SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

In re: CELLPHONE TERMINATION FEE CASES	J.C.C.P. 4332
	ORDER (1) & (2) GRANTING MOTIONS FOR CLASS CERTIFICATION IN CINGULAR AND AWS HANDSET CASES; (3) CONTINUING AWS MOTION FOR SUMMARY JUDGMENT; (4) GRANTING MOTIONS TO APPROVE SETTLEMENT AND FOR FEES IN T-MOBILE HANDSET CASE; (5) DROPPING MOTION TO TRANSFER INTEREST; AND (6) ADDRESSING CMC ISSUES.
	Date: November 24, 2009 Time: 9:30 am Dept.: 23

Motions for class certification in the Cingular and AWS handset locking cases, motions for approval of class settlement, for fees, and to transfer interest in litigation in the T-Mobile handset case, and CMC issues came on for hearing on November 24, 2009, in Department 23 of this Court, the Honorable Winifred Smith presiding. After consideration of the briefing and the argument, IT IS ORDERED:

MOTIONS FOR CLASS CERTIFICATION - CINGULAR AND AWS HANDSET LOCKING CASES (# 1001828, 1001830)

The motion of Plaintiffs for class certification of the Cingular handset locking case is GRANTED. The motion of Plaintiffs for class certification of the AWS handset locking case is GRANTED.

THE CLAIMS.

The Fourth Amended Complaint in *Mendoza v. Cingular*, filed November 20, 2008, and the Fifth Amended Complaint in *Meoli v. AT&T Wireless*, filed November 20, 2008, each allege six causes of action: (1) Business and Professions Code § 17200 et seq, (the UCL) - fraudulent; (2) UCL – unlawful (borrowing Civil Code §§ 1770(a)(5), (6), (7), (9), (14), (19), the Cartwright Act, the FTC Act, 15 U.S.C. § 45(n), and the FCC's rules on bundling; (3) UCL – unfair; (4) the CLRA, Civil Code §§ 1770(a) (5), (6), (7), (9), (14), (19); (5) Declaratory Relief (regarding the arbitration provision); and (6) the CLRA, Civil Code § 1770(a)(14) (regarding the arbitration provision).

Class certification is determined with reference to each claim asserted, and must take into account whether a class is appropriate for each claim. *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal. App. 4th 908, 916 fn 22. The Court follows the practice of the parties in addressing the claims in three categories: (1) handset deception based claims, (2) handset unfairness claims, and (3) arbitration claims.

LEGAL STANDARD.

Class certification under C.C.P. § 382 is determined under well established standards. *Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 435. Class certification under the CLRA is determined under the standards in Civil Code § 1781(b). The Court is

vested with discretion in weighing the concerns that affect class certification. *Sav-on Drug Stores Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 and 336.[1]

ISSUES NOT DECIDED.

The merits of a lawsuit are usually not considered on motions for class certification. *Linder, supra,* 23 Cal. 4th at 443. Following *Linder*, the Court will require Cingular and AWS to make their merits arguments in separate motions that are directed to the merits of the case. *Linder, supra,* 23 Cal. 4th at 440. The Court expressly declines to decide (1) whether Cingular and AWS had a duty to disclose the handset locks to members of the class; (2) whether Cingular's and AWS's alleged failure to disclose the handset locks would have been material to members of the class; (3) whether members of the class suffered any monetary loss as a result of any unlawful practices; or (4) the amount of monetary loss, if any, the members of the class suffered as a result of any unlawful practices. Specifically, Cingular's and AWS's argument that the locking of handsets is not material to the average consumer is a merits issue that is not within the scope of the class certification motions.

1 Cingular and AWS cite to several recent published decisions for the proposition that the Court must deny class certification. Those cases, in which the trial courts denied certification, can also be read for the more modest proposition that trial courts are vested with discretion in evaluating whether to grant or deny class certification. *Kaldenbach v. Mutual of Omaha Mutual Life Ins. Co.* (2009) 178 Cal.App.4th 830, 844 ("Any valid pertinent reason stated will be sufficient to uphold the order."); *Cohen v. DirecTV* (2009) 178 Cal.App.4th 966, 981 ("because the trial court stated at least one valid reason for denying the motion for class certification, we decline to reverse the trial court's order."); *Evans v. Lasco Bathware* (2009) 178 Cal.App.4th 1417, ("although a trial court has discretion to permit a class action to proceed where the damages recoverable by the class must necessarily be based on estimations, the trial court equally has discretion to deny certification when it concludes the fact and extent of each member's injury requires individualized inquiries that defeat predominance.").

