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20 SUPERIOR COURT OF THE STATE OF CALIFORNIA

21 FOR THE COUNTY OF SAN FRANCISCO

22 DEANNA GASTELUM and HEATHER
23 BRYDEN, individually and on behalf of all other
24 persons similarly situated,

25 Plaintiffs,

26 v.

27 VERIZON CALIFORNIA, INC. and DOES 1
28 through 100,

Defendants.

Case No. CGC-11-511467

CLASS ACTION

THIRD AMENDED COMPLAINT

Dept.: 304

Hon. Curtis E. A. Karnow

1 Plaintiffs Deanna Gastelum (“Gastelum”) and Heather Bryden (“Bryden”), individually and
2 on behalf of all others similarly situated, allege as follows:

3 1. This is a class action filed on behalf of current and former residential customers of
4 landline telephone services provided by Defendant Verizon California, Inc. or its predecessors or
5 affiliates (“Verizon”). Plaintiffs seek relief in this action individually and on behalf of all persons
6 similarly situated with regard to late payment charges imposed by Verizon on its customers, which
7 violate California law.

8 2. At times in the past, residential landline telephone service was a “tariffed” service
9 whose prices, terms and conditions were regulated by the California Public Utilities Commission
10 (the “CPUC”). However, in 2007, the CPUC issued an Order allowing incumbent local exchange
11 carriers (“ILECs”) such as Verizon to offer such services on a “detariffed” basis, and to provide
12 them pursuant to private agreement with its customers. *In the Matter of Order Instituting*
13 *Rulemaking on the Commission's Own Motion to Assess and Revise the Regulation of*
14 *Telecommunications Utilities*, Decision No. 07-09-018, 2007 Cal. PUC LEXIS 428 (Cal. Public
15 Utilities Comm. 2007) (hereinafter, “CPUC Decision No. 07-09-018”). On or about October 9,
16 2008, Verizon filed “Advice Letter 12282,” in which it formally availed itself of the detariffing
17 right that the CPUC had granted to it. Verizon began to offer residential landline telephone service
18 on a “detariffed” basis beginning on or about December 1, 2008. This action relates *only* to late
19 payment charges imposed by Verizon on customers who are receiving or have received
20 “detariffed” residential landline services provided pursuant to contract.

21 3. At all times from and after December 1, 2008, Verizon has provided, and still
22 provides, residential landline services to its customers on a “detariffed” basis, and the rates, terms
23 and conditions thereof have been determined through a private contract between Verizon and its
24 customers (the “Agreement”). The Agreement is an adhesion contract drafted by Verizon which,
25 on information and belief, Verizon presents to its subscribers on a take-it-or-leave-it, no
26 negotiation basis.

1 4. At all times relevant hereto, Verizon's Agreement with its residential customers has
2 provided for the imposition by Verizon of late payment charges of the greater of \$2.50 or 1.5% for
3 outstanding amounts of more than \$20.00.

4 a. Verizon's Product Guide, Section 2, "General Terms and Conditions," dated
5 December 1, 2008 (the "Product Guide"), provides:

6
7 1. This Product Guide sets forth the prices, charges, terms and
8 conditions under which Customers ("Customer," "you" or "your") agree to
9 use the services (as defined below) and under which Verizon California Inc.
10 ("Verizon", "Company" or "we") agrees to provide the services to
11 Customers, unless otherwise noted. The general terms and conditions set
12 forth below apply to all services in the Product Guide.

13 * * *

14 3. The Product Guide becomes a binding contract following your acceptance
15 of the terms and conditions applicable to the ordered service. You are
16 deemed to have accepted the terms of the Product Guide applicable to your
17 service upon your order of, use of, or payment for the service.

18 b. In its Order that permitted Verizon to "detriff" these services, the California
19 Public Utilities Commission ("CPUC") authorized Verizon to incorporate by reference into its
20 customer agreements certain prices, charges, terms and conditions contained in Verizon's tariffs
21 that were on file with the CPUC at the time of the "detriffing." In that regard, the CPUC's
22 relevant Order stated:

23 To the extent that a carrier is offering detriffed services in a contract with
24 the customer, the carrier shall incorporate by reference any relevant tariffed
25 terms and conditions into its contract.¹

26 c. Consistent with that CPUC statement, Verizon incorporated certain
27 provisions of a pre-existing tariff into its contracts with customers. Thus, the Verizon "Product
28 Guide" provides:

4. The services in the Product Guide are not subject to the prices, charges,
terms and conditions contained in Verizon's tariffs on file with the
California Public Utilities Commission (CPUC), except to the extent (i)
selected tariff provisions have been expressly incorporated into the Product

¹ CPUC Decision No. 07-09-018 at *113.

1 Guide or (ii) the terms and conditions in Verizon's tariffs are required by
2 federal or state law or by CPUC decisions or orders. The Product Guide
3 hereby incorporates by reference the following provisions set forth in the
4 Verizon California Inc. General Exchange Tariff:

(i) Schedule D&R: Definitions and Rules No. 2, 4-13, 24, 25, 28, 31,
34 and 35....

