Theodore H. Frank (SBN 196332)
Hamilton Lincoln Law Institute
1629 K Street NW, Suite 300
Washington, DC 20006
Voice: (703) 203-3848
Email: ted.frank@hlli.org

M. Frank Bednarz (*pro hac vice* application to be filed shortly)
HAMILTON LINCOLN LAW INSTITUTE
1440 W. Taylor St # 1487
Chicago, IL 60607
Voice: (801) 706-2690
Email: frank.bednarz@hlli.org

Attorneys for Intervenors Allison Hayward, Peter Heinecke, Lawrence Prince, and Will Yeatman

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

TERESA MACCLELLAND, et al.,
For Themselves, as Private Attorneys General, and on Behalf of All Others Similarly Situated,

Plaintiffs,

v.

CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS; and
VERIZON COMMUNICATIONS INC.,

Defendants.

Case No. 3:21-cv-08592-EMC
Hon. Edward M. Chen, Courtroom 5

[PROPOSED] COMPLAINT OF INTERVENORS
CLASS ACTION

DATE: April 4, 2024
TIME: 1:30 p.m.

ALLISON HAYWARD; PETER HEINECKE; LAWRENCE PRINCE; and WILL YEATMAN, for Themselves and on Behalf of All Others Similarly Situated,

Intervenor-Plaintiffs and Cross-Plaintiffs,

v.

HATTIS LAW PLLC D/B/A HATTIS & LUKACS; DENITTIS OSEFCHEN PRINCE, P.C.; DANIEL HATTIS; PAUL LUKACS; STEPHEN DENITTS; and SHANE PRINCE,

Cross-Defendants.

Intervenors, by and through their attorneys, intervene on behalf of themselves and alternatively on behalf of a class of injured Verizon customers for the purpose of asking this Court to review the equity of attorneys' fees arising out of a settlement from this litigation now submitted for consideration before New Jersey state court. After this Court held Verizon's arbitration clause to be unconscionable, the *MacClelland* parties negotiated a common fund settlement to end this and related litigation—but colluded to avoid scrutiny of the settlement by this Court, which has a proven track record of diligent and fair adjudication for class suits, and to avoid the scrutiny required by CAFA, the Northern District of California's Procedural Guidance for Class Action Settlements and local rules, and 28 U.S.C. § 1715. Class Counsel proposed a 33.3% fee award for their $100 million-dollar settlement in New Jersey state court, millions of dollars more than they would have been entitled to under this Circuit's law. This is textbook unjust enrichment and breach of fiduciary duty to the class—and a pattern and practice of the Cross-Defendants in this case who have previously obtained 33.3% fees in the millions of dollars from settling federal class actions brought in this Court and other federal courts by forum shopping new actions in state court without complying with local and statutory rules regarding notice to federal courts and appropriate state and federal officials. Intervenors—who, by nature of the settlement's common-fund structure, lose money from Class Counsel's largesse—seek equitable redistribution of that common fund, or, in the alternative, to add Class Counsel as Cross-Defendants to this litigation for breaching their fiduciary duty to the class by filing the settlement in a new action in New Jersey state court for the primary bad-faith purpose of winning larger fees than which they would otherwise be entitled. Intervenors allege as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this Complaint because the Court maintains jurisdiction over the original action via the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d)(2). The Named Plaintiffs brought a proposed class action whose amount in controversy exceeds $5,000,000, and some members of the proposed class (as well as Intervenors) were and still are citizens of a state different from the Defendants.

2. In addition, this Court has jurisdiction over the complaint in intervention because the amount in controversy exceeds $5,000,000, and some members of the proposed nationwide class are citizens of a state

different from the Cross-Defendants. For example, named cross-plaintiff Allison Hayward is a citizen of California, and cross-defendant Hattis & Lukacs is a citizen of Washington.

3. Additionally, or in the alternative, this Court has supplemental jurisdiction under 28 U.S.C. § 1367. Intervenors assert State unjust enrichment and breach of fiduciary duty claims against the Cross-Defendants, and these claims are so related to the underlying suits that they form part of the same case or controversy under Article III of the United States Constitution.

4. This Court has specific personal jurisdiction over each of the Parties and class counsel, because they actively conduct and/or have done business in California (including, most dispositively, appearing in this matter and/or directing correspondence into this District pertaining to this litigation). Intervenors' suit arises out of these very contacts with the State and this Court.

5. Venue in this district is proper under 28 U.S.C. § 1391(b)(1)-(2) because a substantial part of the events or omissions giving rise to the claim occurred within this district and, indeed, in this very Court.

6. The San Francisco division is the proper division for hearing this Complaint because the relevant events alleged hereafter arise from ongoing litigation in this division.

PARTIES

7. Intervenor, unnamed plaintiff, and Cross-Plaintiff Allison Hayward is a resident of Cambria and a citizen of California.

8. Intervenor, unnamed plaintiff, and Cross-Plaintiff Peter Heinecke is a resident of San Francisco and a citizen of California.

9. Intervenor, unnamed plaintiff, and Cross-Plaintiff Lawrence Prince is a resident of Santa Barbara and a citizen of California.

10. Intervenor, unnamed plaintiff, and Cross-Plaintiff Will Yeatman is a resident of Washington, D.C., and citizen of the District of Columbia.

11. Cross-Plaintiffs Hayward, Heinecke, and Prince are original class members in this litigation, *MacClelland v. Cellco P'ship*, No. 3:21-cv-08592-EMC, ECF Nos. 1 & 58 (N.D. Cal. Nov. 3, 2021), filed by Cross-Defendants. Specifically, they are "individual consumers in California" at the time of the complaint's filing who "currently subscribe[d] or formerly subscribed to a post-paid wireless service plan from Verizon and were

charged what Verizon labeled an Administrative Charge within the applicable statutes of limitations." *Id.* ¶ 113 (quotes omitted). *MacClelland* is a "class action" under 28 U.S.C. § 1711(2).

