

07-15-05  
# 1142  
Vol 59

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REC'D JUL 25 2005

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CELLCO PARTNERSHIP d/b/a VERIZON  
7 WIRELESS

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 IN AND FOR THE COUNTY OF ALAMEDA

10 Coordination Proceeding  
Special Title (Rule 1550(b))

JUDICIAL COUNCIL COORDINATION  
PROCEEDING NO. 4332

11 In Re:  
12 **CELLPHONE TERMINATION FEE**  
13 **CASES**

**ANSWER TO THIRD CONSOLIDATED  
AMENDED COMPLAINT [EARLY  
TERMINATION FEES] AGAINST  
VERIZON WIRELESS**

14 This document relates to:  
15  
16 CHRISTINE MORTON, CHRISTINA  
NGUYEN, DELORES JOHNSON, and  
17 MOLLY WHITE, on Behalf of Themselves  
and All Others Similarly Situated,  
18 Plaintiffs,  
19 vs.  
20 CELLCO PARTNERSHIP d/b/a VERIZON  
WIRELESS and DOES 1-100,  
21 Defendants.  
22

**The Honorable Ronald M. Sabraw**  
Complaint Filed: June 24, 2005

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1 Defendant Cellco Partnership d/b/a Verizon Wireless (“Defendant”) hereby answers the  
2 Third Consolidated Amended Complaint (“Complaint”) filed by Plaintiffs Christine Morton,  
3 Christina Nguyen, Delores Johnson, and Molly White (“Plaintiffs”) as follows:

4 **GENERAL DENIAL**

5 Pursuant to section 431.30(d) of the California Code of Civil Procedure, Defendant denies  
6 each and every one of the allegations of the Complaint and the whole thereof, denies that  
7 Defendant engaged in any wrongdoing or improper conduct in connection with its early  
8 termination fee (“ETF”) policy referenced in the Complaint, and denies that Plaintiffs are entitled  
9 to any recovery or relief sought or alleged by reason of any act, omission, or conduct on the part  
10 of Defendant.

11 **AFFIRMATIVE DEFENSES**

12 Defendant sets forth the following affirmative defenses to Plaintiffs’ Complaint.  
13 Defendant does not, by stating the matters set forth in these defenses, allege or admit that it has  
14 the burden of proof and/or persuasion with respect to any of these matters, and does not assume  
15 the burden of proof or persuasion as to any matters as to which Plaintiffs have the burden of proof  
16 or persuasion.

17 **FIRST AFFIRMATIVE DEFENSE**  
18 **(Federal Preemption)**

19 As its first affirmative defense, Defendant alleges that Plaintiffs have failed to state facts  
20 sufficient to constitute a cause of action created by or recognized under any California statute,  
21 regulation or common law, because state-law causes of action as alleged in the Demand for  
22 Arbitration have been preempted in their entirety by federal legislation and federal common law,  
23 pursuant to the Federal Communications Act, 47 U.S.C. §§ 151, *et seq.*, specifically including 47  
24 U.S.C. § 332(c)(3)(A), and the Supremacy Clause of the United States Constitution, U.S. Const.  
25 Art. VI, cl. 2.  
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**SECOND AFFIRMATIVE DEFENSE**  
**(Primary/Exclusive Jurisdiction)**

As its second affirmative defense, Defendant alleges that Plaintiffs' claims are barred, in whole or in part, by the doctrines of primary and/or exclusive regulatory agency jurisdiction.

**THIRD AFFIRMATIVE DEFENSE**  
**(Failure to State a Claim)**

As its third affirmative defense, Defendant alleges that the Complaint, and each and every cause of action therein, fails to state facts sufficient to constitute a cause of action against Defendant.

**FOURTH AFFIRMATIVE DEFENSE**  
**(No Liquidated Damages Provision)**

As its fourth affirmative defense, Defendant alleges that Plaintiffs fail to state a cause of action under the law of California because the ETF at issue does not impose a payment obligation as compensation for a contract breach, but is an alternative means of contract performance by Plaintiffs.

**FIFTH AFFIRMATIVE DEFENSE**  
**(Setoff)**

As its fifth affirmative defense, Defendant alleges that, even if Plaintiffs' claims are meritorious, which Defendant denies, those claims are subject to setoff to the extent that each Plaintiff breached her contract with Defendant.

**SIXTH AFFIRMATIVE DEFENSE**  
**(Defendant's Practices Not Misleading or Deceptive)**

As its sixth affirmative defense, Defendant alleges that any statements made or actions taken by Defendant were truthful and accurate and were not likely to mislead or deceive Plaintiffs.