5 d. Among the provisions so incorporated into the Agreement is Rule 10 of
6 Verizon's "General Exchange Tariff - Schedules A-X (Local)," which states:

7 C. PAYMENT OF BILLS

8 The customer is responsible for payment of all rates and charges for services
9 furnished and billed in accordance with the provisions of the filed tariff
10 schedules including applicable charges for calls originated and calls
11 accepted at the customer's telephone(s).

* * *

12 E. LATE PAYMENT CHARGE

13 A late payment charge will apply if payment is not received at the Utility or
14 one of its payment agents by the late payment date printed on the bill. The
15 late payment date will not be less than 22 days from the date the bill is
16 mailed or electronically available via the internet by the Utility.

* * *

17 RESIDENTIAL CUSTOMERS - The late payment charge of \$2.50 or 1.5
18 percent of the unpaid balance of \$20.00 or more, whichever is higher,
19 applies to each residential customer's bill when the previous month's bill has
20 not been paid in full. The 1.5 percent charge is applied to a total unpaid
21 amount carried forward and is included in the total amount due on the bill.

22 e. The late payment charges provided for in the Agreement are referred to
23 hereinafter as the "Late Fees."

24 f. On information and belief, Late Fees of \$2.50 or 1.5 percent of the unpaid
25 balance of \$20.00 or more, whichever is higher, have been applied by Verizon to the bills of
26 Plaintiffs and each of the members of the plaintiff class (as defined below) when prior bills have
27 not been paid in full.

28 5. As is set forth more particularly below, Plaintiffs and the members of the proposed
plaintiff class received or are receiving residential local exchange landline telephone service from
Verizon in California pursuant to the Agreement, and incurred Late Fees that were paid to Verizon.

1 6. The Late Fees constitute unlawful penalties that are void and unenforceable under
2 California Civil Code § 1671 (“§ 1671”); unlawful and unfair under California’s Unfair
3 Competition Law, Bus. & Prof. Code Section 17200 *et seq.* (the “UCL”); and unconscionable
4 under California Civil Code Section 1750 *et seq.*, the Consumers Legal Remedies Act (the
5 “CLRA”).

6 7. The Late Fees have generated substantial revenues and profits for Verizon. By this
7 Complaint, Plaintiffs seek, *inter alia*, as is more fully set forth below, to recover as damages,
8 restitution and/or disgorgement the Gastelum Late Fees and the Bryden Late Fees (as defined
9 below) and the Late Fees incurred and paid on the accounts of the members of the plaintiff class;
10 and to obtain the additional relief prayed for in this Complaint.

11 8. On June 2, 2011, Gastelum notified Verizon in writing via certified mail, with return
12 receipt requested, of the particular violations of law alleged in this Complaint, and demanded that it
13 rectify the problems associated with the practices and policies as set forth herein. A copy of the
14 June 2, 2011 letter was attached as Exhibit 1 to the initial complaint in this action, and is
15 incorporated herein by reference. As of the date of filing this Complaint, Verizon has failed and
16 refused to rectify the problems associated with the practices and policies described in this
17 complaint, and has not given notice to all affected consumers of its intent to so act. Plaintiffs now
18 seek relief, individually and on behalf of all others similarly situated, as more fully set forth
19 hereinafter, under Civil Code § 1780, among other provisions of law.

PLAINTIFFS

20
21 9. At all times relevant hereto, Gastelum was a resident of the State of California.
22 Gastelum’s mother is also named Deanna Gastelum. Her father’s name is Rogelio Gastelum.
23 From and after December 1, 2008, Gastelum has had a residential account with Verizon in her
24 name for the California home in which, for much of the class period, she resided with her parents,
25 through which she received landline telephone service. Verizon imposed Late Fees on that account
26 between December 1, 2008 and the date of filing of the initial complaint in this action (the
27 “Gastelum Late Fees”) which were paid by her and/or by her parents on her behalf. Gastelum’s
28

1 parents have assigned to her all right, title and interest they may have in any claims that have been,
2 may be or could be brought by them, or either of them, in connection with the imposition,
3 collection or payment of the Gastelum Late Fees. As a result of the foregoing, Gastelum and/or her
4 assignors suffered an injury in fact resulting in the loss of money and/or property.

5 10. At all times relevant hereto, Bryden was a resident of the State of California. From
6 and after December 1, 2008, Bryden has had a residential account with Verizon in her name for her
7 residence through which she received landline telephone service. Verizon imposed Late Fees on
8 her account between December 1, 2008 and the date of filing of the initial complaint in this action
9 (the "Bryden Late Fees") which she paid. As a result thereof, Bryden suffered an injury in fact
10 resulting in the loss of money and/or property.

11 **DEFENDANTS**

12 11. Defendant Verizon California, Inc., is a corporation organized under the laws of the
13 State of California. On information and belief, Verizon California, Inc., has its headquarters in the
14 State of California.

15 12. At all times relevant hereto, Verizon has been in the business of providing, *inter*
16 *alia*, residential and business landline services to individuals, families and businesses in California.

