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FILED
ALAMEDA COUNTY

DEC 18 2009

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

CLERK OF THE SUPERIOR COURT
By A. J. [Signature] Deputy

In re: CELLPHONE TERMINATION
FEE CASES

) J.C.C.P. 4332

)
) ORDER (1) ON DEFINITION OF CLASS
) IN CINGULAR AND AWS HANDSET
) CASES; AND (2) ADDRESSING CMC
) ISSUES.

)
) Date: December 11, 2009
) Time: 9:30 am
) Dept.: 23
)
)

The motion of Cingular and AWS to redefine the classes in the Cingular and AWS handset locking cases and CMC issues came on for hearing on December 11, 2009, in Department 23 of this Court, the Honorable Winifred Smith presiding. After consideration of the briefing and the argument, IT IS ORDERED:

MOTION TO REDEFINE THE CINGULAR AND AWS HANDSET LOCKING CLASSES (# 1013381)

The motion of Cingular and AWS to redefine the Cingular and AWS handset locking classes is GRANTED.

1 iPhone Issue. Cingular asks the Court to redefine the Cingular handset locking
2 class to exclude any claims based on the purchase of an Apple iPhone. This motion
3 requires the Court to make two findings: (1) that Cingular's sales of iPhones have been
4 materially different from its sales of other handsets and (2) claims based on Cingular's
5 sales of iPhones either (a) have no merit or (b) should not be resolved in this case.

6
7 Cingular's sale of iPhones appear on this record to have been materially different
8 from its sales of other handsets. Cingular's disclosures to consumers that the iPhone is
9 programmed to work only on the Cingular network appear to be significantly more
10 extensive than Cingular's disclosures relating to other handsets. Stortz Dec., Exhs B, C,
11 D, E, F, G, I, J, K. The record discloses significant awareness that iPhones will work
12 only on the Cingular network. Stortz Dec., Exhs L, M. This evidence suggests that the
13 trier of fact consider Cingular's sales of iPhones separately from its sales of other
14 handsets. In addition, the Court is persuaded that because the iPhone provides an
15 expanded mix of technical capabilities there is likely to be a material difference between
16 the increased value of an unlocked standard handset and the increased value of an
17 unlocked iPhone. Stortz Dec., Exh A.

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19
20 The Court cannot determine on this limited record that there is no merit to any of
21 the claims based on Cingular's sale of iPhones. Cingular raised this issue very recently
22 and Plaintiffs have not had an opportunity to conduct discovery regarding the iPhone.(fn1)

23
24
25 _____
26 | Procedurally, the motion to exclude sales of iPhones from the class is not a determination on the
27 | merits because claims relating to the sales are excluded from the class and no adverse judgment is
| entered. *Shelly v. City of Los Angeles* (1995) 36 Cal.App.4th 692 (limitation of class definition is not
| a final order for purposes of because class could be expanded at a later date).

1 The Court can, however, determine the claims based on Cingular's sales of
2 iPhones should not be resolved in this case. The Cingular handset locking claims are
3 based on Cingular's sales of a wide range of handsets from March 12, 1999, through
4 December 31, 2009. The discovery to date has focused on what could be described as
5 standard handsets that were designed primarily to transmit voice and text. The iPhone
6 provides an expanded mix of technical capabilities. Stortz Dec., Exh A. The effective
7 prosecution of claims related to the iPhone is likely to require significant additional fact
8 discovery regarding the disclosures made regarding the iPhone and significant additional
9 expert research and discovery regarding the difference in value between a locked and
10 unlocked iPhone. This would tend to further delay the trial in this already six year old
11 case and the delay would prejudice the class. The members of the putative class who
12 have purchased iPhones will suffer no significant prejudice because there is already a
13 separate putative class action specifically addressing the inability of consumers to use
14 iPhones with carriers other than Cingular. Stortz Dec., Exh N.
15

16
17 Other class definition issues. The Order of 11/25/09 defined the class as:

18 All persons who have both phones with California area codes and
19 California billing addresses who purchased SIM-locked handsets from
20 Cingular/AWS from March 12, 1999, to December 31, 2009.