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**TWELFTH AFFIRMATIVE DEFENSE**  
**(No Reliance)**

As its twelfth affirmative defense, Defendant alleges that Plaintiffs' claims are barred, in whole or in part, because Plaintiffs did not rely on the statements or omissions of which Plaintiffs now complain.

**THIRTEENTH AFFIRMATIVE DEFENSE**  
**(Benefits Realized)**

As its thirteenth affirmative defense, Defendant alleges that Plaintiffs have enjoyed the benefits of one or more of the products or services that are the subject of the Complaint, and therefore are barred from making one of more of the claims for relief set out in the Complaint.

**FOURTEENTH AFFIRMATIVE DEFENSE**  
**(Equitable Defenses)**

As its fourteenth affirmative defense, Defendant alleges that Plaintiffs' claims against Defendant are barred, in whole or in part, by the doctrines of acquiescence, estoppel, laches, and/or waiver.

**FIFTEENTH AFFIRMATIVE DEFENSE**  
**(Ratification and/or Consent)**

As its fifteenth affirmative defense, Defendant alleges that Plaintiffs consented to and approved all the acts and omissions about which they now complain. In addition to other manifestations of consent, Plaintiffs agreed to be bound by the terms of their Verizon Wireless CSAs when they used the wireless services provided by Defendant. Accordingly, Plaintiffs are barred from pursuing this action.

**SIXTEENTH AFFIRMATIVE DEFENSE**  
**(Waiver/Release)**

As its sixteenth affirmative defense, Defendant alleges that Plaintiffs have waived or released, in whole or in part, some or all of the claims asserted in the Complaint. The basis for this defense includes, but is not limited to, provisions in Plaintiffs' contract limiting the time period for disputing bills.

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**SEVENTEENTH AFFIRMATIVE DEFENSE**  
**(Voluntary Payment Doctrine)**

As its seventeenth affirmative defense, Defendant alleges that Plaintiffs are barred from recovering based on the voluntary payment doctrine.

**EIGHTEENTH AFFIRMATIVE DEFENSE**  
**(Wrongful Acts of Plaintiffs)**

Based on the allegations of Plaintiffs' Complaint, it appears that Plaintiffs (a) failed to exercise ordinary and reasonable care on their own behalf; (b) intentionally or recklessly disregarded their own interests, through action or inaction; and/or (c) otherwise committed wrongdoing, and that such acts and/or omissions were the proximate cause of all or some of Plaintiffs' injuries, if any. By reason of the foregoing, Defendant alleges as its eighteenth affirmative defense that Plaintiffs are barred, in whole or in part, from recovering any amounts in this proceeding.

**NINETEENTH AFFIRMATIVE DEFENSE**  
**(Failure to Mitigate)**

As its nineteenth affirmative defense, Defendant alleges that Plaintiffs have failed to take reasonable steps to mitigate, alter, reduce, or otherwise diminish their damages, if any. Plaintiffs accordingly are barred from recovery of any damages that might have been prevented by mitigation.

**TWENTIETH AFFIRMATIVE DEFENSE**  
**(Constitutional)**

As its twentieth affirmative defense, Defendant alleges that Plaintiffs' claims are in contravention of Defendant's rights under applicable clauses of the United States and California Constitutions, including without limitation the following provisions: (a) said claims constitute an impermissible burden on interstate commerce in violation of Article I, Section 8 of the United States Constitution; (b) said claims violate the Excessive Fines Clause of the Eighth Amendment to the United States Constitution; (c) said claims violate Defendant's right to Due Process under the Fourteenth Amendment of the United States Constitution and under the California Constitution; (d) said claims contravene the constitutional prohibition against vague and overbroad laws; (e) said claims reflect an unlawful delegation of prosecutorial power to private

1 parties in violation of Article II of the United States Constitution, the separation of powers  
2 doctrine, and the provisions of Article V of the California Constitution; and (f) an award on said  
3 claims would work an unlawful taking of property in violation of the Fifth and Fourteenth  
4 Amendments of the United States Constitution and Article I, Section 19 of the California  
5 Constitution.

6 **TWENTY-FIRST AFFIRMATIVE DEFENSE**  
7 **(Constitutional Defects with Punitive Damages)**

8 As its twenty-first affirmative defense, Defendant alleges that the imposition of punitive  
9 damages in this case (a) would violate the Due Process Clauses of the Fifth and Fourteenth  
10 Amendments to the United States Constitution, and Article I, Section 7 of the California  
11 Constitution, and would constitute an excessive fine under the Excessive Fines Clauses of the  
12 Eighth Amendment to the United States Constitution and Article I, Section 17 of the California  
13 Constitution, (b) would violate the Fourth, Fifth and Sixth Amendments and the Due Process  
14 Clauses of the Fifth and Fourteenth Amendments to the United States Constitution; (c) would  
15 violate the Contracts Clauses of the United States and California Constitutions.