PROCEDURAL NOTE.

Cingular and AWS previously agreed to settle handset locking claims on a nationwide basis in the context of the *Afroilan v. AT&T Wireless* case pending in Pennsylvania state court. Cingular CMC statement filed 8/13/09. The Pennsylvania judge denied preliminary approval of that proposed settlement by Order dated 10/14/09. Plaintiffs' RJN filed 10/19/09. At the CMC on 10/19/09, Cingular and AWS stated that they intended to continue efforts to settle the handset locking on a nationwide class basis in the context of the *Afroilan* case.

The decisions of Cingular and AWS to enter into and support the proposed *Afroilan* nationwide class settlement demonstrate that Cingular and AWS at one time thought the use of a class was proper and could protect the due process rights of the absent class members. Cingular and AWS are not judicially estopped from opposing class certification given that the Pennsylvania Court did not grant final approval of the class settlement. *Jackson v. County of L.A.* (1997) 60 Cal. App. 4th 171, 181-183. But see *Carnegie v. Household Int'l, Inc.* (7th Cir. 2004) 376 F.3d 656. In addition, the Court cannot certify a class based solely on Cingular's and AWS's prior consent to class certification because the Court has an independent responsibility to ensure that class certification benefits the absent class members and the Court. *Linder, supra,* 23 Cal. 4th at 435. Finally, the Court is aware that the standards for class certification at settlement are less rigorous because the Court is not required to address case management issues. *Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal.App.4th 836, 859. The Court does, however, consider Cingular's and AWS's earlier arguments and actions in evaluating whether to grant class certification. *Capitol People First v. Department of*

Developmental Services (2007) 155 Cal.App.4th 676, 681 (noting that in prior action defendant settled claims on classwide basis and reversing trial court for denying class certification on contested motion).

NUMERIOSITY

Cingular and AWS do not contest numerosity. The Court finds that the proposed class is numerous.

ASCERTAINABILITY

Legal standard. "[Ascertainability] goes to the heart of the question of class certification, which requires a class definition that is 'precise, objective and presently ascertainable.' Otherwise, it is not possible to give adequate notice to class members or to determine after the litigation has concluded who is barred from relitigating." *Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal. App. 4th 836, 858. See also *Hicks v. Kaufman and Broad Home Corp.* (2001) 89 Cal.App.4th 908, 915. At this stage of the proceedings a plaintiff is not required to establish the existence and identity of class members. *Reyes v. Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1275.

Class Definition. If the proposed class is not ascertainable, then the Court can and should redefine the class if the evidence shows that a redefined class is ascertainable. *Hicks*, 89 Cal.App.4th at 916, fn18. Plaintiffs' proposed class definition must be modified as follows:

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

"California residents" is changed to "persons who have both phones with California area codes and California billing addresses" to make class membership readily susceptible to objective proof.

Sub-class Definitions. The Court finds that Plaintiffs' proposed Consumer/CLRA subclass definition must be modified. The Court will re-define the subclass as: "All members of the class who have personal accounts." The Court finds that the need to define an ascertainable class supports equating "consumers" as defined by the CLRA with persons with personal accounts (as opposed to business accounts). See Order of 5/25/06 at 5-6. *Sav-On*, 34 Cal.4th at 326 and 336 (trial courts have substantial discretion in managing class actions).

The Court finds that Plaintiffs' proposed arbitration subclass definition must be modified. The Court will re-define the subclass as: "All members of the Consumer subclass who are parties to the Cingular Wireless Service Agreements dated January 1, 2001, through December 31, 2009."

COMMONALITY

Predominant common questions of law or fact.

"Plaintiffs' burden on moving for class certification … is not merely to show that some common issues exist, but, rather, to place substantial evidence in the record that common issues *predominate*." *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal. 4th 1096, 1108. It is not, however, necessary that the allegedly unlawful practice affect every member of the proposed class in the same way or that the practice had a consistent effect on all members of the class.

