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SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ALAMEDA

**FILED**  
ALAMEDA COUNTY

APR 18 2008

CLERK OF THE SUPERIOR COURT  
By \_\_\_\_\_ Deputy

In re: CELLPHONE TERMINATION	)	J.C.C.P. 4332
FEE CASES	)	
	)	ORDER CLARIFYING DISMISSED
	)	CLAIMS AGAINST NEXTEL.
	)	
	)	Date: April 11, 2008
	)	Time: 9:00 am
	)	Dept.: 22
	)	
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The motion of Sprint regarding the dismissed Nextel claims came on regularly for hearing on April 11, 2008, in Department 22 of this Court, the Honorable Bonnie Sabraw presiding. After consideration of the briefing and the oral argument, IT IS ORDERED: The motion of Sprint regarding the dismissed Nextel claims is GRANTED IN PART.

PROCEDURAL HISTORY.

On November 11, 2004 Plaintiffs filed an omnibus motion for class certification in the T-Mobile, Verizon, Nextel, and Sprint cases. The motion was directed to Sprint and Nextel as separate entities. On January 18, 2005, Sprint and Nexel filed separate oppositions to class certification. On June 24, 2005, Plaintiffs filed separate ETF Third

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1 Amended Complaints against Sprint and Nextel. On July 15, 2005, Sprint and Nextel  
2 filed separate answers. On August 12, 2005, Sprint and Nextel merged and became  
3 Sprint/Nextel.

4 On June 9, 2006, the Court granted the motion of Plaintiffs for class certification  
5 as to the now combined Sprint/Nextel. In that order the Court did not distinguish  
6 between or among the pre-merger Sprint and Nextel customers and the post-merger  
7 Sprint/Nextel customers.  
8

9 On January 29, 2007, Nextel Communications, Inc., Nextel of California, Inc.,  
10 Sprint Spectrum, L.P., and Wirelessco, L.P. filed a motion for summary adjudication and  
11 for no merit determination. The second sentence in Defendants' brief states, "Neither  
12 Sprint nor Nextel has any liability to plaintiffs ..." The brief makes separate arguments  
13 for Sprint and for Nextel. Sprint and Nextel submitted separate evidence for Sprint and  
14 Nextel (compare Pryor Dec. and Wiener Dec.) and the separate combined statement  
15 identifies separate "undisputed facts" for Sprint (SSUF #2, 4, 6, 8, 10, 12, 14, 16) and for  
16 Nextel (SSUF # 3,5, 7, 9, 11, 13, 15, 17).  
17

18 On November 7, 2007, the Court granted summary judgment on the claims  
19 against Nextel. The Court found that Nextel had submitted undisputed evidence that (1)  
20 it would have been impracticable or extremely difficult at the inception of a consumer  
21 contract to calculate Nextel's lost damages from an early termination (SSUF # 3), (2)  
22 Nextel's motivation and purpose in selecting a \$200 ETF was to estimate fair  
23 compensation (SSUF # 7, 9), and (3) Nextel's actual total net loss of \$79.1 million in  
24 California demonstrated that the ETF was a reasonable approximation of fair  
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1 compensation (SSUF # 11, 13, 15, 17). The Court concluded "The Court has granted  
2 summary judgment in favor of Nextel on the claims against pre-merger Nextel."

3 On February 14, 2008, Sprint/Nextel filed a motion to clarify the claims against  
4 Nextel that the Court had dismissed. On March 17, 2008, the Court issued an order  
5 clarifying the issue but asking Sprint/Nextel to file a second motion that proposed a  
6 definition of the dismissed claims.  
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9 THE PRIOR ORDERS.

10 Plaintiffs maintain that the Court erred in the Orders of November 7, 2007, and  
11 March 17, 2008. The Court will not use this motion to revisit those orders. The Court is  
12 satisfied that Plaintiffs were on notice that Sprint/Nextel was seeking separate  
13 adjudication of the claims against Nextel.  
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16 EVIDENCE REGARDING NEXTEL.

17 In September 2000, Nextel decided to put a \$200 ETF in some of its contracts.  
18 (1/25/07 Weiner Dec, para 3.) Before the merger with Sprint on August 12, 2005,  
19 Nextel's ETF was \$200. (3/17/06 Weiner Dec, para 3.)  
20

21 Nextel merged with Sprint on August 12, 2005. At that time, Nextel became a  
22 wholly owned part of the new combined entity of Sprint/Nextel. (Plutzik Dec, Exh C,  
23 section 1.1; Exh E.)  
24

25 After the merger, Nextel still charged a \$200 ETF whereas Sprint charged a \$150  
26 ETF. (3/17/06 Weiner Dec. at para 3.) After the merger, Sprint/Nextel operated both a  
27 Sprint CDMA network and a Nextel iDEN network. (9/20/07 Smith Dec, para 2.) After

1 the merger Sprint/Nextel revised the Sprint customer agreement, but stated, "Separate  
2 terms apply for any iDEN products or services." (Fazio Dec, Exh E.)