12. Cross-Plaintiff Yeatman is an original class member of the nationwide class in *Corsi v. Cellco Partnership d/b/a Verizon Wireless*, No. 22-cv-04621 (D.N.J.), filed by Cross-Defendants in federal court on July 18, 2022; and *Allen v. Cellco Partnership d/b/a Verizon Wireless*, No. 3:23-cv-01138 (D.N.J.), filed by Cross-Defendants on February 27, 2023. The putative class alleged in the initial *Corsi* complaint makes allegations on behalf of a class of Verizon customers of all U.S. states except California and New Jersey; the putative class in *Allen* makes allegations on behalf of a class of Verizon customers of the United States except California, New Jersey, and six other states, and alleges violations of District of Columbia law. *Corsi* and *Allen* are each "class actions" under 28 U.S.C. § 1711(2).

13. All Cross-Plaintiffs are members of the nationwide class as now defined by the Parties in their subsequent, collusive filings in New Jersey state court that arise out of the same nucleus of facts as this case. *See Esposito v. Cellco P'ship*, MID-L-006360-23 (Middlesex Cty. Nov. 10, 2023). Specifically, they are "individual consumer account holders in the United States who currently subscribe or formerly subscribed to a post-paid wireless service plan from Verizon and were charged and paid what Verizon labeled an Administrative Charge or Administrative and Telco Recovery Charge within the applicable statutes of limitations." *Id.* ¶ 213 (quotes omitted). Cross-Plaintiffs each received emailed notice of the putative class action settlement, which expressly settles the *MacClelland* and *Corsi* and *Allen* class actions. It is thus a "proposed settlement" under 28 U.S.C. § 1711(6) subject to the requirements of 28 U.S.C. § 1715. Cross-Plaintiffs have each filed claims, or plan to file claims by the April 15 claim deadline, in the putative *Esposito* class action settlement, and would be harmed by the dilution of the common fund with an excessive attorney-fee award that does not comply with Ninth Circuit law.

14. Cross-Defendant Hattis Law PLLC d/b/a Hattis & Lukacs is a law firm with its principal place of business in Bellevue, Washington. On information and belief it is a citizen of the State of Washington under 28 U.S.C. § 1332(d)(10). Hattis & Lukacs partners were original attorneys in this litigation and filed pleadings as putative class counsel in this litigation, *Corsi*, *Allen*, *Esposito*, and related litigation and arbitration.

15. Cross-Defendant DeNittis Osefchen Prince, P.C., is a law firm with its principal place of business in Marlton, New Jersey. On information and belief, it is a citizen of the State of New Jersey under 28

U.S.C. § 1332(d)(10). DeNittis Osefchen Prince partners were original attorneys in this litigation and filed pleadings as putative class counsel in this litigation, *Corsi* (D.N.J.), *Allen* (D.N.J.), *Esposito*, and related litigation and arbitration.

16. Cross-Defendants Daniel Hattis and Paul Lukacs are attorneys at the firm Hattis & Lukacs of Bellevue, Washington. On information and belief, they are citizens of the State of Washington. Both Hattis and Lukacs were original attorneys in this litigation and as putative class counsel in both this action and related litigation in New Jersey and the District of New Jersey.

17. Cross-Defendants Stephen DeNittis and Shane Prince are attorneys at the firm DeNittis Osefchen Prince, P.C. of Marlton, New Jersey. On information and belief, they are citizens of the State of New Jersey. Both DeNittis and Prince were original attorneys in this litigation and as putative class counsel in both this action and related litigation in New Jersey and the District of New Jersey.

18. Cross-Defendants are Class Counsel in the original *MacClelland* litigation and will be referred to interchangeably as "*MacClelland* Class Counsel."

19. Intervenors/Cross-Plaintiffs are entitled to intervene in this action as a matter of right pursuant to Rule 24(a) because they have "a significant protectable interest relating to [] the subject of th[is] action," "the disposition" of this action "may … impede [their] ability to protect [their] interest," the intervention application is "timely," and, "the existing parties" do not "adequately represent the applicant's interest." *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). Specifically, Intervenors have a pecuniary interest as class members in the settlement's common fund, from which class counsel is also paid. The Parties and their attorneys impede and threaten this interest—and thus also cannot adequately represent it—by colluding to move the case to New Jersey and secure a fee award that is substantially higher than what this Court would allow (and one that likely violates Ninth Circuit caselaw, too). And the intervention is timely because there is no prejudice against the Parties given its limited purpose and this Complaint is submitted about a month after the fee request was submitted.

20. Intervenors should also be granted permissive intervention under Rule 24(b) to participate in this litigation because this Court has "an independent ground for jurisdiction" under CAFA, the motion to intervene is "timely," and, because intervenors rely on the same nucleus of facts and intervene to address a legal issue in this case (fees), the intervenors share "a common question of law and fact" with "the main action."

Freedom from Religion Found., Inc. v. Geithner, 644 F.3d 836, 843 (9th Cir. 2011). Permissive intervention promotes judicial efficiency.

BACKGROUND

I. Cross-Defendants file putative class actions on behalf of Verizon consumers.

21. On November 3, 2021, the Cross-Defendants, through their lawyers, filed a class suit against the Original Defendants in this Court alleging violations of various California consumer protection laws through deceptive cell phone billing practices. *MacClelland v. Cellco P'ship*, No. 3:21-cv-08592-EMC ("*MacClelland*"; actions by this court are styled as "the Court," and unspecified "Dkt." citations refer to filings in this case).