16 **TWENTY-SECOND AFFIRMATIVE DEFENSE**  
17 **(Constitutional Defect with Award to Those Not Damaged)**

18 As its twenty-second affirmative defense, Defendant alleges that to the extent Plaintiffs  
19 purport to seek relief on behalf of any person who has not suffered any damages, the Complaint  
20 and each claim for relief therein violates the right of Defendant to due process under the  
21 California and United States Constitutions.

22 **TWENTY-THIRD AFFIRMATIVE DEFENSE**  
23 **(CLRA Procedural Defects)**

24 As its twenty-third affirmative defense, Defendant alleges that Plaintiffs' claims for  
25 alleged violation of the Consumer Legal Remedies Act ("CLRA") are barred because Plaintiffs  
26 have failed to satisfy the procedural prerequisites to bringing a claim under the CLRA by, among  
27 other things, failing to file the affidavit required under Civil Code Section 1780(c).  
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**TWENTY-FOURTH AFFIRMATIVE DEFENSE**  
**(Res Judicata, Collateral Estoppel, Merger and Bar)**

As its twenty-fourth affirmative defense, Defendant alleges that Plaintiffs' claims are barred by principles of prior adjudication, including but not limited to the doctrines of res judicata, collateral estoppel, and merger and bar.

**TWENTY-FIFTH AFFIRMATIVE DEFENSE**  
**(Right to Arbitration)**

As its twenty-fifth affirmative defense, Defendant alleges that Plaintiffs' claims are subject to a valid agreement to arbitrate, and therefore are not properly brought in this Court.

**TWENTY-SIXTH AFFIRMATIVE DEFENSE**  
**(Class Action Inappropriate)**

As its twenty-sixth affirmative defense, Defendant alleges that Plaintiffs' claims are barred, in whole or in part, because this case is not appropriate for class treatment.

**TWENTY-SEVENTH AFFIRMATIVE DEFENSE**  
**(Not a Proper Representative)**

As its twenty-seventh affirmative defense, Defendant alleges that Plaintiffs' claims are barred, in whole or in part, because Plaintiffs are not proper representatives to bring this action on behalf of any proposed class.

**TWENTY-EIGHTH AFFIRMATIVE DEFENSE**  
**(No Injunctive Relief)**

As its twenty-eighth affirmative defense, Defendant alleges that Plaintiffs are not entitled to equitable relief because Plaintiffs have adequate remedies at law, and no threat of harm exists to support a grant of injunctive relief.

**TWENTY-NINTH AFFIRMATIVE DEFENSE**  
**(No Attorney's Fees)**

As its twenty-ninth affirmative defense, Defendant alleges that to the extent Plaintiffs seek recovery of attorney's fees, such fees are not recoverable.

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**THIRTIETH AFFIRMATIVE DEFENSE**  
**(No Punitive Damages)**

As its thirtieth affirmative defense, Defendant alleges that to the extent Plaintiffs seek recovery of punitive damages, such damages are not recoverable.

**THIRTY-FIRST AFFIRMATIVE DEFENSE**  
**(No Restitution or Disgorgement)**

As its thirtieth-first affirmative defense, Defendant alleges that even if any member of any purported class suffered any injury or damage, which Defendant denies, no such class member is entitled to restitution or disgorgement.

**THIRTY-SECOND AFFIRMATIVE DEFENSE**  
**(Additional Defenses)**

As its thirty-second affirmative defense, Defendant reserves the right to plead any additional, separate defenses, the availability of which may come to light as the action progresses.

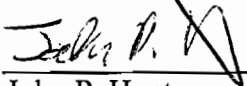
**PRAYER**

WHEREFORE, Defendant prays for judgment as follows:

1. That Plaintiffs and the general public take nothing by way of the Complaint;
2. That the Complaint be dismissed with prejudice and judgment entered in favor or Defendant;
3. That Defendant be awarded its costs of suit; and
4. For such other and further relief as the Court deems just and proper.

DATED: July 15, 2005

MUNGER, FOLLES & OLSON LLP

By:   
\_\_\_\_\_  
John P. Hunt  
Attorneys for Defendant  
CELLCO PARTNERSHIP d/b/a  
VERIZON WIRELESS