3 In collecting and preparing evidence relevant to the motion for summary  
4 adjudication, Sprint/Nextel asked Mr. Dippon to create a Sprint database and a Nextel  
5 database. (1/29/07 Dippon Dec, para 4.) Mr. Dippon relied on Mr. Garris, who  
6 extracted data from Nextel's Ensemble database. (3/20/08 Garris Dec. at para 3.) The  
7 Nextel database was not combined with the Sprint database after the merger. (3/20/08  
8 Dippon Dec. at para 3.) The Nextel database included Nextel customers who were on the  
9 Nextel iDEN network both before and after the merger. (3/20/08 Dippon Dec. at para 3;  
10 3/20/08 Garris Dec. at para 3-5.) The Nextel data included persons who were charged  
11 ETFs both before and after the merger. (3/20/08 Dippon Dec. at 6; 3/20/08 Garris Dec.  
12 at para 4.) Mr. Dippon concluded that there were 311,176 customers who were in the  
13 Nextel database, had California area codes and billing addresses, and were charged an  
14 ETF between July 1, 1999, and September 27, 2006. (3/20/08 Dippon Dec. at 4, 6.)  
15 Nextel based its lost profits analysis on those 311,176 customers.

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18 Except as stated in previous orders, the Court has considered all the evidence  
19 submitted in support or and in opposition to Sprint/Nextel's January 29, 2007, motion for  
20 summary adjudication and for no merit determination, Sprint/ Nextel's February 14,  
21 2008, motion for clarification, Sprint/ Nextel's March 20, 2008, motion regarding  
22 dismissed Nextel claims. The Court's consideration of the evidence is limited to this  
23 motion only and is not to be construed as an indication of admissibility in future motions  
24 or at trial.  
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1       DEFINING THE DISMISSED CLAIMS AGAINST NEXTEL.

2           This order concerns the order of November 7, 2007, and is an extension of that  
3 merits motion. The result of defining what claims have been dismissed will affect which  
4 class members still have claims, but the order itself is in the nature of a merits order  
5 rather than a discretionary class organization or definition order. The Court is focused on  
6 the motion that Sprint and Nextel filed on January 29, 2007, and the evidence presented  
7 in support of and in opposition to that motion. The Court considers the issue from four  
8 perspectives – the law on liquidated damages, class definition, the notice provided to  
9 plaintiffs, and the evidence presented to the Court.

11           Law on liquidated damages. The validity of a liquidated damages clause under  
12 Civil Code 1671(d) is determined as of the inception of the contract. *Better Food*  
13 *Markets, Inc. v. American Dist. Tel. Co.* (1953) 40 Cal. 2d 179, 185; *Vrgora v. L.A.*  
14 *Unified Sch. Dist.* (1984) 152 Cal. App. 3d 1178, 1185; *United Sav. & Loan Assn. v.*  
15 *Reeder Dev. Corp.* (1972) 57 Cal. App. 3d 282, 299. The canceling of a contract and the  
16 charging of an ETF may create damages, but liability is determined as of the inception of  
17 the contract. The law suggests that claims should be defined by the date a contract was  
18 initiated.

19           Class definition. The Sprint/Nextel class was defined as “All persons who (1) had  
20 a wireless telephone personal account with [Sprint/Nextel] with a California area code  
21 and a California billing addresses, who (2) cancelled the account at any time from July  
22 23, 1999, through [DATE], and (3) were charged an early termination fee in connection  
23 with that cancellation.” Order of 6/9/06 at 24. This class definition should not be read to  
24 suggest that liability for the liquidated damages claim will be determined as of the date of  
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1 contract cancellation. The validity decision will be made as of the date of initiation, but  
2 any claim for damage accrued as of the date of contract cancellation.