22. The original class suit only included those who had been or were actively subscribed to Verizon wireless service during the relevant timeframe while living in California. Dkt. 1. Specifically, Cross-Defendants through their clients sought to represent "All individual consumers in California who currently subscribe or formerly subscribed to a postpaid wireless service plan from Verizon and were charged what Verizon labeled an 'Administrative Charge' within the applicable statutes of limitations." *Id.* at 29. The complaint only asserted violations of California law. Cellco Partnership d/b/a Verizon Wireless and Verizon Communications Inc. (collectively "Verizon") were defendants in *MacClelland*.

23. The original action centered on a so-called "administrative charge" that Verizon issued to customers in the amount of $1.95/month per line, which the Plaintiffs alleged resulted in more than $1 billion in overcharging. (Verizon has since increased the fee to $3.30/month and rebranded it as a "telco recovery charge.")

24. Verizon quickly filed a motion to compel arbitration pursuant to its boilerplate subscription contract each customer signs when enrolling in service. Dkt. 20.

25. While the Court had the motion to compel before it, class counsel filed an additional lawsuit on January 11, 2022 in the State of New Jersey under the same nucleus of facts and legal theories against Verizon, but under New Jersey law on behalf of a putative New Jersey-based class. *Achey v. Cellco P'ship*, MID-L-000160-22 (Middlesex Cnty. Sup. Ct. of N.J. January 11, 2022). There, the trial court granted the motion to compel arbitration, but the plaintiffs appealed.

26. This Court denied the motion to compel on July 22, 2022—giving the class suit an increased chance of judicial relief in an Article III court. This Court held that the arbitration agreement was unconscionable because it prevented injunctive relief, barred extrinsic evidence, and included a mass arbitration provision that required arbitration to be "batched" into buckets of 25 cases at a time—with a 90-day break between batches for mediation. As the Court observed about this "batching" provision at the time, "It is one thing to set up a bellwether system to adjudicate a group of cases with the purpose of facilitating global or widespread resolution via ADR. It is another to formally bar the timely adjudication of cases that do not settle."

27. Commentators and practitioners recognized the importance of this Court's decision, which addressed increasingly-popular "batching" provisions apparently intended to frustrate consumers' access to litigation of their claims. *E.g.*, Alison Frankel, *Verizon appeal will be early test of corporate strategy to combat mass arbitration*, REUTERS (Nov. 22, 2022).

28. Verizon appealed the Court's ruling on the motion to compel arbitration to the Ninth Circuit, prompting considerable interest and *amicus* participation from various public interest groups and business associations.

29. Following notice of appeal, Cross-Defendants filed their Second Amended (and operative) Complaint on putative behalf of California Verizon customers. Dkt. 58. The operative complaint seeks certification of an identical class of California consumers as the original complaint. *Id.* at 102.

30. Verizon moved to stay proceedings before this Court pending appeal. Dkt. 60. It argued that permitting discovery would permit Cross-Defendants to "to pursue discovery supporting an entirely different type of case: one involving a purported class with millions of members that would be off the table if Verizon prevails on appeal." *Id.* at 2. Cross-Defendants opposed, arguing that the Court contemplated at the July 26, 2022 status hearing that they could pursue "discovery regarding whether the Administrative Charge is in fact a deceptive and bogus double-charge for service, whether Verizon inadequately disclosed the Charge to Plaintiffs, and whether Verizon's disclosures on the customer bill were false or misleading." Dkt. 69 at 4.

31. The Court agreed discovery should proceed during the pendency of the appeal, which would include corporate documents "easy to identify" but discouraged more costly and burdensome sorts of discovery, entrusting the parties to negotiate within its guidance. Dkt. 74 at 7-8. Upon information and belief, Cross-Defendants only secured their only substantive (non-jurisdictional) discovery in *MacClelland*. Cross-

Defendants represented that "almost 80,000" pages were received through formal discovery in this Court, and that this formal discovery, among other things, provided an "ample basis for evaluating the merits of" the *Esposito* settlement. Bednarz Decl. Ex. 6 at 5, 36.

32. Class counsel relied on this Court's ruling to successfully convince the New Jersey appeals court to overturn the trial court and void the arbitration clause in that case. *See Achey v. Cellco P'ship*, 475 N.J. Super. 446 (Super. Ct. App. Div. 2023). And after this Court's decision, class counsel expanded their legal action in New Jersey by filing two nationwide class suits against Verizon in the District of New Jersey federal court based on the same facts and legal theories. *See Corsi v. Cellco P'ship*, No. 22-cv-4621 (D.N.J.); *Allen v. Cellco P'ship*, 3:23-cv-01138 (D.N.J.). In the nationwide class actions filed in the District of New Jersey, class counsel relied on this Court's ruling on the motion to compel arbitration in its complaint to avoid having to litigate the issue in that court and because the decision was thorough and favorable.

II. Cross-Defendants agree to settle to avoid scrutiny of this Court.

33. Meanwhile, the Cross-Defendants proceeded with arbitration in parallel to their judicial action. On February 22, 2023, a putative mass arbitration of approximately 2500 consumers received a favorable decision from an American Arbitration Association arbitrator that the "batching" provision of Verizon's subscription agreement was not enforceable as written. Bednarz Decl. Ex. 13. The arbitrator quoted this Court's decision based on substantive unconscionability under California law; although the issue was different, the arbitrator found that Verizon's agreement did not "'materially and substantially comply with Principle 8 of the [AAA's Consumer Due Process] Protocol" because it would "would result in extraordinary delays in the resolution of mass claims brought against Verizon." *Id.* at 13. The arbitrator went on to rule against Verizon's argument that the AAA's initial determination on the Customer Agreement "misled" Verizon and proposed a "practical solution" that Verizon could amend its agreement. *Id.* at 14. "Nothing about this ruling is intended, however, to deprive the Association of its customary practice of asking a registrant to either waive the offending provision or revise it to bring the clause into compliance with the Protocol." *Id.* at 15. Verizon wrote the D.N.J. courts that "AAA confirms that the arbitration process works as intended. There is no need for this Court, or any court, to indulge Plaintiffs' speculation about nonfeasance by AAA." Bednarz Decl. Ex. 14.