The Court can certify a class based on a demonstration of partial commonality. *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, addresses this in several places, stating, "Predominance is a comparative concept," 34 Cal. 4th at 334, that the community of interest requirement does not mandate that class members' claims be uniform or identical, 34 Cal.4th at 338, that the "logic of predominance" does not require a plaintiff to prove that a defendant's policy was "either right as to all members of the class or wrong as to all members of the class," 34 Cal. 4th at 338, and "the established legal standard for commonality … is comparative," 34 Cal.4th at 339. *Bell v. Farmers Ins. Exchange* (2004) 115 Cal. App. 4th 715, 750 (*Bell III*), holds that a class trial can be proper even if (1) some individual members of the class cannot, or do not, prove that they were damaged, 115 Cal.App.4th at 744; (2) some (or most) class members do not testify and the trier of fact is required to extrapolate the testimony of the testifying witnesses to the absent members of the class, 115 Cal.App.4th at 747-749; and (3) an award of aggregate damages results in overcompensating some class members and under compensating others, 115 Cal.App.4th at 750-751. *Stephens v. Montgomery Ward* (1987) 193 Cal.App.3d 411, 416 fn1, suggests that it can be appropriate to certify a class of women to pursue claims for sex discrimination where an employer has a pattern of denying promotions to women even though not all women were denied promotions.

The determination of how much commonality is enough to warrant use of the class mechanism requires a fact specific evaluation of the claims, the common evidence, and the anticipated conduct of the trial. For purposes of the commonality analysis the claims can be divided into three categories (1) deception based on a failure to disclose

handset locking; (2) unfair business practices based on the practice of handset locking; and (3) the legality of the arbitration clause.

Deception based claims.

Common factual and legal issues predominate regarding the deception based claims. The central legal and factual issues are (1) whether Cingular and AWS locked handsets; (2) whether Cingular and AWS disclosed that they locked handsets; (3) whether the locking of handsets was material to the members of the class; and (4) whether the class members suffered any injury.

Common factual issues predominate regarding whether Cingular and AWS locked handsets.

Common factual issues predominate regarding whether Cingular and AWS disclosed that they locked handsets. Although the text of the disclosures changed from time period to time period, in any given time period Cingular and AWS each had written "terms and conditions" that made common written disclosures to the members of the putative classes and that across all time periods appear never to have disclosed that Cingular and AWS locked the handsets. This case is therefore similar to *Mass. Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal. App. 4th 1282, 1291, where the defendant allegedly had a common practice of withholding allegedly material information from its customers and is distinguishable from *Kaldenbach v. Mutual of Omaha Mutual Life Ins. Co.* (2009) 178 Cal.App.4th 830, 847-851, where the representations were made by agents and there were material variations in "what materials, disclosures, representations, and explanations were given to any given purchaser."

Common factual and legal issues predominate regarding whether the locking of handsets was material to the members of the class, which in turn supports a common inference of reliance. *Kaldenbach*, 178 Cal.App.4th at 851, states, "when the same material misrepresentations have actually been communicated to each member of a class, an inference of reliance arises as to the entire class." Similarly, *Mass. Mutual*, 97 Cal. App. 4th at 1292-1293, states:

> "Causation as to each class member is commonly proved more likely than not by materiality. That showing will undoubtedly be conclusive as to most of the class. **The fact a defendant may be able to defeat the showing of causation as to a few individual class members does not transform the common question into a multitude of individual ones**; plaintiffs satisfy their burden of showing causation as to each by showing materiality as to all." … Thus, "[i]t is sufficient for our present purposes to hold that if the trial court finds material misrepresentations were made to the class members, at least an inference of reliance would arise as to the entire class." (Emphasis added.)

Cingular and AWS argue that the grant of summary adjudication against some of the named Plaintiffs precludes class certification as a matter of law because it demonstrates a lack of commonality regarding reliance and injury. As stated in the bolded text above, that is not the case.

Sav-on, *Bell III*, *Mass. Mutual*, and *Stephens*, all hold that a trial court may certify a class even though the Court knows at the outset that there will be some persons in the defined class whose claims may not be as strong as other persons in the class. This case is unusual only in that Cingular and AWS can identify a handful of specific class members who cannot prove their individual claims rather than making the reasonable speculation that some absent class members would not be able to prove individual claims.