17 13. The true names and capacities (whether individual, corporate, associate or
18 otherwise) of Defendants Does 1 through 100, inclusive, are unknown to Plaintiffs. Therefore,
19 Plaintiffs sue those defendants by such fictitious names pursuant to Code of Civil Procedure § 474.
20 Plaintiffs further allege that each fictitious Defendant is in some manner responsible for the acts
21 and occurrences alleged herein. Plaintiffs will seek leave of this Court to amend this complaint to
22 state the real names and capacities of said fictitiously named Defendants when the same have been
23 ascertained. Plaintiffs are informed and believe, and on that basis allege, that Verizon and the
24 fictitiously named Defendants proximately caused their damages.

25 14. Plaintiffs are informed and believe, and thereon allege, that each of the Defendants
26 named herein, including those Defendants named as Doe Defendants, acted as the agent, employee,
27 representative partner, joint venture, or co-conspirators of each of the other Defendants named
28

1 herein in the commission of the acts and omissions to act alleged herein, and acted within the
2 course and scope of his, her, or its duty as such agent, employee, representative, partner, joint
3 venture, or co-conspirator. The acts of each such Defendant were authorized and/or ratified by
4 each other Defendant, and together constitute a single and continuing course of conduct.

5
6 **JURISDICTION AND VENUE**

7 15. This Court has subject matter jurisdiction over this class action. This Court has
8 personal jurisdiction over Defendants because, at all times relevant hereto, they have systematically
9 and continually conducted, and continue to conduct, business in this State.

10 16. Venue is proper in this Court pursuant to Civil Code § 1780(c). Defendants conduct
11 business in this County and throughout the State of California.

12 17. Federal court subject matter jurisdiction over this action does not exist. Complete
13 diversity of citizenship does not exist. Plaintiffs assert no federal question or violations of federal
14 law in this Complaint. Neither the individual claims of any Plaintiff nor the sum of all of the
15 individual claims of all of the Plaintiffs exceed \$75,000.

16 18. The CPUC has no jurisdiction over this action. The Late Fees at issue in this action
17 were imposed pursuant to contract. Nor does the so-called “filed rate doctrine” render this Court
18 an inappropriate forum.

19 **FACTUAL ALLEGATIONS**

20 19. Since December 1, 2008, Gastelum has had a residential account in her name with
21 Verizon through which she received “detariffed” landline telephone service pursuant to the
22 Agreement. From and after December 1, 2008, and for a significant period of time thereafter,
23 Gastelum resided with her parents in the family home in California in which landline services were
24 received on Gastelum’s account, and shared household expenses with them. Gastelum incurred the
25 Gastelum Late Fees on her Verizon account. All of the Gastelum Late Fees were paid by Gastelum
26 and/or on her behalf by her parents with community funds.

1 20. Since December 1, 2008, Bryden has had an account in her name with Verizon
2 through which she has received “detriffed” residential landline telephone services. Bryden
3 incurred the Bryden Late Fees on her Verizon account and paid them to Verizon.
4

5 21. Verizon provides residential and business landline services to consumers throughout
6 California. At all times relevant hereto, Verizon has required, and currently requires, customers of
7 its “detriffed” landline telephone service to abide by the Agreement, which was drafted entirely
8 by Verizon and /or its affiliates, is not subject to modification or negotiation and is presented to
9 prospective subscribers on a “take it or leave it” basis. The Agreement is a contract of adhesion
10 under California law.

11 22. For outstanding bills of \$20.00 or more that remain unpaid as of the due date
12 specified on the bill, the Agreement imposes Late Fees of the greater of \$2.50 or 1.5% calculated
13 on the total amount of the bill. Verizon has in fact imposed and collected such Late Fees.

14 23. Defendants have collected significant revenues from Late Fees imposed on
15 members of the proposed class.

16 24. If and to the extent that Verizon suffers, would suffer or has suffered any damage
17 upon late payment, it is neither impracticable nor extremely difficult to fix the actual damage.
18 Furthermore, if and to the extent that Verizon suffers, would suffer, or has suffered any damage
19 upon late payment, the Late Fees are not a reasonable measure or approximation of such damages
20 and do not provide fair average compensation therefor. On information and belief, Verizon did not
21 conduct a reasonable endeavor to fix fair average compensation for losses, if any, that it incurs,
22 would incur or has incurred by virtue of late payments. The Late Fees were not negotiated or
23 discussed with Plaintiffs, or any of them, or the members of the proposed class before they were
24 imposed.

25 25. The Late Fees imposed by Verizon are unconscionable, void and unenforceable
26 under Civil Code §§ 1670.5, 1671(b) and/or 1671(d), constitute an unlawful, unfair and deceptive
27 practice under the UCL, and violate the CLRA, including without limitation Civil Code
28 §§ 1770(a)(14) and 1770(a)(19).

1 **CLASS ACTION ALLEGATIONS**

2
3 26. Plaintiffs bring this action on their own behalf and on behalf of all other persons
4 similarly situated pursuant to the provisions of Code of Civil Procedure § 382 and Civil Code §
5 1781(b).

6 27. Plaintiffs seek certification of the following class:

7 All persons with a California area code who either are receiving or received
8 residential landline telephone service from Verizon pursuant to the
9 Agreement, and who were billed by Verizon for Late Fees which were paid.