34. However, once it became clear that mass arbitration was possible, Verizon flipped the position they took before this Court, the Ninth Circuit, and the District of New Jersey and started suing individual customers represented by an independent attorney, Evan Murphy, to win a declaratory judgement keeping their class claims *out* of arbitration hearings. *See*, *e.g.*, *Cellco P'ship v. Holschen*, No. 4-23-cv-00823 (E.D. Mo. June 26, 2023); *Cellco P'ship v. Lasher*, No. 8:23-cv-1242 (M.D. Fla. June 2, 2023); Bednarz Decl. Exs. 16 and 17. Murphy is an attorney representing clients who want to arbitrate their disputes arising from this litigation's nucleus of facts with Verizon. Bednarz Decl. Ex. 8 (Murphy affidavit).

35. Verizon's complaints for declaratory judgment did not advise these federal courts of the process arbitrator's decision permitting mass arbitration for Cross-Defendants' clients, nor of this Court's decision. Nor did Verizon acknowledge that these actions directly contradict the position it took before the Court and in Ninth Circuit briefing that only an arbitrator could decide the enforceability of the provisions of its Customer Agreement. Indeed, days before filing these actions, Verizon told the Ninth Circuit in its reply brief that "in order to challenge the mass-arbitration provision, one of the first selected plaintiffs would simply file a demand for arbitration, and upon appointment of an arbitrator, ask the arbitrator to determine the validity of the mass-arbitration provision." *MacClelland* Reply Brief 14, No. 22-16020, Dkt. 55 (9th Cir. May 8, 2023); Bednarz Decl. Ex. 15. In Verizon's declaratory judgment actions, it described Murphy's clients following exactly this path, yet they ran to federal courts to *prevent* the arbitrators from hearing challenges to the Customer Agreement. "As a result of the arbitrator's denial to strike Respondent's class allegations, Verizon seeks an order from this Court under the Federal Arbitration Act (9 U.S.C. § 4) compelling Respondent to arbitrate his dispute as an individual claimant pursuant to the terms of the Agreement." Bednarz Decl. Ex. 16 at 4; Ex. 17 at 3.

36. The Parties did not notify this Court of Verizon's declaratory judgment actions in the Eastern District of Missouri or Middle District of Florida.

37. In June 2023, Cross-Defendants invited Evan Murphy to attend a mediation with Cross-Defendants and Verizon before retired Federal Magistrate Judge Jay Ghandi. Bednarz Decl. Ex. 7 (DeNittis Certification) ¶ 5. Class Counsel offered Murphy to settle his claims in Cross-Defendants' nationwide class settlement, but Murphy declined. *Id.* ¶ 8; Bednarz Decl. Ex. 8 (Murphy Aff.) ¶ 9. He has sworn that Class Counsel repeatedly told him that any settlement would not interfere with his arbitration clients (Bednarz Decl.

Ex. 8 ¶ 8), which Cross-Defendants dispute (Bednarz Decl. Ex. 7, ¶ 13), but in any event the settlement did not carve these arbitrations out of the class or release. Instead, Verizon and the Cross-Defendants have each moved to bar opt-out and challenge the opt-outs Murphy has obtained by requiring individual class members to sign original wet signatures to opt-out under the terms of the *Esposito* settlement and preliminary approval order. Bednarz Decl. ¶ 15.

38. Cross-Defendants' strategy paid off: the parties agreed to a nationwide class action settlement on November 9, 2023. That day, the parties asked the Ninth Circuit—which still had the appeal of this Court's motion to compel arbitration on its docket—to stay the oral argument scheduled for November 14.

39. Though *MacClelland* was the first-filed complaint, on November 10 the Parties filed a brand-new nationwide class complaint in the Middlesex County Court of New Jersey, and then moved for preliminary approval of the settlement less than a week later. *Esposito v. Cellco P'ship*, MID-L-6360-23 (Middlesex Cnty. Sup. Ct. of N.J. November 15, 2023); Bednarz Decl. Exs. 1-2.

III. Terms of the *Esposito* settlement

40. The *Esposito* settlement agreement is captioned for an action that did not exist when it was agreed on November 9, 2023: a new suit that the agreement contemplates filed in Middlesex County Superior Court in New Jersey. Bednarz Decl. Ex. 1 (*Esposito* settlement) at 6.

41. The *Esposito* settlement requires that "No press release or press communication concerning the Settlement shall be initiated by any Party or counsel." *Id.* at 38.

42. The settlement establishes a common fund of $100 million dollars to pay for aspects of the settlement: class claims, administration costs, attorneys' fees, and service awards for the named plaintiffs. *Id.* at 12-13. Class members who file claims are nominally credited under the settlement for $15 plus $1 per month of Verizon service since January 1, 2016, up to a maximum of $100. *Id.* at 16. But these payments will be reduced *pro rata* because claims exceed distributable funds—even if the New Jersey court were to award $0 in attorneys' fees and service awards. As of January 31, Cross-Defendants estimate that the *pro rata* reduction will result in an average payment of $11.80 to claimants. Bednarz Decl. Ex. 7 (DeNittis certification) at 4 n.1. Cross-Defendants estimated on January 31that over 90% of the class will not make claims and therefore will be paid nothing. *Id.* at Attachment B (8.6% projected claims rate).

43. Cross-Defendants negotiated for themselves "clear sailing" for Verizon to not oppose an award of up to a $33.3 million attorneys' fee out of the fund. Bednarz Decl. Ex. 1 at 34. The settlement also provides a "quick pay" provision to Cross-Defendants, where their fee award shall be payable in full "within ten (10) business days of the Court's entry of the Final Order and Judgment and any order granting attorneys' fees and costs, notwithstanding any appeal, upon execution of a Stipulated Undertaking … requiring repayment of fees and costs by Settlement Class Counsel should the Final Order and Judgment be reversed or materially modified or the award of attorneys' fees and costs be reversed or reduced on appeal." *Id.* at 34-35.

