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**FILED**  
ALAMEDA COUNTY

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

MAY 09 2008

CLERK OF THE SUPERIOR COURT  
By *[Signature]* Deputy

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In re: CELLPHONE TERMINATION  
FEE CASES

) J.C.C.P. 4332  
)  
) ORDER (1) AMENDING CLASS  
) DEFINITION AND (2) GRANTING  
) MOTION OF VERIZON TO EXCLUDE  
) CUSTOMERS WHO WERE CHARGED  
) A PRORATED ETF.  
)  
) Date: May 8, 2008  
) Time: 10:30 am  
) Dept.: 22  
)  
)

The motion of Verizon to exclude customers who were charged a prorated ETF came on regularly for hearing on May 5, 2008, in Department 22 of this Court, the Honorable Bonnie Sabraw presiding. At the hearing on May 6, 2008, it came to the Court's attention that the class definition is unclear, so the Court thereafter issued a second tentative decision addressing the class definition. After consideration of the briefing and the oral argument, IT IS ORDERED:

**CLASS DEFINITION ISSUE.**

The Order of February 21, 2007, defines the Verizon and Sprint ETF classes as "All persons who (1) had a wireless telephone personal account with [DEFENDANT] with a California area code and a California billing addresses, who (2) cancelled the

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1 account at any time from July 23, 1999, through March 18, 2007, and (3) were charged an  
2 early termination fee in connection with that cancellation.” Order of 2/21/07 at 2:20-26.

3 The form of class notice attached to the Order and agreed to by the parties defines  
4 the Verizon and Sprint ETF classes as “All persons who had a wireless telephone  
5 personal account with Verizon Wireless, Sprint, and/or Nextel with a California area code  
6 and a California billing addresses who were charged and/or paid an early termination fee  
7 from July 23, 1999, to March 18, 2007.” Order of 2/21/07 at 1:23-25 and attachment.

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9 The actions of the parties and the sending of the class notice to the absent class  
10 members requires an amendment of the class definition to conform the formal definition  
11 to what was represented to the classes. The Court can modify the class definition at any  
12 time before a decision on the merits. *Estrada v. RPS, Inc.* (2005) 125 Cal. App. 4th 976,  
13 986; *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal. App. 3d 1341, 1348.

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16 MOTION OF VERIZON TO EXCLUDE CUSTOMERS WHO WERE CHARGED A  
17 PRORATED ETF.

18 Motion of Verizon to exclude customers who were charged a prorated ETF is  
19 GRANTED. The motion was unopposed. Because the motion concerns absent class  
20 members, the Court independently considered the motion.

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22 Relevant facts. The Complaint filed June 24, 2005, alleges that Verizon’s flat-fee  
23 ETF is unlawful. The Class certification order of June 9, 2006, determined commonality  
24 “based on the elements of the claims asserted,” stating “the Court must examine the  
25 issues framed by the pleadings and the law applicable to the causes of action alleged.”  
26 Order of 6/9/06 at 2:15-15. On September 9, 2006, the Court considered class notice  
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1 issues, but deferred the sending of notice and the setting of the class end date until the  
2 Court determined whether “participation in the class might permit Defendants to sue  
3 [class members] individually for actual damages or whether any issue of actual damages  
4 will be dealt with in the class action and they are shielded from individual claims for  
5 actual damages.” Order of 9/9/06 at 3:11-19.

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7 On November 16, 2006, Verizon implemented a prorated ETF policy so that all  
8 customers who entered into a new contract on or after that date were charged a prorated  
9 ETF.

10 Plaintiff’s CMC statement filed January 30, 2007, both informed the Court that  
11 Verizon had instituted a prorated ETF policy and also stated “Class members’ contracts  
12 include, as a term and condition of service, a provision requiring that they pay flat ‘early  
13 termination fees.’” CMC Stmt. filed 1/30/07 at 1:11-14 and 2:20-3:4.

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15 The Class notice order of February 21, 2007, stated that this class “can pursue all  
16 claims in the ETF complaints filed June 24, 2005.” Order of 2/21/07 at 2:25-26.