10 28. Numerosity of the Class: The class is composed of at least thousands of persons, the
11 joinder of which in one action would be impracticable. The disposition of their claims through this
12 class action will benefit both the parties and the Court. The identities of individual members of the
13 class are ascertainable through Defendants' billing records.

14 29. Existence and Predominance of Common Questions of Fact and Law: There is a
15 well-defined community of interest in the questions of law and fact involved affecting the members
16 of the proposed class. The questions of law and fact common to the proposed class predominate
17 over questions affecting only individual class members.

18 30. Such common questions of fact and law include, but are not limited to, the
19 following:

- 20 (a) Whether the Late Fees are illegal, void and unenforceable contractual
21 penalties pursuant to Civil Code § 1671(d);
22 (b) Whether damages are extremely difficult or impracticable to determine;
23 (c) Whether Defendants conducted a reasonable endeavor, prior to imposing the
24 Late Fees or including them in the Agreement, to fix fair average compensation for losses, if any,
25 that they suffer when residential customers pay late, and if so, whether the Late Fees reflect the
26 results of such a reasonable endeavor.
27 (d) Whether Defendants' Late Fees are unconscionable;
28 (e) Whether Defendants' Late Fees violate the UCL;
(f) Whether Defendants' Late Fees violate the CLRA;

1 (g) Whether Plaintiffs and the proposed class members are entitled to
2 declaratory relief pursuant to Code of Civil Procedure § 1060 regarding the Late Fees imposed by
3 Defendants;

4 (h) Whether Plaintiffs and the proposed class members are entitled to restitution
5 of Late Fees paid to Defendants;

6 (i) Whether Plaintiffs and the proposed class members are entitled to
7 disgorgement of Late Fees that Defendants have collected;

8 (j) Whether Plaintiffs and the proposed class members are entitled to an award
9 of reasonable attorneys' fees, pre-judgment interest and costs of this suit; and

10 (k) Whether Plaintiffs and the proposed class members are entitled to injunctive
11 relief.

12 31. Typicality: Plaintiffs' claims are typical of the proposed class members' claims.
13 Plaintiffs and the proposed class members have similarly suffered and will suffer harm arising from
14 Defendants' violations of the law, as alleged herein.

15 32. Adequacy: Plaintiffs are adequate representatives of the proposed class. Their
16 interests do not conflict with, and are not antagonistic to, the interests of the members of that class.
17 They will fairly and adequately represent and protect the interests of the class.

18 33. Superiority: A class action is superior to other available means for the fair and
19 efficient adjudication of Plaintiffs' and the proposed class members' claims. Plaintiffs and the
20 members of the proposed class have suffered irreparable harm as a result of Defendants' unfair,
21 unlawful, and unconscionable conduct. Because of the size of the individual class members'
22 claims, few, if any, proposed class members could afford to seek legal redress for the wrongs
23 complained of herein. Absent the class action, Defendants will be able to retain the proceeds of
24 their misdeeds and the violations of law described herein will continue without remedy.
25 Defendants continue to engage in the unlawful, unfair, and unconscionable conduct that is the
26 subject of this Complaint.
27
28

1 **FIRST CAUSE OF ACTION**

2 **Violation of California Civil Code § 1671(d)**

3 34. Plaintiffs incorporate herein by reference the allegations contained in all preceding
4 paragraphs of this complaint.

5 35. The Gastelum Late Fees, the Bryden Late Fees, and the Late Fees incurred and paid
6 by class members are impermissible liquidated damages provisions under California law. The Late
7 Fees themselves, the contractual language that provides for them and their imposition and
8 collection by Defendants violate Civil Code Section 1671(d) and are unlawful, void and
9 unenforceable under that statute.

10 36. Civil Code § 1671(d) states that a contractual provision, in a contract for the retail
11 purchase or rental of personal property or services primarily for the party's personal, family, or
12 household purposes, liquidating damages for the breach of the contract, is void except that the
13 parties to such a contract may agree therein on an amount that shall be presumed to be the amount
14 of the damage sustained by a breach thereof, when, from the nature of the case, it would be
15 impracticable or extremely difficult to fix the actual damage. The Agreement is a contract for the
16 purchase of services primarily for the personal, family or household use of consumers who enter
17 into it.

18 37. If and to the extent that Defendants suffer, would suffer or have suffered any
19 damages due to late payments by Plaintiffs or members of the class, it would not be impracticable,
20 nor would it be extremely difficult, to determine them with certainty. Furthermore, the amount of
21 the Late Fees –the greater of \$2.50 or 1.5% of outstanding balances over \$20.00 – does not reflect
22 a reasonable endeavor by Defendants, or any of them, to fix fair average compensation for any
23 harm that Defendants would suffer, may suffer or have suffered, if any, from late payments. The
24 Late Fee provisions in the Agreement are liquidated damages provisions that fail to comply with
25 the standards of Civil Code § 1671(d), and therefore constitute impermissible contractual penalties.
26 In imposing contractual Late Fee provisions, and in charging and collecting the Gastelum Late
27 Fees, the Bryden Late Fees and the Late Fees inflicted on the members of the class, Defendants
28 have violated § 1671(d).