44. That said, the award of any particular fee amount is not required by the settlement. "Settlement shall not be conditioned on Court approval of an award of attorneys' fees and costs. In the event the Court declines any request or awards less than the amounts sought, but otherwise approves the Settlement, the remaining provisions of this Settlement Agreement will continue to be effective and enforceable by the Parties." *Id.* at 34.

45. The settlement provides service awards "not to exceed $3,500" for each of the 129 *Esposito* plaintiffs. *Id.* at 35. This means up to 0.45% of the gross settlement fund for 58 million putative class members goes toward service awards.

46. For the nationwide class action of 58 million class members, this $100 million dollar settlement represents less than 1% of the $15 billion in claimed damages which the Plaintiffs and Cross-Defendants attributed to Verizon concerning their Administrative Charge. "Verizon customers incurred alleged out-of-pocket losses of between $1.95 and $185.25 per line from paying the Administrative Charge. The average Verizon customer has 2.5 lines, and was a subscriber for 54 months during the class period, which means the average customer paid a maximum [theory of damages] of $263.25 in [recoverable] Charges." Bednarz Decl. Ex. 7 (DeNittis certification), ¶ 17. This means class damages are approximately $15.27 billion, so the entire settlement fund represents a *de minimis* 0.655% recovery of the plaintiffs' maximum theory of damages.

47. Cross-Defendants represent estimated payments under the settlement as 4.5% to 242% recovery of *claimants'* damages, but these figures only include *claiming* class members (and the higher number also reflects Verizon's theory of damages). *Id.* at 4 n.1. In fact, over 90% of the class is projected to receive no compensation from the settlement. *Id.* at Attachment B.

48. In their filings, Cross-Defendants allege that they secured "significant injunctive relief" in the settlement in the form of disclosure. Bednarz Decl. Ex. 5 at 18-19. But this is hyperbole: the agreement mandates only modest modifications to one part of Verizon's 6,700-word Customer Agreement. The settlement includes only the new disclosure, without any comparison with Verizon's current disclosure.

49. And the changes are illusory—largely an immaterial change in wording with no new information and no change in actual policy. The revisions from the current disclosure are marked below:

> In addition to the cost of your plan or any features to which you may subscribe, our charges may also include ~~a Federal Universal Service Charge, a Regulatory Charge and~~ an Administrative and Telco Recovery Charge, ~~and other costs, fees, and assessments we incur to provide service~~ **in addition to the other fees described in this Agreement**.
>
> ~~We set these charges;~~ **The Administrative and Telco Recovery Charge** ~~they aren't taxes~~**, isn't a tax,** ~~they aren't~~ **it isn't** required by law, ~~they are~~ **is** not necessarily related to anything the government does, and ~~they are~~ **it is** kept by us in whole or in part~~. and t~~**T**he amount~~s~~ **of the Administrative and Telco Recovery Charge** and what ~~they pay~~ **it pays** for may change **over time**.

Compare Bednarz Ex. 1 (*Esposito* settlement), Ex. H *with* My Verizon Wireless Customer Agreement (archived online at: https://web.archive.org/web/20230713124029/https://www.verizon.com/support/customer-agreement/ (July 13, 2023)). *See also* Dkt. 21-1 at 4 (near-verbatim language in 2021 version of the agreement).

50. The agreement also waives future claims by class members through a "covenant" that class members "shall be permanently barred and enjoined from" instituting any form of action or arbitration concerning the "Released Claims," which covers any claims "whether past, present, mature or ***not yet mature***, known or unknown, suspected or unsuspected" that "could have been alleged in this Action or in any other… arising from or relating to the Administrative Charge." Bednarz Decl. Ex. 1 at 27 (emphasis added).

51. "Released Parties" means "Cellco Partnership d/b/a Verizon Wireless and Verizon Communications Inc. and their present and former parents, subsidiaries, divisions, affiliates, predecessors, successors, assigns, attorneys, and insurers, including all of their insurers' affiliates, predecessors, successors, assigns and reinsurers, and the respective agents, servants, attorneys, employees, officers, directors, shareholders and representatives of the foregoing." *Id.* at 9.

52. The proposed preliminary approval, ultimately approved by the New Jersey court, purports to bar "all Settlement Class Members … from filing, commencing, prosecuting, or enforcing any action against

Verizon or the Other Released Parties insofar as such action asserts Released Claims, directly or indirectly, in any judicial, administrative, arbitral, or other forum."

IV. Proceedings before the *Esposito* court.

53. Many of the original California Plaintiffs before the Court are also named plaintiffs in the *Esposito* complaint and settlement.

54. While N.D. Cal. Loc. R. 3-13 requires parties to "promptly" inform the Court when class actions "involve overlapping claims," none of the Parties informed the Court for 42 days, waiting until the New Jersey court issued a purported injunction against class members pursuing claims against Verizon. *See* Dkt. 84 (stipulated motion requesting stay in view of the *Esposito* settlement granted preliminary approval on December 15).