17 Three possible approaches. Verizon asserts that the claims in the Complaint are  
18 fixed and that the Court should modify the class definition so the class is comprised only  
19 of persons who are asserting the claims in the Complaint. The Court can modify the class  
20 definition at any time before a decision on the merits. Order of 4/25/08 at 9-15. A  
21 second approach would be to assume that the class definition is fixed and permit the  
22 Plaintiffs to amend their complaint to include claims regarding prorated ETFs. A third  
23 approach would be to keep both the Complaint and the class definition fixed and proceed  
24 to trial with the understanding that the class is overinclusive.  
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1           Order. The Court will grant Verizon's motion because the Order of 2/21/07 at  
2 2:20-26 states the class "can pursue all claims in the ETF complaints filed June 24,  
3 2005." Plaintiffs do not seek to amend their complaint to state claims based on prorated  
4 ETFs. The Court will not proceed to trial with an overinclusive class. *In re Cipro Cases*  
5 *I & II* (2004) 121 Cal. App. 4th 402, 418 (directing trial court to modify class definition  
6 because "we can perceive no reason to include within the class a sizeable segment of  
7 consumers who could not have been harmed and who could easily be excluded from the  
8 class definition."). The Court will exclude from the Verizon ETF class all Verizon  
9 customers who initiated a contract with a prorated ETF on or after November 16, 2006,  
10 while still including persons who initiated Verizon contracts with flat fee ETFs and who  
11 were charged and/or paid a *flat fee* early termination fee from July 23, 1999, to March 18,  
12 2007.  
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15           Notice. The Court has the discretion whether to require the sending or publication  
16 of a corrective notice to the members of the Verizon ETF class explaining this change in  
17 the class definition. C.R.C. 3.766(b)(1) and (c)(1). If a class is certified and jurisdiction  
18 is obtained over the absent class members, then the absent class members should be able  
19 to "sit back and allow the litigation to run its course, content in knowing that there are  
20 safeguards provided for their protection. *Hypertouch, Inc. v. Superior Court* (2005) 128  
21 Cal. App. 4th 1527, 1539. If a class is certified and then decertified, then notice should  
22 normally be given to the absent class members. *Culver v. City of Milwaukee* (7<sup>th</sup> Cir.,  
23 2002) 277 F.3d 908, 914-915.  
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26           The facts of this case suggest that a corrective notice is not required. From the  
27 start this case has been about the validity of flat rate ETFs. The class notice website

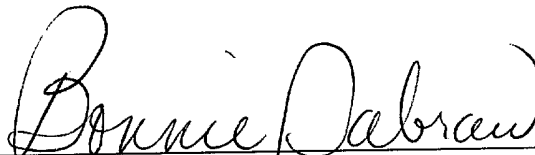
1 includes the Third Amended Complaint against Verizon, which at paragraphs 5 and 7  
2 states that the claims are about flat rate ETFs. The class notice was sent in early 2007,  
3 when Verizon's prorated ETF policy was only a few months old, so a relatively small  
4 percentage of the class is affected by the change in class definition. The result of this  
5 order is that Verizon customers with prorated ETFs will not be bound by any judgment in  
6 this case. The Court will not require the sending or publication of a corrective notice to  
7 the members of the Verizon ETF class.  
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10 ORDER ON CLASS DEFINITIONS.

11 Sprint's ETF class definition is modified to read "All persons who (1) had a  
12 wireless telephone personal account with Sprint with a California area code and a  
13 California billing addresses who were charged and/or paid *a flat fee* early termination fee  
14 from July 23, 1999, to March 18, 2007."  
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16 Verizon's ETF class definition is modified to read "All persons who (1) had a  
17 wireless telephone personal account with Verizon with a California area code and a  
18 California billing addresses who were charged and/or paid *a flat fee* early termination fee  
19 from July 23, 1999, to March 18, 2007."  
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22 Dated: May 9, 2008

  
23 Judge Bonnie Sabraw  
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(RCD-11/00)

**CLERK'S CERTIFICATE OF MAILING**

I certify that the following is true and correct: I am the clerk in Dept. 21 of the Superior Court of California, County of Alameda and not a party to this cause. I served the Order Amending Class Definition And Granting Motion Of Verizon To Exclude Customers Who Were Charged A Prorated ETF. by placing copies in envelopes 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 Alameda County, California, following standard court practices.

Alan R. Plutzik, Esq.  
Bramson, Plutzik, Mahler & Birkhaeuser, LLP  
2125 Oak Grove Road, Suite 120  
Walnut Creek, CA 94598


Kristen Linsley Myles, Esq.  
John Hunt, Esq.  
Munger, Tolles & Olson, LLP  
560 Mission Street, 27<sup>th</sup> Floor  
San Francisco, CA 94105-2907

Christopher Hockett, Esq.  
Thomas S. Hixson, Esq.  
Bingham McCutchen, LLP  
Three Embarcadero Center, Suite 1800  
San Francisco, CA 94111

05/09/08

Pat Sweeten  
Executive Officer/Clerk of the Superior Court

By



Danielle Labrecque  
Clerk, Dept. 22