The peculiarity that a class with a meritorious class claim can include persons who might not prevail in their individual claims (or that a class that cannot prove its

claims might include persons with meritorious individual claims) is due to the tension between ascertainability and commonality. For a class to be "ascertainable" it must be defined by precise, objective and presently ascertainable factors such as the purchase of products or employment in job classifications. The Court can, however, take judicial notice that not every person who purchases a product does so for the exact same reasons and not every person employed in a job classification has the exact same work experience. An inevitable consequence of the need to define an objectively ascertainable class is that the Court's evaluation of commonality is based on whether common factual and legal *predominate* rather than on whether all factual and legal issues are *identical*. *Cohen v. DirecTV* (2009) 178 Cal.App.4th 966 (discussing interaction between ascertainability and commonality).

Common factual issues predominate regarding whether the class members suffered any injury and the amount of any such injury. Plaintiffs have presented evidence from Dr. Dennis and Dr. Selwyn that class members suffered injury because they received handsets that allegedly were materially less functional than what Cingular and AWS represented that the class members would receive and that the difference in value between a locked and an unlocked phone is between $15.00 and $50.00. This is common evidence that can be evaluated on a classwide basis. Cingular's and AWS's arguments that Plaintiffs' evidence is unreliable goes to the merits of the claims and not to whether Plaintiffs can present those claims on a common basis.

In certifying this claim, the Court assumes that Plaintiffs must prove classwide reliance and causation to obtain monetary relief. There is some ambiguity in *In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 320, regarding whether in post-Proposition 64

UCL fraudulent claims by private parties the Court may grant relief "without individualized proof of deception, reliance and injury" or whether the plaintiffs must prove reliance and causation. *Cohen v. DirecTV* (2009) 178 Cal.App.4th 966, suggests there is a material distinction between what a plaintiff must plead to establish standing (an initial jurisdictional issue) and what a plaintiff must prove to establish liability (the ultimate issue in the case). There might also be a distinction between what a private plaintiff must prove to obtain non-monetary injunctive relief to protect the members of a class and what a private plaintiff must prove to obtain monetary relief for such a class.

Practice of handset locking based claims.

Common factual and legal issues predominate regarding the practice of locking claim. Cingular and AWS had a common practice of locking handsets and that practice had a common effect on all Cingular and AWS customers. If the Court determines that the practice of handset locking is unfair then the Court can infer that the unfair practice had an effect on all members of the classes. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal. App. 3d 1341, 1350-1351 (inferable injury in antitrust context). If the practice is unfair, then the amount of monetary relief could be determined on a common basis under Plaintiffs' "diminished value" theory.

In certifying the practice of locking claim, the Court takes no position on the standards that the Court will employ in determining whether handset locking is "unfair" under the UCL. *Camacho v. Automobile Club of Southern California* (2006) 146 Cal.App.4th 1394, 1400 ("there is some uncertainty about the appropriate definition of the word "unfair" in consumer cases brought under section 17200"); *Bardin v.*

Daimlerchrysler Corp. (2006) 136 Cal. App. 4th 1255 (“we urge the Legislature and the Supreme Court to clarify the scope of the definition of "unfair" under the UCL”).

Arbitration based claims. Common factual and legal issues predominate regarding whether the Cingular Wireless Service Agreements dated January 1, 2001, through the date of judgment" contain arbitration provisions that are prohibited by law under Civil Code § 1770(a)(14). The arbitration agreements are standardized consumer contracts and there are common issues of whether the arbitration provisions are still in effect and, if so, whether the Court can determine prospectively that they will be unlawful if invoked by Cingular, AWS, or the members of the class in any and all potential circumstances. *Discover Bank v. Superior Court* (2005) 36 Cal. 4th 148, 157 (“[C]ontroversies involving widely used contracts of adhesion present ideal cases for class adjudication; the contracts are uniform, the same principles of interpretation apply to each contract, and all members of the class will share a common interest in the interpretation of an agreement to which each is a party.’”). The Court does not address the merits of the claim at class certification. Cingular's and AWS's arguments based on the Order of 10/29/09 at 3:26-4:15 and to *Meyer v. Sprint Spectrum, L.P.* (2009) 45 Cal.4th 634, can be raised in an appropriate motion directed to the merits of the claims.