3 Notice provided to Plaintiffs. The notice of motion and the separate statement in  
4 support of the brief for summary adjudication and for no merit determination clearly  
5 differentiate between Nextel and Sprint. They do not, however, refer to the August 12,  
6 2005, merger, explain the effect of the merger, or attempt to identify the dividing line  
7 between the claims against Nextel, the claims against pre-merger Sprint, and the claims  
8 against post-merger Sprint/Nextel. The notice of motion and the separate statement on  
9 their face suggest that the Court default to using the August 12, 2005, merger date as the  
10 dividing line between the claims against Nextel and the claims against pre-merger Sprint  
11 and post-merger Sprint/Nextel.  
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14 Evidence presented to the Court. The evidence presented in the motion for  
15 summary adjudication and for no merit determination suggested that Sprint/Nextel's  
16 motion regarding Nextel was directed to all persons within the scope of the variables that  
17 Mr. Dippon used when he requested information from Nextel would include all the  
18 approximately 311,176 Nextel customers identified by Mr. Dippon. Order of 3/17/08 at  
19 5:10-23. Sprint/Nextel has provided further evidence explaining Mr. Dippon's  
20 methodology. This evidence suggests that the Court could use the Nextel iDEN database  
21 to define the claims against Nextel.  
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1 ORDER.

2 The Order of November 7, 2007, concluded "The Court has granted summary  
3 judgment in favor of Nextel on the claims against pre-merger Nextel." The Court now  
4 more carefully defines "the claims against pre-merger Nextel."

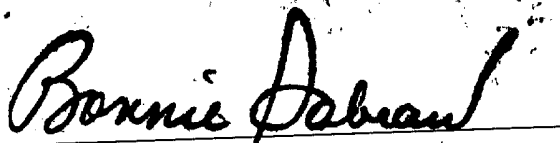
5 The Court defines the dismissed claims as "claims that arise from or relate to an  
6 ETF charge under a Nextel iDEN contract where the contract was initiated before August  
7 12, 2005." Plaintiffs were on notice that Sprint/Nextel was seeking summary  
8 adjudication as to Nextel, but Sprint/Nextel failed to explain the effect of the merger or  
9 attempt to identify the dividing line between the claims against Nextel and the claims  
10 against pre-merger Sprint and/or post-merger Sprint/Nextel. Given that Sprint/Nextel did  
11 not address this issue clearly, the Court will use the August 12, 2005, merger date as the  
12 dividing line.  
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15 The Court will not define the dismissed claims as "claims that arise from or relate  
16 to an ETF charge under a Nextel iDEN contract." The initial Dippon Declaration was  
17 insufficient to place Plaintiffs on notice that Sprint/Nextel was defining the Nextel claims  
18 as those concerning customers in the Nextel database.  
19

20 The Court will not define the dismissed claims as "claims that both (1) arise from  
21 or relate to an ETF charge under a Nextel iDEN contract initiated before August 12,  
22 2005, and (2) concern an ETF charged before August 12, 2005. The merits decision was  
23 focused on the validity of the Nextel liquidated damages clause as of the inception of the  
24 contract. The finding that the Nextel ETF was valid means that it is not relevant when  
25 Nextel or its successor, Sprint/Nextel, may have charged an ETF.  
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1 The Court has considered *Ortiz v. Lyon Management Group, Inc.* (2007) 157 Cal.  
2 App. 4th 604, 620-627, and finds it distinguishable. In *Ortiz* the substantive motion was  
3 before class certification and it was improper to grant class certification thereafter to  
4 extend the scope of the judgment to include absent class members. In this case, the  
5 Sprint/Nextel class was previously certified, Sprint and Nextel filed a substantive motion  
6 against the class, and the Court granted that motion in part. The issue here is defining the  
7 dismissed claims given the mid-litigation merger of Sprint and Nextel into Sprint/Nextel.  
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10 Dated: April 8, 2008



Judge Bonnie Sabraw

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Case Title/No.: Cellphone Termination Fee Cases JCCP004332

**CLERK'S CERTIFICATE OF MAILING**  
(CCP §1013a)

I certify that the following is true and correct:

I am a Deputy Clerk employed by the Alameda County Superior Court. I am over the age of 18 years. My business address is 1221 Oak Street, Oakland, California. I served this ORDER CLARIFYING DISMISSED CLAIMS AGAINST NEXTEL by placing copies in velopes addressed as shown below and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Oakland, California, following standard court practices.

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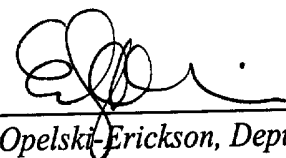
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Dated: April 18, 2008

Executive Officer/Clerk of the Superior Court

By

  
Elizabeth Opelski-Erickson, Deputy Clerk