21 The Consumer subclass was defined as: "All members of the class who have personal
22 accounts." The arbitration subclass was defined as: "All members of the Consumer
23 subclass who are parties to the Cingular Wireless Service Agreements dated January 1,
24 2001, through December 31, 2009."
25

26 ///

1 The Court will modify the class definition to (1) include all persons who
2 purchased handsets in the class period because current possession of a handset is not
3 relevant to the claims asserted and (2) delete the reference to "SIM-locked" phones
4 because the specific locking technology is not relevant to the claims asserted. The Court
5 will modify the arbitration subclass to include persons who are or were parties to the
6 relevant agreements.
7

8 Following informal communications from the parties, the Court modifies the class
9 definition to exclude from the classes any judicial officer presiding over this action, the
10 members of his/her immediate family, and any juror assigned to this action. Although the
11 amount of potential recovery is small for the persons to be excluded and it is unlikely that
12 their participation in the class might affect their judgment in resolving issues related to
13 this case, the Court errs on the side of caution. *In re Cement Antitrust Litigation*, 688
14 F.2d 1297 (9th Cir. 1982), *aff'd*, 459 U.S. 1191 (recusal of judge in class action). See
15 also 2 A. Conte & H. Newberg, *Newberg on Class Actions* (4th ed. 2002), Section 6.16 at
16 p. 629 (discussing the difficulties that may arise when judges are members of a certified
17 class).
18
19

20 Order. The class is redefined as:

21 All persons who have or had a Cingular/AWS account with a California
22 area code and a California billing addresses and who purchased a locked
23 handset from Cingular/AWS from March 12, 1999, through December 31,
24 2009. Excluded from the classes are any judicial officer presiding over
this action, the members of his/her immediate family, and any juror
assigned to this action.

25
26 The Consumer subclass is redefined as:
27

1 All persons who have or had a Cingular/AWS personal account with a
2 California area code and a California billing address who purchased a
3 locked handset from Cingular/AWS from March 12, 1999, through
4 December 31, 2009.

5 The Arbitration subclass is redefined as:

6 All member of the Consumer subclass who are or were parties to the
7 Cingular Wireless Service Agreements dated January 1, 2001, through
8 December 31, 2009.

9 **CMC ISSUES.**

10 **AWS/CINGULAR.**

11 ETF. There has been a nationwide settlement in *Hall v. AT&T Mobility* in federal court
12 in New Jersey. The motion for final approval is set for 4/14/10. (Cingular CMC Stmt filed
13 11/9/09, Exh A.) This Court has stayed the AWS/Cingular ETF cases pending resolution of the
14 motion in *Hall* for final approval. Order of 10/19/09 at 5:16-7:15.

15 **HANDSET LOCKING - CLASS NOTICE.**

16 Content of Class notice. The Court approves the form of class notice agreed to by
17 the parties, subject to the following: (1) The class definitions must be consistent with the
18 class definitions in this order. (2) The notice must inform the absent class members about
19 the result of the motions for summary adjudication directed to the named plaintiffs,
20 including both grants and denials. The grants and denials of summary adjudication are
21 material information that must be conveyed to absent class members. By moving for
22 summary adjudication before class certification, Defendants accepted the possibility that
23 class members would be able to discern the strengths and weaknesses of the case before
24 they made their decisions whether to participate in the action. *Fireside Bank v. Superior*
25 *Court* (2007) 40 Cal.4th 1069.
26
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1 Notice by e-mail. The goal of class notice is to give the best notice practicable
2 within reasonable economic constraints. Notice by e-mail is relatively inexpensive, is
3 directed to the members of the class persons, and is probably as good as, if not better
4 than, notice by publication in newspapers. *S.E.C. v. Global Online Direct, Inc.* (N.D.
5 Ga., 2007) 2007 WL 4258231. The Court ORDERS that Cingular/AWS provide the
6 contact information to Plaintiffs so that Plaintiffs can send e-notice. Cingular/AWS must
7 bear the cost of creating and providing the data. Plaintiffs must bear the other costs of
8 providing notice by e-mail.
9

10 Notice by publication on website. The Court ORDERS that Plaintiffs create a
11 website with the proposed long form notice. The website must remain available to class
12 members until the conclusion of the case by completion of any claims process or the
13 dismissal of the case following any appeals.
14

15 Notice by publication in Newspapers. The Court ORDERS that Plaintiffs publish
16 the proposed long form notice in the identified newspapers as required by Civil Code §
17 1781(d). Plaintiffs must bear this cost.
18

19 Schedule of Notice. Notice on the website and in the newspapers must commence
20 on or about January 15, 2010. Cingular/AWS must provide the data for the e-mail notice
21 on or before January 15, 2010, and Plaintiffs must send out the notice on or before
22 February 5, 2010. If necessary, the Court will consider the need for minor scheduling
23 variations at the CMC on January 6, 2010.
24