TYPICALITY AND ADEQUACY

Plaintiffs are typical of consumers who purchased locked handsets and entered into the relevant contracts. There is no requirement that all named plaintiffs must assert all claims, so it is permissible for the named plaintiffs whose deception based claims were dismissed to remain as class representatives for the other claims. A named plaintiff can be typical of the class members even if the named plaintiff’s specific factual situation

is not the same as the specific factual situation of all the other class members. *Daniels v. Centennial Group, Inc.* (1993) 16 Cal. App. 4th 467, 473; *Wershba v. Apple Computer* (2001) 91 Cal. App. 4th 224, 238. The named plaintiffs are adequate class representatives because they have selected counsel qualified to conduct the litigation and have no interests antagonistic to the interests of the class. *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450; *Lazar v. Hertz Corp.* (1983) 143 Cal.App.3d 128, 141-142.

DETERRING AND REDRESSING THE ALLEGED WRONGDOING

Trial courts have an obligation to consider the role of the class action in deterring and redressing wrongdoing. *Linder*, 23 Cal.4th at 446. There is no evidence that the F.C.C. or some other public entity is investigating the legality of handset locking. Compare *Caro v. Procter & Gamble Co.* (1993) 18 Cal. App. 4th 644, 660 (defendant had already entered in to consent decrees with public law enforcement entities).

The F.C.C. is evaluating "open platform" rules governing the locking of handsets in certain frequency bands. If the F.C.C. implements rules then those rules would apply prospectively and not affect the claims for past injuries. If the F.C.C. implements rules then the Court would be careful to not order injunctive relief that might interfere with the F.C.C.'s regulation of wireless communications.

ALTERNATIVE PROCEDURES FOR HANDLING THE CONTROVERSY

The Court cannot identify any effective alternate procedures to resolve the controversy. Requiring individual consumers to file individual claims in small claims court would not be effective for the consumers and would not be an efficient use of Court resources. If the Court required individual claims, then the Court would give Cingular

and AWS practical immunity from liability given that the vast majority of consumers would probably not elect to file claims. *Discover Bank v. Superior Court* (2005) 36 Cal. 4th 148, 157-161; *Szetela v. Discover Bank* (2002) 97 Cal. App. 4th 1094, 1101.

CONCLUSION

The motions of Plaintiffs for class certification of the Cingular handset locking case and the AWS handset locking case are GRANTED. The class definition is as follows:

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

Plaintiffs' proposed Consumer subclass is defined as follows: "All members of the class who have personal accounts." Plaintiffs' proposed arbitration subclass is defined as follows: "All members of the Consumer subclass who are parties to the Cingular Wireless Service Agreements dated January 1, 2001, through December 31, 2009."

At the hearing on November 24, 2009, Cingular/AWS suggested that the class definition should be modified to exclude purchasers of iPhones. The Court directs the parties to meet and confer on this issue. The Court notes, without the benefit of briefing, that excluding purchasers of iPhones from the class definition is probably inappropriate given that some of Cingular/AWS's customers may have purchased both regular handsets and iPhones. Devereux Dec., ¶15 (customers tend to stay with a carrier for a number of years). The Court is unlikely to exclude purchasers of iPhones from the class unless Plaintiffs concede that purchasers of iPhones cannot prevail on the handset locking claims. *In re Cipro Cases I & II* (2004) 121 Cal. App. 4th 402, 418 (directing redefinition of class to exclude ascertainable group of persons who had not suffered any

injury). Assuming that there is some basis to distinguish claims regarding the sales of iPhones from claims regarding the sales of other handsets, the better course would seem to be the creation of an iPhone subclass.

If the parties cannot agree on a resolution to the iPhone issue, then Cingular/AWS may file a motion on Wednesday, December 2, 2009, Plaintiffs may file an opposition on Monday, December 7, Cingular/AWS may file a reply on Wednesday, December 9, 2009, by 12:00 noon, and the Court will hear the matter on Friday, December 11, 2009, at 9:00 am.