55. The motion for preliminary approval filed in *Esposito* did not comply with the Northern District of California's Procedural Guidance for Class Action Settlements in several respects.

a. Neither Verizon nor Cross-Defendants advised there were "other cases that will be affected by the settlement," namely the arbitrations initiated by Evan Murphy, nor "whether plaintiffs' counsel in those cases participated in the settlement negotiations, a brief history of plaintiffs' counsel's discussions with counsel for plaintiffs in those other cases before and during the settlement negotiations, an explanation of the level of coordination between the two groups of plaintiffs' counsel, and an explanation of the significance of those factors on settlement approval." Cross-Defendants knew about Murphy's arbitrations and invited him to settlement negotiations but did not disclose this information and in fact made misstatements to the *Esposito* court. N.J. Ct. R. 4:5-1(b)(2) requires "a certification as to whether the matter in controversy is the subject of any other action pending in any court or of a pending arbitration proceeding" upon filing a new complaint, but the *Esposito* complaint falsely certified "No arbitration proceeding is pending or contemplated." Bednarz Decl. Ex. 2 at 189.

b. The *Esposito* filings evince no effort to "get multiple competing bids from potential settlement administrators," nor do they "[a]ddress the settlement administrator's procedures for securely

handling class member data" or "the settlement administrator's acceptance of responsibility and maintenance of insurance in case of errors."

c. The moving papers do not address compliance with notice under 28 U.S.C. § 1715, as required by this district's guidance, much less argue why it would not be required.

56. Additionally, the settling parties did not provide notice to counsel for "any plaintiffs with pending litigation" within "one day of filing the preliminary approval order," as required by the Northern District of California's Procedural Guidance for Class Action Settlements. Counsel for arbitration plaintiffs who had been invited to the settlement conference, Evan Murphy, claims that he only located the Middlesex County docket after Cross-Defendants allegedly strung him along about the status of settlement. Bednarz Decl. ¶ 7 & Ex. 8, ¶ 10.

57. Prior to preliminary approval, Murphy wrote letters to Middlesex County Court asking to be opted out or for proceedings to be stayed so he could intervene. No hearing occurred for Murphy and the court issued the preliminary approval order on December 15, 2023, copying the proposed order and adding text in single-space at the bottom concluding "there is no basis for adjourning this motion. Counsel may seek to intervene and otherwise object in accordance with the terms of this Order." Bednarz Decl. Ex. 4 at 12.

58. Murphy moved to intervene and presented the Middlesex court with a motion to compel arbitration on January 17, 2024. Verizon responded with their own motion on January 22, seeking to enjoin Murphy from soliciting clients through advertising they claim to be misleading and in violation of the New Jersey court's preliminary approval order. Plaintiffs piled on with their own motion filed January 24, likewise asking the *Esposito* court to enter a "protective order" prohibiting Murphy from soliciting clients because they are part of a certified class, so such solicitations were supposedly unethical. Plaintiffs asked the New Jersey court to invalidate retention agreements with Murphy and requiring a "corrective communication" sent to opt-outs signed and mailed by Murphy's clients and a that consumers who requested such opt outs "are not excluded from the class." These motions remain pending.

59. On information and belief, the Parties did not and have not complied with 28 U.S.C. § 1715's notice obligations in settling the nationwide class action.

60. The *MacClelland* and *Corsi* and *Allen* class actions are federal class actions under 28 U.S.C. § 1711(2). The *Esposito* settlement, by its own terms, settles the federal *MacClelland* and *Corsi* and *Allen* class

actions. Bednarz Decl. Ex. 1 at 32-33. The *Esposito* settlement is thus a "proposed settlement" under 28 U.S.C. § 1711(6).

61. Under 28 U.S.C. § 1715(b), "Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement." Cross-Defendants filed the proposed settlement in *Esposito* on November 15, 2023.

62. Effective final approval of such a proposed settlement "may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under subsection (b)." 28 U.S.C. § 1715(d).

63. Neither the proposed New Jersey settlement, nor form of notice, nor any declaration filed by any party or witness in the New Jersey action indicates the service of any such notice. Upon information and belief, neither the settling defendants, who are among the defendants before this Court, nor Cross-Defendants have complied with the statutory requirements of 28 U.S.C. §§ 1715(b) & (d).

64. Intervenor/Cross-Plaintiffs and the Claiming Class are thus entitled to the protections of 28 U.S.C. § 1715(e)(1). Under 28 U.S.C. § 1715(e)(3), the protections of 28 U.S.C. § 1715(e) do not limit the rights of class members to participate in the *Esposito* settlement.

65. Cross-Defendants filed a motion for attorneys' fees on January 31, 2024, seeking $33.3 million and $3,500 "service awards" for all 129 named *Esposito* plaintiffs.

V. Cross-Defendants' breach of fiduciary duty

66. Cross-Defendants and the Named Plaintiffs have a fiduciary duty to the class they represent, which includes petitioning the relevant court for reasonable and fair attorneys' fees. They failed to do so here.

67. Verizon played along with this scheme and—for their cooperation—will obtain a broad release of past and future claims, paying *de minimis* damages to the class as a whole relative to what Cross-Defendants asserted was unjustly earned—and relative to what it would cost to defend the several parallel litigations and arbitrations.

68. On information and belief, the primary purpose of filing a new action in a new court thousands of miles away from the first-filed complaint was to obtain additional benefits for Cross-Defendants in the form

of fees greatly exceeding what would be awarded in the first-filed *MacClelland* action at the expense of their clients.

69. On information and belief, the notice and administration costs will be between $7 million and $9.6 million. This makes the $33.3 million fee request between 35.8% and 36.8% of the net common fund, well in excess of the 25% benchmark in the Ninth Circuit. *Cf. Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012) (38.9% is "clearly excessive"). Furthermore, precedent in this Court suggests that this Court would award materially less than 25% of the common fund because of the size of the fund and the small recovery relative to the amount of damages alleged. The difference is between $8.3 million and $16 million.

70. Cross-Defendants had no reason to file a new action in New Jersey state court except in order to "judge shop" so they could request fees beyond what this Court would award, and to keep the existence of the settlement secret for as long as possible while they sought an injunction of class members in the preliminary approval order.

71. Filing a new action in no way advanced class interests; putative class members have superior defenses against statutes of limitation in earlier-filed actions, particularly with the *MacClelland* action before this Court, which is the first-filed.