1 38. Plaintiffs and the members of the class have suffered an injury in fact resulting in
2 the loss of money and/or property as a proximate result of the violations of law and wrongful
3 conduct of Defendants alleged herein. Pursuant to Civil Code § 1671(d), Plaintiffs, individually
4 and on behalf of the members of the class, seek an order of this Court:

- 5 (a) Granting appropriate injunctive relief;
- 6 (b) Awarding Gastelum, as damages, and/or restitution, the Gastelum Late Fees
7 paid by her and/or by her assignor(s) on her behalf;
- 8 (c) Awarding Bryden, as damages and/or restitution, the Bryden Late Fees paid
9 by her;
- 10 (d) Awarding damages and/or restitution to absent class members, according to
11 proof; and
- 12 (e) Providing such other and further relief as may be just and proper.

13 WHEREFORE, Plaintiffs pray for judgment as hereinafter set forth.

14 **SECOND CAUSE OF ACTION**
15 **Violation of the Consumers Legal Remedies Act,**
16 **California Civil Code §§ 1750 *et seq.***

17 39. Plaintiffs incorporate herein by reference the allegations contained in all preceding
18 paragraphs of this Complaint.

19 40. Plaintiffs bring this claim against all Defendants under the Consumers Legal
20 Remedies Act (the “CLRA”), both individually and on behalf of the members of the class.

21 41. Defendants, and each of them, have engaged in deceptive practices, unlawful
22 methods of competition and/or unfair acts as defined by Civil Code § 1750 *et seq.*, to the detriment
23 of Plaintiffs and the members of the class. Plaintiffs and the members of the class have suffered
24 harm as a proximate result of the violations of law and wrongful conduct of Defendants alleged
25 herein.

26 42. Defendants intentionally, knowingly, and unlawfully perpetrated harm upon
27 Plaintiffs and the class members by inserting unconscionable, unenforceable and illegal provisions
28 in their Agreement in violation of Civil Code § 1770(a)(19), and by enforcing those provisions. By

1 inserting an unconscionable, unenforceable and void Late Fee provision in the Agreement, and
2 then enforcing that provision by imposing and collecting Late Fees, Defendants also violated Civil
3 Code § 1770(a)(14), which prohibits them from representing that a transaction confers or involves
4 rights, remedies, or obligations which it does not have or involve, or which are prohibited by law.

5 43. Defendants' policy and practice with respect to their inclusion of Late Fees in their
6 Agreement and their collection of the Gastelum Late Fees, the Bryden Late Fees, and the Late Fees
7 imposed on absent class members are unlawful, unethical, oppressive, fraudulent and malicious.
8 The gravity of the harm to all consumers from Defendants' policies and practices far outweighs
9 any purported utility those policies and practices have.

10 44. Plaintiffs and the members of the class have suffered harm as a proximate result of
11 the violations of law and wrongful conduct of Defendants alleged herein. Plaintiffs, individually
12 and on behalf of the members of the class, seek an order of this Court, *inter alia*:

- 13 (a) Granting appropriate injunctive relief;
14 (b) Awarding Gastelum, as damages, and/or restitution, the Gastelum Late Fees
15 paid by her and/or by her assignor(s) on her behalf;
16 (c) Awarding Bryden, as damages and/or restitution, the Bryden Late Fees paid
17 by her;
18 (d) Awarding damages and/or restitution to absent class members, according to
19 proof; and
20 (e) Providing such other and further relief as may be just and proper.

21 WHEREFORE, Plaintiffs pray for judgment as hereinafter set forth.

22
23 **THIRD CAUSE OF ACTION**

24 **Unlawful Business Practices in Violation of the Unfair Competition Law,**
25 **California Business and Professions Code §§ 17200 *et seq.***

26 45. Plaintiffs incorporate herein by reference the allegations contained in all preceding
27 paragraphs of this Complaint.
28

1 46. Plaintiffs bring this claim individually and on behalf of the members of the class
2 against all Defendants.

3 47. Defendants' continuing imposition, enforcement and collection of unlawful,
4 unconscionable and unenforceable Late Fees constitute an unlawful business practice in violation
5 of Bus. & Prof. Code §§ 17200 *et seq.*

6 48. Plaintiffs and the members of the class have suffered harm as a proximate result of
7 the violations of law and wrongful conduct of Defendants alleged herein.

8 49. Civil Code § 1671(d) states that a provision in a contract liquidating damages for the
9 breach of the contract is void except that the parties to such a contract may agree therein on an
10 amount that shall be presumed to be the amount of the damage sustained by a breach thereof,
11 when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual
12 damage.

13 50. The Gastelum Late Fees, the Bryden Late Fees and the Late Fees that Defendants
14 charged to and collected from class members are unlawful liquidated damages provisions under
15 Civil Code § 1671(d) for the reasons set forth in ¶¶ 35-38 above. In imposing contractual Late Fee
16 provisions, and in charging and collecting the Gastelum Late Fees, the Bryden Late Fees and the
17 Late Fees inflicted on class members, Defendants have violated Civil Code § 1671(d).