MOTION OF AWS FOR SUMMARY JUDGMENT/ADJUDICATION ON ETF CASE (# 984786)

The motion of AWS for summary judgment or, in the alternative, summary adjudication and for a no merit determination of the CLRA claims is CONTINUED to 1/6/08 at 9:00 am in Dept 23. Given that there has been a nationwide settlement in *Hall v. AT&T Mobility* in federal court in New Jersey, the motion for preliminary approval was granted on November 5, 2009, and the motion for final approval is set for April 14, 2010, the Court anticipates that the motion of AWS for summary judgment will be continued further to a date after April 14, 2010.

MOTION OF APPROVAL OF SETTLEMENT - T-MOBILE HANDSET LOCKING CASE (#970410)

The Motion of Plaintiffs for approval of settlement of the T-Mobile handset locking case is GRANTED. Plaintiffs did not provide the Court with a declaration of counsel regarding the potential recovery, the risk of litigation, and other factors that would permit the Court to evaluate how much and why the case was discounted for

purposes of settlement. *Kullar v. Foot Locker Retail, Inc*. (2008) 168 Cal.App.4th 116. The Court is, however, familiar with the strengths and weaknesses of this case and with the settlements in the related handset locking cases in this coordinated proceeding and can, on that basis, find the settlement to be a reasonable compromise between the parties.

The Court has considered the concerns of the single objector regarding the lack of monetary compensation. They are legitimate concerns but do not take in to account the litigation risk and the benefits of the injunctive relief.

The Court has signed the proposed judgment.

MOTION FOR APPROVAL OF FEES - T-MOBILE HANDSET LOCKING CASE (#970410)

The Motion of Plaintiffs for approval of fees in the T-Mobile handset locking case is GRANTED.

Authority for Awarding Fees. Pursuant to the Settlement Agreement Plaintiffs make an unopposed motion for fees under the terms of the Settlement Agreement, the CLRA's fee shifting provision, Civil Code § 1780(d), and California's private attorney general statute, Civil Code § 1021.5.

The Settlement Agreement at Article V(C) states, "Class Representatives will make a Fee and Expense Application to be heard at the Final Approval Hearing." This is an enforceable contractual fee shifting provision. In the absence of any contractual agreement the Court applies the lodestar/multiplier analysis in determining the amount of a reasonable fee. In the alternative, the Court awards fees under the CRLA's fee shifting statute. Civil Code § 1780(d); *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal. App. 4th 140, 150.

Amount of Fees - Lodestar. Plaintiffs' memorandum asserts that their lodestar is above $1,800,000 and that they have incurred costs of $293,853.65. The declarations submitted by class counsel support that assertion. A summary follows:

Decl. of Counsel	Hours billed	Lodestar Fees	Hi/low rate	Costs
Abernathy	41	17,425	425	761
Plutzik	742	402,298	595/495	27,226
Bursor	884	472,833	535	30,535
Pressley	265	136,125	700/515	2,381
Goldstein	117	43,970	570/300	0
Lurie	269	176,133	750/635	4,104
Pastor	63.2	33,180	525	0
Reich	210	73,663	450/350	2,459
Farqui	889	450,806	675/550	226,387
TOTAL	3480.2	$1,806,433		$293,853

Neither T-Mobile nor any objector challenges the number of hours worked. The Court finds the hours worked to be reasonable. There is no challenge to the hourly rates asserted. The "regular rate" should reflect "the general local hourly rate for a *fee-bearing case*; it does *not* include any compensation for contingent risk, extraordinary skill, or any other factors." *Ketchum v. Moses* (2001) 24 Cal. 4th 1122, 1138. Looking at the lodestar of $1,806,433 in the aggregate and without approving any specific hourly rate, the Court finds that the lodestar is appropriate for the prosecution of this case.

The Court determines whether to apply a multiplier based on its consideration of five factors: (1) the novelty and difficulty of the legal issues involved, (2) the skill of counsel, (3) the time commitment and preclusion of other employment, (4) the contingent nature of the fee award, and (5) the benefit conferred. *Ketchum,* 24 Cal. 4th at 1131-1132; *Graciano,* 144 Cal. App. 4th at 154; *Weeks,* 63 Cal. App. 4th at 1171-1172.