72. Cross-Defendants' failure to timely inform this Court of the new action as N.D. Cal. Civ. Loc. R. 3-13 requires and the *Esposito* settlement's unusual prohibition on press statements further suggest their intent to evade review of their fee request by this Court. The parties' failure to provide statutorily required § 1715(b) notice also suggests an attempt to evade scrutiny.

VI. Cross-Defendants' pattern and practice of settling national class actions in state court.

73. The *modus operandi* of Cross-Defendants settling nationwide class actions in newly-filed state court complaints is illustrated in prior litigation.

74. In *Vasquez v. Altice USA, Inc.*, Cross-Defendants won an uncontested fee award of $4,999,500, one third of the gross common fund in that case. MER-L-618-23 (N.J. Super. Ct.); Bednarz Decl. Ex. 19. The *Altice USA* settlement followed the same lifecycle as this case: Class Counsel initially filed it as a putative California class concerning defendants' "TV Fees" billing charge. Class counsel (the Cross-Defendants in this complaint) prevailed over defendants' motion to compel arbitration before this very Court, which defendants

appealed. *Vasquez v. Cebridge Telecom CA, LLC*, 569 F. Supp. 3d 1016 (N.D. Cal. 2021). As in *MacClelland*, the order attracted *amicus* briefs on appeal. During the pendency of the appeal, the same attorneys filed two similar suits with putative classes covering additional states. As in this case, the parties agreed to dismiss all the actions in favor of a newly-filed New Jersey complaint to hear their settlement. The settling parties in *Altice USA* never advised this Court the reason for their Rule 41 dismissal, nor of the newly-filed action in state court. Cross-Defendants requested and received a 33.3% fee award from a $15 million settlement for a nationwide class of seven million consumers; the New Jersey fee motion did not even disclose the number of hours worked on the case. Bednarz Decl. Ex. 18. Regardless, the state court simply adopted the parties' proposed orders without alteration. Bednarz Decl. Ex. 19.

75. Likewise, in *Grillo v. RCN Telecom Servs.*, Cross-Defendants secured for themselves $3,834,401.72, which was one third of the gross common fund in that case. MER-L-1319-22 (N.J. Super. Ct.); Bednarz Decl. Ex. 21. This suit began in federal court as *Grillo, et al. v. RCN Telecom Servs, LLC*, No. 3:20-cv-8609 (D.N.J.), where Cross-Defendants sought to represent a New Jersey class over defendants' "Network Access and Maintenance Fee." The case proceeded to discovery after surviving a motion to dismiss. The settling parties stayed the D.N.J. action. A new complaint was filed in the Superior Court of Mercer County, New Jersey on July 27, 2022 followed shortly thereafter by the agreed motion for preliminary approval settling a multi-state class of about one million cable subscribers. Cross-Defendants requested and received a 33.3% fee award; the New Jersey fee motion did not even disclose the number of hours worked on the case. Bednarz Decl. Ex. 20. Regardless, the state court simply adopted the parties' proposed orders without alteration. Bednarz Decl. Ex. 21.

76. Cross-Defendants settle nationwide class actions in New Jersey courts to avoid the oversight federal courts exercise through Rule 23(h). The refiled actions in *Altice USA* affirmatively imperiled class member interests by potentially forfeiting statute of limitations tolling from the earlier-filed complaints.

CLASS ALLEGATIONS

77. The equitable counts below should be granted by the Court to Intervenors in their individual capacity asking for action on behalf of the *MacClelland*, *Corsi*, and *Allen* class members as a whole. *Cf. Pearson v. Target Corp.*, 968 F.3d 827, 837 (7th Cir. 2020) (*Pearson III*) (reversing denial of intervenor's motion and

remanding to disgorge unjust enrichment as a constructive trust for the benefit of the entire class). However, to deter Cross-Defendants from attempting to settle with, enjoin, pick off, or otherwise harass the Cross-Plaintiffs, they alternatively proceed as a class action on behalf of the claimants harmed by Class Counsel's unjust enrichment.

78. Intervenor/Cross-Plaintiffs bring this lawsuit on behalf of themselves, and alternatively on behalf of all others similarly situated, pursuant to Federal Rule of Civil Procedure 23.

79. Intervenor/Cross-Plaintiffs in the alternative seek to represent the following class ("the Claimant Class"):

> **All class members in the putative classes alleged in *MacClelland v. Cellco Partnership*, No. 3:21-cv-08592-EMC, ECF Nos. 1 & 58 (N.D. Cal.); *Corsi v. Cellco Partnership*, No. 22-cv-04621, ECF No. 1 (D.N.J.); and *Allen v. Cellco Partnership*, No. 3:23-cv-01138, ECF Nos. 1 & 17 (D.N.J.) who have filed valid claims in the settlement of those federal class actions in *Esposito v. Cellco Partnership*, No. MID-L-006360-23.**

80. Specifically excluded from this class are the Cross-Defendants; any entities in which the Cross-Defendants have a controlling interest; the Cross-Defendants' agents and employees; the Cross-Defendants' co-counsel and their agents and employees; the named class representatives in *Esposito*, *MacClelland*, *Corsi*, and *Allen*; the bench officers to whom this civil action, *Esposito*, *Corsi*, and *Allen*, and any appeals of those cases are assigned; and the members of each bench officer's staff and immediate family.

81. **Numerosity**. The members of the Claimant Class are so numerous that joinder of all members would be impracticable. Intervenor/Cross-Plaintiffs do not know the exact number of Class members prior to discovery. However, there are at least one million Class members. The exact number and identities of Class members are contained in records of the *Esposito* settlement administrator, an agent of Cross-Defendants, and can be easily ascertained from those records.

82. **Commonality and Predominance**. This action involves multiple common questions which are capable of generating class-wide answers that will drive the resolution of this case because the cross-defendants have acted identically and proportionally with respect to each member of the class. These common questions predominate over any questions affecting individual Class members, if any.