25 Cost of notice if claims are settled elsewhere. The Court will not shift the cost of
26 notice to Defendants because there is a possibility that Defendants might settle the
27 handset locking claim as part of a nationwide settlement in a different forum. If Plaintiffs

1 in this case pay the cost of notice to move these cases forward to trial and Cingular/AWS
2 then settle the California claims elsewhere, then this Court trusts that Plaintiffs will draw
3 that fact to the attention of the Court overseeing the class settlement.
4

5 **HANDSET LOCKING - CASE MANAGEMENT.**

6 Motions for classwide summary judgment. Cingular/AWS have previously filed
7 two sets of motions for summary judgment/adjudication on the handset locking claims.
8 The Orders of 4/25/07 at 6:4-13 and 3/24/09 at 4:26-5:1 expressly placed Cingular/AWS
9 on notice that those motions might preclude them from filing further motions for
10 summary judgment. The Court does not preclude Cingular/AWS from filing further
11 motions for summary judgment/adjudication. *First State Ins. Co. v. Superior Court*
12 (2000) 79 Cal.App.4th 324, 330-331. The Court will, however, not decide a motion for
13 summary judgment/adjudication "based on issues asserted in a prior motion for summary
14 adjudication and denied by the court, unless [Cingular/AWS] establishes [good cause]."
15 C.C.P. § 437c(f)(2). See also C.C.P. § 1008.
16

17 Federal Style Expert Reports. The Court orders the use of initial and supplemental expert
18 declarations and reports that meet the requirement of both C.C.P. § 2034.260(c) and F.R.C.P.
19 26(a)(2)(B). Preparation of written reports will assist in the framing of the expert testimony and
20 the deposition process. Order of 7/10/09 at 4 (Similar order in ETF cases.)
21

22 Dispositive motions based on admissibility of expert testimony. The Court will not
23 create a new procedural vehicle for challenging the admissibility of expert testimony. If the
24 foundation for expert testimony will be substantially based on evidence that will not be presented
25 to the jury, then the Court might hear the relevant expert motions in limine 14 days before
26
27

1 hearing the fact motions in limine. If the foundation for the expert testimony will be
2 substantially based on evidence to be presented to the jury, then the Court will be inclined to hear
3 the fact motions in limine before hearing the expert motions in limine. The Court will consider
4 this scheduling issue closer to trial.

5 Trial Plan. The Court orders that approximately 85 days before trial Plaintiffs serve and
6 file a trial plan that demonstrates that there can be an effective class trial of common issues and
7 any individualized issues that will provide due process to the absent class members and the
8 defendant while respecting the time of the jury. *Sav-On Drug Stores, Inc. v. Superior Court*
9 (2004) 34 Cal. 4th 319, 339-340 ("innovative procedural tools ... permit defendants to present
10 their opposition, and to raise certain affirmative defenses."). The trial plan must identify the
11 common factual and legal issues and identify the specific documents and witnesses that Plaintiffs
12 will present to prove the common factual issues. For each document, Plaintiffs must state the
13 bates number and a brief description of the document. For each witness, Plaintiff must describe
14 their testimony in 3-4 sentences and estimate the hours of direct testimony.

17 The trial plan is not a substitute for Local Rule 3.35 and will not tie Plaintiffs to the
18 precise witnesses and documents that they can present at trial. The trial plan must, however, give
19 the Court a factual basis for determining whether the trial will be manageable and for
20 determining the length of the trial. The trial plan will serve as the basis for any defense motion
21 to require a different trial plan or to de-certify the class based on manageability concerns.

23 Pre-trial schedule. The handset locking cases have been pending for six and one half
24 years. The Order of 4/20/09 at 8:3-8 concerned the Cingular/AWS handset locking cases and
25 states:
26

1 The Court expects Plaintiffs and Defendants to proceed with diligence. C.C.P. §
 2 583.130. If Plaintiffs or Defendants do not proceed with diligence or do impede
 3 the other's ability to conduct timely discovery, file motions, and prepare for trial,
 the Court will consider appropriate sanctions. Order of 2/20/09 at 6:3-10 and
 Order of 3/24 at 3:24-5:3.

