayed to permit the F.C.C. to address
20 whether it has jurisdiction over ETFs.
21

22
23 Dated: June __, 2006

24 Judge Ronald M. Sabraw
25
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