Counsel for Plaintiffs displayed skill in presenting the evidence and the legal arguments to the Court. This skill is, however, already reflected in the hourly rates of counsel. The Court is aware of the danger of "double counting." *Ketchum*, 24 Cal.4th at 1138-1139; *Flannery*, 61 Cal. App. 4th at 647. Counsel for Plaintiffs coordinated the California and the *In re Wireless* federal antitrust case to minimize duplicative discovery. This efficient use of time warrants some multiplier. The nature of the litigation precluded other employment by counsel for Plaintiffs. Counsel assumed risk in undertaking this case on a contingent basis. That risk warrants some multiplier even though the case was not prosecuted through trial. *Ketchum*, 24 Cal.4th at 1132 and 1138; *Greene v. Dillingham Constr. N.A.* (2002) 101 Cal. App. 4th 418, 428-429. The Settlement conferred a benefit on the members of the class but the benefit cannot be readily quantified due to its injunctive nature and uncertainty about whether benefits to consumers are due to the injunction or the developing nature of the telecommunications industry.

Award of costs. Plaintiffs present evidence that they have incurred costs in the amount of $293,853.65. The authority for awarding costs is the Settlement Agreement. Given the nature and duration of the case, the Court finds that the agreed on amount of fees of is appropriate.

Incentive Awards. The named plaintiffs seek incentive awards of $3,000 each. The Court finds that the amounts sought are appropriate in this case. *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804-807.

Summary. The Court awards a total of $1,850,000 in fees and costs to class counsel. The Court awards incentive payments of $3,000 each to each of the named

plaintiffs. T-Mobile must make those payments under the terms of the Settlement Agreement.

MOTION OF PLAINTIFFS IN THE T-MOBILE ETF CASE TO TRANSFER INTEREST IN LITIGATION (#892392)

The motion of Plaintiffs in the T-Mobile ETF case to transfer interest in litigation is DROPPED. The Order of 9/21/09 continued the motion to 11/24/09. The motion is now moot because the federal court granted final approval of the *Milliron* settlement on 9/10/09 and this Court has entered judgment in the T-Mobile ETF case.

CMC ISSUES.

SCHEDULING.

The next CMC is set for 12/11/09. CMC statements are due on 12/4/09.

AWS/CINGULAR.

ETF. There has been a nationwide settlement in *Hall v. AT&T Mobility* in federal court in New Jersey. The Federal Court issued an order granting preliminary approval on 11/5/009, and the motion for final approval is set for 4/14/10. (Cingular CMC Stmt filed 11/9/09, Exh A.)

The preliminary approval order in the *Hall* at paragraphs 9 and 18 appears to stay all proceedings in this California case. Given the *Hall* preliminary approval order, the Court is inclined to sua sponte order a stay of the Cingular and AWS ETF cases until 4/28/10, or further order of the federal court in *Hall*. If the parties cannot agree that the cases are stayed, the Court will entertain an ex-parte application to stay to be heard on 12/11/10.

HANDSET LOCKING. The Cingular/AWS handset locking cases are not stayed. The parties are to meet and confer regarding class notice to be distributed and published in January

2010. C.R.C. 3.766. The parties are to submit an agreed plan or competing plans with their CMC statements for the 12/11/09 CMC.

Plaintiffs request a trial date of 4/1/10 in the AWS handset locking case and a trial date of 5/15/10 in the Cingular handset locking case. The Court direct the parties to meet and confer regarding the scope of remaining discovery and to develop a CMC and pre-trial schedule similar to those prepared in the ETF cases so that the parties can set realistic pre-trial schedules and trial dates. The parties are to submit an agreed plan or competing plans with their CMC statements for the 12/11/09 CMC.

T-MOBILE.

ETF. The federal court granted final approval of the *Milliron* settlement on 9/10/09. T-Mobile submitted a proposed form of judgment on 10/30/09. Plaintiffs made no objection to the form and content of the proposed judgment. The Court has entered the proposed judgment.

HANDSET LOCKING. The Court has granted the motion for final approval of class settlement and entered a final judgment.

CASE MANAGEMENT. The ETF and Handset locking cases against T-Mobile have both concluded. Absent a post-judgment motion directed to T-Mobile, T-Mobile is not required to participate further in the coordinated proceeding.

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SPRINT/NEXTEL.

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

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: November __, 2009

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Judge Winifred Smith