18 51. The contractual Late Fee provisions, and Defendants' imposition and collection of
19 the Gastelum Late Fees, the Bryden Late Fees and the Late Fees inflicted on class members also
20 violate Civil Code § 1670.5 because the Late Fees are, and all times since December 1, 2008 have
21 been, unconscionable. Prospective subscribers have no meaningful choice with respect to the
22 inclusion of the Late Fees in the Agreement nor in the amount of the Late Fees. Moreover, the
23 amounts of the Late Fees are hidden in separate documentation that is difficult for subscribers to
24 find, rather than being included in the main body of the Agreement. The Late Fee provisions in the
25 Agreement are therefore procedurally unconscionable.

26 52. The Late Fees are unreasonably favorable to Defendants and unduly harsh with
27 respect to Defendants' subscribers, and therefore, are substantively unconscionable. For example,
28

1 the Late Fees have no relationship whatsoever to any damages incurred by Defendants, if any, as a
2 result of late payments by subscribers, and do not reflect a reasonable endeavor to calculate such
3 damages.

4 53. Defendants' inclusion of the Late Fees in its Agreement and its imposition and
5 collection of them also violate the Consumers Legal Remedies Act, Civil Code Section 1750 *et*
6 *seq.*, as the Late Fees are unconscionable, unenforceable and illegal provisions in violation of Civil
7 Code Sections 1770(a)(14) and 1770(a)(19). Accordingly, Defendants' said conduct is an unlawful
8 business practice under Bus. & Prof. Code §§ 17200 *et seq.*

9 54. As is more fully set forth above, Verizon's inclusion of the Late Fees in its
10 Agreement and its imposition and collection of them have inflicted an injury in fact resulting in the
11 loss of money or property on Plaintiffs and the members of the class, who have suffered such
12 injury.

13 55. Pursuant to Bus. & Prof. Code § 17203, Plaintiffs seek an order of this Court, *inter*
14 *alia*:

- 15 (a) Granting appropriate injunctive relief;
- 16 (b) Directing Defendants to make full restitution to Gastelum of the Gastelum
17 Late Fees;
- 18 (c) Directing Defendants to make full restitution to Bryden of the Bryden Late
19 Fees;
- 20 (d) Requiring Defendants to make full restitution to all absent class members of
21 the Late Fees wrongfully obtained by Defendants from them;
- 22 (e) Requiring Defendants to disgorge the Gastelum Late Fees to Gastelum and
23 the Bryden Late Fees to Bryden;
- 24 (f) Requiring Defendants to disgorge to absent class members all ill-gotten
25 revenues and/or profits attributable to Late Fees imposed on them; and
- 26 (g) Providing such other and further relief as may be just and proper.

27 WHEREFORE, Plaintiffs pray for judgment as hereinafter set forth.

1 **FOURTH CAUSE OF ACTION**

2 **Unfair Business Practices in Violation of Business and Professions**
3 **Code §§ 17200 *et seq.***

4 56. Plaintiffs incorporate herein by reference the allegations contained in all preceding
5 paragraphs of this Complaint.

6 57. The conduct of Defendants and each of them, as herein alleged, constitutes an unfair
7 business practice within the meaning of Bus. & Prof. Code § 17200 *et seq.*

8 58. Defendants violated the “unfair” prong of the UCL by requiring subscribers to enter
9 into contracts of adhesion that include the Late Fees provision, by enforcing the contractual
10 provisions that provide for the imposition of the Late Fees and by imposing and collecting the
11 Gastelum Late Fees, the Bryden Late Fees and the Late Fees imposed on class members.

12 59. Defendants’ said practices with respect to Late Fees violate the “unfair” prong of
13 the UCL because the Late Fees: (1) constitute unfair and wrongful penalties inconsistent with the
14 language and policy of Civil Code § 1671; and (2) constitute unconscionable provisions, in
15 violation of various laws and policies recognized by the California Legislature and the California
16 courts, including without limitation Civil Code § 1670.5 and the CLRA.

17 60. Defendants’ said practices with respect to the Late Fees also violate the “unfair”
18 prong of the UCL because the utility of the Late Fees is significantly outweighed by the gravity of
19 the harm that they impose on consumers. The Late Fees have limited or no utility as compared
20 with alternatives that would more fairly measure the harm (if any) incurred by Defendants when a
21 subscriber makes a late payment. The gravity of the harm that the Late Fees impose on consumers
22 is substantial in that they exceed the actual amount of harm (if any) incurred by Defendants when a
23 subscriber makes a late payment. Through their imposition of the Late Fees on the class, and their
24 collection of the Late Fees from class members, Defendants have been massively and unjustly
25 enriched. Defendants’ Late Fees also violate the “unfair” prong of the UCL because their inclusion
26 in the Agreement, imposition and collection are and at all times relevant hereto have been
27 oppressive, unscrupulous or substantially injurious to consumers.

1 61. Defendants' said practices with respect to the Late Fees also violate the "unfair"
2 prong of the UCL because the Late Fees, the provisions of the Agreement imposing the Late Fees
3 and Defendants' enforcement of them through the imposition and collection thereof cause
4 substantial harm that is not outweighed by countervailing benefits to consumers or competition,
5 and consumers could not reasonably have avoided the harm.

6 62. Defendants' said practices with respect to the Late Fees also violate the "unfair"
7 prong of the UCL for the reasons set forth in the Third Cause of Action, above.