4 The Court presumes that the case can proceed to trial in the near future. The Court sets the
 5 following pre-trial schedule:
 6

7	Pretrial Deadline	Approximate Interval	AWS	Cingular
8	COURT - CMC and motions.		1/6/10 at 9:00 am.	1/6/10 at 9:00 am.
9	COURT - CMC and motions.		2/5/10 at 9:00 am.	2/5/10 at 9:00 am.
10	COURT - CMC and motions.		3/5/10 at 9:00 am.	3/5/10 at 9:00 am.
11	COURT - CMC and motions.		4/2/10 at 9:00 am.	4/2/10 at 9:00 am.
12	COURT - CMC and motions.		5/7/10 at 9:00 am.	5/7/10 at 9:00 am.
13	COURT - CMC and motions.			
14	COURT - CMC and motions.			
15	Fact Discovery Cutoff	T-100		
16	Expert Disclosure and Service of Federal-style Expert Reports	T-85		
17	Plaintiffs serve and file trial plan	T-85		
18	Supplemental Expert Disclosure and Service of Federal-style Expert Reports	T-75		
19	Completion of Expert Discovery	T-55		
20	Parties exchange exhibits, deposition excerpts, discovery responses, transcripts, witness lists, proposed statements of the case, juror questionnaires, jury instructions, and special verdict forms under Local Rule 3.35(b), (c), (f), (g) (h), (i) and (j).	T-45		
21	COURT - Last date to hear motions for summary judgment/adjudication.		4/2/10	5/7/10
22				
23				
24				
25				
26				
27				

1	Pretrial Deadline	Approximate Interval	AWS	Cingular
2	Parties file (1) motions <i>in limine</i> regarding non-expert evidence, (2) motions <i>in limine</i> regarding expert evidence and (3) other motions concerning disputes about trial related material.	T-35		
3				
4				
5	Parties file oppositions to (1) motions <i>in limine</i> regarding non-expert evidence, (2) motions <i>in limine</i> regarding expert evidence and (3) other motions concerning disputes about trial related material.	T-28		
6				
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8				
9	COURT - PRE-TRIAL CONFERENCE AND HEARING on (1) motions <i>in limine</i> regarding non-expert evidence, (2) motions <i>in limine</i> regarding expert evidence and (3) other motions concerning disputes about trial related material.		4/16/10 at 2:00 pm	6/4/10 at 2:00 pm
10				
11				
12	TRIAL		5/10/10	6/21/10
13	5 Year Deadline		12/8/2010	2/28/2011

14
15 The Court directs the parties to meet and confer to fill in specific dates in the above schedule and
16 to present the schedule at the next CMC.

17 **T-MOBILE.**

18
19 ETF. Case completed. The federal judge in the *Milliron* case has enjoined California
20 counsel from filing any motion for fees related to this case. The Court directs T-Mobile to file a
21 copy of the order and letter opinion in this proceeding.

22 **HANDSET LOCKING.** Case completed.

23 **SPRINT/NEXTEL.**

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25 ETF – Sprint Payer class. Trial court proceedings concluded and on appeal. No change
26 from CMC Order of 3/24/09.

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ETF – Sprint subscriber class. Stayed per order of the federal Court in New Jersey in *Larson v. Sprint*. The federal court in New Jersey held a final approval hearing on 10/21/09 but has not yet issued an order.

ETF – Nextel payer class. Stayed per this Court’s Order of 2/18/09. The stay remains in effect. Claims potentially settled in *Larson v. Sprint*. The federal court held a final approval hearing on 10/21/09 but has not yet issued an order.

HANDSET LOCKING. Settled. No change from CMC Order of 3/24/09.

VERIZON.

ETF – Settled. Appeal from settlement is pending. A124048.

HANDSET LOCKING – Settled. Appeal filed and dismissed.

Dated: December 17, 2009



Judge Winifred Smith

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA**

**CELLPHONE TERMINATION FEE CASES
JCCP4332**

**CERTIFICATE OF SERVICE BY MAIL: ORDER ON DEFINITION OF CLASS AND CASE MANAGEMENT
ISSUES FOR DECEMBER 11, 2009**

I certify that I am not a party to this cause and that I am a clerk of the Superior Court of California, County of Alameda and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown below, and that the mailing of the foregoing and execution of this certificate occurred at 1225 Fallon Street, Oakland, CA 94612

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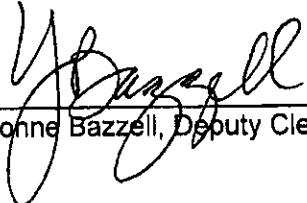
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Dated: December 18, 2009



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