83. **Typicality**. Intervenor/Cross-Plaintiffs' claims are typical of Class members' claims. Cross-Plaintiffs and Class members all sustained injury as a direct result of *MacClelland* and *Corsi* and *Allen* Class Counsel's actions and schemes, bring the same claims, and face the same potential defenses.

84. **Adequacy**. Cross-Plaintiffs and their counsel will fairly and adequately protect the Claimant Class members' interests. Cross-Plaintiffs have no interests antagonistic to Claimant Class members' interests and are committed to representing the best interests of the Claimant Class. Moreover, Cross-Plaintiffs have retained counsel with unprecedented experience and success protecting class members from abusive class action practices.

85. **Superiority**. A class action is superior to all other available methods for fairly and efficiently adjudicating this controversy. Each Claimant Class member's interests are small compared to the burden and expense required to litigate each of his or her claims individually, so it would be impractical and would not make economic sense for Class members to seek individual redress for Cross-Defendants' conduct. Individual litigation would add administrative burden on the courts, increasing the delay and expense to all parties and to the court system. Individual litigation would also create the potential for inconsistent or contradictory judgments regarding the same uniform conduct. A single adjudication would create economies of scale and comprehensive supervision by a single judge. Of the possible particular forums available for litigation of this class action, this Court is most familiar with the law of the Ninth Circuit for the adjudication of Rule 23(h) fees in the first-filed *MacClelland* class action and is most familiar with the basis for fees in the first-filed class action against Verizon. Moreover, Cross-Plaintiffs do not anticipate any difficulties managing class action adjudication, as the facts are almost, and perhaps entirely, ones of which the court can take judicial notice; and the questions are almost, and perhaps entirely, legal ones.

86. By its conduct and omissions alleged in this cross-complaint, Cross-Defendants have acted and refused to act on grounds that apply generally to the Claimant Class, such that final private injunctive or declaratory relief is appropriate respecting the Claimant Class as a whole.

COUNT I – UNJUST ENRICHMENT

87. Intervenor/Cross-Plaintiffs re-allege and incorporate by reference the allegations contained in the paragraphs above as if fully set forth herein.

88. As a result of their collusion with the Parties, the Cross-Defendants petitioned for benefits in the form of fees beyond those they are legally entitled to, and which are paid for from the class members' settlement fund. *See Peterson v. Cellco P'ship*, 164 Cal. App. 4th 1583, 1593 (2008) ("The elements of an unjust enrichment claim are the receipt of a benefit and the unjust retention of the benefit at the expense of another.").

89. It would be unjust to allow Cross-Defendants to retain these benefits at the expense of Intervenors and other class members given the duties owed to the class by counsel and the Parties.

90. As a result of the effort to unjustly enrich class counsel, Intervenors are entitled to declaratory judgment barring the fee request and ultimate disgorgement equal to the excess pecuniary value for any fees awarded to counsel by New Jersey courts pertaining to this litigation.

COUNT II – BREACH OF FIDUCIARY DUTY

91. Intervenor/Cross-Plaintiffs re-allege and incorporate by reference the allegations contained in the paragraphs above as if fully set forth herein.

92. *MacClelland* and *Corsi* and *Allen* Class Counsel owe a fiduciary duty to putative class members, and this duty attaches the moment a putative class complaint is filed.

93. As a result of their coordination with Defendants, *MacClelland* and *Corsi* and *Allen* Class Counsel petitioned for benefits in the form of fees beyond those they are legally entitled to, and which are paid for from the class members' settlement fund. This is a breach of the fiduciary duty that class counsel owes to come up with the best deal *for the class*. *See*, *e.g.*, *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1327 (9th Cir. 1999); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995) ("Beyond their ethical obligations to their clients, class attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed.").

94. Cross-Defendants should not retain financial benefits at the expense of Intervenor/Cross-Plaintiffs and other claimant class members. They have a fiduciary obligation to the class, and not only have they allowed their own pecuniary interests to come into conflict with that obligation—they've chosen their own pockets over the class they purport to represent.

95. As a result of the effort to unjustly enrich class counsel, Intervenor/Cross-Plaintiffs are entitled to declaratory judgment barring the fee request and ultimate disgorgement equal to the excess pecuniary value for any fees awarded to counsel by New Jersey courts pertaining to the Verizon litigation.

PRAYER FOR RELIEF

WHEREFORE, Intervenors request that the Court, pursuant to its equitable powers and inherent authority:

A. Require an accounting of any fees ultimately received by *MacClelland* and *Corsi* and *Allen* Class Counsel through their inequitable conduct;

B. Issue an order reallocating all money unjustly received by class counsel in breach of their fiduciary duties to class members, with any funds recovered directed to the benefit of all class claimants, ideally returned to the common fund for distribution to the class;

C. Award reasonable attorneys' fees for Intervenors/Cross-Plaintiffs' counsel from Cross-Defendants, but only to the extent that Intervenors recover funds for the class; and,

D. Such other and further relief as the Court deems just and proper.

Dated: February 23, 2024

Respectfully submitted,

/s/ Theodore H. Frank

Theodore H. Frank (SBN 196332)
HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1629 K Street NW, Suite 300
Washington, DC 20006
Voice: 703-203-3848
Email: ted.frank@hlli.org

M. Frank Bednarz (*pro hac vice* pending)
HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1440 W. Taylor St # 1487
Chicago, IL 60607
Voice: 801-706-2690
Email: frank.bednarz@hlli.org

Attorneys for Intervenors/Cross-Plaintiffs

PROOF OF SERVICE

I hereby certify that on this day I electronically filed the foregoing Proposed Complaint of Intervenors using the CM/ECF filing system thus effectuating service of such filing on all ECF registered attorneys in this case.

DATED this 23rd of February, 2024.

/s/ Theodore H. Frank
Theodore H. Frank