8 63. Defendants' imposition of the Gastelum Late Fees and the Bryden Late Fees on
9 Plaintiffs, and its collection of the said Late Fees from Plaintiffs, has inflicted an injury in fact
10 resulting in the loss of money or property on Plaintiffs, who have suffered such injury. Verizon's
11 imposition of the Late Fees on, and its collection of them from, the members of the class has
12 inflicted an injury in fact resulting in the loss of money or property on the class members, who
13 have suffered such injury.

14 64. Pursuant to Bus. & Prof. Code § 17203, Plaintiffs seek an order of this Court :

- 15 (a) Granting appropriate injunctive relief;
- 16 (b) Directing Defendants to make full restitution to Gastelum of the Gastelum
17 Late Fees;
- 18 (c) Directing Defendants to make full restitution to Bryden of the Bryden Late
19 Fees
- 20 (d) Requiring Defendants to make full restitution to all absent class members of
21 the Late Fees wrongfully obtained by Defendants from them;
- 22 (e) Requiring Defendants to disgorge the Gastelum Late Fees to Gastelum and
23 the Bryden Late Fees to Bryden;
- 24 (f) Requiring Defendants to disgorge to absent class members all ill-gotten
25 revenues and/or profits attributable to Late Fees imposed on them; and
- 26 (g) Providing such other and further relief as may be just and proper.

27 WHEREFORE, Plaintiffs pray for judgment as hereinafter set forth.

28

1 **FIFTH CAUSE OF ACTION**

2 **Unjust Enrichment/Common Law Restitution**

3 65. Plaintiffs incorporate herein by reference the allegations contained in all preceding
4 paragraphs of this complaint.

5 66. By imposing and collecting the Gastelum Late Fees, the Bryden Late Fees and the
6 Late Fees imposed on class members, Defendants have violated provisions of statutory and
7 common law, as alleged above. Plaintiffs and the class members have suffered harm as a
8 proximate result of the violations of law and wrongful conduct of Defendants alleged herein.

9 67. If Defendants are permitted to keep monies collected under such illegal and void
10 penalty clauses, they will be unjustly enriched at the expense of the class members.

11 68. Plaintiffs also seek, *inter alia*, an order:

12 (a) Granting appropriate injunctive relief;

13 (b) Awarding Gastelum, as damages, and/or restitution, the Gastelum Late Fees
14 paid by her and/or by her assignor(s) on her behalf;

15 (c) Awarding Bryden, as damages and/or restitution, the Bryden Late Fees paid
16 by her;

17 (d) Awarding damages and/or restitution to absent class members, according to
18 proof;

19 (e) Requiring Defendants to disgorge the Gastelum Late Fees to Gastelum and
20 the Bryden Late Fees to Bryden;

21 (f) Requiring Defendants to disgorge to absent class members all ill-gotten
22 revenues and/or profits attributable to Late Fees imposed on them; and

23 (g) Providing such other and further relief as may be just and proper.

24 WHEREFORE, Plaintiffs pray for judgment as hereinafter set forth.

25 **SIXTH CAUSE OF ACTION**

26 **Common Count for Money Had and Received**

27 69. Plaintiffs incorporate herein by reference the allegations contained in all preceding
28 paragraphs of this Complaint.

1 70. Defendants have improperly charged and collected the Gastelum Late Fees, the
2 Bryden Late Fees and the Late Fees imposed on members of the class. Plaintiffs and the members
3 of the class have suffered harm as a proximate result of the violations of law and wrongful conduct
4 of Defendants alleged herein.

5 71. Defendants are legally obligated to pay over and remit those sums.

6 72. Plaintiffs also seek, *inter alia*, an order:

7 (a) Granting appropriate injunctive relief;

8 (b) Awarding Gastelum, as damages, and/or restitution, the Gastelum Late Fees
9 paid by her and/or by her assignor(s) on her behalf;

10 (c) Awarding Bryden, as damages and/or restitution, the Bryden Late Fees paid
11 by her;

12 (d) Awarding damages and/or restitution to absent class members, according to
13 proof;

14 (e) Requiring Defendants to disgorge the Gastelum Late Fees to Gastelum, the
15 Bryden Late Fees to Bryden;

16 (f) Requiring Defendants to disgorge to absent class members all ill-gotten
17 revenues and/or profits attributable to Late Fees imposed on them; and

18 (g) Providing such other and further relief as may be just and proper.

19 WHEREFORE, Plaintiffs pray for judgment as hereinafter set forth.

20
21 **SEVENTH CAUSE OF ACTION**

22 **Declaratory Relief**

23 73. Plaintiffs incorporate herein by reference the allegations contained in all preceding
24 paragraphs of this Complaint.

25 74. California Code of Civil Procedure § 1060 states:

26 Any person interested under a written instrument, excluding a will or a trust,
27 or under a contract, or who desires a declaration of his or her rights or duties
28 with respect to another . . . may, in cases of actual controversy relating to the
legal rights and duties of the respective parties, bring an original action or

1 cross-complaint in the superior court for a declaration of his or her rights and
2 duties in the premises, including a determination of any question of
3 construction or validity arising under the instrument or contract. He or she
4 may ask for a declaration of rights or duties, either alone or with other relief;
5 and the court may make a binding declaration of these rights or duties,
6 whether or not further relief is or could be claimed at the time. The
7 declaration may be either affirmative or negative in form and effect, and the
8 declaration shall have the force of a final judgment. The declaration may be
9 had before there has been any breach of the obligation in respect to which
10 said declaration is sought.

11 75. An actual and justiciable controversy exists between the parties as to their respective
12 rights and obligations under the Agreement imposed on Plaintiffs and the members of the class by
13 Defendants. Specifically, Plaintiffs believe and allege that the provisions regarding the Late Fees
14 in Defendants' existing Agreement are unlawful liquidated damages provisions in violation of Civil
15 Code § 1671 as well as the UCL and CLRA.

16 76. Plaintiffs and the members of the class are "person[s] interested under a contract"
17 and therefore have the right under Code of Civil Procedure § 1060 to seek a judicial declaration of
18 their rights and/or duties under the Agreement.

19 77. Plaintiffs seek a judicial declaration regarding the validity of Defendants' Late Fee
20 provisions in their existing Agreement.

21 WHEREFORE, Plaintiffs pray for judgment as hereinafter set forth.

22 **EIGHTH CAUSE OF ACTION**

23 **Violation of California Public Utilities Code § 2106**

24 78. Plaintiffs incorporate herein by reference the allegations contained in all preceding
25 paragraphs of this Complaint.

26 79. California Public Utilities Code § 2106 provides, in relevant part:

27 **Liability for loss or damage; Exemplary damages; Proper court; Effect**
28 **of section on recoveries by State**

Any public utility which does, causes to be done, or permits any act, matter,
or thing prohibited or declared unlawful, or which omits to do any act,
matter, or thing required to be done, either by the Constitution, any law of
this State, or any order or decision of the commission, shall be liable to the
persons or corporations affected thereby for all loss, damages, or injury
caused thereby or resulting therefrom. If the court finds that the act or

1 omission was willful, it may, in addition to the actual damages, award
2 exemplary damages. An action to recover for such loss, damage, or injury
3 may be brought in any court of competent jurisdiction by any corporation or
person....

4 80. Verizon is a public utility within the meaning of Public Utilities Code § 2106.

5 81. In imposing and collecting the Gastelum Late Fees, the Bryden Late Fees and the
6 Late Fees charged to class members as described above, Verizon has wrongfully done or permitted
7 an act, matter or thing prohibited or declared unlawful, and has omitted to do acts, matters or things
8 required to be done, under California Civil Code § 1671, the UCL and the CLRA.

9 82. Plaintiffs and the members of the class are persons affected thereby, in that Verizon
10 has imposed and collected Late Fees that are inconsistent with California law. Verizon is therefore
11 liable to them for all loss, damages or injury resulting therefrom.

12 **PRAYER FOR RELIEF**

13 WHEREFORE, Plaintiffs, individually and on behalf of the members of the class, pray:

14 A. For an order certifying the class and appointing Plaintiffs and their undersigned
15 counsel of record to represent the class;

16 B. For appropriate preliminary and permanent injunctive relief;

17 C. For an award to Gastelum, as damages, restitution and/or disgorgement, of the
18 Gastelum Late Fees paid by her and/or by her assignor(s) on her behalf;

19 D. For an award to Bryden, as damages, restitution and/or disgorgement, of the Bryden
20 Late Fees paid by her;

21 E. For an award of damages and/or restitution to absent class members, according to
22 proof;

23 F. For disgorgement to absent class members of all funds acquired from Defendants'
24 unfair business practices and other violations of law, including without limitation disgorgement of
25 profits;

26 I. For imposition of a constructive trust;

27 J. For a judicial declaration regarding the validity of Defendants' Late Fee provisions
28 in their Agreement;

- 1 K. For costs of suit herein;
2 L. For both pre- and post-judgment interest on any amounts awarded;
3 M. For payment of reasonable attorneys' fees; and
4 N. For such other and further relief as the Court may deem proper.
5

6 **DEMAND FOR JURY TRIAL**

7 Plaintiffs hereby demand a trial by jury.

8 Dated: March 7, 2014

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BIRKHAUSER, LLP

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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Bramson, Plutzik, Mahler & Birkhaeuser, LLP, 2125 Oak Grove Road, Suite 120, Walnut Creek, California 94598. On March 7, 2014, I served the within documents:

THIRD AMENDED COMPLAINT

- by placing a copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Walnut Creek, California addressed as set forth below.
- by facsimile transmission on that date. This document was transmitted by using a Canon LC 710 facsimile machine that complies with California Rules of Court Rule 2003(3), telephone number (925) 945-8792. The transmission was reported as complete and without error.
- By causing personal delivery of a copy of the document(s) listed above to the person(s) addressed as set forth below.
- by depositing a true copy of the same enclosed in a sealed envelope with delivery fees provided for a Federal Express pick up box or office designated for overnight delivery, and addressed as set forth below.
- by e-mail transmission on that date. These documents were transmitted via e-mail to the following e-mail addresses as set forth below.

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I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct, executed on March 7, 2014, at Walnut Creek, California.



Peggy Toovey